

Draft recommendation of the European Ombudsman in his inquiry into complaint 3307/2006/(PB)JMA against the European Commission

Recommendation

Case 3307/2006/(PB)JMA - Opened on 10/01/2007 - Recommendation on 03/06/2009 - Decision on 08/03/2010

THE BACKGROUND TO THE COMPLAINT

1. The complainant is the General Manager of a circus association. On 20 May 2005, he submitted a complaint to the European Commission (complaint reference number 2005/4510) in which he explained that paragraph 27 of the new Austrian Animal Protection Law, which entered into force on 1 January 2005 [1] , imposed a total ban on the keeping of wild animals in circuses. In the complainant's view, this provision was contrary to the EU principle of the free movement of services and therefore in breach of Article 49 EC [2] .
2. On 12 October 2005, the Commission opened infringement proceedings against Austria pursuant to Article 226 EC by sending a letter of formal notice to the Austrian authorities.
3. This letter stated that measures liable to hinder or make less attractive the freedom to provide services must, among other conditions, not go beyond what is necessary in order to attain a generally accepted public interest. The generally accepted public interest was, in this case, the protection of animals in general, as well as animal welfare. The letter went on to state, however, that the intended aim of the Austrian Animal Protection Law (the protection of wild animals) could be attained by measures less restrictive than a total ban on using wild animals in circuses. On this basis, the letter stated that Austria may have infringed Article 49 EC. It therefore asked the Austrian authorities to provide observations on the Commission's arguments.
4. Subsequently, the Commissioner responsible for the internal market portfolio, Mr McCreevy, stated that the Directorate-General for the Internal Market and Services (DG MARKT) did not intend to pursue the inquiry further. Consequently, the infringement proceeding against Austria would be closed shortly thereafter.
5. On 9 June 2006, in view of the Commission's change of position, the complainant submitted his first complaint to the Ombudsman, which was registered under reference number



1738/2006/PB.

6. In complaint 1738/2006/PB, the complainant argued that the Commission had, without giving any reasons, changed the position taken in its letter of formal notice sent to Austria on 12 October 2005 [3] . In his view, the Commission's inquiry was a " *sham* " and the institution's position was not well-grounded. The complainant underlined that, even though the letter of formal notice made it clear that there were sufficient grounds to pursue the case, the Commission had taken a different position and decided to close the case. In sum, the complainant argued that the Commission failed to follow-up on its initial conclusions on his infringement complaint against Austria. He enclosed a copy of his letter to the Commission dated 2 June 2006, in which he requested its services to be consistent with their initial conclusion on the infringement complaint.

7. Since the complaint to the Ombudsman was submitted almost at the same time as the complainant wrote to the Commission, the Ombudsman considered that the complaint had not been preceded by the appropriate administrative approaches, as required by Article 2(4) of his Statute. On 7 July 2006, he therefore declared it inadmissible.

8. On 24 October 2006, the complainant lodged a new complaint with the Ombudsman, registered under reference number 3307/2006/(PB)JMA, which constitutes the object of the present inquiry. In his second complaint to the Ombudsman, the complainant explained that on the same day (24 October 2006), DG MARKT replied to his letter of 2 June 2006. The letter informed him that, after reviewing the reply given by the Austrian authorities to its letter of formal notice, the Commission decided not to pursue the infringement proceeding further.

THE SUBJECT MATTER OF THE INQUIRY

9. In his complaint to the Ombudsman, the complainant argued that the statements made by the Commission in its letter of 24 October 2006 showed that his complaint was not properly assessed. The Commission explained in that letter that the Austrian authorities informed it that the total ban on wild animals in circuses appeared to be the only possible means to achieve the aim of animal protection. Specifically, the Austrian authorities argued that it was not possible for circuses to keep wild animals in adequate animal housing. The Commission also concluded that the question of how to protect wild animals in circuses was not one to be decided at Community level. It should rather be left to the Member States concerned. It therefore informed the complainant of its intention to close the case. The complainant argued, in his complaint to the Ombudsman, that it was not legally correct to state that Member States should be left to decide whether or not to ban the use of wild animals in circuses.

