



REPORT ON THE INSPECTION OF DOCUMENTS AND THE MEETING OF THE EUROPEAN OMBUDSMAN'S INQUIRY TEAM WITH THE EUROPEAN COMMISSIONS'S REPRESENTATIVES CONCERNING INFRINGEMENT PROCEEDINGS AGAINST GERMANY ON PLANNING LAWS AND RETAIL SPACE

COMPLAINTS: 2238/2021/MHZ and 2249/2021/MHZ

Cases title: How the European Commission handled infringement proceedings against Germany about planning laws and retail space

Date: Tuesday, 22 March 2022

Remote inspection arrangements

Present

European Commission (EC):

██████████ Senior Expert - Coordinator for inter-institutional relations - relations with the European Ombudsman, SG

██████████ (EC); Policy Assistant - Ombudsman and petitions - Comitology (Register) - DG GROW

██████████ (EC); Head of Unit - Single Market Enforcement, Enforcement II DG GROW

██████████ (EC); Deputy Head of Unit - Single Market Enforcement, Enforcement II DG GROW

██████████ (EC); legal officer - Single Market Enforcement, Enforcement II DG GROW

██████████ (EC); Senior Expert - Ecosystems I: Chemicals, food, retail, Food, Retail, Health, DG GROW

European Ombudsman (EO):

██████████ Principal Advisor on Charter Compliance

██████████ Inquiries Officer



[REDACTED] Inquiries Trainee

Purpose of the inspection of documents / meeting

The purpose of the meeting was to discuss questions relating to the documents which had been transmitted by the EC and inspected by the EO's team, and to clarify certain issues concerning the complaints.

Introduction and procedural information

The EO's team opened the meeting by welcoming the EC's representatives and thanking them for accepting the meeting invitation. Prior to the meeting, the EC representatives had shared with the EO the documents of the file by using secured means of transmission. After the meeting, the EC representative sent additional documents by the same means.

At the beginning of the meeting, Ms Marta Hirsch-Ziembińska explained the procedure of remote inspections of documents. She explained that all documents shared with the EO by the EC are exclusively used for the purposes of the inquiry. During the inquiry, they are kept in a secure digital safe with access on a strict 'need to know' basis.

Ms Hirsch-Ziembińska further explained that following the meeting the EO team will draft a report that will be shared with the EC. The report will be sent to the complainant and published on the EO's website but confidential information will not be disclosed.

Documents Inspected

The list of inspected documents constitutes an annex to the report.

The Commission's representatives informed the EO's inquiry team that all documents listed under **1. General Documents** are not confidential.

All documents listed under **2. Documents relating to case 2008/4946 - Restriction a l'établissement de surfaces commerciales**, and under **3. Documents relating to case 2015/4207 restrictions on retail establishment** are confidential.

In accordance with Articles 4.8, 9.3 and 9.4 of the Implementing Provisions of the European Ombudsman, the Ombudsman's inspection will not result in any other person obtaining access to the confidential documents.



Information exchanged - comments made by the European Commission representatives during the inspection meeting

In reply to the questions put by Ms Hirsch-Ziembinska, the European Commission's representatives clarified the following issues concerning the inspected documents and the cases in general:

Contextualisation of the case

The cases concern two infringement proceedings launched by the European Commission against Germany relating to planning laws and retail space. The first case was brought by IKEA in 2008, and was later merged with a similar complaint by Decathlon in 2014. In order to understand the time the case handling procedures have taken for these cases, the Commission emphasised the importance of understanding the legal and political complexities shaping the broader context in which the two cases exist.

The cases present a complicated conflict arising from, on the one hand the EU freedom of establishment, and on the other hand, concerns relating to town and country planning, the protection of the environment and the protection of consumers. These conflicts represent much broader debates on the role of city centres and town and country planning, topics that are very important on a political level, and that are important to keep in mind when examining the reasons why these specific cases have been so protracted.

Another important factor rendering these cases particularly complex is the role of EU law in multi-level legal systems, such as Germany, but also Austria and Spain that have legal systems on federal as well as regional and communal levels. Finally, there is not only a question of vertical legal systems, but also horizontal legal system as these cases invoke judicial mechanisms in several different *Länder* in Germany. In short, it is important to understand that these cases exist in a complex legal patchwork.

How does the Commission justify the length of the procedures?

The infringement procedure that was opened in 2008 is one of the longest case handling procedures to date. An initial letter of formal notice was sent to the German authorities in 2009, followed by an additional letter of formal notice in 2015.

