

Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 289/2005/(WP)GG

Special Report

Case 289/2005/(WP)GG - Opened on 22/02/2005 - Recommendation on 27/07/2005 -

Special report on 22/02/2005 - Decision on 01/06/2006

(Made in accordance with Article 3(7) of the Statute of the European Ombudsman [1])

Introduction

The Ombudsman considers that the present case raises an important issue of principle, namely the question as to whether the Commission is entitled indefinitely to delay its handling of complaints alleging an infringement of Community law by a Member State on the grounds that it is unable to reach a political consensus on how to proceed. The Ombudsman considers that, although the Commission has discretion in the infringement procedure, it is obliged to deal with an infringement complaint within a reasonable period of time. In the present case, the Commission essentially limited itself to stating (i) that it considers the complaint to be "highly politically sensitive and controversial" and (ii) that a decision to open infringement proceedings requires the support of the College of Commissioners and that, so far, the Commission had not been able to take such a decision. In the Ombudsman's view, these considerations do not relieve the Commission of its duty to deal properly with such complaints. The Ombudsman therefore considers that the matter should be put before the European Parliament.

The complaint

The complainant used to offer sports betting services in Lower Saxony (Germany). In his complaint to the Ombudsman, which was lodged by his lawyer in January 2005, the complainant reported that the German authorities had ordered him to stop offering sports betting services, thus forcing him to close his business. In the complainant's view, the behaviour of the German authorities violated EU law in general and the freedom to provide services in particular.



According to the complainant, his lawyer submitted an infringement complaint against Germany and the German authorities to the European Commission's Representation in Berlin on 20 February 2004. Still according to the complainant, he was subsequently told, in reply to an inquiry, that the complaint had neither been dealt with nor been sent to Brussels. The complainant's lawyer thereupon sent the complaint directly to the Commission, where it was registered under reference 2004/4463.

In a letter of 30 November 2004, the complainant's lawyer asked the Commission about the state of the investigation. According to the complainant, this letter remained unanswered.

In his complaint to the Ombudsman, the complainant essentially alleged that the Commission had failed properly to deal with his infringement complaint. He claimed that a quick reaction by the Commission was urgently required because he was incurring losses due to not being able to conduct his business.

The inquiry

The Commission's opinion

In its opinion, the Commission made, in summary, the following comments:

At the time of sending the opinion (June 2005), the Commission had received seven complaints against Germany relating to gambling services (2003/4350, 2003/5288, 2004/4054, 2004/4463, 2004/4899, 2004/4685 and 2005/4017). These complaints concerned national restrictions on the organisation of gambling services, commercial communications relating to gambling services and establishment.

The first complaint from a sports betting service provider had been registered in April 2003. The Commission had not taken a decision to open infringement proceedings since a ruling by the European Court of Justice in a related case concerning Italy had been considered to be key for the assessment of this restriction. The Court's judgment of 6 November 2003 in Case C-243/01 (*Gambelli and Others*) [2] had provided the Commission with guidelines to assess such complaints.

In the light of the case-law of the Court of Justice, the Commission had assessed the justification for and the proportionality of a number of national bans on sports betting services. A letter of formal notice had been sent to Denmark on 30 March 2004 in a case relating to sports betting services.

However, at its meetings on 13 October and 14 December 2004, the Commission had decided to postpone decisions to open infringement proceedings in cases concerning restrictions similar to those raised by the complainant in his infringement complaint in cases concerning Germany (2003/4350), Italy (2003/4616) and the Netherlands (2002/5443). These complaints were



awaiting further examination.

The complainant's infringement complaint had been received on 26 April 2004. By letter of 27 May 2004, the Commission had informed the complainant's lawyer that the complaint had been registered.

In a fax dated 30 November 2004, the complainant had asked for a copy of the Commission's correspondence with the German authorities. The Commission had so far not yet had any contacts with the German authorities relating to sports betting services in general or relating to any specific case.

The Commission was still actively examining specific aspects of the complainant's infringement complaint. On 30 May 2005, it had sent a letter to the complainant's lawyer in which it had explained the state of play and asked the complainant to present a copy of his bookmaker's permit.

As regards the complainant's claim that the Commission should act quickly, it had to be noted that the Commission did not have the power either to intervene and stop actions or to prevent any criminal investigation initiated by a Member State.

