

18 SEP. 2009 D/ 001450

Dear Mr Diamandouros,

**Subject: Complaint by the European Circus Association
Ref. 3307/2006(PB)JMA**

Thank you for your letter of 3 June 2009 to President BARROSO about this case.

Your draft recommendation has been carefully considered and I am pleased to transmit you the enclosed detailed opinion of the Commission.

Yours sincerely,



Charlie McCreevy

Enclosure

Mr Nikiforos DIAMANDOUROS
European Ombudsman
1, avenue du Président Robert Schuman
B.P. 403
F-67001 STRASBOURG Cedex

Opinion of the Commission on the European Ombudsman's draft recommendation
- Complaint by the European Circus Association (ECA), ref. 3307/2006/(PB)JMA

I. THE OMBUDSMAN'S RECOMMENDATION AND FINDINGS

Following the Commission's comments in the above-mentioned complaint transmitted to the Ombudsman on 14 May 2007 and the second opinion sent on 29 May 2008 following the Ombudsman's request of additional information from the Commission, the Ombudsman has transmitted its draft recommendation on 3 June 2009.

The draft recommendation reads as follows:

"The Commission should evaluate the proportionality of the Austrian law. In light of its analysis, if it considers that Austria has not demonstrated that it complies with all the conditions set out in the *Gebhard* test, the Commission should a) pursue its infringement proceeding against Austria or b) provide valid reasons for dropping the case."

The Commission had made it clear in its comments of 14 May 2007 as well as in its second opinion of 29 May 2008 that it has exercised its discretion, recognized by the Court¹, to decide whether it is appropriate to initiate a case under Article 226. It had concluded that the question of how to protect wild animals in circuses was not to be decided at Community level but should rather be left to Austria.

The Ombudsman does not share the Commission's viewpoint. The Ombudsman takes the view that the use of a discretionary power can not lead to arbitrariness and does not entitle the Commission to abdicate entirely from its role as guardian of the Treaty in an entire area such as animal welfare. While accepting the Commission's discretionary power in pursuing case under Article 226 of the Treaty, he takes the view that his task to identify potential maladministration comprises to check whether "a) the Commission has explained adequately the reasons why a particular course of action was chosen, and b) the Commission has acted within the limits of its legal authority".

On the substance of the case, the Ombudsman agrees in principle that the letter to the complainant of 24 October 2006 informing him about the reasons for closing the case was sufficiently clear and that the Commission has acted within the limits of its legal authority.

However, the Ombudsman finds maladministration claiming that the Commission has accepted that the total ban on keeping wild animal in circuses was a means to ensure that Austria's particularly high aim relating to the protection of wild animals was achieved. According to the Ombudsman, the Commission should have analysed whether this was the least restrictive means of achieving the aim. The fact that the Austrian law does not

¹ Case C-200/88, *Commission v Hellenic Republic*, Judgement of the Court of 27.11.1990, ECR 1990, p. I-4299, at point 9

prohibit the keeping of wild animals in general, nor the use of wild animals in other events, such as in films and/or television, in the Ombudsman's view might call into question whether the total ban on using wild animals in circuses in Austria goes beyond what is necessary to achieve the declared aim of the Austrian authorities.

The fact that the Commission has not expressed any viewpoint on the issue of proportionality in its letter of 24 October 2006 to the complainant and that the Commission has therefore not concluded in a clear way whether it finally considered the measure to be proportionate or not, leads the Ombudsman to the conclusion that the Commission has abdicated from its role as Guardian of the Treaty in this area and has, effectively, "re-nationalised" completely the decision on the proportionality of the measure by the national authorities. According to the Ombudsman this was an instance of maladministration.

The Ombudsman finds another instance of maladministration in the fact that the Commission never clearly and unequivocally stated whether or not, in its view, the Austrian law complies fully with the *Gebhard* test. Instead, in the Ombudsman's view, the Commission made vague statements which were not sufficient to allow the complainant to understand fully the Commission's position. The Ombudsman concludes that Commission did therefore not comply with Point 10 of the Annex to the Commission's Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law.

II. THE COMMISSION'S COMMENTS TO THE OMBUDSMAN'S FINDINGS AND RECOMMENDATION

1. Alleged maladministration in not assessing the proportionality of the Austrian measure

The Commission does not share the Ombudsman's view regarding the first allegation of maladministration. The Commission considers that it acted fully within its discretionary power to decide whether or not to pursue a case under article 226 of the Treaty, as recognized by the Ombudsman. In exercising this discretion, the Commission decided that the question on how to protect wild animal in circuses should be left to Member States due to the particular sensitivity of the public opinion concerning the protection of animals, which can be very specific in each individual Member State. These considerations are within the Commission's legal authority. They do not require that the Commission would have to examine and conclude whether a less restrictive means to achieve the aim would be available for the Member state in question. The consideration that Member States are better placed to address the protection of wild animals in circuses does not depend on the conclusion of a proportionality assessment of a particular measure. Indeed, such an examination would appear contrary to the decision taken that this question is up to Member States to decide.

2. Alleged maladministration concerning the reasoning of the Commission's position

Concerning the second allegation of maladministration, the Commission considers that it has informed the complainant in a clear and unequivocal way about the reasons that have led this institution to close the case. The Commission has in particular explained that the question on how to protect wild animal in circuses is not to be decided at Community level, but should rather be left to Member States concerned and that it would therefore

not be appropriate to continue an infringement proceeding against Austria for failure to fulfil its obligations under the Treaty. It is very clear from these explanations that the Commission has exercised its discretion, recognized by the Court, to decide whether it is appropriate to take forward a case under Article 226. The Commission considers that an analysis of the proportionality, which is unrelated to the Commission's stated reasons to close the case and which the Commission was not obliged to undertake, would not have made the letter to the complainant any clearer in that respect.

III. CONCLUSIONS

In deciding to close this infringement case against Austria the Commission has exercised the wide discretion it holds with regard to infringements. It has explained its decision in a clear and unequivocal manner both in its letter to the complainant of 24 October 2006 and in the comments to the Ombudsman of 14 May 2007 and 29 May 2008.

In response to the draft recommendation of the Ombudsman, while not able to accept that recommendation, the Commission provides some further explanation of the reasoning supporting its decision. The reasons include considerations relating to: the diversity of opinion within the EU on the appropriate extent of protection of animals in different contexts; the variety of economics, social, cultural, religious and other factors contributing to this diversity of opinion.