

## **Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 3453/2005/GG**

Special Report

**Case 3453/2005/GG - Opened on 15/11/2005 - Recommendation on 12/09/2006 - Special report on 15/11/2005 - Decision on 14/09/2007**

(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 concerning the way the European Commission handles complaints submitted by citizens, in which an infringement of Community law by Member States is alleged. The question is whether the Commission, instead of opening infringement proceedings or rejecting the complaint, can simply abstain from taking action. The Ombudsman considers that this is not in conformity with principles of good administration.

### **The complaint**

*Complaint 2333/2003/GG (Confidential)*

In November 2001, the complainant, a German doctor, requested the Commission to open infringement proceedings against Germany. The complainant argued that Germany infringed Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time [2] ("Directive 93/104"), in so far as the activity of doctors in hospitals was concerned, in particular as regards time spent on call by these doctors. In the complainant's view, this resulted in a considerable risk for both staff and patients. In this context, the complainant relied on the judgement of the Court of Justice in the Simap case (Case C-303/98 *Simap* [2000] ECR I-7963).

The Commission registered the complaint under reference 2002/4298.



In a complaint lodged with the Ombudsman in December 2003 (complaint 2333/2003/GG), the complainant alleged that the Commission had failed to deal with his infringement complaint within an appropriate period of time.

The Ombudsman thereupon opened an inquiry into the case. In his decision of 19 May 2004 closing this inquiry, the Ombudsman noted that nearly 15 months had passed in the present case before the Commission had started dealing with the objections raised by the complainant by sending a request for information to the Member State concerned. In these circumstances, the Ombudsman considered that the Commission had failed to deal with the complainant's infringement complaint within a reasonable period of time. This constituted an instance of maladministration.

The Ombudsman noted, however, that Germany had in the meantime adopted a new law in order to bring the German legislation in line with Directive 93/104 as interpreted by the Court and that this new law had been communicated to the Commission on 6 February 2004. The Commission thus still needed to examine the compatibility of this new legislation with Community law in order to be able to deal with the complainant's infringement complaint. This examination was still ongoing at the time of the Ombudsman's decision. Given that the Commission appeared to accept that a further judgement (Case C-151/02 *Jaeger* [2003] ECR I-8389) had clarified the relevant legal issues, the Ombudsman had no reason to assume that the Commission would incur further delays in dealing with the complainant's infringement complaint.

The Ombudsman therefore considered that the best way to proceed in the case was to make a finding of maladministration as regards the delay that had occurred in the past. However, he informed the complainant that he was free to submit a new complaint to the Ombudsman if the Commission should nevertheless incur further delays in dealing with his infringement complaint.

#### *Complaint 3453/2005/GG*

On 2 November 2005, the complainant turned to the Ombudsman again. In his new complaint, the complainant submitted that he had received no further information as to what position the Commission proposed to adopt concerning his case. The complainant took the view that the Commission was delaying the matter and ignoring the Ombudsman.

The complainant thus in essence repeated the allegation that he had already submitted in his earlier complaint, according to which the Commission had failed to deal with his infringement complaint within an appropriate period of time.

## **The inquiry**

## **The Commission's opinion**



In its opinion, the Commission made the following comments:

On 6 December 2004, the Commission had written to the complainant. In this letter, it informed the complainant that on 22 September 2004 it had adopted a proposal for an amendment of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time [3] ("Directive 2003/88"). The Commission pointed out that it would examine the complainant's infringement complaint in the light of this proposal and of its current discussions with the other Community institutions.

The complainant had subsequently addressed several letters to the Commission in which he had commented on the proposed amendment. In its replies, the Commission had acknowledged receipt of the complainant's letters and stated that it had taken note of his comments.

In two letters sent on 7 and 9 November 2005, the complainant had asked the Commission to start infringement proceedings against Germany for failure to comply with Directive 2003/88.

In its reply of 22 November 2005, the Commission had informed the complainant that it was unable to add anything to what it had said in its letter of 6 December 2004. The Commission pointed out that the discussions concerning the revision of Directive 2003/88 were still ongoing. It stressed again that it would examine the complaint in the light of the proposal for an amendment. The Commission added that it followed from established case-law that it had a discretion as to whether to start or continue infringements proceedings.

Contrary to what the complainant alleged in his complaint to the Ombudsman, the Commission had informed him on two occasions (on 6 December 2004 and on 22 November 2005) of its position as regards the infringement complaint that he had submitted. Although the Commission had not yet taken a decision as to whether to start infringement proceedings against the Member State concerned, it had kept the complainant informed about the way his infringement complaint was dealt with and about the reasons for the Commission's approach.

## The complainant's observations

In his observations, the complainant made the following comments:

None of the letters addressed to him by the Commission was more than an acknowledgement of receipt. It did not emerge from these letters that the Commission was seriously considering the purpose of the relevant directive or that it had made reasonable proposals for changes that would be equally fair towards employees and employers.

The issues that he had criticised in his letters went beyond those covered by the judgments of the Court of Justice in the *Simap* and *Jaeger* cases.

To the best of his knowledge, EU law did not envisage the possibility of disregarding laws and judgments on the grounds that the Commission proposed new rules. If the fact that such



proposals had been submitted made it lawful to disregard existing law, the legal order of the European Communities was, in the complainant's view, a farce.

By acting as it did, the Commission jeopardised the legal peace and committed "Rechtsbeugung" (that is to say, deliberate distortion of the law).

## **The Ombudsman's draft recommendation**

### **The draft recommendation**

On 12 September 2006, the Ombudsman addressed the following draft recommendation [4] to the Commission, in accordance with Article 3(6) of his Statute:

The Commission should deal with the complainant's infringement complaint as rapidly and as diligently as possible.

This draft recommendation was based on the following considerations:

1 The Ombudsman noted that the complainant's infringement complaint, which the Commission had registered under reference 2002/4298, concerned an alleged infringement of Directive 93/104. This directive had since been replaced by Directive 2003/88, and in his correspondence with the Commission the complainant now alleged an infringement of this directive by Germany. However, this change in legislation did not appear to have had any substantive effect on the complainant's infringement complaint and its handling by the Commission. In his letter of 7 November 2005, the complainant referred to an alleged infringement of Directive 2003/88. In its reply of 22 November 2005, the Commission noted that it had nothing to add to the letter it had addressed to the complainant on 6 December 2004 concerning infringement complaint 2002/4298. The Ombudsman therefore considered that the replacement of Directive 93/104 by Directive 2003/88 was without relevance for the present complaint.

2 The Ombudsman noted that the Commission had provided information to the complainant in its letters of 6 December 2004 and 22 November 2005. From these letters, it emerged that the Commission intended to deal with the infringement complaint in the light of its proposal for an amendment of Directive 2003/88 and of its ongoing discussions with the other Community institutions. In its letter of 22 November 2005 to the complainant, the Commission pointed out that the discussions concerning the revision of Directive 2003/88 were still ongoing. In the Ombudsman's view, it followed that the Commission appeared to assume that Article 211 of the EC Treaty does not require it to ensure the application of a Directive which is the subject of an on-going legislative process that may lead to its amendment in the future. The Ombudsman therefore considered that the Commission did inform the complainant, albeit not in great detail, about its position.

3 As regards the substance of the matter, it had to be noted that Article 211 of the EC Treaty



directs the Commission to ensure "that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied". The role thus attributed to the Commission could be likened to that of a 'guardian' of the Treaty. The Commission itself had stressed that this role is "essential to the interests of European citizens". [5] It had also recognised the importance of the principle of the rule of law in this context. [6] Complaints submitted by citizens constitute one of the most important means of information on possible infringements of Community law, thus enabling the Commission to fulfil the role assigned to it in Article 211 of the EC Treaty. The Ombudsman therefore considered that it is good administrative practice to deal with such infringement complaints as rapidly and as diligently as possible.

