

Decision of the European Ombudsman closing his inquiry into complaint 182/2010/(AR)MHZ against the European Anti-Fraud Office (OLAF)

Decision

Case 182/2010/MHZ - **Opened on** 29/03/2010 - **Decision on** 19/11/2010 - **Institutions concerned** European Anti-Fraud Office (No maladministration found) | European Anti-Fraud Office (Critical remark) |

The background to the complaint

1. The complainant is a Polish farmer. In his view, fraud was committed by the Polish Agency for Restructuring and Modernising Agriculture ('the Polish Agency'), which manages EU subventions granted directly to farmers in Poland in the framework of the Common Agricultural Policy (CAP). On 13 November 2008, he complained to OLAF concerning the Polish Agency's rejection of his application for low scale commodities production support. He alleged that the Polish Agency wrongly refused to pay him subventions and wrongly withheld payment despite his successful appeals through the Polish courts.
2. Almost nine months after complaining to OLAF, and after the Ombudsman's intervention [1] , on 3 July 2009, OLAF sent him an acknowledgement of receipt of his letter dated 13 November 2008, apologising for the delay. OLAF's correspondence was in Polish. It stated that this delay was due to " *an administrative error on OLAF's part* ". In that letter, OLAF informed the complainant that it had (i) registered his complaint; (ii) started to analyse the content of his letter and (iii) contacted the Polish authorities in order to ascertain whether there were grounds for launching an official investigation into alleged fraud. OLAF also informed the complainant that it would contact him in due time. In the event that he wished to receive more information concerning his case, OLAF gave him the name and office telephone number of a certain OLAF official in Brussels whom he could contact.
3. On 7 October 2009, the complainant reiterated his complaint. OLAF reacted on 27 October 2009, by sending him a letter with the same content as its earlier letter dated 3 July 2009, but without addressing substantive issues.
4. In January 2010, the complainant complained to the Ombudsman.



The subject matter of the inquiry

5. The complainant alleged that OLAF was negligent in handling his complaint.
6. The complainant claimed that the OLAF should provide him with substantive information concerning its investigation into his complaint.

The inquiry

7. On 19 March 2010, the Ombudsman opened an inquiry and sent the complaint to OLAF with a request for an opinion. On 9 June 2010, OLAF sent its opinion, which was forwarded to the complainant with an invitation to submit observations. On 4 August 2010, the complainant sent his observations.

The Ombudsman's analysis and conclusions

A. OLAF's allegedly negligent handling of a complaint against the Polish Agency and related claim

Arguments presented to the Ombudsman

8. In his complaint, the complainant argued that OLAF committed an administrative mistake by failing to reply to his complaint of 13 November 2008. Furthermore, when OLAF finally replied to his complaint in July 2009, it did not take a position on its substance, but only promised that it would inform the complainant in due time about the follow-up to his case. In that reply, OLAF also stated that "*it had started*" analysing his complaint. Finally, instead of providing information on the substance, it provided the complainant with the Brussels telephone number of the official dealing with his case. Three months later, the situation was still the same, when, on 27 October 2009, OLAF replied to the complainant's reminder of 7 October 2009, informing him once again that "*it had started*" to analyse his complaint.

9. OLAF outlined in its opinion how it dealt with the complainant's correspondence. First, it pointed out that it received the complainant's complaint on 24 November 2008, but, due to an administrative oversight, it did not send him an acknowledgment of receipt. On 3 July 2009, after the Ombudsman's intervention, OLAF sent the complainant its first letter, the late acknowledgment of receipt. In this letter it explained that it was still waiting for information from the Polish authorities concerning his case and that it could not, therefore, give the complainant detailed information on his case. OLAF further apologised for not sending an acknowledgment of receipt earlier. On 14 October 2009, OLAF received another letter from the complainant concerning his case. OLAF acknowledged receipt of that letter on 27 October 2009. It informed



him that the evaluation process was still ongoing and that OLAF was exchanging information with the Polish authorities concerning the matter. On 23 November 2009, OLAF informed the complainant of its final decision of 13 November 2009.

