

Decision of the European Ombudsman closing his inquiry into complaint 1551/2007/(BM)JMA against the European Commission

Decision

Case 1551/2007/(BM)JMA - Opened on 30/07/2007 - Decision on 11/12/2008

THE BACKGROUND TO THE COMPLAINT

1. The complainant is a representative of X, a trade association who acted on behalf of one of its members, the company Y. Both of them are established in country A. According to the information submitted by the complainant, Y produces, sells and exports eggs for both human consumption and the manufacture of food. In September 2005, a family from country B fell ill with salmonella. They alleged that this was due to their consumption of mayonnaise, which had been manufactured by a local producer using eggs from Y. Consequent inquiries were opened by both the food safety authorities of A and B. As a result of these inquiries, the production and export of products from Y were suspended. On 26 September 2005, however, the Food Safety Agency of A concluded that the origin of the outbreak was not produce from Y. This company itself also carried out a number of controls, which led it to the same conclusion. In October 2005, a similar incident occurred in B and, as a consequence, a new health alert by both A and B's authorities was put in place. At the end of October, the authorities of A certified that the health conditions of Y were adequate and that there appeared to be no health-related problems involving its produce. The authorities of A subsequently contacted their counterparts in B, forwarding to them a number of scientific analyses which appeared to show that Y's products posed no threat to human health. Notwithstanding that information, the health warning against its products was not lifted in B.

2. On 25 January 2006, X submitted two complaints to the European Commission, alleging that the manner in which the authorities of both A and B had handled the alleged health complaints against Y was incorrect. On 4 December 2006, the Commission services informed the complainant that they did not intend to open infringement proceedings in connection with the cases, and proposed to close them.

THE SUBJECT-MATTER OF THE INQUIRY



3. In view of the Commission's position, the complainant lodged a complaint with the Ombudsman on 25 May 2007, arguing that the Commission had neither handled his two complaints properly nor investigated the situation in a satisfactory manner. Similarly, the complainant stated that the Commission had put undue pressure on the responsible authorities of A, in order to prevent them from intervening in the matter.

4. In his complaint to the Ombudsman, the complainant submitted the following allegation and claim:

Allegation :

The Commission had not handled his complaints properly.

In support of this allegation, the complainant argued that the Commission:

- (a) ignored the documents submitted by X, in particular those concerning Y's compliance with the relevant sanitary standards in A;
- (b) failed to contact the authorities of B;
- (c) failed to inform the complainant, in a timely manner, as regards the progress of the case;
- (d) failed to request the intervention of the services responsible for the application of Regulation (EC) No 178/2002 on food safety; and
- (e) prevented the Food Safety Agency in A from intervening in the matter.

Claim :

The Commission should reconsider its position on his complaints.

THE INQUIRY

5. By letter of 30 July 2007, the Ombudsman opened an inquiry into the allegation and claim put forward by the complainant, asking the Commission to submit an opinion by 30 November 2007. The Commission submitted an opinion, in English, on 11 December 2007. On 21 December 2007, a translation into the language of A was sent to the complainant, who sent his observations on the Commission's opinion on 19 February 2008.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. The alleged incorrect handling of complaints 2006/4171



and 2006/4172 by the Commission

Arguments presented to the Ombudsman

6. In its reply of 11 December 2007, the Commission considered that the complaint files in question were handled properly and that the complainant was kept regularly informed of its inquiry.

7. The Commission referred to its formal handling of X's complaints and its contacts with the complainant. On 16 January 2006, the initial complaints were sent to its Directorate-General for Enterprise (DG ENTR), which subsequently transferred them to its Directorate-General for Agriculture (DG AGRI) on 31 January 2006 and, finally, to its Directorate-General for Health and Consumer Protection (DG SANCO) in March 2006. The complaints were registered on 10 February 2006. On 17 February 2006, DG AGRI informed the complainant of the transfer of his complaints to DG ENTR. Following the complainant's request to DG SANCO, a meeting was held on 14 March 2006. The Commission enclosed, with its opinion, copies of all its exchanges with the complainant.

