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REPORT

on the Special Report from the European Ombudsman following the draft recommendation to the European Commission in complaint 3453/2005/GG (2007/2264(INI))

Committee on Petitions

Rapporteur: Proinsias De Rossa

CONTENTS

	Page
MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION.....	3
EXPLANATORY STATEMENT	7
OPINION OF THE COMMITTEE ON EMPLOYMENT AND SOCIAL AFFAIRS	10
RESULT OF FINAL VOTE IN COMMITTEE.....	13

MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the Special Report by the European Ombudsman following the draft recommendation to the European Commission in complaint 3453/2005/GG (2007/2264(INI))

The European Parliament,

- having regard to the Special Report from the European Ombudsman to the European Parliament,
 - having regard to Article 195(1), second subparagraph, and Article 211 of the EC Treaty,
 - having regard to Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties¹, particularly Article 3(7) thereof,
 - having regard to the Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant regarding infringements of Community law (COM(2002)0141)²,
 - having regard to Rule 195(2), first sentence, of its Rules of Procedure,
 - having regard to the report of the Committee on Petitions and the opinion of the Committee on Employment and Social Affairs (A6-0289/2008),
- A. whereas Article 195 of the EC Treaty empowers the European Ombudsman to receive complaints from any citizen of the Union concerning instances of maladministration in the activities of the Community institutions or bodies,
- B. whereas complaints submitted by citizens constitute an important source of information on possible infringements of Community law,
- C. whereas under Article 211 of the EC Treaty the Commission in its role as guardian of the Treaties is responsible for ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied,
- D. whereas, pursuant to the first paragraph of Article 226 of the EC Treaty, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaty, it "shall" deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations, and whereas, pursuant to the second paragraph of that article, if the State concerned does not comply with the opinion within the period laid down by the Commission, the latter "may" bring the matter before the Court of Justice,

¹ OJ L 113, 4.5.1994, p. 15. Decision as amended by Decision 2002/262/EC, ECSC, Euratom (OJ L 92, 9.4.2002, p. 13).

² OJ C 244, 10.10.2002, p. 5.

- E. whereas the Ombudsman has previously emphasised, in his Decision on complaint 995/98/OV, that, even though the Commission enjoys discretionary powers with respect to the opening of infringement procedures, these are nevertheless subject to legal limits "established by the case law of the Court of Justice which requires, for example, that administrative authorities should act consistently and in good faith, avoid discrimination, comply with the principles of proportionality, equality and legitimate expectations and respect human rights and fundamental freedoms",
- F. whereas the Commission has stressed that this role is essential to the interests of European citizens, and has recognised the importance of the rule of law in this context¹,
- G. whereas the Commission confirms that its Communication on relations with the complainant regarding infringements of Community law sets out the administrative measures for the benefit of the complainant with which the Commission undertakes to comply when handling his/her complaint and assessing the infringement in question,
- H. whereas the Ombudsman considers that the Commission's failure to decide on a definitive position as regards the complainant's infringement complaint constitutes an instance of maladministration,
- I. whereas the Ombudsman's recommendation to the Commission is that it should deal with the complainant's complaint as rapidly and diligently as possible,
1. Endorses the European Ombudsman's recommendation to the Commission;
 2. Stresses that the way in which the Commission handles complaints submitted by citizens in which an infringement of Community law by Member States is alleged should always be in conformity with principles of good administration;
 3. Points out that, in its Communication on relations with the complainant regarding infringements of Community law, the Commission has entered into certain commitments as regards its handling of infringement complaints;
 4. Points out that the Commission has indicated in its Communication that, as a general rule, it will decide whether to open infringement proceedings or to close the file within one year from the date of registration of the complaint and that it will inform the complainant in writing when this time limit is exceeded;
 5. Accepts that in difficult and complicated cases the Commission's investigations may require more than one year; considers, however, that exceeding the one-year time-limit is justified only when investigations are indeed still ongoing;
 6. Notes that in the present case concerning the German Government's failure to properly apply the Working Time Directive² the Commission intended to deal with the complaint in the light of its proposal for an amendment of the Directive and decided to await the outcome of the discussions on its proposal with the other Community institutions;

¹ Commission communication entitled "Better monitoring of the application of Community law" (COM(2002)0725 final).

² Directive 2003/88/EC, which replaced and repealed Directive 93/104/EC (OJ L 299, 18.11.2003, p. 9).

