

Decision of the European Ombudsman closing his inquiry into complaint 3307/2006/(PB)JMA against the European Commission

Decision

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

The complainant, the General Manager of a circus association, submitted a complaint to the European Commission against the Austrian Protection Law, which imposed a total ban on the keeping of wild animals in circuses. The Commission opened infringement proceedings against Austria pursuant to Article 258 TFEU, but closed the case shortly thereafter, arguing that Member States are better placed to decide on the appropriate measures to apply to a sensitive matter such as animal protection.

The complainant turned to the Ombudsman alleging that the Commission's decision was not well-grounded and that the infringement proceedings were not properly handled. The complainant, therefore, claimed that his case should be re-examined.

In a draft recommendation, the Ombudsman urged the Commission to provide the complainant with a clear and unequivocal statement of its views as regards whether Austria had or had not demonstrated that its Animal Protection Law was in compliance with the Treaty. The Ombudsman considered that, using its broad margin of discretion, the Commission could decide not to pursue an infringement case further, even if it took the view that the Member State had not demonstrated that its policies are in compliance with the Treaty. The Ombudsman went on to argue that, when the Commission chooses to exercise its discretion in such a manner, it should provide valid arguments explaining the rationale underpinning its decision.

The Commission did not accept the draft recommendation and stated that, in closing the infringement proceedings, it had made use of its discretionary powers. It further argued that animal welfare questions should not be decided at EU level but should rather be left to Member States. The Ombudsman understood that the Commission's decision to close the case, regardless of the possible existence of an infringement of EU law, was a decision taken on political grounds and accepted that the Commission can choose to exercise its discretion by deciding to drop an investigation before it has been completed and before it has taken a decision about whether a Member State is in breach of EU law. In view of these considerations, the Ombudsman didn't deem it justified to inquire further into the complainant's claim that the Commission should re-examine the infringement complaint.



However, the Ombudsman considered it necessary to close the inquiry with a critical remark as regards the reasoning which the Commission put forward as grounds for closing the case. In his view, the Commission's statement that "*animal welfare questions are better left to Member States*" seemed tantamount to an abdication by the Commission from its role as guardian of the Treaties in all matters concerning animal welfare and not merely to those pertaining to the present case. As such, it failed to provide a correct, clear and understandable reasoning for the exercise of the Commission's discretionary powers to close the case. The Ombudsman found that in so doing the Commission had committed an act of maladministration.

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 then Article 49 EC [2] (at present, Article 56 TFEU).

2. On 12 October 2005, the Commission opened infringement proceedings against Austria pursuant to then Article 226 EC (at present, Article 258 TFEU) 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 (at present, Article 56 TFEU). It therefore asked the Austrian authorities to provide observations on the Commission's arguments.

4. Subsequently, in a statement made to the public, the Commissioner responsible for the internal market portfolio indicated 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. 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 formal decision of the Commission closing the case was taken on its meeting of 12 December 2006 and was formally communicated to the complainant by letter of 21 December 2006.

THE SUBJECT MATTER OF THE INQUIRY

9. In the complaint, the Ombudsman identified the following allegations and claims:

(i) The statement made by the Commission in its letter of 24 October 2006 explaining that Member States should be left to decide whether or not to ban the use of wild animals in circuses, was not legally correct.

(ii) 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.

The complainant therefore claimed that:

(iii) The infringement complaint should be re-examined by the Commission.

(iv) The Commission should adopt a conclusion consistent with its initial letter of formal notice of 12 October 2005 to Austria.



THE INQUIRY

10. 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.

11. 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.

12. On 3 June 2009, the Ombudsman addressed a draft recommendation to the Commission. On 18 September 2009, the Commission sent its detailed opinion rejecting the draft recommendation.

13. The Ombudsman forwarded the Commission's detailed opinion to the complainant, who sent his observations on 30 October 2009.

14. On 10 November 2009, the complainant informed the Ombudsman that the organisation he represents had taken legal action before the competent national courts in Austria and Luxemburg to contest the compatibility of the national legislation in question with Community law.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Preliminary remarks

Scope of the Ombudsman's review

15. 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 (at present, Article 258 TFEU). 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 (at present, Article 258 TFEU), 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.*"

16. The Ombudsman considered, however, that he did not share the Commission's viewpoint. He noted that the Commission, in its role as 'Guardian of the Treaty' under then Article 211 EC (at present replaced in substance by Article 17(1) TEU), 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 (new Article 258 TFEU) gives it the power to start infringement proceedings against this Member State and, eventually, if it considers that an infringement has occurred, to bring the matter before the European Court of Justice.

