



Decision of the European Ombudsman closing his inquiry into complaint 301/2008/IP against the European Commission

Decision

Case 301/2008/IP - Opened on 06/03/2008 - Recommendation on 12/10/2009 - Decision on 16/09/2010

THE BACKGROUND TO THE COMPLAINT

1. The present case concerns two issues. First, a request for access to documents submitted to the European Commission under Regulation 1049/2001 [1]. Second, the Commission's handling of an application to amend the specifications for the production of an Italian cheese submitted by the Italian Ministry of Agriculture ('the Italian Ministry') in June 2003.

2. On 4 June 2003, the Italian Ministry sent the Commission an application to amend the production specifications for *Provolone Valpadana* cheese [2]. By Decree of 19 September 2003, published in the Italian Official Journal No 234 of 8 October 2003, the Italian Ministry authorised transitional measures to amend the specifications at national level.

3. On 15 September 2004, the complainant [3] wrote to the Commission. He made observations on the application submitted by the Italian Ministry and asked the Commission (i) to reject the Ministry's application of 4 June 2003, and (ii) to ask the Ministry to repeal the Decree of 19 September 2003. On 12 November 2004, the Commission replied to his letter, stating that it would deal with the application in accordance with Regulation 2081/92 [4].

4. On 26 February 2007, the complainant requested the Commission to give him access to all the documents it had in its possession concerning the procedure it was carrying out in relation to the Italian Ministry's above-mentioned application. He also reiterated his request for the Commission to reject the application to amend the production specifications, and asked to be informed about the state of play of the procedure.

5. On 3 April 2007, the Commission sent a letter to the complainant stating that the Italian authorities were examining the file concerning the procedure in question, and that the Commission's services would subsequently evaluate it in accordance with Regulation 1898/2006 [5]. The Commission added that the request for access to documents should be submitted to the Italian authorities, which were in possession of the relevant file.

6. The complainant contacted the Italian Ministry to ask whether the relevant file, which he understood from the Commission's above-mentioned letter was being dealt with by the national authorities, had been transmitted to the Commission, and if so, on which date. In its



reply of 20 September 2007, the Italian Ministry stated that it had submitted the application to the Commission in June 2003, but the latter had not yet replied. On 30 January 2008, the complainant turned to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

7. In his complaint to the Ombudsman, the complainant made the following allegations and claims, on which the Ombudsman opened an inquiry.

Allegations :

- The Commission's refusal to grant the complainant access to the requested documents was erroneous and illegal since it appeared that the Italian Ministry submitted the relevant file to the institution in due form.
- The Commission denied access to the requested documents on the erroneous grounds that the relevant file was not in its possession.
- The Commission failed to take a decision concerning the request for modification of the rules governing the production of *Provolone Valpadana* , thereby contributing to the prolongation of a transitory measure *sine die* .

Claims :

- The Commission should find the relevant file transmitted to it by the Italian Ministry for agriculture.
- The Commission should (i) grant the complainant access to the requested documents and (ii) inform him of the state of play of the relevant procedure.

THE INQUIRY

8. The complaint was forwarded to the Commission for an opinion. On 3 September 2008, the Commission sent its opinion, which was then forwarded to the complainant for his observations. On 23 September 2008, the Ombudsman received the complainant's observations.

9. On 17 June 2009, the Ombudsman's services asked the relevant Commission service whether, in the meantime, the Commission had taken a final decision on the Italian Ministry's application. In reply, the Commission stated that it had not yet adopted a position and did not provide information about a possible deadline for doing so.

10. On 12 October 2009, the Ombudsman addressed a draft recommendation to the Commission. On 9 March 2010, the Commission sent its detailed opinion. The Ombudsman forwarded it to the complainant with an invitation to make observations by the end of April 2010. The Ombudsman did not receive any observations from the complainant.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegations concerning the Commission's wrong handling of the application for access to documents and corresponding claims

Arguments presented to the Ombudsman



11. The complainant alleged that the Commission's refusal to grant his client access to the requested documents was erroneous and illegal. In support of his allegation, the complainant argued that, in its letter dated 20 September 2007, the Italian Ministry stated that the documents concerning the application were submitted to the Commission in June 2003. If this was true, the institution denied access to the requested documents on the erroneous ground that they were not in its possession.

12. In its opinion, the Commission stressed that it never stated that it did not have, or had not received the file on the application to amend the specifications for the production of *Provolone Valpadana*. Rather, it had stated that the Italian authorities' application would be evaluated by its services once the file was complete. Accordingly, there was no need to "find" the file, as claimed by the complainant.

13. According to the Commission, the complainant's letter dated 15 September 2004 did not contain a request for access to documents. His letter of 26 February 2007 was understood by the institution as a request for information about the progress of the procedure in question. The Commission's services replied on 3 April and on 12 June 2007. The complainant did not avail himself of the procedure foreseen by Regulation 1049/2001 to challenge the Commission's reply. Given these circumstances, the Commission's replies cannot be considered to constitute a refusal of access to documents in the sense of Regulation 1049/2001. It was only in the complaint to the Ombudsman that the complainant clarified that the Commission "should have sent to his client a copy of the documents and submits a request to that end." [6]

14. Furthermore, the Commission stressed that the Italian Ministry possessed copies of all the documentation submitted under the procedure relating to its application. Accordingly, this documentation was available for consultation at the national level.

15. In his observations, the complainant stated that, even accepting that the Commission understood the letter dated 26 February 2007 to be a request for information only, the Commission nevertheless omitted to mention a further letter dated 10 May 2007. In this letter, sent by registered mail, he clarified the possible misunderstanding in the interpretation of his letter dated 26 February 2007, and reiterated his request for access to documents. More specifically, he asked the Commission to send him a copy of the documentation relating to the action it had taken under the procedure concerning the application submitted by the Italian Ministry [7].

16. The fact that, as stated by the Commission, the request for access to documents could have been addressed to the Italian Ministry of Agriculture, did not exempt the Commission from dealing with an application for access to documents. Regulation 1049/2001 does not in fact contain any provision which authorises the institution concerned to refrain from dealing with applications for access to documents when they can be addressed to national authorities. Furthermore, the complainant emphasised that his request for access to documents covered the documentation relating to the action taken by the Commission under the procedure subsequent to the Italian Ministry's application. This documentation could, therefore, reasonably have included internal Commission documents, such as notes



or technical reports. It was not, therefore, obvious that they would be in the possession of the national authorities.

The Ombudsman's assessment leading to a draft recommendation

17. The Ombudsman noted that Regulation 1049/2001 sets out the rules regarding public access to documents held by Community institutions.

18. Article 7 stipulates that:

"[W]ithin 15 working days from the registration of the application, the institution shall either grant access to the documents requested ... or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application ...

... In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position. "

19. Article 8 establishes how to deal with a confirmatory application:

" A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal ...".

20. The Ombudsman further noted that, in the present case, and in accordance with Article 7 of the above Regulation, the complainant submitted an application for access to documents by letter dated 26 February 2007. In a further letter dated 10 May 2007, the complainant clarified the Commission's possible misinterpretation of his previous letter and explicitly reiterated his request for access to documents.

21. However, it did not emerge from the information provided to the Ombudsman in his complaint that the complainant made a confirmatory application to challenge the Commission's replies of 3 April and of 12 June 2007. In light of this, the Ombudsman, therefore, concluded that the Commission's statement that the complainant did not avail himself of the procedure foreseen by Regulation 1049/2001 to challenge the institution's reply was correct.

22. Before examining the Commission's handling of the complainant's request, and in order to avoid any possible misunderstanding, the Ombudsman considered it important to make the following clarifications.

23. Article 2(4) of his Statute establishes that "*a complaint* [to the Ombudsman] *must be preceded by the appropriate administrative approaches to the institutions and bodies concerned.* " In complaints concerning access to documents, the Ombudsman therefore has to verify whether, before turning to him, the complainant acted in accordance with the procedure laid



down in Regulation 1049/2001.

24. This means that the Ombudsman normally only opens a full inquiry into cases where it is clear that a confirmatory application has been made. However, it is possible that the specific facts of a case may justify opening an inquiry without evidence of such a confirmatory application having been made.

25. In the present case, it appeared that the Commission essentially informed the complainant that it did not hold the documents he requested. It would clearly have been inappropriate for the Ombudsman to inform the complainant that he should make a confirmatory application for documents that the Commission claimed not to have in its possession. In light of the correspondence presented to the Ombudsman in this case, and in light of the Commission's well-established practices for handling access requests, it was reasonable to interpret the Commission's initial response in the aforementioned way. This is why the Ombudsman opened his inquiry when the complainant alleged that the Commission's refusal to grant his client access to the requested documents was erroneous and illegal, since it appeared that the relevant file was submitted in due form to the institution by the Italian Ministry.