7. Recalls that that proposal was submitted in September 2004 and that there is no evidence that the Commission has taken any further steps since then in order to proceed with its investigation;
8. Notes that instead of taking one of two possible decisions – either to initiate formal infringement proceedings or to close the case – the Commission abstained from taking any further action as regards its investigation;
9. Is of the opinion that Community law does not envisage the possibility of disregarding existing laws and judgments on the grounds that new rules are being considered; points out that the Commission also failed to deal with issues in the complaint that are not related to the proposed changes to the applicable Directive;
10. Acknowledges that the Commission has certain discretionary powers with regard to the management of complaints and infringement proceedings, in particular as regards bringing matters before the Court of Justice, but points out that Article 226 of the EC Treaty stipulates that the Commission is to initiate the pre-litigation phase if it considers that a Member State has failed to fulfil an obligation under the Treaty;
11. Is of the opinion that the powers of discretion are also subject to legal limits set by general principles of administrative law, as established by the case-law of the Court of Justice, and should not exceed the limits indicated by the Commission itself in its communication;
12. Restates its concern at the unjustified and excessive amount of time – often spanning several years – which the Commission takes to pursue and conclude infringement proceedings and its dissatisfaction with the frequent examples of non-compliance by Member States with decisions of the Court of Justice; considers that this undermines the credibility of the formulation and coherent application of Community law and that it serves to discredit the objectives of the EU;
13. Emphasises once again the key role of the Member States in correctly implementing Community legislation and underlines the fact that the practical application thereof is decisive for the purposes of increasing the relevance of the European Union for its citizens;
14. Asks the Commission to provide a list naming the Member States whose legislation is not in line with all provisions of the Working Time Directive and specifying the action it is taking with regard to this; urges the Commission to take prompt action, in accordance with its prerogatives, in all cases and in all Member States where the transposition or implementation of the directive does not comply with the law laid down by the legislature and by the Court of Justice;
15. Urges the Commission to analyse forthwith the new German law adopted on 1 January 2004, and which came into effect on 1 January 2007, in order to establish whether it is in line with all the provisions of the Working Time Directive and all applicable judgments of the Court of Justice; underlines the need for the Commission to examine the details of the implementation of that Directive;
16. Notes that the Commission has recently revised its guidelines on infringement procedures;

understands from this document that a list of the decisions will be provided in advance to the Permanent Representatives and the Member States and that press releases on adopted infringement decisions may be issued on the day of formal adoption; notes, however, that no provision is made to inform Parliament or its responsible committees;

17. Reiterates its urgent call on the Commission to keep Parliament, and in particular its Committee on Petitions, fully informed of decisions in infringement files at all stages of the procedure;
18. Stresses that, under Article 230 of the EC Treaty, Parliament has the right to bring actions before the Court of Justice under the same conditions as the Council and the Commission and that Parliament, pursuant to Article 201 of the Treaty, is empowered to exercise control over the activities of the Commission;
19. Also urges all the Member States, in the light of the foregoing, to apply faithfully all the rules relating to health and safety at work on the basis of the principle that, in the event of any doubt, the interpretation of the law which is most favourable to the health and safety of workers should prevail (*in dubio pro operario*);
20. Instructs its President to forward this resolution to the Council, the Commission and the European Ombudsman.

EXPLANATORY STATEMENT

In November 2001, the complainant, a German doctor, requested the Commission to open infringement proceedings against Germany. The complainant argued that Germany infringed Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time¹ ("Directive 93/104"), in so far as the activity of doctors in hospitals was concerned, in particular as regards time spent on call by these doctors. In the complainant's view, this resulted in a considerable risk for both staff and patients.

In this complaint (2333/2003/GG) the complainant alleged that the Commission had failed to deal with his infringement complaint within an appropriate period of time.

In the decision closing this inquiry the Ombudsman noted that nearly 15 months had passed in the present case before the Commission had started dealing with the objections raised by the complainant by sending a request for information to the Member State concerned. The Ombudsman considered that the Commission had failed to deal with the complainant's infringement complaint within a reasonable period of time and that this constituted an instance of maladministration.

In the meantime Germany had adopted a new law in order to bring the German legislation in line with Directive 93/104/EC and the Commission needed to examine the compatibility of this new legislation with Community law in order to be able to deal with the complainant's infringement complaint.

On 6 December 2004, the Commission informed the complainant that it had adopted a proposal for an amendment of the Working Time Directive (2003/88/EC)² and that it would examine the infringement complaint in the light of this proposal.

On 2 November 2005, the complainant turned to the Ombudsman again (complaint 3453/2005/GG). He submitted that he had received no further information on the position the Commission proposed to adopt concerning his case. He took the view that the Commission was delaying the matter and ignoring the Ombudsman. He essentially repeated the allegation in his earlier complaint.