10. In its opinion, OLAF admitted that, due to an administrative oversight, it did not reply in time to the complainant's letter dated 13 November 2008, and apologised for that failure. However, OLAF took the view that it was not negligent in handling of the complainant's complaint as such. In support of this view, OLAF argued the following. After receiving the complaint on 24 November 2008, OLAF sent a request for information to the relevant Polish authorities on 8 January 2009. The Polish Ministry of Finance replied on 5 March 2009, stating that the Polish Agency was investigating the matter. On 11 March 2009, OLAF requested further information on the results of that investigation. Since the Ministry's reply was not complete, OLAF put new questions to the Polish Ministry on 12 June 2009. On 25 August 2009, the Polish Ministry replied, but still failed to explain why the Polish Agency refused to pay the subvention to the complainant. At that point, OLAF requested to be directly contacted by the Polish Agency. On 23 October 2009, the Polish Agency submitted additional information. On 13 November 2009, OLAF took the decision that no formal investigation into the complaint was justified.

11. OLAF attached to its opinion copies of its exchange of correspondence with the Polish authorities, and with the complainant.

12. In his observations on OLAF's opinion, the complainant disagreed with OLAF's decision that there were no grounds to open a formal investigation into his complaint. He remained convinced that the Polish Agency had committed irregularities. He stated that (i) after his application for the relevant subvention had been rejected due to "*lack of funds*", the Polish Agency granted 57 490 other applications for the same *funds*; (ii) the Polish Agency granted two subventions "for one farm", and (iii) it also granted subventions to persons who were not actually working on their farms, that is, their forage area was not actually used. Finally, he attached to his observations a copy of the judgment of the Polish Regional Court of Appeal of 27 November 2009, in which reference was made to the complainant's statements (i) to (iii) above. He also attached a copy of the Polish Agency's subsequent decision on his case.

The Ombudsman's assessment

As regards OLAF's correspondence with the complainant

13. On the basis of the evidence available, the Ombudsman notes that, on 24 November 2010, OLAF registered the complainant's letter dated 13 November 2008, under registration number 1708. However, it failed to send the complainant an acknowledgement of receipt of his letter. This was an infringement of Article 14.1 of the Code of Good Administrative Behaviour. This provision foresees that anyone who sends a letter or complaint to the Institution shall receive an acknowledgement of receipt within a period of two weeks, except if a substantive reply can be sent within that period. However, since OLAF, albeit belatedly, and only as a result of the



Ombudsman's intervention, sent the complainant an acknowledgement of receipt, and also apologised for the administrative error, the Ombudsman does not consider it useful to pursue this matter further.

14. As mentioned above, on 3 July 2009, OLAF finally sent the complainant the acknowledgement of receipt of his complaint. In its letter, which was in Polish, OLAF stated that it " **it had started to analyse** *the content of [his] letter and it had simultaneously entered into contact with Polish authorities in order to ascertain whether there are grounds to launch an official investigation in the matter* " [2] (emphasis added). The Ombudsman considers that, on reading the above highlighted words, the complainant had reason to be concerned as to whether OLAF had taken any action whatsoever on his complaint before 3 July 2009. The complainant's concern was certainly increased when, three months later, he received OLAF's next letter, dated 27 July 2009, also drafted in Polish, in which OLAF used the identical wording, namely, that " *it had started to analyse the content of [his] letter.* "

15. In this respect, the Ombudsman notes that the English version of OLAF's letter dated 3 July 2009, which was submitted to the Ombudsman along with OLAF's opinion, and which apparently served as the text for translation into Polish, was worded differently. The English version stated that OLAF " *is currently examining [the complainant's] letter and exchanging information with the Polish authorities to determine if there are grounds to open formal investigation in the matter.* " (emphasis added) the content of

16. It follows that the letter addressed to the complainant in Polish did not exactly correspond to its source version in English, and it distorted the information which OLAF wished to give the complainant. Moreover, the subsequent letter to the complainant in Polish was just a "copy-paste" of the letter dated 3 July 2009, and therefore the distorted information was in fact provided twice. The Ombudsman recalls in this respect that good administration requires that correspondence addressed to citizens, regardless of which EU official language is used, should be drafted carefully. OLAF failed to do so in its letters to the complainant dated 3 July and 27 October 2009, and a critical remark will be made in this respect below.

