

## Decision of the European Ombudsman closing the inquiry into complaint 790/2013/EIS against the European Commission

Decision

**Case 790/2013/EIS - Opened on 24/05/2013 - Decision on 08/10/2014 - Institution concerned** European Commission ( No further inquiries justified ) |

The case concerned the Commission's decision to close its file on an infringement complaint against Finland in which it was alleged that Finland discriminated against men in voluntary additional pension schemes. The complainants contended that the Commission's position was not consistent, as it had brought two similar infringement cases against Italy and Greece before the Court of Justice, whereas it did not do so in the case of Finland. In their view, the Commission also failed to provide adequate reasons for its position that it was not clear whether the Court of Justice would have concluded that the relevant Finnish law breaches EU law.

The Ombudsman inquired into the matter and found that, in the course of the inquiry, the Commission gave adequate reasons for its position, thus exercising the discretion it enjoys when dealing with infringement complaints. She therefore concluded that there were no grounds for further inquiries into the matter and closed the case.

### The background to the complaint

1. The complaint concerns the manner in which the Commission handled infringement complaint 2004/4404 against Finland, in which it was alleged that Finland discriminated against men in voluntary additional pension schemes.
2. The complainants are two Finnish men who are covered by such pension schemes.
3. Upon accession to the European Economic Area on 1 January 1994, Finland had to ensure equal pension benefits for men and women. To this end, it enacted Law 1038/97 on equalising measures in voluntary additional pension schemes (hereinafter the 'Equalising Act'), applicable retroactively from 1 January 1994. Before the entry into force of the Equalising Act, women could retire between the ages of 60 and 63. The retirement age for men was 65 years. The Equalising Act gave both men and women the possibility to choose a lower or a higher retirement age.



4. In 2002, the Finnish Ombudsman for Equality submitted an infringement complaint to the Commission. In her complaint she pointed out that, in some cases, the calculation of pension benefits on the basis of the Equalising Act gave rise to unfavourable results for male employees compared with their female counterparts. If a man chose to retire earlier under the new rules, his employment period prior to 1994 would not be taken into account, whereas if a woman did so, that period would be taken into account. Thus, a male employee with an employment history predating 1 January 1994 and who opted for a lower retirement age would receive a smaller pension than his female counterpart in the same circumstances. The Finnish Ombudsman for Equality questioned whether the Equalising Act is in conformity with what is now Article 157 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') and the relevant secondary legislation (Directive 2006/54/EC [1] , which replaced Directive 86/378/EEC [2] ). The Commission registered the infringement complaint under reference number 2004/4404.

5. Following an exchange of correspondence with the Finnish Government, the Commission opened infringement proceedings in 2004. It sent a letter of formal notice to Finland in January 2005, which was followed by a further letter of formal notice in October 2006. In June 2007, the Commission sent a reasoned opinion, which was followed by an additional reasoned opinion in September 2008.

6. In 2011, the complainants turned to the European Ombudsman for the first time (complaint 230/2011/EIS). The complainants alleged that the Commission had failed to reach a decision in infringement case 2004/4404 within a reasonable time. In the course of the Ombudsman's inquiry, the Commission closed the infringement case without taking further action. This occurred in November 2011, that is, more than seven years after the Commission opened the infringement proceedings. On 12 October 2012, the Ombudsman closed the inquiry with a critical remark, given that the Commission had failed to provide valid reasons to justify the delay.

7. In October 2012, one of the complainants wrote to the Commission anew and argued that the latter had failed to give adequate reasons for closing infringement case 2004/4404. In that letter, he claimed that the Commission should re-open the case. The Commission replied to that letter on 19 December 2012, regretting the delay that occurred in its handling of that complaint, whilst adding that the case had been very complex and difficult. Furthermore, it stated that it had already explained the reasons underpinning its decision to close the case, namely that: (i) it was not sufficiently clear that the Court of Justice of the European Union (hereinafter referred to as the 'CJEU') would have reached the same conclusion as the Commission had in its reasoned opinion; (ii) in other similar infringement cases, the Commission had not asked the Member States to correct pension entitlements retroactively either; and (iii) the Commission merely asked the other Member States concerned to correct their legislation in order to bring it in line with the relevant provisions of EU law. For these reasons, the Commission informed the complainant that it did not intend to re-open the case.

8. The complainants and the Commission subsequently exchanged further correspondence on the matter. The complainants criticised the Commission for having explained its decision to



close the case in only three sentences which they considered vague, misleading, insufficient and contrary to the facts. They also asked the Commission to register their new correspondence as a new infringement complaint in accordance with the Commission's Communication on Infringements of EU Law [3] (hereinafter referred to as the 'Commission's Communication'). The Commission refused to do so, given that the subject matter of the complaint was the same as that in infringement complaint 2004/4404.

9. On 24 April 2013, the complainants turned to the Ombudsman.

## **The inquiry**

10. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

1) The Commission failed to provide adequate reasons for closing infringement complaint 2004/4404.

2) In light of the arguments put forward by the complainants in their further letters, the Commission should either re-open infringement complaint 2004/4404, or register the complainants' further letters as a new complaint in accordance with the Commission's Communication.

11. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainants in response to the opinion. The complainants also submitted further observations. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

## **Allegation that the Commission failed to provide adequate reasons for closing infringement complaint 2004/4404 and related claim**

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

12. In support of their allegation, the complainants argued that (i) the Commission failed adequately to explain its decision to bring similar infringement cases against Italy and Greece before the CJEU but not to do so in respect of other Member States; and (ii) the Commission failed adequately to explain its view that it was not sufficiently clear that the CJEU would have reached the same conclusion as the Commission had in its reasoned opinion.

13. In its opinion, the Commission explained that it was indeed initially of the view that the fact that men lost the pension rights, that had accrued before Finland's accession to the European Economic Area, constituted an infringement of the EU anti-discrimination rules. It held this view



until it issued an additional reasoned opinion but subsequently decided not to bring the issue before the CJEU and simply requested the Member State concerned to bring its pension rules in line with EU law *for the future*. This approach, in the case of Finland, was in line with its approach in similar cases against France, Italy, Greece and Denmark.

**14.** As regards the Finnish case in particular, the Commission took the view that the complainants provided no additional facts or legal arguments that would justify re-opening the case. Instead, they reiterated the arguments that the Commission had already analysed in the context of infringement case 2004/4404. Against this background, the Commission saw no reason to re-open the case or to register the fresh correspondence as a new infringement complaint.

**15.** The Commission argued that according to settled case-law [4], it does not have to explain why it brings an action against a Member State for failure to fulfil its obligations under EU law. It is not even for the CJEU to judge whether or not the discretion that the Commission enjoys in this area was adequately or wisely exercised [5]. Furthermore, it follows from the relevant case-law that the Commission has a discretionary power which excludes the right of individuals to require it to adopt a particular position in relation to their infringement complaints or to bring an action for annulment against its refusal to take action [6].

**16.** Concerning the complainants' argument that it had failed adequately to explain its decision to bring the infringement cases against Italy and Greece before the CJEU but not those against other Member States, the Commission pointed out that the core issue in the cases against Italy and Greece was the different pensionable age for male and female civil servants. Since these Member States refused to change their laws on this issue for the future, the Commission was of the view that there was a clear violation of EU law. At the time when the two cases were referred to the CJEU, no question of retroactive compensation or other rectification of the situation as to the past arose. The question was raised only as a follow-up to the two judgments. The Commission then accepted that no measures to rectify past situations had to be taken by the Member States. Against this background, the remaining cases (including the Finnish one) were closed and were not referred to the CJEU. As the only common issue in the Italian, Greek and the Finnish cases was the rectification of *past* situations, the Commission adopted a consistent approach to all of them by not requiring the Member States concerned to rectify past measures.

