

Decision of the European Ombudsman on complaint 1346/98/OV against the European Commission

Decision

Case 1346/98/OV - Opened on 20/01/1999 - Decision on 18/05/2000

Strasbourg, 18 May 2000 Dear Mr G., On 1 December 1998 you made a complaint to the European Ombudsman concerning an alleged failure to reply by DG VII of the Commission and a denied access to the minutes of an expert group. Previously, on 14 October 1998 (1090/98/OV), you complained to the Ombudsman about the failure of the Commission to reply to your letters of 6 August and 2 September 1998. Further to this complaint, the Ombudsman's office contacted the Commission services which replied to your correspondence on 27 October 1998. Considering that the Commission had taken steps to settle the matter, I decided to close the file (see my letter to you dated 29 October 1998). Later, on 3 November (1165/98/OV) and 14 December 1998 (1244/98/OV) you complained again about the same issue, but your complaints were considered inadmissible on basis of Article 2.3 of the Statute of the Ombudsman, because the object of your complaints was not clearly identified. On 20 January 1999, I forwarded your complaint of 1 December 1998 to the President of the European Commission. On 19 January, 6 February and 26 March 1999 you sent me additional information. The Commission sent its opinion on 27 April 1999 and I forwarded it to you with an invitation to make observations, if you so wished. On 27 May 1999, I received your observations on the Commission's opinion. On 17 July 1999 you sent me additional information on your complaint. I am writing now to let you know the results of the inquiries that have been made.

THE COMPLAINT

According to the complainant, the relevant facts were as follows: The complainant alleged that since 1997 the Commission (DG VII - Transport) failed to reply to his correspondence in which he asked various technical questions on the interpretation of Commission Regulation (EC) n° 2812/94 of 18 November 1994 concerning inland waterway transport (1) . The complainant wrote to the Commission on 30 July and 8 September 1997 concerning the position which the Commission had taken as regards the interpretation of the Regulation. Referring to letters sent by the Commission to the Dutch Ministry of Transport and Communications, the complainant contacted again the Commission on 2 September 1998 asking for clarification of the Commission's position on the interpretation of the Regulation. Further to the intervention of the European Ombudsman, the Commission sent on 27 October 1998 an answer to the complainant's letter of 2 September 1998. However, the complainant was not satisfied with the reply, because the Commission referred to minutes of a group of experts (on the structural reorganisation of the inland waterway transport), the access of which was denied to the



complainant because of confidentiality. The complainant states that those minutes, which were at the basis of the Commission's interpretation of the Regulation, should be public. On 6 November 1998 the complainant was received in DG VII of the Commission, where he was given documents (texts of regulations), but not the minutes of the group of experts on the subject. The complainant therefore complained to the Ombudsman alleging that 1) the Commission failed to reply to his correspondence on the interpretation of Regulation (EC) n° 2812/94 of 18 November 1994 and 2) that he was refused access to the minutes of the group of experts, because of the confidentiality of those minutes.