As regards OLAF's treatment of the substance of the complaint of 13 November 2008

17. The Ombudsman would first like to thank OLAF for attaching to its opinion copies of its exchange of information with the Polish authorities. The Ombudsman carefully examined the content of that correspondence.

18. The Ombudsman first notes that, on 8 January 2009, that is, less than two months after the complainant's complaint was received, OLAF submitted its first request for information to the Polish authorities, entitled " *Request of information about CAP direct payments for a farmer in Poland* ".

19. In order to be able to assess OLAF's subsequent steps, the Ombudsman finds it useful to



summarise OLAF'S correspondence with the Polish authorities. The Ombudsman understands that the steps taken by OLAF were a form of preliminary inquiry leading to the decision on whether there were grounds to open a formal investigation.

20. In its letter dated 8 January 2009, OLAF informed the Polish Ministry of Finance of the complainant's case and asked the Ministry to provide the following information within six weeks: (i) the reference number under which the complainant was registered in the EU Integrated Administration and Control System; (ii) details of the complainant's applications for direct payments; (iii) details of checks carried out to verify that the complainant is entitled to the aid applied for, and the results of these checks; and (iv) details concerning the complainant's dispute with the Polish Agency.

21. On 24 February 2009, the Polish Ministry explained in detail all the benefits received by the complainant. It specified the amounts he had received from 2004 to 2008 as CAP " *direct payment assistance, single area payment for utilised agricultural area and additional area payment* ". In addition, the Polish Ministry informed OLAF that, on 2 November 2005, the complainant applied for EU aid designed for low scale commodities production farms but that the Polish Agency had rejected his application. The reason given was that the funds for that kind of assistance had already been spent. The Polish Ministry admitted that the relevant Polish courts had overruled the above decision, finding that there was no proper basis for it. The Polish courts ordered the Polish Agency to reconsider the case. The latter's new decision was due by 1 March 2009. Finally, the Polish Ministry explained that the complainant's subsequent application of 16 November 2006 for the same kind of subvention was rejected on procedural grounds, and that he also applied for a " *structural pension* " in 2008, which was granted after he had transferred the ownership of his farm to his son.

22. On 11 March 2003, OLAF asked the Polish Ministry to provide detailed information on the Polish Agency's decision which was due by 1 March 2009. On 27 May 2009, the Polish Ministry informed OLAF that, in response to the complainant's request, the Polish Agency decided, on 4 February 2009, that the structural pension would be paid to the complainant as from 1 January 2009, on the basis of the transfer of the complainant's farm to his son, by notary deed. The complainant was thus no longer eligible for the payments of low scale commodities production support because he was receiving a structural pension. On 12 June 2009, OLAF reacted to that information. It pointed out that the dispute concerned the complainant's application for the payment of low scale commodities production support which he made on 2 November 2005 [3] , when he was still eligible for the EU aid scheme. In light of the above, OLAF asked for clarification of the Polish Agency's decision regarding the complainant's application of 2005.

23. In its reply of 25 August 2009, the Polish Ministry stated that when the court (first instance) asked the Polish Agency to review its negative decision on the complainant's application of 2005, it decided that the payment to the complainant could not be made, since the funds had already been allocated. The Court of Appeal overruled the above decision. Subsequently, on 26 March 2009, the Polish Agency found that it could not make the relevant payment to the complainant because, in the meantime, he had become a pensioner. The complainant appealed against this last decision and " *the proceedings are ongoing and the foreseen date of its*



finalisation was set up on 17 July 2009. "

