

Draft recommendation of the European Ombudsman in his inquiry into complaint 503/2012/RA against the European Commission

Recommendation

Case 503/2012/DK - **Opened on** 28/03/2012 - **Recommendation on** 07/05/2013 - **Decision on** 09/06/2015 - **Institution concerned** European Commission (Critical remark) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]

The background to the complaint

1. The complaint concerns the European Commission's handling of an infringement complaint submitted by a French national who worked as an architect in Ireland from 2000. Following the entry into force of the Irish Building Control Act 2007 (hereinafter 'the Act'), which regulated, *inter alia* , the use of the title 'architect', the complainant had to stop using the title pending his registration under the Act [2] . This, he said, placed him at a competitive disadvantage compared to those who were entitled to continue using the title 'architect'.

2. On 17 September 2010, the complainant lodged an infringement complaint (CHAP(2010)02912 - IRELAND) with the Commission concerning the Act, and in particular Sections 21-22 thereof [3] . Sections 21-22 define a Technical Assessment Board procedure for applicants without formal qualifications and who possess a minimum of 10 years' experience " *in the State* " (meaning in the Republic of Ireland) prior to the entry into force of Sections 21-22 [4] . According to the complainant, the experience requirement discriminates against workers from other EU Member States by imposing national restrictions on the required experience. The complainant explained that the route suggested to him for registration, namely, Section 14(2)(f) of the Act, is more onerous than Sections 21-22, involving a sum of €13 500 instead of €5 500 and an examination which is spread over 10 months and constitutes " *a very academic procedure* ".

3. The Commission dealt with the complainant's infringement complaint under the EU Pilot procedure (case 1486/10/MARK) [5] . In an e-mail to the complainant dated 30 May 2011, the Commission referred to the response to the EU Pilot complaint provided by the Irish authorities, in which the latter stated that the provisions of Sections 21-22 were introduced into the Act as a purely transitory measure for the specific purpose of " *regularising* " — on a once-off basis —



the position of a limited number of individuals (regardless of their nationality) who had been established for a minimum of 10 years in the field of architecture in Ireland at the time the Act was introduced. The Irish authorities further indicated that, because Sections 21-22 were meant to target specifically this limited group of practitioners, if the need arose, they would opt to delete these provisions altogether rather than to extend them to cover individuals who acquired their experience outside of Ireland. The Irish authorities further explained that Section 14(2)(f) of the Act applies to persons with experience performing duties commensurate to those performed by an architect in Ireland, but not necessarily performed in Ireland [6] . Thus, any relevant experience acquired outside Ireland is taken into account, they said. The Irish authorities, finally, disputed the complainant's claim that the procedure under Section 14(2)(f) of the Act is of an academic nature best suited to graduates. They stated that it has been specifically designed for experienced practitioners. They suggested that this would be the appropriate route for the complainant in order to obtain registration.

4. The Commission informed the complainant that, on the basis of these observations, there did not appear to be compelling proof of an infringement of EU law by Ireland. Consequently, it proposed to close the case, unless the complainant provided new information, within four weeks.

5. There then followed an extensive exchange of correspondence between the complainant and the Commission. In the course of that exchange, the Commission advanced the following arguments as justification for its proposal to close the case.

6. First, the Commission explained that if Sections 21-22 of the Act provided for a mechanism for registration parallel to the route under Section 14(2)(f), whereby one was applicable to architects who gained all their experience in Ireland and the other one to those who came from other Member States, there could be grounds to conclude that these provisions infringe EU law, in particular Articles 45 TFEU (on freedom of movement for workers) and 49 TFEU (on freedom of establishment), by imposing stricter requirements on professionals who obtained their qualifications in a Member State other than Ireland. However, based on the explanations offered by the Irish authorities and an analysis of the provisions of the Act itself, this does not appear to be the case. Paragraph 1 of Section 22 excludes any "*period of such performance that occurs on or after the commencement of this section*". Thus, unlike Section 14, Sections 21-22 provide for a mechanism whose applicability is limited in time (an "*acquired rights*" regime). The Commission's understanding is that the purpose of this measure is to enable the registration of a finite number of individuals who were adversely affected by the regulation of the use of the title "*architect*". These transitional measures are necessarily subject to conditions which may seem arbitrary and discriminatory, it said. While the complainant may not benefit from them, even though he was adversely affected by the regulation, the same would be true for an architect who, at the time of entry into force of the legislation, had practised in Ireland for nine and a half years.

