

Decision of the European Ombudsman on complaint 1304/2003/(ADB)PB against the European Commission

Decision

Case 1304/2003/(ADB)PB - Opened on 05/09/2003 - Decision on 03/06/2004

Strasbourg, 3 June 2004

Dear Ms B.,

On 16 July 2003, you made a complaint on behalf of Animals' Angels to the European Ombudsman concerning the European Commission's refusal to grant you full access to a Commission report on a mission carried out in Romania from 25 to 29 November 2002.

On 6 September 2003, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 12 November 2003. I forwarded it to you with an invitation to make observations, which you sent on 15 December 2003.

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

THE COMPLAINT

The complainant

The complaint was submitted by the founder of *Animals' Angels*, a registered German animals' rights organisation that specialises in the improvement and surveillance of animal welfare during live transports (1).

Background

According to the complainant, the background to the case was, in summary, the following:

During the two years preceding the complaint, Animals' Angels had regularly informed the European Commission about malpractices related to the transportation of live slaughter horses from Romania to Italy. The malpractices included neglect of the horses in Romanian waiting stables, serious maltreatment, breach of the EC Directive on the transportation of animals, and falsifying of health certificates. A particularly serious instance was the transportation into the EU of horses which were positively tested for infectious anaemia although the enclosed health certificates stated that the horses had been negatively tested.

On 25-29 November 2002, the European Commission conducted a mission to Romania, the participants being six experts from the Commission's Food and Veterinary Office and an expert



from an EU Member State. There could, in Animal's Angel's view, be no doubt that the Commission assessed the malpractices on which Animals' Angels had given it information.

The dispute

By letter dated 9 December 2002, the complainant made an application to the Director of the Commission's Food and Veterinary Office for access to the report on the Commission's mission to Romania on 25-29 November 2002 (the "mission report"). The complainant stated in her letter that she would be very interested in the findings in the report, in particular because it had become too dangerous for Animals' Angels to operate in Romania.

On 27 February 2003, the complainant received a reply from the European Commission's Director-General for the Directorate-General for Health & Consumer Protection, Mr Robert J. Coleman. The letter informed the complainant that her letter of 9 December 2002 had been registered as an application for access to documents under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (2) . The Director-General apologised for exceeding the 15-days deadline, laid down in the Regulation (3)

Mr Coleman informed the complainant that she could not be granted access to the mission report because the report was covered by the exception contained in Article 4 (1)(a) in Regulation 1049/2001. This exception provides that the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards international relations. He explained that "Specifically, the [Food and Veterinary Office's] mission to Romania was carried out to monitor the progress of Romania in the alignment with and implementation of the body of Community law (Community *acquis*) and will be used by the Community in the process of negotiating the conditions for Romania's accession to the EU."

Mr Coleman informed the complainant that she could make a confirmatory application to the Commission's Secretary-General to obtain review of the decision to refuse her access. The complainant made a confirmatory application on 14 March 2003, making the following remarks:

Animals' Angels had a right to obtain access to the mission report since the successful completion of the Commission's mission had been possible partly due to information provided by Animals' Angels.

Reports by the Commission's Food and Veterinary Office had been systematically published on the Internet until March 2001. It was therefore impossible to understand why Romania's status as an applicant country should lead to the kind of mission reports here concerned to be treated as confidential. In fact, the status of a country applying for EU-membership strengthened the public's interest in the state of that country.

One could get the impression that the Commission kept the mission report confidential to keep secret the malpractices that it had undoubtedly learnt about during the mission.

As a matter of fact, reports on malpractices continued to be published, as for instance the report on the appalling hygienic conditions on the central Athens meat market in 2002. Furthermore,



reports on other third countries did not appear to enjoy the secrecy of applicant countries. The report by the Commission's Food and Veterinary Office on fish-breeding in Kenya was an example of this.

The refusal to grant Animals' Angels access to the mission report would seem to conflict with the principle that applicant countries may not be given more favourable treatment than a present EU Member State.

On 14 May 2003, the Commission's Secretary-General replied, in summary, to the complainant's confirmatory application as follows:

In accordance with Article 4(6) of Regulation 1049/2001 (4) , the Commission would give the complainant access to parts of the mission report. However, the most important findings and conclusions contained in these parts were blackened to protect the public interest in international relations and the purpose of inspections and investigations. These exceptions are set out in Article 4 (1) (a) and Article 4 (2) of Regulation 1049/2001.

