

Decision of the European Ombudsman in case 425/2017/ANA on the European Commission's alleged failure to enforce EU law on online gambling services in certain Member States

Decision

Case 425/2017/ANA - Opened on 10/04/2017 - Decision on 02/03/2018 - Institution concerned European Commission (No maladministration found) |

The European Gaming and Betting Association (EGBA) which represents online gaming and betting operators in the European Union, made a number of infringement complaints to the European Commission arguing that the regulatory framework for online gambling in certain Member States was not in line with EU law.

As EGBA was concerned that the Commission did not follow up on these complaints, and did not engage in an open dialogue with stakeholders, it turned to the European Ombudsman.

The Ombudsman inquired into the case. In the course of the inquiry, the Commission decided to close all the infringement complaints. The Ombudsman noted that the Commission has wide discretion on whether and how to pursue infringement cases and that the decision taken fell within the boundaries of that discretion. The Ombudsman inspected the Commission's files concerning several Member States in order to evaluate the Commission's procedural handling of the infringement complaints in the light of the relevant rules and principles. On the basis of the inspection, she found that the Commission had not committed maladministration. Therefore, the Ombudsman closed the case.

Background to the complaint

1. The complaint was brought by the European Gaming and Betting Association (EGBA) [1] which represents several online gaming and betting operators licensed in the European Union. [2]

2. EGBA took the view that the European Commission was failing to ensure that the regulatory framework for online gambling services of certain Member States complies with EU law, notably the freedom to provide services (Article 56 TFEU), the freedom of establishment (Article 49 TFEU), and the obligations deriving from Directive 2015/1535 [3] (hereinafter the "TBT



Directive”).

3. In this connection, EGBA, together with seven online gambling associations, wrote to the European Commission on 14 December 2016 to complain about the Commission’s:

- lack of action in relation to the formal infringement proceedings it had initiated in 2013 against the gambling laws of Belgium, Cyprus, the Czech Republic, Lithuania, Poland and Romania;
- failure to refer Sweden to the Court of Justice of the European Union in 2014 in spite of Sweden’s failure to make changes to its gambling laws;
- lack of action concerning other Member States that introduced or maintained breaches of EU law in their national legislation;
- lack of action following judgments [4] finding that the German Interstate Treaty on Gambling is incompatible with EU law;
- lack of transparency with regard to questions from MEPs, access to documents, and meetings with stakeholders.

4. The complainant asked the Commission to:

- initiate infringement proceedings against those Member States whose national legislation in the gambling sector is contrary to the fundamental freedoms of the EU Treaties;
- examine the legislation of Member States that have not respected the obligation to notify draft legislation establishing technical regulations in accordance with the TBT Directive, and take action to discourage this practice;
- refer Sweden to the Court of Justice of the European Union (CJEU), as announced in 2014, for failing to comply with EU law;
- keep an open dialogue with stakeholders, such as MEPs and the industry.

5. The Commission replied to the complainant on 20 January 2017, and argued that it had been collaborating with Member States, and striving to achieve compliance with EU law in the online gambling sector by following up on infringement proceedings and maintaining an open dialogue with stakeholders.

6. Dissatisfied with the Commission’s reply, the complainant turned to the European Ombudsman on 10 March 2017.

The inquiry



7. The Ombudsman opened an inquiry into the Commission's alleged failure to handle properly a number of infringement complaints related to the online gambling sector

8. In the course of the inquiry, the Ombudsman's inquiry team conducted an inspection at the European Commission on 26 September 2017. The purpose of the inspection was to clarify the status of the infringement cases related to online gambling, by inspecting specific infringement files, namely: a) all the files of the 2013 package of infringements, as well as the file concerning Sweden; and b) a minimum of three files of other infringement cases that were still ongoing, especially those concerning Member States' failure to fulfil their obligations under the TBT Directive (violation of standstill clause, lack of notification etc.).

9. On 26 October 2017, the complainant informed the Ombudsman that it had received pre-closure letters for all the complaints it had submitted and was being invited to submit any new material within four weeks.

10. On 10 November 2017, the complainant sent comments on the report of the Ombudsman's inspection and some additional information.

11. On 7 December 2017, the Commission issued a press release, [5] stating that it had decided to close all infringement procedures and complaints in the gambling sector.

12. The complainant expressed its disagreement with this decision in further correspondence with the Ombudsman, as well as in an EGBA press release [6] .

13. The Ombudsman's decision takes into account all the information and the arguments that she received in the course of the inquiry.

Arguments presented to the Ombudsman

14. The complainant argued that the Commission had decided to close the complaints based solely on political reasons.

15. Furthermore, the complainant argued that the Commission had not followed up on the infringement complaints and had unjustifiably delayed their handling. Specifically, the complainant argued that the amount of time that had passed since the Commission had received the infringement complaints, and had decided to refer Sweden to the CJEU, was unreasonable [7] . According to the complainant, the Commission had not provided the stakeholders with any justification for that delay. The complainant further argued that the Ombudsman had decided in a case in 2006 that political considerations do not constitute a good reason for delaying the handling of a complaint. [8]

16. The complainant also argued that the Commission's procedures were not transparent.

17. In its reply, the Commission argued that it is committed to achieving compliance with EU law



in the online gambling sector and referred to its 2012 Communication “ *Towards a comprehensive European framework for online gambling* ” [9] , which contains initiatives and measures in relation to online gambling. The Commission said that it had been following up on all the infringement procedures initiated in 2013, by analysing all the relevant changes in national legislation that were made after the launch of the infringement package.

18. The Commission pointed out that it had opened new investigations after 2013, including against the Member States covered by the initial infringement action in 2013. In the case of Sweden, the Commission argued that Sweden had made significant efforts to reform its national framework for the provision of online gambling services.

19. Regarding transparency, the Commission stated that it maintained an open dialogue with stakeholders from the gambling industry through expert groups; it also engaged with national regulators from Member States, with a view to strengthening and ensuring adequate consumer protection, the prevention of gambling-related crime, money laundering activities and match fixing in sport events.

20. During the Ombudsman’s inspection, the Commission provided fuller explanations as to the developments that had taken place from the point of view of the handling of the infringement complaints concerned.

21. As to why it had not yet referred Sweden to the CJEU for breach of its EU law obligations, the Commission provided evidence to show that, in addition to changes to the relevant Swedish legislation, there were internal exchanges and disagreements within the Commission as to whether the legal situation in Sweden constituted a sufficiently clear case of an infringement of EU law to warrant the bringing of court proceedings. Hence, the Commission decided to continue the dialogue with the Swedish authorities, rather than bringing the case before the CJEU.

22. Regarding the other infringement complaints, the Commission presented information to show the actions it had taken in the handling of the package of infringements. As the inspection showed, these cases were pending in the internal approval circuit of the Commission, but it was only after the commencement of the Ombudsman’s inquiry that the Commission decided to close all the infringement cases relating to online gambling activities.

23. In the press release of 7 December 2017, the Commission defended its decision to close all infringement cases by referring to its commitment to a more strategic enforcement of EU law, by focusing on political priorities, as described in the Commission Communication “ *EU Law: Better Results through Better Application* ” (hereinafter the “ *2017 Communication* ”). [10] It further noted the fact that the CJEU had repeatedly recognised Member States’ rights to restrict gambling services, and had commended Member States’ ongoing efforts to modernise their legal frameworks on online gambling.

24. In its comments, EGBA expressed its strong objections to the Commission’s decision. It argued that the Commission’s decision was based exclusively on political grounds [11] and



constituted an abuse of power. Moreover, it stated that by excluding the entire sector of online gambling from the Commission's enforcement priorities, the Commission had breached its duty as Guardian of the Treaties. In EGBA's view the Commission's decision discriminates against the online gambling sector, and hinders one of the Commission's current priorities, the development of the Digital Single Market.

The Ombudsman's assessment

25. The Commission enjoys wide discretion in deciding whether and how to pursue infringement proceedings. [12] The decision to close infringement complaints on the basis that they do not represent a priority for the Commission at a particular time is covered by this wide discretion. The Ombudsman's role concerns the administrative and procedural handling of infringement cases by the Commission. The Ombudsman cannot interfere with the exercise of the Commission's margin of discretion as long as the Commission acts within the limits of its legal authority. However, the Ombudsman can, as a matter of good administration, seek to ensure that the Commission explains properly how and why it has exercised its discretion.

26. In this case, the Ombudsman notes that the Commission provided clear reasoning for its decision to close the infringement cases in question. It clearly stated that since the CJEU has already issued a number of judgments about the lawfulness of Member States' restrictions imposed on the provision of online gambling services, such complaints could be solved in national courts which have, when necessary, recourse to the preliminary reference mechanism of Article 267 of the Treaty on the Functioning of the European Union (TFEU). There is nothing in this case to suggest that the shifting of the Commission's enforcement priorities, as far as online gambling services are concerned, to national courts could be seen as a transgression of the boundaries of the Commission's discretion. Thus, the Ombudsman considers that further inquiries into the Commission's decision to **close the infringement cases** are not justified.

27. Regarding the Commission's procedural handling of the infringement complaints, and more specifically the **delay in dealing with the infringement complaints**, the Ombudsman notes that the Commission committed itself [13] to investigating complaints, with a view to arriving at a conclusion as to whether the case should be closed or taken to the formal stage of the infringement procedure, within one year from the date of registration of the complaint. It is clear from the wording of the Communication [14] ("*as a rule*") that this does not exclude the possibility that an inquiry might take longer than one year, particularly where a complaint raises difficult or complex issues or when, as in this case, the Commission is obliged to take a comprehensive, coherent and consistent approach about certain regulations and practices that involve many Member States.

28. The Ombudsman has accepted that the Communication does not lay down an absolute requirement for the Commission to arrive at a decision within one year from the day of registration. However, the Ombudsman has consistently taken the view that, when the one-year time limit is exceeded, good administration requires the Commission to provide specific and valid reasons for the time needed to deal with the case. [15] Generally speaking, the



Ombudsman will find maladministration in this context only if the time the Commission taken to handle the infringement complaints was unnecessarily extended as the result of negligence by the Commission or unfounded postponements. [16]

29. However, having carefully examined the relevant documents in the Commission's files, the Ombudsman considers that the Commission followed the infringement proceedings in question closely and carefully throughout the years, and collaborated consistently with Member States and stakeholders in order to achieve alignment of the national legal frameworks with EU law. Accordingly, the time needed to deal with the complaints seems to have been caused by the sheer complexity of the infringement package, involving a large number of Member States, ongoing court cases on the matter, before both national courts and the CJEU, and internal exchanges and consultations.

30. Regarding the **issue of transparency**, from the facts presented to the Ombudsman, the Commission seems to have provided sufficient opportunity for dialogue with stakeholders on several occasions, and in various contexts. The Ombudsman also notes that the Commission, during that period, kept the complainant regularly informed about its own infringement complaints.

31. In the course of this inquiry, the complainant contended that the Commission had delayed making a decision on the infringement complaints for political reasons; and, when the Commission finally did decide on the infringement complaints, that its decisions were based solely on political considerations. In support of these contentions, the complainant referred to a decision of the European Ombudsman from 2006. [17] The Ombudsman notes that the 2006 decision dealt with a situation in which the Commission (1) had failed to take any decision on the infringement complaint in question and (2) had said explicitly that its failure to take a decision was because the complaint was " ". The Ombudsman notes that, in the present case, the Commission has now taken decisions on the infringement complaints in question. The Ombudsman notes also that, in her view, there were valid reasons for the delay in taking decisions on these complaints. Accordingly, the Ombudsman does not accept either that the delay in these cases, or the eventual decisions, reflected purely political considerations.

32. To conclude, the Ombudsman finds that the Commission's handling of the infringement complaints on online gambling does not constitute maladministration. Therefore, the Ombudsman closes the case.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

There is no maladministration on the part of the European Commission arising from the issues raised by the complainant in this case.

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



Emily O'Reilly

European Ombudsman

Strasbourg, 02/03/2018

[1] <http://www.egba.eu/about-us/> [Link] .

[2] Branschföreningen för Onlinespel (BOS), Danish Online Gambling Association (DOGA), Deutscher Sportwettenverband e.V. (DSWV), Gibraltar Betting and Gaming Association (GBGA), Malta Remote Gaming Council (MRGC), Österreichische Vereinigung für Wetten und Glücksspiel (OVWG), Remote Gambling Association (RGA).

[3] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1.

[4] Joined cases C-316/07, C-409/07, C-410/07, C-358/07, C-359/07 and C-360/07 *Markus Stoß* , judgment of the Court of 8 September 2010; Case C-46/08 *Carmen Media Group Ltd* , judgment of the Court of 8 September 2010; Case C-409/06 *Winner Wetten GmbH* , judgment of the Court of 8 September 2010; Case C-336/14 *Criminal proceedings against Sebat Ince* , judgment of the Court of 4 February 2016.

[5] European Commission Press Release of 7 December 2017 “Commission closes infringement procedures and complaints in the gambling sector”. Available at: http://europa.eu/rapid/press-release_IP-17-5109_en.htm [Link].

[6] <http://www.egba.eu/junckers-political-commission-leaves-gambling-reforms-courts/> [Link].

[7] Based on Article 41 of the Charter of Fundamental Right of the EU, Article 17 of the European Code of Good Administrative Behaviour, as well as the Communication from the European Commission to the Council and the European Parliament “ *Updating the handling of relations with the complainant in respect of the application of Union law* ”, COM (2012) 154 final, 2.04.2012.

[8] Case 289/2005/(WP)GG.

[9] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, “ *Towards a comprehensive European framework for online gambling* ”, COM(2012)596 final Strasbourg,



23.10.2012.

[10] Communication from the Commission - “ *EU law: Better results through better application*”, C/2016/8600,

OJ C 18, 19.1.2017, p. 10, available at

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=urisrv:OJ.C_.2017.018.01.0010.01.ENG&toc=OJ:C:2017:018:T
[Link].

[11] As per the decision of the Ombudsman in Case 289/2005/(WP)GG.

[12] C-247/87 *Star Fruit v Commission* , ECLI:EU:C:1989:58, para. 11; C-87/89 *Sonito and others v Commission* , C-87/89, ECLI:EU:C:1990:213, para. 6.

[13] Communication from the European Commission to the Council and the European Parliament “ *Updating the handling of relations with the complainant in respect of the application of Union law* ”, COM (2012) 154 final, 2.04.2012

[14] Ibid.

[15] See, for instance, the Ombudsman's decisions on complaints 731/2012/JN, point 33; 2944/2004/(GK)(OV)ID, points 1.6-1.7; 706/2007/(WP)BEH, points 32-34; and 230/2011/(TS)EIS, points 27-28; as well as the Ombudsman's own-initiative inquiry OI/5/2016/AB, 14 September 2017.

[16] See for example cases: 706/2007/BEH, 230/2011/EIS, 731/2012/JN.

[17] Decision of the Ombudsman in Case 289/2005/(WP)GG