In its opinion the Commission stated that it had a discretion as to whether to start or continue infringement proceedings.

The complainant alleged that EU law did not envisage the possibility of disregarding laws and judgments on the grounds that the Commission proposed new rules. If the fact that such proposals had been submitted made it lawful to disregard existing law, the legal order of the European Communities was, in the complainant's view, a farce. By acting as it did, the Commission jeopardised the legal peace and deliberately distorted the law.

On 12 September 2006, the Ombudsman addressed the following draft recommendation to the

¹ OJ L 307, 13.12.1993, p. 18-24.

² OJ L 299, 18.11.2003, p. 9-19.

Commission:

The Commission should deal with the complainant's infringement complaint as rapidly and as diligently as possible.

The Ombudsman considered the following:

- The fact that one directive (93/104) has been replaced by another one (2003/88) dealing with the same subject matter was not relevant for the complaint.
- Under Article 211 of the EU Treaty it is the Commission's responsibility to ensure that measures taken by the institutions are applied.
- The Commission is the guardian of the Treaties. It has stressed that this role is essential to the interests of European citizens and it has recognised the importance of the rule of law. Therefore, it is good administrative practice to deal with infringement complaints as rapidly and diligently as possible.
- The Commission proposed to deal with the infringement complaint in the light of its proposal for an amendment of the relevant directive. Apparently the Commission assumed that Article 211 of the EC Treaty did not require it to ensure the application of a Directive which is in the process of being amended.
- Directives 93/104 and 2000/88 both were in force and there was no rule or principle that would allow the Commission to disregard its duty under Article 211.
- The Commission in the case of an infringement has discretion as to whether or not to refer the matter to the European Court of Justice. However, this does not entitle it to postpone indefinitely reaching a conclusion on a complaint on the grounds that applicable law may be amended some time in the future.
- The Commission's failure to deal with the complainant's infringement complaint within a reasonable period of time constituted maladministration.

In its detailed opinion the Commission maintained that it had an established discretion whether to pursue infringement procedures against Member States, as well as over the way in which it managed such procedures. Therefore, it had decided not to advance with infringement procedures pending the results of the legislative process concerning its proposal for amendment of Directive 2003/88. The Commission added that this discretion extended to all phases of complaints and proceedings, including the pre-litigation stage.

In a Communication to the Parliament and the Ombudsman on relations with the complainant in respect of infringements of Community law of 2002, the Commission had indicated that, as a general rule, it would decide whether to open infringement proceedings or to close the file within a year from the date of the registration of the complaint. However, this did not limit the discretion of the Commission when it seemed justified to adopt a different approach more adapted to the particular facts of the case.

The Ombudsman noted the following:

- The Commission had entered into certain commitments as regards the handling of infringement complaints.
- In its Communication the Commission had stated that as a general rule its departments will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than a year from the date of registration of the complaint and that it would inform the complainant in writing where this time limit is exceeded. The Ombudsman considered that the one-year time limit is justified only if the Commission is indeed still investigating a case.
- The Commission would deal with the complaint in the context of its proposal for amendment of the Directive which was submitted in September 2004. It seems the Commission had not taken any further steps since in order to proceed with the investigations.
- According to the Commission's Communication an investigation of an infringement complaint can result in one of two possible decisions. Either the Commission decides to issue a formal notice i.e. to initiate formal infringement proceedings against a Member State or it decides to close the case. It appears that in this particular case the Commission has abstained from taking any further action as regards its investigations.
- The Commission stressed its discretionary powers and that its commitments in its Communication did not limit its discretion when it seemed justified to follow a different approach. However, the Commission confirms that its Communication sets out "the administrative measures for the benefit of the complainant with which it undertakes to comply when handling his/her complaint and assessing the infringement in question". Taking full account of the Commission's discretionary powers, if the Commission were allowed to depart from its commitments in the Communication whenever it considers this to be justified would deprive the Communication of its very meaning. The Commission's discretionary powers should be exercised within the framework of the Communication and the failure to reach a decision cannot be justified by the Commission's discretionary powers.
- Moreover the Commission did not deal with aspects of the complainant's complaint that were independent of the case-law the Commission refers to.
- The identified instance of maladministration consists in the Commission's failure to adopt a definite position as regards the complainant's infringement complaint. If an investigation were completed and an infringement were found the Commission would have discretion as to whether or not to refer the matter to the Court of Justice. However, the Commission has not yet taken such a decision.
- An examination of the question whether the Commission has manifestly exceeded the limits of its discretion could be the subject for a discussion in the European Parliament.

29.5.2008

OPINION OF THE COMMITTEE ON EMPLOYMENT AND SOCIAL AFFAIRS

for the Committee on Petitions

on the Special report from the European Ombudsman following the draft recommendation to the European Commission in complaint 3453/205/GG (2007/2264(INI))

Draftsman: Alejandro Cercas

SUGGESTIONS

The Committee on Employment and Social Affairs calls on the Committee on Petitions, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Underlines the conclusion of the European Ombudsman that the failure of the Commission to deal with the petitioner's complaint what was objectively established as several years' unjustified delay, constitutes ineffective administration;
2. Agrees with the European Ombudsman that the Commission should deal with the petitioner's complaint as rapidly and diligently as possible;
3. Considers that the instant case may constitute an abuse of the discretion that the Commission enjoys when interpreting its obligations under Article 211 of the EC Treaty, which confers on it the role of guardian of the Treaties, in that the Commission so far exceeded the discretionary power it accorded itself in its Communication on Better Monitoring of the Application of Community Law (COM(2002)0725) that it could be regarded as having acted in an arbitrarily rather than in the exercise of its discretion;
4. Also stresses that Community law must be applied as it stands unless and until it is amended by subsequent legislation, and that, consequently, no proposal for amending legislation by the Commission can create a legislative *lacuna* (*vacatio legis*), which, in effect, was the Commission's justification for its failure to act in the instant case;
5. Notes that no account was taken of the introduction, on 1 January 2004, of German legislation which nevertheless contained a transitional provision concerning the existing collective agreements allowing derogations from Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time¹ until 31 December 2005, a deadline subsequently extended to 31 December 2006 by a decision of the German *Bundesrat*; expresses its surprise at

¹ OJ L 299, 18.11.2003, p. 9.

this state of affairs and emphasises that the Commission must examine the German legislation and all collective agreements containing exemptions to working time legislation in order to assess whether Directive 2003/88/EC is being implemented thereby;

6. Notes that the instant case is one example of the systematic failure and difficulties encountered by various Member States in complying with the basic provisions of Directive 2003/88/EC, as can be seen from the Extended Impact Assessment (SEC(2004)1154) which the Commission produced before embarking on the planned review of Directive 2003/88/EC; reminds the Commission that further complaints have been addressed to the Ombudsman regarding the failure of other Member States to comply with Directive 2003/88/EC;
7. Also urges all the Member States, in the light of the foregoing, to apply faithfully all the rules relating to health and safety at work on the basis of the principle that, in event of any doubt, the interpretation of the law which is most favourable to the health and safety of workers should prevail (*in dubio pro operario*).

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	29.5.2008
Result of final vote	+: 35 -: 1 0: 1
Members present for the final vote	Jan Andersson, Edit Bauer, Philip Bushill-Matthews, Alejandro Cercas, Derek Roland Clark, Luigi Cocilovo, Jean Louis Cottigny, Jan Cremers, Harald Ettl, Richard Falbr, Roger Helmer, Stephen Hughes, Jan Jerzy Kułakowski, Jean Lambert, Bernard Lehideux, Elizabeth Lynne, Thomas Mann, Maria Matsouka, Elisabeth Morin, Juan Andrés Naranjo Escobar, Csaba Óry, Marie Panayotopoulos-Cassiotou, Pier Antonio Panzeri, Rovana Plumb, Jacek Protasiewicz, Bilyana Ilieva Raeva, José Albino Silva Peneda, Jean Spautz, Gabriele Stauner, Ewa Tomaszewska, Anne Van Lancker, Gabriele Zimmer
Substitute(s) present for the final vote	Françoise Castex, Gabriela Crețu, Sepp Kusstatscher, Roberto Musacchio, Ria Oomen-Ruijten, Csaba Sógor, Tatjana Ždanoka

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	25.6.2008
Result of final vote	+: 14 -: 1 0: 0
Members present for the final vote	Sir Robert Atkins, Margrete Auken, Inés Ayala Sender, Victor Boştinaru, Michael Cashman, Proinsias De Rossa, David Hammerstein, Marian Harkin, Carlos José Iturgaiz Angulo, Marcin Libicki, Manolis Mavrommatis, Mairead McGuinness, Marie Panayotopoulos-Cassiotou
Substitute(s) present for the final vote	Margie Sudre
Substitute(s) under Rule 178(2) present for the final vote	Georgios Toussas