

## Decision of the European Ombudsman closing his inquiry into complaint 930/2010/(ANA)CK against the European Commission

Decision

**Case** 930/2010/CK - **Opened on** 28/06/2010 - **Decision on** 27/04/2012 - **Institution concerned** European Commission ( No further inquiries justified ) |

### *Summary of the decision on complaint 930/2010/(ANA)CK against the European Commission*

The complainant complained to the European Ombudsman that the European Commission did not deal appropriately with his infringement complaint, in which he alleged that Cyprus infringed EU law by asking him to pay two taxes when importing a second-hand car. He argued that one of the taxes constituted an " *excise tax* ".

In March 2011, the Ombudsman made a proposal for a friendly solution, inviting the Commission to re-examine the complainant's infringement complaint against Cyprus. In its reply to the proposal, the Commission informed the Ombudsman that on 7 April 2011, it had sent a letter of formal notice to Cyprus concerning the fact that the one of the taxes was not fully in line with Article 110 TFEU. It added that it is in the process of examining another aspect of the Cypriot legislation on car taxation in the framework of an older case (case 2005/4093). The Commission went on to state that it would keep the complainant informed of any further action that it would take regarding these cases.

The Ombudsman concluded that no further inquiries are justified, since it appears that the substantive issues raised in the complainant's infringement complaint are receiving appropriate attention from the Commission. With a view to assisting the Commission in further improving its procedures, the Ombudsman made two further remarks.

## The background to the complaint

1. This case is about taxation on vehicles in Cyprus.
2. On 5 October 2007, the complainant imported a vehicle into Cyprus from the UK, where he had completed his university studies in law. The Cypriot authorities asked him to pay two separate taxes, a tax of EUR 5 040 to the Cypriot Department of Customs and Excise and a tax



of EUR 2 270, payable to the Cypriot Department of Transport. The complainant complained to the Cypriot Customs & Excise Authorities and asked for the suspension of the tax of EUR 5 040 on the ground that it infringed EU law. The complainant's application was rejected and the vehicle was confiscated on 5 June 2008.

3. On 6 August 2008, the complainant submitted an infringement complaint to the European Commission (complaint 2008/4766). In his complaint, the complainant alleged that the tax payable to the Cypriot Department of Customs and Excise was in fact an "*excise tax*", which, according to the relevant case-law of the Court of Justice, is incompatible with Articles 30 and 110 of the Treaty on the Functioning of the European Union (TFEU). The complainant focussed on the nature of the Cypriot tax, which is defined as an eco-friendly "*excise tax*" calculated on the basis of CO<sub>2</sub> emissions. However, the complainant argued that the tax may apply in a discriminatory manner and brought an example to demonstrate that an imported second-hand car which pollutes less may be subject to a higher tax than a newer, more polluting car first registered in Cyprus.

4. By letter dated 17 December 2008, the Commission explained that the tax of EUR 5 040 which the complainant called "*excise tax*" was, in fact, a "*registration tax*". According to the information available to the Commission, Cyprus does not apply any "*excise tax*" on vehicles but, like other Member States, a "*registration tax*". The Commission then argued that the Cypriot "*registration tax*" was not a customs duty or charge having an equivalent effect, but rather an internal tax. The Commission stated that there is no harmonised legislation in this field and that the "*registration tax*" did not fall within the scope of Directive 83/182 [1]. Consequently, as long as a Member State does not discriminate, it is free to set the level of taxation as high as it considers appropriate. While the Court of Justice has held that, in principle, a tax on second-hand vehicles might violate Article 110 TFEU [2], this did not appear to be the case for the Cypriot registration tax.

5. In a letter dated 18 December 2008, the complainant disagreed with the Commission's analysis of the tax in question. The complainant reiterated that the duty was in fact an "*excise duty*", which had to be paid directly to the Cypriot Customs and Excise authorities, in contrast to the "*registration tax*" of EUR 2 270, which was payable to the Department of Transport. The complainant asked the Commission to carry out further investigations.

6. By letter dated 22 April 2009, the Commission maintained that the duty of EUR 5 040 referred to by the complainant as an "*excise duty*" was in fact a "*registration tax*". The Commission was not convinced by the complainant's arguments and stated that Member States are free to impose a car "*registration tax*" at the level they see fit. The Commission maintained its position that there was no breach of EU law in this respect. However, the Commission stated that the "*other registration tax*" (the tax of EUR 2 270), which was payable to the Cypriot Department of Transport, needed further inquiry to determine whether it was in line with Union law and, "*for this aspect only, your complaint remains open.*"

7. On 19 April 2010, the complainant lodged the present complaint with the Ombudsman.



## The subject matter of the inquiry

8. The Ombudsman opened an inquiry into the complainant's allegation that the Commission failed properly to examine his infringement complaint.

