

Decision of the European Ombudsman on complaint 1237/2002/(PB)OV against the European Commission

Decision

Case 1237/2002/PB/OV - Opened on 22/07/2002 - Decision on 19/05/2003

Strasbourg, 19 May 2003

Dear Mr H.

On 28 June 2002, you made a complaint to the European Ombudsman concerning the Commission's handling of your Article 226 infringement complaint against Denmark.

On 22 July 2002, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 4 November 2002. I forwarded it to you with an invitation to make observations, which you sent on 27 January 2003.

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

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 complaint have therefore been directed towards examining whether there has been maladministration in the activities of the European Commission.

THE COMPLAINT

The origin of this complaint is a previous complaint to the Ombudsman (801/2000/(ME)PB) lodged by the complainant regarding the same matter and which was closed on 8 June 2001. In that previous complaint, the complainant alleged that the European Commission had dealt inadequately with his infringement complaint against Denmark. This infringement complaint was submitted to the Commission and registered by its General Secretariat in January 1998. The complainant's grievance against the Danish authorities was, in summary, that their taxation of used cars imported from other EU Member States is contrary to the EC rules on free movement.



In its answer to the allegation, the Commission stated that the reason for its delay in taking a final stand regarding the infringement complaint was a pending court case, the outcome of which it wished to await. The Ombudsman accepted the Commission's stance and noted further that the Commission had undertaken to take a decision on the complainant's infringement complaint in October 2001, of which the complainant and the Ombudsman would be informed.

On 15 February 2002, the complainant informed the Ombudsman that he had received no information from the Commission concerning his complaint. The Ombudsman invited the Commission to comment on this statement. The Commission replied that the delay was owing to new court cases and the failure by some Member States to reply to a request for opinions. The Commission repeated its intention to inform the complainant of the outcome of his infringement complaint, but this time the Commission did not provide any timetable for its conclusions.

In June 2002, the complainant still had not received information on any decision taken by the Commission concerning his infringement complaint. He therefore lodged this second complaint against the Commission before the Ombudsman.

In this complaint, the complainant alleges that the Commission has acted contrary to good administration by failing to take a stand on the issues raised by him in his infringement complaint. The complainant claims that the Commission should immediately take a stand on the issues raised in his infringement complaint.

THE INQUIRY

The Commission's opinion

The Commission's opinion acknowledges the fact that three issues put forward by the complainant remain to be answered:

1. The first issue concerns cross-border long-term leasing of vehicles, which are registered in Germany but with an intended use in Denmark. The Commission has informed the complainant that it wanted to await the ruling of the Court of Justice in Case C-451/99 *Cura Anlagen GmbH* before taking any other initiative as regards rules concerning cross-border long-term leasing of vehicles. The Court of Justice delivered its judgement on 21 March 2002. The Commission will soon address itself to all the Member States asking them whether their rules and regulations are in conformity with this judgement.

2. The second issue concerns the Danish taxation of used cars imported to Denmark from another EU country. The Commission has informed the complainant about its intention to await the Court's ruling in Case C-393/98 *Gomes Valente*. In addition, the Commission has decided to await also the outcome of Case C-101/00 *Antti Siilin*. The judgement in the latter case was delivered only very recently, on 19 September 2002. Furthermore, on 1 June 2001 the Commission addressed a Communication to all Member States to make them aware of the consequences of the Court's ruling in the *Gomes Valente* case. In its reply to that Communication, Denmark assured the Commission that its rules are in conformity with the



outcome of the *Gomes Valente* case. However, some of the Member States have still not replied to the communication. Since the Commission takes the view that this is an issue that has to be dealt with as a part of an overall strategy, the Commission has still not been able to come to a decision as regards the complainant's infringement complaint.

3. The third issue concerns the qualifications of the persons carrying out the valuation of used motor vehicles imported to Denmark. This valuation is crucial for the amount of Danish Registration Tax to be paid on an imported used vehicle. The complainant has not made it clear whether these persons are private persons or officials. The Commission will contact the complainant to clarify this matter. Furthermore, this issue only came to the Commission's knowledge through the documents sent by the complainant to the Ombudsman. If the complainant had turned directly to the Commission, it would have been possible to deal with the issue more promptly.

To sum up its opinion, the Commission concludes that it has not failed to fulfil its obligations towards the complainant. The complainant will be personally informed about the Commission's follow-up of his complaint. The course of action chosen is however to solve the problem simultaneously in all Member States through co-operation and by issuing a Communication written in clear and simple language.

The Commission also points out that due to lack of personnel it has to focus on matters with important financial and legal implications. It also points to the fact that the issues concerned are very complex and that they belong to a not yet harmonised area of law, where the rulings of the Court of Justice are the only existing legal reference.

