

Decision of the European Ombudsman closing his inquiry into complaint 379/2010/MHZ against the European Commission

Decision

Case 379/2010/MHZ - **Opened on** 18/03/2010 - **Decision on** 20/12/2010 - **Institution concerned** European Commission (Critical remark) |

The background to the complaint

1. Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes [\[1\] \[Link\]](#) (hereinafter 'the ICSD') entered into force on 26 March 1997. The deadline for transposition in the Member States was 26 September 1998. The ICSD aims to protect investors against the risk of financial loss in the event of an investment firm's inability to repay money or return assets. The ICSD establishes some basic principles, provisions and definitions and gives Member States flexibility to implement them in the most suitable way for their own situations. The ICSD lays down, however, basic requirements for national investor-compensation schemes in order to provide a harmonised minimum level of protection for investors across the EU. The Member States must set up one or more investor-compensation schemes and all firms providing investment services must belong to such a scheme.

2. The complainant was an investor with a Polish investment firm (WGI Dom Maklerski SA, hereinafter 'WGI'). On 4 April 2006, the Polish authorities annulled WGI's license and ordered it to pay back its investors. The WGI failed to do so and, on 22 June 2006, the Polish court declared it insolvent.

3. Following the relevant decisions of the National Depository for Securities (NDP), which manages the investor - compensation schemes in Poland, the complainant received compensation. In his view, the amount was too low. The complainant also considered that the compensation payment was unduly delayed, and thus in breach of Article 9(2) of the ICSD. This Article provides *inter alia* that the compensation scheme shall " ... *be in a position to pay an investor's claim as soon as possible and at the latest within three months of the establishment of the eligibility and the amount of the claim.* "

4. Therefore, on 10 December 2007, the complainant lodged his *first complaint* with the



Commission against Poland for not complying with the above Article 9.2 of the ICSD Directive. The Commission registered the complaint under reference number X . The Commission received several other complaints from Poland in this respect.

5. On 23 January 2008, the Commission requested explanations from the Polish authorities. On 3 March 2008, the Polish Ministry of Finance replied explaining the investor-compensation schemes in Poland and the status of the ICSD's implementation. Following that reply, and further informal contacts with the Polish authorities, the Commission concluded that it should close the infringement case and informed the complainant of its intention to do so on 30 April 2008.

6. On 30 May 2008, the complainant sent a letter to the Commission, in which he referred to, among others, Article 13 of the ICSD, which provides that a "*Member State shall ensure that an investor's right to compensation may be subject of an action by the investor against the compensation scheme.*" He stated that Polish law does not foresee any possibility of redress for investors if they wish to complain against the investor-compensation schemes managed by the NDS. The civil courts do not have jurisdiction over the NDS decisions because they are of an administrative nature (as they are related to the NDS's management of the investor-compensation scheme). The administrative courts have no jurisdiction either because the NDS is not an administrative body, but rather a joint stock company governed by commercial law. He attached, in this respect, a letter from the insolvency administrator of the WGI, dated 28 May 2007.

7. On 3 September 2008, the Commission informed the complainant that it had not found any new information in his letter dated 30 May 2008. Consequently, it had closed the infringement procedure on 26 June 2008.

8. On 10 September, 15 October and 11 December 2008, the complainant sent additional letters to the Commission in which he clearly opposed the Commission's above decision. The Commission replied to these letters on 8 October, 12 November 2008 and 2 February 2009 respectively [2] [Link]. By letter dated 10 September 2008, the complainant requested access to the documents relating to its file, to which the Commission replied on 8 October 2008. In its letter to the complainant dated 12 November 2008, the Commission attached a copy of the Polish authorities' reply of 3 March 2008. In its letter to the complainant dated 2 February 2009, the Commission stated *inter alia* that it had already explained all the legal reasons as regards its decision to close his file in its previous correspondence. The Commission repeated that the complainant had not provided sufficient evidence to support his arguments concerning the Polish authorities' infringement of the obligation to implement the Directive. The Commission also informed the complainant that "*Article 13 of the ICSD was transposed in Article 140 & 7 of the Act on Trading in Financial Instruments of 29 July 2005. Furthermore, complaints can always be sent to the [competent Polish authority] and actions can be introduced before the courts.*" In addition, the Commission referred to its Code of Good Administrative Behaviour and stated that it would not reply to him on the same matter unless he submits new arguments.

9. On 28 July 2009, the complainant lodged his *second complaint* with the Commission. He put



forward that this complaint was different from the *first complaint*, because (i) this time he referred only to Article 13 of the ICSD and the Polish authorities failure efficiently to implement it (he repeated the content of his letter dated 30 May 2008 in this respect); (ii) he had in his possession a new document from a Polish court showing that Article 13 had indeed not been implemented at all. On 30 July 2009, he sent to the Commission a copy of this document together with a short covering letter complementing his *second complaint*. The said document was a Polish court's judgment of 26 February 2008, in which the court stated, in summary, that it had no jurisdiction in cases concerning the investor-compensation scheme. Therefore, no redress was possible.

10. The Commission did not register the *second complaint* as such. In its reply of 19 October 2009, it informed the complainant that it had already explained the reasons for not opening the infringement proceedings against Poland in its previous letters. The Commission did not find new elements concerning his case and therefore considered that the issue should be closed.

11. The complainant then turned to the Ombudsman.

The subject matter of the inquiry

12. The Ombudsman decided to open the present inquiry into the complainant's following allegations and claim.

Allegation:

The Commission failed to handle his second complaint of 28 and 30 July 2009 properly.

Claim:

The Commission should register his second complaint, or provide convincing clarification as why it cannot do so.

The inquiry

13. On 23 October 2009, the complainant submitted his complaint to the Ombudsman [\[3\] \[Link\]](#). On 23 June 2010, the Commission sent the opinion to the Ombudsman in English and, subsequently, its translation into Polish. On 10 August 2010, the complainant sent his observations on the Commission's opinion.

The Ombudsman's analysis and conclusions

A. Alleged failure to handle the infringement complaint



properly and related claim

Arguments presented to the Ombudsman

14. In his original complaint, the complainant argued that the Commission's reason for refusing to register his new complaint of 28 July 2009, which he completed on 30 July 2009, was wrong. He also argued that, in its reply of 19 October 2009, the Commission stated that the complainant had not presented new evidence when he had in fact done so. He included in his new complaint a copy of a Polish court judgment of 26 February 2008, which was previously unknown to the Commission. (' *First argument* ')

15. Additionally, the complainant argued that the Commission's assessment, in its letter to the complainant dated 2 February 2009, that Article 13 of the ICSD had been properly implemented in Polish law, was wrong. (' *Second argument* ')

16. In its opinion, the Commission informed the Ombudsman that, on 6 August 2009, the complainant addressed a petition to the European Parliament. Following that petition, and also taking into account that some of the Commission's previous contacts with the Polish authorities were of an informal nature, on 23 December 2009, the Commission sent a new letter to the Polish authorities. The Polish Ministry of Finance replied to that letter on 10 February 2010 [\[Link\]](#).

17. The Commission took the view that the complainant did not submit any relevant new elements in his correspondence of 28 and 30 July 2009 to justify its registration as a new complaint. The decision of the Polish court which the complainant enclosed did not constitute any such new elements. This court's decision already existed in 2008, when the Commission was still analysing the complainant's *first complaint* (infringement case number 2008/4085). Moreover, in his letter dated 30 May 2008, the complainant had already mentioned that the Polish courts had issued decisions on this matter.

18. The Commission also stated that the Polish court's judgment of 26 February 2008 did not indicate that Poland had improperly implemented Article 13 of the ICSD, which would require the Commission to start a new investigation under a new infringement procedure. This judgment was delivered following an appeal launched by other investors in the Polish investment firm. The court rejected their appeal in the context of the bankruptcy procedure. This judgment does not prevent an investor who is (i) not mentioned in the list managed by the insolvency administrator, or (ii) not satisfied with the amount of compensation granted, from bringing a civil claim. The Commission informed the complainant in its letter dated 2 February 2009 that Article 13 of the Directive had been implemented in Article 140§7 of the Act on Trading in Financial Instruments of 29 July 2005, which was still in force in Poland.

19. The Commission's above assessment was confirmed by the Polish authorities during an informal discussion with the Commission and also in the Polish Ministry of Finance's formal reply of 10 February 2010. In that reply, the Polish Ministry explained that there are two



possibilities for investors to appeal: (i) in the framework of bankruptcy proceedings before a judge-commissioner, pursuant to Article 256(1) of the Polish Act on Bankruptcy, or (ii) through civil claims based on Articles 140§6 and 140§7 of the Act on Trading in Financial Instruments of 29 July 2005. These last remedies are available both for investors whose names are not mentioned in the list of investors, and for investors who are not satisfied with the amount of compensation.

