

Decision of the European Ombudsman on complaint 341/2003/GG against the European Commission

Decision

Case 341/2003/GG - Opened on 21/02/2003 - Decision on 11/11/2003

Strasbourg, 11 November 2003

Dear Mr G.,

On 10 February 2003, you lodged a complaint against the European Commission concerning the latter's handling of a complaint against Germany that you had submitted to the Commission.

On 21 February 2003, the European Ombudsman forwarded the complaint to the President of the European Commission.

By letter of 24 February 2003, you sent the Ombudsman further information in relation to your complaint, which the Ombudsman forwarded to the Commission on 6 March 2003.

On 7 May 2003, you wrote to me in order to ask for a rapid decision on your complaint or for the adoption of interim measures. In my reply of 8 May 2003, I explained that the Commission had been asked to submit its opinion on the complaint by 31 May 2003 and that this opinion would be forwarded to you as soon as possible. I also informed you that the Ombudsman did not have the power to issue binding orders to other institutions or to adopt interim measures. A copy of your letter of 7 May 2003 and of my reply thereto were forwarded to the Commission for its information.

The Commission sent its opinion (dated 13 May 2003) on 23 May 2003. I forwarded it to you on 28 May 2003 with an invitation to make observations.

On 30 May 2003, you sent me a further complaint against Germany which was addressed to the Commission. I acknowledged receipt of this letter on 5 June 2003, expressing the view that this letter had been sent to me for my information. In your reply of 11 June 2003, you asked me to forward your letter of 30 May 2003 to the Commission. I did so on 20 June 2003.

On 30 June 2003, you sent me your observations on the Commission's opinion. On 23 July 2003, you sent additional observations.

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



THE COMPLAINT

The complainant, a German citizen, transferred securities he had kept with the Volksbank Freiburg (a German bank) to a Swiss bank. According to the complainant, this was a normal transaction that was carried out openly and in his own name. Still according to the complainant, the transfer was made because the securities were needed in order to secure loans from the Swiss bank, because the Swiss bank offered more advantageous products, better advice regarding securities, a wider range of services and a faster and more reliable handling of business than the German bank and because of the security offered by the account with the Swiss bank.

In the course of an investigation into illegal transactions carried out at the Volksbank Freiburg on the basis of a search warrant issued on 22 April 1998, the tax authority Freiburg-Land also discovered documents concerning the said transfer. According to the complainant, the tax authority thus went beyond their mandate that was limited to examining transactions that had been carried out anonymously. The tax authority Freiburg-Land subsequently forwarded the information it had discovered to the tax authority Stuttgart I competent for the complainant. The latter subsequently launched its own tax investigation against the complainant whose home and office were searched. As a result of this investigation, the tax authority Stuttgart I modified the complainant's tax charges for the years 1989 until 1999 and set a higher advance payment on taxes due for 2001. With regard to these decisions, the complainant applied to the Finanzgericht (financial court) Baden-Württemberg for a stay of proceedings. In its decisions of 16 April 2002, the Finanzgericht rejected these applications. The complainant's request to allow an appeal to the Bundesfinanzhof (Federal Supreme Financial Court) was rejected by the Finanzgericht on 30 July 2002. The relevant facts also resulted in criminal proceedings being brought against the complainant.

According to the complainant, the transfer carried out by him was covered by the free movement of capital. It could not thus be the basis for an initial suspicion ("Anfangsverdacht") of tax evasion. The complainant submitted that the German tax authorities suspect any transfers to other countries as being potentially abusive. Such an approach was likely to deter citizens from taking advantage of the free movement of capital ("chilling effect"). The complainant took the view that the Community interest in an unimpeded free movement of capital across borders had to be taken into account by national authorities. According to the complainant, the tax authorities and the Finanzgericht had failed to do so in the present case. In the complainant's view, the Finanzgericht had objected to the transfer of the securities on the grounds that it had been carried out without any economic reason. The complainant considered that requiring an economic reason for such transactions constituted a disguised restriction of the free movement of capital. He further considered that there was discrimination, given that no economic reason was required for a transfer to a German bank and that reasons of a non-economic nature were disregarded. The complainant finally submitted that the measures taken by the German tax authorities had been disproportionate, given that the Amtsgericht (local court) Freiburg that had authorised the search at the Volksbank Freiburg had stressed that the investigation was to be



limited to transactions that had been carried out anonymously or by using fake names. There was thus an absolute prohibition on using information on his transfer that had been discovered on the occasion of this investigation.

