

## **Decision of the European Ombudsman on complaint 2126/2003/(BB)PB against the Council of the European Union**

Decision

**Case 2126/2003/(BB)PB - Opened on 09/12/2003 - Decision on 15/09/2004**

Following food scandals in the 1990s, the European Union decided to set up the European Food Safety Authority ('EFSA'), which was legally established by Regulation 178/2002. Article 24 of the Regulation provides, among others, that EFSA shall be headed by a Management Board composed of 14 members appointed by the Council in consultation with the European Parliament from a list drawn up by the Commission, and that the members of the Board shall be appointed in such a way as to secure the highest standards of competence, a broad range of relevant expertise and, consistent with these, the broadest possible geographic distribution within the Union. On 15 July 2002, the Council appointed the members of the Management Board.

The complaint was submitted by The European Consumers' Organisation / Bureau Européen des Unions de Consommateurs (hereinafter 'BEUC'), which considered that the Council had appointed an allegedly number of national civil servants. It considered this to be an excessively "geographic" approach, and that candidates had been appointed on the basis of nationality and not of competence.

The Council stated that experience in the public sector was certainly not irrelevant in managing a European independent public authority, which furthermore was meant to collaborate with the Member States. Experience in public administration was expressly mentioned by Regulation 178/2002 as a relevant criterion. Furthermore, the appointed members had a very broad range of professional expertise. It was therefore the Council's opinion that the complainant had failed to demonstrate an instance of maladministration.

The Ombudsman noted that the appointment procedure here concerned left a large margin of discretion to the Council, and that the Ombudsman's review of the exercise of such discretion is necessarily limited to ascertaining whether the decision of appointment is tainted by breaches of procedure or manifest errors of assessment. The Ombudsman concluded that there was no evidence of any such breaches or errors in this case.

Strasbourg, 15 September 2004

Dear Mr M.,



On 7 November 2003, you made a complaint, on behalf of the European Consumers' Association, to the European Ombudsman concerning the appointment of the members of the Management Board of the European Food Safety Authority. On 25 November 2003, you sent a fax containing an additional allegation related to your complaint.

On 9 December 2003, I forwarded the complaint to the Secretary General of the Council. The Council sent its opinion on 27 February 2004. I forwarded it to you with an invitation to make observations, which you sent on 4 May 2004.

On 9 June 2004, I decided to conduct further inquiries. I therefore sent the Council a second request for opinion, which it sent on 6 July 2004. I forwarded the Council's second opinion to you, with an invitation to make observations. You submitted your observations on the Council's second opinion on 31 August 2004.

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

## THE COMPLAINT

### *Background*

Following food scandals in the 1990s, the European Union decided to establish a new scientific body mandated to provide independent advice on food safety issues. The body became the European Food Safety Authority (hereinafter 'EFSA'), which was legally established by Regulation 178/2002 (1). Article 24 of the Regulation provides that EFSA shall comprise:

(a) a Management Board; (b) an Executive Director and his staff; (c) an Advisory Forum; (d) a Scientific Committee and Scientific Panels.

Article 25 provides that

*"1. The Management Board shall be composed of 14 members appointed by the Council in consultation with the European Parliament from a list drawn up by the Commission which includes a number of candidates substantially higher than the number of members to be appointed, plus a representative of the Commission. Four of the members shall have their background in organisations representing consumers and other interests in the food chain.*

*The list drawn up by the Commission, accompanied by the relevant documentation, shall be forwarded to the European Parliament. As soon as possible and within three months of such communication, the European Parliament may make its views available for consideration by the Council, which will then appoint the Management Board.*

*The members of the Board shall be appointed in such a way as to secure the highest standards of competence, a broad range of relevant expertise and, consistent with these, the broadest possible geographic distribution within the Union."*



On 15 July 2002, the Council appointed the members of the Management Board (2) , referring to the following facts and considerations:

*"Having regard to the list of candidates submitted to the Council by the Commission of the European Communities,*

