

## Decision of the European Ombudsman closing own-initiative inquiry OI/2/2011/OV to the European Commission

Decision

**Case** OI/2/2011/OV - **Opened on** 18/04/2011 - **Recommendation on** 28/05/2014 - **Decision on** 10/04/2014 - **Institution concerned** European Commission ( Critical remark ) |

### The background to the inquiry

1. On 5 September 2007, the Commission launched its " *EU Pilot* " Project via its Communication entitled *A Europe of Results - Applying Community Law* [1] . The EU Pilot Project introduced a novel way of dealing with complaints concerning alleged infringements of EU law. The EU Pilot started operating in April 2008. In September 2009, the Commission introduced a new system entitled " *Complaints Handling - Accueil des Plaignants* " (CHAP) for registering complaints and enquiries relating to the application of EU law by a Member State.

2. The Ombudsman's inquiries into complaints concerning the way in which the Commission deals with infringement complaints suggested a need to clarify the relationship between the EU Pilot and the procedural guarantees for complainants set out in the Commission's 2002 *Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law* [2] ("the 2002 Communication").

### The subject matter of the inquiry

3. The Ombudsman asked the Commission to inform him of its position on the relationship between the EU Pilot and the 2002 Communication and whether it proposed to revise that Communication in light of the experience and insights derived from the application of the EU Pilot in the handling of infringement complaints. In the event that the Commission intended to revise the Communication, the Ombudsman also asked to be informed (a) of the timetable for such a revision, (b) of the state of its thinking and reflections on the matter and (c) whether it envisaged consulting the European Ombudsman in this context.

### The inquiry



4. The own-initiative inquiry was opened on 18 April 2011. The Commission sent its opinion on 24 October 2011. On 28 March 2012, the Ombudsman made a draft recommendation to the Commission. On 19 April 2012, the Commission sent to the Ombudsman a copy of the *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* [3] (hereafter the 2012 Communication). On 21 June 2012, the Ombudsman wrote to the Commission's Secretary General with regard to the fact that, unlike the 2002 Communication, the Ombudsman was not mentioned in the title of the 2012 Communication. On 23 July 2012, the Commission's Secretary General replied that the Commission had followed its normal practice of addressing Communications to the Council and the European Parliament. On 25 July 2012, the Commission sent its detailed opinion on the draft recommendation. On 7 March 2013, Commissioner Maroš Šefcovic sent a further letter to the Ombudsman concerning the 2012 Communication. On 24 January 2014, the Ombudsman wrote to the Commission's Secretary-General who replied by letter of 18 February 2014.

## **The Ombudsman's analysis and conclusions**

### **A. The revision of the Communication**

#### **Arguments presented to the Ombudsman**

5. In its opinion on the own-initiative inquiry, the Commission pointed out that, when monitoring the application of EU law, it always has the interests of the citizens in mind. It stated that, in recent years, it has undertaken several initiatives to ensure and improve the protection of these interests. The following constitute examples of such initiatives:

- Along with the acknowledgement of receipt, the Commission always sends to the complainants a note on administrative guarantees and on the infringement procedure. This practice has been in place for a long time. The Europa website contains information on how citizens can exercise their rights.
- Since April 2008, the " *EU Pilot* " system has allowed for the rapid handling of potential infringement cases and complaints, in cooperation with the Member States, and has helped to deliver better and quicker responses to problems faced by citizens.
- Since September 2009, the "CHAP" system, designed to register and process complaints about the application of EU law, goes beyond the earlier practice. Correspondence is now handled as an enquiry or as a complaint, depending on the information provided by the correspondent.

6. In its comments on the Ombudsman's earlier own-initiative inquiry OI/3/2009/MHZ, the



Commission said that " *the purpose of EU Pilot is to better organize 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. It does not have the purpose to compensate for any excess in volume of complaints over the administrative capacity to deal with them* ".

7. The Commission argued that the EU Pilot system was designed and developed in the framework of the 2007 Communication *A Europe of Results - Applying Community Law* , and in accordance with the 2002 Communication. Complainants are fully informed that the EU Pilot is being used to deal with their correspondence and enjoy all the guarantees provided for in the 2002 Communication. The Commission underlined that the introduction of the EU Pilot did not modify the 2002 Communication, apart from informing complainants that, following registration in the CHAP, complaints and enquiries could be examined further in cooperation with the Member State concerned.