10. The complainant alleged that the Commission failed to properly handle his infringement complaint against Austria. In particular, the complainant challenged the propriety of the reasons for which the Commission's DG MARKT intended to propose that the case should be closed.

11. The complainant claimed: (a) that its infringement complaint should be re-examined by the



European Commission; and (b) that the Commission should adopt a conclusion consistent with its initial letter of formal notice of 12 October 2005 to Austria.

THE INQUIRY

12. The complaint was sent to the Ombudsman on 24 October 2006. On 10 January 2007, the Ombudsman opened an inquiry and sent the complaint to the Commission with a request for an opinion on it. On 14 May 2007, the Commission sent its opinion, which was then forwarded to the complainant. On 30 June 2007, the complainant sent his observations.

13. In light of the complainant's observations, the Ombudsman wrote again to the Commission on 19 February 2008, in order to obtain additional information. On 29 May 2008, the Commission sent its second opinion, which was forwarded to the complainant for observations. The complainant sent his observations on 14 July 2008.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Preliminary remarks

Scope of the Ombudsman's Review

14. In its opinion, the Commission noted that the object of the complaint was related to its decision whether or not to initiate infringement proceedings under Article 226 EC. The Commission underlined that, as recognised by the Court of Justice, it enjoys a great degree of discretion in this area. The institution also took the view that, when acting as Guardian of the Treaty with respect to infringement proceedings pursuant to Article 226 EC, its "*assessment on the interpretation and scope of Community law is a matter which can only be decided by the Court of Justice and which is entirely outside the notion of maladministration.*"

15. The Ombudsman cannot share the Commission's viewpoint. He notes that the Commission, in its role as 'Guardian of the Treaty' under Article 211 EC, has to ensure that Community law is applied. In carrying out its duty, the Commission investigates possible infringements of Community law, which come to its attention largely as a result of citizens' complaints. If, as a result of its inquiry, the Commission considers that a Member State may have failed to fulfil its obligations under the Treaty, Article 226 EC gives it the power to start infringement proceedings against the responsible Member State and, eventually, if it considers that an infringement has occurred, to bring the matter before the European Court of Justice.

16. According to the case-law of the Community courts, even if it takes the view that a Member State has infringed Community law in a specific case [4], the Commission has a wide margin of discretion to decide whether it is appropriate or not to bring an action against the responsible Member State before the Court of Justice in relation to that specific case of an infringement of



Community law. This includes deciding that there is no Community interest in pursuing specific infringement proceedings against a Member State because national courts or authorities would be better placed to deal with the matter [5] .

17. However, as the Ombudsman has consistently held [6] , the use of a discretionary power cannot lead to arbitrariness. A public authority must always have good reasons for choosing one course of action rather than another. A normal part of exercising a discretionary power is to explain the reasons why a particular course of action has been chosen. Furthermore, when making a discretionary decision, an institution must act within the limits of its legal authority [7] . Very broad discretionary powers may exist, but they are always subject to legal limits. General limits on such authority are established by the case-law of the Court of Justice. This requires, for example, that administrative authorities should act consistently and in good faith, avoid discrimination, comply with the principles of proportionality, equality and legitimate expectations and respect human rights and fundamental freedoms.

18. In view of the above, the Ombudsman underlines that, when carrying out his inquiries into possible instances of maladministration, he seeks to ensure that the institution or body concerned: (a) has explained adequately the reasons why a particular course of action was chosen, and (b) has acted within the limits of its legal authority.

B. Alleged improper handling of the complaint

Arguments presented to the Ombudsman

19. The complainant alleged that the Commission failed to handle properly his infringement complaint against Austria and challenged the propriety of the reasons for which DG MARKT intended to propose that the case should be closed.

