

Decision of the European Ombudsman on complaint 1272/2004/GG against the European Commission

Decision

Case 1272/2004/GG - Opened on 17/05/2004 - Decision on 24/11/2004

Strasbourg, 24 November 2004

Dear Mr F.,

On 5 May 2004, you made a complaint to the European Ombudsman concerning Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils and the judgement of the Court of Justice of 9 September 1999 in Case C-102/97. You alleged that the Commission failed to enforce Community law and the judgements rendered on the basis of Community law.

On 17 May 2004, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 18 August 2004 and I forwarded it to you on 30 August 2004 with an invitation to make observations by 30 September 2004. No observations appear to have been received from you.

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 complainant is a German firm active in recycling waste oils. According to the information provided in the complaint, the process used by the complainant results in the production of "Fluxöl" (flux oil).



Article 3 (1) of Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (1) (as amended) provides: “Where technical, economic and organisational constraints so allow, Member States shall take the measures necessary to give priority to the processing of waste oils by regeneration”.

According to the complainant, Germany has subsidised the burning of waste oils (for the purpose of electricity-generation) since 1993 at the latest. The complainant considered this to be in stark contradiction with the provisions of the said Directive. After having unsuccessfully approached the Federal Government of Germany, the complainant submitted a complaint to the Commission. The latter opened infringement proceedings and subsequently submitted the matter to the Court of Justice. In its judgement of 9 September 1999 on that action (2) , the Court found that “by failing to take the measures necessary to give priority to the processing of waste oils by regeneration, notwithstanding that technical, economic and organisational constraints so allowed, the Federal Republic of Germany has failed to fulfil its obligations under Article 3(1) of Council Directive 75/439/EEC”.

According to the complainant, Germany was reluctant to comply with this judgement. Only after the complainant had again turned to the Commission and the latter had taken steps with a view to use the procedure set out in Article 228 of the EC Treaty (which provides for the possibility of penalty payments) did Germany accept to amend her legislation.

The complainant submitted that the amended rules now applicable in Germany define the term “regeneration” so as to exclude (or make it possible to exclude) processes leading to the production of “flux oil”. According to the complainant, this measure had been taken deliberately so as to punish it.

In its complaint, the complainant mentioned a meeting between the Commission's Directorate-General (DG) Environment and representatives of the German Ministry for the Environment and the German Ministry for Economic Affairs that had taken place on 25 September 2003 and in which the Commission seemed to have accepted the new rules.

On 9 January 2004, the complainant wrote to Ms Wallström, the Commissioner in charge of the environment, calling upon the Commission to take action.

In its complaint to the Ombudsman, the complainant alleged that the Commission failed to enforce Community law and the judgements rendered on the basis of Community law.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

The present complaint to the Ombudsman was related to complaint 2002/4775 that had been lodged with the Commission on 28 June 2002. This complaint was a follow-up complaint to complaint 1990/5097. In the latter complaint case, the Commission had referred Germany to the



Court of Justice for not having applied correctly Article 3 (1) of Directive 75/439/EEC. In its judgement of 9 September 1999, the Court had stated in particular "that the possibility of continuing to apply an exemption from the excise duty on waste oils intended for combustion, approved by a Council decision of 30 June 1997, does not have the effect of precluding consideration of the fiscal measures which the Federal Republic of Germany could have adopted in order to comply with its obligation to implement Article 3(1) of Directive 75/439, as amended" (3) .

As the afore-mentioned Court judgement had not been immediately implemented by Germany, the Commission had opened a procedure under Article 228 of the EC Treaty. After Germany had adopted a new subsidy programme for the regeneration of waste oils, thereby implementing the regeneration principle laid down in Article 3 (1) of Directive 75/439, the Commission had closed the case.

New information on the possible ineffectiveness of the said German subsidy programme and the counter-productiveness of tax refunds or exemptions from fuel taxes for waste oils reused as fuel had led to the opening of the current complaint 2002/4775 (and another parallel complaint afterwards).

The complainant claimed that the obligation laid down in Article 3 (1) of Directive 75/439 to give priority to the processing of waste oils by regeneration encompassed the processing designed to generate "flux oil". Flux oil was a petroleum distillate used to produce a long-term reduction in the viscosity of bitumen. Waste flux oils were not collected for regeneration. Article 1, fourth indent of Directive 75/439 defined "regeneration" as "any process whereby base oils can be produced by refining waste oils, in particular by removing the contaminants, oxidation products and additives contained in such oils". The processing of waste oils into flux oils did not remove the contaminants, oxidation products and additives in the waste oils. Moreover, it did not permit the re-use of waste oils for the use for which they had originally been intended.

In addition, Article 3 (1) of Directive 75/439 did not specify the measures that had to be taken to comply with the obligation laid down there. Member States thus had a discretion to design and apply appropriate measures.

In the course of the investigations in case 2002/4775, Germany had provided information indicating the legal possibility for the administration to enforce the priority for regeneration of waste oils and claiming that the regeneration quota in Germany demonstrated that the priority principle was achieved in practice.

From a subsequent meeting with the competent German authorities in September 2003 it appeared that in principle the application of the priority principle was ensured. However, Germany had admitted that the statistics on unregenerate waste oils (incineration, recycling to other products) were unreliable and that therefore a specific study would be initiated.

The results of this study were expected by the end of 2004. In any case, the results of this statistical study should be awaited and assessed before any decision on the substance of the



current complaint case could be taken.

Complaint 2002/4775, the investigation of which was still ongoing, was being treated in accordance with the Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law.

The complainant's letter to Ms Wallström of 9 January 2004 had been answered on 3 February 2004.

The complainant's observations

No observations were received from the complainant.

THE DECISION

1 Alleged failure to enforce Community law and the judgements rendered on its basis

1.1 The complainant is a German firm active in recycling waste oils. According to the information provided in the complaint, the process used by the complainant results in the production of "Fluxöl" (flux oil). Article 3 (1) of Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (4) (as amended) provides: "Where technical, economic and organisational constraints so allow, Member States shall take the measures necessary to give priority to the processing of waste oils by regeneration". Considering that Germany had failed to comply with this obligation, the complainant submitted a complaint (complaint 1990/5097) to the Commission. The latter opened infringement proceedings and subsequently submitted the matter to the Court of Justice. In its judgement of 9 September 1999 on that action (5) , the Court found that "by failing to take the measures necessary to give priority to the processing of waste oils by regeneration, notwithstanding that technical, economic and organisational constraints so allowed, the Federal Republic of Germany has failed to fulfil its obligations under Article 3(1) of Council Directive 75/439/EEC". As this judgement had not been immediately implemented by Germany, the Commission had opened a procedure under Article 228 of the EC Treaty. After Germany had adopted a new subsidy programme for the regeneration of waste oils, thereby implementing the regeneration principle laid down in Article 3 (1) of Directive 75/439, the Commission had closed the case. The complainant submitted that the amended rules now applicable in Germany define the term "regeneration" so as to exclude (or make it possible to exclude) processes leading to the production of "flux oil". According to the complainant, this measure had been taken deliberately so as to punish it. The complainant therefore called upon the Commission to intervene, inter alia in a letter of 9 January 2004 addressed to Ms Wallström, the member of the Commission in charge of environmental matters. In his complaint to the Ombudsman, the complainant alleged that the Commission failed to enforce Community law and judgements rendered on the basis of Community law.

1.2 In its opinion, the Commission pointed out that the present case concerned complaint 2002/4775 that had been lodged by the complainant as a follow-up complaint to complaint 1990/5097. The Commission noted that Article 1, fourth indent of Directive 75/439 defined "regeneration" as "any process whereby base oils can be produced by refining waste oils, in particular by removing the contaminants, oxidation products and additives contained in such



oils". According to the Commission, the processing of waste oils into flux oils did not remove the contaminants, oxidation products and additives in the waste oils. Moreover, it did not permit the re-use of waste oils for the use for which they had originally been intended. The Commission further explained that in the course of the investigations in case 2002/4775, Germany had provided information indicating the legal possibility for the administration to enforce the priority for regeneration of waste oils and claiming that the regeneration quota in Germany demonstrated that the priority principle was achieved in practice. However, at a meeting in September 2003 Germany had admitted that the statistics on unregenerate waste oils were unreliable and that therefore a specific study would be initiated. The results of this study, which were expected by the end of 2004, should be awaited and assessed before any decision on the substance of the current complaint (6) case could be taken.

1.3 The Ombudsman notes that it emerges from the information provided to him by the Commission that the latter is examining the possibility that Germany may still infringe Article 3 (1) of Directive 75/439 and may thus have failed to comply with the judgement of the Court in Case C-102/97. He further notes that the Commission argues that the results of a specific study regarding the relevant matter, which are expected by the end of 2004, should be awaited and assessed before any decision on the substance of the infringement complaint could be taken. In the light of the circumstances mentioned by the Commission, in particular the fact that Germany appears to have admitted that her statistics on unregenerate waste oils are unreliable, the Ombudsman considers that the Commission's approach is reasonable.

1.4 Given that the Commission has thus not yet taken a decision regarding the substance of the complainant's arguments, the Ombudsman further considers that there is no need for him at present to take a view as regards the Commission's submission that the production of "flux oils" does not constitute "regeneration" within the meaning of Article 1, fourth indent of Directive 75/439.

2 Conclusion

In view of the above and subject to what is said in point 1.4, the Ombudsman considers that there appears to be no maladministration on the part of the Commission. The Ombudsman therefore closes the case. The complainant could submit a new complaint at a future stage if it considers that the Commission, after receiving the results of the above-mentioned study, does not pursue the case with the appropriate diligence.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 1975 no. L 194, p. 23.

(2) Case C-102/97 *Commission v. Germany* [ECR] 1999, I-5051.



(3) Loc.cit., paragraph 47.

(4) OJ 1975 no. L 194, p. 23.

(5) Case C-102/97 *Commission v. Germany* [ECR] 1999, I-5051.

(6) It appears that the reference is to complaint 2002/4775 (and not to the present complaint that was lodged with the Ombudsman).