In 2017, the cases were suspended because it was decided at the political level that the Commission needed to wait for the final judgement in the CJEU's judgement in *Visser* (C-360/15). There were no other considerations. After the judgement was issued in 2018, the Commission relaunched the cases and took informal steps.

In 2018, the European Commission published a communication identifying best practices to guide Member States' reforms to strengthen the competitiveness of the European retail sector (Com(2018)219), as well as a practical guide for competent authorities on the revitalisation and modernisation of the small retail sector. Under the German presidency of the EU, the EU also developed a key



policy framework for sustainable urban development in Europe. These communications are based on workshops and other initiatives including stakeholders involved in these cases.

More specifically as regards the German authorities, the European Commission organised a considerable number of bilateral meetings and other types of meetings, such as the meeting on 21/01/2019 involving the German authorities (Federal and *Länder* level), the complainants and several services of the European Commission (Document 2.60). It was a choice of the Commission to pursue the dialogue by way of discussion and not through formal infringement steps, which has made progress in these cases a slow process.

Another reason that further protracted the cases was the German elections in 2017, leading to there being new ministerial developments. The Commission examined the new German proposals (guidelines to the *Länder*). Dialogue with the German authorities is being continuously pursued.

Throughout these lengthy discussions with the German authorities, the European Commission has also maintained regular exchanges with the complainants, and met with them. A dedicated meeting allowed representatives from DG GROW, the Commission's Legal Service, the German authorities at all levels and the complainants to meet and discuss. Such meetings with complainants, national and regional authorities and relevant Commission services are rather exceptional but in these cases a meeting took place with the objective to make progress in a complex legal and politically sensitive situation. In addition, the European Commission also maintained informal exchanges with the complainants to keep them in the loop.

However, although communication with the complainants and the German authorities has been diligently maintained, it has been a long and complex procedure. The Commission does not expect to close the cases any time soon since the dialogues are still ongoing and the German authorities have several more steps to take.

Documentation on the cases

When asked about the maintaining of documentation of all meetings including informal meetings, the Commission noted that minutes of meetings are prepared for all meetings with external stakeholders. Internal minutes are prepared for meetings that are concluded with clear operational solutions. Other meetings are often summarized in brief e-mails. In relation to the opinion of the Legal Service in these cases with regard to the draft 2nd Complementary Letter of Formal Notice proposed in 2016, the European Commission added the agreement of the Legal Service to the case file after the meeting (supplement to Document 2.48, screenshot Ares)

Questions relating to the prospects of resolving the cases

When asked on the prospects of resolving the cases, especially in relation to what is meant when the Commission closes a case on so called 'opportunity grounds', the Commission responded the following:



The Commission can close a case on ‘opportunity grounds’ where it finds that although the national law/practice is clearly not compatible with EU law, still the case carries certain features and characteristics lending themselves to rather closing the case. Closing the case on ‘opportunity grounds’ does not mean that national law concerned is compatible with EU law. When closing a case on opportunity grounds, the Commission’s closing letter meticulously details the legal situation and why it is incompatible with EU law, as well as the specific circumstances in a Member State that lend themselves to closing the case. As a result, the letter allows the complainant to move forward with the case at the national level, such as asking the national courts to address the legality of a specific situation. If the complainant decides to bring a case that has been closed on opportunity grounds to the national court, the national court can decide to ask for a preliminary ruling from the Court of Justice of the European Union (CJEU), a procedure in which the European Commission regularly intervenes.

An example of cases that are systematically closed on opportunity grounds relates to the topic of gambling. Although these cases can be most often incompatible with EU laws, it has been decided that it is neither cost-effective nor appropriate to pursue these cases further. The situation of the complainant is not undermined by closing a case on opportunity grounds because of the possible redress before national courts.

As regards the two cases that are the focus of the EO’s inquiry, it may be an option to close them on opportunity grounds, however nothing is decided yet.

