

Decision of the European Ombudsman closing his inquiry into complaint 2674/2009/(IP)(EIS)ER against the European Anti-Fraud Office (OLAF)

Decision

Case 2674/2009/(IP)(EIS)ER - Opened on 19/03/2010 - Decision on 17/12/2012

The background to the complaint

1. On 28 November 2006, the complainant, who is the owner of a seed breeding company, complained to OLAF concerning alleged mismanagement in Italy of the quality premium for special varieties of durum wheat in Italy. The latter regime had been set up pursuant to Regulation (EC) No 1782/2003 [1] , and Regulations (EC) No 2237/2003 [2] and No 1973/2004 [3] . In particular, the complainant alleged that, to the detriment of its budget, the EU has in recent years granted the quality premium to several durum wheat varieties which did not comply with the criteria stipulated in the aforesaid regulations. OLAF registered his case under reference OF/2006/0822.
2. On 5 January 2007, the complainant met with two OLAF officials and presented his arguments concerning alleged irregularities committed by Italian authorities and private parties in relation to the allegedly illegal payment of the quality premium.
3. By letter of 2 October 2007, OLAF informed the complainant that, after a thorough evaluation of the material he had submitted, it had decided that this case did not fall within its competence. It also informed the complainant that the European Commission's Directorate-General for Agriculture (DG AGRI) would evaluate whether there was an infringement of EU law in the present case. Finally, it noted that it had forwarded copies of the relevant documents to the office of the competent Italian Public Prosecutor for its consideration.
4. On 5 October and 6 October 2007, the complainant wrote to OLAF and expressed his dissatisfaction with its decision to close its investigation in this matter.
5. In its reply of 4 December 2007, OLAF stated that it had examined the complainant's further correspondence. It also recalled that it had (i) sent copies of the relevant documents to the office of the competent Italian Public Prosecutor for its consideration; (ii) organised various coordination meetings with the relevant Commission services, at the end of which it was agreed



that DG AGRI would deal with this matter; and (iii) put DG AGRI in contact with the Office of the 'High Commissioner for the prevention and the impact of corruption in the public administration' in Rome to facilitate the coordination. OLAF stressed that it had done everything possible, despite the lack of a direct impact on the EU budget, and had therefore already interpreted its competence widely. Finally, it confirmed its decision not to open an investigation.

6. Subsequently, the complainant sent further e-mails to OLAF containing more detailed information concerning this matter.

7. On 17 July 2009, the complainant received copies of the minutes of meetings between OLAF and DG AGRI, from which it emerged that OLAF classified the matter as a "non-case", "*since there is no financial impact on the Community budget*".

8. On 28 July 2009, the complainant contacted OLAF again and complained that DG AGRI failed diligently to deal with this matter.

9. By e-mail of 19 August 2009, OLAF reiterated to the complainant that it was not legally competent to investigate the matter he had raised. On this occasion, it also informed him of its decision to discontinue correspondence with him, pursuant to Article 14 of the European Code of Good Administrative Behaviour [4] .

10. On 28 October 2009, the complainant turned to the European Ombudsman concerning his grievances.

The subject matter of the inquiry

11. The Ombudsman opened an inquiry into the following allegations:

(1) OLAF failed to provide adequate reasons for its decision to close its inquiry into complaint OF/2006/0822.

Specifically, OLAF failed to explain and justify its view that complaint OF/2006/0822 was a "non-case" because there was no financial impact on the EU budget.

(2) OLAF failed to inform the complainant of the appeal possibilities available for challenging its decision. This constituted a violation of Article 19 of the European Code of Good Administrative Behaviour.

12. The Ombudsman understood the complainant's claim to be the following:

OLAF should reconsider its decision concerning complaint OF/2006/0822 and re-open its inquiry.

13. In addition to the above-mentioned allegations and claim, the Ombudsman understood the



complainant also to allege that OLAF unlawfully failed to deal with the complaint that the complainant submitted to it on 28 July 2009 against DG AGRI of the Commission. The complainant claimed that OLAF should deal with his complaint. Given that the complainant had apparently not yet contacted OLAF in this regard, the Ombudsman took the view that the complainant had not made the appropriate prior administrative approaches to OLAF in this regard before turning to the Ombudsman, as required by Article 2(4) of the Ombudsman's Statute.