20. The complainant argued that the statements made by the Commission in its letter of 24 October 2006 showed that his complaint was not properly assessed. He argued that the Commission should not have concluded that Member States should be left to decide whether or not to ban the use of animals in circuses. His arguments were based on the fact that, in its letter of formal notice to Austria, the Commission made it clear that Austria's ban on non-domesticated animals in the circus was discriminatory and not proportionate, therefore breaching Article 49 EC. The complainant underlined the fact that the Austrian authorities treated identical activities regarding non-domesticated animals differently depending on whether or not the activities took place in a circus setting. Thus, while certain activities were banned in a circus context, they were allowed in other cases, such as on film sets. The complainant further noted that certain Member States, such as Germany or the United Kingdom, had successfully addressed the well-being of wild animals in circuses through regulation. This showed that the total ban in Austria was unnecessary and not proportionate to its stated aims.

21. In its opinion to the Ombudsman, the Commission stated that it never contested the fact that the total ban on the use of wild animals in circuses, as foreseen by the Austrian law on the



protection of animals, constituted a restriction of the freedom to provide services as set out in Article 49 EC. However, the Commission argued that this type of restriction could be justified by overriding reasons of general interest if, as set out by the Community courts and explained in its letter to the complainant of 24 October 2006, they were suitable for attaining the aim pursued and did not go beyond what appears to be necessary for attaining such an aim. In view of the situation, the Commission decided not to intervene in the assessment of the means chosen by Austria in order to best protect wild animals in circuses. It preferred to leave this matter to the Austrian authorities, since they were best placed to choose the means to protect such animals. The Commission recalled that, as recognised by the Court of Justice, it enjoys a great degree of discretion when deciding whether it is appropriate to initiate an infringement proceeding under Article 226 EC.

22. In his observations, the complainant referred to the reasoning in the Commission's letter of formal notice to the Austrian authorities. This letter stated that the total ban on the use of wild animals was not justified, since it was not proportionate to its purported aim. It was therefore not the least restrictive way to protect animals. The complainant argued that the Austrian authorities' reply did not provide any detailed explanations regarding why the measure imposed was suitable for attaining the aim pursued and why the total ban did not go beyond what is necessary to attain such an aim. According to the complainant, the Commission changed its position on the problem set out in the letter of formal notice, without justifying its new position. The complainant therefore considered that the Commission had not provided him with reasons explaining why the restriction on the free movement of services resulting from the Austrian ban was now justified.

23. On 19 February 2008, the Ombudsman requested further information from the Commission. He asked the Commission to comment on the complainant's observations, in particular his statement that the Commission did not provide any reasoning to explain why the restriction on the free movement of services resulting from the Austrian ban appeared to be justified. The Ombudsman specifically asked the Commission to comment on the complainant's assertions that, in the alleged absence of a detailed explanation by the Austrian authorities, the Commission did not justify why it now believes that the measure in question (a) appeared suitable for attaining the aim pursued, or (b) did not go beyond what is necessary for attaining such an aim.

24. In its second opinion dated 29 May 2008, the Commission reiterated that the Austrian law constituted a restriction to the freedom to provide services as set out in Article 49 EC. The Commission stated, however, that the decision to close the case resulted from the importance of animal protection, as laid down in the Protocol on the Protection and Welfare of Animals annexed to the Treaty of Amsterdam. On the basis of the principles thereof, it concluded that Member States are best placed to assess the situation due to the sensitivity of the subject matter within their respective populations and are best placed to decide on the appropriate measures to take. In so doing, the Commission argued that it had made use of the discretion, recognised by the Court of Justice, to decide whether it is appropriate to initiate infringement proceedings under Article 226 EC.



25. In his further observations, the complainant again stated that the total ban on the use of wild animals was not justified, since it was not proportionate to its purported aim. It was therefore not the least restrictive way to protect wild animals. The complainant argued that the Austrian authorities' reply did not provide any *detailed* explanations regarding why the measure imposed was suitable to attain the aim pursued and why the total ban did not go beyond what is necessary to attain such an aim. He also concluded that the Commission did not answer the questions posed by the Ombudsman. Although the Commission's sole justification was that measures concerning animal welfare were best decided at the Member State level, this argument was, in his view, not well grounded. For the complainant, a decision to allow regulatory matters, regardless of their impact on the internal market, to be decided by the Member States, constitutes maladministration. By doing so, the Commission effectively neglected its responsibility to safeguard the internal market.

