Decision of the European Ombudsman closing his own-initiative inquiry OI/5/2011/BEH concerning the European Commission

Decision
Case OI/5/2011/BEH - **Opened on** 19/05/2011 - **Decision on** 06/09/2011 - **Institution concerned** European Commission (No maladministration found) |

The background to the own-initiative inquiry

1. Article 228 of the Treaty on the Functioning of the European Union empowers the European Ombudsman to conduct inquiries on his own initiative in relation to possible instances of maladministration in the activities of the Union institutions, bodies, offices or agencies.

2. Following the accident at the Fukushima nuclear power station in March 2011, the issue of the maximum permitted levels of radioactive contamination of food and feed in the EU (henceforth referred to as the 'maximum permitted levels') has received significant attention from, among others, citizens, non-governmental organisations, and the media.

3. On 25 March 2011, the Commission adopted Implementing Regulation 297/2011 concerning the import of food and feed from Japan following the Fukushima accident [1] . On 11 April 2011, the Commission adopted Implementing Regulation 351/2011 [2] , by means of which it amended its previous Implementing Regulation.

4. Based on complaints submitted to him, the Ombudsman realised that a number of Union citizens perceive that there is a lack of precise and reliable information as regards the changes the Commission made to the maximum permitted levels in the aftermath of the Fukushima accident.

5. The Ombudsman noted that the Commission's websites provide links to the aforesaid implementing legislation it adopted, but that no comparative information on the maximum permitted levels before and after the Fukushima accident have apparently been made available.

6. In view of the above, the Ombudsman decided to open an own-initiative inquiry into the subject of the maximum permitted levels before and after the Fukushima accident.

The subject-matter of the inquiry

7. In his letter opening the present inquiry, the Ombudsman informed the Commission that his inquiry aims at establishing reliable information on the maximum permitted levels in force before and after the Fukushima accident, as then determined, in particular, by Implementing Regulations 297/2011 and 351/2011.

8. The Ombudsman pointed out that he intends to make the information obtained in the course of the present inquiry available to the public. He added that he would therefore be grateful to be provided with precise figures, preferably also in the form of graphs and charts which would allow an easy identification of the maximum permitted levels in force (i) before the Fukushima accident, and, (ii) after that accident, pursuant to Implementing Regulations 297/2011 and 351/2011.

The inquiry

9. On 19 May 2011, the Ombudsman opened the present own-initiative inquiry and requested an opinion from the Commission. When requesting an institution's opinion, the Ombudsman normally grants that institution a period of three months to submit its opinion. Given the current interest in and the relevance of the subject-matter, however, he asked for the Commission's reply by 30 June 2011.

10. The Commission did not submit its opinion by that date. Therefore, on 21 July 2011, the Ombudsman sent a reminder.

11. The Commission presented its opinion on 28 July 2011.

The Ombudsman's analysis and conclusions

A. Information submitted by the Commission to the Ombudsman

As regards the action taken by the Commission

12. In its opinion, the Commission provided the following timeline for the action it took in the aftermath of the Fukushima accident:
- On 15 March 2011, having been informed by the Japanese authorities that radionuclide levels in certain food products originating in Japan exceeded the maximum permitted levels in Japan, the Commission issued a RASFF [3] information notification and recommended to the Member States that they apply the pre-established maximum permitted levels laid down in the following

pieces of legislation (henceforth referred to as the 'Euratom regulations'):
- Regulation 3954/87 [4] , and,
- Commission Regulation 770/90 [5] for feedingstuffs, and Commission Regulation 944/89 [6] for minor foodstuffs.

The Commission stated that, following the accident at the Fukushima nuclear power station, it did not recommend applying the maximum permitted levels laid down in Regulation 733/2008 [7] concerning imports of agricultural products originating in third countries. That Regulation lays down maximum permitted levels for the sum of caesium-134 and caesium-137 in certain agricultural products originating in third countries. The reason for the Commission's decision was that Regulation 733/2008 is (i) targeted at the consequences of the accident at the Chernobyl nuclear power station and (ii) only provides for permitted maximum levels for radioactive caesium, but not for radioactive iodine, high levels of which were found in food after the Fukushima accident.