The mission report in question was produced by the Commission's Food and Veterinary Office within the framework of a larger mission related to Romania's application for EU membership. That mission had the purpose of assessing Romania's progress towards implementing the EU *acquis* and its implementation of agreements made during the accession negotiations. In addition to *acquis* -related questions, the larger mission looked into the issuing of certificates and the export of live slaughter horses.

The findings in the mission report requested are closely related to the development of the Commission's negotiation positions, and are to be used in the negotiations on the conditions for Romania's accession to the EO. The release of the mission report could, therefore, damage the public's interest with regard to international relations as well as the purpose of the Commission's inspections and investigations.

As regards the argument that Animals' Angels has a right to obtain access to the mission report because the successful completion of the Commission's mission had been possible partly due to information provided by Animals' Angels, no such right of access is automatically granted. Even in respect of formal complaints, the person who submitted the complaint is normally only informed about the Commission's position and the measures taken.

As regards the impression that the Commission keeps the mission report confidential to keep malpractices secret, no such impression is intended by the Commission. In fact, it is exactly because the Commission wishes to make a relentless detection of any information on malpractices in the applicant countries, and wishes to make use of such information in the negotiations, that the Commission asked its Food and Veterinary Office to undertake the mission here concerned.

As regards other mission reports that have been published, no confusion should be made between inspections undertaken in existing Member States and in applicant countries. The



former are already obliged to observe EU legislation, whereas this is not the case for the latter. The applicant countries are not, therefore, under any obligation to allow inspections by the Food and Veterinary Office. These inspections are, therefore, carried out on the understanding that the inspection report will not be made public.

As regards other third countries, there are no differences in the practices related to inspections carried out in the applicant countries and other third countries with regard to authorised imports. All inspection reports are published.

Attached to the letter from the Secretary-General were the parts of the mission report to which the complainant was granted access. These parts were the front page, the list of contents, a list of abbreviations used in the report, and the report summary in which fifteen parts of the text were blackened. The text contained findings of malpractices, such as "problems related to falsification of export certificates and the persistence of shortcomings in relation to the certification procedure".

In her complaint to the Ombudsman, the complainant stated that she could not accept the Commission's argument that the mission report was related to the accession negotiations. From the parts of the mission reports that were made available to her, the complainant concluded that the main purpose of the mission was, in fact, to make on-site assessments of the conditions related to the export to the EU of animals and food of animal origin. The mission was therefore not different from numerous previous inspections, the reports on which had always been published. She stated that she was only interested in information on the conditions related to the export to the EU of horses, the authorisation for which was and is independent of the accession negotiations. The complainant feared that the Commission could effectively withdraw its commitment to publish all inspection reports of its Food and Veterinary Office when these relate to applicant countries "to protect the public's interest in international relations".

Referring to the arguments made in her two access applications, the complainant alleged that the Commission's reasons for refusing her access to the full document were inadequate, and she therefore claimed access to the full mission report.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

1. The complaint

The complainant requested access to the report of a mission carried out in Romania from 25 to 29 November 2002 by the Food and Veterinary Office. She was granted access to the parts of this report concerning third country export inspections. The parts of the report that were not disclosed deal with the progress made by Romania towards meeting future obligations after accession to the European Union. Disclosing those parts of the report would adversely affect the Commission's relations with the Romanian authorities and thus endanger the success of future missions.



The complainant questions this argument and requests access to the full report. She believes that the purpose of the mission was to monitor conditions regarding the agreed exports of horses, which are not related with the accession negotiations. She sees no reason for withholding parts of this report, since previous mission reports have been published.

2. Background

The Food and Veterinary Office may carry out two types of inspections in candidate countries:

(1) Third country export inspections in the areas of food safety, animal welfare and plant health in order to verify that the exporting country meets the conditions set out in European Union legislation. These inspections are carried out in third countries exporting or wishing to export to the European Union. Reports of such missions are routinely published on the Internet, unless bilateral veterinary equivalence agreements provide otherwise.

(2) Inspections in the context of enlargement. These inspections are carried out in the framework of the accession negotiations and aim at monitoring progress made by candidate countries in aligning their legislation to European Union standards. The findings of these inspections are fed into the Commission's negotiating positions. The candidate countries are under no obligation to accept these inspections. They are carried out with their agreement on the understanding that the resulting reports will not be published. The main objective of the inspection carried out in Romania from 25 to 29 November 2002 was to monitor progress in the alignment with and the implementation of European Union legislation in preparation for Romania's accession.

However, prior to the inspection, the Commission had received complaints about controls over certification and the export of live horses from Romania to Italy, both from the Italian authorities and from Animals' Angels. Therefore, the Food and Veterinary Office decided to extend the scope of the mission to include these export-related issues.

3. Reasons for not granting full access

The complainant received an edited copy of the mission report, in which the three sections dealing with the export issue (5.6.11, 5.6.12 and 7.1.1) were disclosed. Access to the remaining parts of the report was denied on the grounds that their disclosure would adversely affect the Commission's relations with Romania.

Candidate countries are under no legal obligation to comply with the requirements of European Union legislation (except as regards approved exports) prior to accession nor are they obliged to accept enlargement-related inspections by the Food and Veterinary Office. These inspections are carried out on a voluntary basis on the understanding that the resulting reports will not be published. They are an important part of the negotiating process. Disclosure of the findings concerning Romania's progress towards meeting EU standards in food safety and animal welfare would interfere with the accession negotiations and seriously affect the Commission's relations with the Romanian authorities. It would jeopardise their willingness to accept such inspections and to co-operate with the Commission. Therefore, the Commission considers that the exception provided for in Article 4 (1)(a) of Regulation 1049/2001 applies.

In addition, disclosure risks being counterproductive, since it would hamper future visits by the



Food and Veterinary Office during the run-up to accession designed to evaluate progress towards achieving compliance with European Union standards. It is important for the success of such visits that the Romanian authorities (and competent authorities in other candidate countries) feel confident that the Commission will respect its undertakings if maximum benefit is to be obtained from these visits.

4. Response to the complainant's arguments

In her submission to the Ombudsman, the complainant confirms that she is only interested in the findings concerning the exports of live horses already authorised by the European Commission. These parts of the mission report have been disclosed in the edited version that was sent to her by the Secretary-General on 14 May 2003. The remaining parts of the report deal with enlargement-related issues, which were the main purpose of the inspection. As explained above, these findings cannot be disclosed.

The Commission considers, therefore, that the complainant has received the information she requested through partial disclosure of the mission report.

The complainant's observations

In her observations, the complainant made, in summary, the following further comments:

1. Animals' Angels would be willing to observe the confidentiality of the mission report, if this would enable the Commission to give access to the report.
2. Referring to the German translation of the Commission's opinion, the complainant noted that the Commission stated that inspections in the applicant countries "werden im Einvernehmen mit dem Bewerberländern mit der Maßgabe durchgeführt, dass der entsprechende Bericht nicht veröffentlicht wird". This was a translation of the English version of the Commission's opinion, in which the Commission stated that the inspections "are carried out with their agreement on the understanding that the resulting reports will not be published". The complainant stated that no statutory or treaty-based obligation was referred to for "Maßgabe", a German official language term for (in this context) "condition".
3. The complainant considered that the Commission should from the beginning of the accession negotiations have agreed with the applicant countries that the European Union's transparency principles should be followed.
4. The difficulties that arose with the application for the mission report here concerned show that the two types of inspections by the Food and Veterinary Office, referred to in the Commission's opinion, should not be used together.
5. Contrary to what the Commission's opinion states, the parts of the mission report to which the complainant was given access did not satisfy her request. She wanted, in particular, access to the full text of chapter 5.6 of the report ("Animal Health") and chapter 5.8 ("Animal welfare").

The complainant repeated that her claim was to be granted access to the full mission report.



THE DECISION

1 Introductory remarks

1.1 The complainant's allegation, made on behalf of her organisation "Animals' Angels", related to the Commission's refusal to grant her access to the document here concerned. In addition, but without making an additional separate allegation, the complainant noted that there had been a delay in the processing of her application. In light of the nature of the delay that occurred, the Ombudsman considers it relevant to make the following observations and remarks.

1.2 Article 7 (1) of Regulation 1049/2002 provides that "An application for access to a document shall be handled promptly", and "Within 15 working days from the registration of the application, the institution shall either grant access to the document requested ... or, in a written reply, state the reasons for the total or partial refusal". Article 8 of Regulation 1049/2001 provides that "A confirmatory application shall be handled promptly. Within 15 working days from the registration of such an application, the institution shall either grant access ... or, in a written reply, state the reasons for the total or partial refusal".

1.3 The reply to the complainant's initial application for access was made approximately two and a half months after her application was registered at the Commission. The reply to the complainant's confirmatory application was made two months after the complainant sent the application to the Commission. The Commission's reply to the complainant's initial application contained an apology for the delay. Its reply to the confirmatory application contained no such apology, or any other acknowledgement of the delay.

1.4 The Ombudsman is confident that measures have or will be taken by the Commission to identify and address the problems that caused these delays.

2 The access application and the reply

2.1 The complainant's application for access concerned the *Final report of a mission carried out in Romania from 25 to 29 November 2002 in order to assess the progress made by the Romanian authorities in the up-grading of certain classes of food-processing establishments and to review associated live controls*, DG(SANCO)/8675/2002 - MR final (hereinafter "the mission report"). The complainant alleged that the Commission's grounds for refusing her full access to the report were inadequate.

2.2 The Commission explained that the main aim of the mission related to accession negotiations with Romania, and that to disclose the full report would therefore be in breach of Articles 4(1)(a) third indent and 4(2) third indent of Regulation 1049/2001. Article 4(1)(a) third indent sets out an exception to public access to protect the public interest as regards *international relations*. Article 4(2) third indent sets out an exception to public access to protect the *purpose of inspections, investigations and audits*.

The Commission furthermore explained that it examined the mission report in accordance with Article 4(6) of Regulation 1049/2001 to decide whether access could be given to parts of the mission report not covered by the exceptions referred to. It concluded that this was the case because the report contained the following two categories of text: one category related to the main purpose of the Commission's mission in Romania (accession negotiations), and one



category related to the conditions to be fulfilled by third countries exporting to the European Union. In accordance with the Commission's existing publication practices, the parts related to the second category were released to the complainant.

2.3 In support of her allegation, the complainant put forward several arguments and observations. These are examined in the following section.

3 The nature of the mission report: "accession" or "export"

3.1 The complainant disagreed with the Commission's view that its mission report was mainly related to the accession negotiations. She considered that the main purpose of the Commission's mission was to make on-site assessments of the conditions related to the export to the European Union of animals and food of animal origin. In her view, the mission was therefore not different from numerous previous inspections, the reports on which had always been published. According to the complainant, the Commission's reliance on the exception related to "international relations" in Article 4 of Regulation 1049/2001 was therefore irrelevant.

3.2 The Commission explained that its Food and Veterinary Office may carry out two types of inspections in candidate countries:

(1) Third country export inspections (hereinafter "export" inspections) in the areas of food safety, animal welfare and plant health in order to verify that the exporting country meets the conditions set out in European Union legislation. These inspections are carried out in third countries exporting or wishing to export to the EU. Reports of such missions are routinely published on the Internet, unless bilateral veterinary equivalence agreements provide otherwise.

(2) *Inspections in the context of enlargement* (hereinafter "accession" inspections). These inspections are carried out in the framework of the accession negotiations and aim at monitoring progress made by candidate countries in aligning their legislation to EU standards. The findings of these inspections are fed into the Commission's negotiating positions. The candidate countries are under no obligation to accept these inspections. They are carried out with their agreement on the understanding that the resulting reports will not be published. The main objective of the inspection carried out in Romania from 25 to 29 November 2002 was to monitor progress in the alignment with, and the implementation of, EU legislation in preparation for Romania's accession.

According to the Commission, it had received complaints about controls over certification and the export of live horses from Romania to Italy, both from the Italian authorities and from Animals' Angels. Its Food and Veterinary Office therefore decided to extend the scope of the mission to include these export-related issues. Because of the combination of an "export" inspection and an "accession" inspection, the Commission was able to identify parts of the mission report that were not covered by the exception relating to accession negotiations, and which could be released to the complainant.

3.3 The Ombudsman notes that the Commission acknowledges that the mission was a combined "export" and "accession" inspection. The Ombudsman does not consider that the facts give reason to doubt the reasonableness of the Commission's view that the *principal*



purpose of the mission was related to its accession negotiations with Romania.

4 Individual right to obtain access

4.1 The complainant argued that she had a right to obtain access to the mission report since the successful completion of the Commission's mission had been possible partly due to information provided by her organisation.

4.2 The Commission responded to this argument in its confirmatory application, stating that no such right of access is automatically granted. According to the Commission, even in respect of formal complaints, the person who submitted the complaint is normally only informed about the Commission's position and the measures taken.

4.3 The Ombudsman is not aware of any rule or principle that would give the complainant a separate individual right of access to the mission report here concerned on the ground that the Commission's mission had been possible partly due to information provided by her organisation.

5 The access exceptions in Regulation 1049/2001

5.1 The complainant argued that even if the mission report related to the accession negotiations with Romania, the Commission was not entitled to refuse access on the basis of Articles 4(1)(a) third indent ("international relations") and Article 4(2) third indent ("the purpose of inspections, investigations and audits"). In particular, the complainant noted that the Commission appeared to use a higher level of confidentiality with regard to candidate countries than with regard to current Member States or other third countries, a difference that she considered to be unjustified.

5.2 In reply to the complainant's argument, the Commission stated that inspections in candidate countries are carried out on a voluntary basis on the understanding that the resulting reports will not be published. They are an important part of the negotiating process. Disclosure of the findings concerning Romania's progress towards meeting European Union standards in food safety and animal welfare would interfere with the accession negotiations and seriously affect the Commission's relations with the Romanian authorities. It would jeopardise their willingness to accept such inspections and to co-operate with the Commission.

In addition, the Commission stated that disclosure risks being counterproductive, since it would hamper future visits by its Food and Veterinary Office during the run-up to accession designed to evaluate progress towards achieving compliance with European Union standards. It is important for the success of such visits that the Romanian authorities (and competent authorities in other candidate countries) feel confident that the Commission will respect its undertakings if maximum benefit is to be obtained from these visits.

The Commission has further pointed out that there are no differences in its practices related to inspections carried out in the applicant countries and other third countries with regard to authorised imports. All inspection reports are published.

5.3 On the basis of the Commission's clarifications and arguments, the Ombudsman considers it a plausible assumption that there would be an unreasonable risk, within the meaning of Article 4 of Regulation 1049/2001, to the interests of "international relations" and, in particular, "the



purpose of inspections" if access was given to the full mission report. For the purpose of the publication and confidentiality practices here concerned, the Commission therefore appears to be acting reasonably by treating candidate countries, with which negotiations are on-going, as a category different from other third countries or European Union Member States.

5.4 On the basis of the above findings, the Ombudsman's considers that the Commission has acted in accordance with Regulation 1049/2001. It appears, therefore, that there is no maladministration with regard to this aspect of the complaint.

6 Additional concerns of the complainant

6.1 In her observations, the complainant expressed the view that the difficulties that arose with the application for access to the mission report here concerned show that the two types of inspections by the Food and Veterinary Office, referred to in the Commission's opinion and in paragraph 3.2 above, should not be used together. She also considered that the Commission should bind candidate countries to accept the transparency norms of the European Union.

6.2 As these views were not clearly formulated as separate allegations, the Ombudsman did not consider it appropriate to take them up for inquiry. However, the Ombudsman considers it useful to make a further remark below concerning the Commission's decision to join the "export" and the "accession" reports.

7 Conclusion

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

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

FURTHER REMARK

In the present case, the Commission gave an account of how its Food and Veterinary Office had joined two types of inspections, and how this led to two different types of inspection reports being merged into one mission report. The Ombudsman fully appreciates that the joining of different types of inspections can be done in the interest of efficient administration. However, the facts of the present case indicate that it would be useful to record, as far as practically possible, non-confidential information separately from confidential information. This would in particular simplify the application of the duty to give partial access to documents, in accordance with Article 4(6) of Regulation 1049 regarding public access to European Parliament, Council and Commission documents.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Its homepage is http://www.animals-angels.de/english/index_en.htm [Link]



(2) OJ 2001 L 145, p. 43.

(3) Article 7 (1) of the Regulation, OJ 2001 L 145, p. 43.

(4) Article 4 (6) provides that "If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released".