

Decision of the European Ombudsman closing his inquiry into complaint 1146/2012/AN against the European Commission

Decision

Case 1146/2012/AN - Opened on 06/07/2012 - Decision on 11/03/2013 - Institution concerned European Commission (Critical remark) |

The background to the complaint

1. On 14 December 2009, the complainant, a Spanish civil servant, submitted an infringement complaint against Spain to the European Commission. He considered that the provisions concerning access to the profession of draughtsman in Spanish Royal Decree 1837/2008 [1] were incompatible with EU law, namely, Directive 2006/100/EC [2] and Directive 2005/36/EC [3]. The complainant argued that, in Spain, the profession of draughtsman was a regulated one. Pursuant to Annex II of Royal Decree 1837/2008, access to this profession requires at least one year of post-secondary training, other than university studies. This level is equivalent to the one described in Article 11 c) of Directive 2005/36/EC [4]. However, other sector-specific pieces of Spanish legislation only require a certificate attesting to a successful completion of a secondary course, which is equivalent to Article 11 b) of the Directive [5]. Therefore, non-Spanish EU citizens who wish to exercise the profession of draughtsman in Spain are subject to more stringent training requirements than Spanish nationals.

2. On the same date, the Commission registered the complaint as CHAP (2009)33 and informed the complainant accordingly. On 13 January 2010, the Commission informed the complainant that it would provide him with its preliminary assessment on the substance within four weeks.

3. On 29 January 2010, the Commission informed the complainant that it would open an EU Pilot investigation in order to request information from the Spanish authorities concerning the apparent contradiction in its legislation concerning access to the profession of draughtsman. The Commission explained to the complainant the steps and deadlines involved in such a procedure. It furthermore explained to him that Directive 2005/36/EC is applicable to EU citizens who wish to carry out a regulated professional activity in the territory of a Member State other than the one where they obtained their professional qualifications. The Directive does not cover purely internal situations.



4. On 1 June and 15 July 2010, the complainant brought additional information to the Commission's attention. On 1 September 2010, he sent a reminder in which he enquired about the status of his complaint.

5. On 6 September 2010, the Commission informed the complainant that it would shortly provide him with further information. The Commission did not do so.

6. On 30 November 2010, the complainant again requested to be updated on his case. He emphasised that almost a year had passed since he had submitted the infringement complaint, and he had still not received any feedback on the substance.

7. On 22 February 2011, the Commission informed the complainant that on 23 February 2010, it had requested information from the Spanish authorities and had received their reply on 27 August 2010. Since the information was insufficient, the Commission contacted the Spanish authorities again. The Commission expected to receive the new reply in the following days. It stated that, it would, nevertheless, need some time afterwards to translate and assess it. The Commission stated that it would keep him informed of its conclusions.

8. On 21 March 2011, the Commission informed the complainant that, according to the information received from the Spanish authorities, they were in the process of adopting a new law on professional services, which would de-regulate the profession of draughtsman. The draft law would be ready in the first quarter of 2011. The Commission stated that it would closely monitor the situation and inform the complainant accordingly.

9. On 30 March 2011, the complainant asked the Commission whether he could have access to the Spanish authorities' letters. He did not receive a reply.

10. On 18 July 2011, the complainant asked the Commission about the status of his complaint. The Commission sent him a holding reply on 19 July 2011, stating that, given the existing workload and the need to translate documents, it would most likely need two months to assess the file.

11. On 16 August 2011, the Commission informed the complainant that it would contact the Spanish authorities again, in order to follow up on their intentions to reform the legislative framework.

12. On 12 January and 14 February 2012, the complainant once again enquired about the state of the procedure. On 27 March 2012, the Commission informed him that it had not received any information from the Spanish authorities in the meantime and that it would contact them again and keep him duly informed.

13. The complainant turned to the Ombudsman on 1 June 2012 and stated that, despite several reminders to the Commission, he had not received any information since March 2012.



14. On 25 July 2012, after the opening of the Ombudsman's inquiry, the Commission informed the complainant that, according to the Spanish authorities, the profession of draughtsman was erroneously included in Royal Decree 1837/2008 among the professions requiring post-secondary training. The Spanish authorities intended to correct this situation through a law liberalising professional services, including the profession of draughtsman, the adoption of which was underway at the time. The Commission considered that this solution went beyond the simple correction of the error in the existing provisions and would ultimately be more favourable for professional mobility in the internal market. Moreover, on 6 June 2012, the Spanish authorities also confirmed that the liberalisation of the professional services sector was placed on the 2012 legislative agenda. However, despite the Commission's requests, Spain had not yet provided a copy of the draft legislation or a clear time frame for its adoption.

15. The Commission added that, in its understanding, the complainant's infringement complaint was aimed at raising a general issue. There was no indication that the complainant or other draughtsmen had difficulties in accessing the profession of draughtsman in Spain on the basis of professional qualifications obtained in another Member State. The Commission itself had no knowledge of such cases. The Commission finally stated that it intended to keep the EU Pilot procedure open and monitor the situation in Spain at the latest in December 2012. It undertook to keep the complainant duly informed.

The subject matter of the inquiry

16. The Ombudsman opened an inquiry into the following allegation and claim.

Allegation:

The Commission has failed properly to deal with infringement complaint CHAP (2009)33.

Claim:

The Commission should (i) explain the reasons for its delay in handling infringement complaint CHAP (2009)33, and (ii) make a reasoned decision on it as soon as possible, informing the complainant accordingly.

17. In his observations on the Commission's opinion, the complainant put forward, in addition, that the Commission failed to grant him access to the Spanish authorities' replies, as he had requested in his letter of 30 March 2011. From the file, it appears that the Commission indeed ignored this request. Although this is regrettable and completely out of line with the principles of good administrative behaviour, the Ombudsman will abstain from making any finding in this regard, given that the complainant only raised this issue in his observations and, in any event, never submitted a confirmatory application pursuant to Article 7, paragraph 4 of the Regulation 1049/2001 [6] .



The inquiry

18. On 6 July 2012, the Ombudsman opened an inquiry into the complaint and asked the President of the Commission to submit an opinion on the above allegation and claim. The complainant was informed accordingly.

19. On 2 October 2012, the complainant provided the Ombudsman with further exchanges of correspondence with the Commission.

20. Following a request for an extension of the deadline to submit its opinion, the Commission sent it to the Ombudsman on 13 November 2012. The opinion was forwarded to the complainant with an invitation to submit observations, which he did on 23 November 2012.

The Ombudsman's analysis and conclusions

A. Allegation of failure to deal with infringement complaint properly

Arguments presented to the Ombudsman

21. In his complaint, the complainant highlighted that, two and a half years after its submission, his infringement complaint had still not been resolved, despite not being particularly complex. He considered that, for the benefit of EU citizens, the Commission's services should take a decision as soon as possible.

22. In reply to the Commission's letter dated 25 July 2012, the complainant disagreed that the legislative non-compliance with EU law in Spain had occurred by error, as the Spanish authorities claimed. The complainant argued that the profession of draughtsman had been regulated in the same way since 1995. Royal Decree 1837/2008 had merely confirmed the pre-existing situation. The complainant considered that, had there indeed been an error, it would have been corrected shortly after the publication, or at least after his infringement complaint, by means of a corrigendum, instead of waiting for the adoption of a new law. Moreover, he argued that he and other colleagues have been jeopardised by Spain's infringement. Pursuant to Directive 2005/36/EC, their profession should be considered as requiring a post-secondary level of education, and yet Spain regarded draughtsmen as mere secondary-level graduates. This caused them a clear economic and moral prejudice. The complainant informed the Commission that other colleagues would write to it in support of this.

23. In its opinion, the Commission reiterated that it had no knowledge of any discriminatory effects of the Royal Decree against citizens of other Member States. As regards the prejudice that the complainant himself may have experienced as a consequence of the legal framework, the Commission advised him from the beginning to turn to the national courts for redress.



24. The Commission explained the steps taken as regards the infringement complaint. The Commission mentioned that it had opened the EU Pilot investigation on 23 February 2010. However, the Spanish authorities only accepted the file on 29 April 2010 and requested an extension of the 10-week deadline for providing the information that the Commission requested. They replied on 27 August 2010 and acknowledged that Royal Decree 1837/2008 erroneously requires a higher level of education than other pieces of existing internal legislation.

25. On 13 December 2010, the Commission requested the Spanish authorities to inform it about the measures they envisaged taking in order to correct this situation. It informed the complainant about the state of the file on 22 February 2011. On the same day, the Spanish authorities informed the Commission that they intended to adopt a comprehensive reform liberalising professional services. The reform would, in particular, deregulate the profession of draughtsman, which would thus disappear from Royal Decree 1837/2008. There was thus no point in amending the Royal Decree as regards this profession. The draft project of the reform would be adopted in the first quarter of 2011.

26. On 21 March 2011, the Commission informed the complainant of the above and also requested the Spanish authorities to provide it with a copy of the draft legislation and the expected time frame for its adoption. The Commission reiterated this request on 16 August and 17 October 2011, and again on 17 February and 20 March 2012. On 16 August 2011, it also informed the complainant of the state of the file.

27. On 5 June 2012, the Spanish authorities reiterated their intention to liberalise the professional services sector. They did not, however, provide a time frame for this, or a copy of the draft legislation. The Commission, therefore, requested both again on 25 July 2012 and informed the complainant of the state of the procedure.

28. The Commission regretted that the procedure had taken longer than it should have. This was due to the Spanish authorities' delay in replying to the Commission's requests and to their incomplete replies, which required further enquiries. Nevertheless, the Commission wished to resolve the issue raised by the complainant in cooperation with the Member State. It took the view that this cooperation had, in any event, led to the Spanish authorities admitting to the drafting error in Royal Decree 1837/2008 and committing themselves to amending it in a future legislative reform. The Commission had been active in the framework of the procedure and had sent several reminders to the Spanish authorities, while at the same time informing the complainant of its actions. The handling of case CHAP (2009) 933 was thus in accordance with the Commission's Communications of 2002 [7] and 2012 [8] on relations with complainants.

29. The Commission referred to its discretionary powers as regards the opening of an infringement procedure and the moment to do so. It stated that the alleged infringement, consisting of a material error in the drafting of Royal Decree 1837/2008, has not affected, to date, the recognition of professional qualifications of draughtsmen in Spain pursuant to Directive 2005/36. Therefore, the Commission did not find it necessary to open a formal infringement procedure against Spain.



30. Furthermore, the solution envisaged by the Spanish authorities to rectify the situation goes beyond the simple correction of the material error concerning the profession of draughtsman in the Royal Decree and is, ultimately, more favourable for mobility in the internal market, since it will liberalise several professional services. However, the Commission had no legal arguments to incite Spain to speed up this liberalisation. The Commission therefore intended to follow up on the progress made by the Spanish authorities and assess the situation again at the end of 2012, in order to take a final decision as regards closing the procedure.

31. In his observations, the complainant stated that he had not been informed in due course that Spanish administration considered that there was a drafting error in Royal Decree 1837/2008 and that, in the Commission's view, the facts he reported did not have concrete repercussions. These failures hindered him in effectively defending his position.

32. The complainant also highlighted that, in its opinion, the Commission did not refer to his letter of 26 July 2012, in which he explained the negative consequences that the current drafting of Royal Decree 1837/2008 had on him and other draughtsmen in Spain. Nor did the Commission mention the letters on the same subject, which other draughtsmen in Spain affected by the wording mentioned above had addressed to it.