THE INQUIRY

The Commission's opinion As regards the alleged failure to reply to the complainant's correspondence concerning the interpretation of Regulation (EC) n° 2812/94 of 18 November 1994, the Commission recalled the facts at the basis of the complaint and made the following comments: Further to a visit in Brussels on 10 March 1997 by the Dutch Breaker's Fund, which informed DG VII that the complainant had sent a complaint to the Dutch national Ombudsman because of the bad treatment of his case by the said Fund in 1994, the Dutch Ministry of Transport interrogated the Commission by letter of 13 March 1997 on the significance and the objective of the transitional period of six months foreseen in Article 2 of the Regulation. By note of 24 March 1997, DG VII consulted the Legal Service of the Commission on the interpretation of the Regulation as well as on the draft reply to the Dutch authorities. The Legal Service replied by note of 10 April 1997 and DG VII sent the response to the Director of the Dutch Breaker's Fund on 6 May 1997. Three months later, the complainant sent a fax to DG VII on 30 July 1997, and two reminders on 3 August and 8 September 1997. However DG VII had agreed with the Dutch authorities to wait to reply to the complainant until it received the official request for information from the Dutch Ombudsman in order to make complete and motivated answers on the file. DG VII replied on 5 December 1997 to the letter of 24 October 1997 of the Dutch Ombudsman. DG VII thought having replied at that time to all questions of the complainant on the interpretation of the Regulation. DG VII however received a new letter from the complainant dated 30 July 1998 in which the complainant asked questions on the interpretation that DG VII had given to the Regulation in its letter to the Dutch Ombudsman. On 13 August 1998, DG VII answered to the 5 questions of the complainant. On 2 September 1998 the complainant sent a new letter to DG VII in which he asked again the similar questions. The complainant also sent a fax on 26 October 1998. By letter of 27 October 1998 DG VII replied to all interpretation questions. After the lodging of the complaint to the Ombudsman, DG VII continued to receive letters from him and replied by letters of 9 December 1998 and 29 January 1999. The Commission therefore concluded that there could be no doubts on the fact that there was no failure to reply by DG VII concerning the interpretation of the Regulation. As regards the refused access to the minutes of the group of experts on the structural reorganisation of the inland waterway transport, the Commission made the following comments: By fax dated 28 October 1998, the complainant asked DG VII to obtain all minutes of the meetings of the group of experts since December 1994 and to have a meeting in the offices of DG VII. On 6 November 1998, the complainant was received by DG VII in Brussels and has obtained a full file containing all the notes on the uniform application of the Regulation 1101/89, as well as two minutes of the group of experts containing the conclusions of the group on the preparation of Regulation (EC) n° 2812/94. DG VII also informed him that, because of reasons of



confidentiality, but also after having made the balance between, on the one hand, the interest of the complainant in obtaining the documents and, on the other hand, the interest of the institution to preserve the confidentiality of its deliberations, it was not possible to provide him with the totality of the minutes of the group of experts, because none of the meetings had studied his case which had been dealt with directly with the Dutch Breaker's Fund. By fax of 9 November 1998, the complainant asked a copy of the letter of 31 October 1989 from the Dutch authorities, as well as the minutes of the meeting of 10 March 1997 between DG VII and the Dutch Breaker's Fund. By fax of 12 November 1998 DG VII replied that he already had this information and that there were no minutes of the informal meeting of 10 March 1997. Later, in a series of e-mails between the complainant and DG VII, the Commission recalled that, in application of the Code on public access to Commission documents adopted by the Commission on 8 February 1994, the Commission only gives access to its own documents. When the request concerns a document from a third party, like a letter from a Member State, the applicant should address himself to the author of the document. As regards the minutes of the group of experts, DG VII, in an e-mail of 13 November 1998, draw the complainant's attention to the principles and the references of the Code on public access to Commission documents (OJ L 46/58 of 18 February 1994 and L 247/45 of 28 September 1996). On basis of the above observations, the Commission concluded that it could not give access to all the minutes of the group of experts constituted by professional organisations. The reason was that it made the balance between, on the one hand, the interest of the complainant in obtaining the documents and, on the other hand, the interest of the institution to preserve the confidentiality of its deliberations, taking into account also the confidentiality of certain information (specialised vessels, elaboration of future ratios or regulations) and that fact that the complainant's case which concerned a decision taken by the Dutch authorities was never examined during these meetings. The Commission annexed copies of all the letters, faxes and e-mails it had sent to the complainant. **The complainant's observations** The complainant was not satisfied with the Commission's comments, because they did not contain concrete answers on the various questions he asked in his correspondence to the Commission. According to the complainant, the Commission was supporting an interpretation of the Regulation which was favourable for the Dutch authorities but not for the complainant. The complainant also observed that the Commission's interpretation could not be sustained by legal arguments and that the Commission officials had been wrongly informed by the officials from the Dutch Breaker's Fund.

THE DECISION

1 The alleged failure to reply by DG VII of the Commission to the various questions of the complainant

1.1 The complainant alleged that the Commission failed to reply to his correspondence in which he asked questions on the interpretation of Commission Regulation (EC) n° 2812/94 of 18 November 1994. Referring to the different letters it sent to the complainant and which were annexed to its opinion, the Commission concluded that there could be no doubts on the fact that there was no failure to reply by DG VII concerning the interpretation of the Regulation. 1.2 The Ombudsman notes that, from the different letters which the Commission annexed to its opinion, it appears that DG VII has on several occasions replied to the various interrogations of the complainant. More particularly has DG VII sent answers to the complainant on 13 August and 27 October 1998, as well as after the lodging of the complaint to the Ombudsman, on 9 December 1998 and 29 January 1999. 1.3 In its reply of



13 August 1998 DG VII answered to 5 questions of the complainant concerning the interpretation which DG VII had given to Regulation n° 1101/89 as amended by Regulation n° 2812/94 in its letter of 5 December 1997 to Mrs L. De Bruin, the Dutch Deputy Ombudsman. DG VII pointed out to the complainant that the standpoint it communicated to the Dutch Deputy Ombudsman was based on the provisions of the Regulation n° 1101/89 as amended by Regulation n° 2812/94, more particularly Article 8 of the Regulation, and on the aim pursued by the Regulation. 1.4 Regulation n° 2812/94 foresees a transitional measure concerning the so-called "old-for-new" rule and stipulates three conditions (2) . According to Article 2 of the Regulation, the 1:1 ratio between the new tonnage and the old tonnage (instead of the 1,5:1 ratio) continues to apply to vessels whose construction has reached a certain stage and which are put into service within six months of the entry into force of the Regulation (i.e. on 9 June 1995). In its letter of 13 August 1998 to the complainant, DG VII replied that the aim of the legislator by introducing the transitional measure was not to prejudice the shippers who had invested in the construction of a vessel and foreseen a construction cost "old-for-new" ratio of 1:1 by imposing at once the 1,5:1 ratio when the construction of the ship was still underway. DG VII informed the complainant that the Breaker's Fund could only evaluate the situation of the construction and the commissioning before the date of 9 June 1995. DG VII equally replied to the complainant that, when the vessel remained on the shipyard, it was not commissioned before 9 June 1995 and thus one of the conditions for the transitional measure was not fulfilled. 1.5 Further to a new letter from the complainant of 2 September 1998, DG VII replied on 27 October 1998 and confirmed its standpoint as communicated in its letter of 5 December to the Dutch Deputy Ombudsman and in its letter of 13 August 1998 to the complainant. In its reply, DG VII provided the complainant also with other information concerning the Regulation such as the conditions which apply to the notion of "putting into service" a new vessel. DG VII informed the complainant also that the interpretations of the Regulation were the results of various meetings which took place on the uniform application of the Community regulations in the Member States. Those meetings take place in the framework of the group of experts on the structural reorganisation of the inland waterway transport. This group of experts is constituted of representatives from the Member States and from the profession and deals with the problems of Community action for reorganisation of the inland waterway transport as well as with interpretation problems of the texts. 1.6 On 9 December 1998 and 29 January 1999, DG VII sent two more letters to the complainant concerning the notions of "vessel under construction" and of "the owner" of the vessel. DG VII informed the complainant that it had made a lot of efforts to reply to the various questions of the complainant and that the information provided to the complainant was a true interpretation of the Regulation. 1.7 From the above the Ombudsman concludes that the Commission has sufficiently replied to the complainant's requests concerning the interpretation of the Regulation by providing him with the necessary information which is at the basis of the interpretation. As regards this aspect of the case, the Ombudsman therefore found no instance of maladministration. 1.8 As regards the interpretation given by the Commission, the complainant alleged that it could not be sustained by legal arguments and that it was favourable for the Dutch authorities but not for the complainant. The Ombudsman notes that DG VII, before replying to the Dutch Breaker's Fund on 6 May 1997, had previously consulted the Legal Service on the interpretation of the Regulation by asking its opinion on the draft reply of the letter to be sent to the Dutch Breaker's Fund. The Ombudsman would however like to recall that the Court of Justice is the highest



authority on questions of application and interpretation of Community law. **2 The alleged refused access to the minutes of the group of experts**

2.1 The complainant alleged that he was refused access to the minutes of the group of experts on the structural reorganisation of the inland waterway transport. The Commission observed that the complainant, who had requested access to all the minutes of the group of experts since December 1994, had been received by DG VII on 6 November 1998 and had obtained a full file containing all the notes on the uniform application of the Regulation n° 1101/89, as well as two minutes of the group of experts containing the conclusions of the group on the preparation of Regulation n° 2812/94.