7. Second, the Commission stated that, whilst defending the rationale behind the current wording of the provisions in question, the Irish authorities have declared that, if necessary, they would be prepared to remove Sections 21-22 of the Act with the result that all applications for



registration for use of the title of architect, including those of existing practitioners from a non-academic background who were operating in Ireland at the time the Act was introduced, would be processed through the various routes provided for in Sections 14, 15, and 16 of the Act. Given the strictly targeted and transitory nature of Sections 21-22, the Commission explained that it was of the view that it would be disproportionate to insist on its deletion, especially as this outcome would not benefit the complainant or any other professionals in his position.

8. Third, the Commission referred to the reassurance given by the Irish authorities that it is possible for the complainant to be registered by means of the route provided for in Section 14(2)(f). This is the basic means of obtaining registration in Ireland without formal qualifications and it applies to Irish nationals and non-Irish EU citizens alike, regardless of where they acquired their experience. It added that, while the complainant considers this route to be costly, it is not within the Commission's competence to determine how access to a profession (or a professional title) is organised within a Member State.

9. On 20 December 2011, the Commission informed the complainant that his EU Pilot case 1486/10/MARK had been closed on 25 November 2011. The Commission explained that it assessed the Act in question and its effects on the free movement of professionals as a whole, without focusing on any single specific section in isolation. According to the Commission, Section 14 et seq., and Section 21 et seq., address different situations but complement each other. Combined, they enable all professionals who operated in Ireland under the previous, unregulated, system to be brought under the new legal system. In this light, the purpose of Sections 14, 15, and 16 of the Act is different from that of Sections 21-22. The former provisions are applicable to persons wishing to establish themselves as architects in Ireland on the basis of qualifications, such as professional experience performing the activities of an architect, acquired in Ireland and/or elsewhere; the latter provisions are designed to "*regularise*" — on a once-off basis — the legal situation of persons whom the Irish government deemed as already established for a long time as architects in the State. The Commission's understanding was that the Irish legislator had to determine who should be included within the definition of established architects targeted by this exceptional measure. Because the professional title had not been regulated in Ireland prior to the Act, the only possible criterion seemed to be the length of time for which a person had been exercising the profession in the State. Ten years was seen to be appropriate for this purpose.

10. The Commission went on to state that these types of decisions are always necessarily arbitrary to some extent. They have to balance, on the one hand, the interests of persons who established themselves in good faith prior to the Act and, on the other hand, the rights and interests of consumers and the wider general public, given the health and safety implications of the activities of architects. Ultimately, said the Commission, in accordance with the principle of subsidiarity, these sorts of determinations are left to the Member States which are best placed to make the judgment.

11. The Commission further explained that it did not question the Irish government regarding national restrictions because it did not find any evidence of national restrictions in Section 14 or



in Sections 21-22 [7] . All the routes for registration under the Act are equally applicable to Irish nationals and non-Irish EU citizens and under exactly the same conditions. Non-Irish EU citizens are thus not treated differently from Irish nationals. Moreover, there does not appear to be a difference in treatment between persons who acquired all of their professional experience in Ireland and those who acquired it in other Member States, in so far as Section 14 and Sections 21-22 are not parallel mechanisms, but complementary provisions of differing natures, designed to address different situations. The Commission concluded that it had been reassured that the Act offered a route for the complainant to obtain registration as an architect and that all of his experience, including that acquired outside of Ireland, would be taken into consideration should he apply through that route.