17. 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, [3] 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. 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. [4]

18. The Ombudsman stated, however, that as he has consistently held [5] , 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. [6] 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.

19. In view of the above, the Ombudsman underlined 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

20. 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.

21. 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 then Article 49 EC (at present, Article 56 TFEU). 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.

22. 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 (at present, Article 56 TFEU). 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 (at present, Article 258 TFEU).

23. In his observations, the complainant again 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.

24. 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.



25. 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 (at present, Article 56 TFEU). 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 its discretion, recognised by the Court of Justice, to decide whether it is appropriate to initiate infringement proceedings under Article 226 EC (at present, Article 258 TFEU).

26. 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

27. 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 of 12 December 2006 to close the case, the Ombudsman reviewed 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.

28. 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") [7] the Ombudsman stated 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. [8]

29. 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 the Commissioner responsible for the internal market portfolio, 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. [9] 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.

30. As the Ombudsman had previously noted, 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. He also noted that 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.

31. The Ombudsman underlined 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 (at present, Article 258 TFEU) 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.

32. It follows from the above that the Commission is not obliged to maintain an identical position throughout the 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.

33. 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.

34. 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.

35. The Ombudsman found useful, in order to consider if the Commission had 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 read:

"... 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 ..."

36. The Ombudsman first noted 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 (at present, Article 56 TFEU) (see paragraph 21 above). The Commission accepted that restrictions to the 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 EU 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.

37. As regards whether the measure was discriminatory (see condition (i) set out in paragraph 36 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.

38. The Ombudsman noted 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 (at present, Article 56 TFEU) 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 considered that this element of the Commission's communication to the complainant was sufficiently clear. He also considered that the Commission acted within the limits of its legal authority regarding this aspect of its explanation.

39. As regarded whether there existed an imperative requirement of general interest (condition (ii) as set out in paragraph 36 above), the Commission had 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 was of the view that this element of the Commission's communication to the complainant was also sufficiently clear. He also found that the Commission acted within the limits of its legal authority regarding this aspect of its explanation.

40. As regarded whether Austrian law was suitable to protect the general interest identified (condition (iii) as set out in paragraph 36 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).

41. In his inquiry of 19 February 2008, 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 believed that the measure in question (i) appeared suitable to attain the aim pursued, and (ii) did not go beyond what is necessary to attain such an aim. In its reply, 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* ".

42. The Ombudsman first noted 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 possible 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 understood that the Commission accepted that the total ban on keeping wild animals in circuses was *a means* , (albeit a highly restrictive one) to ensure that Austria's particularly ambitious aims relating to the protection of wild animals were achieved. [21]

43. 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.

44. The Ombudsman noted 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 (at present, Article 258 TFEU), that their rules are consistent with all the conditions set out in the *Gebhard* judgment. [23] In light of the above, the Ombudsman presumed that, in order to show that the total ban on the use of wild animals in circuses was a proportionate means of protecting wild animals, the Austrian authorities would have had to explain to the Commission why the contexts in which it allowed the use of wild animals (namely, on films sets and on television), were substantively different from a circus context. However, it appeared that the Commission had not required this from the Austrian authorities. Rather, it had simply stated that, as regarded 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*".

45. The Ombudsman first underlined 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 possible 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 recalled, 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 considered that the Commission's discretionary power under Article 226 EC (at present, Article 258 TFEU) does not entitle it to abdicate from its role as guardian of the Treaty *in an entire policy 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.

46. The fact that the Commission should not abdicate from 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 42 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 circuses. 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.



47. 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 gave the Ombudsman no evidence that the Austrian authorities provided the Commission with *any* explanations concerning the potential anomalies/questions discussed in paragraphs 43 and 44 above, even though these anomalies called into question the proportionality of the Austrian rules. The Commission did also not conclude 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 adopted 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.

48. The Ombudsman noted that 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 complied 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 constituted an instance of maladministration. The Ombudsman did not consider that a proposal for a friendly solution would be useful in this case. A draft recommendation was thus made in this regard.

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

Arguments presented to the Ombudsman

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

50. The Commission considered that, for the reasons set out above, it had acted in accordance with its prerogatives under Article 226 EC (at present, Article 258 TFEU).

The Ombudsman's assessment

51. The Ombudsman considered that, while the Commission should have provided the complainant with a clear and unequivocal statement of its views as regards whether or not Austria had demonstrated that its Animal Protection Law was in compliance with the Treaty, this did not imply that the Commission was obliged to pursue infringement proceedings against



Austria. The Commission noted that, in use of its broad margin of discretion, it could decide not to pursue a case further even if it had taken the view that the Member State had not yet demonstrated that it was 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.

52. The Ombudsman took the view that the Commission's acceptance of the draft recommendation would ensure compliance with the principles set out in the previous paragraph. Therefore, the Ombudsman considered that no further inquiries were justified as regards the complainant's claim.

D. The Ombudsman's draft recommendation

53. On 3 June 2009, the Ombudsman made the following draft recommendation to the Commission, in accordance with Article 3(6) of his Statute:

"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 Commission's detailed opinion in response to the Ombudsman's draft recommendation

54. In its detailed opinion of 18 September 2009, the Commission stated that *the question of how to protect wild animals in circuses should not be decided at Community level, but rather be left to Member States. The Commission therefore considered that it would not be appropriate to continue an infringement procedure against Austria for failure to fulfil its obligations under the Treaty*. Accordingly, the Commission took the view that, in its actions in this case, it had *exercised its discretion, recognized by the Court, to decide whether it is appropriate to take forward a case under Article 226 EC (at present, Article 258 TFEU).*

55. In response to the Ombudsman's draft recommendation, the Commission provided some further explanations as to the reasoning supporting its decision. It added that these reasons include considerations relating to the diversity of opinions within the EU on the appropriate extent of protection of animals in different contexts, the variety of economic, social, cultural, religious and other factors contributing to this diversity of opinion.

56. Furthermore, the Commission insisted that it had discretion to decide to close an infringement procedure on the basis of the consideration that Member States are better placed to address the protection of wild animals in circuses. It added that that decision was not dependent on the conclusion of a proportionality test, which it was under no obligation to undertake. The Commission considered that an analysis of the proportionality was unrelated to its stated reasons to close the case. It further considered that making the proportionality test would not have made the letter to the complainant any clearer in that respect.



57. For the above reasons, the Commission concluded that it was unable to accept the Ombudsman's draft recommendation.

The complainant's observations on the Commission's detailed opinion

58. In his observations on the Commission's detailed opinion, the complainant repeated the arguments he had put forward in his complaint. He stated that he had understood the Commission's position to be that the institution did not even need to analyse the legality of a Member State law if it touches on sensitive political issues. In the complainant's view, the Commission's decision to close the infringement procedure was formally based on considerations relating to the diversity of opinion within the EU concerning animals in circuses. He criticised, however, the view that, where diversity of opinion based on different economic, social, cultural, religious and other factors exists, the Commission would not even need to analyse whether a measure violates the Treaty upon which the Union is based.

59. The complainant further regretted the consequences of the Commission's actions in initiating and then dropping the case under pressure from animal rights activists. One of them would be that Member States might conclude that the Commission had endorsed the legality of decisions banning the use of animals in circuses. The complainant expressed his disappointment since, despite his complaint to the Ombudsman, the Commission had not made any clear statement on the legality of such bans. Its failure to do so was damaging circus culture and arts as well as the interests of its members.

60. The complainant sent further information on 10 November 2009, in which he pointed out that his organisation had taken legal action before the competent courts in Austria and Luxemburg, in order to contest the compatibility with EU law of the national legislation in question, including the Austrian Animal Protection Law. In the absence of any progress on the part of the Commission, the complainant explained he had decided to abandon its efforts to seek redress through the Ombudsman and had decided to turn to the national courts to request at that level the annulment of the existing bans. The complainant, however, expressed the wish that *"the Ombudsman could put out a statement clarifying that the decision by the Commission not to pursue an infringement action does not constitute a conclusion about the legality of the matter at hand."*

Final assessment by the Ombudsman

61. Before assessing the content of the Commission's reply to his draft recommendation, the Ombudsman notes that the complainant appears to have started legal proceedings before several courts, in order to contest the legality of the national rules in question.

62. The Treaty on the Functioning of the European Union (TFEU) and the Statute of the European Ombudsman set precise conditions as to the admissibility of a complaint. The Ombudsman can only start an inquiry or proceed with an inquiry if these conditions are met. Article 228 of the TFEU (former Article 195 of the EC Treaty) empowers the European



Ombudsman to receive complaints

"...concerning instances of maladministration in the activities of the Community institutions or bodies ... except where the alleged facts are or have been the subject of legal proceedings . "

63. Furthermore, Article 2(7) of the Statute of the European Ombudsman foresees that

"[w] hen the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward , has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point shall be filed without further action. "

64. However, having carefully reviewed the legal actions undertaken by the complainant, the Ombudsman finds that, whereas the proceedings before the national courts involve the compatibility with EU law of national rules restricting the use of animals in circuses, his inquiry into the present case has been directed at assessing whether or not the Commission properly handled an infringement complaint and thus, if it acted within the limits of its legal authority and if it provided clear and sufficient reasons for its decision.

65. The Ombudsman therefore concludes that the subject matter of his inquiry is not the same as that of the legal proceedings currently pending before the national courts. The Ombudsman thus considers that Article 228 TFEU and Article 2(7) of the Ombudsman's Statute are not applicable in the present case and will proceed to review the substance of the case.

66. The Ombudsman has thoroughly reviewed the Commission's reply to his draft recommendation. In its detailed opinion, the Commission explained that its decision to close the infringement procedure against Austria was not based on the conclusions of a proportionality test concerning the national law and argued that it was under no obligation to undertake such a test. The Commission also explicitly stated that an analysis of the proportionality of the national law was unrelated to its stated reasons to close the case. It further considered that conducting a proportionality test would not have made the letter of 26 October 2006 to the complainant any clearer in that respect.

67. The Ombudsman understands that the Commission's decision to close the infringement procedure against Austria was not premised on a view as to whether the Austrian law was in conformity with the Treaty or not. In fact, the Commission appears to confirm what the complainant asked the Ombudsman to acknowledge in his decision, namely, that *"... the decision by the Commission not to pursue an infringement action does not constitute a conclusion about the legality of the matter at hand "* (see paragraph 60 above). The Ombudsman therefore understands the Commission to be justifying its decision not to proceed further with the infringement proceedings as a political decision, adopted on the basis of its wide discretionary powers.

68. In its reply to the draft recommendation, the Commission explains, in a much clearer way, what it implicitly stated in its letter to the complainant of 24 October 2006. From the overall



content of that letter, it was indeed not clear why the Commission had decided to close the case, given that it also invoked several aspects of the so-called *Gebhard test*. Nevertheless, in the aforementioned letter, the Commission made the following statement:

" It would therefore not be politically appropriate to continue an infringement proceeding against Austria for failure to fulfil its obligations under the Treaty. "

69. In light of the Commission's detailed opinion, the Ombudsman concludes that, when deciding not to proceed further with the infringement proceedings, the Institution based itself on political grounds. The Ombudsman must now consider whether: (i) the Commission was correct to state that, in light of its discretionary powers recognised by the EU courts, it had no obligation to conduct the proportionality test and reach a conclusion regarding the conformity of the national law with EU law; and (ii) the reasoning put forward for closing the case was correct.

70. Concerning the first aspect, the Commission has argued that the EU courts have recognised its power not to bring actions against Member States in cases where the latter's actions fail to comply with EU law [25]. The Ombudsman recognises that the Commission has wide discretion to close an Article 258 TFEU (ex-Article 226 EC) infringement procedure and also accepts that the Commission can exercise its discretion by deciding to drop an investigation before it has been completed [26].

71. The Ombudsman finds that, taking into account that the Commission had resolved to invoke political considerations as a reason for closing the case against Austria, without seeking to determine whether or not EU law had been infringed, for it to have carried out the proportionality test would have been devoid of practical purpose. Any results obtained from such a test would have had no impact on the Commission's decision to close the case against Austria.

72. The Ombudsman therefore considers it reasonable that, if the Commission can exercise its discretion and decide to close an infringement procedure after concluding that a Member State is in breach of EU law, it can also exercise that discretion without reaching a definitive conclusion about whether a Member State is in breach of EU law. It would not be a reasonable use of public resources for the Commission to continue discussions with a Member State concerning the compatibility of that country's national law with EU law, if it had already decided that it will not pursue the matter even if there was a breach.

73. In view of the above findings, the Ombudsman considers that no further inquiries are justified as regards the complainant's claims that the Commission should re-examine the infringement complaint in question and adopt a conclusion consistent with its initial letter of formal notice of 12 October 2005 to Austria.