On 2 September 2002, the complainant turned to the Commission (complaint reference 2002/5041) in order to complain that the decision of the Finanzgericht of 30 July 2002 infringed the rules of the EC Treaty on the free movement of capital. The complainant therefore suggested that Article 226 proceedings should be commenced by the Commission. In its reply of 19 November 2002, the Commission pointed out: "In this context it cannot be seen that the Finanzgericht would have justified a concrete initial suspicion of tax evasion in your case with the fact that there was no economic reason for transferring the securities or that it would even have established a general requirement of such an economic reason in case of transfers abroad." In the Commission's view, the German court had only held that such a suspicion was warranted where the relevant transaction appeared to be uneconomic. The Commission informed the complainant that it therefore proposed to close the case unless the complainant could put forward new arguments or evidence.

The complainant considered that in its letter of 19 November 2002, the Commission had falsified the decision of the Finanzgericht by substituting for the latter's position an argument that had been put forward during the proceedings by the tax authority Stuttgart I which the Finanzgericht had not adopted.

The complainant objected to the Commission's view in several further letters. In its replies of 13 January and 3 February 2003, however, the Commission confirmed its position.

In his complaint to the Ombudsman, the complainant (1) objects to the Commission's refusal to open proceedings under Article 226 and (2) alleges that the Commission has falsified the facts.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

1. Context of the case

Under German law, tax investigations can only be based on a sufficiently substantial initial suspicion of some form of tax evasion ("steuerrechtlicher Anfangsverdacht"). The Bundesfinanzhof (the highest German fiscal court) decided on 6 February 2001 that any fiscal investigation based exclusively on the fact that there had been a cross-border transfer of assets from a national to a foreign bank account infringed the freedom of capital movements protected by Article 56 of the EC Treaty.

In a previous complaint to the Commission of 3 September 2001 (reference 2001/5037), the complainant had claimed that the measures taken against both his bank and himself (i.e. execution of a search warrant and confiscation of documents) had been illegal. Since there had been no indication of a breach of Article 56 of the EC Treaty, the case had been closed by the Commission on 25 January 2002.



The complainant subsequently lodged a further complaint (reference 2002/5041) in which he objected to the decisions of the Finanzgericht Baden-Württemberg of 16 April 2002 and in particular to the decision of the Finanzgericht of 30 July 2002, rejecting his request to overturn the decisions of 16 April 2002. The complainant deduced from the decision of 30 July 2002 that, as a general rule, the court required *economic* reasons for cross-border transfers of securities, something which represented a disguised restriction within the meaning of Article 58 (3) of the EC Treaty.

2. History of the case

The complaint (reference 2002/5041) had been lodged by the complainant on 2 September 2002. On 27 September 2002, the complainant was asked to provide further information. This information was sent on 8 October 2002. An analysis by the Commission's services showed that there was no indication of arbitrary discrimination against transfers to foreign countries within the meaning of Article 58 (3) of the EC Treaty. On 19 November 2002, and with the approval of the Commission's Legal Service, the complainant was therefore informed of the Commission's intention to close the case. After the complainant had made further submissions on 28 November 2002 and 23 December 2002, the Commission informed him that it maintained its position that the case should be closed.

3. The Commission's position regarding the complainant's arguments

In his complaint to the Ombudsman, the complainant referred to grievances regarding the legality of various search warrants. All these grievances had been subject to court decisions. The search warrant executed against the complainant's bank in Freiburg had been annulled by a decision of the Landgericht (regional court) Freiburg of 26 January 2000. Regarding the complainant's claim that this led to an absolute prohibition on the use of evidence thus gained, it had to be pointed out that there was no clear-cut provision in German law automatically excluding consideration of illegally obtained information ('fruit of the poisonous tree' doctrine), but only specific case-law. The complainant had filed a complaint with the Landgericht Stuttgart against the tax investigation measures taken against him by the tax authority in Stuttgart. The court had rejected this complaint on 19 January 2001. The legality of the confiscation of the complainant's documents had been confirmed by a decision of the Amtsgericht (local court) Stuttgart of 23 January 2001.

According to Article 2 (7) of the Statute of the Ombudsman, the complaint was thus inadmissible as far as the issues covered by these legal proceedings were concerned.