4 It was obvious that directives adopted by the Community institutions on the basis of the EC Treaty belong to the "measures taken by the institutions" pursuant to the EC Treaty, commonly referred to as acts of secondary legislation, to which Article 211 refers. In the Ombudsman's view, it was furthermore clear, both from the wording and the purpose of this provision, that Article 211 refers to the acts of secondary legislation that are in force at a given time.

5 The Commission did not dispute that Directive 93/104 had been in force until it was replaced by Directive 2003/88, and that the latter directive was and continued to be in force. The Ombudsman was not aware of any rule or principle that would allow the Commission to disregard the duty imposed on it by Article 211 of the EC Treaty on the grounds that it had submitted a proposal for the amendment of a certain act of secondary legislation. As long as the proposed amendment to Directive 2003/88 had not been adopted by the Community legislator, Directive 2003/88 in its present form was the law of the land.

6 In its letter to the complainant of 22 November 2005, the Commission referred to its discretionary powers in this field. In the light of established case-law, it was clear that, were the Commission to complete an investigation of the complaint and consider that there was an infringement, it would have discretion as to whether or not to refer the matter to the Court of Justice. Nothing in the Commission's opinion or in the documents submitted by it suggested, however, that the Commission had already reached that stage of its investigation. The Ombudsman considered that the Commission's undoubted discretion does not entitle it to postpone indefinitely reaching a conclusion on a complaint on the grounds that the applicable law may be amended at some time in the future.

7 In view of these considerations, the Ombudsman took the view that the Commission's failure to deal with the complainant's infringement complaint within a reasonable period of time constituted maladministration. It appeared useful to recall in this context that the infringement complaint had been registered in April 2002, more than two years before the Commission had submitted its proposal for an amendment of Directive 2003/88, and that by the time the present complaint was lodged in November 2005, more than 3 ½ years had passed since the infringement complaint had been registered.

## 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 10 January 2007 in which it made the following comments:

The Commission attached great importance to its role and duties as guardian of the Treaty. However, the provisions of Community law laid down in directives were not permanently fixed, but could be amended.

Directive 93/104, which was in force at the time of the complainant's original infringement complaint, had been replaced by Directive 2003/88 with effect from 2 August 2004. These directives did not materially differ concerning the issues raised by the complainant.

However, in 2004 the Commission had submitted to Parliament and to the Council a proposal for an amendment of Directive 2003/88 concerning various aspects which were very material to the complainant's case.

The Commission agreed that the existence of a proposal for amending legislation did not affect the continuing legal validity of the existing Directive 2003/88. However, the Commission had an established discretion whether to pursue infringement procedures against Member States, and over the way in which it managed such procedures. [7] The Commission had decided, in the exercise of that discretion, not to advance with infringement procedures with regard to those provisions of Directive 2003/88 where the Commission had itself proposed to change the substance of the law, pending the outcome of its legislative proposal.

The Commission's discretion extended to all phases in the management of complaints and infringement proceedings, including the pre-litigation stage. [8] In its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law [9] (the "Communication"), the Commission had indicated that, as a general rule, it would decide whether to open infringement proceedings or to close the file within a year from the date of the registration of the complaint. However, this commitment did not limit the discretion of the Commission, when it seemed justified to adopt a different approach more adapted to the particular facts of the case, as in the present case.

As the Ombudsman had noted, in light of established case-law, the Commission retained a discretion as to whether or not to refer the matter to the Court of Justice even if its investigation of a complaint established that there had been an infringement of Community law.

The Commission regretted that the Council had not yet reached a decision on its proposal. The delay resulted from differences of opinion between the Council and Parliament, and between Member States within the Council, which were outside the Commission's control. The proposal had again been discussed at an extraordinary meeting of the Council on 7 November 2006, but no agreement had been reached.

The Ombudsman was kindly invited to take into account the above comments regarding the extent of the Commission's discretion and to reconsider his draft recommendation.



