

European Ombudsman Draft recommendation to the European Commission in complaint 956/2004/PB

Recommendation

Case 956/2004/PB - Opened on 03/05/2004 - Recommendation on 18/03/2005 - Decision on 12/05/2006

(Made in accordance with Article 3 (6) of the Statute of the European Ombudsman (1))

THE COMPLAINT

The complainant, a Danish car dealer, has written several times to the Commission about alleged breaches of Community law by Denmark in respect of car taxation. The Commission registered an infringement complaint under the complainant's name, which it closed in 1997 as unfounded. In 1998, the Commission registered a new infringement complaint against Denmark under his name. The Commission and the complainant have since then frequently corresponded about the alleged breaches of Community law by the Danish authorities.

In June 2000, the complainant made a complaint to the European Ombudsman (reference number 801/2000/PB) in which he complained that the Commission had failed to inform him about the outcome of its communications with the Danish authorities. The Commission stated that it was awaiting the outcome of two cases before the Court of Justice, and that it could therefore not provide the complainant with its final legal view on his complaint against Denmark. The Ombudsman accepted this explanation, noting that the Commission had given an undertaking to reach a decision on the complainant's infringement complaint by October 2001.

The Commission did not, however, fulfil its undertaking to reach a conclusion on the complainant's infringement complaint by October 2001. The complainant therefore submitted a new complaint to the Ombudsman (reference number 1237/2002/(PB)OV). In that case, the Commission acknowledged the fact that issues put forward by the complainant remained to be answered. These were, in summary, the following:

(i) Cross-border long-term leasing of vehicles, which are registered in Germany but with an intended use in Denmark. The Commission had informed the complainant that it wanted to await the ruling of the Court of Justice in the *Cura Anlagen* case (2) 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.



(ii) Danish taxation of used cars imported to Denmark from another EU country, and the assessment of the value of such cars. The Commission had informed the complainant about its intention to await the Court's ruling in the *Gomes Valente* case (3) . Judgement was delivered on 22 February 2001 in that case. In addition, the Commission had decided to await also the outcome of the *Antti Siilin* case (4) . The judgement in that case was delivered on 19 September 2002. Furthermore, on 1 June 2001 the Commission sent a letter to all Member States to make them aware of the consequences of the Court's ruling in the *Gomes Valente* case. In its reply, Denmark assured the Commission that its rules were in conformity with the outcome of the *Gomes Valente* case. However, some of the Member States had still not replied to the Commission's letter of 1 June 2001.

In case 1237/2002/(PB)OV, the Ombudsman noted that the Commission explained its failure to respect its undertaking by stating that it preferred to take a global approach to the problems related to car taxation and that its aim was 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 belonged to a not yet harmonised field of law. On that basis, the Ombudsman found 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" (paragraph 1.6). The Ombudsman pointed out, however, 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" (paragraph 1.7).

The present complaint

In the present case, the complainant stated that he received a letter from the Commission dated 20 October 2003, apparently inviting him to submit further information regarding breaches of Community law by Danish authorities. According to the complainant, he responded to that letter by a letter dated 2 February 2004, providing the Commission with examples of the alleged breaches and informing it about the tax payments demanded by those authorities. According to the complainant, the Commission replied that it would take no action before the final judgement in a case before the Court of Justice.

The complainant alleges that the Commission has failed to honour its commitment to reach a conclusion on his infringement complaint concerning Denmark's taxation of imported cars.

THE INQUIRY

The Commission's opinion

The complaint was sent to the Commission, which submitted, in summary, the following comments:

Legal background - investigation of complaints

When investigating complaints, the Commission complies with the provisions of the *Commission Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law* (5) . In particular the following rules should be noted: Article 3 (recording of complaints), Article 8 (time limit for investigating complaints - general rule to arrive at decision within one year, with a duty to inform the



complainant if this time-limit cannot be met), Article 9 (outcome of the investigation of complaint - the Commission decides at its discretion while keeping the complainant informed), Article 10 (closure of case - rule of giving the complainant prior notice), Article 14 (complaint to the European Ombudsman).

The Commission's comments

The complaint submitted to the Ombudsman does not express any grievances about the administrative procedure as provided for in the Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (6) or in the Code of Good Administrative Behaviour for Commission staff in their relations with the public (7) . On the contrary, the complaint criticises the Commission's substantive handling of the complaint, i.e. the fact that the Commission has not decided whether or not to launch infringement proceedings against Denmark concerning the taxation rules applicable to the leasing of cars and those applicable to second-hand cars imported into Denmark. The Commission refuses to accept this criticism.

