

Draft recommendation of the European Ombudsman in his inquiry into complaint 2403/2008/OV against the European Commission

Recommendation

Case 2403/2008/OV - Opened on 11/09/2008 - Recommendation on 20/09/2010 - Decision on 17/10/2011

THE BACKGROUND TO THE COMPLAINT

1. The present complaint follows two earlier ones which the complainant submitted to the European Ombudsman, both concerning the Commission's failure to reply to an infringement complaint he lodged (complaints 3100/2007/OV and 1507/2008/OV).
2. On 27 September 2007 [1], the complainant, a Dutch citizen living in Germany and receiving a Dutch unemployment benefit for civil servants ("*verlengd wachtgeld*"), sent an e-mail message to the Head of Cabinet of Commissioner Kuneva, who is responsible for consumer protection, complaining about what he perceived to be discrimination of non-German citizens by the German Südwestrundfunk in relation to exemption from TV and radio licence fees. He claimed that, on the basis of German legislation (Rundfunkgebührenstaatsvertrag - RGebStV), which grants an exemption for persons receiving certain types of unemployment benefits or social assistance, he should be exempted from these fees in Germany.
3. In the absence of a reply, the complainant turned to the Ombudsman on 5 December 2007 (*complaint 3100/2007/OV*). Following the Ombudsman's intervention, Commissioner Kuneva's Head of Cabinet sent a holding reply to the complainant on 11 December 2007. He apologised for the delay and informed the complainant that, at first sight, the Commission did not appear to be competent for the matter. He explained that he had, nevertheless, asked the Commission's responsible services to examine the complaint carefully, and to reply as soon as possible. Given that the Commission had thus promised a rapid reply, the Ombudsman closed the case.
4. On 27 February 2008, the complainant sent another e-mail to Ms Kuneva's Head of Cabinet, expressing the hope that he would soon receive a reply to his complaint. A member of Ms Kuneva's cabinet replied the same day, informing the complainant that his complaint had been transferred to Commissioner Kovács' cabinet, responsible for Taxation and Customs Union, and that confirmation had been received that a reply was being prepared.



5. On 21 April 2008, Commissioner Kovács' Head of Cabinet informed the complainant that, since the subject matter of the complaint fell within Commissioner Reding's competence (the Commissioner responsible for Information Society and Media), his e-mail had been forwarded to her services with a request for a reply.

6. On 29 April 2008, the complainant turned to the Ombudsman for a second time (*complaint 1507/2008/OV*). He referred to the Commission's letter dated 21 April 2008, and complained that he had still not received a substantive reply to his e-mail of 27 September 2007. The Ombudsman thereupon contacted the Commission's services again.

7. On 9 July 2008, following the Ombudsman's intervention, the Commission's Directorate-General for Information Society and Media ('DG INFSO') sent an e-mail to the complainant to inform him that it was investigating the issue of alleged discrimination, and that it had contacted the German authorities. DG INFSO asked the complainant whether he agreed to having his identity disclosed to the German authorities. It also requested further information from the complainant regarding his status in Germany, namely, whether he was registered as seeking employment, and whether he had ever been employed in Germany.

8. On 17 July 2008, DG INFSO sent a further letter to the complainant confirming that it was investigating the alleged discrimination of foreigners residing in Germany with regard to exemption from TV and radio licence fees. The Commission noted the complainant's consent to having his personal details disclosed to the German authorities. It concluded by stating that it would keep him informed of the progress of its inquiry.

9. In view of the Commission's letter dated 17 July 2008, the Ombudsman concluded that the Commission was actively examining the complainant's original complaint. He therefore closed the file on complaint 1507/2008/OV.

10. On 24 July 2008, the complainant submitted the present complaint to the Ombudsman, pointing out that it had taken seven months for his complaint to reach the office of the responsible Commissioner, and that this was a sign of incompetence. The complainant stressed that 10 months had passed since he first contacted the Commission, and the latter had still not provided him with a substantive reply to his complaint.

THE SUBJECT MATTER OF THE INQUIRY

11. The Ombudsman summarised the complainant's allegation as follows:

The Commission failed properly to deal, as regards both procedure and substance, with the complainant's complaint of 27 September 2007, which was addressed to Commissioner Kuneva, concerning alleged discrimination by the German authorities regarding TV and radio licence fees.



THE INQUIRY

12. The complaint was forwarded to the Commission for an opinion, which it sent on 6 February 2009. The opinion was then forwarded to the complainant, who sent his observations on 26 February 2009.

