



Decision of the European Ombudsman on complaint 760/2004/GG against the European Commission

Decision

Case 760/2004/GG - Opened on 07/04/2004 - Decision on 14/10/2004

Strasbourg, 14 October 2004

Dear Mrs H.,

On 26 June 2003, you submitted a complaint against the European Commission to the European Ombudsman concerning the Commission's decision to exclude certain expenses from Community funding. This complaint was registered under reference 1219/2003/GG. On 23 July 2003, and at my request, you forwarded a number of supporting documents to me.

On 25 July 2003, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 17 November 2003. I forwarded it to you on 26 November 2003 with an invitation to make observations.

In a letter dated 28 November 2003, you informed me that the matter should be regarded as having been dealt with. In my reply of 12 December 2003, I renewed my invitation to make observations on the Commission's opinion and offered to grant you an extension of time for doing so. I asked you to contact my office until 31 December 2003 in case you should wish to make use of this offer. However, no such contact was made.

On 2 February 2004, I closed my inquiry into complaint 1219/2003/GG with a decision in which I noted that the case had been dropped by you.

On 11 March 2004, your press officer came to Strasbourg in order to discuss the case with my services. He informed my services that you wished me to resume my inquiry into your complaint.

I therefore decided to register the complaint anew under the above-mentioned reference and to continue my inquiry. For reasons of procedural economy, I considered that the inquiry should resume at the point where the previous one had stopped, that is to say, after having obtained the Commission's opinion and after having given you the opportunity to make observations.

In order to be able to decide on the complaint in full knowledge of all relevant facts, I considered that I needed to obtain further information on the application that had given rise to the dispute and on the discussions concerning this dispute between the Commission and the German authorities. Given that your press officer had informed me that the competent



Ministry in Stuttgart was ready to forward these documents upon request, I wrote to the Ministry on 7 April 2004, asking for a copy of these documents. You were informed accordingly the same day.

On 25 May 2004, the Ministry sent me a copy of the relevant documents.

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

THE COMPLAINT Introductory remarks

The complainant first lodged a complaint with the Ombudsman in June 2003 (complaint 1219/2003/GG). This complaint was sent to the Commission for its opinion, and the Commission's opinion was then forwarded to the complainant in order to give her the possibility to make observations. The complainant's reply led the Ombudsman to believe that the complainant wished to drop her complaint. However, in order to avoid any misunderstanding, the Ombudsman wrote to the complainant again, renewing his invitation to make observations. In the absence of a reply to this letter, the Ombudsman closed his inquiry by decision of 2 February 2004 (1).

On 11 March 2004, the Ombudsman was informed that the complainant wished him to resume his inquiry into her complaint.

The Ombudsman therefore decided to register the complaint anew under a separate reference (760/204/GG) and to continue his inquiry. For reasons of procedural economy, the Ombudsman considered that the inquiry should resume at the point where the previous one had stopped, that is to say, after having obtained the Commission's opinion and after having given the complainant the opportunity to make observations

The complaint

Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ 1992 no. L 215 p. 85) provided for an aid scheme to promote inter alia the extensification of farming. Farmers could for example obtain a grant if the "Livestock Units" (LSU) per hectare did not exceed a certain figure (1.4). In order to calculate the relevant figure, the regulation provided that "Equidae over six months old" should be taken into account as 1.0 LSU. Ewes and goats counted as 0.15 LSU.

A farmer in the Karlsruhe area applied for a grant under the Regulation. His land covered 3 hectares, and he possessed 4 horses and a dwarf donkey. The farmer considered that the donkey had about the size of a ewe. He therefore calculated a total of 4.15 LSU and thus an average LSU per hectare slightly below the relevant threshold of 1.4 LSU/hectare. The competent authority in the area (the Landwirtschaftsamt Wildberg) examined the matter and arrived at the conclusion that an LSU of 0.16 was appropriate for the dwarf donkey. This meant that the relevant threshold was still respected.

A subsequent check by the European Commission led to the conclusion that this approach was incorrect, given that the donkey belonged to the "Equidae" for which an LSU of 1.0 had to be calculated. As a result, the grant that had been paid to the farmer concerned was claimed back. According to the complainant, the relevant sum amounted to 240 DM.



According to the complainant, the president of the Regierungspräsidium Karlsruhe, the Commission carries out sample checks regarding agricultural subsidies granted by Member States. For example, of 100 000 applications some 400 are checked. If it turns out that 40 out of the 400 applications checked have been granted incorrectly, the Commission takes the view that 10 % (40/400) of the total subsidy has been paid incorrectly.

According to the complainant, the Commission carried out only one check in the present context, i.e. the one on the above-mentioned farmer. Of all the applications checked (i.e., one), 100 % thus proved to have been handled incorrectly. The complainant alleges that the Commission therefore concluded that the whole subsidy granted to the Land Baden-Württemberg (EUR 927 401) should be withdrawn with effect from the following year. According to the complainant, various appeals proved to be unsuccessful.

In her complaint, the complainant basically took the view that it was unfair and disproportionate to punish the Land with nearly EUR 1 million on account of a single mistake concerning one single application.

THE INQUIRY **The Commission's opinion**

In its opinion, the Commission made the following comments:

The complaint concerned the exclusion of expenses incurred by Germany and amounting to EUR 927 401 from Community financing by Commission Decision 2003/364/EC of 15 May 2003 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (2) . The decision to exclude this amount from Community financing had in the meantime become definitive, since Germany, the only party entitled to challenge the decision, had not considered it necessary to bring an action before the Court of Justice.

As to the substance of the case, the Commission referred to the final report that had been adopted by the Conciliation Body on 22 October 2002 and forwarded to the German authorities on 24 October 2002. The Conciliation Body was established by Commission Decision 94/442/EC of 1 July 1994 setting up a conciliation procedure in the context of the clearance of the accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF) Guarantee Section (3) . Its mission was to try to reconcile the divergent positions of the Commission and the Member State concerned as regards decisions refusing Community financing under the EAGGF – Guarantee Section.

It emerges from this report that the German authorities considered the error that had been made in the individual case that is mentioned in the present complaint to be a “systematic” one whereas the Commission took the view that it constituted a “random” error. In the case of a random error found in a sample it is assumed that the error reproduces itself proportionally in all the transactions of which the sample was taken. On the contrary, a systematic error, the reasons of which can be determined, may be evaluated in isolation since it is assumed that it only affects the transactions concerned by this error.

The report of the Conciliation Body notes that during the hearing, the German authorities



admitted that, contrary to their initial declarations, the error had not been an isolated one but that some similar cases had been detected. In the Commission's view, this confirmed the "random" nature of the error.

The Conciliation Body concluded that it was unable to achieve a compromise between the views of the two parties.

The Commission maintained its position in its summary report dated 28 February 2003 concerning the results of the checks that had been carried out.

In the Commission's view, its approach had been correct, in accordance with the principles governing the audit and duly reasoned. It underlined that the Conciliation Body had not found any irregularities as regards this approach.

The Commission added that the clearance of accounts by necessity referred to a previous budgetary year that was closed. In the present case, it concerned expenses made in 2000. The financial correction thus concerned the past, even if it was made at a later stage. The clearance of accounts had no automatic repercussions for Community financing in subsequent budgetary years. The expenses made in these subsequent years were, in their turn, checked ex post.

The complainant's observations

The Commission's opinion was forwarded to the complainant for her observations. In her letter of 28 November 2003, the complainant noted that she did not dispute that the Commission had acted correctly in formal terms but made no further comments as regards the substance of the Commission's opinion.

Further inquiries

After having resumed his inquiry, the Ombudsman considered that he needed further information on the application that had given rise to the dispute and on the discussions concerning this dispute between the Commission and the German authorities. Given that the complainant's press officer had informed the Ombudsman that the competent German Ministry, the Ministerium für Ernährung und Ländlichen Raum of the Land Baden-Württemberg, was ready to forward these documents upon request, the Ombudsman wrote to the Ministry on 7 April 2004, asking for a copy of these documents.

On 25 May 2004, the Ministry sent a copy of the relevant documents to the Ombudsman.

The documents submitted to the Ombudsman comprise a copy of a letter of 26 February 2004 in which the Ministry replied to a citizen who had expressed his dissatisfaction with the Commission's decision in the case of the "dwarf donkey". In this letter, the Ministry explained that the deduction that had directly been caused by the mistake that had been made regarding the said animal had amounted to 858 646 DM. In addition with other little errors (that would not otherwise have resulted in a deduction), the total expenditure disallowed by the Commission had amounted to EUR 927 401 or 1 813 839 DM. The Ministry noted that the possibility of challenging the Commission's decision before the Court of Justice had been considered. It pointed out, however, that according to the established case-law of the Court of Justice the Commission only needed to show that there were reasonable doubts as to the



accuracy of the controls carried out by national authorities. The Member State concerned was then expected to submit detailed evidence in order to refute the shortcomings highlighted by the Commission. The Ministry pointed out that this would have been next to impossible in the present case, given that the authorities of the Land had had to handle 54 000 applications concerning the relevant programme. It added that it had therefore been decided not to bring an action against the Commission's decision. The Ministry pointed out, however, that it had submitted an initiative to the German Bundesrat according to which the federal government should try and convince the Commission that sanctions imposed should be proportionate to the errors or incorrect payments that had been made.

THE DECISION **1 Allegedly unfair decision concerning clearance of accounts**

1.1 By its Decision 2003/364/EC of 15 May 2003 excluding from Community financing certain expenditure incurred by the Member States under the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF) (4), the European Commission decided to exclude expenses incurred by Germany in 2000 and amounting to EUR 927 401 from Community financing. In her complaint to the Ombudsman, the complainant, the president of the Regierungspräsidium Karlsruhe, alleged that this decision was unfair and disproportionate since it was based on a single case where the amount at stake had been DM 240.

1.2 In its opinion, the Commission explained the reasons for its decision and expressed the view that its approach had been correct, in accordance with the principles governing the audit and duly reasoned.

1.3 The Ombudsman notes that the case that gave rise to the Commission's decision concerned an application for a grant under Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ 1992 no. L 215 p. 85). This regulation provided for an aid scheme to promote inter alia the extensification of farming. Farmers could for example obtain a grant if the "Livestock Units" (LSU) per hectare did not exceed a certain figure (1.4). In order to calculate the relevant figure, the regulation provided that "Equidae over six months old" should be taken into account as 1.0 LSU. It is undisputed that at the relevant time this category also covered donkeys. Ewes and goats counted as 0.15 LSU. A farmer in the Karlsruhe area, whose land covered 3 hectares and who had applied for a grant under the Regulation, possessed 4 horses and a dwarf donkey. Considering that the donkey had about the size of a ewe, he calculated a total of 4.15 LSU and thus an average LSU per hectare slightly below the relevant threshold of 1.4 LSU/hectare. The competent authority in the area (the Landwirtschaftsamt Wildberg) examined the matter and arrived at the conclusion that an LSU of 0.16 was appropriate for the dwarf donkey. This meant that the relevant threshold was still respected. The mistake was discovered on the occasion of a subsequent check and the farmer was asked to pay back the amount that had been paid unduly (240 DM). However, the Commission took the view that the relevant error was a random one found in a sample and that it had to be assumed that it reproduced itself proportionally in all the transactions of which the sample was taken.

1.4 The Ombudsman considers that at first sight the Commission's decision does indeed appear to be difficult to reconcile with common sense. The fact that a mistake concerning a



comparatively trivial sum should result in the disallowing of a substantial sum of money (regardless of whether one bases oneself on the total amount of EUR 927 401 or on the amount of 858 646 DM that appears to be directly due to the said mistake) is surprising, all the more so since it is fair to assume that the mistake concerning the dwarf donkey is very likely to have been the only one of its kind.

1.5 However, the Ombudsman notes that the Commission has explained that it considered the matter from a different angle. Seen from this perspective, the national authorities had committed a mistake. This mistake had been discovered when looking at a sample of the relevant applications. The Commission was therefore, in its view, entitled to assume that other mistakes had been committed as well. From the Commission's point of view, the relevant fact was not that the error in the present case had concerned a dwarf donkey but that a mistake had been made.

1.6 The Ombudsman notes that the Court of Justice has consistently held that the Commission, in order to prove an infringement of the rules on the common organisation of the agricultural markets, is not required to demonstrate exhaustively that the checks carried out by the national authorities are inadequate, or that the data submitted by them are incorrect, but to adduce evidence of serious and reasonable doubt on its part regarding the checks or data. The reason for this mitigation of the burden of proof on the Commission is that it is the Member State which is best placed to collect and verify the data required for the clearance of EAGGF accounts and, consequently, it is for that State to adduce the most detailed and comprehensive evidence that its checks or data are accurate and, if appropriate, that the Commission's statements are incorrect (see in particular *Case C-278/98 Netherlands v Commission* [2001] ECR I-1501, paragraphs 39 to 41, and *Case C-329/00 Spain v Commission* [2003] ECR I-6103, paragraph 68).

1.7 The Ombudsman notes that the German authorities accepted, in the course of their discussions with the Commission (during the hearing of the so-called Conciliation Body) that, contrary to their initial declarations, the error had not been an isolated one but that some similar cases (although not concerning other dwarf donkeys) had been detected. In her observations on the opinion, the complainant accepted that the Commission had acted correctly in formal terms.

1.8 In these circumstances, the Ombudsman considers that the Commission's approach in the present case does not constitute an instance of maladministration.

1.9 The Ombudsman considers it useful to point out that the problem that has given rise to this case could in all likelihood have been avoided if the relevant regulation had taken into account the possibility that applicants for a grant possessed dwarf donkeys. He trusts that the Commission will bear this in mind in future proposals for legislation in this field.

2 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.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) The decision is available on the Ombudsman's website (<http://www.ombudsman.europa.eu/>).

(2) OJ 2003 no. L 124, p. 45.

(3) OJ 1994 no. L 182, p. 45.

(4) OJ 2003 no. L 124, p. 45.