

## **Decision of the European Ombudsman in the case 700/2021/OAM on how the European Commission dealt with a complaint that the Netherlands breached EU rules on preliminary reference to the Court of Justice of the EU**

Decision

**Case** 700/2021/OAM - **Opened on** 06/05/2021 - **Decision on** 06/05/2021 - **Institution concerned** European Commission ( No maladministration found ) |

Strasbourg, 06/05/2021

Complaint 700/2021/OAM

**Subject:** Decision of the European Ombudsman in the above case on how the European Commission dealt with a complaint that the Netherlands breached EU rules on preliminary reference to the Court of Justice of the EU

Dear Mr X,

Dear Mr Y,

On 12 April 2021, you complained to the European Ombudsman on behalf of Xerox Manufacturing (Nederland) B.V. (hereafter 'Xerox') [1] . Your complaint is about how the European Commission dealt with the infringement complaints CHAP(2018)00217 and CHAP(2018)00218 against the Netherlands, also submitted on behalf of Xerox.

In your complaints to the Commission, you argued that the Netherlands infringes EU law because the Dutch Supreme Court had, in several cases, refused to make a preliminary reference to the Court of Justice of the EU (CJEU) under Article 267 of the Treaty on the Functioning of the EU (TFEU) concerning a matter related to customs classification of multifunctional printers. In your view, this has led to a lack of uniformity in the application of the EU tariffs, which is in breach of international obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") applying to World Trade Organisation members.

In your complaint to the Ombudsman, you argue that the Commission was wrong to close the infringement complaints and that the procedure the Commission followed in examining the



matter was flawed. You contend that the discretion of the Commission to decide whether to pursue an infringement complaint is not unlimited and that such discretionary power is assigned to the Commission as a collegial body, and not to an individual Directorate-General (in this case the Directorate-General for Taxation and Customs Union -DG TAXUD). You also complain that the Commission has not addressed all the arguments presented in the infringement complaints, in particular those relating to the GATT 1995 provisions. Finally, you disagree with the Commission's conclusion that there is no pattern of non-referral of preliminary questions by the Dutch Supreme Court to the CJEU.

After a careful analysis of all the information provided with the complaint, **we find no indication of maladministration by the European Commission** .

The Commission has wide discretion in dealing with infringement complaints. [2] Its policy on infringements of EU law is set out in its communication *EU law: Better results through better application*. [3] When it comes to infringement complaints, the Ombudsman may examine whether the Commission has clearly explained its position and whether it has given the complainant the opportunity to provide comments before it closes a case. In that regard, the Commission is not obliged to engage with a complainant on every issue or argument raised in the infringement complaint. Rather, it suffices that the Commission explains clearly why it has taken a certain position. Regarding the substance of an infringement complaint, the Ombudsman may only intervene (by asking the Commission to look at the complaint again) in case there is an indication that the Commission was **manifestly wrong** in its presentation of the facts or of law.

We note that you have made a previous infringement complaint about the same issues to the Commission (alleged misclassification and refusal by the Dutch Supreme Court to make a preliminary reference to the CJEU). The Commission assessed that complaint in two EU-pilot investigations [4] and decided not to open infringement procedures. The two EU-pilot were closed in 2017.

In its communication with you in the context of your new complaints, the Commission explained that its role is limited to monitoring the proper functioning of the system of judicial cooperation under Article 267 TFEU, in order to ensure the consistent interpretation of EU law in the Member States. It does not normally initiate infringement procedures in isolated cases.

The Commission stated that the Dutch Supreme Court is one of the most active courts in terms of requests for preliminary rulings and that its decision not to make a reference in the case in question cannot be considered as recurrent or forming part of a general practice. Therefore, the Commission would not have a strong case in initiating an infringement procedure against the Netherlands in this respect.

The Commission also stated that, when examining infringement complaints, in light of its discretionary power, it takes into account the impact of an infringement in view of important policy objectives and systemic impact beyond an individual Member State.



As regards the procedure for deciding on infringement complaints, the Commission said that the decision not to pursue an infringement complaint on technical or objective grounds remains within the competences of the Commission departments having a legitimate interest in the infringement complaint in question.

We consider that the Commission provided you with clear information as regards why it closed the infringement complaints. We find nothing to indicate a manifest error in the Commission's assessment or that it manifestly exceeded the limits of its discretion.

We also note that the Commission gave you the opportunity to comment on its position before it closed the case.

In light of the above, the Ombudsman has closed the case. [5]

While you may be disappointed with the outcome of the case, we hope that you will find the above explanations helpful.

Yours sincerely,

Tina Nilsson Head of the Case-handling Unit

[1] The European Ombudsman can only investigate complaints from EU citizens or natural or legal persons residing or having their registered office in an EU Member State (in accordance with the rules set out in the Treaty on the Functioning of the European Union and in the Statute of the European Ombudsman). As such, this complaint falls outside the Ombudsman's mandate insofar as it has been submitted also on behalf of Xerox Limited, with corporate seat in the UK.

[2] See judgment of the Court of 14 February 1989, *Starfruit v Commission*, 247/87  
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61987CJ0247&from=EN>  
[Link]

[3]  
[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119(01)&from=EN)  
[Link]

[4] EU-Pilot 7637/15 and EU-Pilot 7638/15.

[5] Full information on the procedure and rights pertaining to complaints can be found at

<https://www.ombudsman.europa.eu/en/document/70707> [Link]