8. On 4 December 2006, DG SANCO informed the complainant that, since it was not possible to prove an infringement of EU law, its services would propose that the Commission close the two complaints. A standard period of four weeks was given to him to provide any new information showing that an infringement of EU law had in fact occurred. By letter dated 19 December 2006, which was acknowledged on 8 January 2007, the complainant submitted new evidence within the indicated period of time. Consequently, the infringement file was not closed, allowing time to examine the new elements. However, in July 2007, following an assessment of the new elements, the complainant was informed that the Commission services would propose the closing of the file.

9. As regards the substance of the case, the Commission first described the facts and the legal position taken by its services. It explained that the import of eggs from A was refused by B at the end of 2005, due to several cases of salmonella poisoning caused, according to the authorities of B, by a specific batch of eggs originating from Y. Accordingly, the authorities of B launched a Rapid Alert System for Food and Feed (RASFF). Y subsequently contacted X, which sent a complaint to the Commission against the authorities of both A and B. X argued that, since this particular sector is not yet harmonised at the Community level, B was obliged to accept eggs which complied with the relevant legislation in A. X objected that the authorities of A had not supported its member's claims against the authorities of B.

10. The Commission noted that, according to the documents annexed to the complainant's letter of 17 May 2006, B requested that the egg producers in A apply the same procedures against salmonella as were in force in B for national production. B argued that there was no scientific evidence that the measures currently applied by the producer in A were effective for protecting public health. The only comprehensive EU scientific study on this matter revealed that a very small percentage of farms in B had been affected by the disease, whereas in A the percentage was more than ten times higher. The Commission underlined that, as this area is not yet



harmonised at the Community level, B had decided to make use of the precautionary principle set out in Article 7 of Regulation (EC) 178/2002 [1] and Article 30 of the EC Treaty, which sets out exceptions to the principle of free movement of goods. The position of the authorities in B was not contested by the Commission, since it was based on what the Commission considered to be an appropriate risk assessment. The Commission conveyed this position to the complainant in its letter of 18 July 2007.

11. The Commission further explained that the applicable Community legislation in this case is Regulation (EC) No 2160/2003 on the control of Salmonella and similar agents [2]. The Regulation introduces step-by-step Salmonella control programmes, which set out a number of measures for monitoring eggs. These measures, however, will only enter into force in December 2009. Until that date, Member States are allowed to apply national measures. The Commission considered that, in view of the legal situation and the facts of the case, it should not challenge the position taken by the Government of B. It further noted that the Food Safety Agency in A had questioned neither the decision nor the action of the authorities of B.

12. As regards each of the arguments raised by the complainant, the Commission responded as follows.

(a) All the documents submitted by X were acknowledged and carefully assessed by its services.

(b) It was constantly in contact with the authorities of the Member States concerned. In this particular case, the position of the authorities in B was known to the Commission services, as a result of the letter that the said authorities had sent the complainant on 12 April 2006. Additionally, DG SANCO maintained frequent contacts with the national authorities of the two Member States concerned in the framework of the Standing Committee of the Food Chain and Health and other working groups.

(c) It had acted in accordance with the applicable rules, in particular with the Code of Good Administrative Behaviour [3] and the Commission Communication on relations with the complainant in respect of infringements of Community law [4]. It did not have an obligation to inform the complainant in detail about every single action undertaken in the framework of the ongoing investigation. According to the above-mentioned rules, it only has an obligation to inform the complainant of decisions taken.

(d) The authorities in A did not support the complainant's claims against B; they were cooperating with both the authorities of B and the Commission services in the framework of the ongoing RASSF alert, as required by the relevant legislation. The Commission also denied that it had prevented the authorities of A from intervening. The complainant had indeed informed the Commission about the nature of the bilateral meetings between the national authorities of the two Member States concerned. At no stage did the Commission intervene during these discussions.

13. The Commission also explained that the European Food Safety Authority (EFSA) could not



have intervened in the case since, as described in Regulation (EC) No 178/2002, the role of EFSA is to provide scientific advice and support to the Community institutions and Member States in fields that have an impact on food and feed safety, and to contribute to a high level of protection of human life and health in the context of the operation of the internal market. In the Commission's view, taking into consideration the available information from the two Member States involved, there was no reason to request any further scientific data from EFSA. Thus, the baseline study on the prevalence of salmonella carried out by EFSA between 2004 and 2006, which was available to DG SANCO at the time of examining the complaints, was considered to provide sufficient information.

14. The Commission underlined that, when handling the two complaints submitted by X, its services respected the Code of Good Administrative Behaviour. In the Commission's view, the complainant contested the substance of its decision not to open an infringement procedure against the two Member States. As recognised by the Community courts, such a decision falls under its discretionary powers. The Commission argued that it clearly explained the reasons which led it to decide that it would not open infringement proceedings in the two complaints.

15. In his observations on the Commission's opinion, the complainant repeated his allegations. He considered that, by not asking the authorities of B to confirm how they reached their conclusions relating to Y, the Commission's services failed to act with due diligence.

The Ombudsman's assessment

16. The Ombudsman notes that, under Article 211 of the EC Treaty, the Commission, in its role as 'Guardian of the Treaty', has to ensure that Community law is applied.

17. In carrying out its duty, the Commission investigates possible infringements of Community law, which come to its attention largely as a result of citizens' complaints. If, as a result of its inquiry, the Commission considers that a Member State has failed to fulfil its obligations under the Treaty, Article 226 of the EC Treaty gives it the power to start infringement proceedings against the responsible Member State and, eventually, to bring the matter before the European Court of Justice.

18. The procedures to be followed by the Commission when handling complaints, as well as the information to be given to complainants, are set out in the Commission's Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law [5] ('the Communication'). The Annex to the Communication sets out the main obligations which, from a formal and procedural point of view, the Commission should respect when handling complaints, in particular as regards the recording of complaints (paragraph 3) [6], the acknowledgment of receipt (paragraph 4) [7], the communication with complainants (paragraph 7) [8], the time limit for investigating complaints (paragraph 8) [9], and the closure of the case (paragraph 10) [10].

19. In order to assess whether or not the Commission handled properly the complaints submitted by the complainant, the Ombudsman will first consider if the procedure followed by



the institution in its inquiries was carried out in accordance with the above provisions, and second, if the reasoning given in support of its decision to close the cases was adequate.

20. From the available information, the Ombudsman notes that, on 10 February 2006, the Commission acknowledged receipt of the letter sent by the complainant on 16 January 2006, in which he referred to certain practices by the authorities of both A and B, and alleged that they were contrary to EU law. The Commission services registered the letter as two separate complaints, under reference numbers 2006/4171 and 2006/4172. The Ombudsman therefore finds that the Commission recorded the complainant's correspondence as two complaints and, shortly thereafter, acknowledged receipt, in accordance with the criteria laid down in paragraphs 3 and 4 of the Annex to the Communication.

21. As regards the information furnished to the complainant, the Ombudsman notes that the Commission met the complainant and was in frequent contact with him, via telephone, e-mail and letter. From these exchanges, it further appears that the Commission's services replied to his correspondence in a timely manner.

22. In addition, the Commission's services informed the complainant of each of the steps taken in response to his complaints after each Commission decision. In this regard, the Commission acted in accordance with the criteria laid down in paragraph 7 of the Annex to the Communication.

23. In relation to the time it took the Commission to reach a conclusion on the merits of the case, the Ombudsman notes that, after carrying out an inquiry on the matter, which involved a number of exchanges with the authorities of A and B, the Commission's services concluded that there was no breach of EU law. On 4 December 2006, the Commission informed the complainant of its intention to close the case. This position was confirmed on 18 July 2007, after the Commission had reviewed the new comments sent by the complainant. Both letters contained an explanation of the grounds upon which the Commission believed the case ought to be closed. In sum, the Commission considered that neither A nor B had infringed EU law.

24. The Ombudsman finds that the Commission, having completed its examination of the complaint, informed the complainant of the grounds for its position, and gave him the opportunity to submit his observations within a year from the date of the complainants' registration. In this regard, the Commission acted in compliance with the criteria laid down in paragraphs 8 and 10 of the Annex to the Communication.

25. As regards the position taken by the Commission on the substance of the complaints, the Ombudsman notes that the institution described its reasoning for closing these complaints in its letters to the complainant dated 4 December 2006 and 18 July 2007. In these letters, the Commission explained that, in the absence of harmonised EU legislation relating to the issue, B had made adequate use of the exception to the free movement of goods, based on the protection of human health enshrined in Article 30 of the EC Treaty.

26. The Ombudsman has carefully reviewed the Commission's interpretation of the legal



provisions relevant to the case, namely, Regulation (EC) No 2160/2003 [11] , as well as Articles 28 and 30 of the EC Treaty, as interpreted by the Community courts.

27. Regulation (EC) No 2160/2003 seeks to harmonise, at EU level, the type of controls which the Member States can employ to limit the health risks posed by salmonella. As set out in Article 4, the aim of the Regulation is to establish a series of Community targets aimed at ensuring that proper and effective measures are taken to detect and control salmonella and other zoonotic agents. In order to accomplish this objective, Article 5 requires Member States to develop national control programmes for each zoonosis and zoonotic agent. However, pursuant to section D of Annex II , the application of Community targets for the control of flocks of laying hens will only take place in December 2009, namely, 72 months after the Regulation entered into force (December 2003) [12] .

28. It appears, therefore, that the Commission was correct to conclude that the relevant provisions of the Regulation were not applicable to the situation involving Y.

29. In the absence of specific EU legislation which could have harmonised this field, the general criteria governing the free movement of goods set out in Articles 28 and 30 of the EC Treaty, as interpreted by the Community courts, should apply to this case. Accordingly, while the principle of free movement of goods forbids national authorities from imposing quantitative restrictions on imports or measures having equivalent effect (Article 28), Member States can exceptionally do so on grounds including, among others, the protection of health and life of humans. Such measures must, however, not constitute a means of arbitrary discrimination or a disguised restriction on trade (Article 30). In line with the case-law of the Community courts, the application of this exception has to respect the principle of proportionality, according to which the measure in question should not go further than is necessary, be proportional to the desired objective, and be the least restrictive on trade [13] .

30. As stated in the Commission's letters to the complainant dated 4 December 2006 and 18 July 2007, the authorities of B informed the Commission that their actions against Y were based on the exception laid down in Article 30 of the EC Treaty, relating to the protection of health and life of humans. As the Community courts have recognised, in the absence of EU harmonisation, it is for the Member States to decide on the level of protection of public health they deem appropriate, regard being had to the potential adverse effects and the available scientific data [14] . The Commission decided not to contest the position of the authorities of B, on the grounds that it appeared to be based on an appropriate risk assessment and was, therefore, consistent with the precautionary principle [15] . In this context, when deciding not to pursue the case, the Commission took account of the fact that the authorities of B had argued their position on the basis of the findings of a relevant scientific study on the spread of salmonella in the EU, which revealed that a minimum percentage of farms in B had been affected by the disease, whereas in A the percentage was considerably higher.

31. The complainant argued that he sent information to the Commission, showing that Y complied with sanitary requirements in force in A. However, the Ombudsman has not received any information to prove that the standards required by B had indeed been met, implying that



the restrictions on exports imposed by the authorities of B should have been lifted. In view of the situation, the Ombudsman concludes that the legal view held by the Commission in this case is reasonable.

32. The complainant put forward a number of additional arguments, with a view to calling into question the manner in which the Commission handled his complaints. In particular, he argued that the Commission failed to request the intervention of EFSA and prevented the authorities of A responsible for food safety from intervening in the case.

