



31.10.2018

NOTICE TO MEMBERS

Subject: Petition No 0237/2018 by Torsten Matzak (German) on the alleged breach of the free movement of persons by German authorities

1. Summary of petition

The petitioner, currently living in Spain, is of the opinion that Germany is violating provisions on free movement. The German authorities, in particular the German Bundestag, allegedly requested that he name an authorised recipient for communications because he resides outside Germany. The petitioner states that this has resulted in additional costs and delays for him. The petitioner is seeking an investigation into the matter.

2. Admissibility

Declared admissible on 6 July 2018. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 31 October 2018

‘The petitioner is a German national living in Spain. He claims that the administration of the German Parliament puts German citizens who reside in another EU Member State at a disadvantage compared to citizens who reside in Germany in respect of their procedural rights in Germany because it required him to name an authorised recipient in Germany for various administrative procedures. According to him, the administration of the German Parliament referred for its request to § 15 of the German Administrative Procedure Act (*Verwaltungsverfahrensgesetz (VwVfG)*). This provision concerns the serving of documents in administrative procedures (administrative acts or administrative agreements) for persons who do not reside in Germany. It provides that they shall, upon request, provide the authority with the name of an authorised recipient in Germany, otherwise any document sent to the person concerned shall be regarded as received on the seventh day after its posting, or on the third

day after its electronic transmission.

According to the petitioner, this implies procedural delays, additional efforts and costs for EU citizens like him who make use of their right to free movement. He considers that the documents could instead be sent by regular post, claiming that despite the delay inherent in cross-border mail service, the Spanish mail service is not less reliable than delivery services in Germany. He alleges that this undermines the exercise of the right to free movement in the EU.

The Commission's observations

The petitioner does not specify the nature of the various administrative procedures nor the procedural rights for which he claims he is disadvantaged and that undermine his right to free movement. The Commission would therefore like to recall that there is, at the current state of EU law, no EU competence to harmonise national administrative law, or national administrative procedural law, in general.

The petitioner considers that instead of asking for an authorised recipient in Germany the administration of the German parliament should send the documents directly to him in Spain by regular mail. Although, only national authorities and courts can provide reliable information on national law, the Commission has the impression that the provision in national administrative procedural law indicated by the petitioner may already provide for this, as it seems to imply that the authorities will revert to regular or electronic mail if the person did not name an authorised recipient in Germany.

In so far as the petitioner considers that having to name an authorised recipient in Germany undermines the exercise of the right to free movement, Article 21 of the Treaty on the Functioning of the European Union (TFEU) stipulates that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. The respective limitations and conditions are set out in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.¹

Even though the petitioner alleges a breach of EU law on free movement, it should be recalled that his right to enter and reside in Spain as such is not affected by a request to name an authorised recipient in Germany in relation to 'various administrative procedures' in Germany where he does not reside.

The Court of Justice of the European Union ("the Court") has however held that Article 21 TFEU also precludes national legislation which places certain of the nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State². Provisions that are liable to hamper the exercise of that right, or deter an EU national from leaving the country of origin in order to exercise his right to freedom of movement, therefore constitute an obstacle, or restriction, to that freedom,

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004L0038:20110616:EN:PDF>.

² Judgments in *De Cuyper*, C-406/04 , para 39; *Nerkowska*, C-499/06 , para 32; *Grunkin Paul*, C-353/06, EU:C:2008:559, para 21; *Vardyn*, C-391/09, EU:C:2011:291, para 68

even if they apply regardless of nationality of the EU citizens concerned¹.

However, it follows from the Court's case law that in a policy area where EU law does not provide for harmonisation, and where therefore substantive and procedural differences remain, there is no guarantee that making use of free movement rights will be neutral as regards complexity for the person concerned in administrative steps for the specific area in all circumstances².

Moreover, the Court has held that the provision or decision in question must be liable to cause 'serious inconvenience' to those concerned when exercising free movement rights. It is for national authorities and a national court to decide whether there is a real risk that it might have significant consequences on, among other things, the exercise of the right of residence conferred by Article 21 TFEU³.

The petitioner would therefore have to substantiate further his general claims of procedural delays, additional efforts and costs and effects on procedural rights if he wanted a national court to find that they are indeed liable to cause serious inconveniences that bear the real risk of significant consequences on his exercise of the right to free movement.

In addition, the consequence when not naming an authorised recipient according to the national provision in question seems to be the legal fiction of the document having been delivered after a certain delay. This seems to imply that a person who does not reside in Germany and who does not name an authorised recipient may have to bear the consequences for the administrative procedure of not having received a document or decision.

In this respect, the Commission would like to recall that the Court has held that a purely hypothetical prospect of an obstruction of the right of free movement does not establish a sufficient connection with European Union law to justify its application⁴. The risk that an EU citizen who resides in another Member State may have to accept the consequences that he will be deemed to have received an administrative document or decision that was sent by regular mail in an administrative procedure in his Member State of nationality for which he does not name an authorised recipient is an event that is too uncertain and indirect a possibility for that legal provision to be capable of being regarded as liable to hinder the freedom of movement⁵. Finally, the petitioner seems also to allege discrimination when he claims that he is put at a disadvantage compared to residents in Germany. EU law prohibits discrimination on the basis of nationality within the scope of EU law and without prejudice to any special provisions. However, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. For the purpose of EU free movement law, the situation of an EU citizen who has made use of the right of free movement and resides in a different Member State than the one of his/her nationality is not comparable to the situation of a sedentary EU citizen who does not make use of this right.

¹ Judgment in *Bosman*, C-415/93, EU:C:1995:463, para 96

² Judgment in *Hervein and Lorthiois*, C-393/99 and C-393/99, EU:C:2002:182, para 51, 58

³ Judgment in *Vardyn*, EU:C:2011:291, para 76

⁴ Judgment in *Iida*, C-40/11, EU:C:2012:691, para 77

⁵ Judgment in *Graf*, C-190/98, EU:C:2000:49, para 25

Conclusion

The petition does not show a breach of EU law.

There is no EU competence to harmonise national administrative procedural law in general, which is the area that the petitioner seems to complain about.

The solution that the petitioner proposes may already exist at present under national German law, he would have to investigate this with national German authorities and courts as only they can provide reliable information on national law.

Not every inconvenience linked to the exercise of free movement amounts to an obstacle or a restriction to free movement, as the Treaty does not guarantee that exercising free movement rights must be neutral in all circumstances. The petitioner would have to substantiate further before a national court how his general claims of procedural delays, additional efforts and costs and effects on procedural rights are liable to cause serious inconveniences that bear the real risk of significant consequences on exercising his free movement right.

It is not a matter of discrimination on the basis of nationality prohibited by EU law as that requires the application of different rules to comparable situations. The situation of an EU citizen who has made use of the right of free movement and resides in a different Member State than the one of his/her nationality is not comparable to the situation of a sedentary EU citizen who does not make use of this right.'