

Decision of the European Ombudsman closing his inquiry into complaint 583/2013/MHZ against the European Commission

Decision

Case 583/2013/MHZ - **Opened on** 16/04/2013 - **Decision on** 18/12/2013 - **Institution concerned** European Commission (Critical remark) |

The background to the complaint

1. In 2007, the Commission and the Polish authorities agreed on the use of EU funds under the *Infrastructure and Environment Operational Programme* ["the Programme"] provided for in Regulation 1083/2006 [1] . Priority 3 of the Programme has as its purpose the promotion of environmentally sound methods of water storage in the forests; for instance by promoting the construction of small retention facilities in order to counteract the effects of rainwater runoff in mountainous areas. Priority 5 of the Programme provides for the use of EU funds for initiatives:

(i) aimed at preserving endangered species and the genetic variety of flora, fauna and fungi, as well as restoring the conditions of ecological corridors to enable the proper functioning of the Natura 2000 network;

(ii) aimed at the promotion of social habits supporting environmental protection and the conservation of nature, including the preservation of biological variety, landscape conservation and the development of ecologically friendly habits by way of educational initiatives.

2. The complainant is a Polish eco-farmer and the owner of forests with many streams in the mountain area near Tatra on the Polish border with Slovakia. His farm is located in the Natura 2000 site, where about 20 protected species have their habitat. For the complainant, the protection of environment is indeed an important matter.

3. In 2009, he wished to apply for EU funds under Priority 3 of the Programme. The Polish authorities informed him that only state enterprises could apply to benefit under the Programme and not individuals or communities, even if they were owners of forests.

4. The complainant believed this approach discriminated against private forest owners and, on 17 March 2010, he asked the European Commission to clarify whether individuals and private



foundations are eligible to apply for EU subsidies under the Programme. The Commission replied on 9 September 2010, six months later, saying that it has no authority as regards deciding on the allocation of EU benefits. Decisions on the allocation of funds, it said, are entirely within the power of the Polish ministry managing the Programme.

5. On 20 September 2010, the complainant wrote to the Commission again. He pointed out that his query was not about the allocation of; rather he wished to know who, in principle, is eligible to apply for funds.

6. The Commission replied 16 months later. It stated that all private entities, non-profit and individuals, along with state owned enterprises, are eligible to apply for EU Cohesion funds. It pointed out also that, under Article 70 of Regulation 1083/2006, the national authorities are responsible for setting the reporting and accounting requirements for beneficiaries.

7. Subsequently, the complainant contacted the Polish Coordination Centre for Environmental Projects, in relation to Priority 5 of the Programme. He wished to apply for funding under two separate headings under that Priority. The Polish authorities replied that, as an individual farmer, he was not eligible to apply.

8. On 22 August 2012, the complainant submitted an infringement complaint to the Commission concerning Poland. He complained that the Polish authorities do not respect the relevant legal provisions of Commission Regulation 1828/2006 [2] on the use of Cohesion Funds in implementing Priority 3 of the Programme.

9. In this complaint, he referred to all the problems he had encountered with the Polish administration when he tried to benefit from EU funds and when he tried to alert the administration about the environmental problems in the Natura 2000 site where his farm is located.

Firstly, he reiterated, that the Polish authorities had confined eligibility to apply for funds to the state owned forest enterprise Y, and that this agency had in fact been successful. He expressed the reasonable view that, the allocation of funds should be based on a competition and that the confining of eligibility to apply to one party had invalidated that process. Furthermore, he stated that the Coordination Centre for Environmental Projects, which is responsible for implementing the Programme and for the evaluation of the applications, is subordinate to Y. Even if, he said, the Y were the only possible beneficiary under Priority 3 of the Programme, its involvement should extend to cover water retention works in private forests. This is because, he argued, the surface water run-off has repercussions for all eco-systems and environmentally sound methods of water storage in the forests are in the interests of all.

