

European Ombudsman Draft recommendation to the European Commission in complaint 3317/2004/GG

Recommendation

Case 3317/2004/GG - Opened on 16/11/2004 - Recommendation on 29/06/2005 - Decision on 12/12/2005

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

THE COMPLAINT

Facts

The complainant is a German citizen. The German tax authorities consider that the complainant owes them a considerable amount of money (some EUR 358 000). This claim (which is disputed by the complainant) seems to be based on the view of the German tax authorities that certain assets which belong to the complainant but which are based abroad should be subject to German taxation.

In November 2003, the city where the complainant lives ordered him to hand in his passport on the grounds that he was likely to go abroad in order to avoid having to pay the above-mentioned debt. The city also decided that the validity of the complainant's personal identity card ("Personalausweis") was to be limited to Germany. As a result, the complainant was unable lawfully to leave the territory of the Federal Republic of Germany.

The complainant lodged an administrative appeal against this decision.

On 30 March 2004, the complainant turned to the European Commission in order to complain about an infringement of his right to free movement under Article 18 of the EC Treaty. The complainant submitted that it followed from the case-law of the Court of Justice that any national rules that limited cross-border circulation were prohibited. In this context, the complainant referred to the judgment of the Court of Justice in Case-C-415/93 *Bosman* 1995 [ECR] I-4921. He further submitted that the conditions for any limitations on grounds of public policy, public security or public health were not fulfilled in his case.

On 6 May 2004, the Commission acknowledged receipt of this letter and asked the complainant to submit further information. In response to a further letter addressed to it by the complainant on 18 May 2004, the Commission asked the complainant, by letter of 3 June 2004, to submit a copy of his administrative appeal. The complainant provided this information.



On 16 June 2004, the Commission pointed out that it understood that the complainant had been condemned for tax offences. The Commission informed the complainant that his case did not fall within the scope of application of Community law, given that there was no cross-border element involved. In this context, the Commission referred to the judgment of the Court of Justice in Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* 1997 [ECR] I-3171. The Commission also pointed out, referring to the judgment in Case 180/83 *Moser v Land Baden-Württemberg* 1984 [ECR] 2539, that a purely hypothetical prospect of working in another Member State did not establish a link that would be sufficiently close to justify the application of the rules on free movement.

In his reply of 23 June 2004, the complainant clarified that he had not been condemned by a court, but that his right to move had been limited by a decision of an administrative authority. The complainant submitted that this decision had been based on the fact that he owned assets abroad. In the complainant's view, owning a securities deposit abroad was protected by the EC Treaty's rules on the free movement of capital. The complainant also stressed that the infringement of his right to free movement was real, given that he wished to take over the task of looking after customers living abroad for his employer and that he had booked a holiday trip to another country which he had had to cancel due to the decision taken by the city where he lives. He further submitted that the decision of the city constituted a disproportionate measure. In his letter, the complainant referred to the judgments of the Court of Justice in Case C-18/95 *Terhoeve* 1999 [ECR] I-345 and in Case C-357/98 *Yiadom* 2000 [ECR] I-9265.

In its reply of 20 July 2004, the Commission pointed out that the complainant appeared to rely primarily on the European Convention on Human Rights and on Community law. The Commission further submitted that the complainant's case had reached an advanced stage before German courts. In the Commission's view, however, it was not clear whether having recourse to national courts had had a suspensive effect. The Commission further submitted that the complainant could turn to the European Court of Human Rights (ECHR) as regards the European Convention on Human Rights and that only the European Court of Justice could clarify the interpretation of Community law in response to a request for a preliminary ruling pursuant to Article 234 of the EC Treaty. In the Commission's view, it was therefore not possible to come to a final conclusion regarding the case on the basis of the information available so far.

In his reply of 1 August 2004, the complainant reiterated his view. He also stressed that there was only a decision by an administrative authority so far, that the matter had not been submitted to a court yet and that his administrative appeal had had no suspensive effect. The complainant therefore requested the Commission to open infringement proceedings against Germany.

On 18 September 2004, the Commission replied to this letter. The Commission confirmed its view that Article 18 of the EC Treaty was not applicable in the present circumstances. According to the Commission, the fact that the complainant was a 'potential' recipient of services to be provided in other Member States did not affect this conclusion. The Commission stressed that only one Advocate-General had so far referred to 'potential Community tourists' but that the Court of Justice had not followed this opinion. It further pointed out that the ECHR had decided on two similar cases in 2003 and suggested that the complainant could address himself to this



court. The Commission also suggested that the complainant could write to the UN Centre for Human Rights in Geneva.

Complaint 2847/2004/AS

On 4 October 2004, the complainant turned to the Ombudsman (complaint 2847/2004/AS), alleging an infringement of his right to free movement by the Commission. The complainant submitted that he had booked two trips to European countries which he had been unable to carry out due to the decision taken by the city. In his letter, the complainant referred inter alia to the judgment of the Court of Justice in Case C-10790 *Masgio* 1991 [ECR] I-1119. Given that the complainant had not submitted any supporting documents (and that he had not indicated a telephone number that would have allowed the Ombudsman's office to contact him), this complaint was rejected on 27 October 2004 on the basis of Article 195 (insufficient grounds for an inquiry).