13. On 3 March 2009, the Commission sent the Ombudsman a copy of the letter dated 27 February 2009, sent by the Director-General of DG INFSO to the German authorities. On 24 April 2009, the complainant sent an e-mail to the Ombudsman, pointing out that, after 19 months, the Commission had still not been able to deal with his infringement complaint.

14. On 28 October 2009, the Ombudsman asked the Commission for further information with regard to the present case. The Commission sent its reply on 8 February 2010. The Ombudsman forwarded it to the complainant, who sent his observations on 21 March 2010.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Preliminary remark

15. The Ombudsman notes the complainant's argument in the latter's observations on the Commission's reply to the request for information, that he informed the Commission several times about the unequal treatment of Dutch taxpayers living in Germany who, according to him, have to pay TV and radio licence fees in both the Netherlands and Germany, whereas German taxpayers living in the Netherlands are not required to pay any fees whatsoever, in either country. The complainant further pointed out that, although he pays licence fees in the Netherlands, he cannot receive the Dutch public channel in Germany, whereas Germans in the Netherlands can watch German public channels. The Ombudsman notes that the above issues are new, and were not raised in the infringement complaint submitted by the complainant to the Commission in September 2007. The Ombudsman does not, therefore, have to deal with these issues in the present inquiry. The complainant obviously remains free to turn to the Commission again concerning these issues if he considers that they constitute infringements of EU law.

B. Alleged failure properly to deal with the complainant's complaint of 27 September 2007

Arguments presented to the Ombudsman

16. The complainant alleged that the Commission failed properly to deal, as regards both procedure and substance, with his complaint of 27 September 2007, which was addressed to Commissioner Kuneva, concerning alleged discrimination by the German authorities regarding the exemption from TV and radio licence fees.



17. In its opinion, the Commission summarised the exchange of communications with the complainant since the complaint was submitted on 27 September 2007. It submitted that, on 9 July 2008, its services asked the complainant for complementary information with regard to his status in Germany, but that the complainant did not provide this information. On 17 July 2008, the Commission asked the German authorities for an opinion on the complainant's allegations. The Commission further pointed out that the complaint submitted in September 2007 was registered in the EU Pilot system on 18 July 2008, and that the German authorities sent their reply, using the EU Pilot system, on 18 September 2008.

18. The Commission apologised for the considerable delay which occurred in the initial assignment of the complainant's e-mail of 27 September 2007. It explained that this was due to the fact that it was not clear whether EU law was applicable to the issues raised by the complainant, and if it was applicable, it was unclear precisely which area of EU law applied. Therefore, the Commission had to examine the complainant's allegations with reference to EU audiovisual legislation, the principle of non-discrimination, and EU social and employment law.

19. The Commission further stated that it was finally DG INFSO which launched an inquiry by writing to the German authorities on 17 July 2008. Following the reply from the German authorities on 18 September 2008, DG INFSO analysed the file and consulted other Commission services. The Commission referred to the complexity of the complainant's case and stated that, before it could be addressed, more information was needed about his residence status in Germany, and the Dutch unemployment benefit he was receiving. It noted that a holding reply was sent to the complainant on 11 December 2008. The Commission concluded its opinion by stating that it sincerely regretted the accumulated delay, and pointed out that it would handle the rest of the investigation as speedily as possible, and in compliance with the *Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law* [2] ('the Communication').

20. In his observations, the complainant rejected the Commission's statement that he did not provide the information it requested in its e-mail of 9 July 2008. He pointed out that he attached copies of his correspondence with the relevant German bodies to an e-mail he sent to the Commission on 10 July 2008.

Request for further information

21. On 28 October 2009, the Ombudsman asked the Commission first, for information on the progress of its investigation into the complainant's infringement complaint, and second, to explain how it considered that it had complied with the rules set out in its Communication in so far as the present case was concerned.

Further arguments presented to the Ombudsman

22. In its reply, the Commission reiterated, as regards the *procedure*, that its services initially



encountered difficulties in assessing the scope of the complainant's complaint. The case was therefore reassigned several times between its different services. Furthermore, the information provided by the complainant at the beginning of the investigation did not make it clear whether he had ever worked, or looked for work, in Germany, or whether he had always lived in Germany as a so-called non-active EU citizen. Only the information provided by the complainant in February 2009, in reply to a request from Directorate-General Employment (DG EMPL) in January 2009, clarified the facts and enabled the Commission's services to assess the case fully, and to initiate further investigations.