Secondly, he claimed that the Ministry of Regional Development, which manages the Programme, does not inform the owners of farms located in the Natura 2000 sites that it is open to them to apply for EU benefits for eco-farming, eco-tourism, small water retention or other benefits relating to the protection of the environment. In addition, he complained that the Polish managing authority did not organise public consultations on all priorities of the Programme and



that consultations cannot, by definition, be limited to the announcements in the press but should rather be carried out through meetings between the relevant authorities and the inhabitants of the areas concerned. He also pointed out that there was potential for corrupt behaviour on the part of the officials running the projects.

Thirdly, the complainant pointed to a specific case in which EU funds under the Programme were assigned to reconstruct the tourist trail over X mountain. He claimed that the local authorities did not take into consideration the fact that this trail crossed the habitat of endangered flora and of endangered species. He claimed that this is due to the fact that the relevant Polish ministries do not cooperate among themselves on environmental issues.

Fourthly, the complainant claimed that Poland did not respect the Habitats and Birds Directives because the river in question was not being regulated in a way that would prevent floods. Therefore, he claimed, the negative effects of natural disasters are not minimised and the objective of Priority 3 of the Programme is not being met.

Finally, the complainant referred to the Commission's delayed replies to his earlier correspondence. He stated that, after he had informed the Commission about the irregularities in the running of the Programme, the Commission should have taken action but had failed to do so.

10. On 2 October 2012, the Commission informed him that his complaint had been registered under CHAP– referred to hereafter as 'first infringement complaint'.

11. On 29 November 2012, the complainant submitted another infringement complaint to the Commission.

12. In this second complaint he referred to his negative experience with the Polish Ministry of the Environment and the Ministry of Agriculture concerning the so called eco-benefits, that is, EU benefits for farms in the Natura 2000 sites. He referred to allegedly absurd controls and requirements which, in his view, show that the Polish administration has no knowledge of farming. He observed that, if absurd requirements are complied with, they may result in the destruction of fauna rather than in their protection. For instance he alleged that the eco-benefits are conditioned by absurd requirements such that, for example, the vegetation being protected must be mown up to the same date across the entire country. This is despite the fact that the different localgeographical conditions have an impact on the choice of the relevant date. He commented that early mowing may be prejudicial for some of the protected flora. In addition, the Ministries pay eco-benefits if the mowing is done in a specific pre-established way while, again, (he argued) the manner of mowing should depend on local conditions. In summary, he considered that Poland infringes Directive 2004/35/CE [3] on environmental liability with regard to the prevention and remedying of environmental damage.

13. The Commission registered this second complaint under CHAP referred to hereafter as 'second infringement complaint'.



14. On 13 March 2013, the complainant sought more information on the status of his first infringement complaint first from the Commission (Directorate General for Regional and Urban Policy) and then from Europe Direct. The Directorate General did not reply and Europe Direct replied that the Commission does not allow it to answer queries concerning the status of infringement complaints. On 24 March 2013, the complainant complained to the European Ombudsman.

The subject matter of the inquiry

15. The complainant alleged that the Commission failed to handle his two infringement complaints with due diligence.

16. The complainant claimed that the Commission should have taken speedier action on both infringement complaints.

17. In his observations (dated 6 September 2013) on the Commission's opinion, sent to the Ombudsman in response to her inquiries and made available to him, the complainant claimed damages for the loss of his time when dealing with the correspondence from the Commission and also "*for the loss of confidence in the Commission* ." Since the complainant has not approached the Commission with this claim before submitting it to the Ombudsman [4] , she has decided not to deal with it in this inquiry.

The inquiry

18. On 16 April 2013, the Ombudsman asked the Commission to inform the complainant about the status of his infringement complaints and to apologise for its failures to provide him with prompt replies to his letters. Following the Ombudsman's intervention, the Commission sent an answer to the complainant, dated 15 May 2013. The complainant commented to the Ombudsman on that reply on 17 May 2013.