26. Furthermore, it appeared to be undisputed that the Italian Ministry submitted the file concerning its application in June 2003. Therefore, the Commission's statement that the complainant should submit his request for access to documents to the Italian authorities was irrelevant. The fact that a request for access to documents can be submitted to other authorities does not exempt the institution concerned from dealing with an application submitted in accordance with Regulation 1049/2001.

27. In light of the above, the Ombudsman concluded that the complainant's allegation was justified. He therefore made the following draft recommendation:

" The Commission should take a decision on the complainant's request for access to documents corresponding to the decision it would have taken in response to a confirmatory application.

Given that the requested documents appear to include documents originating from Italy, the Ombudsman recalls that the Court of Justice in Case Sweden v. Commission [8] laid down precise rules for the application of Article 4(5) of Regulation 1049/2001 [9] ."

B. Allegation that the Commission failed to take a decision on the application submitted by the Italian Ministry, and corresponding claim

Arguments presented to the Ombudsman

29. The complainant alleged that the Commission failed to take a decision concerning the request for modification of the rules governing the production of *Provolone Valpadana* . The



consequence of this failure was that a transitory measure adopted by the Italian authorities in October 2003 was prolonged *sine die* . The complainant claimed that the institution should inform him about the state of play of the procedure.

30. In its opinion, the Commission explained that it had received a high number of applications for the recognition of designations of origin, geographical indications, and applications to amend specifications. Some of them were still pending when Regulation (EC) No 383/2004 [10] entered into force on 15 March 2004. The Commission, therefore, requested Member States to send the relevant forms, including those for amendments to specifications already submitted. Italy was among those Member States. The Italian authorities did not act on the request and the Commission was, as a result, prevented from carrying out the initial analysis of the application submitted in June 2003 and, subsequently, from publishing the text concerned, in accordance with the legislation in force.

31. On 14 March 2008, the Commission wrote to the Italian authorities again and invited them to provide within two months the documents requested by letter dated 1 March 2004. The Italian authorities replied on 6 May 2008.

32. The Commission outlined that it would adopt a final decision regarding the Italian Ministry's application, in accordance with the relevant applicable rules.

33. In his observations, the complainant maintained his allegation and the corresponding claim. He further considered that the Commission could not rely on its workload to justify the delay in dealing with the application submitted by the Italian Ministry in 2003. The complainant noted that *Provolone Valpadana* was still on sale, on the basis of the Decree adopted by the Italian authorities in October 2003, which foresaw *transitional* measures only.

34. The Ombudsman noted that, when the Italian Ministry submitted an application to amend the specifications for the production of *Provolone Valpadana* , the relevant legislation in force was Regulation 2081/92 [11] . It set out the rules on the protection of geographical indications and designation of origin for agricultural products and foodstuffs. This Regulation was replaced by Regulation 510/2006 [12] , which entered into force on 31 March 2006.

35. The two Regulations laid down similar rules regarding the publication of applications for the recognition of designation of origin, their examination by the Commission, and any objections submitted by third parties against the Commission's decision in this regard.

36. Article 4 of both Regulations laid down the content and the requirements with which an agricultural product or foodstuff had to comply in order to be eligible for a protected designation of origin.

37. The Commission had to verify, by appropriate means, whether the registration application was justified, and whether it met the required conditions. In accordance with Article 6 of Regulation 2081/92, the period for carrying out this verification was six months. According to Regulation 510/2006, the Commission's verification should not have exceeded a



period of 12 months.

38. Article 9 of both Regulations foresees the possibility to apply for approval of an amendment to the specifications for a specific product. As stated by both Regulations, the procedural rules which were to be applied in such a case were the same as those applicable for the recognition of designation of origin.

39. In the case in question, the Italian Ministry submitted its application in June 2003.

40. The Ombudsman stated that the Commission's opinion showed that the institution requested information from the Member States, including Italy, on 15 March 2004. The Ombudsman understood that this information was requested as part of the verification process which the institution has to carry out when it receives an application to amend a specification.

41. In the absence of a reply, the Commission wrote a second letter to the Italian authorities in March 2008, to which they replied on 6 May 2008.

