




**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL FOR INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP  
AND SMES  
Single Market Enforcement  
**E.2 – Enforcement II**

Brussels, 14.10.2022  
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Marta HIRSCH-ZIEMBINSKA  
Principal Advisor on Charter  
Compliance  
European Ombudsman  
Directorate of Inquiries

By email: 

**Subject: Complaints 2238/2021/MHZ and 2249/2021/MHZ – letter of the European Ombudsman of 15 July 2022 to the President of the European Commission**

Dear Ms Hirsch-Ziembinska,

We would like to provide you with a response to the preliminary findings and suggestions expressed by the European Ombudsman in the letter of 15 July 2022 mentioned above.

Since the inspection meeting on 22 March 2022, we continued our exchanges with the German authorities to finalise the assessment and progress in view of a decision in the pending infringement cases, notably through the following steps:

- An online meeting with the German authorities took place on 4 April 2022;
- Following up that meeting, a list of detailed questions on the guidelines for derogation procedures issued by the German Conference of Spatial Planning Ministers (MKRO) in December 2020 was submitted to German Government on 23 May 2022;
- The case was also discussed at a package meeting between the German authorities and the Commission services at Deputy Director-General level on 4 July 2022;
- On 31 August 2022, the German authorities submitted their response to the questions sent to them on 23 May 2022;
- Further exchanges with the German authorities to clarify some of their recent proposals took place on 23 September and 11 October 2022.

In the meantime, we have also taken further contacts with the complainants, with whom we also are planning another meeting in the second half of October 2022.

All the meetings and exchanges mentioned above are meant to collect the necessary information with a view to a decision on the pending infringement procedures by early 2023.

We acknowledge that the infringement procedures have been pending for a long time. The complaint in case INFR(2008/4946) was submitted almost 14 years ago, the complaint in case INFR(2015/4207) – almost 8 years ago. The last Commission decision in these cases was taken more than 7 years ago.

However, as outlined during the inspection meeting on 22 March 2022, there have been reasons for the delay, which cannot be attributed to the Commission's own failure to take a decision. Amongst these reasons we would like in particular recall that:

- The cases subject to this investigation are legally complicated and politically highly sensitive. At their centre are two conflicting issues:
  - The economic interest of the freedom of establishment in the retail sector;
  - Justified public interest objectives such as environmental considerations, consumer protection and social and territorial cohesion;
- These cases are linked to ongoing political debates about dying city centres, reduction of land-take, urban congestion and the European Green Deal;
- The Commission has been constantly following the issue of retail establishment in various Member States. The situation across the EU is very complex, comprising varying rules and regulations at national, regional and, at times, even local level. The German cases thus cannot be seen in isolation;
- In Germany, as in other federally organised Member States, the retail regulatory framework is fragmented. The regulatory framework for retail establishment is set at Länder level while some autonomy rests with the municipal level with regard to applying this legal framework;
- During the pending procedures, two important rulings of the CJEU have been rendered in the field of retail establishment, respectively on 24 March 2011, in case C-400/08, *Commission v/ Spain* <sup>(1)</sup> and on 30 January 2018, in joined Cases C-360/15 and C-31/16, *Visser* <sup>(2)</sup>. Moreover, Member States had until 28 December 2009 for the implementation of the Services Directive 2006/123/EC.

Before the above-mentioned CJEU ruling in 2018 (in the *Visser's* case), Germany contested the view of the Commission. Since the ruling, however, the German authorities have engaged in constructive discussions to accommodate the concerns expressed by the Commission. These discussions were complex and time-consuming themselves. In these discussions, modifications of the existing complex legal framework for spatial planning appeared unrealistic due to the abovementioned reasons. However, strengthening the instrument of derogation procedures (*Zielabweichungsverfahren*), already existing in the federal legal framework, offers some potential for ensuring better EU law compliance of the German retail establishment framework in practice.

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<sup>(1)</sup> Judgment of the Court of 24 March 2011, *Commission v/ Spain*, C-400/08, ECLI:EU:C:2011:172.

<sup>(2)</sup> Judgment of the Court of 30 January 2018, *Visser*, joined Cases C-360/15 and C-31/16, ECLI:EU:C:2018:44.

In view of the above-described circumstances, the Commission disagrees with the view expressed in the response of Decathlon and IKEA of 31 May 2022 to the inspection report that the Commission has failed to respect Article 258 TFEU. The complainants claim that the Commission was obliged to deliver a reasoned opinion.

The CJEU has constantly recognised that the Commission enjoys discretionary power in deciding whether or not, and when, to start an infringement procedure or to refer a case to the Court of Justice. We have already outlined during the inspection meeting that the Commission can close a case on opportunity grounds although a national law or practice is clearly not legally compatible with EU law. The Commission is thus not obliged to deliver a reasoned opinion even if it considers that a Member State has failed to fulfil an obligation under the Treaties.

The Commission works in partnership with the Member States to try to solve problems concerning the application of EU law. According to the principle of sincere cooperation, the EU and the Member States assist each other in carrying out tasks under the Treaties (Article 4(3) TEU). In the present case, the Commission is fully committed to actively work with the German authorities to develop a viable system for retail establishment for the benefit of economic operators such as the complainants.

Yours sincerely,

*[electronically signed]*

Salvatore D'ACUNTO  
Head of Unit

Contact:

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c.c.: GROW MEDIATEUR