**17.** As to the complainants' argument that the Commission did not adequately explain why, in its view, it was not sufficiently clear that the CJEU would have reached the same conclusion as the Commission had in its reasoned opinion, the Commission explained that it was possible that the CJEU would have decided that pension accrual rules regarding a period of time when a country was *not* a Member State of the European Union are outside the scope of EU law. In fact, there is no case-law on the matter. Initially, the Commission also took the view that Finland had violated EU law by enacting legislation on pension accrual for male employees that was to be applied to periods *before* accession if they chose early retirement *after* accession. However, it then decided not to require other Member States to rectify past situations either, even though in the other cases EU law was undoubtedly applicable, since the other Member



States concerned were already members of the EU when the disputed measures were adopted. Against this background, as the Finnish case was even more complex than the others from a legal point of view, it would not have been consistent to refer one case to the CJEU but not to refer the other cases to which EU law undoubtedly applied. Furthermore, the Commission pointed out that the burden of proof incumbent upon it in infringement cases is rather strict.

**18.** In their observations, the complainants explained that they do not intend to question the discretion the Commission enjoys when dealing with infringement complaints, but rather to point out that it did not live up to the obligations set out in the Commission's Communication on Infringements of EU Law when processing their complaint. They added that the reasons given by the Commission were either wrong, legally questionable or at least substantially weak.

**19.** First, the complainants argued that their new letters to the Commission constituted a new infringement complaint, given that the subject matter of their new complaint concerned the present and future situation in Finland. Thus, their new correspondence with the Commission should have been registered as a new infringement complaint. In their further observations, they also argued that the new correspondence clearly has a wider scope than infringement case 2004/4404 and referred to the transposition of Directive 2006/54/EC into Finnish law, the different legal treatment of the two sexes in Finland as well as some allegedly discriminatory judgments of the Finnish Insurance Court in that respect.

**20.** As to the Commission's argument that the essential issue in the Italian and Greek cases related to pensionable age, whereas the Finnish case essentially concerned retroactivity, the complainants rejected this view. They argued that the main issue in the Finnish case was clearly also pensionable age, as women could retire between 60 and 63 years of age, whereas the pensionable age for men was 65. The Equalising Act opened the way for weaker pensions for men compared to women in comparable circumstances as far as the period prior to 1 January 1994 is concerned. The Finnish case thus concerned exactly the same issue as the Italian and Greek cases and the Commission's position was not consistent. Furthermore, the CJEU had ruled in the *Niemi* [7] case that pension benefits such as those paid under the Finnish State Pensions Act fall within the scope of what is now Article 157 TFEU.

**21.** In reply to the Commission's argument that in the other cases, it had not asked the Member States concerned to compensate or rectify *past* unequal treatment of the discriminated sex either, the complainants said that such an argument is not legally valid. With reference to the case-law of the CJEU on state liability matters, and to the *Francovich* case [8] in particular, the complainants argued that private parties may claim compensation before national courts, if a Member State fails to transpose a Directive into national law. However, Directive 2006/54/EC does not contain any provisions regarding retroactive (financial) compensation for unequal measures. The reason provided by the Commission was therefore artificial, given that it has no authority to order such compensation.

**22.** In the complainants' view, the wording of the operative part of the CJEU's judgments in the cases against Italy and Greece ("*by maintaining provisions under which the age at which officials have the right to receive the old-age pension varies according to whether they are men*")



*or women , the Italian Republic has failed to fulfil its obligations under Article [157 TFEU]" and " by maintaining in force provisions which provide for differences between male and female workers with regard to retirement age and minimum required service [...], the Hellenic Republic has failed to fulfil its obligations under Article [157 TFEU]" ) also clearly suggested that the essential issue in these two cases was the same as in the Finnish case.*

**23.** Regarding the Commission's view that it was not sufficiently clear that the CJEU would have reached the same conclusion as the Commission had in its reasoned opinion, the complainants submitted that, instead of referring the case to the CJEU, the Commission took on the latter's role. Instead of taking into account the detailed legal arguments advanced by the complainants, it limited itself to putting forward artificial and generic explanations in support of its unconvincing position.