9. In his letter opening an inquiry into the complaint, the Ombudsman understood the complainant to argue that the Commission failed to take account of the fact that, upon importation of his second-hand vehicle into Cyprus, he had to pay two separate amounts: an "*excise duty*" for EUR 5 040, payable to the Cypriot Department of Customs and Excise, and a car "*registration tax*" for EUR 2270, payable to the Cypriot Department of Transport. The complainant acknowledged that Cyprus may impose a "*registration tax*", but he objected to the "*excise duty*", which he considered unlawful under the Treaty.

10. The complainant claimed that the Commission should carry out a full investigation and re-evaluate the lawfulness of the Cypriot "*excise tax*" under EU law.

## The inquiry

11. On 28 June 2010, the Ombudsman sent a request for an opinion to the Commission. On 20 August 2010, the Commission sent its opinion. The opinion was forwarded to the complainant, from whom the Ombudsman did not receive any observations. On 31 March 2011, the Ombudsman made a proposal for a friendly solution to the Commission which submitted its reply on 30 May 2011. That reply was forwarded to the complainant with an invitation to submit observations. The Ombudsman did not receive any observations from the complainant.

## The Ombudsman's analysis and conclusions

### A. The Commission's alleged failure properly to examine the complainant's infringement complaint

#### Arguments presented to the Ombudsman

12. In his infringement complaint, the complainant alleged that the Cypriot "*excise tax*" was unlawful under EU law. In support of his allegation, the complainant brought forward an example showing that the tax in question may be applied in a discriminatory manner.

13. In its letter of 17 December 2008, the Commission declared that the tax in question was not an "*excise tax*", but a "*registration tax*". It went on to add that, in accordance with the relevant EU legislation and the case-law of the Court of Justice, for as long as Cyprus did not discriminate, it was free to impose the registration tax at a level it considered appropriate.



14. By letter dated 18 December 2008, the complainant highlighted that there were, in fact, two taxes, the " *excise duty* ", payable to Cypriot Department of Customs and Excise, and a car " *registration tax* ", payable to the Cypriot Department of Transport.

15. In its reply of 22 April 2009, the Commission stated that it was not convinced by the complainant's arguments. However, it held the complainant's infringement complaint open as regards " *the other registration tax* ".

16. In his complaint to the Ombudsman, the complainant pointed out that the Commission failed to recognise that the sum of EUR 5 040 was in fact an " *excise duty* " which had to be paid directly to the Cypriot Customs and Excise authorities. This was in contrast to the " *registration tax* " amounting to EUR 2 270, which was payable to the Department of Transport. These are two separate departments of the Cypriot administration which were completely independent of each other. In support of his assertions as to the nature of the tax, the complainant provided web-based information, including the relevant legislation. Moreover, the complainant argued that the tax in question was disproportionate and discriminatory because it could be much higher (up to 388%) than the market value of an imported second-hand car. In this regard, he argued that an imported two-year-old, second-hand car could cost more than a new car first registered in Cyprus. As regards the tax of EUR 2 270, the complainant acknowledged that it was a registration tax which was lawful under EU law.

17. In its opinion, the Commission outlined the steps it had taken in relation to the complainant's infringement complaint. It considered that the tax for the amount of EUR 5 040 was in fact a registration tax, but the additional registration tax of EUR 2 270 required further investigation. To this end, by letter dated 7 May 2009, the Commission asked the Cypriot government to provide it with information concerning the additional registration tax. By letter dated 13 August 2009, the Cypriot authorities provided the requested information and informed the Commission about their plan to amend the relevant legislation. Following a request from the Commission dated 8 March 2010, the Commission, on 19 May 2010, with the detailed rules and the envisaged amendments. The Commission stated that the information provided by the Cypriot authorities was under examination and that it would decide on further steps in the procedure. The Commission reached the conclusion that it properly examined the complainant's infringement complaint and seriously and effectively handled the issues raised by him. The Commission acknowledged that the one-year time limit laid down in the 2002 Communication [3] had been exceeded, but stated that " *it is also true that this time limit may be exceeded, if only provided that the Commission department responsible for the case informs the complainant in writing, at his request. Since the complainant has not expressed any request in this regard, the Commission's services did not have the obligation about informing him about the state of play of the procedure.* " The Commission also made a statement in relation to its discretion in infringement proceedings, in accordance with the Court's case-law.

## **The Ombudsman's preliminary assessment leading to a friendly solution proposal**



**18.** The Ombudsman noted that the focus of his preliminary assessment was on whether the Commission handled the complaint submitted to it with diligence, that is, in accordance with the level of care which it is expected to exercise when responding to infringement complaints submitted to it in its role as Guardian of the Treaties.

**19.** Moreover, the Ombudsman's assessment examined the question whether, in determining its position on the complaint at hand, the Commission provided the complainant with adequate, clear and intelligible explanations. The importance of providing reasons for administrative decisions, be they justiciable before the Court or not, is recognised throughout EU administrative law (Article 296 of the Treaty on the Functioning of the European Union [4] , Article 41(2)(c) of the Charter of Fundamental Rights of the European Union [5] and Article 18 of the European Code of Good Administrative Behaviour [6] , and Section 3 of the European Commission's Code of Good Administrative Behaviour [7] ).

**20.** As regards the content of the duty to state the grounds of decisions, the Ombudsman pointed out that the relevant case-law of the Court of Justice provides a useful starting point. The Court has laid down [8] that a statement of reasons should show, clearly and unequivocally, the reasoning of the institution which adopted the measure so as to inform the persons concerned of the justification for the measure adopted, thereby enabling a review of those measures [9] .

**21.** In the context of the Commission's decisions on infringement complaints - which cannot be separately challenged before the Court [10] - the duty to state reasons must be recognised to serve two important objectives. Firstly, reason-giving promotes the degree of transparency which citizens increasingly expect from the Union's institutions, especially those citizens who are affected by an alleged Member State's infringement and seek help from the Commission. The Ombudsman has recognised that informing a citizen who has submitted an infringement complaint of the reasons for the Commission's decision at any given stage is, alongside the procedural guarantees enshrined in the 2002 Communication [11] , an important element of the proper exercise of the Commission's discretion [12] . Moreover, reason-giving dispels any impression that the Commission might act in an arbitrary and high-handed manner.

**22.** Second, from the Commission's own perspective, the duty to give reasons helps ensure that the rationale for the action has been thought through and that it can be explained and defended. By aiming at a high standard of reason-giving, the Commission also creates an opportunity for it to receive criticism of its views in time to evaluate and respond to those criticisms before committing itself to a final conclusion. As a consequence, the Commission enables citizens fully to engage in the process and also helps improve the quality of its decisions. In this regard, the Commission at one and the same time contributes to an administrative culture of service, which the Ombudsman aims to promote, and serves its own self-interest.

**23.** Against this backdrop, it was recalled that, both in his infringement complaint and in the complaint to the Ombudsman, the complainant essentially argued that there were two separate



taxes imposed upon the importation of his second-hand vehicle into Cyprus: a tax for EUR 5 040 and one for EUR 2 270. The complainant argued that the former tax was an excise duty which was incompatible with EU law, while the latter was a registration tax which was compatible with EU law.

**24.** In its reply to the complainant, the Commission stated that the former tax was a registration tax, compatible with EU law, and the latter tax an additional registration tax in relation to which further investigation was required. In its opinion, issued in response to the Ombudsman's inquiry into the present complaint, the Commission outlined the steps it had taken vis-à-vis the Cypriot authorities in order to establish whether that "*additional registration tax*" was compatible with EU law. In this respect, the Commission concluded that it properly handled the infringement complaint submitted to it.

**25.** The Ombudsman disagreed with the Commission's conclusion. The Ombudsman noted that the Commission's exchange of correspondence with the Cypriot authorities concerned the tax which the complainant calls "*registration tax*", while the Commission calls it "*additional registration tax*." However, although the complainant and the Commission disagreed on the name of the tax, it was clear that the complainant did not dispute its compatibility with EU law.

**26.** The gist of the complainant's complaint was that the tax of EUR 5 040, which the Commission calls "*registration tax*", was in fact a disproportionate and discriminatory "*excise tax*". As far as that tax was concerned, the Commission did not sufficiently address the complainant's specific arguments. Nor did it provide clear and intelligible explanations for not doing so.

**27.** By contrast, the Commission declared that the Cypriot tax was not an "*excise duty*" and proceeded on the basis of that assumption. Although the Commission accepted the complainant's argument that the latter tax was an "*additional registration tax*" it did not consider it necessary to re-evaluate the nature of the former tax in order to determine whether it still considered it a "*registration tax*" or an "*excise duty*" and, whichever the case, to assess its compatibility with Article 110 TFEU. There was no evidence that the Commission had, in fact, carried out such an examination of the tax here concerned.

**28.** The Ombudsman noted that, for the Commission properly to handle the complainant's complaint, it had thoroughly to examine the specific Cypriot legislation in question and its application in practice. Such examination had to be without prejudice to the nature of similar car taxes applicable in other Member States. It goes without saying that the Commission had to address the specific example of the allegedly discriminatory application of the tax in question, which was brought to its attention by the complainant, and give the complainant a specific reply. In case the Commission determined that the tax in question constituted an "*excise tax*", as the complainant alleged, it had to assess its compatibility with Article 110 TFEU. In contrast, should the Commission have reached the conclusion that the tax in question was a "*registration tax*", it had to provide the complainant with the reasons for its decision.

**29.** In light of the above considerations, the Ombudsman made the preliminary finding that the



Commission failed to examine the complainant's infringement complaint with the necessary diligence. Article 3(5) of the Statute of the Ombudsman directs the Ombudsman to seek, as far as possible, a solution with the institution concerned to eliminate the instance of maladministration and satisfy the complainant. He therefore made the following proposal for a friendly solution to the Commission:

*Taking into account the Ombudsman's findings, the Commission could re-examine the complainant's infringement complaint against Cyprus.*

*Specifically, the Commission could analyse the Cypriot legislation in question and its application in practice. It ought to address the specific example of the allegedly discriminatory application of the tax in question, which was brought to its attention by the complainant, and give the complainant a specific reply. Should the Commission determine that the tax in question constitutes an "excise tax", as the complainant alleges, it should assess its compatibility with Article 110 TFEU. In contrast, should the Commission reach the conclusion that the tax in question is a "registration tax", it should provide the complainant the reasons for its decision.*

## **The arguments presented to the Ombudsman after his friendly solution proposal**

**30.** In its reply, the Commission reiterated that it acted diligently when examining the complaint submitted to it and came to the correct conclusions on the merits of the case. It informed the Ombudsman that, on 7 April 2011, it sent a letter of formal notice to Cyprus concerning the fact that the second registration tax is not fully in line with Article 110 TFEU. It also added that it is still in the process of examining two different aspects of the Cypriot legislation on car taxation:

(a) compliance of the excise duty on passenger cars with Article 110 TFEU. Infringement procedure number 2005/4093 was opened on 4 April 2006. Following the assessment of subsequent amendments of the Cypriot legislation, the Commission decided to send two additional letters of formal notice, on 27 June 2007 and 29 January 2009 respectively.

(b) compliance of the registration tax on cars with Article 110 TFEU. Infringement procedure number 2008/4766 against Cyprus was opened on 6 April 2011. The letter of formal notice was sent to Cyprus on 7 April 2011.

**31.** The Commission enclosed with its reply a letter sent to the complainant on 11 April 2011, informing him that it had opened an infringement procedure against Cyprus in case 2008/4766 and about the state of play in case 2005/4093 concerning the excise duty. The Commission added that it would keep the complainant informed of any further action it would take regarding these cases. Based on the above, the Commission considered that it acted diligently when examining the complaint submitted to it and that there is no need to re-examine the complainant's infringement complaint against Cyprus as it is in the process of analysing the Cypriot legislation in question and its application in practice.





32. The complainant did not comment on the Commission's reply.

## **The Ombudsman's assessment after his friendly solution proposal**

33. In his friendly solution proposal, the Ombudsman noted that the complainant only complained that the tax of EUR 5 040 was in fact a disproportionate and discriminatory " *excise tax* ". His complaint, that is, did not concern the compatibility of the EUR 2 270 tax with EU law. The Ombudsman also observed that, as far as the EUR 5 040 tax was concerned, the Commission did not address the complainant's specific arguments at all. Nor did it provide clear and intelligible explanations for not doing so. Instead, the Commission merely declared that the Cypriot tax was not an " *excise duty* " and proceeded on the basis of that simple assumption. It did not, therefore, consider it necessary to re-evaluate the nature of the former tax in order to determine whether it still considered it a " *registration tax* " or an " *excise duty* " and, whatever the case, to assess its compatibility with Article 110 TFEU. There was, simply, no evidence to show that the Commission had carried out any examination of the tax in question. The Ombudsman thus invited the Commission to re-examine the complainant's infringement complaint against Cyprus.

34. It results from the information which the Commission communicated to the Ombudsman that, currently, there are two ongoing infringements procedures against Cyprus: one regards the tax which, according to the complainant, is an excise duty, and the other concerns the 'registration tax' (the second corresponds to the procedure regarding the registration tax which was opened as a result of the complainant's infringement complaint). In light of the foregoing, since it now emerges that the relevant aspects of the complaint are already under scrutiny by the Commission's services, further action in relation to the complainant's specific infringement complaint would serve no practical purpose. Taking into consideration that the complainant has not commented on the Commission's response to the proposal for a friendly solution, the Ombudsman concludes, therefore, that no further inquiries are appropriate.

35. With a view to assisting the Commission in further improving its procedures, the Ombudsman considers it useful to note that it was not until its response to the Ombudsman's proposal for a friendly solution that the Commission informed the complainant of the existence of infringement procedure 2005/4093 regarding the excise duty imposed on passenger cars, although this procedure had been ongoing since 4 April 2006. The Ombudsman cannot see why the Commission could not have informed the complainant about this ongoing procedure at an earlier stage. Further, regarding the question of the registration tax, the Commission acknowledged in its opinion that it failed to observe the one-year time limit laid down in the 2002 Communication [13] . It considered that its services were not obliged to inform the complainant about the state of play of the procedure, since the latter had not made a request to this effect. The Ombudsman notes that point 8 of the 2002 Communication provides that "[a] s a *general rule*, Commission 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 one year from the date of registration of the complaint by the Secretariat-General. Where this time limit is exceeded, the





*Commission department responsible for the case will inform the complainant in writing " [14] . It therefore follows that the Commission has committed itself to adopting a definitive position on an infringement complaint normally within one year and to inform the complainant in case it cannot comply with this time limit. In the Ombudsman's view the Commission's commitment to inform the complainant is an expression of the principle of good administrative behaviour and cannot be conditional upon the latter's express request.*

**36.** While the Ombudsman is of the view that the substance of his proposal for a friendly solution has been addressed, he nonetheless considers it useful to remind the Commission that, whenever it cannot comply with the one-year time limit mentioned above, it should inform complainants of that fact. Further, and in line with its undertaking contained in its letter of 11 April 2011, it should also inform the complainant in the present case of each new step taken in relation to the ongoing infringement procedures against Cyprus, as well as of their final outcome. Doing so would be both constructive and in accordance with the EU administration's commitment to a culture of service towards citizens. In this respect, the Ombudsman will make two further remarks below.

## B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

**No further inquiries are justified.**

The complainant and the Commission will be informed of this decision.

## Further remarks

**The Ombudsman reminds the Commission that, whenever it cannot comply with the one-year time limit for deciding on how it should proceed following an infringement complaint, it should inform the complainant concerned of that fact.**

**The Ombudsman trusts that, in line with its undertaking contained in its letter of 11 April 2011, the Commission will inform the complainant in the present case of each new step taken in relation to the ongoing infringement procedures against Cyprus, as well as of their final outcome. Doing so would be both constructive and in accordance with the EU administration's commitment to a culture of service towards citizens.**



P. Nikiforos Diamandouros

Done in Strasbourg on 27 March 2012

[1] Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, OJ 1983 L 105, p. 59.

[2] Case C-156/04 *Commission v Greece* [2007] ECR I-4129.

[3] Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law, COM(2002) 141 final, OJ 2002 C 244, p. 3.

[4] " *Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.* "

[5] " *This right includes: ... the obligation of the administration to give reasons for its decisions.* "

[6] " *1. Every decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.*

*2. The official shall avoid making decisions which are based on brief or vague grounds or which do not contain individual reasoning.*

*3. If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore made, the official shall guarantee that he subsequently provides the citizen who expressly requests it with an individual reasoning.* "

[7] The European Commission's Code of Good Administrative Behaviour for staff of the European Commission in their relations with the public states:

" *Duty to justify decisions*

*A Commission decision should clearly state the reasons on which it is based and should be communicated to the persons and parties concerned.*

*As a general rule, full justification for decisions should be given. However, where it may not be possible, for example because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of individual decisions, standard replies may be given. These standard replies should include the principal reasons justifying the decision taken. Furthermore, an interested party who expressly requests a detailed justification shall be provided with it.* "



[8] Decision of the European Ombudsman closing his inquiry into complaint 1270/2007/(ET)(ID)(DK)CK against the European Commission.

[9] Case C-367/95 P *Commission v Systraval and Brink's France SARL* [1998] ECR I-1719, paragraphs 40-41.

[10] Case C-48/65 *Lütticke v Commission* [1965] ECR 19; Case 247/87 *Star Fruit v Commission* [1989] ECR 291; Case C-205/98 *Commission v Austria* [2000] ECR I-7367.

[11] Cited in footnote 3 above.

[12] Decision of the European Ombudsman closing his inquiry into complaint 443/2008/JMA against the European Commission, paragraph 25.

[13] Cited in footnote 3 above.

[14] In accordance with Article 8 of the Annex to the 2002 Communication, cited in footnote 3 above.