## The complainant's observations

In his observations, the complainant maintained his complaint. He stressed that his infringement complaint to the Commission also concerned aspects that were independent of the Court's case-law, namely (i) the fact that hospitals ordered doctors to perform 'duty on call' even though normal work was concerned and (ii) the fact that working time effectively performed was not documented due to pressure from employers. The complainant further submitted that the Commission kept ignoring the judgments of the Court of Justice. In the complainant's view, and given that even after four years the Commission and Commissioner Špidla had not managed to bring about reasonable rules on working time and conditions of work in the EU, the latter should resign.

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

1 The Ombudsman notes that in its Communication of 2002, the Commission has entered into certain commitments as regards the handling of infringement complaints.

2 Point 8 of the Communication provides that "[a]s a general rule, Commission departments will 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 by the Secretariat-General." The Ombudsman considers that this provision signifies that the Commission has committed itself to using best endeavours to complete its investigation within one year, but that it is not excluded that more time may be needed in certain cases. This is confirmed by the last sentence of point 8, according to which the Commission will inform the complainant in writing "[w]here this time limit is exceeded". In the Ombudsman's view, it is clearly possible that the Commission's investigation in difficult or complicated cases may require more than one year. The Ombudsman considers, however, that exceeding the one-year time limit is only justified where the Commission is indeed still investigating a case.

3 As regards the present case, the Commission informed the complainant that it intended to deal with his infringement complaint in the light of its proposal for an amendment of Directive 2003/88 and of its discussions with the other Community institutions concerning this amendment. It should be noted, however, that this proposal was already submitted in September 2004. There is nothing to suggest that the Commission has taken any further steps since then in order to proceed with its investigation.

4 It emerges from point 8 of the Communication that the Commission's investigation of an infringement complaint is intended to result in one of two possible decisions. The Commission can either decide to issue a formal notice, i.e., to initiate formal infringement proceedings against a Member State, or decide to close the case. The Ombudsman notes, however, that the Commission has done neither the one nor the other in the present case. In effect, it appears





that instead of taking one of the two types of decision foreseen in point 8 of the Communication, the Commission has simply abstained from taking any further action as regards its investigation.

5 The Ombudsman considers that such an approach is not in conformity with the commitments the Commission entered into in its Communication.

6 In its detailed opinion, the Commission has stressed its discretionary powers in this field and submitted that its discretion extended to all phases in the management of complaints and infringement proceedings, including the pre-litigation stage. The Commission added that the commitment set out in point 8 of the Communication did not limit its discretion, when it seemed justified to adopt a different approach. The Ombudsman is unable to accept this position. The Communication sets out, as its preamble confirms, "the administrative measures for the benefit of the complainant with which it [the Commission] undertakes to comply when handling his/her complaint and assessing the infringement in question". The provisions set out in this Communication take full account of the Commission's discretionary powers in this field. If the Commission were nevertheless allowed to depart from the provisions set out in this Communication whenever it considers this to be justified, the Communication would be deprived of its very meaning. It should be recalled in this context that the Communication constitutes the Commission's reaction to a number of inquiries conducted by the Ombudsman and to the comments on the Commission's procedures in infringement cases made by the Ombudsman in these cases.

7 The Ombudsman further notes that point 9 of the Communication provides as follows: "After investigating the complaint, Commission officials may ask the College of Commissioners either to issue a formal notice opening proceedings against the Member State in question, or to close the case definitively. The Commission will decide on the matter at its discretion. (...)".

8 The Ombudsman fully respects the discretionary power that the Commission enjoys when dealing with infringement complaints. He considers, however, that the Communication in general and its points 8 and 9 in particular make it clear that this discretionary power needs to be exercised within the framework of the Communication. This means that the Commission, when dealing with an infringement complaint, has a choice between a decision to issue a formal notice and a decision to close the case. However, and as mentioned above, the Commission has done neither the one nor the other in the present case. The Ombudsman therefore considers that the Commission's failure to reach a decision on the complainant's infringement complaint cannot be justified by the Commission's discretionary powers.