2.2 As regards the other minutes, the Commission first invoked that, because of reasons of confidentiality, but also after having made the balance between, on the one hand, the interest of the complainant in obtaining the documents and, on the other hand, the interest of the institution to preserve the confidentiality of its deliberations, it was not possible to provide him with all the minutes of the group of experts, because none of the meetings had studied the complainant's case which had been dealt with directly by the Dutch Breaker's Fund. Later the Commission recalled the complainant that, in application of the Code on public access to Commission documents, the Commission only gives access to its own documents. When the request concerns a document from a third party, the applicant should address himself to the author of the document.

2.3 From the additional information which the complainant sent to the Ombudsman on 19 January 1999, it appears that the complainant finally got access to the minutes of the group of experts. In his letter of 13 January 1999 to the Commission, the complainant informs DG VII that, on basis of the Dutch Law on Transparency of the Administration, he obtained access to all the minutes since 1994 in the Dutch Ministry of Transport. The Ombudsman therefore considers that no further inquiries are necessary into this aspect of the case.

2.4 The Ombudsman would however like to make the following observations concerning the reasons invoked by the Commission to deny the complainant access to the said minutes. Principles of good administration require that a decision adversely affecting an individual states the grounds on which it is based *by indicating clearly the relevant facts and the legal basis of the decision* (3). The Ombudsman however notes that the Commission has in fact given on different occasions different reasons to refuse access to the complainant.

2.5 The Commission firstly observed that access could not be given because of reasons of confidentiality and after having made the balance between, on the one hand the interest of the complainant in obtaining the documents, and on the other hand, the interest of the institution to preserve the confidentiality of its deliberations, and because none of the meetings had dealt with the complainant's case. However, later, in the e-mail of 14 November 1998, the Commission gave another argument to deny access which is that it could only give access to its own documents, and that for documents originating from a third party, the applicant should address himself to the author of the document.

2.6 The Ombudsman therefore concludes that taken together, the reasons were inadequate to explain the rejection of the complainant's request for access to the minutes of the group of experts. The Ombudsman therefore makes the critical remark below.

3 Conclusion On the basis of the European Ombudsman's inquiries into part 2 of this complaint, it appears necessary to make the following critical remark: Principles of good administration require that a decision adversely affecting an individual states the grounds on which it is based *by indicating clearly the relevant facts and the legal basis of the decision*. (4) The Ombudsman however notes that the Commission has in fact given different reasons on different occasions to refuse access to the complainant. The



Commission firstly observed that access could not be given because of reasons of confidentiality and after having made the balance between, on the one hand the interest of the complainant in obtaining the documents, and on the other hand, the interest of the institution to preserve the confidentiality of its deliberations, and because none of the meetings had dealt with the complainant's case. However, later, in the e-mail of 14 November 1998, the Commission gave another argument to deny access which is that it could only give access to its own documents, and that for documents originating from a third party, the applicant should address himself to the author of the document. The Ombudsman therefore concludes that giving different reasons for a decision on different occasions is a practice that may confuse a citizen and does not indicate the due reasons for the decision. Thus it establishes an instance of maladministration. Given however that the complainant finally obtained access to the information requested, no further inquiries into this aspect of the complaint were necessary. The Ombudsman therefore decided to close the case. The President of the European Commission will also be informed about this decision. Yours sincerely Jacob SÖDERMAN

(1) Commission Regulation (EC) n° 2812/94 of 18 November 1994 amending Council Regulation (EEC) n° 1101/89 as regards the conditions which apply to the putting into service of new capacity in inland waterway transport.

(2) Article 2 of Regulation 2812/94 provides that: *"For vessels in respect of which the owner proves that: - construction was underway on the date of publication of this Regulation, and that - work already carried out by the date of publication of this Regulation represents at least 20 % of the steel weight or 50 tonnes, and that - delivery and commissioning is to take place within the six months following the entry into force of this Regulation, the conditions set out in article 8(1)(a) of Regulation (EEC) n° 1101/89, as they applied before the entry into force of this Regulation, shall continue to apply, on request to the authorities of the Fund covering the vessel".*

(3) See Article 18 of the Code of Good Administrative Behaviour of the European Ombudsman.

(4) See Article 18 of the Code of Good Administrative Behaviour of the European Ombudsman.