8. The Commission stated however that the introduction of the CHAP required some modifications to the 2002 Communication. The Commission now responds more directly to the interests of citizens, business and civil society by registering the correspondence either as an enquiry or as a complaint, depending on the information provided by the correspondent. The Commission said that this change in its working method may be reflected in a revision of the Communication. It further pointed out that the Treaty on the Functioning of the European Union (TFEU) also gives rise to the need for adaptations to the Communication as regards some terms which have been modified. Some corrections are also envisaged in order to clarify divergences in some linguistic versions of the Communication.

9. The Commission concluded that it intends to revise the Communication in light of the experience gained in the area of complaints over the last years, and that this revision would focus "inter alia" on alignment with the new "CHAP" system.

10. On 21 December 2011, the Commission sent to the Ombudsman its *Second Evaluation Report on EU Pilot* , which covers the period from its start-up in April 2008 until September 2011. There has not been a more recent report.

11. According to the *Second Evaluation Report* Member States are given ten weeks to react to cases introduced in the EU Pilot and there is a further deadline of ten weeks for the Commission to examine and assess the Member State's reply. The Report underlines that the observance of these deadlines by both parties 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 in the CHAP or the opening of an inquiry in the EU Pilot on the Commission's own initiative. As regards the success rate of cases introduced in the EU Pilot, the Report shows that 80 % of the responses by the Member States were assessed by the Commission as being acceptable (that



is, in line with EU law), thereby enabling the relevant cases to be closed without the need to launch an infringement procedure under Article 258 of the TFEU. The Commission also noted a reduction in the volume of new infringement proceedings since 2010.

## **The Ombudsman's assessment leading to a draft recommendation**

**12.** The Ombudsman welcomed the EU Pilot as a positive development allowing for quicker and more efficient handling by the Commission of complaints about infringements of EU law by Member States. The Ombudsman noted however that the *Second Evaluation Report* was silent on the relationship between the EU Pilot and the CHAP, on the one hand, and the 2002 Communication on the other. Although the Report underlines the EU Pilot's positive results for citizens, it does not mention the 2002 Communication. Even the CHAP registration system is mentioned only once in the Report (page 4, second paragraph). More generally, the Report seems to focus exclusively on relations between the Commission and the Member States ("the parties"). The position of the complainants, who are an important source of information for possible infringement cases, seems not to have been taken into consideration in this context. The Report only mentions, at the bottom of page 3 [4], that in the event of a complaint, a response will also be prepared to inform the complainant of the outcome of the inquiry. However, there is no indication in the Report of whether complainants are also kept informed when the Commission requests information from the Member State within 10 weeks or when the latter has replied. There is, in addition, no indication in the report as to whether, in those cases where a Commission department intends to propose that no further action be taken on a complaint, the Commission will still give the complainant prior notice thereof in a letter setting out the grounds on which it is proposing that the case be closed and inviting the complainant to submit any comments he or she may have within a period of four weeks (point 10 of the Communication).

**13.** The Ombudsman noted that, in its opinion, the Commission indicated that it intended to revise the 2002 Communication, but had not put forward any timetable for such a revision or indicated whether it envisaged consulting the European Ombudsman in this context. Considering that four years had elapsed since the EU Pilot was introduced in April 2008, the Ombudsman was of the opinion that it would be important for the Commission to revise the Communication so as to ensure it reflects the changes which were introduced by the EU Pilot and the CHAP, as well as by the Lisbon Treaty.

**14.** The Ombudsman emphasised that the draft recommendation aimed merely at updating the 2002 Communication, while retaining what the Ombudsman understands as being the objectives and the spirit of the original Communication as drafted by the Commission. The draft recommendation was made, therefore, without prejudice to the possibility of a subsequent reform of the infringement procedure that would enhance the rights of complainants.

**15.** On the basis of the Commission's *Second Evaluation Report on EU Pilot*, the then Ombudsman examined in detail which parts of the 2002 Communication would need to be



revised in order to reflect the changes which were introduced by the EU Pilot and the CHAP. He compiled a document which reflected, in track changes, the modifications which he considered appropriate. Apart from changes to the relevant Articles of the TFEU instead of the EC Treaty, reference to Union law instead of Community law and to new internet links [5], these modifications mainly concerned the following points:

