

## Decision of the European Ombudsman closing the inquiry into complaint 2302/2013/DK against the European Commission

Decision

**Case 2302/2013/DK - Opened on 09/01/2014 - Decision on 17/04/2015 - Institution concerned** European Commission ( No maladministration found ) |

The case concerned the allegedly insufficient explanation given by the European Commission concerning its decision not to initiate an infringement proceeding against Austria.

The Ombudsman inquired into the issue by asking the Commission to provide further information about its decision. In reply, the Commission clarified its position. The Ombudsman found that the information thus provided was coherent, sufficient and reasonable. She therefore closed the case with a finding of no maladministration.

### The background to the complaint

1. The complaint originates from the provision of allegedly insufficient information on the decision by the European Commission not to open an infringement proceeding against Austria for violation of EU law on avoidance of double taxation.
2. The complainant is a former chief executive officer of an Austrian bank, as well as the owner of a Liechtenstein-based company which provided advice on the privatisation of the same bank.
3. In 2000, the complainant became the subject of taxation and criminal law procedures in Austria relating to tax issues which resulted in an additional income tax becoming due in Austria.
4. The complainant contested the decisions to impose additional tax on him before all the competent Austrian courts. When these appeals were unsuccessful, he turned to the European Court of Human Rights.
5. In October 2009, the complainant submitted an infringement complaint [1] to the European Commission against Austria. The complainant argued that Austria infringed the fundamental freedom of establishment [2] and his fundamental rights [3] . He also argued that the Austrian



Administrative Court wrongly failed to request a preliminary ruling on his case from the European Court of Justice. In September 2011, the Commission informed the complainant that it saw no grounds to pursue his infringement complaint further.

**6.** In July 2012, the complainant wrote to the Commission in response to its decision to close the infringement complaint. The Commission registered the correspondence as a new infringement complaint [4] and informed the complainant that the case raised complex legal issues requiring in-depth analysis and that it would provide a reply within one year

**7.** In January 2013, the Commission informed the complainant that the information submitted by him so far did not allow it to conclude that infringement proceedings should be initiated against Austria. It therefore asked the complainant to submit any new information that could change its position, within a month. On 29 January 2013, the complainant sent additional information to the Commission.

**8.** In December 2013, the complainant complained to the Ombudsman that the Commission wrongly failed to initiate infringement proceedings against Austria.

## The inquiry

**9.** The Ombudsman opened an inquiry into the complaint by analysing the Commission's position and the complainant's arguments raised against it. Further to that analysis, the Ombudsman found that the Commission's position, as outlined in its reply to the first infringement complaint, was reasonable. In that reply, the Commission had pointed out that it was for the Austrian administrative and/or judicial authorities to decide on his individual case and that his case indeed was dealt with by these authorities. It also said that it could commence an infringement procedure only if either the wording of the provisions of national legislation or the administrative application of those provisions systematically and consistently violated EU law. However, the Commission found, this had not been proven to be the case. Finally, the Ombudsman also found that the Commission's position on double taxation was in line with the relevant case-law of the EU courts [5]. The Ombudsman therefore asked the complainant to clarify why he considered that the Commission acted wrongly when it decided not to initiate infringement proceedings against Austria.

**10.** In his clarifications, the complainant argued that in another infringement complaint which was against the United Kingdom and concerned the same issue as his complaint against Austria [6], the Commission adopted a different approach. In that complaint, the Commission found that the United Kingdom was not complying with EU law on freedom of establishment and free movement of capital when it continued to tax profits of subsidiaries of UK companies established in the EU or in the Member States of the European Economic Area.

**11.** On the basis of the complainant's clarifications, the Ombudsman decided to ask the Commission for an opinion on this issue.



## Allegation of wrongful decision not to initiate an infringement procedure

### Arguments presented to the Ombudsman

12. In its opinion, the Commission gave a very detailed account of the events leading to the complainant's infringement complaints and his complaint to the Ombudsman.

13. As a preliminary point, the Commission argued that the European Ombudsman should not conduct inquiries on complaints where the alleged facts are or have been the subject of legal proceedings [7] . It said that the issue at stake in the present complaint has already been adjudicated upon by various Austrian Courts concerning taxation and criminal tax fraud.

14. As regards the substance of the case, the Commission stated that, in accordance with the established case-law of the EU courts, the Commission enjoys a discretionary power in deciding whether or not to commence, maintain or close infringement procedures, and on whether to refer a case to the Court of Justice of the European Union [8] , and that the above discretion of the Commission excludes the right for individuals to require it to adopt a specific position [9] .

15. The Commission reiterated that the complaint concerns an individual case, and that it cannot intervene in individual cases to solve tax-payers' problems or act as an appeal institution with regard to national judgments. Indeed, the Commission does not intervene in individual tax cases, since it does not have the means, the information or the capacity to assess the specific facts and circumstances surrounding the application of the domestic law to a particular situation.

16. It added that in individual cases, such as the one at stake, which do not reveal a general practice, recourse can be had only to nationally available legal remedies. It is therefore for the national courts to ensure that the complainant's rights are adequately protected. The complainant had availed himself of those rights and the national courts found against him.

17. As regards the infringement proceedings in complaint 2009(4105) referred to by the complainant, the Commission explained that this procedure against the United Kingdom concerned a follow-up on the judgments of the Court of Justice in the *Cadbury Schweppes* case [10] and in the *Test Claimants in the CFC and Dividend* case [11] , which concerned the United Kingdom legislation on taxation of Controlled Foreign Companies (CFC) [12] . The Commission noted that even after those rulings, the UK still failed to comply with EU law since profits of CFCs, which are subsidiaries of companies established in EU Member States or in EEA countries, should not be subject to additional taxation in the country of the parent company **if the subsidiaries are engaged in genuine economic activities** . It therefore formally requested the United Kingdom to amend its legislation to better take into account the rulings in the above two cases. The United Kingdom complied with the request by amending its legislation and the infringement procedure was thus closed in November 2012. The Commission also pointed out that the United Kingdom legislation applied only to subsidiaries of United Kingdom



resident companies which are established outside the UK, while it did not apply to purely domestic situations. That resulted in a less favourable treatment where a subsidiary was established in another Member State or in an EEA country.

**18.** The Commission then noted that the Austrian provisions **do not differentiate between purely domestic and cross-border situations**. Also, in contrast to the United Kingdom provisions, the Austrian ones aim explicitly to address cases **where there was no genuine economic activity by the subsidiary**.

**19.** In light of the above, the Commission rejected the complainant's view that the United Kingdom legislation at issue in infringement procedure 2009/4105 was similar to the contested Austrian legislation.

**20.** In his observations, the complainant maintained his complaint.

## The Ombudsman's assessment

**21.** The Ombudsman notes in respect of the Commission's preliminary point about the statutory limits of her inquiries, that the present inquiry did not concern the aspects that have been brought before the Austrian judiciary authorities by the complainant. In fact, it concerned the allegation that the **Commission wrongly decided not to initiate infringement proceedings against Austria**. The issue of how the Commission dealt with the infringement case, which is the sole subject of the present inquiry, has not been brought before a court (indeed, there is no legal mechanism by which that issue could be brought before a court). It can therefore be brought before the Ombudsman.

**22.** As regards the substance of the case, the Ombudsman considers that the Commission has given a comprehensive explanation as regards why the infringement case referred to by the complainant could be differentiated from the complainant's case. The Ombudsman finds the Commission's explanation to be coherent, sufficient and reasonable, insofar as it allows one to understand why the Commission acted differently in the two cases.

**23.** The Ombudsman therefore considers that the Commission has now properly addressed the complainant's grievances. She therefore finds no maladministration by the Commission.

## Conclusion

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

**The Ombudsman finds no maladministration by the Commission.**

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



Emily O'Reilly

Strasbourg, 17/04/2015

[1] Complaint reference CHAP 2009(229).

[2] Notably, Articles 49 and 56 of the Treaty on the Functioning of the European Union and Articles 31 and 34 of the [Agreement on the European Economic Area \[Link\]](#).

[3] Notably, Articles 47, 48 and 49 of the Charter of Fundamental Rights of the European Union.

[4] Complaint reference CHAP 2422(2012).

[5] Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas v. Commissioners of Inland Revenue* [2006] ECR I-7995

[6] Complaint registration number: 2009/4105.

[7] Article 228(1) of the Treaty on the Functioning of the European Union provides that "...the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, except where the alleged facts are or have been the subject of legal proceedings ..."

[8] Case C-329/88, *Commission v Greece* [1989]; ECR 4159; Case C-200/88, *Commission v Greece* [1990]; ECR I-4299; Case C-207/97, *Commission v Belgium* [1999]; ECR I-275; and Case C-212/98 *Commission v Ireland* [1999]; ECR I-8571.

[9] Case T-571/93, *Lefebvre v. Commission*, ECR.II-2379.

[10] Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006], ECR I-7995.

[11] Case C-201/05 *Test Claimants in the CFC and Dividend GLO* [2008] ECR I-2875.

[12] The UK tax legislation at stake in the *Cadbury Schweppes* case provided that a resident company is subject to UK corporation tax on its worldwide profits. Those profits included the profits made by branches or agencies through which the resident company carried on its activities outside the United Kingdom. On the other hand, the resident company was not generally taxed on the profits of its subsidiaries as they arose. The UK legislation on CFCs



provided for an exception to the general rule that a resident company was not taxed on the profits of a subsidiary as they arose (undistributed). It also provided that the profits of a CFC were attributed to the resident company and taxed in its hands by means of a tax credit for the tax paid by the CFC in the State in which it is established. If those same profits were then distributed in the form of dividends to the resident company, the tax paid by the latter in the United Kingdom on the profits of the CFC were treated as additional tax paid by the latter abroad and gave rise to a tax credit payable in respect of the tax owed by the resident company on those dividends. The legislation on CFCs was designed to apply when the CFC was subject, in the State in which it was established, to a 'lower level of taxation', which was the case, under that legislation, in respect of any accounting period in which the tax paid by the CFC was less than three quarters of the amount of tax which would have been paid in the United Kingdom on the taxable profits as they would have been calculated for the purpose of taxation in that Member State. The Court found that cross-border investments were treated less favourably than domestic investments under the relevant legislation. The Court concluded in the operative part of the judgment:

*"Articles 43 EC and 48 EC must be interpreted as precluding the inclusion in the tax base of a resident company established in a Member State of profits made by a controlled foreign company in another Member State, where those profits are subject in that State to a lower level of taxation than that applicable in the first State, unless such inclusion relates only to wholly artificial arrangements intended to escape the national tax normally payable. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives that controlled company is actually established in the host Member State and carries on genuine economic activities there".*