12. The complainant contested this conclusion before the Commission. He argued that the Commission refused to question the necessity and purpose of the national restrictions for registration through Sections 21-22 of the Act. While he understood that the discrimination probably concerned no more than a dozen European citizens based in Ireland, he claimed that the Commission should not ignore the obvious facts. Applicants with over 10 years' experience, who gained some of that experience within the EU but outside Ireland, are charged €7 000 more to sit a much more difficult exam than their counterparts who have never migrated within the EU. These two different routes for registration obviously discriminate against workers who have used their right of free movement within the EU. In the complainant's view, the Irish legislation established these national restrictions on experience due to the increased movement of foreign workers within Ireland since the year 2000. Experience gained within other EU countries should be viewed as an asset, he said, considering the poor construction and design standards which applied in Ireland prior to 2005.

13. The complainant then decided to submit his complaint to the European Ombudsman.

The subject matter of the inquiry

14. The complainant alleged that the Commission erred by closing his complaint without fully examining whether Sections 21-22 of the Irish Building Control Act 2007 are in compliance with EU law.

In support of his allegation, the complainant argued, in substance, that the apparently neutral requirement in question, that is, that the relevant experience be acquired "*in the State*", could primarily affect a greater number of non-Irish citizens and work to their disadvantage.

15. The complainant claimed that the Commission should recognise that the provisions in question are discriminatory and that it closed his complaint on the grounds that it would be disproportionate to pursue the matter.

16. In further correspondence to the Ombudsman, dated 28 November 2012, the complainant stated that he is losing potential projects due to his inability to register as an architect. This, he stated, is due to the Irish Act which is in breach of EU law. The complainant asked the



Ombudsman who would be liable for the financial loss that his practice is enduring due to the Commission's failure to properly investigate his case, which has, he said, aggravated the situation.

17. The Ombudsman notes that the complainant appears to be suggesting that an additional claim be included in this inquiry, namely, a claim for financial compensation. However, as this claim was not included at the outset of the inquiry, the Ombudsman takes the view that it would not be appropriate to include it at this stage.

The inquiry

18. The complainant submitted his complaint to the Ombudsman on 6 March 2012. On 28 March, the Ombudsman opened an inquiry by asking the Commission for an opinion. He also asked the Commission to include, in its opinion, an explanation of the comment made in its e-mail of 20 June 2011 to the complainant that the conditions set out in the Irish legislation " *may seem arbitrary and discriminatory* " and, in particular, whether that comment refers to discrimination on grounds of nationality.

19. On 2 August 2012, the Commission sent its opinion, which was forwarded to the complainant with an invitation to submit observations. The complainant submitted observations on 5 September 2012.

The Ombudsman's analysis and conclusions

A. Allegation that the Commission erred by closing the infringement complaint and related claim

Arguments presented to the Ombudsman

20. In his complaint to the Ombudsman, the complainant argued that the Commission was refusing to act on the grounds that it would be disproportionate to do so. While he stated that he fully accepted this verdict, he took issue with the fact that the Commission refused to acknowledge the discrimination of workers from EU Member States outside Ireland. He further argued that the person in the Commission assessing his complaint lacked knowledge of the subject.

21. In its opinion, the Commission again explained that the transitional route to registration, namely, Sections 21-22, appear to be of a different nature from Section 14: whereas Section 14 sets out a long-term, comprehensive system for the registration of qualified individuals as architects, Sections 21-22 seek to mitigate the impact of the regulation of the professional title on a finite number of individuals who, regardless of their nationality, had been established in



Ireland for 10 years or more as architects at the time of entry into force of the Act. Thus, these are transitional provisions which provide for the registration, on a once-off basis, of persons who, in the Irish legislators view, had acquired the right to do so by virtue of having practised the profession in Ireland for a long time.