The Commission also explained that, in the immediate aftermath of the Fukushima accident, Japan enforced action levels for iodine, caesium, uranium and plutonium. Foodstuffs not complying with those action levels cannot be placed on the market in Japan and cannot be exported. With one exception, the action levels set by Japan are lower than the maximum levels established in Regulation 3954/87. This is due to the fact that, in Japan, a much higher percentage of the population's daily diet than the 10% on which the EU levels are based could be contaminated with significant levels of radio-nuclides.
- On 22 March 2011, a meeting of the Chief Veterinary Officers [8] took place. Several delegations called on the Commission urgently to adopt harmonised control measures at EU level regarding the import of food and feed from Japan.
- At a meeting of the working group 'Atomic Questions' of the Council of the EU on 23 March 2011, that request was reiterated.
- On 25 March 2011, the Commission adopted, as a precautionary measure, Implementing Regulation 297/2011. That Implementing Regulation requires pre-export checks to be carried out by the Japanese authorities on all exported food and feed from the affected zone, combined with random controls at the point of entry into the EU to verify compliance with the maximum permitted levels set out in the Euratom regulations. Implementing Regulation 297/2011 entered into force on 27 March 2011.
- On 11 April 2011, the Commission adopted Implementing Regulation 351/2011 amending Implementing Regulation 297/2011. The Commission explained that the reference to the maximum permitted levels established by the Euratom regulations had become a point of discussion in the week following the entry into force of Implementing Regulation 297/2011. It was perceived that these maximum permitted levels were not sufficiently health-protective and were higher than the action levels currently applied in Japan as well as higher than the maximum permitted levels for caesium established in Regulation 733/2008. In order to ensure consistency between the pre-export checks performed by the Japanese authorities and the controls at import into the EU, the Commission, by means of Implementing Regulation 351/2011, aligned, on a provisional basis, the applicable maximum permitted levels on food and feed imported from Japan to the action levels in Japan. Implementing Regulation 351/2011

entered into force on 13 April 2011.

As regards the maximum permitted levels

Before the Fukushima accident

13. The Commission explained that, before the Fukushima accident, only the maximum permitted levels established by Council Regulation 733/2008 were applicable at EU level. These maximum permitted levels relate to imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station. Regulation 733/2008 establishes maximum permitted levels for the sum of caesium-134 and caesium-137 only (Table 1).

Table 1: Maximum level (Bq/kg) for imports of agricultural products from third countries following the accident at the Chernobyl nuclear power station (*)

Milk and Infant food (**)

Other food and feed

Sum of caesium-134 and caesium-137

370

600

(*) The level applicable to concentrated or dried products is calculated on the basis of the reconstituted product as ready for consumption.

(**) Infant food is defined as those foodstuffs intended for the feeding of infants during the first four to six months of life, which meet, in themselves, the nutritional requirements of this category of person and are put up for retail sale in packages which are clearly identified and labelled " *food preparation for infants* ".

After the Fukushima accident

14. The Commission pointed out that the maximum permitted levels for the sum of caesium-134 and caesium-137 established by **Regulation 733/2008** remain applicable (see Table 1 above).

15. The Commission stated that, both in its **recommendation issued via RASFF** (for the period of 15 March 2011 to 27 March 2011) and in **Implementing Regulation 297/2011** (for the period from 28 March 2011 to 12 April 2011), reference is made to the pre-established

maximum permitted levels in the Euratom regulations (Tables 2 and 3 below). These levels were to be applied for evaluating the acceptability of consignments of feed and food from Japan.

Table 2: Pre-established maximum levels (Bq/kg) for food in Regulation (Euratom) 3954/87

Foodstuffs(*)

Infant food (**)

Dairy produce

Other foodstuffs except minor foodstuffs (***)

Liquid foodstuffs

Sum of isotopes of strontium, notably Sr-90

75

125

750

125

Sum of isotopes of iodine, notably I-131

150

500

2 000

500

Sum of Alpha-emitting isotopes of plutonium and transplutonium elements, notably Pu-239, Am-241

1

20

80

5

20

Sum of all other nuclides of half-life greater than 10 days, notably Cs-134, Cs-137 (****)

400

1 000

1 250

1 000

(*) The level applicable to concentrated or dried products is calculated on the basis of the reconstituted product as ready for consumption.

(**) Infant food is defined as those foodstuffs intended for the feeding of infants during the first four to six months of life, which meet, in themselves, the nutritional requirements of this category of person and are put up for retail sale in packages which are clearly identified and labelled " *food preparation for infants* ".

(***) For the minor foodstuffs, listed in Regulation No 944/89, the maximum permitted levels to be applied are 10 times those applicable to " *other foodstuffs except minor foodstuffs* ".

(****) Carbon 14, tritium and potassium 40 are not included in this group.

Table 3: Pre-established maximum levels (Bq/kg) for feed in Regulation (Euratom) 770/90

Feed (*)

Pig

Poultry, lambs, calves

Other

Sum of caesium-134 and caesium-137

1 250

2 500

5 000

(*) These levels apply to feed as ready for consumption.

16. Implementing Regulation 351/2011 amending Implementing Regulation 297/2011 has been applicable since 13 April 2011. The maximum permitted levels set in Implementing Regulation 351/2011 align the applicable maximum levels on food and feed imported from Japan to the action levels applied in Japan (Table 4).

