

Decision of the European Ombudsman on complaint 1580/2005/JMA against the European Commission

Decision

Case 1580/2005/JMA - Opened on 29/04/2005 - Decision on 30/07/2007

Strasbourg, 30 July 2007

Dear Mr X,

On 11 April 2005, you submitted a complaint to the European Ombudsman against the European Commission, concerning the alleged failure on the part of its services to give you a reply, within a reasonable time, to the request you had made in July 2003 to have access to a Eurostat database.

On 29 April 2005, I informed the President of the Commission of this complaint, and asked him to submit an opinion. On 20 July 2005, the Commission sent me its opinion, which I forwarded to you with an invitation to make observations. On 30 July 2005, you sent your observations.

On 23 August 2006, I wrote to the President of the Commission in order to seek a friendly solution to your complaint. On 27 September 2006, I extended the deadline for the Commission's reply until the end of October 2006. On 6 November 2006, the Commission sent its reply to the Ombudsman's proposal for a friendly solution, which I forwarded to you with an invitation to make observations. On 15 December 2006, you sent your observations on the Commission's reply to my proposal for a friendly solution.

On 5 February 2007, I wrote again to the President of the Commission in order to assess whether your conditions for a friendly solution could be accepted by the institution. On 2 March 2007, the Commission requested an extension of the deadline to reply. By letter of 12 March 2007, I granted the Commission's request until the end of March 2007. The Commission replied to my new proposal on 3 April 2007. I forwarded the Commission's reply to you on 17 April 2007, with an invitation to make observations. On 25 May 2007, you sent your observations on the new Commission's proposal.

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

THE COMPLAINT



The facts of the case according to the complainant are, in summary, as follows:

The complainant works in a university. He was working on a research project financed by a national Ministry of Education on a comparative EU study. A significant amount of data for his research was held by Eurostat. Having requested information on the formalities to gain access to that material, the complainant was informed, on 2 July 2003, that the procedure was somewhat cumbersome, to the extent that all EU Member States had to be consulted on the research project and the data requested, and that a fee of EUR 8 000 had to be paid. The reply to the complainant concluded that it could take approximately six weeks to have his application processed. Because of the fees involved in any consultation, on 18 July 2003, the complainant requested his sponsor to modify the budgeted foreseen for his project, which it agreed to do on 18 September 2003.

On 9 July 2003, in reply to the complainant's formal request to have access to a database, Eurostat informed him that the procedure was under way. Eurostat explained that the request had been forwarded to the responsible authorities of all EU Member States, and that a reply should be forthcoming within six weeks. On 22 July and 4 August 2003, Eurostat requested additional information, which was sent by the complainant on 7 August 2003. On 25 September 2003, the complainant was informed that the process had been successfully completed and that he should receive a contract within a week. Upon the contract's signature, the requested data would then be sent to him in CD-ROM format.

On 7 October 2003, the complainant received an e-mail from Eurostat which stated that "*because of the Eurostat's legal situation, a number of questions concerning contracts demanded legal clarification*", as a result of which Eurostat regretted that the complainant would not be able, for the time being, to receive the contract or the requested data. In view of this situation, the complainant tried to obtain the data from other sources, to which he had to travel, in October 2003, at his own expense. This trip cost the complainant EUR 1 804.02.

On 18 November 2003, in the absence of further news, the complainant contacted Eurostat's focal point near his place of residence. In a reply dated 24 November 2003, he was advised to approach the two Eurostat officials responsible for the handling of his request in Eurostat's headquarters in Luxembourg. On 25 November 2003, the complainant wrote to them, summing up the procedure followed up to that point, and requesting information on the current impasse. He received no reply to his communication.

As the funding for his research project expired at the end of 2003, the complainant asked Eurostat to have his data request billed to him in advance. On 18 December 2003, Eurostat explained to him that that option was not feasible.

In May 2004, the complainant tried to obtain information on the state of his request and was informed that the situation had not changed. In view of the reply, on 22 December 2004, the complainant submitted a formal complaint to Eurostat, in which he claimed reimbursement amounting to EUR 1 804.02 for the expenses he incurred in order to obtain the information through a foreign university and asked that the requested data be forwarded to him free of



charge. In a reply dated 1 March 2005, Eurostat informed him on that, due to an unforeseeable reorganisation, all on-going administrative and judicial proceedings had to be put on hold. The reorganisation of Eurostat was completed only in July 2004, at which date all previous requests were honoured. Given that the complainant appeared to have had an interest in obtaining the data by the end of 2003, Eurostat's focal point erroneously concluded that he no longer needed the requested information. Eurostat rejected the complainant's claims, and informed him that, if he so wished, he could request a re-examination of his complaint by the Commission's Secretary-General.