23. The Commission pointed out that, upon receiving the German authorities' reply of 18 September 2008 to its letter dated 18 July 2008, DG INFSO realised that the case raised issues for which DG EMPL was responsible. DG INFSO therefore closed the registration in the EU Pilot scheme, and transferred the case to DG EMPL. According to the Commission, on 17 December 2008, DG EMPL registered the file as correspondence, and not as a complaint. DG EMPL's reason for doing so was because it intended to deal with it initially through the system of co-operation with the Member State representatives in the Administrative Commission of the European Communities on social security for migrant workers ('the AC'). DG EMPL would have registered the case as an infringement procedure if the investigations within the AC consultation procedure had led the Commission to conclude that the German authorities had infringed EU law. The Commission added that DG EMPL coordinated the reply with the Directorate-General for Justice and Home Affairs (DG JLS), because the issue of equal treatment of unemployed EU citizens living in other Member States falls within DG JLS's remit. On 26 January 2009, DG EMPL sent a letter to the complainant asking him about his residence status in Germany, whether he had ever worked in Germany, and whether he was applying for, or receiving, unemployment benefits in the Netherlands or in Germany at the time he requested an exemption from the German TV and radio licence fees. He was also requested to provide more information about the type of Dutch benefit he received. By e-mail of 3 February 2009, the complainant informed DG EMPL that he had never worked and never looked for work, in Germany. He also provided more information about the Dutch benefit he received.

24. In order to assess whether the Dutch and German benefits were comparable, DG EMPL consulted the German authorities by letter dated 8 April 2009. The German authorities replied by letter dated 25 June 2009, and gave detailed information about the German benefits system, explaining which recipients are entitled to an exemption from TV and radio licence fees in Germany. The Dutch member of the AC was consulted informally, and it provided more information on the type of benefit the complainant was receiving from the Dutch authorities.

25. On 10 August 2009, DG EMPL informed the complainant that, on the basis of its examination of the facts, it concluded that the EU rules on the free movement of persons had not been infringed.

26. The Commission submitted that it considered that, taking into account the technical nature of the file, which had made it necessary to consult several DGs and the German authorities, the latter on several occasions, the case had been dealt with within a reasonable time.



27. As regards the *substance*, the Commission noted that the complainant receives a Dutch benefit called "*verlengd wachtgeld*", which is an unemployment benefit for civil servants. The amount of the "*verlengd wachtgeld*" depends on the beneficiary's previous salary. In the complainant's case, the rules on "*verlengd wachtgeld*" did not oblige him to look for work. The Commission further noted that, under German law, recipients of certain German benefits are granted an exemption from TV and radio licence fees. EU nationals lawfully residing in another Member State enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The Commission considered that the relevant exemption from TV and radio licence fees fell within the scope of the Treaty and that, therefore, the German benefits that gave rise to the exemption needed to be compared with the benefit which the complainant received from the Dutch authorities. In order to make this evaluation, the Commission contacted the Dutch and German authorities with a view to obtaining details concerning the respective benefits. In their reply, the German authorities provided detailed information about the conditions which had to be satisfied before an exemption from TV and radio licence fees could be granted. In particular, they explained that persons entitled to benefits under the second part of the *Sozialgesetzbuch* (Code on social law, SGB II), who do not receive an additional allowance on the basis of Article 24 of the SGB II, were entitled to such an exemption. The German authorities stressed that, in contrast to unemployment benefits paid out under an unemployment insurance scheme, the relevant unemployment benefit is not intended to replace the salary previously earned, but is paid by the State as a social benefit for people in need. The amount of this unemployment benefit is thus not dependent on the level of the last earned salary, but is based on the real needs of the person receiving it.

28. On the basis of the information received from the Dutch and German authorities, the Commission concluded that the "*verlengd wachtgeld*" which the complainant received from the Dutch authorities was not comparable with the German benefit which entitles its recipients to an exemption from German TV and radio licence fees. It explained that the amount received by the complainant from his Dutch unemployment benefit is calculated on the basis of his previous salary, and it is not means-tested, whereas the relevant German unemployment benefits are means-tested, and are not intended to replace previous income. Having decided that the respective benefits were not comparable, the Commission took the view that the fact that the complainant was not granted an exemption from TV and radio licence fees in Germany did not constitute an infringement of EU rules on the free movement of persons.

29. In his observations, the complainant pointed out that, at the time of his request for an exemption from the TV and radio licence fees, his unemployment benefit was EUR 746.60 per month, which was below the poverty threshold of EUR 9 370 per year (or EUR 781 per month) set out in an EU definition of 2006. The complainant regretted that the Commission did not seem to object to what he considered to be social discriminatory rules in Germany. He argued that the Commission failed to respect the principle of non-discrimination enshrined in Article 3(3) of the German Constitution, and Articles 20 and 21 of the EU Charter of Fundamental Rights.

The Ombudsman's assessment

i) As regards the substance



30. In his complaint to the Commission, the complainant alleged that he was discriminated against because, unlike some German citizens, he was not exempted from TV and radio licence fees in Germany. The Ombudsman would like to recall that, according to established case-law, the principle of non-discrimination or equal treatment requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way, unless such treatment is objectively justified.

31. In the present case, therefore, the benefit the complainant receives from the Dutch State, namely, the unemployment benefit for civil servants ("*verlengd wachtgeld*") needs to be compared with the German benefit which allows recipients to be exempted from TV and radio licence fees.

32. From the information provided by the German authorities to the Commission, it appears that the unemployment benefits which, in principle, entitle their recipients to an exemption from TV and radio licence fees in Germany are benefits that are not intended to replace a previous salary, but are granted to meet the real needs of the applicant. From the information available to the Ombudsman, it further appears that the complainant's unemployment benefit for civil servants ("*verlengd wachtgeld*") is an unemployment benefit calculated on the basis of his previous salary, and it is not linked to his real needs. These facts have not been challenged by the complainant in the present inquiry. In these circumstances, the Commission's view appears to be reasonable, namely, that the Dutch benefit was not comparable with the German benefit which entitles its recipients to an exemption from TV and radio licence fees in Germany, and that there was, therefore, no infringement of the EU rules on the free movement of persons. No instance of maladministration was therefore found as regards this aspect of the case.

ii) As regards the procedure

33. The Ombudsman notes that, as regards relations with complainants in respect of infringements of Community law, the Commission set out procedural rules in its Communication. In his request for further information of 28 October 2009, the Ombudsman asked the Commission explicitly to explain how it considered that it had complied with those rules.

34. Before discussing the contents of the Communication, the Ombudsman considers it useful to point out that the complainant's complaint was transferred from one Commission service to another on three occasions before it was examined in depth:

(i) On 27 February 2008, that is to say, more than five months after the complainant first turned to the Commission, Commissioner Kuneva's Head of Cabinet informed the complainant that his complaint had been transferred to the cabinet of Commissioner Kovács;

(ii) On 21 April 2008, that is to say, nearly two months later, the cabinet of Commissioner Kovács informed the complainant that his complaint had been transferred to the cabinet of Commissioner Reding. It seems that the latter asked DG INFSO to deal with the case.



(iii) After making some efforts to deal with the matter, DG INFSO transferred the complaint to DG EMPL, where it was registered on 17 December 2008.

35. In the absence of any convincing explanation, the Ombudsman fails to understand why the complainant's complaint was transferred three times, and was essentially left unattended for a period of nine months. The Ombudsman also has considerable difficulty in understanding why it took DG INFSO such a long time to realise that the complainant's complaint of 27 September 2007 did not concern EU audiovisual legislation, but rather the complainant's right to free movement within the EU. It is clearly unacceptable for concerns raised by citizens to be dealt with in this way. However, considering that the Commission recognised and also apologised for the considerable delay which occurred in assigning the complainant's complaint to the appropriate body, the Ombudsman is of the view that no further action is necessary with regard to these aspects of the complaint.

36. As regards the Communication, the Ombudsman notes the particular relevance in the present case of the rules regarding the following: (i) the registration of infringement complaints; (ii) acknowledgements of receipt; and (iii) hearing the complainant before rejecting a complaint.