Regarding the complainant's objection to the Commission's refusal to open proceedings under Article 226 of the EC Treaty, it had to be pointed out that, in accordance with the established case-law of the Community courts, the Commission enjoyed a discretionary power in deciding whether or not to commence such proceedings.

Regarding the complainant's claim that the Finanzgericht in its decision of 30 July 2002 wrongly upheld a specific initial suspicion of tax evasion in his case on the basis that there was no economic reason for a transfer of securities, the court's decision reads as follows: (1)

"It was decisive for the judgement by the senate [in its decisions of 16 April 2002] that the



transfer of the securities to a foreign bank occurred without an economic reason. (...) Since the lack of an economic reason was decisive for the decision by the senate, it is not relevant that only a part of the deposit had been transferred.”

This referred to the previous decisions by the Finanzgericht of 16 April 2002 which both read as follows:

“In addition, in the senate’s view it is not usual bank practice in relation to foreign countries that an existing deposit is transferred as a whole to a foreign bank for no apparent economic reason. This is because debtor and creditor remain the same, only the administration of the assets changes. On the contrary, in such circumstances the senate upholds the initial suspicion of tax evasion.”

What “no apparent economic reason” and the “lack of an economic reason” in this context meant became apparent when looking at section I of the decisions of 16 April 2002 which reads as follows:

“[The Finanzamt Stuttgart I] claims as justification that the investigation by the tax investigators was based on lawful investigative actions: The [complainant] had transferred a deposit of his consisting of fixed-interest securities to a foreign country. There were no economic reasons to do so, because the costs of this deposit were higher abroad.”

In this context, the facts did not show that the Finanzgericht had based a specific initial suspicion of tax evasion in the complainant’s case on the fact that there was no economic reason for a transfer of securities or even stipulated a general requirement for there to be an economic reason for cross-border transfers. Following a comprehensive analysis of all the court decisions submitted, it became obvious that the court upholds an initial suspicion of tax evasion if the cross-border transfer concerned is economically disadvantageous. The tax authority in the relevant case had uncontestedly claimed that the costs of the foreign deposit were higher than those charged by the German bank. Thus, contrary to the complainant’s allegations, investigative action against the complainant was based on the fact that the transfer was *economically disadvantageous* and not on the fact that an economic reason was missing.

The complainant claimed that there were economic or non-economic reasons for the transfer he had carried out. However, such possible reasons had been unknown at the time the initial suspicion had arisen.

Article 58 (1) of the EC Treaty stipulates that the provisions of Article 56 enshrining the free movement of capital shall be without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation. Based on the information available to the Commission, there was no indication that the tax authorities or the Finanzgericht had relied merely on the cross-border nature of the transfer of securities in order to establish an initial suspicion of tax evasion. The investigations had on the contrary been based on the fact that the complainant’s transfer seemed economically disadvantageous at the time and that the complainant had refused to provide further



clarification.

The Commission enjoyed a discretionary power in deciding whether or not to commence infringement proceedings. In the complainant's case, this decision was not based on a falsification of the facts, but on the interpretation of information provided by the complainant.

The complainant's observations

In his observations, the complainant maintained his complaint and made the following further comments:

It followed from the decision of the Bundesfinanzhof of 6 February 2001 that tax investigations can only be based on a sufficiently substantial initial suspicion of some form of tax evasion ("steuerrechtlicher Anfangsverdacht"). This meant that such tax investigations could only be based on the fact that there had been an *anonymous* transfer of assets from a national to a foreign bank. The question as to whether there had been an economic reason for the transfer abroad or whether the transfer appeared to be economically disadvantageous was irrelevant according to the case-law of the Bundesfinanzhof.

According to a letter from the tax authority Freiburg-Land to the tax authority in Stuttgart, the tax investigation had been started in the present case "since the transfer of fixed-interest securities to a deposit in a foreign country did not make economic sense and since the transfer had been carried out in close temporal vicinity to the introduction of the deduction on interest ("Zinsabschlag") [in Germany]. The documents [concerning the complainant] had been treated as documents found by chance ("Zufallsfunde") since they had not been covered by [the search warrant]".

On 4 September 1998, the Amtsgericht Freiburg had rejected the request by the tax authority Freiburg-Land to confirm the seizure of these documents. The court argued that otherwise the restrictions that had been imposed on the search warrant issued on 22 April 1998 would be rendered nugatory. This decision was confirmed by the Landgericht Freiburg on 4 March 1999. Despite these decisions, the relevant documents were transmitted to the tax authority Stuttgart I on 9 August 1999. Doing so already constituted an infringement of the free movement of capital.