The Ombudsman's assessment leading to the draft recommendation

26. In order to assess the complainant's allegation, namely, whether or not the Commission correctly handled his infringement complaint against Austria and gave proper reasons for its decision to close the case, the Ombudsman, in line with the criteria set out in paragraph 18 above, will review if the Commission (a) explained adequately the reasons why a particular course of action had been chosen and (b) acted within the limits of its legal authority.

27. As regards whether the Commission explained adequately the reasons why it chose a particular course of action, Point 10 of the Annex to the Commission's Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (the "Communication") [8] states that complainants have the right to be informed of the reasons which may lead the Commission to close a complaint. If they are to serve their intended purpose of informing the complainant, the reasons must, be clear and unequivocal [9] .

28. The complainant obtained a copy of the Commission's letter of formal notice and thereby became aware of the initial position taken by the Commission vis-à-vis the Austrian Animal Protection Law. The complainant, in his written exchanges with the Commission (in particular in his letter to Commissioner McCreevy dated 2 June 2006), quoted parts of the Commission's letter of formal notice. He noted that the Commission, in the letter of formal notice, took the view that the total ban on wild animals in circuses restricted the free movement of services and did not comply with the *Gebhard* test [10] . The complainant specifically argued that the Commission did not act consistently, given that it eventually closed the case by taking a view which was not in accordance with the view it took previously in the letter of formal notice.

29. As the Ombudsman noted in paragraph 16 above, the Commission has a wide margin of discretion to decide: (i) whether it is appropriate to bring an action against the responsible Member State before the Court of Justice in relation to a specific instance of a infringement of Community law, or (ii) if there is no Community interest in pursuing specific infringement proceedings against a Member State because, for instance, national courts or authorities would be better placed to deal with the matter. As noted in paragraph 17 above, an institution will use



its discretionary powers within the limits of its legal authority if it acts consistently and in good faith, avoids discrimination, complies with the principles of proportionality, equality and legitimate expectations and respects human rights and fundamental freedoms.

30. The Ombudsman first notes that a letter of formal notice does not, even concerning the Member State to which it is directed, establish the definitive position of the Commission regarding the existence of an infringement by that Member State. The preliminary administrative procedure under Article 226 EC gives the Member State concerned an opportunity to provide justifications for its position and to enable the Commission to persuade the Member State to comply on its own accord with the requirements of the Treaty. However, the Commission may then review its position in light of the explanations provided to it.

31. It follows from the above that the Commission is not obliged to maintain an identical position throughout administrative proceedings. It can thus, without exceeding its legal authority, change its view on the basis of information and arguments presented to it by the Member State concerned, or information it obtains itself from other sources.

32. Furthermore, a letter of formal notice is directed to a Member State [11] . Complainants and other third parties cannot directly derive legally enforceable rights, or argue that they have legally enforceable legitimate expectations, based on the content of a letter of formal notice.

33. While the position of the Commission in its letter of formal notice creates no legally binding rights for a complainant, such as rights derived from legitimate expectations, principles of good administration require the Commission to respond appropriately to arguments presented to it by a complainant. This includes the arguments made by a complainant which are identical to those made by the Commission itself in a letter of formal notice sent to a Member State.

34. It is useful at this point, in order to consider if the Commission has given clear unequivocal and understandable reasons for closing the case, to quote the relevant paragraphs of the Commission's letter to the complainant of 24 October 2006. The letter reads:

"... While the Austrian government recognizes a restriction of the freedom to provide services through § 27 TSchG, it also considers that the TSchG is in line with the aim of the Community to protect animals and that in particular it fulfils the criteria set out by the European Court of Justice in order to justify restrictions of a fundamental freedom of the Treaty. According to the Austrian government the total ban on wild animals in circuses is the only possible way to achieve the aim of animal protection because of the impossibility to keep wild animals in circuses in adequate animal housing.

There is no doubt that a total ban on the use of animals in circuses constitutes a restriction to the freedom to provide services as set out in Article 49 of the Treaty. According to the case law of the European Court of Justice, restrictions to the fundamental freedoms of the Treaty can be justified by overriding reasons of general interest. Animal welfare and animal protection are among those reasons that can justify a restriction. However, any measure taken has to be necessary and proportionate in relation to the aim pursued, i.e. the protection and the



well-being of animals. A total ban is, in general, a very restrictive means and it therefore has to be demonstrated that there are no other less restrictive means available to achieve the aim pursued.