**24.** In conclusion, the complainants asked the Ombudsman to make use of the powers bestowed upon her by the Treaty and the Statute and suggested that she submit a special report to the European Parliament.

## The Ombudsman's assessment

**25.** Complaints by citizens constitute an essential means for informing the Commission of possible infringements of EU law. They enable the Commission effectively to fulfil its role of guardian of the Treaties.

**26.** It follows from settled case-law of the CJEU that the Commission enjoys a wide margin of discretion when assessing complaints submitted by citizens and that it is not obliged to commence infringement proceedings in every instance where a Member State has violated EU law. Citizens are therefore not entitled to require the Commission to adopt a particular position with regard to the substance of their infringement complaints [9] .

**27.** The fact that the Commission enjoys wide discretion clearly does not mean that in the handling of infringement complaints it is free from constraints flowing from fundamental rights and from principles of good administration. In this respect, Article 41 of the Charter of Fundamental Rights of the European Union, which provides for a right to good administration, is of particular relevance. It follows from the wording of Article 41(2)(c) of the Charter that this right includes " *the obligation of the administration to give reasons for its decisions* ". This duty is also enshrined in Article 18 of the European Code of Good Administrative Behaviour [10] . The Commission's position that in principle it does not have to give reasons for its decisions in such cases is therefore not in conformity with principles of good administration. The Ombudsman will thus assess whether the Commission gave adequate reasons for its decision not to re-open infringement case 2004/4404 and not to register the complainants' new correspondence as a new infringement complaint.

**28.** The Commission was initially of the view that there was an infringement in case 2004/4404 and intended to bring the matter before the CJEU. However, it subsequently decided not to ask



Member States to correct past situations retroactively. Therefore, the Commission decided to close infringement case 2004/4404.

**29.** The Ombudsman notes that by so doing, the Commission exercised the discretion it enjoys when handling infringement complaints. The complainants do not contest this discretion as such.

**30.** As regards the Commission's reasons for closing the case, the Ombudsman is not convinced by the complainants' argument that the cases against Italy and Greece concerned exactly the same issue as the Finnish case, namely, pensionable age. In fact, whereas all three cases concern the issue of different pensionable ages between men and women, in the Finnish infringement case, the national law was changed and the remaining issue was limited to the employment period prior to 1 January 1994 that would not be taken into account in respect of male employees. In the Italian and Greek cases, on the contrary, the Member States concerned refused to change their laws for the future. There is thus a clear difference between the Finnish case on the one hand and the infringement proceedings against Italy and Greece on the other hand.

**31.** As regards the Commission's argument that it was not sufficiently clear that the CJEU would have reached the same conclusion as the Commission had in its reasoned opinion, the Ombudsman notes that the Commission based its view essentially on the fact that, in the Finnish case, it was not clear whether or not the question would be covered by EU law, as the period in question predates the time when Finland acceded to the European Economic Area, that is, on 1 January 1994. The complainants considered this finding unconvincing and appeared to invoke the operative part of the judgments against Italy and Greece in support of their position. The Ombudsman is not convinced by this argument, since, as the Commission argued (see point 17 above), in the Finnish case, it was uncertain whether EU law applied. Besides, the wording of the operative part of the judgments against Italy and Greece ("by maintaining [...]") lends support to the Commission's view, since the infringements identified therein consist in the fact that the said Member States kept the relevant discriminatory laws in force, without there being any doubt about the temporal scope of application of EU law. The Commission's position therefore appears to be reasonable.