In its "Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law" (COM(2002) 141 final, OJ 2002 C 244, p. 5), the Commission had indicated that, as a general rule, it proposed to investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint. The Commission nevertheless envisaged the possibility that this rule could not be respected. This would be particularly the case where the Commission was confronted with cases implying a difficult assessment of the justification and proportionality, based on public order considerations, of the national measure at stake. This was the situation in the present case. In such circumstances, the Commission had committed itself "to inform the complainant in writing". This had been done in the present case by means of the letter of 30 May 2005.

The Commission submitted a copy of its letter of 30 May 2005. In this letter, the Commission referred to the complainant's infringement complaint as having been lodged on 5 April 2004 and to further letters from the complainant or his lawyer dated 15 June 2004, 30 November 2004 and 18 April 2005. The Commission stated that it was dealing "intensively" with the complainant's complaint and other complaints concerning sports betting services in Germany. As regards timing, the letter stated "that due to the special procedural deadlines for inquiries by the Commission in relation to infringements of the Treaty the taking of a position by the Commission can probably not be expected in the near future."

The complainant's observations

In his observations, the complainant submitted that the Commission's opinion was wrong and



incomplete as regards dates, given that he had already submitted his complaint to the Commission's Representation in Berlin on 20 February 2004. According to the complainant, this complaint had neither been dealt with nor passed on. It was only through a telephone conversation with the Representation that the complainant's lawyer had found out that the complaint was still in Berlin. In the complainant's view, precious time had thus been lost. The complainant furthermore submitted that he could not see how the Commission proposed to proceed further and when it would finally ask Germany for its opinion.

The complainant submitted copies of two letters addressed to the Commission on 5 April 2004 and 4 July 2005. In his letter to the Commission of 5 April 2004, the complainant's lawyer referred to the fact that he had already addressed the complaint to the Commission's Representation in Berlin on 20 February 2004.

The Ombudsman's draft recommendation

The draft recommendation

On 27 July 2005, the Ombudsman addressed the following draft recommendation to the Commission, in accordance with Article 3(6) of his Statute:

"The Commission should deal with the complainant's infringement complaint diligently and without undue delay".

This draft recommendation was based on the following considerations:

1 Introductory remark

1.1 In his complaint to the Ombudsman, the complainant submitted that his infringement complaint had already been sent, by his lawyer, to the Commission's Representation in Berlin on 20 February 2004. According to the complainant, he was subsequently told, in reply to an inquiry, that the complaint had neither been dealt with nor been sent to Brussels. The complainant thereupon submitted his complaint directly to the Commission by letter of 5 April 2004.

1.2 In its opinion, the Commission refrained from dealing with the complainant's submission that his infringement complaint had already been submitted on 20 February 2004 but had not been dealt with at first.

1.3 The Ombudsman noted that the Commission's alleged failure properly to deal with the letter that the complainant claimed to have addressed to the Commission's Representation was clearly referred to in the complaint that the complainant had submitted to him in January 2005. In these circumstances, the Ombudsman failed to understand why the Commission did not



address this issue in its opinion. However, in order to clarify this issue, further inquiries would have had to be conducted. Such further inquiries would inevitably have resulted in further delay in a matter that, according to the complainant, was urgent. In view of his conclusions concerning the other aspects of the case (see point 2 below), the Ombudsman therefore considered that the best way to proceed was to exclude the above-mentioned issue from the scope of the present inquiry, so as to enable him to deal with the core of the matter as rapidly as possible. The complainant remained free, however, to submit the said issue to him again in a separate complaint.

2 Alleged failure properly to deal with an infringement complaint

2.1 The complainant alleged that the Commission had failed properly to deal with his infringement complaint 2004/4463. He stressed that he had inquired as to the state of play in a letter sent on 30 November 2004 without receiving a reply.

2.2 In its opinion, the Commission pointed out that at the time of sending the opinion (June 2005), it had received seven complaints against Germany relating to gambling services (2003/4350, 2003/5288, 2004/4054, 2004/4463, 2004/4899, 2004/4685 and 2005/4017). The Commission explained that it had registered the first complaint in April 2003 and that it had not taken a decision to open infringement proceedings since a ruling by the European Court of Justice in a related case concerning Italy had been considered to be key for the assessment of this restriction. According to the Commission, the Court's judgment of 6 November 2003 in Case C-243/01 (*Gambelli and Others*) had provided it with guidelines to assess such complaints.

The Commission added that in the light of the case-law of the Court of Justice, it had assessed the justification for and the proportionality of a number of national bans on sports betting services and that a letter of formal notice had been sent to Denmark on 30 March 2004 in a case relating to sports betting services.

However, at its meetings on 13 October and 14 December 2004, the Commission had decided to postpone decisions to open infringement proceedings in cases concerning restrictions similar to those raised by the complainant in his infringement complaint in cases concerning Germany (2003/4350), Italy (2003/4616) and the Netherlands (2002/5443). These complaints were now undergoing further examination.

The Commission explained that, in a fax dated 30 November 2004, the complainant had asked for a copy of the Commission's correspondence with the German authorities. The Commission stressed that it had so far not yet had any contacts with the German authorities relating to sports betting services in general or relating to any specific case.

According to the Commission, it was still actively examining specific aspects of the complainant's infringement complaint. On 30 May 2005, it had sent a letter to the complainant's lawyer in which it had explained the state of play and asked the complainant to present a copy



of his bookmaker's permit.

The Commission noted that it had indicated, in its "Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law" (COM(2002) 141 final, OJ 2002 C 244, p. 5), that, as a general rule, it proposed to investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint. According to the Commission, this did however not exclude the possibility that its inquiry might take longer than that. The Commission submitted that this would be particularly the case where it was confronted with cases implying a difficult assessment of the justification and proportionality, based on public order considerations, of the national measure at stake. According to the Commission, this was the situation in the present case. The Commission noted that it had committed itself "to inform the complainant in writing" in such circumstances. According to the Commission, this had been done in the present case by means of the letter of 30 May 2005.

2.3 It is good administrative practice to answer letters from citizens within a reasonable period of time. In the present case, the Commission had replied to the complainant's letter of 30 November 2004 on 30 May 2005, i.e., six months after it had been sent. The Ombudsman noted that no explanation or apology had been offered for this considerable delay. The Commission's failure to reply to the complainant's letter of 30 November 2004 within a reasonable period of time thus constituted maladministration.

2.4 The Ombudsman noted that the Commission had committed itself, in its "Communication" of 2002, to investigating complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint. It was clear from the wording of the Communication ("as a rule") that this did not exclude the possibility that an inquiry might take longer than one year where there were valid reasons, particularly where a complaint raised difficult or complex issues. As the Commission had correctly observed, the "Communication" of 2002 provided that the complainant had to be informed in writing in such cases.

The Ombudsman considered, however, that, in order to be meaningful, the information to be given to a complainant in such cases must at least explain the reasons as to why the handling of the complaint will take more than one year.

However, in its letter to the complainant of 30 May 2005 the Commission had simply stated "that due to the special procedural deadlines for inquiries by the Commission in relation to infringements of the Treaty the taking of a position by the Commission can probably not be expected in the near future."

In the Ombudsman's view, this 'explanation' was manifestly inadequate, given that it did not refer to any particular circumstances that could justify the fact that the Commission's inquiry exceeded the period of one year that should, according to the "Communication" of 2002, be respected "as a rule". The Commission's failure to provide adequate reasons for not being able



to conclude its inquiry into the complainant's infringement complaint within one year after its registration thus constituted maladministration.

2.5 As regards the handling of the infringement complaint as such, it was good administrative practice to examine such complaints diligently and without undue delay. The Ombudsman noted that the Commission had claimed, in its opinion, to be still actively examining specific aspects of the complainant's infringement complaint. He further noted that, in its letter to the complainant of 30 May 2005, the Commission had submitted that it was dealing "intensively" with both the complainant's complaint as well as with other complaints concerning sports betting services in Germany.

In the Ombudsman's view, however, these claims did not appear to be supported by the information that had been submitted to the Ombudsman.

It should first be noted that the Commission stressed that the Court's judgment of 6 November 2003 in Case C-243/01 (*Gambelli and Others*) had provided it with guidelines to assess complaints such as the one submitted to it by the complainant. However, this judgment had already been rendered more than 1 ½ years before the opinion was submitted. It should further be noted that the Commission had claimed that the complainant's infringement complaint confronted it with a case implying a difficult assessment of the justification and proportionality, based on public order considerations, of the national measure at stake. The Ombudsman noted, however, that the Commission itself, in its opinion, had acknowledged that it had so far not yet had any contacts with the German authorities relating to sports betting services in general or relating to any specific case. It was difficult to see how the Commission could assess the justification and proportionality of the relevant provisions of German law without, at the very least, asking the German authorities for information and explanations as to the "public order considerations" on which these provisions were based.

2.6 In view of the above, the Ombudsman took the view that the Commission had failed properly to deal with the complainant's infringement complaint.