The Commission attaches great importance to all questions concerning the well-being of animals insofar as they fall within its responsibilities. In particular, the respect for the principles set out by the Protocol on the Protection and Welfare of Animals annexed to the EC Treaty by the Amsterdam Treaty should be underlined. In addition, the Commission's commitment on that subject has recently been embodied in its Communication of January 23, 2006 to the European Parliament on a Community Action Plan on the Protection and Welfare of Animals.

However, it should be noted that the Protocol on the Protection and Welfare of Animals indicates that 'in formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.'

Having analysed the reply of the Austrian government and taking into account the stated position on animal protection, the Commission's services have come to the conclusion that the question on how to protect wild animals in circuses is not one to be decided at Community level, but rather should be left to Member States concerned. It would therefore not be politically appropriate to continue an infringement proceeding against Austria for failure to fulfil its obligations under the Treaty.

Consequently, my services will propose the closure of this case at the next meeting of the Commission on infringements ..."

35. The Ombudsman first notes that the Commission never contested the fact that the Austrian Animal Protection Law is a restriction to the freedom to provide services set out in Article 49 EC (see paragraph 21 above). The Commission accepts that restrictions to that free movement of services can be justified in accordance with the conditions laid down by the case-law of the Community courts, the so-called *Gebhard* test [12]. In accordance with the aforementioned case-law, rules which are liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty must, in order to comply with EC law: (i) be applied in a non-discriminatory manner (that is, the rules must be indistinctly applicable); (ii) must be justified by imperative requirements in the general interest; (iii) must be suitable for securing the attainment of the objective which they pursue; and (iv) must not go beyond what is necessary in order to attain the objective which they pursue.

36. As regards whether the measure was discriminatory (see condition (i) set out in paragraph 35 above), the complainant argued that the measure was in fact discriminatory because the Austrian authorities treated identical activities regarding non-domesticated animals differently, depending on whether or not the activities took place in a circus setting. The complainant pointed out that, while the use of wild animals was banned in a circus context, it was allowed in



other contexts, such as on film sets. The Commission stated, however, that the total ban on using wild animals in circuses was applied to *all circuses* and was thus non-discriminatory.

37. The Ombudsman notes that the concept of discrimination in cases of free movement of services relates to whether the measure in question (in this case, the ban on using wild animals in circuses in Austria) is equally applicable to service providers based in the Member State where the measure is imposed, and to service providers based in other Member States [13]. According to settled case-law, Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State [14]. The Commission stated that the total ban on using wild animals in circuses taking place in Austria applied to *all circuses*, including those based in Austria, as well as those based in other Member States. The ban was therefore non-discriminatory. The Ombudsman considers that this element of the Commission's communication to the complainant was sufficiently clear. He also considers that the Commission acted within the limits of its legal authority regarding this aspect of the Commission's explanation.

38. As regards whether there existed an imperative requirement of general interest (condition (ii) as set out in paragraph 35 above), the Commission has consistently stated that the protection of animals, as well as animal welfare, is a generally accepted public interest. The Commission reinforced this view by referring to the Protocol on the Protection and Welfare of Animals annexed to the Treaty of Amsterdam [15]. The Ombudsman is of the view that this element of the Commission's communication to the complainant was also sufficiently clear. He also finds that the Commission acted within the limits of its legal authority regarding this aspect of the Commission's explanation.

39. As regards whether Austrian law was suitable to protect the general interest identified (condition (iii) as set out in paragraph 35 above) and whether the law did not go beyond what is necessary to protect the general interest identified (condition (iv)), the Commission referred, in its letter to the complainant of 24 October 2006, to the fact that these two conditions must be met in order for a restriction to be justified. The Commission also stated that the total ban on using wild animals in circuses was a very restrictive measure. It therefore had to be demonstrated that there were no other less restrictive means available to achieve the aim pursued (that is, the protection of wild animals).