The inquiry

14. On 19 March 2010, the Ombudsman opened an inquiry and invited OLAF to submit an opinion. OLAF sent its opinion to the Ombudsman on 30 June 2010. The opinion was forwarded to the complainant, who sent observations on 2 August 2010, supplemented by further material sent on 14 September 2010. On 16 February 2012, the Ombudsman requested further information from OLAF which it provided on 17 April 2012. OLAF's reply was sent to the complainant for observations on 19 September 2012. The complainant submitted observations on 28 September 2012.

The Ombudsman's analysis and conclusions

A. Allegation concerning OLAF's failure to provide adequate reasons for its decision to close its inquiry into complaint OF/2006/0822

Arguments presented to the Ombudsman

15. The complainant alleged that OLAF failed to provide adequate reasons for its decision to close its inquiry into complaint OF/2006/0822. Specifically, he argued that OLAF failed to explain and justify its view that complaint OF/2006/0822 was a "non-case" because there was no financial impact on the EU budget.

16. In its opinion, OLAF stated that " *according to EU rules, it was up to the Member States to decide the list of durum wheat varieties which were entitled for the quality premium. Later on, based on that decision, the producers sowing grains of the selected varieties received a per hectare EU subsidy. Therefore, in concrete terms, an alleged mismanagement of the scheme would not have had any impact on the EU budget because the irregularities were allegedly committed in the selection of the special varieties of durum wheat* " (OLAF's emphasis). OLAF also stated that it had informed the complainant about its decision not to investigate the matter further, " *because no irregularity detrimental to the EU budget had been detected* ".

17. OLAF further referred to the fact that it forwarded a copy of the relevant material to the



office of the competent Italian Public Prosecutor to allow it to consider investigating possible criminal offences at the national level.

18. Finally, OLAF noted that, on 17 July 2009, it had provided the complainant with a copy of the assessment of the initial information obtained on 25 June 2007 and containing more details concerning the analysis of the matter.

19. In his observations, the complainant essentially maintained his allegation. He explicitly referred to the fact that, although it is up to the Member States to decide on the list of durum wheat varieties, in doing so they still have to comply with the specific provisions laid down in the applicable regulations. He also observed that OLAF failed to provide adequate reasons why it considered that the irregularities committed in the selection of the special varieties of durum wheat do not impact on the EU budget.

20. In his request for further information, the Ombudsman asked OLAF to specify why the fact that the selection of the special varieties of durum wheat which took place at the Member State level would mean that there was no possible impact on the EU budget.

21. In its reply, OLAF noted that the complainant's allegations concerned irregularities in the procedures for selecting the special varieties eligible for the quality premium for durum wheat in Italy. According to OLAF, the complainant argued, in particular, that the quality premium scheme for durum wheat in Italy was mismanaged by the Italian authorities, which were responsible for the selection of the special varieties of durum wheat. Consequently, according to the complainant, some varieties, including the varieties produced by him, were unfairly excluded from the national catalogue, while other varieties were included. Thus, the alleged irregularities were related to the selection of varieties for which the Italian authorities were competent.

22. In support of its position that the complaint is a "non-case", OLAF, referred to the applicable regulations and argued that (i) the aid was granted per hectare to users of certified seeds of selected varieties of durum wheat in the traditional production zones. As regards Italy, the maximum area for which the aid could be granted amounted to 1 646 000 hectares. A Member State's selection of particular varieties had no impact on the ceiling thus established. Only in case of an overrun, the total amount for the Member State in question would have been reduced. Furthermore, the aid was not granted for the selected varieties, but for the area where the selected varieties were used; (ii) the national authorities were the only responsible bodies for choosing the selected varieties, in accordance with the applicable regulations; and (iii) the Italian authorities decided to include certain varieties instead of others in the national catalogue for the quality premium, in accordance with the above-mentioned regulations.

23. In his observations, the complainant contested the further information submitted by OLAF. In summary, he submitted that Regulation 1782/2003 established a quality premium for durum wheat of EUR 40 per hectare, making it conditional only on the use of a determined quantity of seed varieties. The complainant accepted that the Regulation sets a ceiling for the aid at 1 646 000 hectares. However, the fact that a ceiling was set did not rule out that, as happened in Italy in 2006, 2007 and 2008, the ceiling would not be reached which in turn would have an impact



on the EU budget. Consequently, irregularities in the selection of varieties could also, contrary to what OLAF argued, negatively impact on the EU budget.

The Ombudsman's assessment

24. In order to assess whether OLAF failed to provide adequate reasons for its decision to close its inquiry into complaint OF/2006/0822, the Ombudsman essentially has to consider whether OLAF has provided a reasonable explanation for that decision.

25. The Ombudsman first recalls that the EU institutions and bodies have a duty to state reasons for a decision, pursuant to Article 41(2), third indent, of the Charter of Fundamental Rights of the European Union [5] , as well as to Article 18 of the European Code of Good Administrative Behaviour [6] , and also following the relevant case-law [7] . In line with these provisions, institutions should provide citizens turning to them with sufficient elements which allow them to understand the decision taken, as well as to ascertain whether that decision is in line with the relevant legal provisions.

26. The Ombudsman notes that, in both its letters of 2 October and 4 December 2007, OLAF informed the complainant that, after having evaluated the material he submitted, it concluded that this matter did not fall within its competence. Furthermore, on 17 July 2009, OLAF provided him with copies of the meetings between itself and DG AGRI, from which it clearly emerged that OLAF classified this matter as a "non-case", given its view that " *there is no financial impact on the Community budget* ". In these letters, OLAF did not, however, provide the complainant with any further information explaining this conclusion. In particular, OLAF did not explain the reasons why it considered that there was no financial impact on the EU budget.

27. The Ombudsman also takes note of the fact that OLAF consulted with the Commission as regards the alleged unlawfulness of the selection of durum wheat varieties and also forwarded the relevant materials to the competent Public Prosecutor for further assessment. As for the Commission, the Ombudsman moreover notes that it dealt with the complainant's underlying grievance, namely, the irregularities in the selection of durum wheat varieties allegedly committed by the Italian authorities, in the framework of infringement complaint INF/2008/4147.

28. In the course of the inquiry, OLAF explained that it was the Member States' responsibility to set up the list of durum wheat varieties which qualified for the quality premium and that the alleged irregularities were committed in the selection of varieties without any impact on the EU budget. Following the Ombudsman's request for further information, OLAF provided further details concerning the durum wheat premium scheme, as well as the modalities of its application. In particular, OLAF pointed out that the quality premium was not linked to any particular variety selected, but rather to a maximum area for which the aid could be granted.

29. The Ombudsman understands that OLAF thus wishes to argue that, regardless of any mistakes regarding the selection of the durum wheat varieties that the Italian authorities may or may not have made, there would not have been any impact on the EU budget, as, in any event,



the relevant premium was subject to a ceiling. In fact, the relevant premium could only be granted with regard to a maximum of 1 646 000 hectares in Italy. The complainant has confirmed that this ceiling did indeed exist. In these circumstances, the Ombudsman considers that OLAF's position appears to be reasonable at first sight.

30. The Ombudsman notes that, in his last observations, the complainant argued that the fact that such a ceiling existed did not rule out the possibility that irregularities in the selection of durum wheat varieties did have any impact on the EU budget. The complainant added that this was the case where the ceiling would not otherwise have been reached. According to the complainant, this was the case in Italy in 2006, 2007 and 2008.

31. The Ombudsman considers that the complainant's argument does not appear unreasonable at first sight. He also notes, however, that the information that has been provided to him does not allow him to ascertain whether the complainant's assumption is correct. In addition, it would also appear that the complainant has not submitted this argument to OLAF yet. The Ombudsman trusts that OLAF will examine this argument as soon as it is informed thereof. Instead of prolonging the present inquiry, the Ombudsman considers it preferable, therefore, to give OLAF the possibility to address the complainant's argument first. The Ombudsman reserves the option of opening a new inquiry, either at the request of the complainant or on his own initiative, if OLAF's examination does not provide a convincing answer to the complainant's argument. In order to enable him to decide whether such a new inquiry is possible, the Ombudsman would be grateful if OLAF could inform him of the outcome of its examination by 28 February 2013.

32. In view of these circumstances, the Ombudsman considers that there is no need for further inquiries into this aspect of the case at present.

B. Allegation concerning OLAF's failure to inform the complainant of the appeal possibilities available for challenging its decision

Arguments presented to the Ombudsman

33. In his complaint, the complainant alleged that OLAF failed to inform him of the appeal possibilities available for challenging its decision. In his view, this constituted a violation of Article 19 of the European Code of Good Administrative Behaviour [8] .

34. In its opinion, OLAF observed that the complainant had been duly informed about the results of its assessment of the material which he submitted to it and of the reasons for it.

35. OLAF added that there was no possibility for the complainant to appeal against this decision and that it consequently could not have been obliged to inform him of it. Additionally, OLAF pointed out that a "non-case" decision is not a decision per se adversely affecting his



rights or interests.

36. In his observations, the complainant explicitly referred to Point 3.1.4 (review and remedies) of the short version of OLAF's manual, which reads that "*in case of alleged maladministration any person may also refer the issue to the European Ombudsman*".

The Ombudsman's assessment

37. The Ombudsman emphasises that Article 19 of the European Code of Good Administrative Behaviour is very clear as to the obligation of the EU institutions and bodies to indicate the possibilities of appeal. Furthermore, the Ombudsman recalls OLAF's obligations under the Charter of Fundamental Rights of the European Union [9] , and in particular under Articles 43 [10] and 47 [11] thereof.

38. As regards the complainant, the Ombudsman observes that he did turn to him and was thus able to exercise his right to complain to the Ombudsman. The fact that OLAF did not provide him with information on possible remedies did not thus negatively affect him. The Ombudsman notes that the complainant would in any event appear to have been familiar with the possibility of complaining about OLAF to the Ombudsman, given that he invoked the passage in OLAF's manual which explicitly refers to the possibility of making a complaint to the Ombudsman.

39. However, the above does not affect the Ombudsman's conclusion that, by failing to inform the complainant in the present case of the appeal possibilities available for challenging its decision, OLAF committed an instance of maladministration. OLAF's argument that its "non-case" decision is not a decision per se adversely affecting the rights or interests of the complainant and that thus no such information needed to be provided is not convincing. This is because, whereas for a court action an applicant indeed needs to have been adversely affected by a decision, no such requirement exists as regards the possibility to complain to the Ombudsman.

40. When the Ombudsman finds an instance of maladministration, he makes, where appropriate, a friendly solution proposal or a draft recommendation to the institution concerned. The above-mentioned position adopted by OLAF could be understood as meaning that it generally considers that no information on possible remedies needs to be given in cases where it considers a matter to fall outside its competence. Such an attitude would constitute a systemic problem, which would justify further action from the Ombudsman, such as a draft recommendation. The Ombudsman considers, however, that it is not certain that the said interpretation indeed reflects OLAF's thinking on this issue. The fact that OLAF's manual explicitly mentions the possibility to complain to the Ombudsman would appear to suggest otherwise.

41. In these circumstances, the Ombudsman takes the view that it is appropriate for him to limit himself to making the critical remark below. OLAF's response to this critical remark will enable



him to decide whether further action is needed.

C. Conclusions

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

It is good administrative practice to indicate the possibilities of appeal against decisions taken by an EU institution, body, office or agency. In the present case, OLAF failed to do so. This constitutes an instance of maladministration.

The complainant and OLAF will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 17 December 2012

[1] Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001, OJ L 270, 1.

[2] Commission Regulation (EC) No 2237/2003 of 23 December 2003 laying down detailed rules for the application of certain support schemes provided for in Title IV of Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ L 339, 52.

[3] Commission Regulation (EC) No 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials, OJ L 345, 1.

[4] Article 14 of the Code reads as follows: " 1. *Every letter or complaint to the Institution shall receive an acknowledgement of receipt within a period of two weeks, except if a substantive reply can be sent within that period.* 2. *The reply or acknowledgement of receipt shall indicate the name and the telephone number of the official who is dealing with the matter, as well as the service to which he or she belongs.* 3. *No acknowledgement of receipt and no reply need be sent in cases where letters or complaints are abusive because of their excessive number or because of their repetitive or pointless character "*.



[5] In fact, Article 41(2), third indent of the Charter provides that the right to good administration includes " *the obligation of the administration to give reasons for its decisions* ".

[6] Article 18 of the Code stipulates the following: " 1. *Every decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.* 2. *The official shall avoid making decisions which are based on brief or vague grounds or which do not contain individual reasoning.* 3. *If it is not possible, because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of the decision and where standard replies are therefore made, the official shall guarantee that he subsequently provides the citizen who expressly requests it with an individual reasoning.* "

[7] See, in this respect, for instance Case C-417/11 P *Council v Bamba* , judgment of 15 November 2012, not yet published in the ECR, paragraphs 49 and 50.

[8] Article 19 of the Code reads as follows: " 1. **A decision of the Institution which may adversely affect the rights or interests of a private person** shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them. 2. Decisions shall in particular refer to the possibility of judicial proceedings and complaints to the Ombudsman under the conditions specified in, respectively, Articles 230 and 195 of the Treaty establishing the European Community " (emphasis added by OLAF in its opinion).

[9] Charter of Fundamental Rights of the European Union, OJ C 364, 1.

[10] Article 43 of the Charter provides the following: " *Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.* "

[11] According to Article 47 of the Charter, "[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article [...]. "