Table 4: Maximum levels (Bq/kg) for food (*)

Foods for infants and young children

Milk and dairy products

Other foodstuffs, except liquid foodstuffs

Liquid foodstuffs

Sum of Isotopes of strontium, notably Sr-90

75

125

750

125

Sum of Isotopes of iodine, notably I-131

100

300

2 000

300

Sum of Alpha-emitting isotopes of plutonium and trans-plutonium elements, notably Pu-239, Am-241

1

1

10

7

1

Sum of all other nuclides of half-life greater than 10 days, notably Cs-134 and Cs-137, except C-14 and H-3

200

200

500

200

(*) The level applicable to concentrated or dried products is calculated on the basis of the reconstituted product as ready for consumption.

Table 5: Maximum levels (Bq/kg) for feed (*)

Feed

Sum of caesium-134 and caesium-137

500

Sum of Isotopes of iodine, notably I-131

2000

(*) Maximum level is relative to a feed with a moisture content of 12%.

17. In conclusion, the Commission submitted the following:
- The EU measures regarding the import of food and feed from Japan after the accident at the Fukushima nuclear power station invariably pursued the objective of ensuring a high level of human health protection.
- A consultation of the Group of scientific experts, provided for in Article 31 of the Euratom Treaty, was held in June 2011 to provide further scientific analysis of the measures with regard to food and feed imported into the EU after the accident in Fukushima. The opinion [9] of this group should provide precise and reliable information for Union citizens as regards the changes made to the maximum permitted levels for food and feed in the aftermath of the Fukushima accident.
- Based on the opinion of the Group of scientific experts, the Commission moreover provided its considerations on the current appropriateness of the maximum permitted levels pre-established in the Euratom regulations for future accidents, as well as on the continuing checks carried out in line with Implementing Regulation 351/2011.

B. The Ombudsman's assessment

18. The Ombudsman takes note of the detailed explanations provided by the Commission in response to his own-initiative inquiry.

19. He considers the Commission's opinion useful in shedding light on the actions it took in the aftermath of the Fukushima accident.

20. He is particularly pleased that the Commission has provided him with precise comparative information about the maximum permitted levels before and after the Fukushima accident. The information provided appears to be accurate.

21. The Ombudsman trusts that the information provided by the Commission will be useful to citizens.

22. He recalls that the aim of the present own-initiative inquiry was to establish precise information on the maximum permitted levels. In view of the above, the Ombudsman considers that the aim of his own-initiative inquiry has been achieved.

23. In the interest of providing citizens with information which is as complete as possible, the Ombudsman will publish the present decision and the Commission's opinion.

C. Conclusions

In view of the above, the Ombudsman closes his present own-initiative inquiry with the following conclusions:

Given that the Commission has provided detailed and precise comparative information on the maximum permitted levels of radioactive contamination of food and feed in the EU, the aim of the own-initiative inquiry has been achieved.

The Commission will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 6 September 2011

[1] Commission Implementing Regulation (EU) No 297/2011 of 25 March 2011 imposing special conditions governing the import of feed and food originating in or consigned from Japan following the accident at the Fukushima nuclear power station (OJ 2011 L 80, p. 5).

[2] Commission Implementing Regulation (EU) No 351/2011 of 11 April 2011 amending Regulation (EU) No 297/2011 imposing special conditions governing the import of feed and food originating in or consigned from Japan following the accident at the Fukushima nuclear power station (OJ 2011 L 27, p. 20).

[3] 'RASFF' stands for Rapid Alert System for Food and Feed. The RASFF is a mechanism for food and feed control authorities to exchange information about measures taken in response to serious risks detected in relation to food or feed.

[4] Council Regulation (EURATOM) No 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency (OJ 1987 L 371, p. 11).

[5] Commission Regulation (EURATOM) No 770/90 of 29 March 1990 laying down maximum permitted levels of radioactive contamination of feedingstuffs following a nuclear accident or any other case of radiological emergency (OJ 1990 L 83, p. 78).

[6] Commission Regulation (EURATOM) No 944/89 of 12 April 1989 laying down maximum permitted levels of radioactive contamination in minor foodstuffs following a nuclear accident or any other case of radiological emergency (OJ 1989 L 101, p. 17).

[7] Council Regulation (EC) No 733/2008 of 15 July 2008 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station (OJ 2008 L 201, p. 1).

[8] The Chief Veterinary Officers are the heads of the veterinary administrations of the EU Member States.

[9] This opinion is available at http://ec.europa.eu/energy/nuclear/radiation_protection/article_31_en.htm [Link]