40. In his further inquiry of 19 February 2008 (see paragraph 23 above), the Ombudsman made a specific request to the Commission to comment on the complainant's assertions that the Commission did not justify why it now believes that the measure in question (i) appeared suitable to attain the aim pursued, or (ii) did not go beyond what is necessary to attain such an aim. In its further reply to the Ombudsman, the Commission reiterated the view that the decision to close the case " ... *was based on the consideration that, with regard to animal protection, Member States are best placed, given the sensitivity of that subject matter within their respective populations and the fact that this may vary from one Member State to another, to decide on the appropriate measures to apply* ".



41. The Ombudsman first notes that Community law does not require that the overriding reasons of general interest, which Member States can invoke in order to restrict the free movement of goods or services, be identical in all Member States. In the absence of harmonisation at Community level, it is for each Member State to decide whether to invoke a particular general interest and to decide upon the relative importance of that general interest " *in accordance with its own scale of values and in the form selected by it* " [16] . Certain divergences between Member States regarding the relative importance of a general interest may " *reflect certain political ... choices ...so arranged as to accord with national or regional socio-cultural characteristics (which), in the present state of Community law, is a matter for the Member States.* " [17] In that context, moral, religious or cultural factors may serve to justify a margin of discretion for the national authorities [18] . Therefore, it is entirely feasible that Austria may have decided to place a greater emphasis on the welfare of wild animals in circuses than the United Kingdom and Germany. If Austria attached a very high priority to the protection of wild animals, it would indeed be entirely logical that more stringent measures (for example, a total ban on using wild animals in circuses) might be suitable to achieve *that particular aim of Austria* . This conclusion would not be called into question by the fact that similarly stringent measures were not adopted by other Member States that might give less importance to the protection of wild animals [19] . Furthermore, the test concerning suitability does not exclude that there may be several different means which are suitable to achieve a particular aim. The suitability test will be met if the means chosen *is one of the ways in which the interest invoked can be protected* [20] . From the Commission's letter of 24 October 2006, the Ombudsman understands that the Commission accepts that the total ban on keeping wild animals in circuses was *a means* , (albeit a highly restrictive means) to ensure that Austria's particularly high aims relating to the protection of wild animals was achieved [21] .

42. The fact that a measure figures amongst the " *suitable means* " to achieve a particular aim does not automatically imply that the measure in question is the *least restrictive* means of achieving that aim. In accordance with the proportionality test (condition iv), the measures imposed must *not go beyond* what is necessary in order to achieve the aim [22] . The conclusion that the total ban on using wild animals in circuses is a proportionate means to achieve the aim of protecting wild animals *might* be called into question if the Member State imposing a total ban on the use of wild animals in circuses allowed wild animals to be used in contexts which are substantively identical to a circus context. Austrian law does not forbid the keeping of wild animals in general, nor does it prohibit the use of wild animals in other events, such as in films and/or television. Such potential anomalies in Austrian law might indeed call into question whether the total ban on using wild animals in circuses in Austria went beyond what is necessary to achieve the declared aim of the Austrian authorities.

43. The Ombudsman notes that all exceptions to the principles of free movement must be strictly interpreted. If a particular measure infringes the principle of free movement, it is for the national authorities to show to the Commission, in the context of administrative proceedings under Article 226 EC, that their rules are consistent with all the conditions set out in the *Gebhard* test [23] . In light of the above, the Ombudsman presumes that, in order to show that the total ban on the use of wild animals in circuses is a proportionate means of protecting wild animals, the Austrian authorities would have had to explain to the Commission why the contexts



in which it allows the use of wild animals (namely, on films sets and on television), is substantively different from a circus context. However, it appears that the Commission has not required this from the Austrian authorities. Rather, it has simply stated that, as regards animal protection, "*Member States are best placed, given the sensitivity of that subject matter within their respective populations and the fact that this may vary from one Member State to another, to decide on the appropriate measures to apply*".