20. The Commission also pointed out that, in his petition to the European Parliament, the complainant implicitly acknowledged the possibility of bringing civil claims when he stated that "*it is impossible that a complaint against [the compensation scheme] with an ordinary court is the same as an action against the compensation scheme within the meaning of Article 13 of [the ICSD].*" The Commission does not agree with this argument, since Article 13 of the ICSD is a very general provision requiring the existence of a procedure for investors to appeal against the compensation scheme. As such, contrary to what the complainant claimed in his petition to Parliament, Article 13 of the ICSD leaves to the Member States the right to choose the way in which this appeal may be made under the national insolvency and judicial procedures. In this respect, the Commission had already stated, in its letter to the complainant dated 2 February 2009, that "*furthermore, complaints can always be sent to [the competent Polish authority] and action can be introduced before the courts.*"

21. The Commission stressed that its conclusion that Article 13 of the ICSD has been properly transposed into Polish law was based on a thorough investigation of the issue and following several contacts with the Polish authorities in this regard. The Commission's conclusions were clearly communicated to the complainant in a number of letters, including the one dated 2 February 2009.

22. The Commission also concluded that it did not see any maladministration in dealing with the complainant's case and considered the complainant's claim to be unfounded. Finally, it noted that "*the procedure before the Ombudsman is not an appropriate means to exercise control over the substance of Commission's decisions, particularly as regards the interpretation of provisions of Community law.*"

23. In his observations, the complainant reiterated that he did not mention the Polish court's judgment as new evidence in his letter dated 30 May 2008, with which he completed his *first complaint*. The Commission was obviously not aware of the content of the Polish judgment before 28 July 2009 (the date of his *second complaint*), even though it was issued in 2008.

24. The complainant argued that the possibility for a civil action against the NDS which manages the compensation scheme is not the same as the possibility to bring an action against the investor-compensation scheme. According to the complainant, there is currently no possibility under Polish law to bring a civil action against the investor-compensation scheme. The scheme has no legal personality and it is only possible to bring an action against the NDS. In the complainant's view, the Commission distorted the statements he made in this respect in his petition to Parliament. Finally, the complainant argued that Article 13 of the ICSD does not refer to an appeal before the court, but to other means of redress which, in the light of the



relevant case-law of the European Court of Human Rights, should be effective, that is, *inter alia*, easily accessible. In Poland, however, access to justice is costly and the procedures are lengthy.

25. The complainant examined the reply of the Polish Ministry dated 10 February 2010, to which the Commission referred in its opinion. He found that the Polish Act on Bankruptcy and the Act on Trading in Financial Instruments, which, according to the Polish Ministry and as reiterated by the Commission, should have transposed Article 13 of the ICSD, do not include any relevant provisions on the possibility for investors to make an appeal against the investor-compensation scheme. In addition, he took the view that the Polish Ministry referred to the possibility for an appeal against the list of creditors and not against the list of investors entitled to compensation. In the complainant's view, the Polish Ministry misled the Commission. The Commission should not have accepted this Ministry's views without verifying them further.

26. The complainant concluded that redress against the investor-compensation scheme is not possible under Polish law and therefore Article 13 of the ICSD was not properly implemented. He found that the Commission infringed the European Code of Good Administrative Behaviour by, among other things (i) not dealing with his new complaint of 28 July 2008 as such, despite the new evidence; and (ii) not properly justifying why.

The Ombudsman's assessment

Preliminary remarks concerning the complainant's Second argument

27. In its opinion, the Commission informed the Ombudsman that the complainant submitted a petition to Parliament on 6 August 2009, that is, approximately three months before he lodged his complaint with the Ombudsman. On the basis of the Commission's opinion, and of the Polish Ministry's reply dated 10 February 2010, requested in the framework of the Parliament's dealing with the complainant's petition, it emerged that this petition concerned the Polish Authorities' implementation of Article 13 of the ICSD. The Ombudsman notes that the Polish Ministry replied, in its letter dated 10 February 2010, to the following questions put forward by the Commission:

(1) Can the right to compensation be the subject of an action by an investor pursuant to Article 13 of the ICSD; how can the investor fight for this right?;

(2) Do the investors mentioned on the list of investors entitled to compensation, pursuant to Article 140(1) 1 of the Polish Act on Trading in Financial Instruments, have the right to appeal against that list of investors and, in the affirmative, on which legal basis?; which action the investor may take in order to appeal against the list of investors?;

(3) Does the investor have the right to make a complaint to the Polish Financial Supervision Authority and can he/she bring a legal action before a court in this respect? [\[5\]](#) [\[Link\]](#)



28. In light of the above, and given that the Committee on Petitions of the European Parliament has already dealt with Poland's implementation of Article 13 of the ICSD and, consequently, with the Commission's assessment in this respect, there are no grounds for the Ombudsman to deal with the complainant's *Second argument* that this assessment was wrong.

29. For the same reason, the Ombudsman does not find it useful to comment on the Commission's statement in its opinion that "*the procedure before the Ombudsman is not an appropriate means to exercise control over the substance of Commission's decisions, particularly as regards the interpretation of provisions of Community law.*" Nevertheless, the Ombudsman regrets this unfortunate statement by the Commission. He would like to clarify that, if the Committee on Petitions had not already dealt with this aspect of the complaint, and if the Ombudsman were to evaluate the Commission's conclusions on the issue, he would obviously be able to express his position concerning the interpretation of the relevant provisions of EU Law, while recognising that the highest authority for interpreting that law is the Court of Justice of the European Union.

The complainant's First argument that the Commission failed to register as a new complaint the complainant's letter dated 28 July 2009, completed on 30 July 2009

30. The Ombudsman finds it difficult to understand why the Commission did not register the complainant's above letters as a formal complaint, in conformity with its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law [\[6\]](#) [\[Link\]](#) ('the Communication').

31. In the Communication, the Commission published the rules applicable to its relations with persons complaining to it about infringements of Community law. The first paragraph of point 3 (Recording of complaints) of this Communication provides:

" 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. "

The second paragraph of point 3 contains an exhaustive list of reasons, on the basis of which

"[c] orrespondence shall not be investigable as a complaint by the Commission, and shall therefore not be recorded in the central registry of complaints, if:

... - it sets out a grievance with regard to which the Commission has adopted a clear, public and consistent position, which shall be communicated to the complainant ... "

The fourth paragraph of point 5 (Acknowledgement of receipt) of the Communication provides:

" Where the Commission departments decide not to register the correspondence as complaint,



they shall notify the author to that effect by ordinary letter setting out one or more of the reasons listed in the second paragraph of point 3. "

32. The Commission argued that it did not register the complainant's letters in question as a new complaint because the complainant did not submit any new evidence with respect to his earlier complaint concerning the wrong implementation by Poland of the ICSD. This previous complaint was definitively closed by the Commission on 26 June 2008 with a finding of no infringement. It appears, therefore, that the Commission considered that it had already taken a "*clear, public and consistent*" position on the complainant's letters dated 28 and 30 July 2009 before the dates on which they were sent.

33. However, in his complaint to the Commission dated 10 December 2007, the complainant basically referred to the Polish authorities' failure properly to implement Article 9 of the ICSD. In contrast, in his letters dated 28 and 30 July 2009, the complainant focussed on the wrong implementation of Article 13 of the ICSD.

34. It also appears that, following the complainant's *first complaint* of 10 December 2007, the Commission did not investigate Poland's implementation of Article 13 of the ICSD. From the Polish authorities reply dated 22 February 2008, which was apparently sent in the framework of the Commission's handling of the complainant's *first complaint*, it is clear that the Polish Ministry of Finance was not asked by the Commission to explain the implementation of the said Article 13 of the ICSD. It is therefore hard to identify on the basis of which "*thorough investigation*" the Commission arrived at its position on the implementation of Article 13 into Polish law, which was conveyed to the complainant in the letter dated 2 February 2009. This letter stated that (i) "*complaints can always be sent to [the competent Polish authority] and action can be introduced before the courts*" and (ii) Article 13 of the Directive had been implemented in Article 140§7 of the Act on Trading in Financial Instruments dated 29 July 2005.

35. Furthermore, the Ombudsman points out that it was only on 30 July 2009 that the complainant submitted, for the very first time in his exchanges with the Commission concerning the ICSD, a copy of the judgment of the Polish court in which the Polish judge commissioner took the view that there is no legal possibility for an appeal against the investor-compensation scheme in the framework of bankruptcy proceedings. The relevant section of the Polish Judge's decision of 26 February 2008, concerned two individual claims for compensation relating to the insolvency of the Polish investment firm. It reads as follows:

" Drafting of the list of investors and the rules on the award of compensation and how this compensation should be paid are provided for in Article 132 and following articles of the [Polish Act on Trading in Financial Instruments], which do not foresee a possibility for a judge-commissioner to decide on claims for compensation and on whether appeals against the list of investors can be made. Such possibility is not provided for in the Act on Bankruptcy and in the Code of Civil Procedure either, since the list of investors does not constitute a judgment of the judge commissioner or of the court. The National Depository for Securities [NDS] decides on the right to compensation and on its amount and this decision has a form of a resolution of the [NDS's] Board. Even an insolvency administrator, who drafts and deposits the list of investors,



has no right to challenge the above resolution. Since there are no provisions on that matter, it is arguable whether the insolvency administrator can bring a legal action if the NDS gives back the list of investors drafted by him or if the NDS decides to award lower compensation than that indicated in the list. In light of the above, the [present] claims for compensation should be rejected on the ground that there is no legal redress possible in the sense of Article 199§1 of the Code of Civil Procedure and Article 229 of the Act on Bankruptcy. " [7] [\[Link\]](#)

36. As rightly observed by the complainant, the Commission did not demonstrate that it was aware of this judgment before the date of its submission by the complainant. It is also reasonable to consider that this judgment constitutes an important probative element to argue whether Polish law adequately implemented Article 13 of the ICSD and should or not have been ignored by the Commission. It should rather have been analysed thoroughly.

37. However, the Commission only carried out this analysis following the present complaint to the Ombudsman (or rather in the framework of the complainant's petition to Parliament of August 2009). In doing so, it concluded that this judgment " *does not provide relevant indications of improper implementation by Poland of Article 13 of Directive which would require an investigation by the Commission under a new infringement procedure* ". The Commission should, however, have already carried out such analysis before the complainant went to Parliament (and the Ombudsman), after having first registered the complainant's letters dated 28 and 30 July 2009 as a new complaint. The Ombudsman considers it clear that the issues to which these letters referred should have been investigated at the time when the letters were submitted.

38. Finally, the Ombudsman notes that, in the complainant's letter to the Commission dated 30 May 2008, he indeed referred to Article 13 of the ICSD and took the view that there was no possibility under Polish law to appeal against the decisions of the NDP managing the compensation scheme. The complainant also mentioned, albeit in rather general terms, that " *a court dealing with the bankruptcy rejected the appeals against the compensation scheme stating that such appeals do not concern it.* " However, at that time he did not submit a copy of the judgment of the Polish court dated 26 February 2008. He did so only on 28 and 30 July 2009. The Commission could not therefore rely on the content of the complainant's letter dated 30 May 2008 in order to argue, in its opinion, that there was no new element in the complainant's correspondence of 28 and 30 July 2009.

39. In light of the above, the Ombudsman takes the view that, by having failed to register the complainant's letters dated 28 and 30 July 2009 as a new complaint on the ground that this correspondence did not include new evidence, the Commission acted against its own Communication and thus committed an instance of maladministration.

40. The Ombudsman notes that, subsequently and in the framework of the complainant's petition to Parliament, the Commission contacted the Polish authorities in order to verify this new evidence and the complainant's allegation that Article 13 ICSD was not properly implemented by the Polish authorities. The Commission has thus taken action which might have been expected from it if it had registered the complainant's relevant letters as a new (*second*)



complaint . In light of the above, the Ombudsman considers that he should not, at this stage, require the Commission to register the complainant's complaint of 28 and 30 July 2009 as such and thus satisfy the claim. A friendly solution is therefore not possible and the Ombudsman thus closes the case with the critical remark below.

C. Conclusions

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

The Commission erred and acted against its own Communication by not registering the complainant's letters dated 28 and 30 July 2009 as a new complaint. In those letters, the complainant included a copy of a Polish court judgment of 26 February 2008, which indeed constituted new evidence brought to the Commission's attention for the first time. This was an instance of maladministration.

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

P. Nikiforos Diamandouros

Done in Strasbourg on 20 December 2010

[1] [\[Link\]](#) OJ 1997 L 84 pp. 22-31.

[2] [\[Link\]](#) The complainant only attached to his complaint copies of the Commission's replies dated 12 November 2008 and 2 February 2009. However, the content of the Commission's remaining letters was described in the attached letters.

[3] [\[Link\]](#) This complaint, although validated by the Ombudsman's electronic submission system was not transferred to the Ombudsman's Register due to technical reasons. Only on 26 December 2009, when the complainant approached the Ombudsman (his letter was registered as further correspondence of an earlier complaint by the same complainant: Y) asking about his complaint of 23 October 2009, did the Ombudsman's services discover that he had submitted this latest complaint. His complaint was thus registered on 10 February 2010. The complainant was informed of the above on 18 March 2010.

[4] [\[Link\]](#) The complainant received a copy of that letter directly from the Polish Ministry of Finance.

[5] [\[Link\]](#) On 24 November 2010, the Ombudsman's services contacted informally the



Committee on Petitions of Parliament. The Committee confirmed that, in his petition, the complainant claimed that the Polish authorities had not correctly implemented the ICSD into Polish legislation and that, in this regard, he specifically referred to Article 13 of the ICSD. On 22 November 2009, the petition was declared admissible. On 11 May 2010, the Commission provided Parliament with the relevant information concerning the petition. The petition was closed by Parliament in July 2010.

[6] [\[Link\]](#) COM(2002)141 final.

[7] [\[Link\]](#) This translation has been provided by made by the Ombudsman's services.