The complainant's observations

The complainant was invited to submit observations on the Commission's opinion. In reply, the complainant sent a three page letter and supporting documents, making in summary the following points:

1. As regards the Danish tax rules on cross-border long-term leasing of vehicles, there is a judgement from the Court of Justice and it is the Commission's obligation to make Denmark conform to this judgement.
2. As regards Danish taxation of used cars imported to Denmark from another EU country, there now exist so many clear rulings from the Court of Justice that the Commission can no longer neglect making Denmark comply with the rules. As it is now, Denmark does not comply with the rules. When a used car is imported to Denmark, its value is always put too high, leading to a heavier tax burden on imported used cars than on used cars which once were sold as new in Denmark.
3. As regards the qualifications of the persons carrying out the valuation of used motor vehicles imported to Denmark, the complainant has several times contacted the Commission directly on the matter.

Finally the complainant questions why the Commission should not take his complaint seriously



since the Danish authorities seem to have taken it seriously by exempting him from paying the tax at issue until the end of 2003.

THE DECISION

1 The alleged failure to take a stand on the infringement complaint

1.1 The complainant alleges that the Commission has acted contrary to good administration by failing to take a stand on the issues raised by him in his infringement complaint. The complainant claims that the Commission should immediately take a stand on the issues raised in his infringement complaint.

1.2 The Commission argues that it has not failed to fulfil its obligations towards the complainant. Since the course of action chosen by the Commission is to solve the problems related to car taxation simultaneously in all the Member States it has not yet been able to come to a decision as regards the complainant's infringement complaint. The complainant will however be personally informed about the Commission's follow-up of his complaint. The Commission also points out that the issue concerned is very complex and belongs to a not yet harmonised field of law.

1.3 The Ombudsman notes that the complainant's infringement complaint to the Commission was registered by its Secretariat General in January 1998. In the framework of the Ombudsman's own initiative inquiry into the administrative procedures for dealing with complaints concerning Member States' infringement of Community law (reference 303/97/PD) (1), the Commission undertook to take a decision either to close the file or to initiate official infringement proceedings within a maximum period of one year from the date on which it was registered, except in special cases, the reasons for which must be stated (2).

1.4 In his decision on the complainant's previous complaint 801/2000/PB concerning the lack of response from the Commission with regard to his infringement complaint, the Ombudsman found no maladministration because he accepted that the Commission was waiting for the outcome of cases pending before the Court of Justice before producing a final reply to the complainant. He further noted that the Commission undertook to take a decision on the complainant's infringement complaint in October 2001 and to inform the complainant.

1.5 It appears that the Court of Justice has now delivered judgement in the cases for which the Commission was waiting. Notwithstanding this, the Commission has still not taken a decision on the alleged infringement, despite its undertaking to do so in October 2001. The Commission explained its failure to respect its undertaking by stating that it preferred to take an overall approach to the problems related to car taxation and that its aim is to solve these problems simultaneously in all the Member States, namely through co-operation and by issuing a Communication written in clear and simple language. The Commission further indicated that the matter at stake belongs to a not yet harmonised field of law.

1.6 It is good administrative practice to respect the legitimate and reasonable expectations that members of the public have in the light of how the institution has acted in the past (3). The



Ombudsman considers that the Commission's explanation of why it did not reach a decision by October 2001, despite its undertaking to do so, is not unreasonable. However, the complainant could reasonably expect that the Commission would inform him in October 2001 of the fact that it would not fulfil its undertaking and of the reasons. The Commission's failure to do so is an instance of maladministration. The Ombudsman therefore makes the critical remark below.

1.7 The Ombudsman also points out that the complainant has the possibility of making a new complaint to the Ombudsman in the future if there is further delay by the Commission in reaching a decision on the infringement complaint.

2 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

It is good administrative practice to respect the legitimate and reasonable expectations that members of the public have in the light of how the institution has acted in the past (4) . The Ombudsman considers that the Commission's explanation of why it did not reach a decision by October 2001, despite its undertaking to do so, is not unreasonable. However, the complainant could reasonably expect that the Commission would inform him in October 2001 of the fact that it would not fulfil its undertaking and of the reasons. The Commission's failure to do so is an instance of maladministration.

Given the explanations provided by the Commission for the delayed inquiry into the complainant's complaint and its new promise to keep the complainant informed about the outcome, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) See the Ombudsman's Annual Report for 1997, page 270.

(2) The Ombudsman notes that this one year rule has been formally laid down in point 8 of the Annex to the *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 244/5.

(3) Cf. Article 10 (2) of the European Code of Good Administrative Behaviour adopted by the European Parliament in its resolution C5-0438/2000 of 6 September 2001 (available on the Ombudsman's website: <http://www.ombudsman.europa.eu> [Link]).



(4) Cf. Article 10 (2) of the European Code of Good Administrative Behaviour adopted by the European Parliament in its resolution C5-0438/2000 of 6 September 2001 (available on the Ombudsman's website: <http://www.ombudsman.europa.eu> [Link]).