**32.** As to the complainants' argument about the Commission's allegedly erroneous comment regarding retroactive financial compensation and the case-law referred to in footnote 8 above, the Ombudsman notes that both in the Finnish and the English versions of its opinion, the Commission used the word "compensation" several times. While this led the complainants to believe that the Commission referred to financial compensation based on state liability, the context of the Commission's opinion clearly suggests that the Commission in fact meant to refer to a *rectification* of past situations, not to (financial) compensation based on state liability. While the Commission's opinion thus contains a linguistic imprecision, the complainants' reliance on the CJEU's case-law on state liability cannot call into doubt the Commission's position on the infringement complaint here at issue.

**33.** The complainants appear to argue further that, since it follows from the *Niemi* judgment





that pension benefits such as those paid under the Finnish State Pensions Act fall within the scope of what is now Article 157 TFEU, the Commission could not take the position it adopted in infringement complaint 2004/4404. In this respect, the Ombudsman notes that the said judgment does not concern the issue of whether the Commission could legitimately decide, by exercising the discretion it enjoys in such cases, to refrain from asking Member States to correct past situations retroactively. The complainants' position is thus not convincing.

**34.** In light of what has been stated above, the Ombudsman considers that in the course of this inquiry, the Commission has provided adequate reasons for its position. She thus concludes that there are no grounds for further inquiries into the complainants' allegation.

**35.** Turning to the complainants' claim, the Ombudsman points out that the fifth indent of the second paragraph of point 3 of the Commission's Communication provides that correspondence shall not be recorded as a complaint 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*". Against this background, the Ombudsman considers that in this case, the Commission would only have to register the complainants' new correspondence as a new infringement complaint if the complainants put forward new issues which the Commission has not yet had a chance to consider. According to the complainants, for the reasons referred to in point 19 above, their new correspondence clearly has a wider scope than infringement case 2004/4404. However, the Ombudsman considers that the main aim of their correspondence was to challenge the position the Commission took in relation to periods before 1994 when closing the infringement complaint. Given that the Commission has taken a position on this issue which it communicated to the complainants, and given that the Ombudsman considers this position to be reasonable, it follows that there are no grounds for further inquiries into this aspect of the complaint either.

**36.** Finally, the complainants suggested that the Ombudsman should submit a special report to the European Parliament in relation to this case. The circumstances in which the Ombudsman reports to the European Parliament are set out in Article 228(1) TFEU and in Article 3(7) of her Statute. The Ombudsman reports to Parliament in relation to an individual complaint or issue only where she has already found maladministration. As the Ombudsman has not found maladministration in this case, there is no basis for submitting a report to Parliament.

## Conclusion

On the basis of the inquiry into this complaint, the Ombudsman closes it with the following conclusion:

**There are no grounds for further inquiries into the complaint.**

The complainants, the Commission and the Finnish Equality Ombudsman will be informed of this decision.





Emily O'Reilly

Done in Strasbourg on 8 October 2014

[1] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204, p. 23.

[2] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ 1986 L 225, p. 40.

[3] COM(2012) 154 final.

[4] Case C-333/99 *Commission v France* [2001] ECR I-1025, paragraph 24; Case C-474/99 *Commission v Spain* [2002] ECR I-5293, paragraph 25; Case C-33/04 *Commission v Luxembourg* [2004] ECR I-10629, paragraphs 65 and 66; Case C-562/07, *Commission v Spain* [2009] ECR I-9553, paragraph 25.

[5] Case C-236/99 *Commission v Belgium* [2000] ECR I-5657, paragraph 28; Case C-383/00 *Commission v Germany* [2002] ECR I-2039, paragraph 19.

[6] Case C-87/89 *Sonito* [2000] ECR I-1981, paragraph 6.

[7] Case C-351/00 *Niemi* [2002] ECR I-7007.

[8] Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italy* [1991] ECR I-5357.

[9] See footnote 6 above and Case T-571/93 *Lefebvre frères et soeurs and Others v Commission* [1995] ECR II-2379, paragraph 60.

[10] " 1. Every decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision ."