

Decision of the European Ombudsman on complaint 292/2004/TN against the European Commission

Decision

Case 292/2004/TN - Opened on 16/02/2004 - Decision on 26/11/2004

Strasbourg, 26 November 2004

Dear Mr M.,

On 20 January 2004, you made a complaint to the European Ombudsman on behalf of Norrbottens Frihandelsförening (a Swedish free trade association) concerning the European Commission's decision to close your "Article 226 complaint" against Sweden.

On 16 February 2004, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 15 June 2004. I forwarded it to you with an invitation to make observations, which you sent on 27 July 2004.

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

In January 2004, a complaint was made to the Ombudsman on behalf of Norrbottens Frihandelsförening (a Swedish free trade association) concerning the European Commission's decision to close its "Article 226 complaint" (1) against Sweden.

According to the complainant, the relevant facts are, in summary, the following:



The complainant made an Article 226 complaint against Sweden concerning alleged infringements of Community rules on excise duties and the carriage of dangerous goods. When buying heating oil in Finland and transporting it to Sweden for private use there, Sweden charges excise duty on the oil and requires the transport to be covered by an accompanying document. According to the complainant, this practice is against Community rules.

However, the complainant is dissatisfied with the Commission's handling of his complaint and in particular with its interpretation of Article 9.3 of Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products. Article 9.3 states that an excise duty becomes chargeable in the Member State of consumption if the mineral oils are transported using atypical models of transport. The complainant argues that the Commission's interpretation of Directive 92/12/EEC, and particularly Article 9.3, is too extensive. In the Commission's view, Article 9.3 gives Sweden the right to charge excise duty on the oil and to require e.g. accompanying documents in accordance with Article 7. The complainant argues that the Commission's extensive interpretation of Article 9.3 gives the Member States the right to set aside primary Community legislation. The complainant thus believes the Commission's interpretation to be contrary to, and to not take into proper consideration, the general principles of the EC Treaty about the internal market and taxation, the European Agreement concerning the International Carriage of Dangerous Goods by Road (the ADR agreement) and Directive 94/55/EEC on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road. The complainant considers that the Commission's analysis of Article 9.3 of Directive 92/12/EEC as regards excise duties and accompanying documents should be supplemented with an analysis in the light of the general principles of primary Community law, the ADR agreement and Directive 94/55/EEC.

The complainant alleges, in substance, that the Commission, in dealing with his Article 226 complaint against Sweden, failed to take into consideration all relevant Community legislation and international agreements.

The complainant claims that the Commission should analyse Directive 92/12/EEC in the light of all relevant Community legislation and international agreements.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission makes the following comments:

The complainant made an Article 226 complaint to the Commission alleging that Swedish authorities act contrary to Community law on the following grounds. The Swedish authorities interfere with the principle of free movement by charging excise duties and carrying out controls of transports of mineral oils which are bought in Finland and brought to Sweden intended for the private use of the buyers. According to Article 8 of Directive 92/12/EEC, excise duties on products acquired by private individuals for their own use and transported by them should be charged in the Member State in which they are acquired, which in this case is Finland. It is true



that the above principle can be limited in accordance with Article 9.3 of the same Directive, according to which the Member States may provide that the excise duty shall become chargeable in the Member State of consumption if the mineral oils are transported using atypical modes of transport by private individuals or on their behalf. In the complainant's view, however, the Swedish authorities act contrary to the Directive by considering modes of transport, which are normal for private transport and which have been used in the Swedish-Finnish border area for a long time, to be atypical. In his complaint, the complainant also referred to the Swedish authorities' alleged breach of Directive 94/55/EEC and the ADR agreement.

In examining the complaint against the Swedish authorities, the Commission's Directorate-General for Taxation and Customs Union (hereafter "DG TAXUD") found no breach of Directive 92/12/EEC. As regards the alleged breach of Directive 94/55/EEC and the ADR agreement, the Commission noted that the complainant had submitted a similar complaint, which was already dealt with by its Directorate-General for Energy and Transport (hereafter "DG TREN").

By letter of 12 December 2003, DG TAXUD informed the complainant of its findings as regards Directive 92/12/EEC. It had analysed the relevant national legislation in light of the Directive, and particularly in light of the definition of "atypical modes of transport" in Article 9.3, but it had found no infringement of the Directive. DG TAXUD therefore informed the complainant of its intention to close the case, if the complainant did not provide information that would enable it to establish that an infringement of the Directive had taken place. The complainant was given four weeks to submit his observations regarding the matter. The complainant was also informed that the allegations concerning Directive 94/55/EEC and the ADR agreement were dealt with separately by DG TREN and that those allegations did not affect DG TAXUD's findings as regards Directive 92/12/EEC. Since DG TAXUD received no reply from the complainant to its letter, the case was closed. The complainant was informed of the decision to close the case by letter of 21 April 2004.

The Commission argues that it dealt with the complaint against the Swedish authorities in accordance with its communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (2) and in accordance with its code of good administrative behaviour (3). These rules imply that a complainant can expect the Commission to take into consideration all his or her relevant arguments and to inform him or her of its intention to close the case without further action before doing so. Accordingly, if a complainant argues that certain secondary legislation is contrary to primary legislation, the Commission has to consider this argument, although, in practice, secondary legislation can only be found unlawful in an action for annulment before the Court of Justice in accordance with Article 230 of the EC Treaty or in connection with a request for a preliminary ruling under Article 234 of the EC Treaty. In the context of an Article 226 complaint, principles of good administrative behaviour do not require the Commission to investigate, on its own initiative, whether certain secondary legislation is in conformity with primary legislation. Acts of Community institutions are presumed to be lawful until such time as they are annulled or withdrawn (4).



The complainant did not base his Article 226 complaint against Sweden on the alleged illegality of Article 9.3 of Directive 92/12/EEC. The illegality aspect was mentioned only in the last paragraph of the complaint, in which the complainant asked the Commission to act against Sweden, or he would have to request the Court of Justice to annul the relevant articles of Directive 92/12/EEC since they, according to the Swedish authorities, leave room for such an extensive interpretation that a secondary act invalidates the effects of certain primary legislation. The Commission understood this to merely underline the importance of the alleged infringement, i.e. the Swedish authorities' failure to act in accordance with the Directive. The Commission, therefore, had no reason to deal with the illegality issue.

The complainant's observations

In his observations, the complainant maintains his complaint and argues that the Commission is required to investigate an Article 226 complaint on the basis of all applicable Community legislation and that national interpretation of a Directive has to be considered in the light of superior Community legislation and Community case law without the complainant's explicit request.

The complainant argues that private transport of heating oil cannot be considered as "atypical" in accordance with Article 9.3 of Directive 92/12/EEC if the mode of transport fulfils the security requirements in Directive 94/55/EEC and is commonly used for private transport in another Member State, in this case Finland. During a meeting on 4 May 1999, the Commission services explained that the purpose of Article 9.3 is to prevent transport of dangerous goods not fulfilling the security requirements in the ADR agreement. Article 9.3 has to be interpreted narrowly and in accordance with the principles of proportionality and non-discrimination.

THE DECISION

1 The alleged failure to take into consideration all relevant legislation

1.1 The complaint to the Ombudsman concerns the Commission's handling of an Article 226 complaint against Sweden concerning alleged infringements of Community rules on excise duties and the carriage of dangerous goods. When buying heating oil in Finland and transporting it to Sweden for private use there, Sweden charges excise duty on the oil and requires the transport to be covered by an accompanying document. According to the complainant, this practice is against Community rules.