- In point 1 of the Communication ("*Definitions and scope*"), a distinction should be made between "complaints" and "enquiries".
- Registration and acknowledgement of complaints and enquiries could be dealt with together in one single point instead of in two separate points.
- In a further point which could be entitled "*Actions with respect to complaints and enquiries*", there should be a reference to the possibility that the Commission may deal with a complaint under the EU Pilot.
- As regards point 7 "*Communication with complainants*", it would be appropriate also to inform the complainant(s) of the Commission's decision to submit the case to the Member State through the EU Pilot and of the Commission's analysis of the Member State's reply received through the EU Pilot;
- As regards the time-limits for investigating complaints (point 8 of the Communication), the Ombudsman considered that it was appropriate to include the following new time-limits in the text of the Communication: i) to arrive at a decision to launch an EU Pilot process within ten weeks from the date a complaint is registered; ii) to request the Member State concerned to provide comments in relation to a complaint or enquiry within ten weeks from the date the EU Pilot process is launched; and iii) to examine and assess a Member State's reply within ten weeks from the date the reply is received.

**16.** As regards divergences between linguistic versions, the Ombudsman noted that the second paragraph of point 9 of the Communication, referred, in English, to "*the choice of the complaint*", whereas in the French and German versions, the reference is, respectively, to "*le choix des griefs*" and to "*die Wahl der Beschwerdegründe*". It would therefore be appropriate to adapt the English text which could refer instead to "*the choice of the allegations*".

**17.** Finally, the Ombudsman noted that the Communication was not available in the official languages of the Member States which acceded to the EU in 2004 and 2007. Nor was it available in Irish. On 12 March 2012, the Ombudsman therefore opened a separate own-initiative inquiry (OI/2/2012/VL) into this issue.

**18.** The Ombudsman considered that the above suggestions for minimum changes could help the Commission in revising the text of the 2002 Communication. The Ombudsman remained available to be of whatever help possible to the Commission in its revision of the 2002 Communication.



19. On the basis of the above, on 28 March 2012, the Ombudsman made the following draft recommendation to the Commission: " *The Commission should consider revising the [2002] Communication, so as to ensure that it reflects the changes that were introduced by the EU Pilot and the CHAP* ".

## **The arguments presented to the Ombudsman after the draft recommendation**

20. In its detailed opinion, the Commission stated that, on 2 April 2012, it had adopted the 2012 Communication. The Commission pointed out that it had revised the 2002 Communication with the following objectives in mind:

- the need to take into account the new CHAP system launched in 2009 for the registration of complaints and enquiries addressed to the Commission;
- the obligation to update certain wordings and references following the entry into force of the TFEU, the need to correct certain divergences between the different linguistic versions of the 2002 Communication; and
- the need to clarify certain terms and complaint handling modalities or to simplify communication.

21. The Commission made the following comments on the modifications suggested by the Ombudsman:

22. As regards the proposed distinction between "complaints" and "enquiries" on the application of EU law, the Commission explained that existing working methods were being developed to allow the distinct registering and recording of enquiries and complaints, and that complaints would continue to be treated as a specific category of correspondence. The Commission stated that the Communication contained instructions to the Commission services for dealing with complaints and thus dealt with complaints concerning the application of EU law only.

23. As regards the consequences of the EU Pilot for the information to be given to complainants, the Commission referred to its observations in response to the Ombudsman's earlier own initiative inquiry OI/3/2009/MHZ. The Commission stated that the purpose of the EU Pilot was to better organise the Commission's work in dealing with citizens' and businesses' enquiries and complaints on the application of EU law. The EU Pilot was designed to achieve increased efficiency and therefore to accelerate and improve the results obtained. The Commission reiterated that the introduction of the EU Pilot thus did not modify the 2002 Communication apart from informing complainants that, following registration in the CHAP, complaints and enquiries could be examined further in cooperation with the Member State concerned.



**24.** The Commission took the view that the EU Pilot, which is a cooperation stage of mutual information between the Member States and the Commission, does not call for specific rules to ensure that the complainant is kept informed.

**25.** The Commission however drew attention to point 7, paragraph 1, of the 2012 Communication which stated that "[f]ollowing registration, a complaint can be examined further in cooperation with the Member State concerned. The Commission will inform the complainant thereof in writing". Thus, the Commission underlined, the complainant is informed when the complaint leads to contacts with the Member State in the framework of the EU Pilot. Once this stage is finished, the complainant is also informed of the outcome of the complaint (closure or opening of infringement proceedings), in accordance with point 10 of the Communication.

**26.** The Commission stated that the information communicated to complainants should however comply with the conditions of confidentiality of the inquiries and the Commission's discretion in infringement proceedings (see paragraph 5 of the introduction of the 2012 Communication and footnotes 3 to 6).

**27.** As regards in particular the information to the complainant about the Commission's analysis of the Member State's reply, the Commission reiterated that, in the *Petrie* case [6], the General Court stated that "the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure".

**28.** As regards deadlines, the Commission stated that, already in 2002, it encouraged its services to limit the time spent on the investigation of complaints. The Commission referred to point 8 of the Communication which provides that "[a]s a general rule, the Commission will 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 considered that every further reduction of the deadline, set generally or abstractly, would be counterproductive for the quality of the investigation in view of the diversity and specificity of the cases. This however does not prevent the Commission encouraging its services, in specific cases, to follow shorter deadlines.

**29.** The Commission concluded that the adoption of the 2012 Communication constituted a pertinent revision of the instructions to its services (in particular the new CHAP registration system) which serve the interests of complainants. The Commission therefore considered that the revised Communication dealt with the Ombudsman's concerns.

**30.** On 7 March 2013, the Commissioner Šefcovic informed the Ombudsman that the Commission had reviewed its webpage "*Exercise your rights*" [7] in order to inform citizens about the role of the Ombudsman in relation to the Commission's handling of infringement complaints.

**31.** On 18 February 2014, the Commission's Secretary-General replied to the Ombudsman's letter of 24 January 2014, which invited the Commission to make the 2012 Communication available also in Croatian, to publish it in the Official Journal, to include the Ombudsman as an





addressee of the Communication and to revise some paragraphs of the Communication concerning informing the complainant [8] . The Commission reiterated that the 2012 Communication is available on EUR-Lex and was also posted on Europa. It would soon also be available in Croatian. The Commission however stated that it stopped publishing the full text of its Communications in the Official Journal some years ago. In reply to the Ombudsman's suggestion that making the Communication available in Croatian could provide an opportunity to revise the Communication, the Commission stated that it is not possible to revise final Communications in such a way.

**32.** As regards the Ombudsman's suggestions concerning informing the complainant, the Commission explained its current practice that it informs the complainant in writing of each procedural step and that, at any point during the procedure, the complainant may ask to receive explanations on the case.

## **The Ombudsman's assessment after the draft recommendation**

**33.** The Ombudsman notes that the 2012 Communication was adopted on 2 April 2012, which is just five days after the Ombudsman made the draft recommendation to the Commission (on 28 March 2012). Although the Ombudsman has gained useful experience in dealing with complaints about compliance with the 2002 Communication, the Ombudsman was not consulted during the revision process of the Communication. The Commission also refrained from replying to the Ombudsman's question, raised in the opening of his own initiative inquiry, whether it envisaged consulting him in the course of the revision process. The very short time which elapsed between the draft recommendation and the adoption of the 2012 Communication makes it obvious that the Commission did not have an opportunity to take into account the Ombudsman's recommendation when adopting the 2012 Communication. It rather seems that the 2012 Communication was presented to the Ombudsman, not as a response to the draft recommendation, but resulted from a purely internal revision process of which the Ombudsman was not kept informed. In the introduction of the 2012 Communication, the Commission, as Guardian of the Treaties, "*acknowledges the vital role played by the complainant in helping the Commission to detect infringements of Union law*" (emphasis added). The Ombudsman regrets that the Commission, before adopting the 2012 Communication, has not taken the opportunity to consult him in this important matter and subsequently failed to engage in a discussion of the recommendations made by the Ombudsman in the framework of this own initiative inquiry.

**34.** As its title indicates, the 2012 Communication is an *update* of the rules set out in the 2002 Communication. However, whereas the 2002 Communication was addressed to the European Parliament and to the European Ombudsman, the 2012 Communication is no longer addressed to the Ombudsman, but to the Council and the European Parliament. The reasoning put forward for this change by the Commission's Secretary General in her letter of 23 July 2012, namely that the Commission followed its normal practice of addressing Communications to the Council and the European Parliament, is not convincing. In his letter of 7 March 2013, Commissioner Šefcovic stated that the Communication highlighted the important role the European Ombudsman can play for citizens in relation to the Commission's handling of infringement





complaints. Also, point 13 of the Communication (as well as the Commission's "*Exercise your rights*" webpage) mentions that complainants can complain to the European Ombudsman in case they consider that the Commission has not followed the measures set out in the Communication. Therefore, considering the specific role of the Ombudsman, which the Communication itself recognises, it is difficult to understand why the Ombudsman was no longer referred to as an addressee of the Communication. This aspect can nevertheless be considered just a formal one.

**35.** More important, however, is that the Ombudsman's letter of 24 January 2014 asked the Commission to consider revising several substantive elements of the Communication in line with the draft recommendation of 28 March 2012. In its reply, the Commission stated that it is not possible to revise the final Commission Communication. However, in its opinion in the own initiative inquiry OI/2/2012/VL, the Commission underlined that the 2002 Communication, as revised in 2012, constitutes a *purely internal measure* and that the provisions of the Communication set out internal administrative measures which, for the benefit of the complainant, need to be followed when dealing with complaints. Given that, according to the Commission, the Communication constitutes a purely internal measure, the Ombudsman cannot understand why there should be any obstacle to the Commission revising it.

**36.** The Commission also argued that the Communication was not published in the Official Journal, because the Commission stopped publishing the full text of its Communications in the Official Journal some years ago. This argument is surprising, since several other Communications which post-dated the 2012 Communication *were* published in the Official Journal [9] .

**37.** The Ombudsman therefore concludes that the 2012 Communication and the contents of the Commission's subsequent correspondence on the matter do not constitute an adequate response to the draft recommendation. She more particularly notes that the Commission has not taken on board any of the proposed suggestions for modifications aimed at better informing complainants. The Commission also failed to explain convincingly why the 2012 Communication could not be revised and why it could not be published in the Official Journal.

**38.** The Ombudsman particularly regrets that the Commission failed to make use of the opportunity to engage constructively in a substantive discussion of its relations with citizens who complain about infringements. As the Commission itself has recognised, such complaints are vital in helping it to perform its role as Guardian of the Treaties. They constitute an important mechanism through which citizens can participate in maintaining the rule of law.

**39.** The Ombudsman has considered the option of making a special report to the European Parliament in the present case. It seems unnecessary to do so for two reasons. First, Parliament regularly scrutinises the Commission's performance as Guardian of the Treaties, by examining its Annual Report on the Monitoring of the Application of EU law. Second, there is an on-going public debate, in which Parliament is the central actor, on the possible drafting of an EU law on administrative procedure. The Ombudsman thus considers it useful to close the present inquiry with a critical remark and to forward the decision to Parliament, so that it can be



taken into account both in dealing with the Commission's Annual Report on the Monitoring of the Application of EU law and in Parliament's future discussions of an EU law on administrative procedure.

## C. Conclusion

On the basis of the own initiative inquiry, the Ombudsman closes it with the following critical remark:

**The Commission failed to respond adequately to the draft recommendation and more particularly, failed to make use of the opportunity to engage constructively in a substantive discussion of how to improve its relations with citizens who complain about infringements. The Commission also failed to explain convincingly why the 2012 Communication could not be revised and why it could not be published in the Official Journal. This constitutes an instance of maladministration.**

Emily O'Reilly

Done in Strasbourg on 10 April 2014

[1] COM(2007) 502 final, 5 September 2007.

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

[3] COM(2012) 154 final, 2 April 2012. The Communication was not published in the Official Journal, but is available on the EUR-Lex website in all the official languages (except Croatian):

<http://eur-lex.europa.eu/Notice.do?checktexts=checkbox&checktexte=checkbox&val=676045%3Acs&pos=3&page=>  
[Link]

[4] In the English version of the Report.

[5] Several internet links mentioned in the 2002 Communication as it stood no longer worked.

[6] Case T-191/99 *Petrie and others v Commission* [2001] ECR II-3677, paragraph 68; Case T-29/08 *LPN v Commission* [2011] ECR II-6021.

[7] [http://ec.europa.eu/eu\\_law/your\\_rights/your\\_rights\\_en.htm](http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm) [Link]

[8] The Ombudsman's letter to the Commission's Secretary-General and the Secretary-General's reply are available on the Ombudsman's website under:

<http://www.ombudsman.europa.eu/en/cases/initiatives.faces> [Link]



[9] For instance the 'Banking Communication' (OJ 2013 C 216, p. 1), the Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (OJ 2013 C 167, p. 19) or the Communication concerning the prolongation of the application of the Community framework for State aid for research and development and innovation (OJ 2013 C 357, p. 1).

It is true that, contrary to the 2012 Communication, the Banking Communication has EEA relevance.