

## **Decision of the European Ombudsman closing his inquiry into complaint 1628/2008/TS against the European Commission**

Decision

**Case 1628/2008/TS - Opened on 23/07/2008 - Decision on 17/09/2009**

The complainant, who represents a Lithuanian environmental NGO, complained to the Commission about Lithuania's failure to comply with the EC directives implementing the Aarhus Convention on Access to Information. The Ombudsman's inquiry concerned the Commission's alleged failure to register the complainant's letter of 8 April 2008, as an "infringement complaint".

After the Ombudsman opened his inquiry, the Commission registered the complainant's correspondence as a complaint and acknowledged the delay in the initial registration. The Commission also provided the information that the complainant had requested.

The Ombudsman considered that the Commission's failure to register the complaint was not in line with the procedural guarantees concerning the handling of infringement complaints, as set out in the Commission's communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (COM/2002/0141 final). This constituted an instance of maladministration. In view of the fact, however, that the Commission satisfied the complainant's claim, by registering the complaint in the course of its inquiry, and that it informed the complainant of the investigatory measures taken, the Ombudsman considered that no further inquiries were necessary.

According to the further remark of the Ombudsman, the Commission could, in applying the criteria set out in its Communication, clearly separate the process of identifying, registering and acknowledging complaints from the process of deciding how to deal with each complaint. The Commission could promptly inform the complainant that his complaint has been registered and undertake to inform the complainant within a set time limit, which should not exceed two months, of the procedure it will use to investigate the complaint. If the complaint will not be investigated, reasons for not doing so should be given. The Commission was invited to reply to the further remark within six months.

## **THE BACKGROUND TO THE COMPLAINT**



1. In July 2001, Lithuania ratified the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), and in May 2004, it joined the European Union. The European Community has been a party to the Convention since May 2005 [1] .

2. In 2003, two Directives concerning the first and second "pillars" of the Aarhus Convention were adopted.

- Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003, on public access to environmental information [2] ; and

- Directive 2003/35/EC of the European Parliament and the Council of 26 May 2003, providing for public participation in drawing up certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC [3] with regard to public participation and access to justice.

These directives were to be implemented in the national law of the EU Member States by 14 February and 25 June 2005, respectively.

3. On 8 April 2008, the complainant, who represents a non-Governmental organisation based in Lithuania, complained to the European Commission that Lithuania had failed to comply with the above-mentioned directives and the Aarhus Convention itself. It also referred to a number of alleged translation errors in the Lithuanian version of the Aarhus Convention.

4. With regard to Lithuania's alleged failure to comply with the EU directives, the Commission informed the complainant that there was an ongoing detailed study of Lithuanian national legislation transposing Directives 2003/35/EC [4] and 2003/4/EC [5] , which was expected to be finalised at the end of 2008. If it were established that the provisions of the above-mentioned directives were incompletely and/or incorrectly transposed into Lithuanian legislation, the Commission would take the necessary action to ensure compliance with Community law. The Commission informed the complainant that its letters would be kept for reference in assessing the conformity of Lithuanian legislation.

5. As regards the alleged incorrect translation of the Aarhus Convention into Lithuanian, the Commission informed the complainant that a letter, dated 23 April 2008, from the Lithuanian authorities, suggested that the Aarhus Convention had not been correctly translated, and that the translation would have to be corrected. The Commission pointed out that, since the Aarhus Convention was concluded on behalf of the European Community by Council Decision [2005/370/EC], it would be appropriate for Lithuania to refer suggestions to the Council regarding the correction of the translation errors in the Aarhus Convention and related EC legislation. The Commission concluded that it would look at the translation issue and analyse its practical implications in a broader context.

## **THE SUBJECT MATTER OF THE INQUIRY**



6. On 6 June 2008, the complainant turned to the Ombudsman because it was not satisfied with the Commission's reply and it felt that the Commission had not handled its complaint correctly.

7. The Ombudsman opened an inquiry into the following allegation:

The Commission wrongly failed to register the complainant's letter of 8 April 2008 as an infringement complaint and wrongly omitted to inform the complainant about the reasons for this non-registration.