37. First, as regards the *registration of complaints*, point 3 of the Communication provides that any correspondence which is likely to be investigated as a complaint shall be recorded in the central registry of complaints kept by the Secretariat-General of the Commission, except in six specific cases. In the present case, the complainant lodged a complaint concerning discrimination of Dutch citizens with regard to exemption from TV and radio licence fees in Germany [3]. The complainant's opening phrase in his letter was that he wished to make use of his right as an EU citizen to submit a complaint concerning " *Discrimination on the basis of origin* ". There can therefore be no doubt that the complainant intended to lodge a complaint concerning what he considered to constitute an infringement of EU law by a Member State. Nor can there be any doubt that the Commission was able to understand that this was the complainant's intention. In fact, the Commission clearly understood the complainant's intentions. It should be noted in this context that the Commission's reply of 11 December 2007 informed the complainant that the responsible services had been requested to look carefully at his ' *complaint* '. The Commission thus clearly appears to have considered the complainant's correspondence as an infringement complaint. However, the Commission never registered it as such, contrary to the Communication. In this context, the approach adopted by DG EMPL should be mentioned in particular. According to the information provided by the Commission, DG EMPL decided to register the complainant's complaint as normal correspondence rather than as a complaint. The Commission added that DG EMPL would have registered the case as an infringement complaint only if its investigation had shown that the German rules infringed EU law. This approach is clearly irreconcilable with the obligations laid down in the Communication. The Commission could of course have refrained from registering the complainant's e-mail of 27 September 2007 as an infringement complaint if it had been of the view that one of the six exceptions mentioned in point 3 of the Communication applied in this case. However, at no stage of the procedure did the Commission argue that the complainant's e-mail should not be considered as an infringement complaint within the meaning of the Communication. The Ombudsman therefore concludes that the Commission failed to abide by point 3 of the



Communication.

38. Second, as regards the *sending of an acknowledgement of receipt*, point 4 of the Communication provides that the Secretariat-General of the Commission shall issue an initial acknowledgement of all correspondence within 15 working days of receipt, and that correspondence registered as a complaint shall be acknowledged again by the Secretariat-General within one month from the date of dispatch of the initial acknowledgement. It further provides that, where the Commission departments decide not to register the correspondence as a complaint, they shall notify the author by ordinary letter setting out one or more of the six exceptions. In the present case, the Commission not only failed to send an initial acknowledgement of receipt within 15 days, but also failed to inform the complainant whether it had registered his e-mail as an infringement complaint. It further failed to inform him of the reasons why, on the basis of the Communication, no registration needed to be made. The Commission thus also failed to abide by point 4 of the Communication.

39. Third, as regards hearing the complainant before rejecting a complaint (*the closure of the case*), Point 10 of the Communication foresees that, where, as in the present case, 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 inviting him to submit any comments within a period of four weeks. The Ombudsman notes that, in its letter dated 10 August 2009, DG EMPL merely informed the complainant that it considered that there was no infringement of EU law. However, it failed to invite the complainant to submit any comments within a period of four weeks. The Commission thus also failed to abide by point 10 of the Communication.

40. It is good administrative practice for the Commission to deal with infringement complaints in accordance with the provisions of the Communication. In the present case, the Commission failed to do so. In fact, the Commission appears to have completely ignored the Communication in the present case. This is all the more surprising in view of the fact that, in its opinion of 6 February 2009, the Commission stated that it would handle the matter in compliance with the Communication. It should further be noted that, in his letter dated 28 October 2009, the Ombudsman explicitly asked the Commission to explain how it considered that it had complied with the rules set out in the Communication. However, in its reply of 8 February 2010, the Commission failed to address this question.

41. The Ombudsman's conclusion is, therefore, that the Commission's failure to abide by the provisions of the Communication in the present case constitutes an instance of maladministration. Taking into account the way the Commission dealt with the present infringement complaint, and the implications this might have on the way the Commission deals with infringement cases in general, the Ombudsman decided to make the draft recommendation below.

C. The draft recommendation

On the basis of his inquiries into this complaint, the Ombudsman makes the following draft



recommendation to the European Commission:

The Commission should acknowledge that it failed to respect the Communication when dealing with the complainant's infringement complaint. It should apologise for this omission, and take the necessary measures to ensure that it will comply with the Communication when dealing with cases in the future.

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 31 December 2010. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 20 September 2010

[1] The e-mail was sent on 27 September 2007, although the date given in the text of the message was 26 September 2007.

[2] COM (2002) 141 final, OJ 2002 C 244, p. 5.

[3] The Communication provides in point 5 ("Methods of submitting a complaint") that complaints may be sent to the address of the Secretariat-General or lodged with one of the Commission's offices in a Member State. In the present case, the complainant did not send his complaint to the Secretariat-General or a Commission office in a Member State, but to a Commissioner's cabinet. However, the recipient of this complaint was clearly able, and was indeed obliged to forward the matter to the competent service. The Ombudsman notes that the Commission did not raise any objections as regards the way in which the complainant submitted his complaint.