24. OLAF then contacted the Polish authorities by e-mail on several occasions, including by e-mail dated 16 September 2009 and addressed directly to the Polish Agency. In that e-mail, OLAF asked the Polish Agency to reply to the following questions: (i) why the Polish Agency considered that, by applying for the subvention on 2 November 2005, the complainant did not respect the relevant deadline if, on the basis of the information provided by the Polish Ministry, it appears that there were two deadlines established to apply for the same subventions: up to 22 March 2005, and from 6 to 16 November 2005? (ii) why the complainant's application of 2 November 2005 was not joined to other applications of November 2005? (iii) if the Polish Agency's decision of 26 March 2009 that the subventions should not be paid to the complainant was based on the fact that he was a pensioner, why this decision was based on facts which occurred in 2008/2009 (when the complainant made his request for a structural pension, which was subsequently granted), instead of on the basis of the factual situation which existed when the complainant submitted his application on 2 November 2005? (iv) what was the decision on the complainant's subsequent administrative appeal, due by 17 July 2009? On 2 October 2009, OLAF reiterated question (iii) of its e-mail of 16 September 2009.

25. In its reply of 23 October 2009, the Polish Ministry of Finance, Department of the Protection of EU Financial Interests, explained on behalf of the Polish Agency, *inter alia*, the following. The Polish Agency set two deadlines for applications for the relevant subventions in the framework of the action entitled "Support for low scale commodities production farms 2004-2006". The first was from 1 February 2005 to 22 March 2005, and the second was from 6 November 2006 to 16 November 2006. The complainant submitted two applications. The first, on 2 November 2005, and the second, on 16 November 2006. The complainant's first application, apart from being submitted outside of the deadline, did not comply with the relevant Polish authority's decree which provided that the subventions would be paid (a) until the budget assigned for them ran out, and (b) in accordance with the chronological order of the applications received [4] . The complainant's first application was, however, submitted after the foreseen budgetary means had been exhausted by earlier successful applications. In sum, the complainant's first application was rejected. The complainant made some errors in his second application. He was subsequently asked to correct the errors, but he failed to do so. His second application was, therefore, also rejected. Finally, the Polish Ministry explained that, following the complainant's appeals, his first application was reconsidered on 19 July 2009. The Polish Agency then decided that no payment could be made to the complainant because, in the meantime, he had transferred ownership of his farm to his son in exchange for a pension. Finally, the Ministry stated that, on 13 August 2009, the complainant appealed to the Regional Administrative Court against the above decision.

26. On 13 November 2009, OLAF decided not to open a formal investigation and to close the complainant's case. On 23 November 2009, OLAF informed the complainant of its decision.

27. The Ombudsman reviewed the administrative steps taken by OLAF in relation to the complainant's complaint (referred to in paragraphs 20-26 above). In his view, they were adequate in the given circumstances. OLAF approached the Polish authorities immediately after



receiving the complaint. OLAF asked the Polish authorities on several occasions for detailed information. It was persuasive in its contacts with the Polish authorities, and insisted on being given exhaustive explanations to clarify its doubts. In this respect the Ombudsman also notes that the complainant's complaint to OLAF dated 13 November 2008 does not refer to facts which he subsequently alleged in his observations. These are summarised in (ii) and (iii) of paragraph 12 above. It is therefore reasonable that OLAF did not ask the Polish authorities for explanations related to these (new) alleged facts.

28. The Ombudsman further notes that, when the Polish authorities informed OLAF that the Polish court had started dealing with the complainant's case, OLAF decided to stop the preliminary inquiry it had launched regarding the complainant's case. In its statement of reasons dated 23 November 2009, OLAF clearly indicated that it could not pursue the complainant's case " *taking into account the principle of subsidiarity*." The Ombudsman considers this approach to be reasonable.

29. The Ombudsman considers that the further explanation which OLAF gave the complainant in its letter dated 23 November 2009 is also appropriate in the given context, and in light of the information OLAF had at its disposal at that time [5]. In his complaint to OLAF, the complainant alleged, in summary, that the Polish Agency committed fraud by refusing to grant him the relevant subvention. In its letter informing the complainant of its decision on his complaint, OLAF pointed out that the Polish Ministry of Finance had informed it that he had applied for the relevant subvention on 2 November 2005, but the deadline for submitting applications was from 1 February 2005 until 22 March 2005. Moreover, OLAF stated that, according to the Polish Ministry, by the time the complainant submitted his application, the budgetary funds for the subventions were already exhausted. Even if, as OLAF pointed out, in a subsequent passage of its letter dated 23 November 2009, the Polish Agency " *replied to the complainant's appeals by stating that the subventions for the low scale production farms cannot be granted to him because he received a structural pension* ", OLAF concluded that the complainant's application of 2 November 2005 was rejected on other grounds, namely, because (i) he did not comply with the deadline, and (ii) the budgetary funds for the low scale production subvention had run out.