19. On 17 June 2013, the Ombudsman asked the Commission to respond to the complaint and the Commission replied to the Ombudsman, in English, on 17 August 2013. The translation into Polish was forwarded to the complainant for observations. In addition, on 27 August 2013, the Commission (Directorate General for Regional and Urban Policy) sent the complainant a letter concerning the first infringement complaint. The complainant submitted his observations to the Ombudsman on 30 August and 6 September 2013. On 28 October 2013, the Commission sent the complainant a letter concerning the second infringement complaint a copy of which the complainant forwarded to the Ombudsman on 5 November 2013, together with his comments on that reply.

The Ombudsman's analysis and conclusions



Preliminary remarks

20. The complaint refers to the alleged failure of the Polish authorities to comply with EU legislation. The Ombudsman does not have the jurisdiction to deal with complaints regarding the actions of public bodies in the EU Member States.

21. Accordingly, in this inquiry the Ombudsman will deal exclusively with the issue of possible maladministration on the part of the Commission, namely whether the Commission, in its handling of the complainant's infringement complaints under Article 258 TFEU [5], has acted in accordance with the procedural rules and principles binding upon it. Since the Commission has not yet decided on the substance of the alleged infringements, it will be open to the complainant, if he so wishes, to make a separate complaint to the Ombudsman should he be unhappy with whatever conclusions and actions are decided upon by the Commission.

A. Alleged mishandling of the infringement complaints

Arguments presented to the Ombudsman

22. In his original complaint, the complainant argued that the Commission took respectively 6 months and 16 months to reply to his letters (dated 17 March and 20 September 2012). In addition, the first infringement complaint was dated 22 August 2012 but the Commission registered it only on 2 October 2012. Moreover, the Commission did not inform him about the status of the first infringement complaint in spite of his query of 13 March 2013.

23. He also argued that the species he referred to in the infringement complaints are endangered. Therefore, his case is urgent and requires immediate action.

24. In his observations to the Ombudsman, dated 17 May 2013, the complainant dealt with the Commission's reply of 15 May 2013. In that reply, the Commission referred to the first infringement complaint. However, the complainant pointed out that the Commission's reply dealt with issues, and a region, which had no bearing on his infringement complaint. The Commission's reply dealt with a complaint concerning water retention on the construction of a highway near "Gorzow Wielkopolski" (west border of Poland with Germany); and it identified the complaint as relating to non-compliance with Bird and Habitats Directives. The complainant took the view that the Commission's letter of 15 May 2013 established that the Commission was completely negligent when dealing with his complaints. Firstly, the Commission had referred to one of his complaints only. Secondly, this reference was totally wrong and indicated that the Commission had not even read his complaints. Both of his complaints concerned the South-Eastern region of Poland, near the Polish-Slovak border, while the Commission wrote about a project located in the South-Western region of Poland, near the Polish-German border.

25. In its reply to the Ombudsman's inquiry (dated 16 August 2013), the Commission pointed



out that the first infringement complaint was dealt with by its Directorate General for Regional and Urban Policy and the second infringement complaint by Directorate General for Agriculture and Rural Development. As regards the first infringement complaint, the Commission said that it did not receive that complaint until 1 October 2012 (even if it was dated 22 August 2012) and, therefore, the deadline for dealing with it is 2 October 2013. The second infringement complaint was received on 29 November 2012 and the deadline for dealing with it is, therefore, 29 November 2013.

26. The Commission explained that its letter of 15 May 2013 [6] concerned only the first infringement complaint because it was drafted by DG Regional and Urban Policy which is responsible for that complaint. The letter did not refer to the second infringement complaint because that complaint falls under the responsibility of the Directorate General for Agriculture and Rural Development.

27. The Commission acknowledged that in its letter 15 May 2013 it gave an incorrect description of the works concerned. The title of a different project (road transport) was given due to an error in transcription. The Commission apologised for that error. It also stated that the Directorate General for Regional and Urban Policy is currently working on correcting the mistake and will provide the complainant with an answer relating to the correct project.

28. The Commission also stated that it will “endeavour” to respond to the complainant on the substantive issue of his complaints within the respective deadlines of 2 October 2013 and 29 November 2013.