After the Landgericht Freiburg had, on 26 January 2000, annulled the decision authorising the search warrant of 22 April 1998, the relevant documents had been returned to the Volksbank Freiburg. At that time it was apparently overlooked that copies of these documents had already been passed on to the tax authority in Stuttgart. This also constituted an infringement of the complainant's free movement of capital.

On 14 November 2000, the tax authority in Stuttgart applied for a search and seizure warrant. The initial suspicion was based on the fact that a transfer of securities to a Swiss account had taken place.

The question as to whether this transfer had been economically disadvantageous had not been examined at all at the time when the documents were seized on 26 June 1998. This issue only became relevant during the proceedings before the Finanzgericht towards the end of 2001 and



in 2002, given that the tax authority Stuttgart I had relied on the alleged absence of an economic purpose of the transfer. It was not legitimate to project this issue back to 1998. The complainant had at first not replied to this issue in 2001/2002 since according to the case-law of the Bundesfinanzhof and of the German Constitutional Court it was irrelevant for the purposes of the initial suspicion.

Requiring an economic reason for a transfer abroad or that such a transfer should not appear to be economically disadvantageous constituted an arbitrary discrimination as well as a disguised restriction on the free movement of capital within the meaning of Article 58 (3) of the EC Treaty.

THE DECISION

1 Introductory remarks

1.1 The complainant, a German citizen, transferred securities he had kept with the Volksbank Freiburg (a German bank) to a Swiss bank. According to the complainant, this was a normal transaction that was carried out openly and in his own name. In the course of an investigation into illegal transactions carried out at the Volksbank Freiburg on the basis of a search warrant issued on 22 April 1998, the tax authority Freiburg-Land also discovered documents concerning the said transfer. According to the complainant, the tax authority thus went beyond their mandate that was limited to examining transactions that had been carried out anonymously. The tax authority Freiburg-Land subsequently forwarded the information it had discovered to the tax authority Stuttgart I competent for the complainant. The latter subsequently launched its own tax investigation against the complainant whose home and office were searched. As a result of this investigation, the tax authority Stuttgart I modified the complainant's tax charges for the years 1989 until 1999 and set a higher advance payment on taxes due for 2001. With regard to these decisions, the complainant applied to the Finanzgericht (financial court) Baden-Württemberg for a stay of proceedings. In its decisions of 16 April 2002, the Finanzgericht rejected these applications. The complainant's request to allow an appeal to the Bundesfinanzhof (Federal Supreme Financial Court) was rejected by the Finanzgericht on 30 July 2002. On 2 September 2002, the complainant turned to the European Commission. However, by letter of 19 November 2002 the Commission informed the complainant that it did not see any reason why it should intervene. The Commission confirmed this position in further letters of 13 January and 3 February 2003.

1.2 In his complaint to the Ombudsman, the complainant submits that the European Commission ought to have opened infringement proceedings on the basis of Article 226 of the EC Treaty. The complainant takes the view that the German tax authorities and the Finanzgericht infringed the free movement of capital in his case.

1.3 For the avoidance of any doubt, it should be recalled that Article 195 of the EC Treaty empowers the European Ombudsman to receive complaints concerning instances of maladministration in the activities of the Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. The European Ombudsman thus has no mandate to consider complaints against other institutions or bodies, such as national tax authorities or courts. The present decision therefore deals exclusively with



the complaint against the European Commission.

1.4 In its opinion, the Commission points out that the grievances regarding the legality of various search warrants to which the complainant had referred were subject to court decisions. In the Commission's view, and according to Article 2 (7) of the Statute of the Ombudsman (2) , the complaint is thus inadmissible as far as the issues covered by these legal proceedings were concerned.

1.5 It should be noted that it follows from Articles 1 (3) and 2 (7) of the Ombudsman's Statute that the European Ombudsman may not question the soundness of a court's ruling and that he has to declare a complaint inadmissible if the facts that have been put forward by the complainant have already been dealt with by a court. However, the present complaint concerns the Commission's decision not to open infringements proceedings against Germany. Given that this decision does not appear to have been the subject of court proceedings, the Commission's doubts as to the admissibility are not founded.