The Ombudsman's assessment

33. The Ombudsman does not question the Commission's will to resolve the issues raised by the complainant through cooperation with the Spanish authorities rather than by means of an infringement procedure. He also acknowledges the Commission's statement that, to date, the Spanish Royal Decree has not had, to its knowledge, any negative effects on the mobility of draughtsmen in the internal market. In this regard, the Ombudsman notes that the complainant himself, and the other Spanish draughtsmen who support his complaint, could not have been jeopardised by the current wording of Royal Decree 1837/2008, since the latter does not apply to professionals who have acquired their professional qualifications in Spain, but only to those who have studied abroad and who subsequently wish to have their professional qualifications recognised in Spain in order to work as draughtsmen in that country. There is no indication that this is the complainant's case, or that of any of the colleagues he mentions [9] .

34. The Ombudsman's assessment will, therefore, be limited to the Commission's procedural handling of the complainant's infringement complaint.

35. At the outset, the Ombudsman recalls that the Commission launched its " *EU Pilot* " Project on 5 September 2007, via its Communication entitled " *A Europe of Results - Applying Community Law* " [10] . The EU Pilot Project, which the European Ombudsman applauds, introduced a novel way of dealing with complaints concerning alleged infringements of EU law.

36. In its reply to the Ombudsman's own-initiative inquiry OI/03/2009/MHZ [11] , the Commission indicated that " *the purpose of EU Pilot is to better organise work which the*



*Commission has to do in trying to respond to citizens' and businesses' enquiries and complaints on the application of EU law. The Commission initiated [the] EU Pilot to test increased commitment, co-operation and partnership between the Commission and Member States in **responding more quickly and better** to these enquiries and complaints. EU Pilot is designed to achieve increased efficiency in the work of the Commission and therefore to **accelerate and improve results obtained**, thereby ensuring a more effective use of its resources. " (emphasis added)*

37. The Ombudsman cannot help but note that, in the case at hand, the time frames set out in the procedure, which provides for a 10-week period for the national authorities to reply to the Commission's requests and another 10 weeks for the latter to assess the replies, have been greatly exceeded. Spain's first reply to the Commission was dated 27 August 2010, that is to say, more than six months after the request. The Commission subsequently took four months, that is, until 12 January 2011, to request further details from the Spanish authorities, which, in turn, replied more than one year and two months later, without even providing the information requested. In this regard, the Ombudsman recalls that, in its *Second Evaluation Report on EU Pilot* [12], published by the Commission on 21 December 2011, the Commission emphasised that the observance of the deadlines by both itself and the Member State is essential to ensure that the decision, either to send a letter of formal notice or to close the case, is taken within one year from the date of the registration of an infringement complaint.

38. On the other hand, it cannot be argued that the EU Pilot procedure has enabled the Commission to obtain better results in the case at hand. On the contrary, at the time of writing the present decision, Spain has still not adopted the law concerning the liberalisation of professional services, or amended the alleged material error in Royal Decree 1837/2008. More than three years after the complainant submitted his infringement complaint, the situation which led to that complaint remains exactly the same. The Ombudsman therefore concludes that the purposes of the EU Pilot procedure have been largely frustrated. In fact, regardless of the Commission's discretion as to which procedure to use, the Ombudsman doubts that, in the present case, the relationship between the Commission and the Spanish authorities can genuinely be described as one of "cooperation", as the Commission appears to believe. It rather appears that the Commission has been led to wait for more than three years for a solution to a problem which, with goodwill, could, as the complainant pointed out, have been instantly solved by a corrigendum in the Spanish Official Journal.

39. In addition to the above, the Ombudsman recalls that, in the framework of his own-initiative inquiry OI/03/2009/MHZ, the Commission emphasised that the introduction of the EU Pilot did not modify its 2002 Communication on relations with complainants, apart from the fact that the Commission would inform complainants that, following their registration, complaints and inquiries could be examined further in cooperation with the Member State concerned.

40. However, the case at hand shows that the delays in the EU Pilot procedure have significantly undermined the complainant's rights arising from the 2002 Communication [13], and in particular his right to expect that the Commission would take a formal decision on his case within a year of its registration [14]. Not only did the Commission fail to do so, but it also



failed to inform the complainant that it would not be able to meet the deadline and of the reasons for this, despite his enquiries on the state of the file. The Commission only replied to the complainant's e-mail of 30 November 2010 in this regard on 22 February 2011. That is to say, the complainant was first informed about the state of his file one year and two months after its registration, almost two months after asking, and almost six months after the Spanish authorities provided substantive information to the Commission for the first time.

41. Moreover, following the complainant's new request for information dated 13 January 2012, the Commission took two and a half months merely to state that it had not received anything else from the Spanish authorities in the meantime. It did not provide the complainant with any substantive reply until six and a half months after his request, namely, on 25 July 2012.

42. The Ombudsman considers that, by acting in the way described in paragraphs 37, 40 and 41, the Commission failed properly to implement the EU Pilot procedure, which has been emptied of its purpose of finding rapid and better solutions for infringement complaints. In so doing, it also failed to comply with its duties under the 2002 Communication. This constitutes an instance of maladministration.

43. Pursuant to Article 3(5) of his Statute [15] , "[a]s far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint ". Given that the Commission's procedural mishandlings identified above can no longer be corrected, and that the Ombudsman cannot request that the Commission formally close the EU Pilot procedure and adopt a formal decision, a friendly solution proposal would not be appropriate in this case. The Ombudsman, therefore, closes the case with a critical remark.

B. Conclusions

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

By acting in the way described in paragraphs 37, 40 and 41, the Commission failed properly to implement the EU Pilot procedure, which has been emptied of its purpose of finding rapid and better solutions for infringement complaints. In so doing, it also failed to comply with its duties under the 2002 Communication. This constitutes an instance of maladministration.

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

P. Nikiforos Diamandouros



Done in Strasbourg on 11 March 2013

[1] Royal Decree 1837/2008 of 8 November transposing into Spanish law Directive 2005/36/EC and Directive 2006/100/EC concerning the recognition of professional qualifications.

[2] Council Directive 2006/100/EC of 20 November 2006 adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania, OJ 2006 L 363, p. 141.

[3] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ 2005 L 255, p. 2.

[4] Article 11 states: "... *the professional qualifications are grouped under the following levels as described below: ... (c) a diploma certifying successful completion of (i) either training at post-secondary level other than [University training] of a duration of at least one year...; or (ii) in the case of a regulated profession, training with a special structure, included in Annex II, equivalent to the level of training provided for under (i), which provides a comparable professional standard...* "

[5] "... *(b) a certificate attesting to a successful completion of a secondary course, (i) either general in character, ... (ii) or technical or professional in character, ...* "

[6] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. OJ 2001 L 145, p. 43. Article 7(4) provides that "[f] *ailure by the institution to reply within the prescribed time-limit [of 15 working days of registration of an application] shall entitle the applicant to make a confirmatory application.* "

[7] Commission 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), OJ 2002 C 244, p. 5.

[8] Communication from the Commission to the Council and the European Parliament updating the handling of relations with the complainant in respect of the application of Union law (COM/2012/0154 final).

[9] In fact, the damage sustained by the complainant is precisely the opposite, namely, that his profession is not homogeneously regulated in Spanish law as one requiring post-secondary studies, as mentioned in the Royal Decree.

[10] COM(2007) 502 final, 5 September 2007. Available at:
http://ec.europa.eu/eu_law/eulaw/pdf/com_2007_502_en.pdf [Link]

[11] Available at: www.ombudsman.europa.eu



[12] COM(2011) 930 final. The Second Evaluation Report was accompanied by a Commission Staff Working Paper entitled "Functioning of the system" SEC(2011) 1626 final, dated 21 December 2011. Available at:

http://ec.europa.eu/eu_law/docs/docs_infringements/eu_pilot_en.pdf

[13] The 2002 Communication was in force at the time when the complainant submitted his infringement complaint. However, the complainants' rights provided for in that Communication and relevant for the present case also form part of the Commission's 2012 Communication, which replaced the 2002 Communication in the course of the EU Pilot procedure in this case.

[14] Rule 8 of the Communication.

[15] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.