The Commission's detailed opinion

After having received the draft recommendation, and in accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission sent a detailed opinion on 5 January 2006.

In its detailed opinion, the Commission made the following comments:

The complainant did not have any required licence in Germany but wished to offer his services to on-line service providers operating under a licence in another Member state (to act and offer services as an intermediary). Between April 2003 and January 2005, the Commission had registered seven complaints (including the one submitted by the complainant) against Germany relating to gambling services. These complaints related to the same restrictions. The



Commission had therefore decided (on 16 March and 2 September 2005) to treat all these complaints together.

Complaints relating to sports betting services were "highly politically sensitive and controversial" (in spite of existing case-law in this field). Complaints against Germany, relating to its restrictions on sports betting services, had been raised in four internal infringement meetings (13 October 2004, 14 December 2004, 16 March 2005 and 5 July 2005). To date, the Commission had not been able to take the necessary decision.

The Commission acknowledged and regretted that it had failed to reply to the complainant's letter of 30 November 2004. It also acknowledged that the 'explanation' it had provided in its letter of 30 May 2005 was inadequate. The Commission could have referred to the fact that it was investigating a number of complaints against Germany and that these complaints had been raised at three internal infringement meetings (13 October 2004, 14 December 2004 and 16 March 2005). It regretted that it had not been able to take a decision on this politically sensitive issue within one year from the date of registration of the complaint. However, the Commission was of the opinion that the speed of processing the complaint would not benefit from disclosure of further details relating to internal discussions.

Nevertheless, the Commission had sent a further letter to the complainant which provided further information relating to the state of play. In this letter of 10 October 2005, the Commission's Directorate-General Internal Market and Services ("DG Markt") had informed the complainant that it had decided to treat a number of complaints concerning the relevant issues together and explained that a decision to open infringement proceedings against Germany required the support of the College of Commissioners. DG Markt had also pointed out that so far, the Commission had not been able to take such a decision and that the complaints awaited further consideration.

The complainant's observations

No observations were received from the complainant.

The Ombudsman's evaluation of the Commission's detailed opinion

The Ombudsman considers that the Commission's detailed opinion does not constitute an acceptance of his draft recommendation. Although the Commission acknowledges that it had failed to answer the complainant's letter of 30 November 2004 within a reasonable period of time and to provide a valid explanation as to why the examination of the case would take longer than one year, the Commission has not shown that the infringement complaint will be dealt with diligently and without undue delay, as recommended by the Ombudsman.

Instead, the Commission has referred to the fact that it considers complaints relating to sports



betting services to be highly politically sensitive and controversial. The Commission has also explained that the issue had been raised at four internal infringement meetings (13 October 2004, 14 December 2004, 16 March 2005 and 5 July 2005) but that it had not been possible to take a decision yet. In a letter to the complainant of 10 October 2005, which was referred to in the detailed opinion, DG Markt further explained that a decision to open infringement proceedings against Germany required the support of the College of Commissioners and that so far, the Commission had not been able to take such a decision.

The Ombudsman welcomes the Commission's frankness in admitting that the delay in handling the complainant's infringement complaint is due to the fact that the Commission appears to be unable to decide on how to proceed in this case (and several other related cases) for political reasons. He considers, however, that this fact does not constitute a valid reason for not dealing with this infringement complaint within a reasonable period of time.

The Ombudsman is conscious of the fact that the Commission has discretion in the infringement procedure. It should be noted, however, that the present case concerns the administrative stage of that procedure. The Ombudsman considers that it is good administrative practice for the Commission to deal with infringement complaints within a reasonable period of time and that the Commission is not, therefore, entitled indefinitely to delay its decision on a given infringement complaint. In the present case, it appears that the Commission has considered the issue at four internal infringement meetings (13 October 2004, 14 December 2004, 16 March 2005 and 5 July 2005) without arriving at a decision as to how to proceed. Furthermore, in its detailed opinion that was submitted on 5 January 2006, the Commission has not given any indication as to when a decision could be expected.

The Ombudsman's recommendation

In view of the above, the Ombudsman re-states his draft recommendation as a recommendation to the Commission as follows:

The Commission should deal with the complainant's infringement complaint diligently and without undue delay.

The European Parliament could consider adopting the recommendation as a resolution.

Strasbourg,

P. Nikiforos DIAMANDOUROS

[1] Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.

[2] Case C-243/01 *Gambelli and Others* [2003] ECR I-13031.