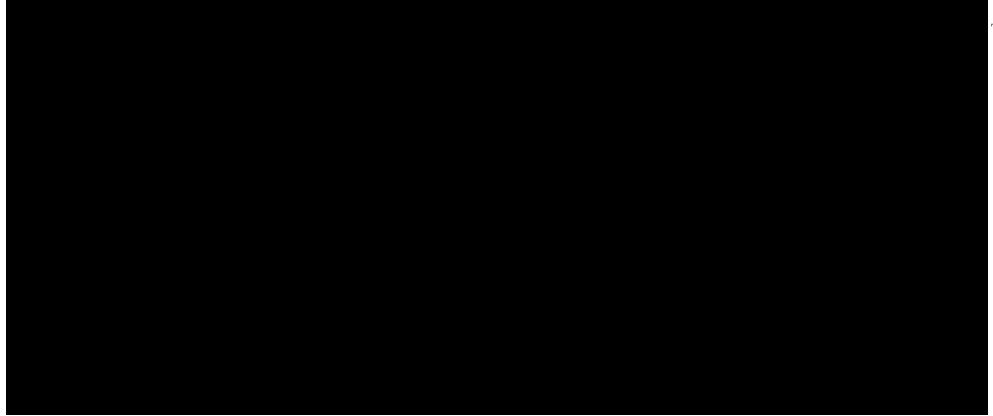
It is extremely difficult to forecast how the cases might play out. Currently, the further developments of the cases depend on the pending responses from the German authorities, relating to their work on developing internal guidelines relating to the implementation of planning and retail establishment laws. The meetings with the German authorities that are expected to take place over the next few weeks will be important in establishing what the next steps are.

Conclusion of the inspection of documents / meeting

The meeting was concluded by Ms [REDACTED] thanking the European Commission for their cooperation.



Strasbourg, 22/03/2022





Annex: List of documents inspected

1. General Documents (non - confidential)

1.1 Leipzig Charter	24/05/2007
1.2 CJEU ruling C-400/08	24/03/2011
1.3 CJEU ruling C-360/15 Visser	30/01/2018
1.4 Communication “A European retail sector fit for the 21st Century”, COM (2018)219 final	19/04/2018
1.5 Facing the future - A practical guide for revitalising and modernising the small retail sector	19/04/2018
1.6 The new Leipzig Charter	2020
1.7 Document implementing the new Leipzig Charter	2020

2. Documents relating to case 2008/4946 - Restriction a l'établissement de surfaces commerciales (Confidential)

2.1 Complaint	01/12/2008
2.2 Acknowledgment of receipt	03/12/2008
2.3 Letter of Formal Notice	26/06/2009
2.4 Email from IKEA to EC	30/07/2009
2.5 German response to Letter of Formal Notice	28/08/2009
2.6 Annexes German response	28/08/2009
2.7 Complementary German response to Letter of Formal Notice	16/11/2009
2.7a Annex 1	



2.7b Annex 2	
2.8 Minutes of meeting with German authorities of 01/06/2010	16/06/2010
2.9 Complementary German response to Letter of Formal Notice	01/07/2010
2.10 Letter from IKEA to EC	19/08/2010
2.11 Minutes, meeting with complainant 15/10/2010	15/10/2010
2.12 Letter from IKEA to EC	18/10/2010
2.12a Annex	
2.13 German position paper: Räumliche Steuerung des Einzelhandels in Deutschland	23/11/2010
2.14 Letter from IKEA to EC	02/12/2010
2.15 Letter from IKEA to EC	10/12/2010
2.16 Letter from German authorities to EC	16/12/2010
2.17 Letter from German authorities to EC+ 2 Annexes (EN)	16/12/2010
2.18 Letter from German authorities to EC	05/07/2011
2.19 Draft internal note - state of play 2008/4946	06/10/2011
2.20 Letter from IKEA to EC	18/10/2011
2.21 Memo for meeting EC Cabinet-German authorities	21/10/2011
2.22 Email from IKEA to EC	28/10/2011
2.22a Annex 1	
2.22b Annex 2	
2.23 Non-paper from the German authorities	07/02/2012
2.23a EN version	
2.24 German authorities reply to the non-paper	26/04/2012
2.25 Letter from IKEA to EC	15/05/2012



2.26 Fact Finding Mission Report (Minutes)	29/05/2012
2.27 Fact Finding Mission Report (Report)	12/06/2012
2.28 Letter from IKEA to EC	01/03/2013
2.29 Email meeting report with IKEA	24/06/2013
2.30 Briefing for meeting EC with IKEA	13/09/2013
2.31 Letter from IKEA to EC	06/11/2013
2.32 Exchange emails EC - German authorities	13/03- 22/04/2014
2.33 Briefing meeting between EC and IKEA	02/04/2014
2.35 German presentation at 49th Expert Group	06/05/2014
2.36 Workshop infringements restrictions related to retail establishments with German authorities	08/05/2014
2.37 Report meeting with German authorities	05/06/2014
2.38 Letter from IKEA to EC part 1	12/06/2014
2.38a Letter from IKEA to EC part 2	
2.39 Letter from IKEA to EC	24/10/2014
2.40 Note to the Cabinet Commissioner Bienkowska	02/02/2015
2.41 EC sending the Complementary Letter of Formal Notice to German authorities	19/06/2015
2.42 Letter from EC to IKEA providing information on the Complementary Letter of Formal Notice	08/07/2015
2.43 German reply to the Complementary Letter of Formal Notice	18/08/2015
2.44 Email from the IKEA to EC	16/12/2015
2.45 Letter from IKEA to EC + 2 Annexes	10/02/2016
2.46 Letter from EC to IKEA	11/03/2016
2.47 Draft 2nd Complementary Letter of Formal Notice to German Authorities	19/10/2016