In his complaint to the European Ombudsman, the complainant alleged, in summary, that, there had been excessive delay by the Commission in sending him a contract for access to a database.

The complainant claims that the Commission should compensate him for the costs and loss of income that resulted from the excessive delay.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission first described the background of the case. It explained that, in July 2003, the complainant requested access to certain information. His request was originally addressed to the former Data Shop, near his city of residence, which forwarded it to Eurostat.

Eurostat explained that, up to 30 September 2004, it had maintained a network of Data Shops in various EU Member States, located mainly at National Statistical Institutes. Some Data Shops were managed by private companies. This was the case in the complainant's country. The Data Shops served as the first contact point for Eurostat data users, acting as sole intermediaries between Eurostat and its data users. Accordingly, users who needed to exploit Eurostat databases had to address their requests to the Data Shops.

Since October 2004, a new policy of free dissemination of statistical data by Eurostat has been put in place. For certain sets of microdata falling within the scope of Commission Regulation (EC) No 831/2002 of 17 May 2002 implementing Council Regulation (EC) No 322/97 on Community Statistics, concerning access to confidential data for scientific purposes (1) ("Regulation 831/2002"), a pricing policy agreed with Member States is followed in all cases, in order to avoid unfair competition.

Following the complainant's request, a consultation with all EU Member States on the project descriptions was launched. In July and August 2003, the Data Shop and the complainant contacted each other a number of times concerning the details of the request. On 25 September 2003, once the consultation with the Member States was completed, the Data Shop, pursuant to Regulation 831/2002, informed the complainant that the contract would be prepared and sent to him. In October 2003, however, Eurostat had to go through internal investigations and, as a result, all contracts under preparation were blocked. At the time, Eurostat was not able to forecast how long the situation would last. On 7 October 2003, in response to his requests, the



complainant was informed of the situation by the Data Shop. In November 2003, Eurostat confirmed this information. On 18 December 2003, Eurostat confirmed that the situation had not changed and that the proposal made by the complainant in a telephone conversation with its services, whereby the project would be invoiced to him before signing the contract, could not be accepted.

On 28 April and 11 May 2004, Eurostat, the Data Shop and the complainant had an exchange of e-mails, on the basis of which Eurostat and the Data Shop came to the conclusion that, due to the long delay involved, the complainant no longer required the data. The Data Shop also came to this conclusion following a visit to its premises, which the complainant made in April 2004. In July 2004, the situation was resolved and all parties that had requested data up to July 2004 were finally supplied with a contract and a CD-Rom.

On 22 December 2004, the complainant sent a complaint letter to the Commission's Secretariat-General stating that Eurostat had breached the Code of Good Administrative Conduct. In reply to his complaint dated 1 March 2005, Eurostat confirmed that it had acted properly.

As regards the complainant's claim to have his travel costs for EUR 1 804.02 reimbursed, the Commission explained that it could not grant the request, since at that time there were no contractual arrangements with the complainant to cover costs which he assumed on his own initiative. Furthermore, the foreign university was not contractually entitled to give the complainant access to these data. In his complaint to the Ombudsman, the complainant has requested the payment of EUR 8 000 to compensate for the loss of the subsidy from his sponsor, which would have been used to acquire the requested data. Eurostat noted that, in its letter of 1 March 2005, it had already informed the complainant that the Commission was not involved in the issue of his subsidy and therefore, was not in a position to make the payment. In addition, this part of the subsidy corresponded to the price of the CD-Rom which, in no case, could be considered as a loss to the complainant.

For legal reasons, the Commission was also unable to provide the complainant with the relevant information free of charge as requested. The National Statistical Institutes of all EU Member States charge for their national microdata and therefore Eurostat cannot be seen to be in a position of creating unfair competition by providing the data free of charge.

The Commission considered that Eurostat and the Data Shop had treated the complainant's request correctly, although clearly the delays he faced were lengthy and unfortunate. However, these delays arose from extraordinary circumstances during the period of his request, which the Commission regrets, but for which it could not consider itself responsible.

In view of the situation, the Commission took therefore the view that its services had acted correctly and that there was no instance of maladministration in this case.

The complainant's observations

In his observations, the complainant repeated the allegations made in his complaint.



