

Decision of the European Ombudsman closing his inquiry into complaint 295/2012/MMN against the European Commission

Decision

Case 295/2012/MMN - **Opened on** 23/02/2012 - **Decision on** 26/06/2013 - **Institution concerned** European Commission (No further inquiries justified) |

The background to the complaint

1. The present case concerns the Commission's handling of an infringement procedure against Spain.
2. In 2002, the Commission initiated on its own motion an infringement procedure (namely, procedure 2002/2315) against Spain concerning a non-harmonized excise duty on mineral oils.
3. On 6 May 2008, the Commission sent a reasoned opinion to the Spanish authorities in relation to the alleged infringement of EU law by Spanish tax legislation relating to the excise duty in question.
4. On 30 December 2010, the complainant, who is a Spanish lawyer, sent an e-mail to the Cabinet of the Commissioner responsible for taxation, indicating that a Spanish region intended to levy the above-mentioned excise duty, which could be contrary to EU law.
5. On 17 January 2011, the complainant forwarded to the Commission's Directorate-General for Taxation ('DG Taxation') an article which appeared in the Spanish press in relation to the excise duty in question. This article indicated that several Spanish regions had started to levy the excise duty. This article also suggested that the Commission had taken the view in 2008 that this excise duty was contrary to EU law.
6. On 19 January 2011, the Commission sent a letter to the complainant informing him that it had opened an infringement procedure (namely, procedure 2002/2315) against Spain in relation to this matter and that it had already sent a reasoned opinion to Spain. However, it had not yet decided whether to refer the case to the Court of Justice of the EU (the 'Court').
7. On 16 January 2012, the complainant sent an e-mail to DG Taxation stating that a Spanish



national court had made a preliminary reference to the Court which related to the subject matter of infringement procedure 2002/2315. Furthermore, he noted that the Commission appeared to have initiated its investigation in 2002 and sent a reasoned opinion to the Spanish authorities in 2008. In view of this, the complainant contended that the Commission should either close the case or bring the matter before the Court. The complainant added that, in his view, the fact that a Spanish court has made a preliminary reference to the Court concerning the compatibility of the relevant national legislation with EU law did not affect this conclusion.

8. On 1 February 2012, the Commission sent its reply. As a preliminary point, the Commission thanked the applicant for the information relating to the preliminary reference made by a Spanish court in relation to the compatibility of Spanish tax legislation with EU law. As regards the complainant's claim that the Commission should either bring the matter before the Court or close the case, the Commission noted that, according to well-established case-law, it has discretionary powers to decide whether it should bring the matter before the Court. The Commission added that, after sending a reasoned opinion and before deciding whether it should bring the matter before the Court or close the case, the Commission has the possibility to continue the contacts with the national authorities in order to solve the issue in a ' *diplomatic* ' manner.

9. On the same date, the complainant lodged the present complaint with the European Ombudsman. Furthermore, the complainant attached to his complaint an article written by him. This article noted, *inter alia* , that following a petition he had addressed to the European Parliament, the latter adopted, in 2010, a resolution inviting the Commission to consider adopting a procedural regulation for infringement proceedings.

10. On 16 February 2012, the Higher Regional Court of Catalonia (*Tribunal Superior de Justicia de Catalunya*) made a preliminary reference to the Court of Justice in order to examine the compatibility of Spanish tax legislation with EU law (Case C-82/12 *Transportes Jordi Besor a v TEARC and Generalitat de Catalunya*).

The subject matter of the inquiry

11. The Ombudsman opened an inquiry into the following allegation and claim:

Allegation

After having issued a reasoned opinion in the context of infringement proceedings against Spain, the Commission failed to take action within a reasonable time, either by bringing the matter before the Court of Justice or by closing the case.

Claim



The Commission should either initiate proceedings before the Court of Justice against Spain or close the case.

The inquiry

12. On 23 February 2012, the Ombudsman requested the Commission to submit an opinion. Moreover, the Ombudsman invited the Commission to provide information concerning the current state of affairs of the proceedings at issue.

13. On 2 and 27 March 2012, the complainant submitted additional information to the Ombudsman in support of his complaint.

14. On 11 June 2012, the Commission submitted its opinion, which was forwarded to the complainant for observations.

15. On 14 June 2012, the complainant submitted his observations.

16. On 8 April 2013, the Commission submitted additional information to the Ombudsman.

17. On 25 April 2013, the Ombudsman's services inspected the Commission's file concerning the infringement complaint in question.

18. On 8 May 2013, the inspection report was sent to the parties. On the same date, the complainant submitted his observations on the inspection report.

The Ombudsman's analysis and conclusions

A. Allegation of failure to take action within a reasonable time and related claim

Arguments presented to the Ombudsman

19. In his complaint to the Ombudsman, the complainant alleged that, having issued a reasoned opinion in the context of infringement proceedings against Spain, the Commission failed to take action within a reasonable time, either by bringing the matter before the Court or by closing the case. He added that the right to good administration and the principle of legal certainty supported his contention.

20. In his e-mail of 2 March 2012, the complainant disputed that the Commission should be allowed to assess for a period of ten years, at the pre-litigation stage, whether national legislation is contrary to EU law. Moreover, he argued that infringement proceedings are



administrative in nature and not 'diplomatic' as the Commission contended.

21. In his e-mail of 27 March 2012, the complainant drew the Ombudsman's attention to certain correspondence he had exchanged with the Commission in relation to the adoption of a procedural regulation for infringement proceedings. In his view, this correspondence showed that the Commission is reluctant to accept that infringement proceedings are subject to certain rules (namely that the Commission should take action within a reasonable time).

22. In its opinion, the Commission stressed, as a preliminary remark, that it had opened the infringement procedure at stake on its own motion and not as a result of an infringement complaint by the complainant. As regards the substance, the Commission considered that the allegation and claim put forward by the complainant should be rejected having regard to its discretionary powers in infringement proceedings. In support of this, the Commission referred to the case-law cited in its letter to the complainant of 1 February 2012, in which it explained its position in detail. The Commission further argued that pursuant to its discretionary powers it had suspended the infringement proceedings in question.

23. Moreover, in its subsequent letter of 8 April 2013, the Commission drew the Ombudsman's attention to the reference for a preliminary ruling made by the *Tribunal Superior de Justicia de Cataluña* concerning the compatibility of the Spanish tax legislation at stake with EU law (Case C-82/12 *Transportes Jordi Besora v TEARC and Generalitat de Catalunya*, lodged on 16 February 2012).

24. In his observations, the complainant pointed out that the Commission merely stated that the procedure still remained suspended and failed to provide information concerning the current state of affairs of the proceedings, as the Ombudsman had requested. Moreover, the complainant indicated that, in case Spain were found to have infringed EU law, the Commission's delay in handling the infringement proceedings would have caused harm to Spanish consumers which would be difficult or even impossible to repair. In that regard, the complainant added that consumers are unlikely to keep documentary evidence of the payment of the excise duty in question in order to claim compensation in the future.

25. Although the complainant recognised that according to the case-law of the Court the Commission has wide discretionary powers in the context of infringement proceedings, he argued that this case-law should be read in the light of other principles of EU law, such as the right to good administration, the principle of legal certainty and the prohibition of arbitrary administrative behaviour.

26. The complainant added that, even if the law does not establish any specific time-limit for the duration of infringement proceedings, this does not mean that they can remain open for an indefinite period. In the complainant's view, the principles of good administration and legal certainty require the Commission to conduct infringement proceedings within a reasonable time.

27. Moreover, the complainant suggested that the reason why the Commission has not yet brought Spain before the Court in relation to this matter may be because it wishes to have



Spain's support for its proposal for a new directive for the taxation of energy products. In the complainant's view, if this explanation was correct, this would amount to a misuse of the purpose of infringement proceedings.

The Ombudsman's assessment

28. As a preliminary matter, the Ombudsman notes that the Commission has informed the complainant that the infringement proceedings against Spain are currently suspended.

29. In that regard, the Ombudsman notes that the Commission enjoys a wide discretionary power when deciding whether to bring the matter before the Court or close the case after having issued a reasoned opinion. As the Court has held:

" under the system established by [Article 258 TFEU], the Commission enjoys a discretionary power as to whether it will bring an action for failure to fulfil obligations and it is not for the Court to judge whether that discretion was wisely exercised ". [1]

30. The Court has further held that:

" given the Commission's role as guardian of the treaties, that institution alone is competent to decide whether it is appropriate to initiate the procedure under [Article 258 TFEU]. The Commission also enjoys sole competence to decide whether the pre-litigation procedure should be taken further by delivering a reasoned opinion and, on completion of that procedure, it has the right, but not the duty, to commence proceedings before the Court for a declaration that the Member State concerned is in breach of its obligations as alleged. " (references omitted) [2]

31. Furthermore, the Commission's discretion as to whether to initiate infringement proceedings before the Court *" excludes the right for individuals to require it to adopt a specific position " . [3]*

32. Moreover, the case-law does not confer on individuals the right to request the Commission to take action within a specified period of time, either by bringing the matter before the Court of Justice or by closing the case.

33. From a legal point of view, the Commission's position thus cannot be criticised. This conclusion is not affected by the complainant's reliance on a number of principles of EU law, that is to say, the principle of good administration, the principle of legal certainty and the prohibition of arbitrary administrative behaviour and of misuse of power.

34. It is good administrative practice to handle administrative examinations or inquiries within a reasonable period of time. This principle also applies within the context of infringement proceedings where, as in the present case, the Commission has addressed a reasoned opinion to a Member State and thus has to decide whether the matter should be submitted to the Court of Justice. In the present case, the Ombudsman notes that nearly four years had elapsed since the Commission sent its reasoned opinion to the Member State concerned when the present



complaint was lodged. The Ombudsman notes, however, that the Commission has drawn his attention to the fact that a reference for a preliminary ruling on the same issues is now pending before the Court of Justice. In these circumstances, the Ombudsman considers that it was reasonable for the Commission to decide to suspend the ongoing infringement proceedings until the matter is decided by the Court of Justice.

35. As far as the principle of legal certainty is concerned, the Ombudsman notes that any possible legal uncertainty as regards the current legal situation will be solved by the Court of Justice's ruling in the above-mentioned case.

36. As regards the prohibition of arbitrary administrative behaviour and misuse of power, the Ombudsman notes that, the concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it. A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for such a purpose. [4]

37. The Ombudsman understands that the complainant's criticism is based on his suspicion that the reason why the Commission has not yet brought Spain before the Court may be that it wishes to obtain Spain's support for its proposal of a new directive for the taxation of energy products.

38. The Commission has suggested that it is inherent to its discretionary powers in this area that it can decide not to bring a matter before the Court for various reasons. It could be argued that such reasons may include the Commission's pursuit of its legislative policy objectives. However, in the present circumstances, it is not necessary for the Ombudsman to take a position on this matter.

39. Indeed, and as indicated above, the *Tribunal Superior de Justicia de Cataluña* has made a preliminary reference to the Court of Justice concerning the compatibility of the Spanish tax legislation in question with EU law. As explained above, the Ombudsman considers that the Commission's decision not to proceed with the infringement proceedings while this case is pending before the Court of Justice is reasonable.

40. In view of the above, there are no grounds for further inquiries into the present complaint.

41. The Ombudsman points out, however, that the Commission did not initially indicate the reasons why, within the scope of its wide discretionary powers, it had decided to suspend the infringement proceedings in question. It was only after the Ombudsman opened an inquiry into the current complaint that the Commission provided further explanations and also made reference to the pending reference for a preliminary ruling by the *Tribunal Superior de Justicia de Cataluña*. In the Ombudsman's view, it would be in the interest of good administration if in the future the Commission could provide citizens with adequate information concerning the reasons for which it has decided to suspend the investigation of an infringement complaint. Such transparency would increase the Commission's accountability and further strengthen the citizens' trust in the Commission in its role as the guardian of the Treaties. Therefore, the



Ombudsman will make a further remark in this regard.

B. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion and the following further remark:

No further inquiries are justified into the present inquiry.

Further remark

The Commission could consider providing citizens with adequate information concerning the reasons for which it has decided to suspend the investigation of an on-going infringement proceeding.

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

P. Nikiforos Diamandouros

Done in Strasbourg on 26 June 2013

[1] Case C-383/00 *Commission v Germany* [2002] ECR I-4219, paragraph 19. See also Case C-200/88 *Commission v Greece* [1990] ECR I-4299, paragraph 9.

[2] See Case C-207/97 *Commission v Belgium* [1999] ECR I-275, paragraph 24.

[3] Case T-571/93 *Lefebvre frères v Commission* [1995] ECR II-2379, paragraph 60. See also Case 247/87 *Star Fruit v Commission* [1989] ECR 291, paragraph 11.

[4] Case T-387/08 *Evropaiki Dynamiki - Proigmena Systemata Tilepikoinonion Pliroforikis kai Tilematikis v Commission* [2010] ECR II-178, paragraph 159.