1.6 It should however be noted that the complainant's case is based on the premise that decisions taken by German tax authorities that appear to have been the subject of court proceedings and ultimately decisions by a German court infringed Community law. This fact will be taken into consideration when the complainant's allegations are examined (see 2.3 below).

2 Failure to open infringement proceedings

2.1 The complainant objects to the Commission's refusal to open infringement proceedings against Germany on the basis of Article 226 of the EC Treaty. He takes the view that the transfer carried out by him was covered by the free movement of capital. It could not thus be the basis for an initial suspicion ("Anfangsverdacht") of tax evasion. The complainant submits that the tax authorities and the Finanzgericht failed to take into account the Community interest in an unimpeded free movement of capital across borders. According to the complainant, the Finanzgericht objected to the transfer of the securities on the grounds that it had been carried out without any economic reason. The complainant considers that such an approach constitutes a disguised restriction of the free movement of capital. He further submits that there was discrimination, given that no economic reason was required for a transfer to a German bank and that reasons of a non-economic nature were disregarded. The complainant finally takes the view that the measures taken by the German tax authorities were disproportionate, given that the Amtsgericht (local court) Freiburg that had authorised the search at the Volksbank Freiburg had stressed that the investigation was to be limited to transactions that had been carried out anonymously or by using fake names. In his view, there was thus an absolute prohibition on using information on his transfer that had been discovered on the occasion of this investigation.

2.2 In its opinion, the Commission points out that the complainant's grievances concerning the legality of various search warrants were subject to court decisions. The search warrant executed against the complainant's bank in Freiburg was annulled by a decision of the Landgericht (regional court) Freiburg. However, according to the Commission there was no clear-cut provision in German law automatically excluding consideration of illegally obtained information ('fruit of the poisonous tree' doctrine), but only specific case-law. The Commission further takes the view that the facts did not show that the Finanzgericht had based a specific



initial suspicion of tax evasion in the complainant's case on the fact that there was no economic reason for a transfer of securities or even stipulated a general requirement for there to be an economic reason for cross-border transfers. Based on the information available to the Commission, there was no indication that the tax authorities or the Finanzgericht had relied merely on the cross-border nature of the transfer of securities in order to establish an initial suspicion of tax evasion. The investigations had on the contrary been based on the fact that the complainant's transfer seemed economically disadvantageous at the time and that the complainant had refused to provide further clarification.

2.3 It should be noted at the outset that the European Commission only has the power to refer a case to the Court of Justice under Article 226 of the EC Treaty if it considers that there is an infringement of Community law. The Ombudsman considers that the above-mentioned arguments put forward by the Commission to support its view that there is no infringement appear to be reasonable. In particular, the Ombudsman takes the view that the Commission's interpretation of the decisions rendered by the Finanzgericht appears to be correct. The Ombudsman notes that in his observations on the Commission's opinion, the complainant submits that the alleged absence of an economic purpose of the relevant transfer was first raised in the proceedings before the Finanzgericht in 2001/2002 and that it was not legitimate to project this issue back to 1998 when the first investigation was carried out. By raising this argument, the complainant thus effectively questions the soundness of the decisions of the Finanzgericht of 16 April 2002 and of 30 July 2002. However, and as mentioned in point 1.5 above, the Ombudsman may not question the soundness of a court's ruling. It follows that the complainant has thus not established his allegation concerning the Commission's refusal to start infringement proceedings.

2.4 In these circumstances, there appears to be no maladministration on the part of the European Commission in so far as the first allegation is concerned.

3 Falsification of facts

3.1 The complainant alleges that the following remark contained in the Commission's letter of 19 November 2002 falsified the facts: "In this context it cannot be seen that the Finanzgericht would have justified a concrete initial suspicion of tax evasion in your case with the fact that there was no economic reason for transferring the securities or that it would even have established a general requirement of such an economic reason in case of transfers abroad." According to the complainant, the Commission substituted for the Finanzgericht's position an argument that had been put forward during the proceedings by the tax authority Stuttgart I which the Finanzgericht had not adopted.

3.2 The Commission takes the view that its decision not to open infringements proceedings was not based on a falsification of facts.

3.3 As discussed above (see point 2.3), the Commission's interpretation of the decisions rendered by the Finanzgericht appears to be correct.

3.4 In these circumstances, there appears to be no maladministration on the part of the European Commission in so far as the second allegation is concerned.



4 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. 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) Translation provided by the Commission.

(2) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, page 15.