The complainant stressed that no information was given to him on the situation which gave rise to the suspension of the procedure. He was never told of the nature of the allegations against Eurostat and the seriousness of the judicial and administrative inquiries carried out. In reply to his query of 7 October 2003, the complainant was merely informed that, for the time being and without any further reasoning, no more contracts could be sent out for signature. In his view, that reply could not constitute a timely and adequate response. In addition, the complainant noted that, notwithstanding the Commission's assertion in its opinion, no reply was given to his written queries of 25 November 2005.

The complainant also pointed out that he could not have suggested that he was no longer interested in the data requested, since, on 5 May 2004, he had once more asked for information on the state of the file.

THE OMBUDSMAN'S EFFORTS TO ACHIEVE A FRIENDLY SOLUTION

The Ombudsman's proposal

After a careful evaluation of the opinion and observations, the Ombudsman took the view that the Commission had not responded adequately to the complainant's allegation and claim, in particular that, in breach of Article 17 of the European Code of Good Administrative Behaviour, it had failed to take a decision on the complainant's request within a reasonable time. The Ombudsman therefore considered that it could be appropriate for the Commission to make a financial gesture to alleviate the consequences of the maladministration for the complainant, by offering to facilitate his access to the requested data at a discounted price. This view was based on the following considerations:

The Ombudsman acknowledged that the situation in question, namely, Eurostat's delay in handling the complainant's request for access to a database, occurred as a result of a complete re-organisation of the Office which the Commission undertook as of October 2003. The magnitude of those changes was illustrated in the reply to a parliamentary question given by Mr Prodi, former Commission President on 19 December 2003, to which the complainant himself referred in his observations.

It appeared therefore that the depth of the internal reforms undertaken in Eurostat at the time were of such magnitude that they seriously impinged on the Office's normal business, making it impossible for it to carry some of its administrative procedures and, as a corollary, to honour its contractual commitments.

The Ombudsman considered, however, that even if the situation at Eurostat had been so serious as to call for extensive measures that had a disruptive effect on Eurostat's ability to carry out its normal activities, Eurostat was part of the Commission. The Commission should have therefore ensured that (i) the complainant received adequate information concerning the situation and the expected timeframe for dealing with his request, and (ii) the commitment given by Eurostat to the complainant was fulfilled.



As regards the information given by Eurostat or its agents, the Ombudsman noted that the Office did not take the initiative to contact the complainant in order to explain the situation and inform him that its previous commitments could not be kept. It appeared that the only communications from Eurostat in that regard had been made in reply to the complainant's correspondence concerning the state of his request, dated 18 and 25 November 2003, 25 December 2003, and 11 May 2004.

Having carefully reviewed the replies given by Eurostat or its agents to those queries of 7 October 2003, 24 November 2003, and 11 May 2004, the Ombudsman pointed out that Eurostat did not give the complainant any clear indication on the type of situation it confronted, its implications for potential customers, or a foreseeable timetable for resuming operations. Instead Eurostat's correspondence only referred to the existence of general problems affecting the organisation, which made it impossible for the Office to send a contract to the complainant (2) , as promised on 29 September 2003 (3) .

The Ombudsman was mindful of the fact that Eurostat had only informed the complainant on 1 March 2005 of the reasons which justified the suspension of its handling of all requests for data contracts, and more generally of the situation it had encountered. This information was contained in its reply to the complaint lodged by the complainant on 22 December 2004 regarding the Commission's failure to comply with its own Code of Good Administrative Behaviour.

The Ombudsman recalled that, as enshrined in Article 41(1) of the Charter of Fundamental Rights of the European Union:

" Every person has the right to have his or her affairs handled (...) within a reasonable time by the institutions and bodies of the Union. "

In pursuit of this principle, Article 17 of the European Code of Good Administrative Behaviour establishes that:

" 1. The official shall ensure that a decision on every request or complaint to the Institution is taken within a reasonable time-limit, without delay, and in any case no later than two months from the date of receipt. (...)

2. If a request or a complaint to the Institution cannot, because of the complexity of the matters which it raises, be decided upon within the above mentioned time-limit, the official shall inform the author thereof as soon as possible. In that case, a definitive decision should be notified to the author in the shortest time. "

The Ombudsman considered that, because of the magnitude of the changes imposed on Eurostat since October 2003, the Commission should have been aware that pending decisions concerning requests for data from third parties could not be replied to within a reasonable time. Accordingly, the Commission should have informed the authors of those requests within a reasonable time of the difficulties Eurostat had encountered, so that the citizens affected could



be aware of the situation and, on the basis of that information, take the most appropriate alternative course of action.

In this case, however, the Ombudsman noted that Commission gave a proper explanation to the complainant only in March 2005, that is to say, 19 months after he submitted his request.

The Ombudsman therefore concluded that the Commission had, in breach of Article 17 of the European Code of Good Administrative Behaviour, failed properly to inform the complainant of Eurostat's predicament as soon as it was aware of it and that this failure constituted an instance of maladministration.

As regards the substantive decision on the complainant's request, the Ombudsman noted that no decision appeared to have been taken yet. Even though the Commission had argued that, on the basis of an exchange of e-mails dated 28 April and 11 May 2004, its services had come to the conclusion that the complainant no longer required the data, the Ombudsman found no evidence that the complainant had formally withdrawn his request. Having carefully reviewed the content of those exchanges, the Ombudsman considered that they did not reveal any intention on the part of the complainant to have his request withdrawn, but rather expressed his concern about the financial aspects of the contract. Such concern was understandable, given that the financial assistance he received from his sponsor had expired.

In connection with the complainant's claim that Commission should compensate him for the costs and loss of income that resulted from the excessive delay, the Ombudsman noted that the Commission was correct to point out that a claim for compensation could not be based on a contract because none existed at the time. Nonetheless, in view of his findings of maladministration, the Ombudsman considered that the Commission could agree to make a financial gesture towards the complainant.

By letter dated 23 August 2006, the Ombudsman therefore proposed that it could be appropriate for the Commission to make a financial gesture to alleviate the consequences of the maladministration for the complainant by offering to facilitate his access to the requested data at a discounted price. The Commission could state expressly that its offer is made on an *ex gratia* basis, and without admission of any legal liability.

The Commission's reply to the proposal for a friendly solution

In its communications with the Ombudsman subsequent to the proposal for a friendly solution, the Commission acknowledged that, even if the delays the complainant faced arose as a result of extraordinary circumstances, the delays were lengthy and unfortunate. For this reason, the Commission expressed its readiness to make a gesture aimed at alleviating the consequences suffered by the complainant. After having considered the complainant's observations and the Ombudsman's provisional conclusions, and on the basis of further clarifications in relation to the needs of the complainant, the Commission agreed to offer the complainant access to the database for the discounted price of 3 000 EUR, which represents a discount of 62.5 % compared to the original price.

The Commission pointed out that its offer was made on an *ex gratia* basis, and without



admission of any legal liability.

The complainants' observations

In his reply, the complainant expressed satisfaction for the successful mediation carried out by the Ombudsman. He stated that, as a sign of goodwill, he had decided to accept the Commission's proposal, and to purchase the database in question at a total price of EUR 3 000. He noted that, in the near future, he would take the necessary measures to obtain the necessary funds to pay the EUR 3 000 for access to the relevant database.

THE DECISION

1 Excessive delay to obtain access to a Eurostat's database, and requested compensation

1.1 The complainant alleges that there was excessive delay by the European Commission in sending him a contract for access to a Eurostat database, and claims therefore that the Commission should compensate him for the costs and loss of income that resulted from it.

1.2 For the reasons explained above, after a careful evaluation of the Commission's opinion on the complaint and the complainant's observations, the European Ombudsman proposed that a friendly solution be reached between the parties.

1.3 The Ombudsman notes that, in reply to his proposal, the Commission agreed to offer the complainant access to the requested data at the price of EUR 3 000, as a means of alleviating the effects of the lengthy delays he had to face. The Ombudsman also notes that the complainant has expressed his satisfaction with the Ombudsman's successful mediation, which led the Commission to make an offer which he has accepted.

In view of this circumstances and taking into account that the complainant has expressed satisfaction with the Commission's offer, the Ombudsman considers that the case has been settled by the institution.

2 Conclusion

Following the Ombudsman's initiative, it appears that a friendly solution to the complaint has been agreed between the Commission and the complainant. The Ombudsman therefore closes the case.

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

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 2002 L 133, p. 7.

(2) Eurostat's reply of 7 October 2003 read in the relevant part: "*I am sorry, but for the*



*moment I cannot send out any contracts for signature. Due to the actual situation at Eurostat, some topics of these contracts need to be legally clarified and are under examination right now (...). I cannot give you an estimation on how long this will take ". Eurostat's reply of 24 November 2003 stated, *inter alia* , " I cannot give you any more information concerning your contract (...) ". Eurostat's reply of 11 March 2004 stated, *inter alia* , that " [e]verything concerning [...]contracts is still on hold within Eurostat ".*

(3) " The six weeks delay for approval of the projects by the Member States are over now. The contract will be sent to the client for signature during next. Once returned to us and signed by Eurostat, the CD Rom with the data will be transmitted to the client ".