

## **Decision of the European Ombudsman on complaint 2200/2005/GG against the European Commission**

Decision

**Case 2200/2005/GG - Opened on 28/06/2005 - Decision on 17/01/2006**

Strasbourg, 17 January 2006

Dear Mr W.,

On 15 June 2005, you made a complaint to the European Ombudsman concerning the European Commission's handling of a request for access to a document.

On 28 June 2005, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 18 October 2005. I forwarded it to you on 24 October 2005 with an invitation to make observations, which you sent on 28 November 2005.

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

### **THE COMPLAINT**

Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (1) ("Regulation 2081/92") provides for the possibility to award special protection to a "geographical indication". According to Article 5, applications for protection under this heading are to be submitted to the European Commission by the Member State concerned. Article 6 (1) provides that the Commission "shall make public any application for registration, stating the date on which the application was made" and that the Commission shall verify, within six months, whether the conditions set out in the Regulation for a registration are fulfilled. If the Commission reaches the conclusion that these conditions are fulfilled, it shall (according to Article 6 (2) of the Regulation) publish in the Official Journal "the name and address of the applicant, the name of the product, the main points of the application, (...) and, if necessary, the grounds for its conclusions". Article 7 provides that any Member State may object to the registration within six months of the publication in the Official Journal.

According to Article 1 of Commission Regulation (EC) No 918/2004 of 29 April 2004 introducing transitional arrangements for the protection of geographical indications and designations of origin for agricultural products and foodstuffs in connection with the accession of the Czech



Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (2) ("Regulation 918/2004"), where an application under Regulation 2081/92 was forwarded to the Commission by one of these countries by 31 October 2004, the protection already afforded under national law "may be upheld until a decision has been taken in accordance with Article 6 of that Regulation".

According to the Commission's online register of applications, the Czech authorities submitted, on 19 October 2004, a request to protect the indication "Pravé olomoucké tvarůzky" (a cheese speciality).

On 1 April 2005, the complainant, the director of a German association for the protection of milk and milk products, asked the Commission for access to this document. This request was made on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (3) ("Regulation 1049/2001").

In the absence of a reply, the complainant lodged a confirmatory application on 10 May 2005.

In a letter dated 18 May 2005 in which it replied to the request for access of 1 April 2005, the Commission informed the complainant that no access could be granted to the relevant document. The Commission pointed out that it had consulted the Czech authorities under Article 4 of Regulation 1049/2001 and that the latter had opposed disclosure of the document. According to the Commission, the exception set out in Article 4 (3) of the Regulation was applicable.

On 9 June 2005, the Commission rejected the confirmatory application. The Commission submitted that a consultation of the Czech authorities had been necessary since the document originated from the latter. The Czech authorities having opposed disclosure, Article 4 (5) of Regulation 1049/2001 was applicable. There was therefore no need to examine other possible exceptions. In this context, the Commission referred to the judgment of the Court of First Instance of 30 November 2004 in Case T-168/02 *IFAW v Commission*. According to the Commission, no partial access was possible, either, given that the Czech authorities had opposed disclosure of the whole document.

The Commission apologised for the fact that the decision on the initial request for access had been delayed.

In his complaint to the Ombudsman, the complainant noted that he did not wish to insist on the procedural defect regarding the delay of the reply to his initial request. He submitted, however, that the document had lost its character as a document originating from a Member State by virtue of the fact that it was mentioned on a website of the Commission and had thus become an integral part of the Commission's documents. The complainant also pointed to the legal effects that the application had created pursuant to Regulation 918/2004.

Based on these considerations, the complainant took the view that the Commission's decision



to refuse to grant access to the relevant document was wrong. He claimed that he should be given access to this document.

## THE INQUIRY

### The Commission's opinion

In its opinion, the Commission made the following comments:

The number, date and the subject of the application were available online ( [http://ec.europa.eu/agriculture/foodqual/protec/applications/list\\_en.pdf](http://ec.europa.eu/agriculture/foodqual/protec/applications/list_en.pdf) [Link]) under reference no 0399. However, the application itself was not accessible via the Internet. At the time when the opinion was submitted, the procedure concerning the possible registration of "Pravé olomoucké tvaružky" as a protected designation of origin was ongoing.

After the complainant had asked for access to the application, the Commission had consulted the Czech authorities pursuant to Article 4 (5) of Regulation 1049/2001 and Article 5 (4) (a) of the implementing provisions (4) . In their reply of 2 May 2005, these authorities had explicitly opposed disclosure of the relevant document.

The complainant did not dispute that the application originated from the Czech authorities, that these authorities opposed disclosure and that a request of non-disclosure is an exception to the right of access as confirmed by the recent case-law of the Court of First Instance (Case T-168/02 *IFAW v Commission* paragraphs 57, 58).

The decisive question was therefore whether the Commission had adopted the Czech application as its own document by referring to it on its website and/or due to the alleged legal effects of Regulation 918/2004.