With regard to the issue of cross-border leasing of cars, the Commission informed the complainant in its letter of 20 October 2003 that, following the Court's judgement of 21 March 2002 in the *Cura Anlagen* case (8) , it had asked all the Member States - and not only Denmark - to confirm whether their legal arrangements were in line with the new case law. The letter also stated that the area relating to cross-border leasing *"is very complex and is not harmonised at present. The Commission has chosen to adopt a global approach which takes account of the situations in the various Member States. The Commission therefore plans to wait until it receives the replies from the Member States to the letter which has just been sent out concerning the compatibility of their legislation with the judgement in the Cura Anlagen case before deciding whether to launch infringement proceedings"* .

After having received the Commission's letter of 20 October 2003, the complainant asked the Commission, in a letter of 10 November 2003, to take action immediately against Denmark. The Commission replied to the complainant again on 12 December 2003, informing him that it would wait until it had received replies from all the Member States before deciding whether to launch infringement proceedings, and that it would take account of the documents submitted by the complainant when examining the reply from Denmark.

The Commission has still not received replies from all the Member States, despite sending out reminders. It would nevertheless point out that it still prefers to take a global approach and, by doing so, is legitimately using its discretion. When all the replies have been examined, the Commission will, of course, take account of all the information it has received, including that supplied by the complainant. Once the Commission has decided whether or not to launch infringement proceedings against Denmark, it will naturally inform the complainant of its decision.

As the Commission pointed out in its comments to the Ombudsman concerning complaint 1237/2002/PB, the complainant, who appears to be involved in several disputes with the Danish taxation authorities, might well consider taking the matter to court in Denmark. The case might then be referred to the Court of Justice for a preliminary ruling.



With regard to the issue of taxation of imported second-hand cars, the Commission sent a letter of 1 June 2001 to all the Member States informing them of the consequences of the judgement in the *Gomes Valente* case. However, certain Member States have still not replied, despite the fact that the Commission has sent them numerous reminders. As a consequence, this particular matter has not yet been examined in full. It is important to stress that, from an operational point of view, this matter needs to be handled as part of a global approach in co-ordination with the Member States. Denmark, however, had replied to the Commission's letters of 1 June 2001, and the Danish authorities considered Danish legislation to be consistent with the judgement in the *Gomes Valente* case. Following further correspondence with the complainant, the Commission informed the complainant in February 2004 that, as regards the taxation of vehicles, the Commission had decided to await the judgement of the Court of Justice in the *Weigel* case (9). The judgement of the Court of Justice in the *Weigel* case was handed down on 29 April 2004 and was being examined by the relevant departments in the Commission.

Conclusion

The Commission has duly replied to all the letters sent by the complainant following the Ombudsman's decision on complaint 1237/2002/(PB)OV. Each of the Commission's replies provided detailed statements on the substance of the case. It goes without saying that the Commission will inform him personally of the outcome of his complaint.

Good administrative practice (as indicated by Communication COM/2002/14 and the Commission's Code of Good Administrative Behaviour) requires that the Commission, when deciding on whether to take a Member State to court for failure to comply with Community law, takes account of all the submissions put forward by the complainant, while seeking to ensure that the steps it takes to investigate the case are in proportion to the desired objective. Once the investigation has been completed, the Commission can exercise its discretion in deciding whether or not to launch infringement proceedings. In choosing to wait until all the Member States have replied before deciding whether or not to launch infringement proceedings against each of them, thereby adopting a global approach, the Commission is not only acting in a rational manner but is also legitimately exercising its discretion. In an infringement case, the complainant is therefore entitled to expect that all the relevant arguments he puts forward are taken into account by the Commission when investigating the case and, if it is proposed that the case be closed, that he is given prior notice in a letter setting out the reasons for this. However, he is not entitled to demand that the Commission should launch infringement proceedings, or to demand that it should adopt his interpretation of applicable Community law. In the light of the arguments set out above and the previous comments sent to the Ombudsman concerning the complaints associated with the same dossier, the Commission does not feel that it has failed in its duty of good administration vis-à-vis the complainant.

The complainant's observations

The Commission's opinion was forwarded to the complainant. In his observations, the complainant maintained his complaint.