The Ombudsman also opened an inquiry into the following claim:

The Commission should register the complainant's letter of 8 April 2008 as an infringement complaint, in accordance with its Communication COM/2002/141 final.

## THE INQUIRY

8. On 23 July 2008, the Ombudsman forwarded the complaint to the Commission. The Commission provided its opinion, which was forwarded to the complainant with an invitation to make observations. The complainant did not submit any observations.

## THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

### A. Allegation that the Commission wrongly failed to register the complainant's letter of 8 April 2008 as an infringement complaint and wrongly omitted to inform the complainant about the reasons for this non-registration

#### *Arguments presented to the Ombudsman*

9. In its opinion, the Commission acknowledged that there had been a delay in the initial registration of the complaint but went on to state that the complainant's letters had now been registered in EU PILOT [6] and information had been requested from the Lithuanian Government. The Commission noted that this should at least ensure a quick initial response from the authorities concerned, while it awaits further information from the complainant.

10. On 20 November 2008, the Commission wrote to inform the complainant that its complaint had been registered. It explained that it had recently agreed, with a number of Member States, to improve the speed and efficiency of the information exchange and problem resolution process by using EU PILOT, which aims to provide complainants with a full response from Member States authorities as quickly as possible, within a deadline of ten weeks. The Commission asked the complainant to state whether it agreed to having its identity disclosed to the Member State authorities concerned. It further informed the complainant that work on this



matter would continue only when this information had been received. If the complainant agreed to disclose its identity, the Member State authority concerned would reply to it directly, sending a copy to the Commission. The complainant would then be informed of the Commission's conclusions. It appears from the Commission's opinion that no reply to this request had been received from the complainant by 6 February 2009.

11. In its opinion, the Commission explained that it did not initially register the complainant's correspondence as a complaint because (a) it was in the process of studying the relevant Lithuanian legislation and (b) the complainant's concerns were not set out in a sufficiently clear and detailed manner. The Commission noted that it had informed the complainant of the ongoing detailed study of Lithuanian national legislation transposing Directives 2003/35/EC and 2003/4/EC and that the complainant's letters would be kept for reference, pending a complete assessment of the conformity of Lithuanian legislation. In a letter dated 23 June 2008, the Commission requested additional information from the complainant to enable it to carry out an in-depth assessment of the correspondence. The complainant was asked to specify which directive provisions had been incorrectly applied or transposed into national law and to provide more specific factual information or documentation to support its allegation. At the date of the Commission's opinion, the complainant had not yet replied.

#### *The Ombudsman's assessment*

12. Article 226 of the EC Treaty generally empowers the Commission to deal with infringements of Community law by Member States:

*" If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. "*

13. The procedural guarantees with regard to the Commission's handling of infringement complaints are set out in the "Commission's Communication to the European Parliament and the European Ombudsman on Relations with the Complainant in Respect of Infringements of Community Law [7] " ("the Commission's Communication").

14. Point 3 of the Commission's Communication sets out the basic rule for complaint registration. According to Point 3, first paragraph,

*"[a] ny correspondence which is likely to be investigated as a complaint shall be recorded in the central registry of complaints kept by the Secretariat-General of the Commission. "*

15. The exhaustive list of exceptions to the basic rule is contained in Point 3, second paragraph, of the Commission's Communication.

*" Correspondence shall not be investigable as a complaint by the Commission, and shall therefore not be recorded in the central registry of complaints, if:*



- it is anonymous, fails to show the address of the sender or shows an incomplete address;*
- it fails to refer, explicitly or implicitly, to a Member State to which the measures or practice contrary to Community law may be attributed;*
- it denounces the acts or omissions of a private person or body, unless the measure or complaint reveals the involvement of public authorities or alleges their failure to act in response to those acts or omissions. In all cases, the Commission shall verify whether the correspondence discloses behaviour that is contrary to the competition rules (Articles 81 and 82 of the EC Treaty);*
- it fails to set out a grievance;*
- it sets out a grievance with regard to which the Commission has adopted a clear, public and consistent position, which shall be communicated to the complainant;*
- it sets out a grievance which clearly falls outside the scope of Community law. "*

