

## Decision of the European Ombudsman on complaint 422/2002/IJH against the European Commission

Decision

**Case 422/2002/IJH - Opened on 20/03/2002 - Decision on 10/09/2002**

Strasbourg, 10 September 2002

Dear Mr F.,

On 5 March 2002, you and four others made a complaint to the Ombudsman against the European Commission, concerning the Commission's interpretation of Article 7 of Directive 2001/37 on the manufacture, presentation and sale of tobacco products. Your complaint is made on behalf of the Tobacco Workers Alliance.

On 20 March 2002, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 27 June 2002. I forwarded it to you with an invitation to make observations, which you sent on 25 July 2002.

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

### THE COMPLAINT

The complainants are trade union representatives working for British American Tobacco. They complain on behalf of the Tobacco Workers Alliance.

The complaint concerns Directive 2001/37 on the manufacture, presentation and sale of tobacco products (1) . The Member States must implement the Directive by 30 September 2002. Article 7 of the Directive provides that "With effect from 30 September 2003 . texts, names, trade marks and figurative or other signs suggesting that a particular tobacco product is less harmful than others shall not be used on the packaging of tobacco products." The provision therefore prohibits what are known as "descriptors."

According to the complainants, the Commission interprets Article 7 of the Directive so as to apply to tobacco products intended for export, as well as to those intended for consumption within the European Union.

The complainants allege that the Commission is thereby misinterpreting Article 7 and that this



misinterpretation is unfair and discriminates against UK manufacturers, such as British American Tobacco in Southampton and Darlington who export over 90% of their product.

The complainants also allege that the Commission misled the Committees of the European Parliament which dealt with the Directive, MEPs and other organisations, since it never made them aware of its intention to interpret Article 7 to apply to exports as well as to tobacco products sold within the European Union.

The complainants annexed to their complaint letters from Jules MATEEN MEP and Guido SACCONI MEP (respectively rapporteur and shadow rapporteur on the Tobacco Sales Directive for the European Parliament) which confirm their understanding that the ban on descriptors does not concern exports.

## THE INQUIRY

### **The Commission's opinion** *The admissibility of the complaint*

The Commission first stated its view that the complaint is inadmissible. The Commission's arguments are, in summary, as follows.

First, there is no possible case of maladministration since the issues raised in the complaint concern the interpretation of law. What is at stake for the complainants is the scope of application of Directive 2001/37. The final interpretation of European law is an exclusive prerogative of the Court of Justice. The complainants are using the procedure of maladministration when, in fact, what they are really asking for is an interpretation of a Directive in the sense they favour.

Second, the interpretation of Article 7 of the Directive is the subject a preliminary reference case currently before the Court of Justice (Case C-491/01). Article 2.3 of the Statute of the Ombudsman refers to the object of a complaint to the Ombudsman and the second paragraph of Article 195 (1) EC provides that a complaint is inadmissible where the alleged facts are the subject of legal proceedings. The complainant's declaration as regards point 7 of the Ombudsman's complaint form ( *Has the object of your complaint already been settled by a court or is it pending before a court?* ) is incorrect, since the object of the complaint is pending before the Court. Moreover, there is a substantial identity of interest between the complainants and British American Tobacco, which is the plaintiff in the case pending before the Court. In this context, the Commission also refers to a decision of the Court of First Instance confirming that a judicial procedure and a complaint to the Ombudsman cannot both be followed at the same time and on the same facts (2) .

### *The substance of the case*

The Commission submitted, in summary, the following arguments in case the Ombudsman should consider the case admissible.

The Commission's original proposal for Article 7 was for an authorisation regime by Member States. The European Parliament and the Council introduced the drafting of Article 7 that was finally adopted. The scope of this provision appears never to have been discussed by the



European Parliament or within the Council.

The Commission's position on the interpretation of Article 7 has been made explicit on several occasions. This position called initially for a broad interpretation of Article 7, as reflected in the Commission's reply to written question P-0196/01 from Mr J. BOWIS MEP, who asked the Commission to confirm that Article 3 of the draft Directive is the only Article which applies to products exported from the EU. The Commission's reply mentioned that other provisions could also concern products for export, such as those relating to additives and to misleading descriptors. This reply was given on 7 March 2001, before the Council and the Parliament adopted the Directive on 5 June 2001.

However, after deeper legal analysis and consideration, the Commission changed its position in its written observations of 27 March 2002 in the above-mentioned pending case C-149/01. The Commission came to the conclusion that Article 7 could not be interpreted on its own, but in the context of the labelling provisions of Article 5 and that it should have the same geographical scope as Article 5.

#### **The complainant's observations**

As regards the question of admissibility, the complainants emphasised the allegation that the Commission provided misleading information.

According to the complainants, Mr BOWIS asked his written question on 29 January 2001. The Commission gave its answer on 7 March 2001, only days before the provisional text of the Directive was agreed in conciliation between Council and Parliament. The answer given was deliberately vague and therefore misleading.

Furthermore, the Commission has completely disregarded the views of the co-legislators and in particular those expressed by the rapporteur (Mr J. MATEEN MEP) in a letter to Mr C. HUHNE MEP, dated 13 May 2001.