The present complaint

By letter dated 1 November 2004 (that was sent by fax on 2 November 2004), the complainant forwarded copies of his correspondence with the Commission to the Ombudsman. This letter was registered as a new complaint by the Ombudsman. In this complaint, the complainant basically alleged that the Commission had failed properly to handle his infringement complaint against Germany.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

On 30 March 2004, the complainant had asked the Commission to start infringement proceedings against Germany. In accordance with the Commission's Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (COM(2002) 141 final, OJ 2002 C 244, p. 5), this letter had been registered as a complaint (reference 2004/4462). The complainant had been informed accordingly on 27 May 2004.

On 16 June and 18 September 2004, the Commission had informed the complainant of its view that his situation was purely internal and that Article 18 of the EC Treaty was therefore not applicable. The Commission had also informed the complainant about the possibility to turn to the ECHR or the UN Centre for Human Rights in Geneva.

By letter of 27 September 2004, the complainant had complained about the position taken by the Commission's services. The Commission had not replied to this letter on the grounds that it contained no new element compared to the complainant's previous letters and that it could therefore be considered as being repetitive (see the section "Dealing with enquiries" of the Commission's Code of good administrative behaviour).

On 9 December 2004, the service in charge of the matter at the Commission had asked the Commission's Secretariat-General to close the file.



The German authorities had informed the Commission in the meantime that the restrictions imposed on the complainant were still applicable and that the matter was, as of 17 December 2004, pending before the Regierungspräsidium of Baden-Württemberg, the authority competent to deal with the complainant's administrative appeal. The latter had furthermore informed the Commission that the complainant had not asked the competent administrative court for interim relief as he could have done.

The Commission's services had done all they could in order to respond to the complainant's questions and to help him find remedies outside Community law. They had however explained to the complainant that his situation was not covered by Community law. As regards the complainant's infringement complaint, the procedural requirements concerning relations with complainants had been respected.

Further inquiries

After careful consideration of the Commission's opinion, it appeared that further inquiries were necessary.

The request for further information

On 28 February 2005, the Ombudsman therefore asked the Commission to comment on how it complied, in the present case, with the procedural safeguards laid down in point 10 of its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law. Point 10 of this Communication provides that the Commission (1) gives the complainant prior notice where it wishes to close the case and (2) invites the complainant to submit any comments within a period of 4 weeks.

The Commission's reply

In its reply to this request for further information, the Commission pointed out that a simplified procedure had been used in the present case in accordance with point 11 of the Communication. The Commission expressed its regrets at the fact that no formal letter informing the complainant of the Commission's intention to close the file, as foreseen by point 10 of the Communication, had been sent.

The complainant's observations

The complainant provided two sets of observations, the first after having received a copy of the Commission's opinion and the second after having taken knowledge of the Commission's reply to the request for further information. However, the contents of the complainant's second letter are virtually identical to those of the first letter.

In his observations, the complainant made the following comments:

The administrative appeal, that had been lodged on 4 December 2003, had still not been dealt with. The length of the procedure concerning this administrative appeal also constituted an infringement of the right to free movement.

The decision taken by the city infringed Articles 18 and 39 of the EC Treaty, given that it prevented him from leaving Germany. It was not justified on grounds of public policy, public security or public health (Article 39 (3) of the EC Treaty). Fiscal reasons could not be invoked to justify limitations of the right to free movement. The decision to take his passport away from him pursued the aim of preventing him from working abroad, given that it was easier to enforce tax



claims within the country than in other states. However, these reasons of administrative expediency could not justify a limitation of the right to free movement either.

In this context, the complainant referred to a number of further judgments of the Court of Justice.

THE DECISION

1 Introductory remark

1.1 The complainant is a German citizen. The German tax authorities consider that the complainant owes them a considerable amount of money (some EUR 358 000). In November 2003, the city where the complainant lives ordered him to hand in his passport on the grounds that he was likely to go abroad in order to avoid having to pay the above-mentioned debt. The city also decided that the validity of the complainant's personal identity card ("Personalausweis") was to be limited to Germany. As a result, the complainant was unable lawfully to leave the territory of the Federal Republic of Germany. The complainant lodged an administrative appeal against this decision.

On 30 March 2004, the complainant turned to the European Commission in order to complain about an infringement of his right to free movement under Article 18 of the EC Treaty. The complainant submitted that it followed from the case-law of the Court of Justice that any national rules that limitations on cross-border circulation were prohibited. He further submitted that the conditions for any limitations on grounds of public policy, public security or public health were not fulfilled in his case. In the course of his subsequent correspondence with the Commission, the complainant submitted that he owned assets abroad, that he wished to take over the task of looking after customers living in other Member States for his employer and that he had booked two holiday trips to other Member States, which he had had to cancel due to the decision taken by the city.

On 27 May 2004, the complainant was informed that his letter had been registered as a complaint (reference 2004/4462).

In two letters dated 16 June and 18 September 2004, the Commission informed the complainant of its view that his situation was purely internal and that Article 18 of the EC Treaty was therefore not applicable. The Commission further informed the complainant about the possibility to turn to the ECHR or the UN Centre for Human Rights in Geneva.

In his complaint to the Ombudsman lodged on 2 November 2004, the complainant alleged that the Commission had failed properly to handle his infringement complaint against Germany.

1.2 In its observations of April 2005 on the Commission's opinion, the complainant pointed out that the administrative appeal, that had been lodged on 4 December 2003, had still not been dealt with. In the complainant's view, the length of the procedure concerning this administrative appeal also constituted an infringement of the right to free movement.



1.3 It should be noted that the present inquiry concerns the issue as to whether the Commission properly handled the infringement complaint that the complainant had lodged with it in March 2004. Given that the above-mentioned argument (contained in point 1.2) does not appear to have been submitted to the Commission within the framework of the infringement complaint, it cannot be considered in the present inquiry.

2 Alleged failure properly to deal with infringement complaint

2.1 The complainant alleged that the Commission had failed properly to handle his infringement complaint against Germany.

2.2 In its opinion, the Commission basically submitted that it had handled the matter properly. The Commission further took the view that the procedural requirements concerning relations with complainants had been respected. It also noted that on 9 December 2004, the service in charge of the matter at the Commission had asked the Commission's Secretariat-General to close the file.

2.3 As regards *procedural* aspects, it should first be noted that the Commission's Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (COM(2002) 141 final, OJ 2002 C 244, p. 5) provides for certain procedural safeguards as concerns infringement complaints submitted to the Commission. Point 10 of this Communication provides that the Commission (1) gives the complainant prior notice where it wishes to close the case and (2) invites the complainant to submit any comments within a period of 4 weeks. In response to a question that the Ombudsman put to it, the Commission admitted that it had not complied with these requirements and expressed its regrets at this failure. The Commission explained that it had used a simplified procedure in the present case in accordance with point 11 of the Communication. It should be noted, however, that the last paragraph of point 11 provides that when "the Commission intends to use this procedure, it will inform the complainant thereof in accordance with the procedure described in point 10". The Ombudsman concludes, therefore, that the Commission failed to comply with the procedural safeguards set out in point 10 of its own Communication. This constitutes an instance of maladministration.

The Ombudsman notes that the Commission's decision to close its file on the complainant's infringement complaint appears to have been taken after the present complaint had been brought to the Commission's attention by the Ombudsman. The Commission's failure to comply with its own Communication is therefore all the more surprising.

2.4 As regards the *substance* of the case, the Ombudsman considers that the Commission is correct in pointing out that the EC Treaty's rules on free movement do not apply to purely internal situations not involving any cross-border elements (2) . It should however be noted that Article 18 of the EC Treaty provides that every EU citizen "shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". This right by necessity includes an obligation on Member States to allow their nationals to leave their territory in order to make use of this freedom. The Ombudsman notes, however, that the very purpose of the measures adopted by the relevant German authority was to make it impossible for the



complainant to leave Germany. It should further be pointed out that the complainant has explained that he wishes to go to other Member States for professional reasons and for tourist purposes. Given the broad wording of Article 18, the Ombudsman takes the view that this provision also protects the right of EU nationals to go to other Member States with a view to spending a holiday there.

It should further be noted that in his letter to the Commission of 23 June 2004, the complainant submitted that he had booked a holiday trip that he subsequently had had to cancel due to the measures taken by the German authorities. In his letter to the Commission of 4 October 2004, the complainant referred to two trips that he had had to cancel, one in June and one in August/September 2004. In a letter addressed to the Ombudsman on 19 November 2004 (which was forwarded to the Commission), the complainant indicated that these trips would have taken him to Hungary and Austria respectively. In the light of these indications, the Ombudsman considers that it is difficult to argue that the complainant's intention to use his right of free movement was hypothetical. In any event, it should be noted that it does not emerge from the Commission's letters that the Commission ever considered these submissions.

2.5 In these circumstances, the Ombudsman considers that the Commission failed properly to deal with the complainant's infringement complaint also as regards the substance of this complaint. This constitutes a further instance of maladministration.

2.6 For the avoidance of doubt, it should be noted that the above considerations only concern the issue as to whether the complainant's case could be covered by the Community rules on free movement. If this question were (after a proper examination of the complainant's arguments) to be answered by the Commission in the affirmative, the restriction on the right to free movement that would then exist might still be justified, taking into account "the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". Lastly it should also be recalled that where the Commission arrives at the conclusion that an infringement exists, it disposes of a discretion as to whether to open infringement proceedings or not.

In addition to the cases cited by the Commission, see Wölker/Grill, commentary on Article 39, paragraph 11-13, in von der Groeben/Schwarze (eds.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, 6th edition, Baden-Baden 2003.

3 Conclusion

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

The draft recommendation

The Commission should reconsider the infringement complaint submitted to it by 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 September 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, 29 June 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) In addition to the cases cited by the Commission, see Wölker/Grill, commentary on Article 39, paragraph 11-13, in von der Groeben/Schwarze (eds.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, 6th edition, Baden-Baden 2003.