*Having regard to the views expressed by the European Parliament,*

*Whereas:*

*(1) It is vital to ensure the independence, high scientific quality, transparency and efficiency of the European Food Safety Authority. Cooperation with Member States is also indispensable.*

*(2) The candidatures have been examined on the basis of the documentation provided by the Commission and in the light of the views expressed by the European Parliament with the aim of securing the highest standard of competence, a broad range of relevant expertise, for instance in management and in public administration, and the broadest possible geographic distribution within the Union.*

*(3) Four of the members should have a background in organisations representing consumers and other interests in the food chain.*

*(4) The members of the Management Board should generally be appointed for a period of four years; however, for the first appointment of the Board half of the members should be appointed for a period of six years".*

*The complaint to the European Ombudsman*

The complaint was submitted by The European Consumers' Organisation / Bureau Européen des Unions de Consommateurs (hereinafter 'BEUC'). The complainant considered that the Council had failed to observe the rules laid down in Regulation 178/2002 by appointing one member from each of the fourteen Member States from which there were eligible candidates, and by appointing an allegedly excessive number of national civil servants. It considered this to be an excessively "geographic" approach, which stood in contrast with that of the Commission and the Parliament, both of which had (in the complainant's view) generally followed the principles laid down in Regulation 178/2002. The complainant noted that the list put forward by Parliament contained more than fourteen candidates and not one from every Member State.

The Council's decision had led the complainant to conclude that candidates had been appointed on the basis of nationality and not competence, as it was impossible to believe that the fourteen best candidates were coincidentally from fourteen separate Member States. Referring to Article 25(1) of Regulation 178/2002, the complainant argued that the Council had given priority to the "broadest possible geographic distribution within the Union" to the detriment of the duty to ensure "the highest standards of competence [and] a broad range of relevant expertise".

The complainant considered that the Council's decision would give support to the notion that seats on EFSA's Management Board are assigned to particular Member States and that this



would therefore make it more difficult to choose the best candidates when vacancies arise. Furthermore, the Council's decision would in general make it more difficult to meet the various requirements in Regulation 178/2002, including the requirement that four members shall have their background in organisations representing consumers and other interests in the food chain. The complainant also feared that the presence of so many national officials on the Management Board would make it more difficult for the Authority to win the confidence of consumers or serve as a *"point of reference by virtue of its independence"* (Article 2(7) of Regulation 178/2002).

The complainant emphasised that it did not question the competence, qualifications or integrity of any one individual member of the Board, nor did it have any desire to challenge the validity of anything done to date by EFSA.

Shortly after submitting its complaint, the complainant informed the Ombudsman that it also wished to complain about the Council's failure to respond to a letter of 5 June 2003, in which the complainant had submitted the above views and arguments and expressly requested a reply.

In summary, therefore, the complainant made the following allegations:

1. The Council did not follow the scheme of appointment as laid down in Regulation (EC) No 178/2002 by appointing members of the Management Board on the basis of nationality and not of competence;
2. Lack of reply to a letter sent to the Council on 5 June 2003.

## THE INQUIRY

### **The Council's opinion** *Legal background*

The Council referred to Article 25 of Regulation 178/2002, as quoted above. It also referred to Recitals 40 and 41 of the same regulation:

*"(40) The confidence of the Community institutions, the general public and interested parties in the Authority is essential. For this reason, it is vital to ensure its independence, high scientific quality, transparency and efficiency. Cooperation with Member States is also indispensable.*

*(41) To that effect the Management Board should be appointed in such a way as to secure the highest standard of competence, a broad range of relevant expertise, for instance in management and in public administration, and the broadest possible geographic distribution within the Union. This should be facilitated by a rotation of the different countries of origin of the members of the Management Board without any post being reserved for nationals of any specific Member State."*

### *Factual background*

On 8 April 2002 the Council received from the Commission a list of 30 candidates for a post in the Management board of EFSA, pursuant to Article 25 of Regulation 178/2002. The list, together with all the relevant documentation, application forms, curricula etc. was immediately circulated to the members of the Council.