29. The Commission further explained that the first infringement complaint was indeed dated 22 August 2012 but the post office stamp indicates 27 September and it was received by the Commission on 1 October 2012. The complaint was subsequently registered on 2 October 2012 and the acknowledgement of receipt was sent out on 18 October 2012, that is, within 12 days.

30. The Commission said that the second infringement complaint is under examination and that it might lead to a request for information from Poland through the EU-Pilot application.

31. On 27 August 2013, the Commission (Directorate General for Regional and Urban Policy) wrote to the complainant concerning the first infringement complaint. The Commission identified the complaint as referring to the water retention, agro-tourism projects and other projects which may have an impact on the complainant's farm and environment in the region of the complainant's farm. The Commission stated that it had asked for explanations from the Polish authorities managing the operational programme in question, in order to check whether EU law is being complied with. Finally, the Commission stated that it would keep the complainant informed about progress in its dealing with his case.

32. On 6 September 2013 the complainant sent the Ombudsman his comments on the Commission's reply and on its letter of 27 August 2013. The complainant accepted the Commission's explanation concerning the date on which it registered the first infringement complaint. The complainant said that it had been necessary for him to submit the first



infringement complaint through the Commission's Delegation in Poland because of technical difficulties in submitting the complaint on line. As regards the second infringement case, however, the Commission delayed sending him the acknowledgement of receipt. It did so only on 29 January 2013 while he had submitted this complaint on 29 November 2012.

33. In its further letter to the complainant, dated 28 October 2013, the Commission (Directorate General for Agriculture and Rural Development) referred to the complainant's second infringement complaint. The Commission informed the complainant that it had decided to deal with his case under the EU-Pilot and had asked for explanations from the Polish authorities. Furthermore, the Commission provided the complainant with standard information concerning the Pilot procedure. The Commission explained that the Member State has to reply to the Commission within ten weeks at the latest and that the Commission then has a further ten weeks in which to analyse the reply. Following that, the Commission will inform the complainant of its conclusions. The Commission also stated that if complainants consider that their own rights are being infringed by the alleged non-compliance with EU law by the Member State concerned, it is open to them to seek a remedy at the national level and that only national courts may decide about the complainants' right to compensation.

34. In his comments on the above reply, the complainant said he was astonished that it was only eleven months after the registration of his second infringement complaint that the Commission had checked the situation with the Member State concerned. The complainant felt that the Commission's advice, that he could consider bringing an action in the Polish courts, was unfair and inappropriate because of the high court costs this would involve for him.

The Ombudsman's assessment

35. The Ombudsman notes that the Commission apologised for its mistakes in the letter dated 15 May 2013. The Ombudsman also notes that in the course of her inquiry the Commission was ultimately able to provide the complainant with correct information about the status of his two infringement complaints: as regards the first infringement complaint, on 27 August 2013 and, as regards the second infringement complaint, on 28 October 2013. The Ombudsman is concerned, however, with the significant delays by the Commission in providing this information. On 13 March 2013, the complainant had asked about the status of the first infringement complaint but received no substantive reply up to 27 August. As regards the second infringement complaint, prior to 28 October 2013, the only information received by the complainant was the acknowledgement of receipt dated 29 November 2012.

36. In its response of 30 October 2013 to the Ombudsman, on a separate complaint (1111/2012/AN), the Commission acknowledged that complainants have a right to receive information about their complaint, even if no progress has yet been made on it. For this reason, the Ombudsman considers that further inquiries into the issue of the failure to inform the complainant in the present case are not justified.

37. At the same time, the Ombudsman believes the Commission could improve the standard



letters it uses when informing complainants in infringement cases that it has launched a Pilot procedure. The advice regarding the taking of legal action in the national courts is correct, in substance, since national courts are the first-line guardians of EU law. But, as rightly pointed out by the complainant, a Polish farmer, invoking this remedy is likely to be costly and not a realistic option for most ordinary people. The Ombudsman, therefore, would encourage the Commission to amend its standard letters in such cases so as to include information about the right to complain to national Ombudsmen or similar bodies. Such complaints may usually be made without the complainant incurring any costs.