22. With regard to the complainant's argument that the Commission closed the infringement complaint without having carried out a full examination, the Commission replied that its services analysed all the information provided by the complainant in his initial complaint, as well as all his subsequent communications, and provided him with extensive feedback in writing and by telephone. Moreover, further to his allegation that the Irish Building Control Act 2007 contained provisions which led to discrimination on the grounds of nationality, an EU Pilot procedure was launched in order to clarify both the provisions of the Act and the practical organisation of the recognition of professional qualifications of architects in Ireland. The Commission held discussions with the Irish authorities to obtain supplementary information in order to gain as complete a picture as possible of the situation before taking a decision. The Commission even sought clarification of certain points of potential interest to the complainant in the context of his application which were not of direct relevance to his infringement complaint. Finally, the Commission kept the complainant fully informed with regard to the various stages of its examination and assessment of the situation.

23. With regard to the argument put forward by the complainant in his complaint to the Ombudsman that his complaint was assigned to the wrong Unit within the Commission, the latter stated that, in so far as his complaint concerned access to a profession in a Member State other than that in which he obtained his qualifications, the Unit 'Professional qualifications' was competent to handle the complaint. Further to internal reorganisation of the Directorate-General Internal Market and Services, the Unit was renamed 'Free movement of professionals' without in any way changing its remit or its personnel.

24. As regards the complainant's claim, the Commission explained that its assertion that neither Section 14 nor Sections 21-22 resulted in discrimination on the basis of nationality was based on the fact that none of these provisions makes registration as an architect in Ireland conditional on Irish citizenship. The Commission shared the complainant's view, which also reflects established case-law, that measures of national law can be discriminatory without making explicit reference to nationality, if they have a greater adverse effect on non-nationals than on nationals. However, it added that this does not appear to be the case with respect to the Act in question. When read as a whole, the Act appears neither to impede nor to render less attractive the establishment in Ireland of architects with qualifications obtained in another Member State, because Section 14 establishes the system for registration of architects. Section 14 safeguards the equal treatment of all architects regardless of whether they are nationals of Ireland or of another Member State and regardless of whether they obtained their qualifications in Ireland or in another Member State. The applicability of Sections 21-22 is so limited — both in time and to very specific circumstances — that these cannot be considered to undermine the system put in place through Section 14.

25. The Commission further explained that its comment that the provisions of Sections 21-22 "



may seem arbitrary and discriminatory " does not refer to discrimination on the grounds of nationality. It refers to the fact that any major change in the way a profession is organised, or significant new legislation in any area for that matter, is likely adversely to affect some persons or groups of persons. In this context, efforts by the legislator to mitigate the undesirable effects may not extend to all interested persons. The final outcome may appear to be discriminatory to those persons who are not able to benefit from the mitigating transitional measures and who are, consequently, negatively affected by the change in the law. This appears to be true in the case of the complainant, whose work as an architect has been affected by the Irish Building Control Act 2007. However, the fact that the transitional "*acquired rights*" provisions set out in Sections 21-22 do not apply to him is not related to his nationality or his past experience gained in different Member States, but to the fact that he does not belong to the limited group of individuals who were established in Ireland for at least 10 years at the time the Act entered into force. This may seem arbitrary and discriminatory to him, just as it may seem arbitrary and discriminatory to an Irish national who only practised the profession in Ireland but who can only demonstrate experience of nine years and eleven months.

26. The Commission pointed out that the complainant's allegations could have led it to take action against Ireland, if there had been compelling evidence that Sections 21-22 and the complainant's individual circumstances were indicative of a general attempt by the Irish authorities to impede the establishment as architects in Ireland of non-Irish nationals or persons who acquired their qualifications, whether formal degrees or professional experience, in another Member State. However, it added, this does not appear to be the case. The Commission stated that it is also aware that, in practice, the Irish authorities have exceeded their obligations under EU law by facilitating access to the profession for certain applicants, notably from the Member States which joined the Union in 2004, who were treated with flexibility, despite the fact that they did not meet formal requirements. This challenges the view advocated by the complainant that the Irish government sought to discriminate against non-Irish architects through the provisions of the Building Control Act 2007.

27. The Commission concluded that there were no legal grounds to seek the launch of an infringement procedure against Ireland pursuant to the infringement complaint. The complainant's claim that the Commission should have acknowledged discrimination on grounds of nationality on the part of Irish authorities was unfounded, since there was no compelling evidence that the Irish authorities sought to restrict access to the profession of architect for persons who are nationals of other Member States or who obtained their qualifications in another Member State.

28. In his observations, the complainant argued that the Commission was, intentionally or not, overlooking the issue that he raised. It preferred, he said, to give an opinion on Section 14 of the Act, without dealing with the specific issue of Sections 21-22 and the double standard for self-taught architects with 10 years' experience gained in Ireland and those with 10 years' experience gained in Ireland and other Member States [8] . The complainant highlighted the very negative impact that the Commission's position has had on his situation, in that the Irish authorities refer to the Commission's decision when he approaches them about this case.



29. The complainant contested the Commission's statement that "*... a person may continue to carry out the functions of an architect without becoming registered, as long as he/she does not call himself/herself an architect* ", arguing that one cannot fully perform the activity of an architect without being registered [9] . The situation will only deteriorate for him, he said, when the Building Control (amendment) Regulations 2012 enter into force.

30. With regard to the Commission's statement that Section 14 of the Act provides the legal basis for a system that treats all EU citizens equally regardless of where they acquired their qualifications, the complainant argued that this may be accurate for holders of professional qualifications listed in Directive 2005/36/EC on the recognition of professional qualifications [10] ; however, it does not apply to self-taught architects. The complainant further argued that the provisions in question also discriminate against Irish citizens who gained experience as architects abroad.

31. The complainant took the view that the national restriction imposed on experience was foreseen to keep immigrants outside the transitional arrangement. He asked what the purpose of this national restriction was and posited three reasons as to why the Commission had not looked into this matter: (i) lack of expertise — the responsible Unit in the Commission dealt with persons with professional qualifications or registered professionals and, specifically, the Directive on the recognition of professional qualifications, which was not relevant to his situation; (ii) lack of coordination — the complainant again referred to the case of teachers in Greece, which, he said, is currently being pursued by the Commission's Directorate-General for Employment, Social Affairs & Inclusion; and (iii) the small number of individuals affected— the complainant claimed that the Commission deemed it disproportionate to take action against the Irish State. As a result, it deliberately ignored the facts because acknowledging discrimination "*may imply action* ".

The Ombudsman's assessment

Preliminary remark

32. One of the Commission's most important duties is to serve as the guardian of the Treaties [11] . Article 258 TFEU creates a general procedure under which the Commission may investigate and refer to the Court of Justice of the European Union possible infringements of EU law by Member States. As far as the infringement procedure conducted by the Commission is concerned, there are two distinct stages: the Commission seeks to determine whether or not there is an infringement (stage 1); in the event that the Commission identifies an infringement, it decides whether or not to refer the infringement to the Court (stage 2) [12] .

33. The Ombudsman supervises the Commission in its role of guardian of the Treaties. The European Ombudsman has, however, no mandate to investigate the actions of Member State authorities. The purpose of his inquiry in cases such as the present one is therefore not to examine whether there is an infringement by the Member State in question. The Ombudsman's



inquiry is rather directed at examining the Commission's behaviour in analysing and dealing with the infringement complaint. This can extend to a review of the substance of the analyses and conclusions reached by the Commission [13] . However, the Ombudsman's inquiries and conclusions fully respect the Commission's discretionary power, recognised by the Treaties and the case-law of the Court of Justice, to decide whether or not to refer an infringement to the Court (stage 2 of the procedure, referred to above).

The principle of non-discrimination

34. Article 21(2) of the Charter of Fundamental Rights of the EU provides that, within the scope of application of the Treaties, any discrimination on grounds of nationality shall be prohibited. Similarly, Article 18 TFEU prohibits any discrimination on grounds of nationality, within the scope of application of the Treaties. With regard to freedom of movement for workers, Article 45(2) TFEU provides that discrimination on grounds of nationality shall be abolished as regards employment, remuneration, and other conditions of work and employment. Article 49 TFEU lays down that restrictions on the freedom of establishment of nationals of a Member State in another Member State shall be prohibited. Freedom of establishment includes the right to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals under the law of the country where such establishment is effected.

35. In accordance with settled case-law, the principle of non-discrimination, whether it has its origin in Article 18 TFEU (formerly Article 12 EC) or Articles 45 and 49 TFEU (formerly Articles 39 and 43 EC respectively), requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. Such treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued [14] .

36. A difference in treatment expressly and solely based on nationality constitutes direct discrimination. However, the Court has consistently held that the rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result [15] .

The application of the principle of non-discrimination in this case

37. The complainant alleged that the Commission erred by closing his complaint without fully examining whether Sections 21-22 of the Irish Building Control Act 2007 are in compliance with EU law. In his view, these provisions discriminate against non-Irish nationals.

38. The Commission rightly asserted that Section 14 and Sections 21-22 do not give rise to direct discrimination on the basis of nationality, given that these provisions do not make registration as an architect in Ireland conditional on holding Irish nationality.



39. The Commission, however, also agreed that national law can be discriminatory if it has a greater adverse effect on non-nationals than on nationals. It nevertheless stated that the Act neither impedes nor renders less attractive the establishment in Ireland of architects with qualifications obtained in another Member State.

40. The Act lays down two conditions to qualify for registration under Sections 21-22 of the Act, namely, (i) 10 years' experience (ii) acquired "*in the State*" [16] .

41. With regard to condition (i), the Ombudsman notes that there is, in principle, nothing problematic about setting a cut-off point in order to qualify for a particular benefit or, in this case, route of registration. He acknowledges that deadlines must be set in all sorts of administrative and legislative procedures.

42. With regard to condition (ii), the Ombudsman recalls that indirect discrimination occurs where an apparently neutral provision works to the disadvantage of a greater number of individuals than others (in this case, non-Irish nationals compared to Irish nationals). Where one set of individuals is disadvantaged, the measure can still be acceptable, if (a) the requirement can be objectively justified by a legitimate aim unrelated to any discrimination on grounds of nationality, and (b) the means of achieving that aim are appropriate and necessary.

43. Taking into account the definition of indirect discrimination, the Ombudsman takes the view that the requirement that the relevant experience be acquired "*in the State*" could primarily affect a greater number of non-Irish nationals than Irish nationals.

44. The Commission has not produced evidence that it asked the Irish authorities (a) whether the requirement for the experience in question to be acquired in the State can be objectively justified by a legitimate aim unrelated to any discrimination on grounds of nationality and (b) whether the means of achieving that aim are appropriate and necessary.

45. With regard to point (a), there is no explanation as to why the complainant, and others in his situation, namely, with 10 years' experience not necessarily acquired in Ireland, could not also benefit from Sections 21-22 aimed at regularising the situation of a certain number of individuals. The Commission has not produced evidence from the Irish authorities in support of their view that the experience must necessarily have been acquired "*in the State*" for a particular reason which is linked to the nature of the duties to be performed. Neither did it provide any detailed reasoning as to why experience gained outside of Ireland is not equally relevant. The fact that the Irish authorities recognise such experience under Section 14(2)(f), but refuse to recognise it under Sections 21-22, makes this difference in treatment all the more difficult to understand [17] . Neither does the Commission appear to have questioned the Irish authorities in order to obtain an indication of how many additional people might be in a situation similar to that of the complainant and why it might, for example, be disproportionate to enable them too to benefit from Sections 21-22.

46. With regard to point (b), the Commission has not pursued at all with the Irish authorities the issue of the degree to which the more onerous requirements demanded of individuals, such as



the complainant, in terms of sitting an exam, are appropriate and necessary.

47. In light of the above, the Ombudsman takes the view that the complainant's allegation, namely, that the Commission erred by closing his complaint without fully examining whether Sections 21-22 of the Irish Building Control Act 2007 are in compliance with EU law, is well-founded.

48. As outlined in paragraph 15 above, the complainant's claim was that the Commission should recognise that the provisions in question are discriminatory and should recognise that it closed his complaint on the grounds that it would be disproportionate to pursue the matter.

49. The Commission has explained that the complainant's allegations could have led it to take action against Ireland, if there had been compelling evidence that Sections 21-22 of the Irish Building Control Act 2007 and the complainant's individual dispute in relation thereto were indicative of a **general attempt** by the Irish authorities to impede non-Irish nationals from registering as architects in Ireland. The Commission took the view that there was no such general attempt. It explained that the Irish authorities have exceeded their obligations under EU law by facilitating access to the profession for certain applicants, notably from the Member States which joined the Union in 2004. Such cases were treated with flexibility, despite the fact that they did not meet the formal requirements. Finally, the Commission explained that the Irish authorities would be prepared to remove Sections 21-22 of the Act if the Commission challenged it. This would mean that all applications for registration for use of the title of architect, including those of existing practitioners from a non-academic background who were operating in Ireland at the time the Act was introduced, would then be processed through the various routes provided for in Sections 14, 15 and 16 of the Act. Given the strictly targeted and transitory nature of Sections 21-22, the Commission explained that it was of the view that it would be disproportionate to insist on its deletion, especially as this outcome would not benefit the complainant or any other professionals in his position.

50. The Ombudsman underlines that, if the Commission had closed the case with a finding that the Act was indirectly discriminatory, but that it did not warrant pursuing infringement proceedings against Ireland (for the reasons set out above), the complainant would have been in a better position to seek redress for his **individual situation** before the Irish authorities. However, by wrongly taking the view that there was no infringement of EU law in the present case, the Commission has limited the complainant's options to seek such redress. It is important to remedy that failure.

51. In light of the above, the Ombudsman makes the finding that the Commission erred by closing the complainant's infringement complaint without fully examining whether Sections 21-22 of the Irish Building Control Act 2007 are in compliance with EU law. This amounted to an instance of maladministration. He therefore makes a draft recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

B. The draft recommendation



On the basis of his inquiries into this complaint, the Ombudsman makes the following draft recommendation to the Commission:

Taking into account the Ombudsman's findings, the Commission should recognise that Sections 21-22 of the Irish Building Control Act 2007 are discriminatory and should recognise that the sole justification for closing the infringement complaint was that it would be disproportionate to pursue the matter.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 30 September 2013. The detailed opinion could consist of the acceptance of this draft recommendation and a description of how it has been implemented.

P. Nikiforos Diamandouros

Done in Strasbourg on 7 May 2013

[1] 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.

[2] According to the Commission, the Act introduced, for the first time in Ireland, a requirement for persons who wish to use the professional title 'architect' to be registered. Registration is subject to certain conditions, notably the possession of professional qualifications. In addition to holders of evidence of formal qualifications from a school of architecture in Ireland or in another EU Member State, persons who have acquired experience in the profession can also apply for registration, without any evidence of formal qualifications. Unlike most other EU Member States, the activities associated with the profession of architect are not subject to regulation in Ireland. In other words, a person may continue to carry out the functions of an architect without being registered, as long as he/she does not call himself/herself an architect.

[3] Section 21 of the Act is entitled "Technical Assessment Board". Section 22 is entitled "Technical Assessment Board procedure". The Ombudsman notes that, at times, the complainant and the Commission refer to Section 22, while at other times, they refer to Sections 21-22. For the sake of consistency, the Ombudsman refers to Sections 21-22 throughout.

[4] Section 22(1) reads: "*The following person may apply to the Technical Assessment Board for a decision that he or she is eligible to be registered in the register pursuant to this section, namely, a person who has been performing duties commensurate with those of an architect for a period of 10 or more years in the State (but no period of such performance that occurs on or after the commencement of this section shall be reckoned for the purposes of this subsection)*" (emphasis added).



[5] EU Pilot is a working method developed in 2007 between the Commission and the Member States, with a view to correcting infringements of EU law at the earliest possible stage, without having recourse to infringement proceedings. See the Commission Communication entitled “A Europe of Results – Applying Community Law”, COM(2007)502.

[6] The relevant provision, Section 14(2)(f), reads: "*a person who (i) has at least **7 years' practical experience of performing duties commensurate with those of an architect in the State**, (ii) is at least 35 years of age, and (iii) has passed a prescribed register admission examination*" (emphasis added). The Commission confirmed to the complainant, in an e-mail dated 10 June 2012, that under Section 14(2)(f), the 7 years' experience need not necessarily be acquired in Ireland, whereas the 10 years' experience referred to in Section 22(1) must be acquired in Ireland.

[7] The Commission gave the example of a French national who was established in Ireland as an architect for at least 10 years at the time the Building Control Act 2007 entered into force. This person would be able to benefit from Sections 21-22, while an Irish national who had only practised the profession for 9 years would not.

[8] The complainant referred, by way of example, to an infringement case which the Commission is pursuing in relation to teachers in Greece who are being discriminated against for having worked abroad. See:

<http://ec.europa.eu/social/main.jsp?langId=en&catId=457&newsId=1379&furtherNews=yes>
[Link]

[9] The complainant provided some examples, notably that public tenders require that all participating architects be registered. The tenders can be accessed at: www.etenders.gov.ie [Link] In further correspondence, dated 28 November 2012, the complainant furnished the Ombudsman with three examples of cases since July 2012, where potential clients had not used his services due to, what he referred to as, his inability to register as an architect.

[10] 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.22. It appears that there are provisions in the Act, notably, Section 16 of the Act, enabling one to register on the basis of professional qualifications.

[11] Article 17 TEU requires the Commission to “*ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them*”.

[12] The Ombudsman notes, in this regard, that the fact that there is an infringement of EU law does not automatically imply that the Commission should pursue infringement proceedings. The Commission must, however, justify how it exercises its wide margin of discretion.

[13] It should be recalled, however, that the highest authority in interpreting EU law is the Court of Justice.



[14] Case C-155/09 *Commission v Greece* [2011] ECR I-65, paragraph 68 and the case-law cited therein.

[15] *Idem* , paragraph 45 and the case-law cited therein. See also paragraph 46 of that judgment which states: *"That is true, in particular, of a measure under which a distinction is drawn on the basis of residence or ordinary residence, inasmuch as that requirement is liable to operate mainly to the detriment of nationals of other Member States, since persons who are not resident or ordinarily resident on the national territory are in the majority of cases foreigners"* .

[16] The Ombudsman notes that the complainant drew attention to the similar wording used in Section 14(2)(f) and Section 22(1) with regard to the term " *in the State* ". The former refers to " *a person who (i) has at least 7 years' practical experience of performing duties commensurate with those of an architect in the State* ", while the latter refers to " *a person who has been performing duties commensurate with those of an architect for a period of 10 or more years in the State* . " The Commission has confirmed that the Act recognises experience gained abroad in Section 14(2)(f) but that it does not recognise experience gained abroad in Section 22(1). The Ombudsman notes that, while the wording is indeed similar, it is not identical and that it is possible to understand the two provisions in the manner explained by the Commission.

[17] See footnote 6 above.