THE DECISION

1 Alleged failure to reach conclusion on infringement complaint



1.1 In 1998, the complainant, a Danish car dealer, had complained to the Commission about alleged breaches of Community law by Denmark in respect of car taxation. The complainant's infringement complaint concerned the taxation of second-hand imported cars, including the issue of the evaluation of those cars, and cross-border long-term leasing. The complainant had made two other complaints to the Ombudsman: 801/2000/PB and 1237/2002/(PB)OV. In case 801/2000/PB, the Commission stated that it was awaiting the outcome of two cases before the Court of Justice, and that it could therefore not provide the complainant with its final legal view on his complaint against Denmark. The Ombudsman accepted this explanation, noting that the Commission had given an undertaking to reach a decision on his infringement complaint by October 2001. The Commission did not, however, fulfil this undertaking. In case 1237/2002/(PB)OV, the Commission explained its failure to respect its undertaking by stating that it preferred to take a global approach to the problems related to car taxation and that its aim was 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 belonged to a not yet harmonised field of law. The Ombudsman found that these were reasonable grounds for why the Commission had not reached a decision by October 2001, and he therefore closed his inquiry into that complaint on 19 May 2003. The Ombudsman pointed out, however, 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" (paragraph 1.7).

1.2 In the present complaint to the Ombudsman, submitted on 29 March 2004, the complainant stated that he had received a letter from the Commission, dated 20 October 2003, apparently inviting him to submit further information regarding the alleged breaches of Community law. According to the complainant, he responded to that letter by letter dated 2 February 2004, providing the Commission with examples of the alleged breaches by the Danish authorities and informing it about the tax payments demanded by those authorities. According to the complainant, the Commission replied that it would take no action before the final judgement in a case before the Court of Justice. In his complaint to the Ombudsman, the complainant alleged that the Commission had failed to honour its commitment to reach a conclusion on his infringement complaints concerning Denmark's taxation of imported cars.

1.3 With regard to the taxation of imported second-hand cars, the Commission stated in its opinion of 5 August 2004 that, following the judgement in the *Gomes Valente* case (10), it had sent a letter to all Member States on 1 June 2001 informing them of the consequences of the judgement. However, certain Member States had still not replied, despite the fact that the Commission had sent them numerous reminders. As a consequence, this particular matter had not yet been examined in full. The Commission stated that from an operational point of view, this matter needed to be handled as part of a global approach in co-ordination with the Member States. The Commission did, however, note that Denmark had replied to its letter of 1 June 2001, and that the Danish authorities considered Danish legislation to be consistent with the judgement in the *Gomes Valente* case. Following further correspondence with the complainant, the Commission informed the complainant in February 2004 that, as regards the taxation of vehicles, the Commission had decided to await the judgement of the Court of Justice in the *Weigel* case (11). The judgement of the Court of Justice in the *Weigel* case was handed down



on 29 April 2004 and was being examined by the relevant departments in the Commission.

1.4 With regard to cross-border leasing of cars, the Commission referred in its opinion to its letter of 20 October 2003 to the complainant, in which it informed him that the area relating to leasing of cross-border vehicles *"is very complex and is not harmonised at present. The Commission has chosen to adopt a global approach which takes account of the situations in the various Member States. The Commission therefore plans to wait until it receives the replies from the Member States to the letter which has just been sent out concerning the compatibility of their legislation with the judgement in the Cura Anlagen case before deciding whether to launch infringement proceedings"*. The Commission stated in its opinion that it had still not received replies from all the Member States, despite sending out reminders. It nevertheless pointed out that it still preferred to take a global approach and, by doing so, was legitimately using its discretion. When all the replies had been examined, the Commission would take account of all the information it had received, including that supplied by the complainant. Once the Commission had decided whether or not to launch infringement proceedings against Denmark, it would inform the complainant of its decision.

1.5 In his observations, the complainant maintained his complaint. On 4 March 2005, the complainant telephoned the Ombudsman's services to ask about the progress of the Ombudsman's inquiry into his complaint. During that telephone conversation, the complainant informed the Ombudsman's services that he had still not received any decision from the European Commission as to what action it would take on his infringement complaint.

1.6 As noted in the Ombudsman's decision on the *own-initiative inquiry into the Commission's administrative procedures in relation to citizens' complaints about national authorities* (adopted on 13 October 1997), it appeared from the Commission's comments in that case that *"under the Commission's internal rules, a decision to close the file without taking any action or a decision to initiate official infringement proceedings must be taken within a maximum period of one year from the date when the complaint was registered, except in special cases, the reasons for which must be stated "* (emphasis added).