38. The Ombudsman notes that Point 8 of the Commission's Communication on relations with the complainants in respect of infringements of EU law, as updated in 2012 [7] , provides that, "[a] s a general rule, the Commission 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 ". As the Ombudsman understands it, this one year deadline includes all administrative steps leading to the conclusion whether to issue a letter of formal notice or to close the case , including the Pilot procedure . In its reply of 25 July 2012 to the Ombudsman's draft recommendation in the own initiative inquiry OI/2/2011/OV the Commission appears to have taken the same view. [8]

39. In the present case, however, it is clear that the Commission cannot now comply with its self imposed [9] one year deadline given that the Polish authorities have ten weeks to reply to the Pilot procedure and that this procedure was very late in being started. In relation to the first infringement case, the Polish authorities were contacted around 27 August 2013 (that is, about 11 months after the complaint was registered with the Commission); and, as regards the second infringement complaint, the Polish authorities were contacted around 28 October 2013 (that is, again, about 11 months after the complaint was registered with the Commission).

40. The Commission did not explain, either in its correspondence with the complainant or in its responses to the Ombudsman, why it was unable to launch the Pilot procedure in both infringement cases until 11 months after it had received the complaints.

41. These Commission delays are all the more unfortunate in that the complainant's infringement complaints related to the protection of the environment and, as the complainant pointed out [10] in his email to the Commission dated 13 March 2013, protected species were in danger.

42. In light of the foregoing, the Ombudsman takes the view that the Commission unjustifiably delayed the start of the Pilot procedure and by doing so made it impossible for itself to comply with the one year deadline to decide on the complainant's infringement complaints. This was an instance of maladministration. Since this inexcusable delay cannot now be remedied, the Ombudsman will close the case with a critical remark

C. Conclusions



On the basis of her inquiry, the Ombudsman has decided to close this complaint with the following critical remark:

The Commission's overall handling of the contacts and complaints from the complainant was deficient in many respects. In particular, by delaying the start of the Pilot procedure and, as a result, making it impossible for itself to comply with the one year deadline to decide on the complainant's infringement complaints, the Commission was guilty of maladministration.

The complainant and the Commission will be informed of this decision.

Further Remark

The Ombudsman encourages the Commission to add to its standard letters informing complainants about the Pilot procedure that they may complain to national Ombudsmen or similar bodies, whose procedures generally do not involve any costs, regarding alleged infringements of EU law by national administration.

Emily O'Reilly

Done in Strasbourg on 18 December 2013

[1] Regulation (EC)1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund (OJ 2006 L 210 p. 25.)

[2] The complainant pointed out Articles 2.2 points a, b, d and e; Article 5 points 1, 2 and 3; Article 7 points 1, 2 a and b; Article 27 a and c; Article 28 b, d, fi, and k; Preamble points 2 and 3.

[3] OJ 2004 L 143 p.56.

[4] Article 2.4 of the Ombudsman's Statute provides that a complaint must be preceded by the appropriate administrative approaches to the institutions and bodies concerned.

[5] Article 258 TFEU provides: "*If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union ."

[6] In its opinion the Commission referred to 13 May 2013 as the date of its letter while in fact



the letter bears the date 15 May 2013.

[7] Communication from the Commission to the Council and the European Parliament updating the handling of relations with the complainants in respect of the application of Union law (COM(2012)154 final

[8] <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11860/html.bookmark>
[Link]

[9] Principle *Patere legem quam ipse fecisti* requires that every authority should abide by its own rules. See, by analogy, Joined Cases T-79/89 T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 BASF AG V Commission [1992] ECR II-315, paragraph 78.

[10] Translation from Polish: "*Storks flew in the valley of Poprad: today I saw from the window a black stork flying over the river in the direction of its nets: Two couples of black storks come here for years, the sign that the spring is very close ...*"