The initial publication of an application in accordance with Article 6 (1) of Regulation 2081/92 in no way altered the status of the application itself, which, at that stage, had not yet been examined, modified or transformed. It remained a document originating from the Member State and was not made accessible on the Commission's website. The reference to the relevant application on the Commission's website therefore did not turn this application into a document emanating from the Commission.

It should also be stressed that Article 7 (2) of Regulation 2081/92 provided that the competent authorities of the Member States "shall ensure that all persons who can demonstrate a legitimate economic interest are authorized to consult the application". The publication in the Official Journal in accordance with Article 6 (2) of Regulation 2081/92 triggered the opposition procedure, where any legitimately interested person was entitled to request and to receive the entire specification of the product. Such a request could be addressed either to the Commission or to the authorities of the Member State.

In view of the above, the Commission considered that its refusal to disclose the requested document was justified.



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

In his observations, the complainant stressed that the decisive question was indeed whether the Czech application had moved from the purely national, Czech sphere into the *acquis communautaire* or had at least become an EU document. According to the complainant, this metamorphosis had been made possible by Regulation 918/2004. The complainant submitted that this meant that the Czech authorities' power over the document, that was correctly protected by Article 4 (5) of Regulation 1049/2001 and which had been recognised by the Community courts, was no longer relevant.

The complainant therefore asked the Ombudsman to annul the Commission's decision of 9 June 2005 and to procure him access to the relevant document.

## **THE DECISION**

### **1 Alleged failure to provide access to a document**

1.1 Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (5) ("Regulation 2081/92") provides for the possibility to award special protection to a "geographical indication". According to Article 5, applications for protection under this heading are to be submitted to the European Commission by the Member State concerned. Article 6 (1) provides that the Commission "shall make public any application for registration, stating the date on which the application was made" and that the Commission shall verify, within six months, whether the conditions set out in the Regulation for a registration are fulfilled. If the Commission reaches the conclusion that these conditions are fulfilled, it shall (according to Article 6 (2) of the Regulation) publish in the Official Journal "the name and address of the applicant, the name of the product, the main points of the application, (...) and, if necessary, the grounds for its conclusions". Article 7 provides that any Member State may object to the registration within six months of the publication in the Official Journal.

According to Article 1 of Commission Regulation (EC) No 918/2004 of 29 April 2004 introducing transitional arrangements for the protection of geographical indications and designations of origin for agricultural products and foodstuffs in connection with the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (6) ("Regulation 918/2004"), where an application under Regulation 2081/92 was forwarded to the Commission by one of these countries by 31 October 2004, the protection already afforded under national law "may be upheld until a decision has been taken in accordance with Article 6 of that Regulation".

On 19 October 2004, the Czech authorities submitted a request to protect the indication "Pravé olomoucké tvarůžky" (a cheese speciality) to the Commission. The application was added to the Commission's online register of applications.

1.2 On 1 April 2005, the complainant, the director of a German association for the protection of milk and milk products, asked the Commission for access to this document. This request was made on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the



Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (7) ("Regulation 1049/2001").

This request was finally rejected on 9 June 2005 on the grounds of Article 4 (5) of Regulation 1049/2001. The Commission submitted that a consultation of the Czech authorities had been necessary since the documents originated from the latter. According to the Commission, Article 4 (5) of Regulation 1049/2001 was applicable, given that the Czech authorities had opposed disclosure.

1.3 In his complaint to the Ombudsman, the complainant submitted that the relevant document had lost its character as a document originating from a Member State by virtue of the fact that it was mentioned on a website of the Commission and had thus become an integral part of the Commission's documents. The complainant also pointed to the legal effects that the application had created pursuant to Regulation 918/2004. Based on these considerations, the complainant alleged that the Commission's decision to refuse to grant access to the relevant document was wrong. He claimed that he should be given access to this document.

1.4 In its opinion, the Commission repeated its view that Article 4 (5) of Regulation 1049/2001 prevented it from disclosing the document, given that the Czech authorities had opposed its disclosure. The Commission pointed out that the decisive question was therefore whether it had adopted the Czech application as its own document by referring to it on its website and/or due to the alleged legal effects of Regulation 918/2004.

As regards this issue, the Commission submitted that the initial publication of an application in accordance with Article 6 (1) of Regulation 2081/92 in no way altered the status of the application itself, which, at that stage, had not yet been examined, modified or transformed. It remained a document originating from the Member State and was not made accessible on the Commission's website. The reference to the relevant application on the Commission's website therefore did not turn this application into a document emanating from the Commission.

The Commission further stressed that Article 7 (2) of Regulation 2081/92 provided that the competent authorities of the Member States "shall ensure that all persons who can demonstrate a legitimate economic interest are authorized to consult the application". The publication in the Official Journal in accordance with Article 6 (2) of Regulation 2081/92 triggered the opposition procedure, where any legitimately interested person was entitled to request and to receive the entire specification of the product.

In view of the above, the Commission considered that its refusal to disclose the requested document was justified.

1.5 In his observations, the complainant stressed that the decisive question was indeed whether the Czech application had moved from the purely national, Czech sphere into the *acquis communautaire* or had at least become an EU document. According to the complainant, this metamorphosis had been made possible by Regulation 918/2004. The complainant submitted that this meant that the Czech authorities' power over the document, which was correctly



protected by Article 4 (5) of Regulation 1049/2001 and which had been recognised by the Community courts, was no longer relevant. He therefore asked the Ombudsman to annul the Commission's decision of 9 June 2005 and to procure him access to the relevant document.

1.6 As a preliminary point, the Ombudsman considers it useful to recall that his role is to examine possible instances of maladministration and to make proposals or recommendations as to how any such maladministration can be corrected. It is however not within his power to issue instructions to the Community institutions and bodies. For this reason, the Ombudsman would obviously be unable to annul the Commission's decision of 9 June 2005 and to force the Commission to grant access to the document concerned.

1.7 Article 4 (5) of Regulation 1049/2001 stipulates that a Member State "may request the institution not to disclose a document originating from that Member State without its prior agreement." The Court of First Instance has held that Article 4 (5) of Regulation 1049/2001 "confers on the Member State the power to request the institution not to disclose documents originating from that State without its prior agreement." (8) The Court also pointed out "that the power conferred on Member States to request the non-disclosure of their documents to third parties without their prior agreement is one of the exceptions to the right of access to documents of the institutions which are laid down in Article 4 of Regulation No 1049/2001." (9)

The Ombudsman notes that in the present case the complainant did not dispute the Commission's view that the application originated from the Czech authorities, that these authorities opposed disclosure and that this request of non-disclosure is an exception to the right of access under Regulation 1049/2001. In these circumstances, the Commission's position appears to be in full conformity with Regulation 1049/2001 as regards the issue of access to the application originally submitted by the Czech authorities.

1.8 As both the complainant and the Commission agree, a right of access to the relevant document under Regulation 1049/2001 could thus only exist if this document had changed its nature and was no longer to be considered as a document originating from a Member State. In order to support his view that this was indeed the case, the complainant referred (1) to the fact that the relevant application was mentioned on the Commission's website and (2) to the legal effects of Regulation 918/2004.

1.9 As regards the first argument, the Ombudsman notes that Article 6 (1) of Regulation 2081/92 provides that the Commission "shall make public any application for registration, stating the date on which the application was made." It emerges from the context that what this provision mandates the Commission to do is to inform the public of the fact that such an application has been made, without however obliging it to publish the full text of the application. By making available the relevant information on its website, the Commission thus merely complies with the obligation imposed on it by Article 6 (1) of Regulation 2081/92. The Ombudsman considers that there is nothing to suggest that this initial publication could or should alter the status of the application. As the Commission correctly observed, the application has not yet been examined, modified or transformed by the Commission when the publication under Article 6 (1) is made.



1.10 It should furthermore be noted that if the Commission arrives at the conclusion that an application fulfils the substantive conditions laid down in Regulation 2081/92, Article 6 (2) thereof mandates it to publish in the Official Journal "the name and address of the applicant, the name of the product, the main points of the application, (...) and, if necessary, the grounds for its conclusions". According to Article 7 (1) of the Regulation, any Member State may then object to the registration within six months of the date of this publication in the Official Journal. Article 7 (2) provides that the competent authorities of the Member States "shall ensure that all persons who can demonstrate a legitimate economic interest are authorized to consult the application". It follows from the above that Regulation 2081/92 itself envisages access to the entire application for a limited category of persons, albeit only after the Commission has proceeded to the publication foreseen in Article 6 (2) of the Regulation.

In the Ombudsman's view, it follows from the above that the complainant's view would thus also be difficult to reconcile with the system set up by Regulation 2081/92, given (1) that it would lead to access before the date foreseen for this purpose in Article 7 (2) of the Regulation and (2) that it would open access to any person (since no reasons need to be given for an application based on Regulation 1049/2001) whereas Regulation 2081/92 only grants this right to "persons who can demonstrate a legitimate economic interest".

1.11 As regards Regulation 918/2004, Article 1 thereof stipulates that where an application under Regulation 2081/92 was forwarded to the Commission by one of the accession countries by 31 October 2004, the protection already afforded under national law "may be upheld until a decision has been taken in accordance with Article 6 of that Regulation". Regulation 918/2004 thus does not affect the procedure foreseen by Regulation 2081/92. It is true that Regulation 918/2004 foresees that the protection hitherto afforded by national law can be maintained until the Commission decides on the application concerned. However, the Ombudsman considers that the complainant has not shown how this legal effect could have the consequence that an application submitted by national authorities should become a Commission document to which access would have to be granted under Regulation 1049/2001.

## **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) OJ 1992 L 208, p. 1; as subsequently amended.

(2) OJ 2004 L 163, p. 88.





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

(4) The "Detailed rules for the application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents". These rules were added as an Annex to the Commission's Rules of Procedure by Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001, OJ 2001 L 345, p. 94.

(5) OJ 1992 L 208, p. 1; as subsequently amended.

(6) OJ 2004 L 163, p. 88.

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

(8) Case T-76/02 *Messina v Commission* [2003] ECR II-3203, paragraph 40.

(9) Loc. cit., paragraph 55.