

## Decision of the European Ombudsman closing his inquiry into complaint 387/2008/BEH against the European Commission

Decision

**Case 387/2008/BEH - Opened on 22/02/2008 - Decision on 10/12/2008**

### THE BACKGROUND TO THE COMPLAINT

1. On 12 April 2007, the complainant, a German citizen, sent an e-mail to the Commission in which he complained about a judgment given by the *Finanzgericht Baden-Württemberg*, a German fiscal court. He referred specifically to the following passage in the judgment:

*" In the Federal Republic of Germany, nobody is hindered to invest his capital in other EU Member States or in third countries by the obligation to declare his assets to the fiscal authority and by the right of the authority to control the fulfilment of that obligation. The opinion of Ress/Ukrow (see Grabitz/Hilf, Das Recht der EU, Art. 58 Rz 30), according to which there could be a "chilling effect" on the transfer of capital by investigative measures, cannot, at any rate, be valid for such investigation in individual cases. "*

2. According to the complainant, the statement quoted above amounted to a violation of the free movement of capital (Article 58(1) of the EC Treaty). This was because it made the free movement of capital subject to unrestricted control by the fiscal authorities and, automatically, presumed an abuse. It was also not in conformity with Article 58(1)(b) of the EC Treaty, which recognises the Member States' right to take " *requisite measures* " to prevent infringement of national law. In the complainant's view, an unrestricted control of cross-border transfers, in individual cases where there is no initial suspicion of a sufficiently substantial form of tax evasion ( *steuerrechtlicher Anfangsverdacht* ), could not be considered as falling under the definition of 'requisite measures'. According to the complainant, the statement of the *Finanzgericht* also violated Article 58(3) of the EC Treaty because it amounted to an arbitrary discrimination and a disguised restriction of cross-border transfers. Furthermore, he argued that unrestricted investigative measures were not necessary and thus disproportionate. Finally, in the complainant's view, the *Finanzgericht Baden-Württemberg* had failed to refer a question for a preliminary ruling to the European Court of Justice ('the Court of Justice') even though, pursuant to Article 234 of the EC Treaty, it was under an obligation to do so.



3. After confirming receipt of the complainant's correspondence, the Commission informed him, by letter of 1 June 2007, of its intention to close the case. In its view, no infringement of Community law could be established on the basis of the information submitted. In particular, the Commission stated that, in line with the case-law of the Court of Justice, a failure to fulfil obligations by a Member State could be established only by sufficiently documented and detailed evidence of the alleged practice of the national administration and/or courts concerned. Apart from the fact that a judgment in an individual case is not sufficient to adduce evidence of a consistent and general practice, the Commission pointed out that it saw no reasons to object to the substance of the judgment of the *Finanzgericht*. As regards the alleged violation of Article 234 of the EC Treaty, the Commission stated that the facts submitted by the complainant did not suggest a violation.

4. On 9 July 2007, the complainant submitted a complaint to the Ombudsman, in which he essentially alleged that the Commission failed properly to deal with his letter of 12 April 2007 (complaint 1829/2007/(RF)BEH). Given that the complainant had not availed himself of his right to submit observations to the Commission [1], the Ombudsman took the view that he had not yet made appropriate administrative approaches to the Commission. These are required by Article 2(4) of the Statute of the European Ombudsman before the Ombudsman can deal with a complaint. As a consequence, complaint 1829/2007/(RF)BEH was declared inadmissible.

5. Following subsequent exchanges of correspondence between the complainant and the Commission, copies of which were not submitted to the Ombudsman, the complainant wrote to the Commission on 6 December 2007, referring to several judgments given by different German fiscal courts. According to him, these judgments established a consistent and general practice of German courts to consider permissible, in individual cases, unrestricted controls with regard to the transfer of assets to other countries. Moreover he pointed out that, in line with the case law of the Court of Justice, isolated national court judgments also have to be considered in infringement cases, provided they contain a significant interpretation which has not been quashed by a supreme court. The complainant furthermore argued that the cross-border element of fiscal transfers alone triggered controls and investigations, which, as a result, were of a discriminatory and freezing character.

6. In reply, the Commission essentially explained that none of the cases brought to its attention could be considered contrary to Community law, given that investigative measures had not exclusively been triggered by the cross-border nature of the underlying transaction.

7. On 6 February 2008, the complainant submitted the present complaint to the Ombudsman.

## THE SUBJECT MATTER OF THE INQUIRY

8. In his complaint to the Ombudsman, the complainant submitted the following allegation:

The Commission has failed properly to deal with his infringement complaint. In particular, it has failed to take into account that:



- (a) the practice of German courts in connection with transfers of assets to other countries amounts to a restriction on the free movement of capital;
- (b) investigations by national tax authorities are exclusively due to the cross-border character of transfers and are thus discriminatory;
- (c) as a rule, national authorities assume an intent to evade taxes in connection with transfers to other countries, which is disproportionate and amounts to a disguised restriction on the free movement of capital; and
- (d) facts underlying the relevant decisions and judgments of national authorities and courts are prohibited from being used as evidence in court.