2.48 Legal Service agreement to draft a 2nd Complementary Letter of Formal Notice (screenshot Ares)	19/10/2016
2.49 Internal Email exchange EC DG GROW	07- 18/11/2016
2.50 Letter from IKEA to EC	08/03/2018
2.51 Email from Decathlon - to EC with 2 Annexes	10/03/2018
2.52 Response from EC to Decathlon	14/06/2018
2.53 Exchanges of emails from EC to German Authorities	24- 27/07/2018
2.54 Letter from EC to IKEA	07/08/2018
2.55 Letter from IKEA to President Juncker	07/08/2018
2.55a Same letter to Commissioner Timmermans	
2.55b Same letter to Commissioner Moscovici	
2.56 Email from EC to IKEA and Decathlon	23/10/2018
2.57 Email from German Authorities to EC	23/11/2018
2.57a Annex 1	
2.57b Annex 2	
2.57c Annex 3	
2.57.de Letter from German Regional Authorities to German Federal Authorities	14/11/2018
2.58 EC internal note to Cabinet Commissioner Bienkowska	28/11/2018
2.59 EC internal note on the contributions of Baden-Württemberg and Nordrhein-Westfalen on possible derogations/deviations to planning rules	21/01/2019
2.60 EC meeting report between German authorities, IKEA and Decathlon and EC facilitator (sent by internal e-mail 20/03/2019)	21/01/2019
2.61 Letter from EC to IKEA	31/01/2019



2.62 Exchange of emails between German authorities and EC -	10/4-6/05/2019
2.65 Letter from EC to German authorities	19/07/2019
2.66 Letter from EC to German authorities	13/08/2019
2.67 Letter from German authorities to EC	28/10/2019
2.67a Annex	
2.69 Letter from EC to German authorities	14/11/2019
2.70 Letter from IKEA and Decathlon to EC	16/12/2019
2.71 EC internal report meeting between IKEA, Decathlon, Kaufland and EC	05/02/2020
2.72 Letter from EC to IKEA and Decathlon	27/02/2020
2.73 Letter from German authorities to EC	08/04/2020
2.74 Letter from IKEA and Decathlon to EC	23/07/2020
2.75 EC internal briefing meeting of EC Cabinet with IKEA and Decathlon	28/09/2020
2.76 Letter from IKEA and Decathlon to German authorities	05/10/2020
2.77 State of play - EC internal document	19/11/2020
2.78 Letter from EC to IKEA and Decathlon	23/11/2020
2.79 Letter from EC to German authorities	14/01/2021
2.80 EC internal minutes package about EC meeting with German authorities	27/01/2021
2.81 German authorities submission to EC	09/02/2021
2.81a Annex (guidelines)	
2.82. a EC internal briefing for the telephone call EC-German authorities	18/02/2021
2.82.b EC internal minutes of EC meeting with German authorities (in an email)	19/02/2021
2.82 Letter from German authorities to EC	03/03/2021
2.83 Letter from EC to German authorities	09/06/2021



2.84 Letter from German authorities to EC	17/06/2021
2.85 Letter from IKEA and Decathlon to EC	08/07/2021
2.86 EC internal note to the file	12/07/2021
2.87 Letter from EC to Ikea-Decathlon	04/08/2021
2.88 EC internal report on EC senior level meeting	20/10/2021
2.89 Internal EC DG GROW document	13/10/2021
2.90 EC internal email about the Coherence review meeting of 20 October 2021	20/10/2021

3. Documents relating to case 2015/4207 restrictions on retail establishment (confidential)

3.1 Complaint	01/08/2014
3.2 Acknowledgement of receipt to Decathlon - with Annex	14/10/2014
3.3 Letter to Decathlon from EC on Complementary Letter of Formal Notice	08/07/2015
3.4 Exchange e-mails EC Legal Service to DG GROW	30/09/2015
3.5 Decision CTS	10/12/2015
3.6 Internal EC document <i>Etat de dossier</i>	20/11/2015