

## Decision of the European Ombudsman closing his inquiry into complaint 406/2008/(WP)VIK against the European Commission

Decision

**Case 406/2008/(WP)VIK - Opened on 03/03/2008 - Decision on 16/12/2009**

### THE BACKGROUND TO THE COMPLAINT

1. The complainant is an NGO dealing with issues concerning European citizenship and the right of EU citizens to free movement.

2. Part 2 of the EC Treaty (Articles 17 to 22) contains provisions on the " *Citizenship of the Union* ". Article 22(1) of the EC Treaty provides as follows:

*" The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union. "*

3. The first report on European Citizenship [1] , published on 21 December 1993, covered the year 1993. The second report [2] , published on 27 May 1997, covered the period from 1994 to 1996. The third report [3] , published on 7 September 2001, covered the period from 1997 to the end of April 2001. The fourth report [4] covered the period from 1 May 2001 to 30 April 2004, and was published on 26 October 2004.

4. The fifth report on European Citizenship was to cover the period from 1 May 2004 until 30 June 2007.

5. Prior to the expiry of the period to be covered by this report, the complainant asked for a meeting with officials from the European Commission's Directorate-General Justice, Freedom and Security ('DG JLS'). During this meeting, which took place on 14 June 2007, the Commission and the complainant exchanged views on European citizenship. Following the meeting, the complainant sent the Commission a number of documents relating to European citizenship.

6. In September 2007, the complainant organised a seminar on European citizenship. An official



from DG JLS participated in this seminar as a speaker.

7. On 16 October 2007, the complainant wrote to Vice-President Frattini suggesting that widespread consultations should be carried out prior to the publication of Commission reports on European Citizenship. Among other things, the complainant asked the Commission to make a commitment that minimum standards of consultation would be applied with respect to the sixth report on European Citizenship.

8. On 20 November 2007, the Commission replied to the complainant's letter. It explained that it had consulted civil society, including the complainant, in the context of the Green Paper on consular and diplomatic protection of EU citizens in third countries [5]. It stated that this was the only citizenship right for which reinforcement had been proposed within the period covered by the fifth report. The Commission stated that the cut-off date for the reporting exercise for the fifth report was 30 June 2007, and that it was too late to launch a further consultation process. It added that it was prepared to carry out a consultation exercise prior to the publication of the sixth report on European Citizenship, which is scheduled for 2010.

9. By letter dated 3 January 2008, the complainant asked the Commission to explain the form the consultation was to take. The complainant also queried why the fifth report had not yet been adopted.

10. On 23 January 2008, the Commission sent a letter to the complainant explaining that it would be contacted once work on the sixth report started. The Commission explained that the fifth report had not been published by the end of 2007, as originally envisaged, because the Commission wished to include in it the results of the 2007 Eurobarometer survey on awareness of citizens' rights. The Commission pointed out that it had not been possible to sign the contract to launch this survey until 9 November 2007, and that the final results were delivered only on 11 December 2007. It added that the fifth report would be published in the near future. The Commission further noted that, although Article 22 of the EC Treaty provided that reports should be submitted every three years, the third report, for example, covered a longer period.

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

11. In its complaint to the European Ombudsman, the complainant made two allegations. First, it alleged that the Commission failed to consult civil society on the fifth report on European Citizenship. Secondly, the complainant alleged that the Commission failed to respect the Treaty deadline for the publication of the fifth report on European Citizenship.

12. The complainant pointed out that the Commission could remedy its failure to carry out a consultation for the fifth report by conducting a wide, and well-organized consultation on the sixth report. In this context, the complainant invited the Ombudsman to develop consultation guidelines for the field of European Citizenship.

13. The Ombudsman informed the complainant that, in his view, such guidelines should be



drawn up and elaborated by the administration concerned, and that it was not for him to do so. His task, he pointed out, was rather to watch over the correct application of such guidelines.

## THE INQUIRY

14. The complaint was submitted on 4 February 2008. On 3 March 2008, the Ombudsman opened an inquiry and asked the Commission for an opinion on the complaint.

15. The Commission sent its opinion on 3 July 2008. The opinion was forwarded to the complainant, which submitted its observations on 31 August 2008.

16. On 23 September 2008, the Ombudsman asked the Commission for its position concerning the complainant's comments.

17. The Commission replied to the Ombudsman's request on 4 February 2009. The Ombudsman forwarded this reply to the complainant, which submitted further observations on 6 April 2009.

## THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

### A. Allegation of failure to consult civil society in relation to the fifth report on European Citizenship

#### *Arguments presented to the Ombudsman*

18. The complainant alleged that DG JLS failed to consult civil society on the fifth report on European Citizenship. In this context, it referred to the Commission's Communication on general principles and minimum standards for consultation [6], according to which "*wide consultation is one of the Commission's duties according to the Treaties and helps to ensure that proposals put to the legislature are sound*". The complainant also referred to Protocol no. 7, annexed to the Amsterdam Treaty, on the application of the principles of subsidiarity and proportionality, which places the Commission under a general obligation to ensure "*consultation with parties concerned in order to ensure that the Union's actions are coherent and transparent*". Against this background, the complainant argued that DG JLS should have opened consultations before drawing up its fifth report on European Citizenship. As regards the Commission's argument that it was too late to launch a consultation, given that the relevant request was made after the period to be covered by the report had ended, the complainant submitted that, in retrospect, the Commission would have had time to do so. The complainant argued that the Commission thus failed to fulfil its general obligation by not opening consultations, either before, or after the closing date for the reporting exercise. It added that the participation of a Commission official as a speaker in a conference on European Citizenship on 18 September 2007 did not make up for the lack of consultation.



19. In its opinion, the Commission first pointed out that the fifth report on European Citizenship was published on 15 February 2008 [7] .

20. The Commission emphasized that the purpose of the reports on European Citizenship was to report on " *the application of the provisions* " of Part 2 of the EC Treaty during the relevant period. In the Commission's view, the report was thus mainly a stock-taking exercise. The Commission further stressed that civil society was consulted extensively regarding the proposal for an actual reinforcement of citizens' rights in the field of consular and diplomatic protection, and that this had been submitted during the reporting period.

21. The Commission also pointed out that the complainant had the opportunity to present its ideas and views at the meeting with DG JLS on 14 June 2007, prior to the adoption of the fifth report.

22. The Commission stressed that it was in favour of consulting civil society prior to the publication of its reports on European Citizenship. It pointed out that, although it was under no legal obligation to do so, it had, nevertheless, taken on board the complainant's suggestion that there should be wider consultation, and pledged itself to implement this measure prior to the publication of its sixth report on European Citizenship.

23. In its observations, the complainant first underlined that it was pleased that the Commission expressed its commitment to carrying out a consultation prior to the publication of the sixth report. However, the complainant considered that three conditions needed to be fulfilled in this context. It pointed out that it would be happy to withdraw its complaint, if the Commission could give reasonable assurances that these three conditions would be fulfilled.

24. In the complainant's view, the first aim of the consultation should be to reach a wide audience. In order to achieve a more holistic concept of European Citizenship, the consultation should reach out beyond associations at the European level. In this context, the complainant referred to the Commission's minimum standards of consultation, which stress the need to cover minority groups and diffuse interests.

25. Second, the consultation should be based on substantial findings and data. In its view, the objective of a wide consultation could only be achieved, if the Commission invested more resources in the preparation of its reports than had been the case with some of its previous reports. The complainant singled out the fourth report as an example of a substantial document. According to the complainant, the principle of good administration goes beyond legal requirements and should include the idea that input should be commensurate with the task to be undertaken. In support of its assertion, the complainant submitted an alternative report on European Citizenship, which it had drafted itself.

26. Finally, the complainant argued that the consultation should relate to the preparation of the sixth report as a whole, and not only to those aspects of European Citizenship about which the Commission intended to make proposals. The complainant noted that, when applying the



minimum standards for consultation, the Commission generally allowed interested parties to comment on all aspects of the issue, whilst, at the same time, indicating the questions to which it was particularly interested in receiving answers.

27. The Ombudsman asked the Commission for its views on the complainant's observations. In its reply, the Commission pointed out that it was looking into the best way to ensure wider consultation prior to the adoption of the sixth report. It noted that it would ensure that this report is based on any substantial findings and data presented by interested stakeholders. The Commission added that it would also welcome receiving information from interested stakeholders regarding concrete citizen concerns relating to the rights mentioned in Part 2 of the EC Treaty.

28. The Commission also pointed out that it launched a wide-ranging consultation exercise in the area of Freedom, Security and Justice within the framework of its Multi-Annual Programming. The complainant and all other interested stakeholders were invited to provide their input during the period of consultation, which ended on 4 December 2008.