9 In his observations on the Commission's detailed opinion, the complainant submitted that his infringement complaint also covered aspects that were independent of the Court's case-law, namely (i) the fact that hospitals ordered doctors to perform 'duty on call' even though normal work was concerned and (ii) the fact that working time effectively performed was not documented due to pressure from employers. The Ombudsman has not been provided with copies of all the correspondence between the Commission and the complainant in this case. It appears, however, that at least the first of the above issues was indeed raised by the complainant in his letter of 7 November 2005. Given that the Commission's approach in the





present case is based on the fact that a proposal for an amendment of Directive 2003/88 has been tabled, this reason would therefore in any event not be sufficient to explain the Commission's failure to deal with issues that are not related to the proposed changes. However, given that the Ombudsman takes the view that the Commission should in any event deal with the complainant's infringement complaint, there is no need to address these issues in more detail here.

10 For the avoidance of any doubt it appears useful to clarify that the instance of maladministration that the Ombudsman has identified in the present case consists in the Commission's failure to adopt a definitive position as regards the complainant's infringement complaint. As the Ombudsman already acknowledged in his draft recommendation, were the Commission to complete an investigation of the complaint and consider that there was an infringement, it would have discretion as to whether or not to refer the matter to the Court of Justice. Since no such decision has yet been taken by the Commission, it is not necessary for the Ombudsman to discuss the question whether the exercise of this discretion could at all be examined by him. Any such examination could in any event only concern the question whether the Commission has manifestly exceeded the limits of its discretion in the area concerned. However, the Ombudsman cannot exclude the possibility that Parliament, in the exercise of its sovereign powers, might also wish to comment on this issue. In this context, a press release published by the Commission on 20 September 2006, in which the Commission reacted to the draft recommendation made by the Ombudsman in the present case, could be of interest to Parliament. [10]

11 The Ombudsman considers that the present case raises an important issue of principle concerning the way the European Commission handles complaints submitted by citizens, in which an infringement of Community law by Member States is alleged. The question is whether the Commission, instead of opening infringement proceedings or rejecting the complaint, can simply abstain from taking action. The Ombudsman considers that this is not in conformity with principles of good administration.

## **The Ombudsman's recommendation**

The Ombudsman therefore re-states his draft recommendation as a recommendation to the Commission as follows:

The Commission should deal with the complainant's infringement complaint as rapidly and as diligently as possible.

The European Parliament could consider adopting a resolution accordingly.

Strasbourg, 10 September 2007



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] OJ 1993 L 307, p. 18.

[3] OJ 2003 L 299, p. 9. This Directive, which entered into force on 2 August 2004, replaced (and repealed) Directive 93/104.

[4] The text of the draft recommendation is available on the Ombudsman's website (<http://www.ombudsman.europa.eu>).

[5] See the Commission's Communication on Better Monitoring of the Application of Community Law (COM(2002) 725 final of 16 May 2003, p. 3.

[6] See point 3.1 of the said Communication.

[7] Case C-200/88 *Commission v Greece* [1990] ECR I-4299; Case C-317/92 *Commission v Germany* [1994] ECR I-2039; Case C-422/92 *Commission v Germany* [1995] ECR I-1097; Case C-207/97 *Commission v Belgium* [1999] ECR I-275.

[8] Case C-207/97 *Commission v Belgium* [1999] ECR I-275, at paragraph 24.

[9] COM(2002) 141; OJ 2002 C 244, p. 5.

[10] This press release contains the following statements: "(...) As almost all Member States seem to be in breach of the court rulings, Commissioner Špidla has drawn the Council's attention to the urgency of bringing a balanced solution to the problem. (...) It is unacceptable that citizens suffer from the political deadlock. If Ministers cannot agree over the next months, I have no other choice than to take Member States to court on this issue. However, I trust the Finnish Presidency to bring about a solution in the coming weeks."