44. The Ombudsman first underlines that it is certainly the case that each Member State can invoke an exception to free movement rights based on their national sensitivities in a certain area (such as in the area of animal protection). In such circumstances, it is entirely feasible that the sensitivity of a particular subject matter (such as the issue of animal protection) within the respective populations of Member States may vary from one Member State to another. However, while the above is certainly true, this does not in any way imply that the Commission can abdicate entirely from its obligation to review whether particular measures taken by a Member State are or are not proportionate. The Ombudsman recalls, in this respect, that the question of the proportionality of a restriction on a right of free movement *is* a matter of Community law, rather than of national law. The Ombudsman considers that the Commission's discretionary power under Article 226 does not entitle it to abdicate entirely from its role as guardian of the Treaty *in an entire area*, such as in the area of animal welfare. Such an abdication of responsibility in an entire area, such as animal welfare [24], would effectively "re-nationalise" decisions on proportionality in relation to that entire area and could have severe consequences for the functioning of the internal market.

45. The fact that the Commission should not abdicate *entirely* its responsibility in the area of animal welfare does not imply, however, that the Commission is not entitled to take the view, when carrying out its duties as guardian of the Treaty, that Member States should enjoy a broader "*margin of appreciation*" in relation to matters such as animal welfare (see paragraph 41 above). In sum, it is certainly the case that a particular Member State, enjoying a broad margin of appreciation, can invoke its particular national sensitivities as regards animal welfare to justify to the Commission a particularly high level of protection for animals in circus. The Commission should then verify the proportionality of the means chosen by the Member State to achieve the Member State's aim taking into consideration the particular sensitivity of the matter in the Member State concerned.

46. The Commission did not, however, express *any* viewpoint on the issue of proportionality in its letter of 24 October 2006 to the complainant, or in the opinions it submitted in the framework of the Ombudsman's inquiry. Indeed, the Commission has given the Ombudsman no evidence that the Austrian authorities provided the Commission with *any* explanations concerning the potential anomalies/questions discussed in paragraphs 42 and 43 above, even though these anomalies called into question the proportionality of the Austrian rules. The Commission has also not concluded in a clear way whether it finally considered the measure to be proportionate or not. The Commission merely stated in general that, as regards animal protection, Member States are better placed, given the sensitivity of that subject matter within their respective populations, to decide on the appropriate measures to apply. Thus, the Ombudsman takes the view that the Commission abdicated from its role as Guardian of the Treaty in this area and,



effectively, "re-nationalised" completely the decision on the proportionality of the measure taken by the national authorities. This was an instance of maladministration

47. As noted in paragraph 33 above, principles of good administration also require the Commission to respond appropriately to arguments presented to it by a complainant. While the Commission referred, in its correspondence with the complainant and in its opinions to the Ombudsman, to the need for Austrian law to comply with the conditions of the *Gebhard* test, the Commission never clearly and unequivocally stated whether or not, in its view, the Austrian law complies fully with the *Gebhard* test. Instead, the Commission made vague statements which were not sufficient to allow the complainant to understand fully the Commission's position. The Commission, therefore, did not fully comply with Point 10 of the Communication. This was also an instance of maladministration. The Ombudsman does not consider that a proposal for a friendly solution would be useful in this case. As a result, he will make a draft recommendation in this regard.

C. Claim that complaint number 2005/4510 should be re-examined by the Commission

Arguments presented to the Ombudsman

48. The complainant claimed that the Commission should re-examine his complaint and adopt a conclusion consistent with its initial letter of formal notice of 12 October 2005 to Austria.

49. The Commission considered that, for the reasons set out in paragraphs 21 and 24 above, it acted in accordance with its prerogatives under Article 226 EC.

The Ombudsman's assessment

50. The Ombudsman considers that, while the Commission should, in the present case, provide the complainant with a clear and unequivocal statement of its views as regards whether Austria has or has not demonstrated that its Animal Protection Law is in compliance with the Treaty, this does not imply that the Commission is obliged to pursue infringement proceedings against Austria. The Commission could, using its broad margin of discretion, which has been consistently recognised by the Court of Justice, decide not to pursue a case further even if it took the view that the Member State has not yet demonstrated that it is in compliance with the Treaty. When doing so, however, the Commission should provide valid reasons to explain how and why it exercised this discretion in a particular case.

51. The Ombudsman notes that the Commission's acceptance of the draft recommendation below, would ensure compliance with the principles set out in the previous paragraph. Therefore, the Ombudsman considers that no further inquiries are justified as regards the complainant's claim.



D. Conclusions

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

The Commission should evaluate the proportionality of the Austrian law. In light of its analysis, if it considers that Austria has not demonstrated that it complies with all the conditions set out in the *Gebhard* test, the Commission should a) pursue its infringement proceeding against Austria or b) provide valid reasons for dropping the case.

The Ombudsman will inform the complainant of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Institution shall send a detailed opinion by 30 September 2009. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 3 June 2009

[1] BGBl II, Nr. 489/2004.

[2] Article 49 EC reads as follows: " ... restrictions on freedom to provide services within the Community shall be prohibited... "

[3] A copy of the letter of formal notice was annexed to the complaint submitted to the Ombudsman.

[4] Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 46; Case 247/87 *Star Fruit v Commission* [1989] ECR 291; Case 87/89 *Société nationale interprofessionnelle de la tomate and others v Commission* [1990] ECR-I 1981; Order of the Court in Case T-182/97 *Ségaud v Commission* [1998] ECR II-271.

[5] See, for example, the Ombudsman's decisions on complaints 962/2006/OV, 3453/2005/GG, 3125/2005/BB, 995/98/OV, 480/2004/TN and 493/2000/ME, which can be found on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).

[6] See, for example, the Ombudsman's decisions on complaint 995/98/OV (<http://www.ombudsman.europa.eu/decision/en/980995.htm> [Link]), and on complaint 1999/2007/FOR (<http://www.ombudsman.europa.eu/decision/en/071999.htm> [Link]).

[7] Recommendation N° R (80)2 concerning the exercise of discretionary powers by administrative authorities, in *The administration and you, Principles of administrative law concerning the relations between administrative authorities and private persons, a handbook* ,



Council of Europe Publishing, Council of Europe, 1996, p. 362.

[8] OJ 2002 C 244, p. 5:

" [W]here a Commission department intends to propose that no further action be taken on a complaint, it will give the complainant prior notice thereof in a letter setting out the grounds on which it is proposing that the case be closed and inviting the complainant to submit any comments within a period of four weeks.

[...]

Where the complainant does not reply, or where the complainant cannot be contacted for reasons for which he/she is responsible, or where the complainant's observations do not persuade the department to reconsider its position, a proposal to close the case will be put forward. In that event, the complainant will be informed of the Commission's decision. "

[9] See Case C-367/95 P, *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63 and the case-law cited there.

[10] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* . (reference for a preliminary ruling) [1995] ECR I-04165, paragraph 37. The Court of Justice states that rules which are liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty must, in order to comply with EC law: (i) be applied in a non-discriminatory manner (that is, the rules must be indistinctly applicable); (ii) must be justified by imperative requirements in the general interest; (iii) must be suitable for securing the attainment of the objective which they pursue; and (iv) must not go beyond what is necessary in order to attain the objective which they pursue.

[11] Normally, a third party will not have access to letters of formal notice.

[12] See *Gebhard ob cit* at paragraph 37.

[13] See Case C-124/97 *Läärä and Others* [1999] ECR I-6067, paragraph 28.

[14] See Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, paragraph 30 and the case-law cited therein.

[15] See Protocol 33; OJ 1997 C 340.

" [I]n formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage. "



[16] See Case 34/79, *Regina v. Henn & Darby* [1979] ECR 3795, paragraph 15.

[17] See Case C-145/88 *Torfaen Borough Council v. B & Q PLC* [1989] ECR 3851, paragraph 14.

[18] See Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 63.

[19] See, in this respect, Case C-262/02 *Commission v France* , paragraph 37 and Case C-443/02 *Schreiber* [2004] ECR I-7275, paragraph 48.

[20] See Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2008] ECR I - 0000, paragraph 86.

[21] The letter states that " *A total ban is, in general, a very restrictive means [of ensuring animal protection]* ".

[22] See Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 49.

[23] See Paragraph 35 above.

[24] The same comment could be made as regards any other sensitive areas, such as consumer welfare or environmental protection, or public health.