33. Having reviewed these arguments, the Ombudsman finds that the complainant has not provided any evidence to substantiate his arguments. The role of EFSA is not in risk management, but rather in risk assessment. In effect, EFSA, as set out in Article 22 of Regulation (EC) No 178/2002, is to provide scientific advice and scientific and technical support for the Community's legislation and policies in all fields which have a direct or indirect impact on food and feed safety. Accordingly, EFSA does not appear to have powers to intervene in the handling of *individual* food-related problems, such as in the Y's case.

34. Article 30(4) of Regulation (EC) No 178/2002 allows EFSA to give its views where there is a divergence of scientific opinions on a particular scientific issue *in abstracto*. The Ombudsman points out that he has received no information to show that such divergent points of view arose as regards this issue. In fact, as set out in Article 60 of Regulation (EC) No 178/2002, EFSA could have been called to deliver a scientific opinion if the authorities of A had complained to the Commission about the measures undertaken by B. No such complaint was made.

35. In the course of his inquiry, the Ombudsman has not received any information which would have proven that the Commission exerted pressure on the responsible authorities of A to prevent them from intervening in the case involving Y, or from submitting a complaint to its services.

36. In view of the above findings, the reasoning provided by the Commission in support of its decision not to initiate infringement proceedings against either A or B appears to be reasonable. The Ombudsman therefore takes the view that the Commission acted within its legal authority when deciding to close the case.

37. The Ombudsman therefore concludes that there has been no maladministration as regards this aspect of the case.

B. Claim that the Commission should reconsider its decision in cases 2006/4171 and 2006/4172

Arguments presented to the Ombudsman

38. The complainant claimed that the Commission should reconsider its position on his complaints.



The Ombudsman's assessment

39. In view of the above findings, in particular the conclusions reached in point 36, according to which the Commission acted within its legal authority when it decided to close the complaints, the Ombudsman does not consider that the complainant's claim can be sustained.

C. Conclusions

On the basis of the Ombudsman's inquiries into this complaint, there has been no maladministration by the Commission. The Ombudsman therefore closes the case.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 11 December 2008

[1] Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety; OJ L 31, 1.2.2002, p. 1-24.

[2] Regulation (EC) No 2160/2003 of the European Parliament and of the Council of 17 November 2003 on the control of salmonella and other specified food-borne zoonotic agents; OJ L 325, 12.12.2003, p. 1-15.

[3] http://ec.europa.eu/civil_society/code/_docs/code_en.pdf [Link]

[4] Commission communication to the European Parliament and the European ombudsman on relations with the complainant in respect of infringements of community law; COM/2002/0141 final; OJ 244, 10/10/2002 p. 5.

[5] OJ 2002 C 244, p. 5.

[6] " Any correspondence which is likely to be investigated as a complaint shall be recorded in the central registry of complaints kept by the Secretariat-General of the Commission. "

[7] " Correspondence registered as a complaint shall be acknowledged again by the Secretariat-General within one month from the date of despatch of the initial acknowledgement. "

[8] " The Commission departments will contact the complainants in writing, after each Commission decision (formal notice, reasoned opinion, referral to the Court or closure of the



case), of the steps taken in response to their complaint. "

[9] " As a general rule, Commission departments will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint by the Secretariat-General. "

[10] " Unless there are exceptional circumstances requiring urgent measures, where a Commission department intends to propose that no further action be taken on a complaint, it will give the complainant prior notice thereof in a letter setting out the grounds on which it is proposing that the case be closed and inviting the complainant to submit any comments within a period of four weeks. "

[11] See supra footnote 2.

[12] Article 18 of Regulation (EC) No 2160/2003.

[13] Case 174/82 *Officier van Justitie v Sandoz BV* [1983] ECR 2445, pp. 18-19.

[14] See Case 174/82 above; Case 42/90 *Bellon* ECR I-04863 and Case C-192/01 *Commission v Denmark* [2003] ECR I-9693.

[15] See Article 7 of Regulation (EC) No 178/2002 [see footnote 1]:

Precautionary principle

1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.

2. Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment.