

## Draft recommendation to the European Commission in complaint 146/2005/GG

Recommendation

**Case 146/2005/GG - Opened on 18/01/2005 - Recommendation on 15/06/2005 - Decision on 09/06/2006**

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

### THE COMPLAINT

#### *Background*

The complainant is a German firm active in recycling waste oils. 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 (as amended, hereinafter referred to as the "Directive") 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 Article 1 of the Directive, "regeneration" means "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 complainant, Germany has subsidised the combustion of waste oils (for the purpose of electricity-generation) since 1993 at the latest. The complainant considered this to be in stark contradiction to the provisions of the Directive and submitted a complaint to the Commission. The latter opened infringement proceedings which led to a judgment by the Court of Justice in 1999 finding in favour of the Commission (Case C-102/97).

Germany was at first reluctant to comply with this judgement. It seems that it was only after the complainant had again turned to the Commission and the latter had taken steps with a view to using the procedure set out in Article 228 of the EC Treaty (which provides for the possibility of penalty payments) that Germany accepted to amend her legislation.

According to the complainant, the amended rules define the term "regeneration" so as to exclude (or make it possible to exclude) processes leading to the production of "flux oil". In the complainant's view, this measure was taken deliberately to punish it.

*Complaint 1272/2004/GG*



On 5 May 2004, the complainant turned to the Ombudsman. In its complaint, the complainant alleged that the Commission had failed to enforce Community law in general and the above-mentioned judgement in particular.

In its opinion submitted in August 2004, the Commission pointed out that the complaint to the Ombudsman was related to infringement complaint 2002/4775 that the complainant had lodged with the Commission on 28 June 2002. The Commission explained that in the course of its investigations into this complaint, Germany had provided information indicating the legal possibility for the administration to enforce the priority for the regeneration of waste oils and claiming that the regeneration quota in Germany demonstrated that the priority principle was achieved in practice.

According to the Commission, a subsequent meeting with the competent German authorities in September 2003 had indicated 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 Commission submitted that the results of this study, which were expected by the end of 2004, should be awaited before taking a decision as regards the infringement proceedings (2) .

The opinion was sent to the complainant for its observations. No such observations were received.

In the light of the circumstances mentioned by the Commission, in particular the fact that Germany appeared to have admitted that her statistics on unregenerate waste oils were unreliable, the Ombudsman considered that the Commission's approach was reasonable. On 24 November 2004, the Ombudsman therefore closed his inquiry with a finding of no maladministration. The Ombudsman noted, however, that the complainant could submit a new complaint at a future stage if it considered that the Commission did not pursue the case with the appropriate diligence.

*Complaint 3534/2004/GG*

In a letter of 30 November 2004, the complainant asked the Ombudsman to continue his inquiry or, if this should not be possible, to consider its letter as a new complaint.

The complainant pointed out that the above-mentioned study would be ready in September 2005 at the earliest. It argued, in substance, that both the Commission and Germany were playing for time.

Given that the inquiry into complaint 1272/2004/GG had already been closed, the complainant's further letter was registered as a new complaint.

The Ombudsman considered that re-opening an inquiry that had been closed at the end of November 2004 would only make sense if there were any new facts or arguments that could affect the Ombudsman's analysis. The complainant's submission that the Commission and Germany were procrastinating could be considered as such a new argument. However, the



complainant had not submitted any evidence to establish that the relevant study was indeed delayed and that the Commission had failed to pursue the matter in an appropriate manner.

The Ombudsman therefore informed the complainant that there were insufficient grounds for an inquiry. However, the complainant's attention was drawn to the possibility to renew its complaint, provided that sufficient evidence was produced.

*The telephone conversation of 7 January 2005*

On 7 January 2005, the complainant rang the Ombudsman's Office to ask what evidence was needed. The official in charge of the case explained that the Ombudsman needed evidence to prove or suggest that the relevant study would not be available before the middle of 2005.

*The e-mail of 10 January 2005*

On 10 January 2005, the complainant provided a copy of an information sheet produced by the institute that appears to deal with the relevant study. According to this sheet, the study covers the period from June 2004 until June 2005.

This e-mail was registered as a new complaint (146/2005/GG). In the light of the information provided by the complainant, the Ombudsman decided to ask the Commission for an opinion on the complainant's allegation that the Commission had failed to enforce Community law and judgements rendered on the basis of Community law.

## THE INQUIRY

### **The Commission's opinion**

In its opinion, the Commission made the following comments:

The desirability of waiting for the results of the relevant study had been mentioned in the Commission's opinion on complaint 1272/2004/GG as the main reason for keeping complaint 2002/4775 open. In this opinion (which had been prepared in the summer of 2004), it had been explained that the study would be available by the end of 2004.

In July 2004, the German authorities had informed the Commission that the study had been launched in the meantime, albeit with a delay. They had indicated that an interim report was expected for September 2004. The Commission could not be held responsible for this delay, nor was there an obligation under Community law for Germany to carry out such a study.

On 7 October 2004, Germany had provided information on the implementation of the Directive to the Commission. This communication had included a model for the calculation of the waste oil flows in Germany. Following this method, the quantities of regenerated waste oils had significantly increased over the last years, whereas the total quantity of waste oils as well as the quantity of combusted waste oils contained therein had decreased.

The first interim report on the above-mentioned study had been attached to this communication. The objective of this study was to elaborate a waste oils flow balance that satisfied the information needs of the Commission and served as a common basis for the discussion with the waste oil actors. The report detailed the calculation model used by the German authorities and



concluded that it was a good basis for further investigation. In the course of the study, the model would be adjusted to obtain the real waste oil flows.

Also attached to the communication had been the terms of reference of the study. According to this document, the final report was indeed due in June 2005.

On the basis of the information currently available, the Commission's preliminary conclusion was that Germany had taken the necessary measures to give priority to the processing of waste oils by regeneration. However, the Commission considered it necessary to wait for the final report to get a picture that was as complete as possible before taking a decision on complaint 2002/4775.

**The complainants' observations** *The complainant's letter of 27 May 2005*

In its letter of 27 May 2005, the complainant made the following comments:

Complaint 2002/4775 had been lodged on 28 June 2002. Since then, nearly three years had passed without the Commission being able to provide a substantive reply.

The relevant study was overdue, given that it had been promised by Germany for the beginning of 2004. The study was furthermore part of Germany's efforts to win time.

According to information provided by the person in charge at the German Ministry of the Environment, the Commission had discontinued all proceedings against Member States that had still not implemented the Directive. According to the same source, there was a clear tendency within the Commission to abolish the Directive altogether.

There were a number of further questions that had not been clarified by the Commission's opinion (3) .

Given that any further delay caused considerable damage, the Ombudsman should see to it that the Commission should speedily implement the judgment of the Court of Justice and the Directive.

*The complainant's letters of 31 May 2005 and 9 June 2005*

In further letters of 31 May and 9 June 2005, the complainant reiterated its views.

## THE DECISION

### **1 Alleged failure to enforce Community law and judgements rendered on the basis of Community law**

1.1 The complainant is a German firm active in recycling waste oils. Article 3 (1) of Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (as amended, hereinafter referred to as the "Directive") 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 failed to comply with the obligations arising from this directive. After the complainant had submitted a complaint to the Commission, the latter opened infringement proceedings which led to a judgment by the Court



of Justice in 1999 finding in favour of the Commission opinion (4) . In 2002, the complainant submitted a further complaint to the Commission (infringement complaint 2002/4775).

1.2 On 5 May 2004, the complainant turned to the Ombudsman (complaint 1272/2004/GG). In this complaint, the complainant alleged that the Commission had failed to enforce Community law and judgements rendered on the basis of Community law.

In its opinion on that complaint (which was submitted to the Ombudsman in August 2004), the Commission 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 the regeneration of waste oils and claiming that the regeneration quota in Germany demonstrated that the priority principle was achieved in practice. According to the Commission, at a subsequent meeting with the competent German authorities in September 2003 the German authorities had admitted that the statistics on unregenerate waste oils were unreliable and that therefore a specific study would be initiated. The Commission submitted that the results of this study, which were expected by the end of 2004, should be awaited before taking a decision as regards the infringement proceedings.

1.3 In the light of the circumstances mentioned by the Commission, the Ombudsman considered that the Commission's approach was reasonable. On 24 November 2004, the Ombudsman therefore closed his inquiry with a finding of no maladministration. The Ombudsman noted, however, that the complainant could submit a new complaint at a future stage if it considered that the Commission did not pursue the case with the appropriate diligence.

1.4 In January 2005, the complainant asked the Ombudsman to renew his inquiry, submitting evidence to show that the relevant study would not be available before the middle of 2005. The Ombudsman decided to register the complainant's letter as a new complaint (complaint 146/2005/GG) and to open an inquiry.

1.5 In its opinion on the new complaint, the Commission pointed out that it had been informed in July 2004 by the German authorities that the study had been launched in the meantime, albeit with a delay. The Commission submitted that it could not be held responsible for this delay. It added that Germany had provided information on the implementation of the Directive on 7 October 2004 and that the first interim report on the above-mentioned study had been attached to this communication. Also attached to the communication had been the terms of reference of the study. According to this document, the final report was indeed due in June 2005. The Commission submitted that on the basis of the information currently available, its preliminary conclusion was that Germany had taken the necessary measures to give priority to the processing of waste oils by regeneration. However, the Commission considered it necessary to wait for the final report in order to get a picture that was as complete as possible before taking a decision on complaint 2002/4775.

1.6 In its observations, the complainant pointed out that complaint 2002/4775 had been lodged on 28 June 2002 and that nearly three years had passed without the Commission being able to



provide a substantive reply. According to the complainant, the relevant study was overdue, given that it had been promised by Germany for the beginning of 2004. In the complainant's view, the study was furthermore part of Germany's efforts to win time. The complainant added that it had obtained information to the effect that the Commission had discontinued all proceedings against Member States that had still not implemented the Directive and that there was a clear tendency within the Commission to abolish the Directive altogether.

1.7 It is good administrative practice for the Commission to deal with infringement complaints diligently and within a reasonable period of time. In order to ascertain whether the Commission has acted accordingly, the Ombudsman considers that all the relevant facts of the case need to be considered, to the extent that they have been brought to his attention.

1.8 The Ombudsman notes that nearly three years have passed since the complainant lodged its infringement complaint (complaint 2002/4775) with the Commission. Regard should also be had to the fact that in this complaint, the complainant appears to have argued that Germany had failed to comply with the judgement of the Court of Justice in Case C-102/97 which had been rendered in 1999. The Ombudsman recalls that in its "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), the Commission stated that, as a general rule, it proposed to 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.

1.9 The Ombudsman further notes that the Commission has taken the view that it will only be possible to deal with the complainant's infringement complaint after it has received the results of a study commissioned by the German authorities. Given (1) that the complainant had submitted that Germany failed to comply with the obligation created by the directive to give priority to the processing of waste oils by regeneration and (2) that the German authorities had admitted that the statistics on unregenerate waste oils were unreliable and that therefore a specific study would be initiated, the Ombudsman continues to believe that this position is reasonable.

1.10 It should however be noted that, according to the Commission, the German authorities had made the above-mentioned admission at a meeting that was held in September 2003 whereas the study only appears to have been commissioned in the middle of 2004. Whilst it is true that the Commission cannot be blamed for this delay which is the responsibility of the German authorities, the Commission has not shown that it has made any effort to ensure that the relevant data would be available as soon as possible. According to the information available to the Ombudsman, the Commission informed the complainant by letter of 3 February 2004 that it had been informed by the German authorities that the missing information would not be forwarded before the spring of 2004. In its opinion on complaint 1272/2004/GG, the Commission stated that the results of the study were expected by the end of 2004. In its opinion on the present complaint, the Commission acknowledged that the final report was indeed due in June 2005 as the complainant had claimed. In these circumstances, the Ombudsman considers that the Commission has not acted with the requisite diligence in the present case. This is an instance of maladministration.



1.11 In his decision of 24 November 2004, the Ombudsman closed his inquiry into complaint 1272/204/GG with a finding of no maladministration. This finding was based on the consideration that the Commission appeared to be pursuing the case actively, given that the latter had informed the Ombudsman that the results of the study that it wished to await were expected for the end of 2004. The Ombudsman recalls that this information was contained in the opinion that the Commission submitted to him by note of 6 August 2004. In its opinion on the present complaint, the Commission stated that "in July 2004" it had been informed by the German authorities that the study had been launched with a delay. The Ombudsman concludes that at the time when it forwarded its opinion to him in August 2004, the Commission should thus have been aware of the fact that the contents of this opinion no longer corresponded to the actual facts as regards the date by which the study would be ready. It can of course not be excluded that the information from the German authorities "in July 2004" arrived so late that it could no longer be included in the Commission's opinion, particularly in view of the fact that the opinion was sent in the holiday period. The Ombudsman notes, however, that the Commission nevertheless refrained from forwarding an addendum (or corrigendum) to him subsequently. In the Ombudsman's view, a Community institution or body that has inadvertently supplied inaccurate or misleading information to the Ombudsman should correct this information as soon as it becomes aware of its error. For the avoidance of doubt, it should be added that the date by which the results of the study were due constituted an important factor in the context of the Ombudsman's inquiry.

## **2 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 deal with the complainant's infringement complaint as rapidly and as diligently as possible.

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 15 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, 15 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) Together with its opinion, the Commission submitted a copy of a letter it had addressed to



the complainant on 3 February 2004. In this letter, the Commission pointed out that the German authorities had explained that the missing information would not be forwarded before the spring of 2004.

(3) The complainant submitted for example that Germany was (or had been) subsidising the combustion of waste oils by an amount of EUR 52,5 million over a period of seven years whereas the subsidy for the purposes of regeneration only amounted to EUR 10,2 million for the same period. In the light of this discrepancy, the complainant queried whether Germany had properly implemented the Directive.

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