42. The Ombudsman noted that, in its opinion, the Commission made a generic reference to 'informal requests' made by its services to the Italian authorities 'at various meetings', which apparently took place between 2004 and 2008. However, it did not put forward any specific and concrete arguments to explain its omission to adopt a decision within the above period of time. In particular, he noted that the Commission gave no information or explanation as to how such an omission could be compatible with the deadlines laid down in the above-mentioned Regulations.

43. In light of the deadlines foreseen in the Regulations referred to above, and in the absence of any convincing arguments from the Commission, the Ombudsman concluded that the Commission failed to provide a valid and adequate justification for not having taken a decision on the application submitted by the Italian Ministry in June 2003. He therefore made the following draft recommendation:

" The Commission should conclude its examination on the application submitted by the Italian Ministry in June 2003 as soon as possible, and by no later than 31 January 2010. If the Commission considers that it cannot respect this deadline, it should provide valid and adequate reasons why. "

C. The arguments presented to the Ombudsman after his draft recommendation

44. On 9 March 2010, the Commission submitted its detailed opinion on the Ombudsman's draft recommendation.

45. With regard to the aspect of the draft recommendation concerning the complainant's request for access to documents, the Commission stated that it would deal with this request



in accordance with Regulation 1049/2001. The Commission explained that Article 4(5) of Regulation 1049/2001 requires it to consult the national authorities from which some of the requested documents originated.

46. With regard to the aspect of the draft recommendation concerning the Commission's examination of the application submitted by the Italian Ministry of Agriculture in June 2003, the institution pointed out that, by letter dated 26 January 2010, the Italian authorities informed it of their intention to withdraw the relevant application. The Commission, therefore, closed the file concerned.

47. The Ombudsman forwarded the Commission's reply to the complainant with an invitation to submit observations. Since no observations were received from him, the Ombudsman's services contacted the complainant on 17 August 2010 in order to verify whether, in the meantime, he had received the Commission's decision concerning his request for access to documents. The complainant confirmed that the Commission had given him access to the documents requested and thanked the Ombudsman for his work.

The Ombudsman's assessment after his draft recommendation

48. In light of the above, the Ombudsman concludes that the Commission accepted and implemented his recommendation to take a final decision on the complainant's application for access to documents. Moreover, the complainant was satisfied with its decision.

49. As regards the Ombudsman's recommendation that the Commission should conclude its examination of the application submitted by the Italian Ministry in June 2003, the Ombudsman notes that the basis for this part of the case no longer exists because the Italian authorities have, in the meantime, decided to withdraw the application in question.

D. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusions:

The Commission accepted the Ombudsman's draft recommendation regarding the complainant's application for access to documents.

Since the Italian Ministry of Agriculture has now withdrawn its application to the Commission for a decision on the proposed amendment of the specifications governing the production of *Provolone Valpadana*, the basis for this part of the case no longer exists.

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

P. Nikiforos DIAMANDOUROS



Done in Strasbourg on 16 September 2010

[1] 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, OJ 2001, L 145, p. 43.

[2] On the basis of Council Regulation (EEC) No 2081/92 of 14 July 1992, this cheese was assigned the protection of designations of origin and of geographical indications.

[3] The complainant is an Italian lawyer who complained on behalf of his client, the director of the "*Istituto Bromatologico italiano*".

[4] 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, OJ 1992, L 2008, p.1.

[5] Commission Regulation (EC) No 1898/2006 of 14 December 2006 laying down detailed rules of implementation of Council Regulation (EC) No 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ 2006, L 93, p. 1.

[6] Quoted from the Commission's opinion.

[7] "*Confidando che l'equivoco sia chiarito sono con la presente a reiterare l'istanza di accesso agli atti già contenuta nella mia ultima del 26 febbraio 2007, chiedendo che la Spett.le Commissione europea voglia indicare quali atti ha adottato in relazione alla richiesta di modifica del disciplinare di produzione della denominazione di origine Provolone Valpadana che contempla l'impiego dell'additivo E239 nella nota DOP, trasmettendomi in copia la relativa documentazione*".

[8] Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, paragraphs 75-77.

[9] Article 4(5) provides that "*A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.*"

[10] Regulation (EC) No 383/2004 of 1 March 2004 laying down detailed rules for applying Council Regulation (EEC) No 2081/92 as regards the summary of the main points of the product specifications OJ 2004, L64, pp. 16-20.

[11] Referred to in note 4 above.

[12] Referred to in note 5 above.