

Decision of the European Ombudsman on joined complaints 1554/99/ME and 227/2000/ME against the European Commission

Decision

Case 1554/99/ME - Opened on 10/02/2000 - Decision on 27/04/2001

Case 227/2000/ME - Opened on 28/03/2000 - Decision on 27/04/2001

Strasbourg, 27 April 2001

Dear Mr M., Dear Mr L.,

With letters of 23 December 1999 and 14 February 2000, the Ombudsman received two complaints concerning the implementation by Sweden of Council Directive 92/12/EEC.

On 10 February 2000 and 28 March 2000, I forwarded the complaints to the President of the European Commission. The Commission sent two separate opinions on 31 May 2000. I forwarded the opinions to you with an invitation to make observations, which you sent on 24 and 28 July 2000. Furthermore, on 24 January 2001, I invited Mr L. to make observations on the Commission's opinion in complaint 1554/99/ME, if he so wished. No further observations appear to have been received from Mr L.. On 3 April 2001, the Ombudsman's services called the Commission and spoke to the official responsible for the file.

Given that the complaints raised the same points, the Ombudsman decided to investigate them together.

I am writing now to let you know the results of the inquiries that have been made.

I apologise for the length of time it has taken to deal with your complaints.

To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman.

The Ombudsman's inquiries into your complaints have therefore been directed towards examining whether there has been maladministration in the activities of the European



Commission.

THE COMPLAINTS

The complainant in complaint 1554/99/ME was the President of the Swedish free-trade association "Norrbottnens Frihandelsförening" and complained to the European Ombudsman on behalf of the association in December 1999. The complainant in complaint 227/2000/ME was a citizen residing in northern Sweden close to the border of Finland and he submitted his complaint in February 2000. Moreover, the complainant in complaint 227/2000/ME had close contacts with the association "Norrbottnens Frihandelsförening" and the two complaints were thus interlinked.

Taken together, the complainants put forward in summary the following:

The complainants stated that Sweden had wrongly implemented Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products. Sweden thereby consistently breached Community law by charging excise duty on the transport of mineral oil from Finland to Sweden.

One complainant explained that in northern Sweden, import for personal use of mineral oil from Finland was common and had been so for decades. Since Sweden and Finland entered the European Union, the control of this trade had intensified.

According to Article 9(3) of Directive 92/12/EEC, the Member State may charge excise duty if the mineral oil is transported using atypical modes of transport. The Article also states that transportation in the tank of vehicles or in appropriate reserve fuel canisters should not be seen as atypical transports. The complainants stated that the Swedish Taxation authority interprets the term "atypical modes of transportation" as including all private transports of mineral oil. The complainants on the other hand meant that this provision must be interpreted strictly since it is an exception to the general principle of freedom of movement. The complainants stated that a private person transporting mineral oil in appropriate reserve fuel canisters must be allowed and was in their view in accordance with the provisions of Directive 92/12/EEC.

The association "Norrbottnens Frihandelsförening" had assisted a very large number of persons with appeals to the Swedish administrative courts following decisions from the Swedish Taxation authority. The association had thereby requested that the courts ask the Court of Justice of the European Communities for a preliminary ruling according to Article 234 (previous Article 177) of the EC-Treaty. These requests had never been taken into account.

The complainants turned to the European Commission to complain about the matter. The complainants had also met with the Commission. They alleged that the Commission did not investigate the matter. One complainant stated that this was due to political pressures.

The complainants claimed that the Commission should resume its investigation of the matter



and examine whether Sweden is in breach of Community law and in particular of Directive 92/12/EEC.

THE INQUIRY

The Commission's opinions

The complaints were forwarded to the Commission. The Commission provided two different opinions. Taken together, the opinions contained in summary the following:

The Commission stated that it received a letter from the association "Norrbottens Frihandelsförening" in 1997. The letter contained information about systematic and arbitrary border controls and was interpreted by the Commission as relating only to the border controls between Sweden and Finland. The complaint was therefore dealt with by Internal Market DG. By letter of 1 September 1998, the Commission asked the association to submit further information. No such information was received within the deadline and the Commission closed the file on 8 October 1998.

By letter of 28 September 1998, which was received by the Commission on 13 October 1998, further information with some new elements on border controls but also concerning the Swedish rules on excise duty was submitted by the association. The information motivated the Commission to deal with the matter which was registered as a complaint. In May 1999, a meeting took place with the complainants. According to the Commission, this was the first time more precise information was provided by the complainants which allowed the Commission to better understand their concern. The Commission understood the complaint not to relate to a specific rule but to the methods used at the border controls and the scope and systematic character of the controls.

Following the meeting and an analysis of the complaint, the Commission contacted the Swedish authorities to explain the complaint and the details of the case. The Swedish authorities rejected the allegations of the complaint.

On 19 November 1999, the Commission requested further information from the complainants. No such information was received and the Commission explained in an e-mail to the complainants of 3 January 2000, that its proposal on the steps to be taken would be based on the material already at hand. Further contacts between the Commission and the complainants took place but no real substantial information was submitted. Nevertheless, on the basis of the information available to the Commission, Internal Market DG had made a proposal that a letter of formal notice shall be sent to Sweden. A formal decision from the Commission to send the notice was under consideration.

The allegation that the Commission's actions were based on political concerns was refuted by the Commission.

The Commission explained that during the whole procedure it had been very difficult to explain the legal situation to the complainants and thus receive relevant information in exchange.



As regards the specific rules on excise duty, the Commission stated that the general rule allows citizens to purchase goods in the Member State of their choice and to pay excise duty in that same state. There are however exceptions to this rule. Excise duty on mineral oil is such an exception and the excise duty should instead be paid in the Member State to which it is brought. There is one exception to this rule and that is transport in the vehicle tank or in an appropriate reserve fuel canister. Sweden may therefore charge excise duty if private persons use atypical modes of transportation in the meaning of Article 9(3) of Directive 92/12/EEC. This has been explained to the complainants and has been the reason for the Commission not to act against Sweden up to now.

The complainants' observations

The respective opinions were forwarded to the complainants who submitted separate observations.

In summary, the complainants maintained their complaints. They referred to the term "atypical transportation modes" and to the fact that the Commission in its opinion stated that transportation in an appropriate reserve fuel canister would be allowed. In relation hereto, the complainants put forward that Directive 92/12/EEC does not mention the number of canisters and that the Swedish translation refers to *canisters*. The complainants also pointed out that canisters approved for the purpose of transportation according to national rules must necessarily be seen as appropriate reserve fuel canisters. If not, it would be a clear obstacle to the free movement and the principles of the EC-Treaty.

The complainants concluded that the Commission had not taken all relevant facts into consideration.

One complainant admitted that an investigation had been initiated against Sweden. It did however not appear to be satisfied with the Commission's actions in general.

That same complainant also put forward a new point. This related to the behaviour of the Finnish customs confiscating vehicles registered in Sweden claiming that the owner of the vehicle had lived permanently in Finland for more than 185 days. According to the association, it complained to the Commission at the meeting in May 1999 by written submission, but the Commission had not acted upon the complaint. As this was a new point not relating to the excise duty charged in Sweden, it was outside the scope of the original complaints and the Ombudsman did not find reasons to deal with it in the framework of the present inquiry.

The other complainant concluded that since the Directive appears to be contrary to the EC-Treaty, he requested that the Commission follows the Treaty and not the Directive. Furthermore, that complainant asked the Ombudsman for advice on where to turn about the fact that the Directive is not in accordance with the EC-Treaty, in the case that the Ombudsman could not deal with that issue. The Ombudsman therefore informed the complainant that, as regards this specific part of the complainant's observations, he could petition the European Parliament and provided the complainant with the relevant address.

Request for further observations



Since the Ombudsman found that the Commission's opinion received in complaint 1554/99/ME was more extensive than the one received in complaint 227/2000/ME, the opinion in complaint 1554/99/ME was forwarded to the complainant in complaint 227/2000/ME for comments. No such comments appear to have been received by the Ombudsman.

Further inquiries

On 3 April 2001, the Ombudsman's services called the responsible official at the Commission, Internal Market DG, to query about the proposed letter of formal notice to Sweden. The responsible official thereby informed the Ombudsman that the formal notice had been sent on 13 June 2000. The Swedish authorities had replied to the notice on 29 August 2000. Moreover, the Internal Market DG of the Commission had made a proposal that a reasoned opinion shall be sent to Sweden which was presently awaiting approval from the Commission. The responsible official stated that the complainants had been informed regularly by phone and with e-mails.

THE DECISION

1 Investigation on the charging of excise duty in Sweden

1.1 The complainants alleged that the Commission had not investigated the complaint concerning Sweden's implementation of Directive 92/12/EEC and consistent breach of Community law. One complainant stated that this was due to political pressures. The complainants stated that Sweden wrongly charged excise duty on the transport of mineral oil from Finland to Sweden. The complainants claimed that the Commission should resume its investigation of the matter and examine whether Sweden is in breach of Community law and then in particular of Directive 92/12/EEC.

1.2 The Commission refuted the allegation that the Commission had failed to deal with the complaint because of political pressures. The Commission explained that it had in fact acted upon the letter of one complainant but had closed the file when no further information was received. Further correspondence from that complainant had been registered as a complaint and the Commission had made a proposal to send a formal notice to Sweden. The Commission also explained the legal framework of excise duty on mineral oil.

1.3 The Ombudsman notes that it comes within the Commission's discretionary powers to decide on bringing legal proceedings against Member States under Article 226 of the EC-Treaty. Nevertheless, in the Ombudsman's own-initiative inquiry into the Commission's administrative procedures for dealing with complaints concerning Member States' infringement of Community Law (303/97/PD) which was closed on 13 October 1997, the Commission undertook to respect certain procedural safeguards that the complainants enjoy in that procedure. There is nothing to indicate that the Commission in the present cases did not respect those safeguards.

1.4 As regards the allegation that the Commission did not investigate the matter for political reasons, the Commission refuted this. The Ombudsman finds that the complainant stating this did not put forward any evidence to support the allegation.



1.5 Regarding the complainants' claim that the Commission should resume its investigation, the Ombudsman notes that following the letter of 28 September 1998, the Commission initiated a new investigation into the matter. The Commission also met with the complainants and put forward a proposal to send a letter of formal notice to Sweden. The Commission therefore met the complainants' claim. Moreover, the Ombudsman was informed that the formal notice had been sent on 13 June 2000, that the Swedish authorities had replied on 29 August 2000 and further that a proposal to send a reasoned opinion to Sweden was awaiting approval. The Ombudsman therefore finds that there is no maladministration on behalf of the Commission.

2 Conclusion

On the basis of the Ombudsman's inquiries into these complaints, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the cases.

The President of the European Commission will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN