

Decision of the European Ombudsman closing own-initiative inquiry OI/3/99/(IJH)PB as regards the European Commission

Decision

Case OI/3/99/(IJH)PB - Opened on 29/04/1999 - Decision on 27/10/2000

Strasbourg, 27 October 2000 Dear X, On 23 October 1998, your Senior Investigator addressed a query to me in accordance with the procedure agreed at the seminar for national Ombudsmen and similar bodies held in Strasbourg in September 1996. The query concerned legal advice by the European Commission to the national Department of Agriculture and Food regarding the correct interpretation of Article 9 (2) of Regulation (EEC) 3887/92. On 3 November 1998, I forwarded the query to the European Commission. On 10 February 1999 the Commission sent an opinion, which I forwarded to you on 19 February 1999. On 29 March 1999, you sent me your observations on the Commission's opinion. On 30 April 1999 I informed the Commission of my decision to begin an own initiative inquiry into the matter raised in your query. I informed you of this decision in my letter of 30 April 1999. On 7 June 1999, the Commission sent its opinion on my own initiative inquiry, containing certain comments on the competence of my Office. On 28 June 1999 I sent a letter to the Commission in response to those comments. The Commission replied by letter of 15 July 1999. On 13 October 1999 the Commission sent me its second opinion, responding to the substantive issues raised in my own initiative inquiry. On 28 October I sent you the Commission's second opinion. On 25 November 1999 you sent your observations on the Commission's second opinion. I have also received letters or emails in which you asked for information on the progressing of the inquiry, sent on 26 November 1998, 28 July 1999, 28 April 2000 and 3 October 2000. I sincerely apologise for the length of time that it has taken to produce a response to your query.

THE BACKGROUND

In October 1998, a national Ombudsman of a EU Member State addressed a query to the European Ombudsman concerning EC agricultural aid applications by a number of farmers. The farmers had applied to the National Department of Agriculture and Food for grants under Special Beef and Extensification Premium Schemes in 1993 and 1994. The Department either rejected the applications or provided only a restricted payment, the reason being that the farmers had made inaccurate declarations on certain Area Aid forms. The Area Aid forms were an essential part of the application procedure. The farmers did not dispute that they had made inaccurate declarations, but nevertheless considered that they had been treated unfairly. Their allegation was based on the fact that they had in good faith relied on advice by a specialised agency, T., to fill in the Area Aid forms. T. is a national statutory body that was set up to provide



independent advisory, research, education and training services to the agricultural and food industry in The Member State; it is financed mainly through the budget of the Department of Agriculture and Food, and its governing board is appointed by the Minister for Agriculture and Food. It remains outside the national Ombudsman's jurisdiction. In his query to the European Ombudsman, the national Ombudsman considered that the allegation of the farmers was correct. More specifically, the national Ombudsman submitted that the Department of Agriculture and Food should have applied an EC legal provisions which provides that penalties arising out of mistakes on Area Aid applications *"shall not be applied if the farmer can show that his determination of the area was accurately based on information recognised by the competent authority"* (1) The national Ombudsman had already asked the Department of Agriculture and Food to reconsider its decisions on the farmers' applications. The Department informed the national Ombudsman that it had asked the European Commission if the above provision would apply. The Commission had replied that in its opinion the provision does not apply. *"for services provided by semi-State agencies within their role of advising farmers to fill in application forms. The benefit of the doubt given to the farmer by this article is limited to information provided by Ordnance Survey or similar authorities. I am therefore of the opinion that the approach of the Department taken up to now in this context should not be subject of any modifications."* The national Ombudsman considered that this interpretation was unnecessarily restrictive, unduly harsh in its application, and unfair. He also pointed out that as long as the Department of Agriculture and Food was acting in accordance with advise by the European Commission, he could not pursue the matter further with the Department. The national Ombudsman therefore asked the European Ombudsman to examine the Commission's interpretation of the above provision (hereinafter 'the disputed provision').

The European Ombudsman's preliminary remarks The procedure for dealing with queries of this kind was agreed at the seminar for national Ombudsmen and similar bodies held in Strasbourg in September 1996. *"The European Ombudsman will receive queries from national Ombudsmen about Community law and either provide replies directly, or channel the query to an appropriate Union institution or body for response."* The query procedure does not resemble the procedure of Article 234 EC (former Article 177), which provides for the Court of Justice to give preliminary rulings on questions of Community law raised in pending cases before national courts. The Statute of the European Ombudsman explicitly provides that no authorities other than Community institutions and bodies come within his mandate. Although it could be argued that nothing prevents him providing an abstract interpretation of a Community law issue in a complaint pending before a national Ombudsman, such an interpretation would in reality find either in favour or against the national authority concerned. It is not to be excluded the query procedure could lead to an inquiry by the European Ombudsman, either on his own initiative or on the basis of a complaint, into a possible instance of maladministration by a Community institution or body, including the institution or body to which a query has been channelled. In accordance with the above procedure, the European Ombudsman accepted the query from the national Ombudsman. The European Ombudsman therefore forwarded the query to the President of the European Commission, with a request for a response.

The Commission's response In its opinion dated 10 February 1999, the Commission maintained its view that the disputed provision should not apply for services provided by semi-State agencies within their role of advising farmers to fill in application forms. More specifically, the Commission stated that *"Official information does not seem to be given by the agency T. whose role is described as*



providing advisory, research, education and training services to the agriculture and food industry." The Commission's response was forwarded to the national Ombudsman. **The national Ombudsman's observations** On 31 March 1999 the national Ombudsman submitted his observations to the Commission's response. The national Ombudsman maintained his view that the Commission's interpretation of the disputed provision was unfair. He submitted that information provided by T. to farmers should be regarded as "information recognised by the competent authority" within the disputed provision, and that there could be little doubt that information furnished by T. is "recognised" by the Department of Agriculture and Food (the "competent authority"). The national Ombudsman also disagreed with the Commission's conclusion that information provided by T. is not "official" information, given that the agency operates under the aegis of the Department of Agriculture and Food.

THE EUROPEAN OMBUDSMAN'S DECISION TO BEGIN AN OWN INITIATIVE INQUIRY

On 24 April 1999, the European Ombudsman decided to begin an inquiry on his own initiative, under Article 138e of the EC Treaty (now Article 195), into a possible instance of maladministration by the Commission in relation to the guidance which it has given to the national Department of Agriculture and Food concerning the application of Commission Regulation 3887/92 to the cases raised by the complaints to the national Ombudsman. The reason for the inquiry was that the Commission's interpretation of the disputed provision, i.e. Article 9 (2) of Commission Regulation (EEC) 3887/92, appeared narrower than the literal meaning of the provision and produced a result which was unfair, in that it penalised applicants for aid who acted in good faith on official advice. Furthermore, the Commission's interpretation appeared to depend in part on the classification of T. as a "semi-state" body. It was not obvious, however, why the legal status which the Member State has chosen to confer on such a body should be relevant in this context. Finally, the European Ombudsman was not aware of any case law of the Community Courts which supported the Commission's interpretation of the provisions in question. The Commission was asked to provide its opinion on these points. **The Commission's first opinion on the European Ombudsman's own initiative inquiry** On 7 June 1999, the Commission provided its opinion on the European Ombudsman's own initiative inquiry. The opinion first made reference to the Ombudsman's request for an opinion, in the following terms: *"In his letter of 29.04.1999 the European Ombudsman requires the Commission to modify its interpretation of part of Article 9 (2) of Commission Regulation 3887/92 ..."*. The Commission's opinion then stated that *"The Commission notes that according to Article 1.2 of his Statute, 'the Ombudsman shall perform his duties in accordance with the powers conferred on the Community institutions and bodies by the Treaties. The Commission is of the opinion that the legal interpretation of an article of a regulation is not a matter of maladministration. According to art. 220 (formerly art. 164) of the Treaty, this question could eventually be decided by the Court of Justice."* The Commission also stated that it would nevertheless endeavour to re-examine its stance on the interpretation of the disputed provision. The Commission's comments on the European Ombudsman's competence are addressed in a further remark to this decision. **The Commission's final opinion on the Ombudsman's own initiative inquiry** In its final opinion, the Commission first pointed out that part of the purpose of adopting the legislation which contains the disputed provisions, i.e. Regulation 3887/92, was to prevent and penalise irregularities and fraud effectively. It added that the correct management of the aid



schemes is one of the essential requirements in the administration of the agricultural policy, aiming inter alia at avoiding excessive expenditure to the EU-budget. As for the substance of the European Ombudsman's inquiry, the Commission observed that the starting point is that farmers who apply for aid are themselves responsible for the accuracy of the data entered on the relevant forms. This applies also if the farmers have received assistance and support to fill in the forms. If the farmers have received incorrect advice, then they have legal means of recourse against the advisor. The legal status of the organisation or body which provides the information is, however, irrelevant. An exception to the principle of application of sanctions in the case of mistakes on Area Aid forms is contained in the disputed provision, i.e. Article 9 (2) of Regulation 3887/92. According to the case law of the Community Courts, an exception must be construed in a restrictive manner. As Article 9 (2) concerns mistakes in the "determination of the area", the "information recognised by the competent authority" is that which relates to the measurement of parcels. Such information is provided by the Ordnance Survey or similar bodies. The Commission does not consider that T., although operating under the aegis of the department of Agriculture, could be considered one of these authorities. It is more likely that it acts as an independent advisor, which avails itself of some kind of official information, while offering a wider service to the farmers. The Commission furthermore noted that Regulation 3887/92 provides for Member States to allow claims of Area Aid to be adjusted without sanctions in cases of genuine error which have to be recognised as such by the competent Authority of the Member State, which is the authority entitled to receive and check the aid claims (Article 5a, inserted by Regulation (EC) No. 229/95, OJ L 27 of 4.2.1995, p 3 (2)). The responsibility of recognising errors lies with the Member States. The Commission also pointed out that it had modified Regulation (EEC) No. 3887/92 by introducing a clause giving farmers the possibility, under certain conditions, of correcting information in their applications which could lead or have led to the imposition of penalties (Article 11.1a, as amended by Regulation (EC) No. 1678/98, OJ L 212 of 30.7.1998, p 23 (3)). The relevant authorities of the Member States therefore now have at their disposal mechanisms to obviate the imposition of penalties in circumstances which they may consider to be unfair. Under these circumstances, the Commission saw no reason to modify its position as expressed in its communication to the national Department of Agriculture and Food. **The national Ombudsman's observations on the Commission's opinion** The national Ombudsman restated his view that information provided by T. should be considered "information recognised by the competent authority" within Regulation 3887/92. He referred to T.'s legal status and its expertise on EU agricultural legislation. The national Ombudsman also addressed the Commission's reference to Article 5a of Regulation 3887/92, as inserted by Regulation (EC) No. 229/95. He asked for clarification from the Commission on whether this provision could be applied by the national Department of Agriculture and Food to reassess the merits of the individual cases that the national Ombudsman was investigating. The national Ombudsman finally observed that the Commission's reference to Article 11.1a of Regulation 3887/92, as inserted by Regulation (EC) No. 1678/98, was irrelevant in that the provision was not available at the time when the farmers in question received the decisions of the Department of Agriculture and Food.

THE DECISION

1 The reasons for the European Ombudsman's own initiative inquiry 1.1 The European Ombudsman's decision to conduct the own initiative inquiry was prompted by a query from the



national Ombudsman, submitted under the query procedure between national ombudsmen and the European Ombudsman. The query revealed facts which could suggest that there had been maladministration in legal advice given by the European Commission to the national Department of Agriculture and Food. 1.2 The potential maladministration concerned the Commission's interpretation of Article 9 (2) of (EEC) Regulation 3887/92. Article 9 (2) provides that penalties arising out of mistakes on Area Aid applications *"shall not be applied if the farmer can show that his determination of the area was accurately based on information recognised by the competent authority"* 1.3 The Commission had advised the national Department of Agriculture and Food that Article 9 (2) was not applicable in cases where farmers had inaccurately filled in their application forms as a result of incorrect information provided to them by the national body 'T.', an agency described as a "semi-state" agency. The Commission's advice had led the national Department of Agriculture and Food to maintain its decisions to reject aid-applications by a number of farmers, or impose penalties. 1.4 The Commission's advice to the Department of Agriculture and Food suggested a narrower interpretation than the literal meaning of the provision and produced a result which was unfair, in that it penalised applicants for aid who acted in good faith on official advice. Furthermore, the Commission's interpretation appeared to depend in part on the classification of T. as a "semi-state" body. It was not obvious, however, why the legal status which the Member State has chosen to confer on such a body should be relevant in this context. **2 The Commission's re-examination of its interpretation** 2.1 The European Ombudsman requested the Commission to re-examine its interpretation of Article 9 (2) Regulation 3887/92. In its final opinion, the Commission, stated that it applied the principle of the case law of the Court of Justice that exceptions shall be interpreted restrictively. The Commission therefore interpreted Article 9 (2) to refer only to information concerning the "determination of the area". The information would therefore have to be produced by bodies which are specifically concerned with area determination, such as the national Ordnance Survey or similar bodies. According to the information held by the Commission, T. does not produce such information, but has a primarily advisory function. The Commission also concluded that the legal status of the body that produces the information referred to in Article 9 (2) is irrelevant. 2.2 The European Ombudsman acknowledges the applicability in this case of the legal principle that exceptions shall be interpreted restrictively. The Ombudsman also takes note of the fact that the Commission appears to have modified its view on the relevance of the legal status of the agency. 2.3 The Commission appears to have applied in a reasonable manner the principle that exceptions shall be interpreted restrictively. The Ombudsman does not, therefore, find reason to conclude that there has been maladministration in the Commission's interpretation of Article 9 (2) of Regulation 3887/92. 2.4 As regards the status of the agency, the Ombudsman welcomes the clarification of the Commission's stance in respect of the status of the body that produces the information referred to in Article 9 (2). While the Commission's initial formulation appeared to support the view that T.'s status as a "semi-state" agency was a determining factor in the application of the exception provided for in Article 9 (2), the Commission's final opinion to the present inquiry has revealed that this is not the case. It is therefore not implied in the Commission's interpretation that the creation of quasi-public bodies in itself reduces citizen protection within the framework of Regulation 3887/92. The fact that the agency is outside the national Ombudsman's jurisdiction is a national matter which is not within the European Ombudsman's competence to comment on. **3 The Commission's additional legal information and advice** 3.1 In addition to its



re-examination of its interpretation of Article 9 (1) of Regulation 3887/92, the Commission provided information on other legal provisions which may enable national authorities to avoid or remedy unfairness in their application of EC aid schemes. It referred to Article 5a of Regulation 3887/92, inserted by Regulation (EC) 229/95, and Article 11.1a, as amended by Regulation 1678/98. The Commission appears to suggest that Article 5a is a basis on which the national Department of Agriculture and Food could possibly provide some remedy to the farmers. Article 11.1a is, as noted by the national Ombudsman, not directly pertinent to the farmers concerned, given that the provision did not exist at the relevant time of the farmers' dispute with the Department. 3.2 While it is regrettable that the Commission did not draw attention to Article 5a in its original reply to the national Department's request for information on Article 9 (2), and although Article 11.1a does not have a direct relevance to the farmers concerned, the Ombudsman welcomes the fact that the Commission has now endeavoured to provide information on other possible means to avoid or remedy injustices. 3.3 As concerns the national Ombudsman's request for a clarification of the Commission's stance on the applicability of Article 5a, the European Ombudsman notes that this request goes beyond the present inquiry. **4 Conclusion** On the basis of the Ombudsman's own initiative inquiry, initiated on the basis of a query submitted by the national Ombudsman, there appears to be no maladministration in this case. The Ombudsman therefore closes the case. The President of the European Commission will also be informed of this decision.

FURTHER REMARKS

The European Commission's comments on the Ombudsman's competence The European Ombudsman considered that two points in the Commission's first opinion to his own initiative inquiry required comment since they appeared to be based on misunderstandings about the procedures and mandate of the European Ombudsman. The first point concerned the Commission's statement that *"the European Ombudsman requires the Commission to modify its interpretation"*. This is not an accurate description of the opening of an inquiry by the Ombudsman, which consists of a request to the Commission to give its opinion on a possible instance of maladministration. The second point concerned the Commission's statement that *"... that the legal interpretation of an article of a regulation is not a matter of maladministration. According to art. 220 (formerly art. 164) of the Treaty, this question could eventually be decided by the Court of Justice."* The European Ombudsman is always mindful of the fact that the highest authority on the meaning and interpretation of Community law is the Court of Justice. Furthermore, in accordance with Article 195 of the EC Treaty the Ombudsman cannot conduct inquiries where the alleged facts are or have been the subject of legal proceedings (emphasis added). In practice, however, neither the national Ombudsman nor the citizens who complained to him has brought, or could easily bring, legal proceedings concerning the issue. The Ombudsman also pointed out that the meaning of the term "maladministration" is of fundamental importance for the work of the Ombudsman. For this reason, the Ombudsman dealt with the matter in the very first Annual Report, for 1995, which stated: *"Neither the Treaty nor the Statute defines the term 'maladministration'. Clearly, there is maladministration if a Community institution or body fails to act in accordance with the Treaties and with the Community acts that are binding upon it, or if it fails to observe the rules and principles of law established by the Court of Justice and Court of First Instance."* The 1995 Annual Report was considered by the responsible Committee of the European Parliament, which accepted the



above explanation of maladministration, and a plenary debate took place on 20 June 1996 to which Commissioner Marin contributed. The explanation of the term maladministration in the 1995 Annual Report was also referred to with approval at the meeting of the European national ombudsmen held in September 1997. In the discussion of the 1996 Annual Report by the Parliament, there was a call for a more precise definition of maladministration and the European Ombudsman undertook in the plenary debate to provide such a definition. The Ombudsman asked the national ombudsmen and similar bodies to inform the Ombudsman of the meaning given to the term maladministration in their Member States. From the replies received, it appears that the fundamental notion can be defined as follows: *Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.* This definition was included in the Annual Report for 1997, together with a commentary which emphasised that when the European Ombudsman investigates whether a Community institution or body has acted in accordance with the rules and principles which are binding upon it, *"his first and most essential task must be to establish whether it has acted unlawfully"*. Following a plenary debate held on 14 July 1998, in which Commissioner Gradin welcomed the fact that the meaning of the term "maladministration" has now been clearly defined, the European Parliament adopted a resolution on 16 July 1998 welcoming the definition of maladministration and stating that the definition and the examples mentioned in the Annual Report for 1997 give a clear picture as to what lies within the remit of the European Ombudsman (4). This definition was repeated in the 1998 Annual Report, which was debated in the European Parliament on 15 April 1999 in the presence of Commissioner Monti. Against this background, the European Ombudsman expressed his surprise that the Commission should wish to re-open a matter which has already been dealt with through a procedure in which it has had full opportunity to make its views known. If the Commission considers that the interests of European citizens would be better served by making the Ombudsman's mandate narrower, it has the possibility to propose an amendment to the Treaty so as to exclude cases in which the complainant has a possible remedy before a court or tribunal. This restriction would be highly unusual, as is made clear by the Council of Europe's definition of an ombudsman's role, which includes review of the lawfulness of administrative acts (5). Such a restriction does exist, however, in the law governing the Parliamentary Commissioner in the United Kingdom. Unless and until the Treaty is amended to impose a similar restriction on the European Ombudsman, however, he should continue to fulfil the present Treaty mandate, which allows inquiries unless the facts *"are or have been subject to legal proceedings"*. The European Ombudsman informed the Commission that in addition to receiving the outcome of the Commission's re-examination of its stance on the disputed provision of the present inquiry, he would also be grateful to be informed of whether the Commission accepts the definition of maladministration, included in the Ombudsman's Annual Report for 1997 and welcomed by the European Parliament in the resolution which it adopted on 16 July 1998, following the proposal by the Committee on Petitions (6). **The Commission's response dated 15 July 1999** In response to the European Ombudsman's remarks on his competencies, the Commission sent a reply in which it intended to clarify its position. It referred to the definition of "maladministration", according to which *"maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it"*, and stated that: *"Commissioner Gradin agreed on behalf of the Commission on 14 July 1998 in the European Parliament to this definition and underlined that it was most useful that this definition had now been clarified"*. The Commission added that it



agreed with the Ombudsman that he may investigate interpretations given which produce results that may be unfair. The European Ombudsman notes that the question of the Ombudsman's competence is now settled, and requests the President of the European Commission to ensure that the responsible Commission services take into account these further remarks, as well as the Commission's response to them, when preparing the Commission's replies to the Ombudsman. Yours sincerely Jacob Söderman

(1) Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administration hand control system for certain Community aid schemes; OJ L 391, 31.12.1992, p 36, Article 9 (2).

(2) "Without prejudice to the provisions contained in Articles 4 and 5, an aid application may be adjusted at any time after its submission, in cases of obvious error recognized by the competent authority."

(3) "The penalties applicable according to Articles 9 and 10 shall not be imposed in cases where the farmer, on finding that the application which he has lodged contains errors other than those made intentionally or by serious negligence incurring one or more of the said penalties, within 10 working days of finding these errors, informs the competent authority in writing, provided that the authority has not notified the farmer of its intention to carry out an on-the-spot control, the farmer has not been able to learn of this intention in any other way and the authority has not already informed the farmer of the irregularity in the application."

(4) OJ 1998 C 292/168.

(5) The Administration and You: a handbook, 1996 p. 44.

(6) A4-0258/98.