On 12 June 2002, the President of the European Parliament submitted the Parliament's recommendation as to the candidates to be appointed.

On 15 July 2002, after discussion in its preparatory bodies, the Council adopted a document setting out its working arrangements for the appointment of the members of the EFSA Management Board and, in accordance with the said arrangements, decided to appoint seven members of the board for four years and seven for six years.

#### *Substance*

The Council stated that it fully shared the applicant's view that, should the need to ensure the highest standard of competence and a broad range of relevant expertise ever conflict with the need to ensure the broadest geographic distribution within the Union, the former requirement should take precedence over the latter. The Council noted that in the present case, the complainant did not question the competence, qualifications or integrity of any one individual member of the EFSA Board. The Council concluded that the complainant was only taking issue with the fact that the Council respected one of the requirements of the regulation, namely the one to ensure the broadest geographic distribution.

The Council further noted that the complainant's concerns seemed to be of a prospective nature, i.e. that the contested decision would make it more difficult to choose the best candidates in the future. The Council viewed that a complaint concerning possible future instances of maladministration was inadmissible.

Furthermore, the Council considered that nothing in the contested decision would support the notion that in the future the Council would breach Regulation 178/2002. On the contrary, it was quite clear that when, in 2006, the Council would be called upon to appoint 7 members of the Board at a time when the Council would have 25 members, no Member State would be in a position to claim that a particular post on the board should be assigned to one of its nationals.

With specific regard to the concern that the manner in which the Council appointed the members of the Board would make it difficult to respect the requirement of having members with a background in organisations representing consumers or other interests, the Council noted that three of the seven members appointed for a six-year term and one of those appointed for four years had their background in such organisations, including organisations represented by the complainant. Other members of the Board did in fact have very significant expertise in consumer matters, and the chairman of the Board had almost thirty years' experience in a Swedish autonomous agency concerned with the interests of consumers.

With respect to the allegation that an excessive number of national officials had been appointed and that this would have compromised the objective of ensuring broad expertise, the Council noted that experience in the public sector was certainly not irrelevant in managing a European independent public authority, which furthermore was meant to collaborate with the Member States. Experience in public administration was expressly mentioned by Regulation 178/2002 as a relevant criterion. Furthermore, the appointed members had a very broad range of professional expertise ranging from chemistry to economy, law, medicine, biology, veterinary



medicine, pharmacology and food administration.

It was therefore the Council's opinion that the complainant had failed to demonstrate an instance of maladministration, let alone a violation of Regulation 178/2002. The fact that in appointing the members of the Management Board the Council had, in compliance with Article 25 of the Regulation, managed to ensure a broad geographic distribution, was due to the outstanding quality of the candidates shortlisted and to the broad range of their academic and professional backgrounds.

#### **The complainant's observations**

In its observations, the complainant stated that the Council seemed to believe that once satisfied with the basic eligibility of individual candidates, it should then select the candidates to achieve the widest possible geographic spread. In the complainant's view, the Council should first review the competence of all eligible candidates with a view to securing the highest level of competence and a broad range of relevant experience, and only then look to the question of geographic distribution.

Regarding the Council's comment that the complaint was about future decisions, the complainant stated that this was not the case. Instead, the complaint was that the procedures actually followed in this case would make it more difficult to follow the principles of good administration in the future. On the question of national officials, it was not argued that there should be a total exclusion of national officials, but only that there should be an overall balance in the composition of the Board to secure, as required by the regulation, the highest standards of competence, a broad range of expertise, independence, high scientific quality, in particular to ensure that the Authority could "serve as a point of reference by virtue of its independence". In the complainant's view, the Council had not given the attention it should have given to the overall balance of the board.

The complainant stated that while it accepted that the Council did not have to follow the advice of the European Parliament, the Ombudsman "may fairly examine whether and to what extent the Council considered the advice of the Parliament", stating that this was relevant because the Parliament had submitted a list that did not include a candidate from every relevant Member State.

The complainant also asked the Ombudsman to thoroughly scrutinise the Council's selection of the Board members, including a re-examination of the merits of the unsuccessful candidates, and to check whether each Member State was in fact left free to choose its own "national" nominee.

Finally, the complainant noted that the Council's opinion made no reference to the alleged failure to reply to the complaint's letter of 5 June 2003. In the complainant's view, this suggested that the Council did not challenge the validity of this aspect of the complaint.

#### **Further inquiries**

On 9 June 2004, the Ombudsman sent the Council a request for a response to the complainant's second allegation regarding its failure to reply to the complainant's letter of 5 June 2003.



On 6 July 2004, the Council sent the Ombudsman its reply in which it stated that *"it is regretted that due to a clerical error within the General Secretariat of the Council, the letter of 5 June 2003 was inappropriately attributed and consequently no reply was sent..."* .

The Ombudsman forwarded the Council's reply to the complainant, who submitted its observations on 31 August 2004. In its observations, the complainant noted that the Council's failure to reply may have been an isolated occurrence of a kind that may arise in any organisation however well administrated. However, the complainant asked the Ombudsman to consider whether this was in fact the cause of the failure to reply, or whether the failure to reply had been a consequence of the administrative policy or culture of the Council.

## THE DECISION

### 1 Introductory remarks

1.1 In its observations on the Council's opinion, the complainant submitted additional claims. These were, first, that the Ombudsman should examine whether and to what extent the Council considered the Parliament's views on the list of candidates presented by the Commission, and, second, that the Ombudsman should thoroughly scrutinise the Council's selection of the EFSA Board members, including a re-examination of the merits of the unsuccessful candidates to check whether each member state was in fact left free to choose its own "national" nominee.

1.2 The Ombudsman has not received any concrete allegations, evidence or arguments that would warrant an inquiry into these issues. The complainant remains free, however, to submit a new complaint, specifying its allegations and submitting relevant evidence concerning these issues.

1.3 The Ombudsman furthermore points out that, in the light of his findings in paragraph 2 below, it has been deemed unnecessary to assess the complainant's submission that the Council's decision of appointment would make it more difficult to choose the best candidates when vacancies arise in the future.

### 2 Failure to follow the scheme of appointment in Regulation 178/2002

2.1 The complaint concerned the Council's appointment of the members of the Management Board of EFSA (European Food Safety Authority). Referring to the requirements set out in Regulation 178/2002 setting up EFSA, the complainant alleged that the Council had failed to follow the scheme of appointment as laid down in that Regulation by appointing members of the Management Board on the basis of nationality and not of competence. Article 25(i) of the Regulation provides that the members shall be appointed by the Council in consultation with the European Parliament from a list drawn up by the Commission. Article 25(iii) provides that *"The members of the Board shall be appointed in such a way as to secure the highest standards of competence, a broad range of relevant expertise and, consistent with these, the broadest possible geographic distribution within the Union."*

2.2 The complainant argued that, in breach of Regulation 178/2002, the Council had given priority to the "broadest possible geographic distribution within the Union" to the detriment of the





duty to ensure "the highest standards of competence [and] a broad range of relevant expertise". The complainant referred to the fact that the Council had appointed one member from each of the fourteen Member States from which there were eligible candidates. It stated that it was impossible to believe that the fourteen best candidates were coincidentally from fourteen separate Member States. The complainant pointed out that the list put forward by the Parliament did not contain a candidate from every Member State.

The complainant also argued that the Council's approach had been excessively "geographic" in respect of the allegedly large proportion of Board members who had been national civil servants.

2.3 In its opinion, the Council stated that should the need to ensure the highest standard of competence and a broad range of relevant expertise ever conflict with the need to ensure the broadest geographic distribution within the Union, the former requirement should take precedence over the latter. The Council considered, however, that in the present case the members appointed clearly met the requirements as to competence and expertise. The Council noted that the complainant emphasised that it did not question the competence, qualifications or integrity of any one individual member of the Board.

In respect of the complainant's argument relating to the proportion of Board members who had been national civil servants, the Council stated, first, that experience in the public sector was not irrelevant in managing a European public authority, and, second, that experience in public administration was expressly mentioned in Regulation 178/2002 as a relevant criterion (Recital 41).

2.4 The Ombudsman notes that the present complaint concerns the appointment of public servants selected through a special pre-established procedure involving the Commission, the European Parliament and the Council. Like other recruitment procedures in the European Union, this procedure leaves a large margin of discretion to the appointing authority, in this case the Council. The Ombudsman's review of the exercise of such discretion is necessarily limited to ascertaining whether the decision of appointment is tainted by breaches of procedure or manifest errors of assessment.

2.5 In the present inquiry, the complainant does not appear to dispute that the Council appointed the members of the EFSA Management Board in consultation with the European Parliament on the basis of a list submitted by the European Commission. The complainant has emphasised, however, that the list submitted by the Parliament did not contain one candidate from every Member States.

The Ombudsman notes that, as recognised by the complainant in its observations, the Council did not have to follow the Parliament's advice, which was submitted as a matter of consultation. The fact that the Council decided to appoint candidates not on the Parliament's list of proposed candidates was not, therefore, in itself inconsistent with the scheme of appointment laid down in Regulation 178/2002.





In the light of the above, the Ombudsman does not consider that the Council's decision of appointment is tainted by breaches of procedure.

2.6 As regards possible errors of assessment, the relevant question is whether any of the persons who were appointed to the EFSA Management Board were manifestly less competent or evidently possessing less relevant expertise than any of the unsuccessful applicants. The Ombudsman notes that he has received no evidence to this effect, and that the complainant itself has emphasised that it does not question the competence, qualifications or integrity of any one individual member of the Board.

Within the limits of the present review, the Ombudsman therefore considers that the decision of appointment here concerned does not appear to be tainted by any manifest errors of assessment.

2.7 As regards the complainant's view that the Council had, in breach of Regulation 178/2002, appointed too many national civil servants to the EFSA Management Board, the Ombudsman notes that Regulation 178/2002 contains no ceiling on members with backgrounds in the national public administrations, and that its Recitals 40 and 41 emphasise the importance of cooperation with Member States and mention experience in public administration as relevant expertise. The Council appears, therefore, to have acted within the limits of its legal authority in respect of this aspect of the complaint.

2.8 On the basis of the above findings, the Ombudsman does not consider that the complainant has established its allegation that the Council failed to follow the scheme of appointment as laid down in Regulation (EC) No 178/2002. It appears, therefore, that there has been no maladministration with regard to the complainant's first allegation.

### **3 Alleged failure to reply**

3.1 The complainant alleged that the Council had failed to reply to its letter of 5 June 2003, in which it made submissions on the matter referred to in paragraph 2 above.

3.2 In its second opinion, the Council stated that "it is regretted that due to a clerical error within the General Secretariat of the Council, the letter of 5 June 2003 was inappropriately attributed and consequently no reply was sent...".

3.3 In its observations on the Council's second opinion, the complainant asked the Ombudsman to consider whether this was in fact the cause of the failure to reply, or whether the failure to reply had been a consequence of the administrative policy or culture of the Council.

3.4 The Ombudsman does not consider that there is anything to suggest that the error referred to by the Council was not an isolated mistake. The Ombudsman furthermore trusts that the Council will seek to avoid similar errors in the future. No further inquiries into this matter therefore appear necessary.

### **4 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Council with regard to the complainant's first allegation. As regards the



second allegation, the Ombudsman has concluded that no further inquiries appear necessary. The Ombudsman therefore closes the case.

The Secretary-General of the Council will also be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) Regulation (EC) N°178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law and establishing the European Food Safety Authority and laying down procedures in matters of food safety, Official Journal 2002 L 31, p. 1.

(2) Council Decision of 15 July 2002 appointing the Members of the Management Board of the European Food Safety Authority, Official Journal 2002 C 179, p. 2.