The complainant is dissatisfied with the Commission's handling of his complaint and, in particular, with its interpretation of Article 9.3 of Directive 92/12/EEC. He argues that the Commission's extensive interpretation of Article 9.3 gives the Member States the right to set aside primary Community legislation. The complainant believes the Commission's interpretation to be contrary to, and to not take into proper consideration, the general principles of the EC Treaty about the internal market and taxation, the ADR agreement and Directive 94/55/EEC.

The complainant argues that private transport of heating oil cannot be considered as "atypical" under Article 9.3 of Directive 92/12/EEC if the mode of transport fulfils the security requirements in Directive 94/55/EEC and is commonly used for private transport in another Member State, in this case Finland.



The complainant alleges that the Commission, in dealing with his Article 226 complaint against Sweden, failed to take into consideration all relevant Community legislation and international agreements.

1.2 The Commission argues that it dealt with the complaint against the Swedish authorities in accordance with the rules binding upon it. It explains that the complaint concerned the Swedish authorities' alleged breach of, in particular, Article 9.3 of Directive 92/12, Directive 94/55/EEC and the ADR agreement. DG TAXUD informed the complainant of its findings as regards Directive 92/12/EEC, that the allegations concerning Directive 94/55/EEC and the ADR agreement were dealt with separately by DG TREN and that those allegations did not affect DG TAXUD's findings as regards Directive 92/12/EEC. DG TAXUD received no reply to its letter informing the complainant of its intention to close the case.

The Commission acknowledges that if a complainant argues that certain secondary legislation is contrary to primary legislation (5) , the Commission has to consider this argument, although, in practice, secondary legislation can only be found unlawful in an action before the Court of Justice. In the context of an Article 226 complaint, principles of good administrative behaviour do not require the Commission to investigate, on its own initiative, whether certain secondary legislation is in conformity with primary legislation. Acts of Community institutions are presumed to be lawful until such time as they are annulled or withdrawn (6) . Furthermore, the complainant did not base his Article 226 complaint against Sweden on the alleged illegality of Article 9.3 of Directive 92/12/EEC. The illegality aspect was mentioned only in the last paragraph of the complaint, in which the complainant asked the Commission to act against Sweden, or he would have to request the Court of Justice to annul the relevant articles of Directive 92/12/EEC since they, according to the Swedish authorities, leave room for such an extensive interpretation that a secondary act invalidates the effects of certain primary legislation. The Commission understood this to merely underline the importance of the alleged infringement, i.e. the Swedish authorities' failure to act in accordance with the Directive. The Commission, therefore, had no reason to deal with the illegality issue.

1.3 The Ombudsman recalls that his investigation is directed at determining whether the Commission, in its handling of the complainant's Article 226 complaint, acted in accordance with the rules and principles binding upon it and within the limits of its legal authority.

1.4 The Ombudsman understands the essence of the complainant's concern to be that when analysing the Swedish legislation's conformity with Article 9.3 of Directive 92/12/EEC, the Commission failed to examine whether Article 9.3, and Sweden's interpretation of it, was in conformity with other Community legislation. The complainant's concern implies either that Article 9.3 is illegal or that the Commission's interpretation of it is wrong.

1.5 As regards the possible illegality of Article 9.3 of Directive 92/12/EEC, the Ombudsman notes the Commission's explanation that it had no reason to address this issue in its handling of the Article 226 complaint because the complainant did not base his complaint on the alleged illegality of the provision, but on Sweden's alleged failure to comply with it. The Ombudsman



also notes the Commission's explanation that it understood the complainant's statement that if the Commission was not to act against the Swedish authorities' extensive interpretation of the relevant articles of the Directive he would have to request the court to annul the articles, as an attempt to underline the importance of the alleged infringement. The Ombudsman considers reasonable the Commission's explanations, which have not been questioned by the complainant.

The Ombudsman further notes that the complainant did not react to the Commission's letter proposing to close the case, although the letter did not address the issue of whether Directive 92/12/EEC, and particularly Article 9.3, was in conformity with other Community legislation.