The complainants also stated that, after making their complaint to the Ombudsman, they became aware that the Commission advised the UK authorities in a letter dated 28 June 2001 that the ban on descriptors would also apply to exports (letter from Mr J RYAN, Health and Consumer Protection DG to Mr T BAXTER, UK Department of Health). The UK has produced draft implementing regulations consistent with this interpretation. In contrast, other Member States such as Germany, Luxembourg, Greece, Sweden, Ireland and the Netherlands interpret the prohibition of descriptors as not applying to exports. This will cause considerable damage to UK tobacco manufacturers and therefore to jobs in the tobacco industry. The Commission should have anticipated that its advice to the UK would be relied on and the consequences of such reliance. The Commission should therefore have carried out at an earlier stage the in-depth legal analysis which subsequently led to its change of position in pending case C-491/01. Its failure to do so has undermined any internal market objectives the Commission claimed for the Directive.

## **THE DECISION**



According to the complainants, the Commission interprets Article 7 of Directive 2001/37 (3) so as to apply to tobacco products intended for export as well as to those intended for consumption within the European Union. The complainants allege that the Commission is thereby misinterpreting Article 7 and that this misinterpretation is unfair and discriminates against UK manufacturers. The complainants also allege that the Commission misled the Committees of the European Parliament which dealt with the Directive, MEPs and other organisations since it never made them aware of its intention to interpret Article 7 to apply to exports.

## **1 The admissibility of the complaint**

1.1 The Commission argues that the complaint is inadmissible. Firstly, there is no possible case of maladministration since the issues raised in the complaint concern the interpretation of law. The complainants are using the procedure of maladministration when, in fact, what they are really asking for is an interpretation of a Directive in the sense they favour. Secondly, the interpretation of Article 7 is the subject of a preliminary reference currently pending before the Court of Justice. There is a substantial identity of interest between the complainants and the plaintiffs in the pending case. Article 195 EC provides that a complaint to the Ombudsman is inadmissible if the alleged facts are the subject of legal proceedings.

1.2 As regards the Commission's first argument, the Ombudsman recalls that error of legal interpretation is a form of maladministration, as clarified in the correspondence between the Ombudsman and the Commission reported in the Ombudsman's Annual Report for 1999 (4) .

1.3 As regards the Commission's second argument, the Ombudsman does not consider that the words 'alleged facts' in Article 195 can apply to a point of law in a pending case with different parties. However, in a previous case where the object of a complaint was to challenge, as a general issue, the Commission's interpretation of a provision of Community law and the same point of law was being examined by the Court of First Instance in a pending case with different parties, the Ombudsman considered that no further inquiries were justified (5) . Furthermore, the Ombudsman notes that, after deeper legal analysis and consideration, the Commission has concluded that Article 7 of the Directive should have the same geographical scope as Article 5. There no longer appears, therefore, to be any dispute between the complainants and the Commission as regards the correct interpretation of Article 7 and the complainants' observations do not pursue the question.

1.4 In view of the above, the Ombudsman considers that no further inquiries are justified into the complainant's allegation concerning the interpretation of Article 7 of the Directive. However, the Ombudsman will deal with the complainant's allegation that the Commission provided misleading information.

## **2 The allegation that the Commission provided misleading information**

2.1 The complainants allege that the Commission misled the Committees of the European Parliament which dealt with the Directive, MEPs and other organisations since it never made them aware of its intention to interpret Article 7 to apply to exports.

2.2 According to the Commission, the European Parliament and the Council introduced the drafting of Article 7 that was finally adopted. The scope of this provision appears never to have



been discussed by the European Parliament or within the Council. The Commission's position called initially for a broad interpretation of Article 7. This was reflected in a reply to a written question from an MEP, given before the Council and the Parliament adopted the Directive.

2.3 In their observations, the complainants point out that the written question was dated 29 January 2001 and that the Commission gave its answer on 7 March 2001, only days before the provisional text of the Directive was agreed in conciliation between Council and Parliament. The complainants also argue that the answer given was deliberately vague and therefore misleading and that the Commission has completely disregarded the views expressed by the rapporteur.

2.4 The evidence available to the Ombudsman is that the Commission did not draft the text of Article 7 of the Directive. The Ombudsman notes, therefore, that the Commission could not explain the draft Article's scope and purpose in the same way as for a proposal of its own. The Ombudsman also notes that the Commission indicated its view that the ban on descriptors could also apply to exports in reply to a written question from an MEP. The Ombudsman does not consider that the delay between the date of the written question and the date of the answer appears unreasonable, nor that the Commission's answer was deliberately vague, since only the Court of Justice can give a definitive interpretation of a provision of Community law. Furthermore, the Ombudsman does not consider that the complainants have supplied evidence that the Commission ignored the views of the European Parliament's rapporteur. The Ombudsman also points out that, in any event, those views could not be considered as an authoritative interpretation.

The Ombudsman therefore finds no maladministration as regards this aspect of the complaint.

2.5 Also in their observations, the complainants argue that the Commission should have carried out the in-depth legal analysis which subsequently led to its change of position on the interpretation of Article 7, before advising the UK authorities that Article 7 also applies to exports. The Ombudsman notes that the complainant's argument depends on the assumption that the Commission's advice was wrong. The Ombudsman points out that the question of whether Article 7 applies to exports is before the Court of Justice in pending Case C-491/01. The Ombudsman therefore considers that it would be premature to conduct further inquiries into the complainant's argument in the framework of the present complaint. The complainants could consider in future whether to make a new complaint to the Ombudsman in the light of the outcome of the above-mentioned case.

### **3 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,



Jacob SÖDERMAN

(1) 2001 OJ L 194/26.

(2) Case T-209/00 Lamberts v European Ombudsman, judgement of 10 April 2002, paragraph 66.

(3) Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, 2001 OJ L 194/26.

(4) Pages 17-19 of the English language version.

(5) Case 633/97. The case pending before the CFI was T-188/97 Rothmans International v Commission [1999] ECR-II 2463.