Decision of the European Ombudsman on complaint 1343/2002/(SM)IJH against the European Commission

Decision
Case 1343/2002/IJH - **Opened on** 11/09/2002 - **Decision on** 23/07/2003

Strasbourg, 23 July 2003
Dear X.,

By letters dated 17 July and 12 August 2002, you complained on behalf of an Irish company, against the Irish Department of Agriculture and the Commission.

On 11 September 2002, your complaint was forwarded to the President of the Commission. On the same day, you were informed of this action and that the European Ombudsman cannot deal with your complaint against the Irish Department of Agriculture. On 7 October 2002, you sent additional information and allegations. On 21 October 2002, your letter of 7 October was forwarded to the Commission, with a request that its opinion should take into account the additional information and allegations. On the same day, you were informed of this action.

On 17 December 2002, the Commission sent its opinion, which was forwarded to you with an invitation to make observations. On 23 January 2003, you requested a document to which the Commission's opinion in your case refers. On 10 February 2003, a copy of the document was sent to you. On 28 February 2003, you sent your observations on the Commission's opinion.

On 23 April 2003, I requested further information from the Commission. On the same day, I informed you of this action by letter. On 27 May 2003, the Commission sent its reply to my request. On 10 June 2003, I forwarded the reply to you with an invitation to submit observations, which you sent on 15 July 2003.

At your request, your complaint has been treated confidentially, in accordance with Article 2 (3) of the Statute of the Ombudsman.

I write now to let you know the results of the inquiries that have been made.

THE COMPLAINT

In July, August and October 2002, an Irish company complained to the Ombudsman against the

Irish Department of Agriculture (DoA) and the Commission, concerning the interpretation and application of Commission Regulation 954/2002 (1) .

The complaint was classified as confidential, at the complainant's request, in accordance with Article 2 (3) of the Statute of the Ombudsman.

The Ombudsman informed the complainant that he could deal only with the complaint against the Commission, since the Irish DoA is not a Community institution or body. The Ombudsman advised the complainant to contact the Irish Ombudsman. The complainant rejected this possibility and was then advised that he could complain to the Commission if he considered that the authorities of a Member State had infringed Community law.

According to the complainant, the facts relevant to the complaint against the Commission were, in summary, as follows:

The Commission issued a Regulation in each of the past ten years to administer an annual frozen beef import quota. In 2001, changes were made which unintentionally produced significant benefits to Irish traders. In the 2002 Regulation, (954/2002), the Commission introduced a requirement for Member States to check that applicants were not related to each other ("the independence provision"). Differences in company law and VAT rules make it impossible to implement this provision fairly across the Community.

The Irish DoA requested the Commission to clarify Regulation 954/2002. The Commission promised to provide clarification, but failed to do so until 14 June 2002: one day after the expiry of the deadline for applications in Ireland, but before the closing date in other language versions of the Regulation.

The Irish DoA applied the independence provision in a very strict fashion, in the belief that the Commission would insist that all Member States took this approach. As a result, Irish applicants were unfairly disadvantaged.

In summary, the complainant alleges that the Commission targeted the trade in Ireland; included a provision on independence that could not be implemented fairly; and failed to ensure that the Regulation was correctly implemented.

The complainant claims that the Commission should review all the relevant applications and issue no licences until this process has been completed.

THE INQUIRY

The Commission's opinion

The Commission's opinion made, in summary, the following points:

The quota concerned has been characterised by an increasing level of speculation. For this reason, it was decided to provide stricter criteria for participation, so as to avoid the registration

of fictitious operators. Where there are obvious reasons to suspect that fictitious operators have applied for registration, Member States should proceed to a more detailed examination. Penalties should be determined where fictitious operators have applied for registration, or approval was granted on the basis of forged or fraudulent documentation.

Article 9 of Regulation 954/2002 reflects these aims. New operators must prove a minimum activity in the trade on their own account. Where two or more applicants have the same postal address, or where there are other serious grounds to suspect that operators are related, Member States shall verify that such applicants are not related to one another within the meaning of Article 143 of Commission Regulation 2454/93.

The Commission's guidelines make clear that a Member State only initiates the Article 143 examination where it discovers common addresses, or has serious grounds to suspect that applicants are not independent in terms of management, staff and operations. The fact that the possible examination is performed on the basis of factual evidence excludes the occurrence of discrimination between companies of different Member States.

The guidelines are for the benefit of national authorities processing applications. The Commission submitted guidelines on 14 June 2002, in time for the national authorities to process applications.

The disparity in the different linguistic versions regarding the deadline (13 or 14 June) was raised in a previous complaint to the Ombudsman: 1470/2002/ADB. In such cases, the provision of the language version officially recognised in the Member States of application applies. No discrimination or distortion of competition has taken place. The application process was simply a means to get on a list of approved operators, without any economic advantage attached to that approval. All interested parties had sufficient time to prepare their application file, irrespective of the deadline being 13 or 14 June.

It would not be sound to expect the Commission to carry out an inquiry of the kind claimed by the complaint and to freeze in the meantime the issuing of the licences. In any case, the Regulation does not give the Commission power to do so.

The complainant's observations

The complainant's observations made, in summary, the following points:

The 2001-2 quota inadvertently and disproportionately benefited applicants from Ireland. Importers then began an intensive lobbying campaign to exclude exporters in 2002-3. At the Beef Management Committee meeting held on 18th March 2002, the Commission stated that the major increases in new applications, in particular from countries like Ireland, has lead to a need to revamp the system and the scheme should be seen as an importer scheme.

The independence provision is unlawful. The Commission's argument that examining eligibility on the basis of factual evidence excludes discrimination is flawed. Any examination depends on the Member State's interpretation and application of the Regulation, using criteria derived from national company and VAT law. Thus companies in different countries were not subject to the

same examination. The Commission's legal service advised against applying the same provision in the dairy sector, because it could not be administered in a fair, just and equitable manner in the absence of a common company and VAT law throughout the Community.

A licence ensures a substantial financial benefit. No one can apply for a licence unless declared eligible under this Regulation. The Commission's reply seems to imply that less consideration need be given to the concepts of fairness, justice, equity and proportionality if the distribution of the quota conforms to some pre-determined optimal disbursement plan.

At a meeting of the Beef Management Committee on 31 May 2002, the Commission undertook to issue clarifications within a week, but did not do so. Member States sought clarification so that they could give instruction and guidance to their trade before the closing date. In the absence of clarification, and contrary to the approach adopted in other Member States, the Irish DoA adopted a very uncompromising approach, threatening to expel companies and their former subsidiaries if that former subsidiary made an application. This had a direct negative financial impact on all companies because they were prevented from maximising their potential by not being able to dispose of their assets, where that subsidiary had an entitlement to a share of the GATT quota.

The clarifications issued on 14 June 2002 diluted the interpretation of Article 143, so that those Member States that were still open to receive applications were able to adopt a very different approach than was the case the day before. Moreover, applications submitted in Ireland on 14 June 2002 were rejected as late, whereas companies in England were able to lodge applications on 14 June, despite the language version of the Regulation being the same.

A review of the minutes, file notes, correspondence etc. of the Beef Management Committee between mid-March and mid-May 2002 will provide evidence to support the complainants.

The Commission made a commitment to publish the final list of successful applicants, but has failed to do so. The BMC should prepare a report comparing the interpretation, application and procedures in each Member State with what was agreed centrally at the BMC.

If the Irish DoA does not fall within the European Ombudsman's mandate as the Commission's agent, it does so as a member of the BMC.

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, the Ombudsman asked the Commission to supply further information in relation to certain points in the complainant's observations and to send copies of the minutes, file notes and correspondence of the Beef Management Committee between mid-March and mid-May 2002.

The Commission's reply

The Commission's reply made, in summary, the following points:

The aim of Regulation 954/2002 was to combat the speculation specific to the sector and to render the appearance of fictitious operators more difficult. Article 9 of the Regulation clearly indicates both importers and exporters when defining the operators who can apply for import

licences.

In confirming the legality of Commission Regulation 241/94, which also provided for anti-speculative measures in the sector of quotas for import of frozen beef, the Court of Justice confirmed the need to deter the artificial fragmentation by certain traders of their economic structure (2) . The Regulation's criteria for detecting "fictitious operators" are either the same postal or VAT address, or "where Member States have any other serious ground to suspect that operators are related". In these cases, Member States must refer to the criteria set out in Article 143 of Regulation 2454/93. Therefore in order to proceed to further checks in the strict framework of Article 143 of Regulation 2454/93 (which can lead to the rejection of all related applications) Member States must

a) possess documentary evidence, or

b) have serious ground to suspect that operators are related.

The terms under b) are commonly used in legal texts to indicate a degree of suspicion which goes well beyond a mere or even a reasonable doubt. It is evident from the text of Article 9 that the existence of a link between two operators within the meaning of Article 143 of Regulation 2454/93 is only an indication to be used by the Member States, together with other elements, in order to detect fictitious operators.

The Legal Service of the Commission has never invoked the absence of a common company and VAT law throughout the Community to oppose the independence clause, either in the dairy sector or in Regulation 954/2002.

The management of the scheme falls within the competence of the Member States and clarifications were issued at the request of some of them. The clarifications also concern other points of the Regulation and could not add much to the content of the independence provision. The Commission cannot be held responsible for subjective interpretations of this provision.

The Irish authorities correctly interpreted the English language text of the Regulation as concerns the deadline for applications. The idea that operators in Member States which construed the deadline differently had an advantage seems far-fetched. The Commission does not dispose of any element to justify action against these Member States.

While some Regulations or Directives foresee that the Commission prepares reports on their application, this is not the case for Regulation 954/2002. Nor is it the role of the Beef Management Committee to prepare such a report. It was never intended to publish the list of approved operators and Regulation 954/2002 contains no obligation to do so.

The complainant's observations

The complainant sent nine pages of observations, together with documentary annexes. The observations repeat, in substance, the earlier arguments and make, in summary, the following new points:

Documentary evidence shows that from February to mid-May 2002, the Commission made a concerted effort to exclude exporters from the quota.

The Commission's guidelines diluted the independence provision by adding the word "only", which is not to be found in Article 9 of the Regulation.

The Commission's refusal to publish the list of approved operators is contrary to the principles of fairness and openness.

THE DECISION

1 The scope of the Ombudsman's inquiry

1.1 The complaint is made on behalf of an Irish company and concerns the interpretation and application of Commission Regulation 954/2002 (3) , concerning an annual import quota for frozen beef.

1.2 The complaint is against both the Irish Department of Agriculture (DoA) and the Commission. The Ombudsman informed the complainant that he cannot deal with the complaint against the DoA, because his mandate is limited to the Community institutions and bodies and no action by any other authority or person may be the subject of a complaint (4) . The complainant later argued that the DoA falls within the Ombudsman's mandate, either as the Commission's agent, or as a member of the Beef Management Committee.

1.3 The Ombudsman maintains his view that the Irish DoA is a national body and therefore not a Community institution or body. Insofar as the Commission has given instructions or advice to the DoA, or has responsibility for monitoring its actions, the Ombudsman can examine whether there is maladministration by the Commission. Moreover, the Ombudsman does not exclude that the Beef Management Committee (BMC) could be within his mandate. The Ombudsman points out, however, that the complainant's allegations are against the Commission and the DoA, not the BMC as such. The Ombudsman's inquiry and the present decision therefore deal only with the complainant's allegations against the Commission.

2 The allegation that the Commission targeted the Irish trade

2.1 The complainant alleges that the Commission targeted the trade in Ireland. The complainant argues that, following a lobbying campaign by importers, the Commission sought to benefit importers by excluding exporters, who are mainly Irish, from the quota. The Ombudsman understands the complainant's allegation to be that the Commission misused its powers.

2.2 According to the Commission, the aim of Regulation 954/2002 was to combat speculation in the sector and to render the appearance of fictitious operators more difficult. Article 9 of the Regulation clearly indicates both importers and exporters when defining the operators who can apply for import licences. At the Ombudsman's request, the Commission forwarded to the Ombudsman and to the complainant minutes and other documents of the Beef Management Committee for the period in question.

2.3 The Ombudsman notes that, according to the case law of the Community courts, an act of a

Community institution is vitiated by misuse of powers only if it was adopted with the exclusive or main purpose of achieving an end other than that stated (5) . The Ombudsman considers that his inquiry has revealed no evidence that the Commission used its regulatory powers to achieve purposes other than the declared ones of combating speculation and the appearance of fictitious operators. Moreover, these appear to be legitimate purposes. The Ombudsman therefore finds no maladministration as regards this aspect of the complaint.

3 The independence provision

3.1 The complainant alleges that Commission Regulation 954/2002 includes a provision on independence of applicants that cannot be implemented fairly, justly and equitably and that the provision is therefore unlawful. The complainant argues that Member States must apply the independence provision using criteria derived from national company and VAT law and that companies in different Member States were, therefore, not subject to the same examination. The Commission's legal service advised against applying the same provision in the dairy sector, because it could not be administered in a fair and equitable manner in the absence of a common company and VAT law.

3.2 According to the Commission, the independence provision reflects the Regulation's aim to avoid the registration of fictitious operators. The existence of a link between two operators is only an indication to be used by the Member States, together with other elements, in order to detect fictitious operators. The Commission's legal service has never invoked the absence of a common company and VAT law throughout the Community to oppose the independence clause either in the dairy sector or in Regulation 954/2002.

3.3 The Ombudsman considers that the Commission's explanation of the purpose and meaning of the independence provision is reasonable and that the complainant has not demonstrated that the provision, as such, violates any binding rule or principle. The complainant's allegations concerning its implementation are examined in the following section. The Ombudsman therefore finds no maladministration as regards this aspect of the complaint.

4 Implementation of the Regulation

4.1 The complainant alleges that the Commission failed to ensure that the Regulation was correctly implemented. The complainant argues that Member States sought clarification so that they could give instruction and guidance to their trade before the closing date for applications. The Commission failed to provide clarification of the independence provision until 14 June 2002, although it had promised to do so earlier. The clarifications issued on 14 June 2002 diluted the interpretation of the independence provision, so that those Member States that were still open to receive applications were able to adopt a different approach. Moreover, applications submitted in Ireland on 14 June 2002 were rejected as late, whereas companies in England were able to lodge applications on that date, despite the language version of the Regulation being the same. As a result, Irish applicants were unfairly disadvantaged.

The complainant claims that the Commission should publish the list of successful applicants, review all the relevant applications and issue no licences until this process has been completed.

4.2 The Commission argues that the management of the scheme falls within the competence of the Member States, some of which asked for clarifications. The clarifications also concern other

points of the Regulation and could not add much to the content of the independence provision. The Irish authorities correctly interpreted the English text of the Regulation as regards the deadline, but all interested parties had sufficient time to prepare their application, irrespective of the deadline being 13 or 14 June 2002. The idea that operators in Member States which construed the deadline differently had an advantage seems far-fetched and the Commission does not dispose of any element to justify action against these Member States. As regards the timing of the clarification, the relevant guidelines are for the benefit of national authorities processing applications. The Commission submitted guidelines in time for the national authorities to process applications. The Regulation does not give the Commission power to freeze the issuing of the licences, nor does it foresee the preparation of a report on its application.

4.3 The Ombudsman notes that the Commission does not deny the complainant's argument that it promised to provide clarification before 14 June 2002. However, the Ombudsman notes that any such promise was not made to the complainant, but to the national authorities, in the context of on-going contacts concerning a Regulation intended to counter speculation and the appearance of fictitious operators. The Ombudsman accepts as reasonable the Commission's argument that it issued the clarifications in time to fulfil their purpose of assisting national authorities to process applications. The Ombudsman takes the view that the Commission was not obliged to have regard to other purposes for which clarification may have been sought and that economic operators such as the complainant could not reasonably expect to rely on a promise made to the national authorities concerning the timing of such clarification.

The Ombudsman notes that the Commission's view that the Irish authorities correctly interpreted the English text of the Regulation as regards the deadline confirms the complainant's argument that the same deadline should have applied in England. However, the Ombudsman takes the view that the Commission's arguments that all interested parties had sufficient time to prepare their applications and that the Commission does not dispose of any element to justify action against Member States which construed the deadline differently, appear reasonable.

As regards the complainant's argument that the Commission's guidance diluted the independence provision, the Ombudsman has carefully compared the relevant part of the guidance with Article 9 (4) of the Regulation. The Ombudsman finds nothing to indicate that the Commission's interpretation was erroneous. Although it is true that Article 9 (4) does not contain the word "only", it seems obvious from the structure of this provision that Member States should initiate the procedure mentioned therein only if one of the conditions for so doing applies. The Ombudsman recalls, however, that the Court of Justice is the highest authority on the interpretation of Community law.

As regards the complainant's claims, the Ombudsman takes the view that the relevant legislation does not oblige the Commission to publish the list of successful applicants, or to review all the relevant applications. The Ombudsman points out that, if a list of successful applicants exists, the complainant could apply to the Commission for access to it, in accordance with the provisions of Regulation 1049/2001. (6)

In view of the above, the Ombudsman finds no maladministration as regards this aspect of the complaint.

5 Conclusion

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

The President of the Commission will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Commission Regulation (EC) No 954/2002 of 4 June 2002 opening and providing for the administration of a tariff quota for frozen meat of bovine animals covered by CN code 0202 and products covered by CN code 02062991 (1 July 2002 to 30 June 2003), 2002 OJ L 147/8.

(2) Case C-241/95, ex parte Accrington Beef 1996 ECR I-6699, paragraph 25.

(3) Commission Regulation (EC) No 954/2002 of 4 June 2002 opening and providing for the administration of a tariff quota for frozen meat of bovine animals covered by CN code 0202 and products covered by CN code 02062991 (1 July 2002 to 30 June 2003), 2002 OJ L 147/8.

(4) Article 195 EC; Statute of the Ombudsman, Article 2 (1).

(5) Case C-285/94, *Italy v Commission* [1997] ECR I-3519, paragraph 52.

(6) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 OJ L 145/43.)