Moreover, the Ombudsman recalls that the aim of the Article 226 procedure is to ensure that the Member State complies with its obligations under the Treaty. The Ombudsman finds nothing in the context of the present Article 226 complaint that should have prompted the Commission to address the issue of the legality of the relevant provisions of the Directive.

1.6 As regards the possibly incorrect interpretation of Article 9.3 of Directive 92/12/EEC, the Ombudsman notes the Commission's analysis as presented in its letter of 12 December 2003 to the complainant. In its letter, the Commission refers to Article 9.3, noting its explicit explanation that "atypical transport" shall mean the transport of liquid heating products other than by means of tankers used on behalf of professional traders. The Commission continues by stating that heating oil transported by means other than the one referred to in Article 9.3 is excluded from the exception in Article 8, which states that excise duty on products acquired by private individuals for their own use and transported by them shall be charged in the Member State in which the products are acquired. Since Article 8 does not apply to private transport of heating oil with atypical modes, such transport has to be governed by another scheme, namely Article 7 of the Directive. The Commission thus finds that, in the situation described by the complainant in his Article 226 complaint, the Swedish authorities are entitled to charge excise duty on the heating oil and to make sure that the requirements of Article 7 of Directive 92/12/EEC are fulfilled, meaning, for instance, that the transport has to be covered by accompanying documents.

The Ombudsman finds reasonable the Commission's analysis of the Swedish authorities' interpretation of the matter. Furthermore, the Ombudsman finds no evidence to support the complainant's argument that modes of transport which are commonly used in another Member State and fulfil the security requirements in Directive 94/55/EEC cannot be considered atypical under Article 9.3 of Directive 92/12/EEC.

As regards the complainant's argument, put forward in his observations on the Commission's opinion, that Article 9.3 of Directive 92/12/EEC has to be interpreted in accordance with the principles of proportionality and non-discrimination, the Ombudsman finds no evidence to show that the Commission's interpretation of Article 9.3 is disproportionate or discriminatory.

It should be noted, however, that the Court of Justice of the European Communities is the highest authority as regards the interpretation of Community legislation.



1.7 On basis of the above, the Ombudsman takes the view that the Commission acted in accordance with the rules and principles binding upon it and within the limits of its legal authority when dealing with the complainant's infringement complaint. The Ombudsman therefore finds no maladministration by the Commission.

2 The complainant's claim

2.1 The complainant claims that the Commission should analyse Directive 92/12/EEC in the light of all relevant Community legislation and international agreements. The Ombudsman understands the complainant's claim as a request for the Commission to investigate, in a wider legal context, the situation in Sweden as regards private transport of heating oil bought in Finland. However, on the basis of the findings in paragraph 1.7 above, the Ombudsman finds no reason to pursue the complainant's claim within the framework of this inquiry.

2.2 The Ombudsman points out that the complainant has the possibility to submit a new complaint to the Commission explicitly based on the incompatibility of the existing situation in Sweden with the principles of the EC Treaty.

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,

P. Nikiforos DIAMANDOUROS

(1) Article 226 of the EC Treaty empowers the Commission to proceed against a Member State in respect of infringements of Community law. Anyone may lodge a complaint (an "Article 226 complaint") with the Commission against a Member State about any state measure or administrative practice which he/she considers incompatible with Community law.

(2) OJ 2002, C 244, p. 5.

(3) Available at: http://www.europa.eu/comm/secretariat_general/code/index_en.htm [Link]

(4) See Case C-245/92, *Chemie Linz GmbH v. Commission*, [1999] ECR I-04643, paragraph 93.

(5) The Ombudsman notes that primary legislation is the Treaties and secondary legislation, which is based on the Treaties, includes e.g. directives and decisions. Secondary legislation must comply with general principles of law, as established in the case law of the Court of Justice.



(6) See Case C-245/92, *Chemie Linz GmbH v. Commission* , [1999] ECR I-04643, paragraph 93.