16. Point 4 of the Commission's Communication provides that, where one or more of the exceptions listed in Point 3, second paragraph, applies, the correspondent must be informed of this by ordinary letter:

*" Where the Commission departments decide not to register the correspondence as a complaint, they shall notify the author to that effect by ordinary letter setting out one or more of the reasons listed in the second paragraph of point 3. "*

17. Point 8 of the Commission's Communication provides a general one-year time limit for the Commission's investigation of infringement complaints.

*" As 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. "*

18. Moreover, according to point 4.2.1 of the Commission's internal manual of procedures for monitoring the application of Community law (SEC(2005)254/5) [8] ,

*" 4.1.2 Registration*

*The written approach denouncing measures or practices contrary to Community law in the Member States must be examined within a month of the decision to classify it as a complaint [...]"*.

19. The Commission acknowledged that there had been a delay in the initial registration of this complaint, but, to ensure further investigation of the issues raised by the complainant, the letters had been registered in EU PILOT and information had been requested from the Lithuanian Government.



20. The Ombudsman welcomes the fact that, in the course of the present inquiry, the Commission registered the complainant's correspondence as a complaint and that information has been requested from the Lithuanian Government.

21. The Ombudsman does not consider the reasons given in the Commission's opinion for not initially registering the correspondence as a complaint to be valid and adequate. First, as regards the obligation to register the correspondence as a complaint, the fact that the Commission was in the process of studying the Lithuanian legislation is irrelevant. Second, the Ombudsman does not agree that the complainant's concerns were not set out in a sufficiently clear and detailed manner and notes that the Commission did not contact the complainant to inform it that its correspondence was unclear. In any event, Point 4 of the Commission's Communication states that the author must be informed if the Commission considers that one or more of the exceptions in the second paragraph of Point 3 may apply.

22. The Ombudsman considers that the Commission's failure to register the complainant's correspondence of 8 April 2008 was not in line with the procedural guarantees set out in the Commission's Communication. In this context, the Ombudsman notes that the timely registration of complaints is particularly relevant in view of the above-mentioned one-year time limit, provided in Point 8 of the Commission's Communication, for taking a decision on how to proceed with the complaint.

23. This constituted an instance of maladministration. In view of the fact, however, that the Commission has now registered the complaint, thereby satisfying the complainant's claim, and has informed the complainant of the investigatory measures taken, the Ombudsman considers that no further inquiries are necessary. He will, however, make a constructive suggestion to the Commission in the further remark below, based on the considerable experience he has accumulated in dealing with complaints from citizens.

## Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes this case with the following findings: concerning the complainant's allegation, no further inquiries are justified; concerning the complainant's claim, it has been settled by the institution.

## FURTHER REMARK

By applying the criteria set out in its 2002 Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, the Commission could clearly separate (a) the process of identifying, registering and acknowledging complaints from (b) the process of deciding how to deal with



each complaint. The Commission could promptly inform the complainant that his complaint has been registered and undertake to inform the complainant within a set time limit, which should not exceed two months, of the procedure it will use to investigate the complaint. If the complaint will not be investigated, reasons for not doing so should be given.

The complainant and the European Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 17 September 2009

[1] Decision 2005/370/EC on conclusion of the Aarhus Convention by the EC was adopted on 17 February 2005.

[2] OJ L 41, 14.2.2003, p.26.

[3] OJ L 156, 25.6.2003, p.17.

[4] OJ L 156, 25.6.2003, p.17.

[5] OJ L 41, 14.2.2003, p 26.

[6] EU PILOT is a pilot project aimed at rapidly dealing with complaints to the Commission concerning infringements of EC law by Member States.

[7] COM(2002) 141 final.

[8] The European Commission provided a copy of the internal manual (SEC(2005)254/5) with the opinion it issued in the course of the present inquiry.