74. Turning now to the reasoning put forward by the Commission to close the case, the Ombudsman notes that the Commission closed its infringement proceedings on the basis of political considerations. It did this without having arrived at any definitive position on whether the Member State concerned infringed EU law or not. In this context, and without calling into question the Commission's right to exercise its discretionary power to take a political decision to



close infringement proceedings, the Commission could have better clarified its position to the complainant, by clearly informing him that it was closing the case *notwithstanding* the fact that Austria had yet to demonstrate to the Commission that the restrictions Austria had imposed were proportionate. The Ombudsman notes that such a statement would have accurately reflected the state of play in the infringement proceedings at the time the Commission chose to use its discretionary powers to close them. It would also have facilitated the complainant's understanding of the Commission's position and would not have prejudged any assessment of the proportionality of the Austrian measures by a competent national jurisdiction, which could have been approached in relation to the issue.

75. However, both in its letter of 24 October 2006 to the complainant, and in its detailed opinion to the Ombudsman's draft recommendation, the Commission justified the use of its discretion by saying that "... *the question of how to protect wild animals in circuses should not be decided at Community level, but rather be left to Member States*". The Commission also provided some further explanations in this regard. It added that its decision to use its discretion was based on considerations relating to the diversity of opinions within the EU on the appropriate extent of animals protection in different contexts, as well as the variety of different economic, social, cultural, religious and other factors contributing to this diversity of opinion.

76. The Ombudsman considers that these explanations are unconvincing and fail to address the concerns underlying his finding of maladministration and his draft recommendation addressed to the Commission. The Ombudsman considers that the Commission's discretionary power under Article 258 TFEU (ex Article 226 EC) does not entitle it to abdicate from its role as guardian of the Treaties *in an entire policy area* such as animal welfare [27]. Such an abdication of responsibility would effectively 're-nationalise' decisions on entire areas of the internal market and could have severe consequences for its functioning.

77. The fact that the Commission should not abdicate from 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 Treaties, that Member States in general, or a particular Member State, should enjoy a broad "*margin of appreciation*" in relation to matters such as animal welfare (see paragraph 42 above). In sum, it is clear that a 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 circuses. The Commission could then take into consideration the sensitivity of the matter in the Member State concerned and decide to use its discretion not to pursue the infringement procedure against that particular Member State. However, this was not the Commission's approach in relation to the Austrian law in question. Its broad statement that animal welfare is better left to Member States cannot be accepted as a valid and coherent reason for justifying the exercise of its discretionary powers when dealing with infringement complaints concerning this issue. The Ombudsman therefore maintains his finding of maladministration in this respect.

78. The Ombudsman recalls that the complainant has launched an action before the Austrian courts challenging the compatibility of the Austrian law with EU law. This court action will



provide an opportunity to clarify the matter disputed by the complainant. Moreover, the Ombudsman considers that, due to the nature of the maladministration identified in this inquiry, which relates to the reasoning provided by the Commission in deciding to close its infringement complaint, it is appropriate to close this inquiry with a critical remark.

D. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark.

The statement used by the Commission in order to justify its political stance in the present case, that is, that "*animal welfare questions are better left to Member States*" appears to be tantamount to acknowledging that, in all matters concerning animal welfare, the Commission is ready to abdicate from its role as guardian of the Treaties. Such a statement does not comply with the duty to provide correct, clear and understandable reasons to justify the exercise of the Commission's discretionary powers to close an inquiry on an infringement complaint. This was an instance of maladministration.

The Ombudsman considers that no further inquiries are justified as regards the complainant's claims that the Commission should re-examine the infringement complaint in question, and that it should adopt a conclusion consistent with its initial letter of formal notice of 12 October 2005 to Austria.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 8 March 2010

[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] 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.

[4] See, for example, the Ombudsman's decisions on complaints 3660/2004/PB, 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]).



[5] 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]).

[6] 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.

[7] 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. "

[8] 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.

[9] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, 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 EU 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] Third parties do not have access to letters of formal notice.

[12] See the judgment in the *Gebhard* case cited in footnote 9.

[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.

" [1] *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.* "

[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* [2004] ECR I-6569, 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-10779, 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, environmental protection, or public health.

[25] Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 46.

[26] See " *The European Ombudsman and the Application of EU Law by the Member States* ", P. Nikiforos Diamandouros, *Review of European Administrative Law* , I:2 (2008), 5-37.

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