30. Furthermore, the Ombudsman emphasises that the information on which OLAF based its decision of 13 November 2009 was provided by the relevant Polish authorities. Ultimately, it is reasonable that OLAF, pursuant to Article 4.3 of the TEU [6], should trust that the information provided by the Polish authorities is correct.

31. In light of the above findings, the Ombudsman does not find an instance of maladministration in the way in which OLAF dealt with the substance of the complainant's complaint.

32. Nevertheless, the Ombudsman notes that, in his observations, the complainant referred to developments in his case which occurred after OLAF's decision of 13 November 2009. The complainant attached to his observations (i) a copy of the Polish Regional Court of Appeal's judgment of 27 November 2009 concerning the Polish Agency's decision of 17 July 2009, to which paragraph 25 above refers [7], and (ii) a copy of the Polish Agency's subsequent



decision of 7 June 2010 [8] . In this respect, the Ombudsman points out the following. The mandate of the European Ombudsman is limited to the control of European institutions, bodies and agencies, while national ombudsmen scrutinise national administrations. The Ombudsman therefore advises the complainant to address the Polish Ombudsman with his observations on the developments which occurred during the handling of his case.

B. Conclusions

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

There was no maladministration in the way in which OLAF dealt with the substance of the complainant's case.

As regards OLAF's correspondence with the complainant, the Ombudsman makes the following critical remark:

Principles of good administration require that, regardless of which official EU language is used, correspondence addressed to citizens should be drafted carefully, clearly, and in an understandable way. OLAF failed to do so in its letters 3 July and 27 October 2009, which were addressed to the complainant in Polish.

The complainant and OLAF will be informed of this decision.

P. Nikiforos Diamandouros

Done in Strasbourg on 19 November 2010

[1] On 21 April 2009, the complainant submitted a complaint to the Ombudsman (1107/2009/(MW)MHZ), concerning OLAF's failure to reply to his letter dated 13 November 2008. The Ombudsman launched a telephone procedure. As a result, OLAF sent the acknowledgement of receipt on 3 July 2009.

[2] OLAF "rozpoczał "(**Emphasis added**) analize zawartosci Pana pisma i jednocześnie nawiązał kontakt z odpowiednimi władzami w Polsce w celu stwierdzenia czy istnieją podstawy do otwarcia oficjalnego dochodzenia w tej sprawie.

[3] In fact the application was dated 28 October 2005, and received by the Polish Agency on 2 November 2005.



[4] *Rozporządzenie Rady Ministrów w sprawie szczegółowych warunków i trybu udzielania pomocy finansowej na wspieranie gospodarstw niskotowarowych objętej planem rozwoju obszarów wiejskich* , Decree-Law dated 7 December 2004.

[5] See Case T-228/02 *OMPI v Council* [2006] ECR II-4665, paragraph 141 and the case-law cited there, concerning the standards for the statement of reasons.

[6] Article 4.3 TEU provides: " *...The Member States should facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.* "

[7] It appears that the Regional Court found that it was unlawful to base the refusal of the subvention to the complainant on the fact that the latter had signed his farm over to his son. The Regional Court also found that the Polish Agency should have considered the complainant's son as the new beneficiary of the subvention originally due to the complainant as a result of his application of 2 November 2005.

[8] It appears that the Polish Agency decided to discontinue its proceedings concerning the payment of the subvention to the complainant because, in summary, the Polish Supreme Administrative Court ruled that the transfer of the property of a farm to another person does not entitle the new owner to subventions due to the former owner.