

Draft recommendation to the European Commission in complaint 289/2005/(WP)GG

Recommendation

**Case 289/2005/(WP)GG - Opened on 22/02/2005 - Recommendation on 27/07/2005 -
Special report on 22/02/2005 - Decision on 01/06/2006**

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

THE COMPLAINT

The complainant used to offer sports bets in Lower Saxony (Germany). In his complaint to the Ombudsman that was lodged by his lawyer in January 2005, the complainant reported that the German authorities had ordered him to stop offering sports bets, thus forcing him to close his business. In the complainant's view, the behaviour of the German authorities violated EU law in general and the freedom to provide services in particular.

According to the complainant, his lawyer submitted an infringement complaint against Germany and German authorities to the European Commission's Representation in Berlin on 20 February 2004. Still according to the complainant, he was subsequently told, in reply to an inquiry, that the complaint had neither been dealt with nor been sent to Brussels. The complainant's lawyer thereupon sent the complaint directly to the Commission where it was registered under reference 2004/4463.

In a letter of 30 November 2004, the complainant's lawyer asked the Commission about the state of the investigation. According to the complainant, this letter remained unanswered.

In his complaint to the Ombudsman, the complainant basically alleged that the Commission had failed properly to deal with his infringement complaint. He claimed that a quick reaction by the Commission was urgently required because he was incurring damages from not being able to conduct his business.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

At the time of sending the opinion (June 2005), the Commission had received 7 complaints



against Germany relating to gambling services (2003/4350, 2003/5288, 2004/4054, 2004/4463, 2004/4899, 2004/4685 and 2005/4017). These complaints concerned national restrictions on the organisation of gambling services, commercial communications relating to gambling services and establishment.

The first complaint from a sports betting service provider had been registered in April 2003. The Commission had not taken a decision to open infringement proceedings since a ruling by the European Court of Justice in a related case concerning Italy had been considered to be key for the assessment of this restriction. The Court's judgment of 6 November 2003 in Case C-243/01 (*Gambelli and others*) had provided the Commission with guidelines to assess such complaints.

In the light of the case-law of the Court of Justice, the Commission had assessed the justification for and the proportionality of a number of national bans on sports betting services. A letter of formal notice had been sent to Denmark on 30 March 2004 in a case relating to sports betting services.

However, at its meetings on 13 October and 14 December 2004, the Commission had decided to postpone decisions to open infringement proceedings in cases concerning restrictions similar to those raised by the complainant in his infringement complaint in cases concerning Germany (2003/4350), Italy (2003/4616) and the Netherlands (2002/5443). These complaints were now pending further examination.

The complainant's infringement complaint had been received on 26 April 2004. By letter of 27 May 2004, the Commission had informed the complainant's lawyer that the complaint had been registered.

In a fax dated 30 November 2004, the complainant had asked for a copy of the Commission's correspondence with the German authorities. The Commission had so far not yet had any contacts with the German authorities relating to sports betting services in general or relating to any specific case.

The Commission was still actively examining specific aspects of the complainant's infringement complaint. On 30 May 2005, it had sent a letter to the complainant's lawyer in which it had explained the state of play and asked the complainant to present a copy of his bookmaker's permit.

As regards the complainant's claim that the Commission should act quickly, it had to be noted that the Commission did not have the power either to intervene and stop actions or to prevent any criminal investigation initiated by a Member State.

In its "Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law" (COM(2002) 141 final, OJ 2002 C 244, p. 5), the Commission had indicated that, as a general rule, it proposed to investigate complaints with a view to arriving at a decision to issue a formal notice or to close



the case within not more than one year from the date of registration of the complaint. The Commission nevertheless envisaged the possibility that this rule could not be respected. This would be particularly the case where the Commission was confronted with cases implying a difficult assessment of the justification and proportionality, based on public order considerations, of the national measure at stake. This was the situation in the present case. In such circumstances, the Commission had committed itself "to inform the complainant in writing". This had been done in the present case by means of the letter of 30 May 2005.

The Commission submitted a copy of its letter of 30 May 2005. In this letter, the Commission refers to the complainant's infringement complaint as having been lodged on 5 April 2004 and to further letters from the complainant or his lawyer dated 15 June 2004, 30 November 2004 and 18 April 2005. The Commission stated that it was dealing "intensively" with the complainant's complaint and other complaints concerning sports betting services in Germany. As regards timing, the letter states "that due to the special procedural deadlines for inquiries by the Commission in relation to infringements of the Treaty the taking of a position by the Commission can probably not be expected in the near future."

The complainants' observations

In his observations, the complainant submitted that the Commission's opinion was wrong and incomplete as regards dates, given that he had already submitted his complaint to the Commission's Representation in Berlin on 20 February 2004. According to the complainant, this complaint had neither been dealt with nor passed on. It was only when telephoning the Representation that the complainant's lawyer had found out that the complaint was still in Berlin. In the complainant's view, precious time had thus been lost. The complainant furthermore submitted that he could not see how the Commission proposed further to proceed and when it would finally ask Germany for its opinion.

The complainant submitted copies of two letters addressed to the Commission on 5 April 2004 and 4 July 2005. In his letter to the Commission of 5 April 2004, the complainant's lawyer refers to the fact that he had already addressed the complaint to the Commission's Representation in Berlin on 20 February 2004.

THE DECISION

1 Introductory remark

1.1 The complainant used to offer sports bets in Lower Saxony (Germany). In his complaint to the Ombudsman that was lodged by his lawyer in January 2005, the complainant reported that the German authorities had ordered him to stop offering sports bets, thus forcing him to close his business. In the complainant's view, the behaviour of the German authorities violated EU law in general and the freedom to provide services in particular. The present case concerns the handling of the infringement complaint that the complainant submitted to the European Commission in 2004 and that was registered by the latter under reference 2004/4463.

1.2 In his complaint to the Ombudsman, the complainant submitted that his infringement complaint had already been sent, by his lawyer, to the Commission's Representation in Berlin on 20 February 2005. According to the complainant, he was subsequently told, in reply to an



inquiry, that the complaint had neither been dealt with nor been sent to Brussels. The complainant thereupon submitted his complaint directly to the Commission by letter of 5 April 2004.

1.3 In its opinion, the Commission refrained from dealing with the complainant's submission that his infringement complaint had already been submitted on 20 February 2004 but had not been dealt with at first.

1.4 The Ombudsman notes that the Commission's alleged failure properly to deal with the letter that the complainant claims to have addressed to the Commission's Representation is clearly referred to in the complaint that the complainant submitted to him in January 2005. It may be useful to recall that this complaint consists of one single page and a number of enclosures. In these circumstances, the Ombudsman fails to understand why the Commission did not address this issue in its opinion. In order to clarify this issue, further inquiries would thus have to be conducted. Such further inquiries would inevitably result in further delay in a matter that, according to the complainant, is urgent. In view of his conclusions concerning the other aspects of the case (see point 2 below), the Ombudsman therefore considers that the best way to proceed is to exclude the above-mentioned issue from the scope of the present inquiry, so as to enable the Ombudsman to deal with the core of the matter as rapidly as possible. The complainant remains free, however, to submit the said issue to him again in a separate complaint.

1.5 The present inquiry will therefore not deal with the complainant's submission that the Commission failed properly to deal with his letter of 20 February 2004.

2 Alleged failure to deal with infringement complaint

2.1 The complainant alleged that the Commission had failed properly to deal with his infringement complaint 2004/4463. He stressed that he had inquired as to the state of play in a letter sent on 30 November 2004 without receiving a reply.

2.2 In its opinion, the Commission pointed out that at the time of sending the opinion (June 2005), it had received seven complaints against Germany relating to gambling services (2003/4350, 2003/5288, 2004/4054, 2004/4463, 2004/4899, 2004/4685 and 2005/4017). The Commission explained that it had registered the first complaint in April 2003 and that it had not taken a decision to open infringement proceedings since a ruling by the European Court of Justice in a related case concerning Italy had been considered to be key for the assessment of this restriction. According to the Commission, the Court's judgment of 6 November 2003 in Case C-243/01 (*Gambelli and others*) had provided it with guidelines to assess such complaints.

The Commission added that in the light of the case-law of the Court of Justice, it had assessed the justification for and the proportionality of a number of national bans on sports betting services and that a letter of formal notice had been sent to Denmark on 30 March 2004 in a case relating to sports betting services.

However, at its meetings on 13 October and 14 December 2004, the Commission had decided to postpone decisions to open infringement proceedings in cases concerning restrictions similar



to those raised by the complainant in his infringement complaint in cases concerning Germany (2003/4350), Italy (2003/4616) and the Netherlands (2002/5443). These complaints were now undergoing further examination.

The Commission explained that in a fax dated 30 November 2004, the complainant had asked for a copy of its correspondence with the German authorities. It stressed that it had so far not yet had any contacts with the German authorities relating to sports betting services in general or relating to any specific case.

According to the Commission, it was still actively examining specific aspects of the complainant's infringement complaint. On 30 May 2005, it had sent a letter to the complainant's lawyer in which it had explained the state of play and asked the complainant to present a copy of his bookmaker's permit.

The Commission noted that it had indicated, in its "Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law" (COM(2002) 141 final, OJ 2002 C 244, p. 5), that, as a general rule, it proposed to investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint. According to the Commission, this did however not exclude the possibility that its inquiry might take longer than that. The Commission submitted that this would be particularly the case where it was confronted with cases implying a difficult assessment of the justification and proportionality, based on public order considerations, of the national measure at stake. According to the Commission, this was the situation in the present case. The Commission noted that it had committed itself "to inform the complainant in writing" in such circumstances. According to the Commission, this had been done in the present case by means of the letter of 30 May 2005.

2.3 It is good administrative practice to answer to letters from citizens within a reasonable period of time. In the present case, the Commission replied to the complainant's letter of 30 November 2004 on 30 May 2005, i.e., six months after it had been sent. The Ombudsman considers that no explanation or apology has been offered for this considerable delay. The Commission's failure to reply to the complainant's letter of 30 November 2004 within a reasonable period of time thus constitutes maladministration.

2.4 The Ombudsman notes that the Commission committed itself, in its "Communication" of 2002, to investigating complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint. It is clear from the wording of the Communication ("as a rule") that this does not exclude the possibility that an inquiry might take longer than one year where there are valid reasons, particularly where a complaint raises difficult or complex issues. As the Commission has correctly observed, the "Communication" of 2002 provides that the complainant has to be informed in writing in such cases.

The Ombudsman considers, however, that in order to be meaningful, the information to be



given to a complainant in such cases must at least explain the reasons as to why the handling of the complaint will take more than one year.

However, in its letter to the complainant of 30 May 2005 the Commission simply stated "that due to the special procedural deadlines for inquiries by the Commission in relation to infringements of the Treaty the taking of a position by the Commission can probably not be expected in the near future."

In the Ombudsman's view, this 'explanation' is manifestly inadequate, given that it does not refer to any particular circumstances that would justify the fact that the Commission's inquiry exceeded the period of one year that should, according to the "Communication" of 2002, be respected "as a rule". The Commission's failure to provide adequate reasons for not being able to conclude its inquiry into the complainant's infringement complaint within one year after its registration thus constitutes maladministration.

2.5 As regards the handling of the infringement complaint as such, it is good administrative practice to examine such complaints diligently and without undue delay. The Ombudsman notes that the Commission claimed, in its opinion, to be still actively examining specific aspects of the complainant's infringement complaint. He further notes that in its letter to the complainant of 30 May 2005, the Commission submitted that it was dealing "intensively" with the complainant's complaint and other complaints concerning sports betting services in Germany.

In the Ombudsman's view, however, these claims do not appear to be supported by the information that has been submitted to the Ombudsman.

It should first be noted that the Commission stressed that the Court's judgment of 6 November 2003 in Case C-243/01 (*Gambelli and others*) had provided it with guidelines to assess complaints such as the one submitted to it by the complainant. However, this judgment was already rendered more than 1 ½ years ago. It should further be noted that the Commission claimed that the complainant's infringement complaint confronted it with a case implying a difficult assessment of the justification and proportionality, based on public order considerations, of the national measure at stake. The Ombudsman notes, however, that the Commission itself, in its opinion, acknowledged that it had so far not yet had any contacts with the German authorities relating to sports betting services in general or relating to any specific case. It is difficult to see how the Commission could assess the justification and proportionality of the relevant provisions of German law without, at the very least, asking the German authorities for information and explanations as to the "public order considerations" on which these provisions were based.

2.6 In view of the above, the Ombudsman takes the view that the Commission has failed properly to deal with the complainant's infringement complaint.

3 Conclusion

In view of the above, the Ombudsman makes the following draft recommendation to the Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:

The draft recommendation



The Commission should deal with the complainant's infringement complaint diligently and without undue delay.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 31 October 2005. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 27 July 2005

P. Nikiforos DIAMANDOUROS

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.