29. The Commission underlined that all its proposals are subject to impact assessments which take stakeholders' concerns into account in a comprehensive manner.

30. Finally, the Commission pointed out that it can act only within the bounds set by the Treaty and, thus, cannot propose action which would go beyond its competence. For example, a number of the complainant's proposals included in the alternative report on European Citizenship went beyond the Commission's mandate under the Treaty.

31. In its further observations, the complainant remarked that the report on European Citizenship was an opportunity to make European Citizenship " *an evolutionary concept* ", and should not, therefore, be limited to a " *stock-taking exercise* ". The complainant can see no reason why the Commission should not make suggestions in the report that go beyond the current Treaty framework.

32. The complainant reiterated that the Commission should commit itself to devoting more resources to the preparation of future reports on European Citizenship in order to ensure widest possible consultation with the stakeholders.

#### *The Ombudsman's assessment*

33. The Ombudsman considers that the first point in need of clarification is whether the Commission was under a legal obligation to consult civil society when drawing up the fifth report on European Citizenship. Article 22 of the EC Treaty does not stipulate that consultation is mandatory. As regards the Protocol on applying the principles of subsidiarity and proportionality, which was introduced by the Amsterdam Treaty, the Ombudsman notes that the relevant passage urges the Commission " *to consult widely before proposing legislation* ". It is obvious, however, that the report to be drawn up under Article 22 of the EC Treaty does not constitute a proposal for legislation. The Ombudsman notes that the complainant also invoked the



Commission's Communication on general principles and minimum standards for consultation [8] , which provides that " *wide consultation is one of the Commission's duties according to the Treaties and helps to ensure that proposals put to the legislature are sound* ". However, the passage cited by the complainant refers to proposals to be submitted by the Commission to the EU legislator. The Ombudsman remains unconvinced that this Communication applies to the present case. The Ombudsman concludes, therefore, that the Commission correctly affirmed that it was not under a legal obligation to carry out a consultation before publishing its reports on European Citizenship.

34. It needs to be examined, therefore, whether the Commission, by publishing its fifth report on European Citizenship, without carrying out a prior consultation of civil society, acted against the principles of good administration.

35. Article 22 of the EC Treaty directs the Commission to report on the " *application* " of the provisions of part 2 of the EC Treaty. These provisions concern the right to free movement (Article 18); the right to take part in municipal elections and elections to the European Parliament in other Member States (Article 19); the right to protection by diplomatic and consular authorities of the Member States in third countries (Article 20); and the right to complain to the Ombudsman, to petition the European Parliament and to communicate with the institutions and bodies of the EU in any of the Community languages (Article 21). The Ombudsman considers that it is very difficult to imagine that a report on the practical application of these rights can usefully be written without collecting information from third parties. It is unrealistic to expect the Commission to know how Articles 17-21 of the EC Treaty are applied in practice unless it consults other sources. The Commission itself appears to confirm this view when it points out, in its opinion, that it would welcome information from interested stakeholders regarding concrete citizens concerns relating to the rights mentioned in Part 2 of the EC Treaty.

36. The Ombudsman considers, therefore, that consulting interested parties before publishing the reports on European Citizenship would clearly be good administrative practice. In this context, it appears useful to note that, in a recent opinion [9] , the European Parliament's Committee on Constitutional Affairs expressed its disappointment at the Commission's failure to consult civil society during the preparation of the fifth report, and stated that it expected such consultations to be carried out during the preparation of the sixth report, as pledged by the Commission.

37. The complainant does not dispute the Commission's statement that civil society was consulted extensively during the reporting period for the Green Paper on consular and diplomatic protection of EU citizens in third countries. This consultation was undoubtedly important, but it covered only one aspect of European Citizenship. Consultation on this matter cannot be seen as a substitute for consultation on the development of European citizenship in general. For the sake of completeness, it should be added that the consultation exercise in the area of Freedom, Security and Justice, within the framework of its Multi-Annual Programming, to which the Commission also referred in its opinion, is not relevant for the examination of the complainant's allegation, since it took place after the fifth report had been published.



38. The Commission's argument that the complainant had the opportunity to present its ideas and views during a meeting with the Commission on 14 June 2007 is not convincing either. A meeting organised to hear the views of just one association cannot be considered to be a representative consultation of civil society as a whole. For the same reasons, the Ombudsman does not consider a Commission official's participation as a speaker in a conference on European Citizenship on 18 September 2007 to be sufficient compensation for the failure to consult civil society before the publication of the fifth report.

39. The Ombudsman understands the complainant's aim in presenting the present allegation as a means of obtaining a commitment from the Commission to consult civil society regarding future reports on European Citizenship. During the course of the present inquiry, the Commission clarified that it will carry out such consultations in future. The Ombudsman has no reason to assume that the Commission will fail to comply with this commitment.

40. The complainant underlined that future consultations should be subject to three conditions. The Ombudsman explained at the outset of the present inquiry that it is not his role to instruct the Commission on how to carry out future consultations. Some brief comments in this respect are, nevertheless, necessary to avoid possible misunderstandings. The Ombudsman considers that the Commission and the complainant do not hold irreconcilable views as to the form and scope of future consultations. The only major difference is the question of whether the Commission should also be obliged to consider proposals for further action in this field. As regards this point, it should be pointed out that the report to be drawn up under Article 22 of the EC Treaty deals with how the rights concerned were applied during a given period. As the Commission observed, this is, basically, a stock-taking exercise. The Commission is not, therefore, required to discuss proposals for legislative or political change in its reports on European Citizenship. There is nothing to prevent interested parties from submitting such proposals to the Commission. The latter may find these suggestions useful in determining the need for legislative measures to strengthen the rights covered by Part 2 of the EC Treaty.

41. The complainant also suggested that the Commission should devote sufficient resources to its reports on European Citizenship. The Ombudsman considers that this suggestion clearly goes beyond the scope of the present inquiry. If the complainant considers that the Commission has assigned insufficient resources to this task, it could address this grievance to the Commission and subsequently consider submitting a further complaint to the Ombudsman.

42. In view of the above, the Ombudsman considers that there is no need for further inquiries as regards this allegation.

## **B. Allegation of failure to respect the Treaty deadline for the publication of the fifth report on European Citizenship**

### *Arguments presented to the Ombudsman*

43. The complainant further alleged that the Commission failed to publish the fifth report on





European Citizenship before the deadline set by the ECTreaty expired. It argued that, in accordance with Article 22 of the EC Treaty, and, given that the fourth report was published on 26 October 2004, the fifth Report was due in 2007, the final deadline being 31 December 2007.

44. The Commission reiterated its view that the delay in publishing the report was justified in view of the need to include in it the results of the Eurobarometer survey on awareness of citizens' rights.

#### *The Ombudsman's assessment*

45. The Ombudsman notes that no strict deadline is provided in Article 22 of the Treaty for the publication of the report on European Citizenship. It merely states that these reports are to be submitted " *every three years* ". The Ombudsman considers, however, that for this provision to have any effective use, the relevant reports need to be published within a reasonable period of time subsequent to the three years to which they refer.

46. The Ombudsman notes that the Commission and the complainant agree that the fifth report was to cover the period ending on 30 June 2007. He further notes the complainant's view that the fifth report should, therefore, have been presented before 31 December 2007, and that the Commission did not challenge this assumption. In the Ombudsman's view, his examination can, therefore, be based on the premise that the fifth report should have been published by that date.

47. The Ombudsman notes that the publication of the fifth report on European citizenship was delayed until 15 February 2008. The Commission did not deny that there was a delay. However, the Ombudsman considers reasonable the Commission's explanation that, prior to publishing the report, it needed to take account of the results of the Eurobarometer survey on awareness of citizens' rights.

48. In view of the above, no maladministration is found regarding the complainant's second allegation.

## C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusions:

As regards the complainant's allegation that the Commission failed to consult civil society for the fifth report on European Citizenship, the Ombudsman considers that, in view of the statements made by the Commission relating to future consultations on such reports, no further inquiries are needed.

No maladministration was found as regards the allegation that the Commission failed to respect the deadline for publishing its fifth report on European Citizenship.





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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 16 December 2009

[1] COM(93) 702 final.

[2] COM(97) 230 final.

[3] COM(2001) 506 final.

[4] COM(2004) 695 final.

[5] COM(2006) 712 final.

[6] COM(2002) 704 final: Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission.

[7] COM(2008) 85 final: Report from the Commission - Fifth Report on citizenship of the Union (1 May 2004 - 30 June 2007).

[8] See footnote 6 above.

[9] 2008/2234(INI): Opinion of the Committee on Constitutional Affairs for the Committee on Civil Liberties, Justice and Home Affairs of 22 January 2009 on the problems and prospects concerning European citizenship.