Article 8 of the Commission's *Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law* (12) now provides as follows:

"As a general rule, Commission departments will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint by the Secretariat-General.

Where this time limit is exceeded, the Commission department responsible for the case will inform the complainant in writing."

1.7 The Ombudsman considers that when the Commission informs a complainant that the time-limit will be exceeded, valid reasons must be given for the delay.



1.8 In the present case, it appears to be undisputed that the one-year time-limit has been exceeded. The question is therefore whether the Commission has given valid reasons for the delay in reaching a decision on the complainant's infringement complaint.

1.9 In its opinion in the present case, the Commission has essentially stated that it is pursuing a global approach in co-operation with all Member States. It has referred to information requests that it sent to all Member States on 1 June 2001 and in 2002, and stated that it is still waiting for replies from some of the Member States. The Commission has indicated that it that it does not intend to reach a decision on the complainant's infringement complaint against Denmark without having received, and analysed, the replies to these information requests.

1.10 In his decision on complaint 1237/2002/(PB)OV, adopted on 19 May 2003, the Ombudsman concluded that the Commission's decision to adopt a global approach could reasonably explain why there had been a delay in taking a decision on the complainant's infringement complaint by October 2001, previously indicated as the date when the Commission intended to adopt its decision. It must be pointed out, however, that the Ombudsman did not find that the Commission could effectively abstain from taking a decision on the complainant's infringement complaint for as long it was pursuing its global approach. In the Ombudsman's view, it does not appear consistent with the procedure applicable to the Commission's handling of infringement complaints that no decision has been adopted on the complainant's infringement complaint on the ground that the Commission has not yet been able to obtain information that it requested from the Member States in 2001 and 2002. It appears that the Commission has had considerable time to try to obtain that information, and it is not clear why a lack of response to these information requests should still prevent the Commission from reaching a decision on individual infringement complaints. In this respect, the Ombudsman points out that in accordance with the case-law of the Court of Justice, the Member States must facilitate the achievement of the Commission's task as the "Guardian of the Treaty", under Article 211 (13) of the Treaty. The Member States are required to co-operate bona fide in an inquiry undertaken by the Commission under Article 226 of the Treaty, and to supply the Commission with all the information requested for that purpose (14). Refusal by a Member State to assist the Commission in its investigations constitutes a failure to fulfil a duty incumbent on every Member State under Article 10 to facilitate the achievement of the Commission's tasks (15). In such a case the Commission may bring the matter before the Court of Justice. In such a case the Commission may bring the matter before the Court of Justice. If the Commission nevertheless considers that difficulties in obtaining information from the Member States in the framework of its global approach make it impossible for it to conclude on individual infringement complaints, serious consideration should be given by it as to whether that global approach should not be re-assessed.

1.11 In the light of the above, the Ombudsman considers that there is maladministration on the part of the Commission, and a draft recommendation is made below.

2 Conclusion

In view of the above, the Ombudsman makes the following draft recommendation to the European Commission, in accordance with Article 3 (6) of the Statute of the Ombudsman:



The Commission should adopt a decision on the complainant's infringement complaint against Denmark as quickly as possible, and communicate its decision to the complainant.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3 (6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 30 June 2005.

The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 18 March 2005

P. Nikiforos DIAMANDOUROS

(1) 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, p. 15.

(2) Case C-451-99 [2002] ECR, I-3193.

(3) Case C-98/393 [2001] ECR, I-1327.

(4) Case C-101/00 [2001] ECR, I-7487.

(5) Official Journal 2002 C 244, p 5.

(6) Official Journal 2002 C 244, p 5.

(7) Official Journal 2000 L 308, p 26, Annex at p 32.

(8) Case C-451-99 [2002] ECR, I-3193.

(9) Case C-387/01 judgement of 29 April 2004.

(10) Case C-393/98 [2001] ECR, 1327.

(11) Case C-387/01 judgement of 29 April 2004.

(12) Official Journal 2002 C 244, p 5.

(13) the Commission shall: - ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied; (....)



(14) Case C-192/84 Commission of the European Communities v Hellenic Republic [1985] ECR 3967, paragraph 19.

(15) Case C-240/86 Commission of the European Communities v Hellenic Republic [1988] ECR 1835, paragraph 28.