## THE INQUIRY

9. The complaint was forwarded to the President of the Commission for an opinion. On 19 June 2008, the Commission sent its opinion, which was forwarded to the complainant with an invitation to make observations. On 29 July 2008, the complainant submitted his observations.

## THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

### Preliminary remarks

10. To avoid any misunderstanding, it is important to recall that Article 195 of the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration 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 therefore 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 Commission.

11. In his present complaint to the Ombudsman, the complainant did not raise the issue concerning the obligation of the *Finanzgericht Baden-Württemberg* to make a reference for a preliminary ruling. Nevertheless, in its opinion, the Commission commented on this issue and pointed out that there was nothing to suggest that the *Finanzgericht* was "a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law." Pursuant to Article 234(3) of the EC Treaty, only the latter category of national courts are under an obligation to refer a question on the interpretation of Community law to the Court of Justice, if a decision on the question is necessary to enable the court to give judgment. In his observations, the complainant explained that the Commission failed to consider that, in the present case, an appeal to the Federal Finance Court had not been admitted. Given that the



*Finanzgericht Baden-Württemberg* therefore decided at last instance, it would have been obliged to refer a question to the Court of Justice.

12. In his complaint to the Ombudsman, the complainant did not question the compliance of the *Finanzgericht Baden-Württemberg* with Article 234(3) of the EC Treaty. This aspect has therefore not been taken up in the Ombudsman's inquiry. In its opinion, the Commission stated that, " *based on the information provided in the complaint* " to it, it was not in a position to establish any obligation on the said court to ask for a preliminary ruling. Article 2(4) of the Statute of the European Ombudsman requires a complaint to him to be preceded by appropriate administrative approaches to the institution concerned. It appears that the complainant has not brought to the Commission's attention those elements, which, according to him, suggest that the *Finanzgericht Baden-Württemberg* acted as a court of last instance within the meaning of Article 234(3) of the EC Treaty. The Ombudsman is therefore not entitled to deal with this aspect in the present decision.

## A. As regards the complainant's allegation

### *Arguments presented to the Ombudsman*

13. In his complaint, the complainant alleged that the Commission failed properly to deal with his infringement complaint. In particular, it failed to take into account that:

- (a) the practice of German courts in connection with transfers of assets to other countries amounts to a restriction on the free movement of capital;
- (b) investigations by national tax authorities are exclusively due to the cross-border character of transfers and are thus discriminatory;
- (c) as a rule, national authorities assume an intent to evade taxes in connection with transfers to other countries which is disproportionate and amounts to a disguised restriction on the free movement of capital; and
- (d) facts underlying the relevant decisions and judgments of national authorities and courts are prohibited from being used as evidence in court.

As concerns the latter aspect, the complainant was of the view that, although subject to a prohibition to be used as evidence in court, certain facts had been relied on in national court proceedings.

14. In its opinion, the Commission observed that the complainant relied on a statement in a judgment of the *Finanzgericht Baden-Württemberg* in support of his view that Germany violated the free movement of capital [2] . Reiterating its position explained in its letters of 1 June 2007 and 24 January 2008, the Commission stated that the quoted judgment was a ruling in an individual case and, as such, did not formally constitute a sufficient basis to assume the



existence of a practice having a consistent and general nature.

15. With regard to the judgments invoked by the complainant to suggest the existence of a consistent and general practice by German courts, the Commission noted that these are rulings of different German fiscal courts, which all refer to objectively different individual circumstances. Thus, the Commission expressed doubts as to whether these judgments actually illustrated a practice of German courts which is, to some degree, of a consistent and general nature. At the same time, the Commission noted that it was only relevant fully to establish such a practice if the judgments referred to could be considered to be contrary to Community law.

16. Commenting on each of the judgments referred to by the complainant, the Commission pointed out that in none of these cases, as well as in similar complaints brought to the Commission, was it possible to establish that investigative measures were, as alleged by the complainant, based exclusively on the cross-border nature of the underlying transactions. Thus, in addition to the cross-border nature of the transfer, additional elements, such as the amount and timing of the transfer of securities, concrete evidence of tax evasion or the economically disadvantageous nature of a transfer, were present in all of these cases. Hence, there was no indication of a practice by German fiscal courts that could be considered contrary to Community law. In particular, no general practice of unrestricted control, without a sufficiently substantial suspicion of some sort of tax evasion, could be established.

17. Turning to the judgment of the *Finanzgericht Baden-Württemberg*, the Commission observed that, according to the complainant, the court had violated Article 58(3) of the EC Treaty. This was because the ruling arbitrarily discriminated against cross-border transactions and introduced unrestricted control by the fiscal authorities with regard to the exercise of the free movement of capital. Against this background, the Commission pointed out that Article 58(1)(a) of the EC Treaty explicitly allows Member States to apply the relevant provisions of their tax law which distinguish between taxpayers in different situations in terms of where their capital is invested. Such distinction was therefore not a case of discriminatory treatment or of arbitrary discrimination within the meaning of Article 58(3) of the EC Treaty. In line with Article 58(1)(a) of the EC Treaty, German law foresaw that a taxpayer benefiting from a foreign income had an increased duty to cooperate with the tax authorities. As in previous correspondence, the Commission also referred to its " *Communication on Exit taxation and the need for co-ordination of Member States' tax policies* " [3], which illustrated the appropriateness of a taxpayer's obligation to declare his or her assets with particular regard to cross-border situations. Moreover, the Commission noted that Article 58(1)(b) of the EC Treaty explicitly allowed Member States to take all requisite measures to prevent infringements of national law and regulations, especially in the field of taxation. This included investigative measures regarding taxpayers' liability resulting from the increased duty to cooperate with tax authorities.

18. In light of these circumstances, the Commission concluded that it was incorrect to allege that investigative measures by tax authorities rendered virtually impossible or excessively difficult the exercise of rights conferred by Community law. Against this background, the statement of the *Finanzgericht Baden-Württemberg* quoted in paragraph 1 above did not discriminate against cross-border transactions. Furthermore, the obligation to declare foreign



income to German tax authorities did not amount to an outright prohibition of any cross-border transaction and, in line with the case-law of the Court of Justice [4] , could therefore not be considered as disproportionate. In addition, no general practice of unrestricted control without a sufficiently substantial suspicion of some sort of tax evasion could be established.

19. As regards the issue of the non-usability of certain documents, the Commission again concluded that no practice by German fiscal courts in this regard could be considered as contrary to Community law. There was no reason to assume that the decisions and judgments of national authorities and courts affecting the complainant could be considered to be subject to a prohibition to prevent their use as evidence in court.

20. In his observations, the complainant stated that the Commission had failed to consider that, according to an order given by the *Landgericht Freiburg* , a German court, certain facts were subject to a prohibition to be used as evidence in court. Nevertheless, in the incriminated judgment, the *Finanzgericht Baden-Württemberg* relied on facts which were prohibited from being used. According to the complainant, this amounted to a disguised restriction of the free movement of capital and to a violation of the principle of proportionality.

21. The complainant reiterated that there was a consistent and general practice in Germany which infringed Community law. This practice existed because investigative measures were exclusively triggered by the cross-border nature of a transfer. According to him, absurd allegations, such as the economically disadvantageous nature of a transfer, sufficed to trigger investigative measures, without, however, there being concrete evidence to suggest tax evasion in an individual case. The complainant also observed that, in case of doubt, a restriction on the free movement of capital had to be assumed. He restated his arguments concerning arbitrary discrimination, a disguised restriction of the free movement of capital and a violation of the principle of proportionality. In his view, the practice of German courts rendered possible unrestricted controls with regard to all transfers of a cross-border nature and that such a situation went far beyond what was tolerated by the law. According to him, the Commission had not taken a stance on this issue.

#### *The Ombudsman's assessment*

22. The Ombudsman notes at the outset that the 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 has been an infringement of Community law. The Ombudsman considers that, in its opinion, the Commission gave a detailed account of its position with regard to the issues raised by the complainant. The Ombudsman is further of the view that the arguments put forward by the Commission, both in its letters to the complainant and in its opinion, support its view that an infringement of Community law has not been established. Against this background, the Commission's position appears to be reasonable.

23. The Ombudsman notes that, in his observations, the complainant reiterated his view that investigations were being exclusively triggered by the cross-border nature of underlying transfers, which were subject to unrestricted control. However, against the background of the



information provided by the Commission, the Ombudsman is not convinced that this is the case. On the basis of the Commission's opinion, the Ombudsman sees no basis for the complainant's view that the additional elements, apparently required by German courts to accept the lawfulness of investigative measures with regard to cross-border transfers, could be satisfied by absurd statements.

24. As regards the issue concerning the non-usability of certain documents, the Ombudsman notes that the Commission repeatedly stated that a ruling of a national court in an individual case is not a sufficient basis to assume the existence of a practice having a consistent and general nature.

25. The Ombudsman therefore concludes that the complainant has not established his allegation concerning the Commission's failure properly to deal with his infringement complaint.

26. In light of these circumstances, the Ombudsman finds no maladministration on the part of the Commission as far as the complainant's allegation is concerned.

## B. Conclusions

On the basis of his inquiries into this complaint, there has been no maladministration by the Commission. The Ombudsman therefore closes the case.

The complainant and the President of the Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 10 December 2008

[1] This right is enshrined in point 10 of the Commission's communication on relations with the complainant in respect of infringements of Community law, COM(2002) 141 final, which provides as follows: "*Unless there are exceptional circumstances requiring urgent measures, where a Commission department intends to propose that no further action be taken on a complaint, it will give the complainant prior notice thereof in a letter setting out the grounds on which it is proposing that the case be closed and* inviting the complainant to submit any comments within a period of four weeks." (emphasis added by the Ombudsman).

[2] See point 1 above.

[3] COM(2006) 825 final, p. 6, paragraph 5.

[4] See Case C-478/98, *Commission v Belgium* [2000] ECR I-7587, paragraph 45.