European Ombudsman

Decision of the European Ombudsman closing his inquiry into complaint 2293/2007/(ID)PB against the European Commission

Decision
Case 2293/2007/(ID)PB - **Opened on** 03/10/2007 - **Recommendation on** 09/07/2009 - **Decision on** 16/12/2010

The background to the complaint

1. This inquiry concerns the European Commission's response to a letter in which a person working in the Greek farm industry expressed concerns about the allegedly discriminatory effects of a Commission regulation adopted within the framework of the Common Agricultural Policy (CAP). The Commission regulation concerned one aspect of the major reform of the CAP, which took place in 2003. This reform introduced a new aid system, the Single Farm Payment (SFP), which separated aid from production. It was initially introduced through the adoption of Council Regulation 1782/2003 [1] . Numerous implementing regulations followed [2] .

2. The complainant's letter to the Commission concerned certain SFP eligibility rules laid down in Commission Regulation 1701/2005 [3] , amending Commission Regulation 795/2004 [4] . The complainant understood the rules to apply in a discriminatory way depending on whether a Member State had opted to apply the SFP at the regional or at the national level. He enclosed with his letter a statement by the relevant Greek authority (a reply to a question posed by the Greek Parliament in relation to a petition), which appeared to interpret the rules in a similar way to him.

3. In a short reply to the complainant, the Commission's Directorate-General for Agriculture and Rural Development (DG AGRI) referred to a provision in Commission Regulation 795/2004 (as amended by Commission Regulation 1701/2005) to demonstrate that, in its view, no discrimination exists because eligibility is foreseen both when a Member State applies the SFP at the regional or at the national level. The Commission trusted the information it provided would be sufficient and informed the complainant of the possibility to find additional information via an internet address on the Commission's website. The Commission's reply to the complainant's letter (written in Greek) was made in English.

The subject matter of the inquiry

4. On 3 October 2007, the Ombudsman opened an inquiry into the following allegations:

(1) The Commission wrongly failed to reply to the complainant in Greek;

(2) The Commission failed to address properly the matter which the complainant raised regarding possible discrimination against farmers having multiannual crops in a Member State, like Greece, where the single payment scheme is applied at the national level.

THE INQUIRY

5. The Commission submitted its opinion on 4 March 2008. On 16 May 2008, the complainant submitted his observations on that opinion. On 9 July 2009, the Ombudsman made a draft recommendation. The Commission replied to the draft recommendation on 9 December 2009. The Ombudsman forwarded the Commission's reply to the complainant, who submitted his observations on 29 January 2010.

The Ombudsman's analysis and conclusions

A. The alleged failure of DG AGRI to reply to the complainant in Greek

Arguments presented to the Ombudsman

6. The complainant expressed his dissatisfaction with the fact that the Commission sent him its reply in English. He alluded to the fact that Greek is one of the official languages of the Union.

7. In its opinion, the Commission explained that it had replied to the complainant in English using its fast-track procedure. Under this procedure, responses are written in one of the Commission's official working languages to save time. Since the complainant's letter had a " *tone of desperation* ", it wished to respond to him as soon as possible.

8. Furthermore, the Commission explained that June is a busy period for the translation services due to legislative activity. If it had sent the letter in Greek, this would have significantly delayed its response.

9. On 17 December 2007, the Commission sent a translation of the letter, along with an apology.

10. In his observations on the Commission's opinion, the complainant expressed doubts as to the seriousness of the Commission's above-mentioned apology. He felt that if the Ombudsman had not intervened in October 2007, he would never have received a translation of the letter. The complainant also questioned the seriousness of the Commission's technical explanations for its failure to reply in Greek, pointing out that the Commission's letter only covered 13 lines of text. He expressed strong concern about the Commission's behaviour, which he felt attempted to " *diminish* [his] *language* ".

The Ombudsman's assessment leading to the first part of the draft recommendation

11. Article 24 of the Treaty on the Functioning of the European Union provides that every citizen of the Union may write in any of the official languages to the institutions referred to in Article 7 of the Treaty (including the Commission). Citizens also have the right to receive a reply in that language. This rule is also stated in the Commission's Code of Good Administrative Behaviour [5] . Accordingly, the Commission was obliged to reply to the complainant in Greek.

12. The Commission clearly did not dispute that it failed to comply with this obligation. It attempted, however, to put forward a number of reasons for this failure. Since it only sent the complainant a reply in Greek after the Ombudsman had opened the present inquiry, it presumably considered that those reasons were sufficiently valid for not replying in Greek at all.

13. The reasons put forward by the Commission were the following.

(1) An urgent reply appeared necessary because of the " *tone of desperation* " in the complainant's letter;

(2) June is a busy period for the translation services; and

(3) Sending a reply in Greek would (therefore) have significantly delayed the response.

14. With regard to the first point, the argument that the complainant's letter had a " *tone of desperation* " was not justified. Both the structure and the formulations in his letter demonstrate that it was written by a particularly informed author who was familiar with bureaucratic communication. There was not, for instance, a tone of desperation in the following words: "[t] *hus, in my opinion, Regulation (EC) No 1701/2005 produces inequality for some Member States and, by extension, for European citizens* "; or " *I am making this administrative approach to the competent institution for further consideration ...* " With regard to the other two points referred to by the Commission, it is obvious that foreseeable busy periods for the translation services cannot, in principle, remove the Treaty-based obligation here concerned.

15. With regard to the apology that the Commission eventually made to the complainant, the Ombudsman considered that the points and arguments made by the complainant in paragraph 10 above are valid. The Ombudsman therefore considered it appropriate to make a

corresponding draft recommendation (see below, section D.).

B. The alleged failure of the Commission properly to address the issue raised in the complainant's letter

Arguments presented to the Ombudsman

16. In his complaint to the Ombudsman, the complainant argued that the Commission's reply to his letter of 18 April 2007 had " *no connection at all* " with the subject he had raised, " *perhaps because of a failure to understand* ". He referred to the following correspondence and its content.

17. His letter of 18 April 2007 referred to the context of the complaint (as described in the *Background to the complaint* section above), and noted that the European Commission issued Regulation 1701/2005 to extend eligibility entitlements to 'permanent' and 'multiannual' crops. However, "[a] *ccording to Article 3b(5), it offers this supplement to Member States that made use of Articles 59 and 60 of Regulation (EC) No 1782/2003, i.e. the countries that previously chose to use the Regional level to implement the single payment scheme. It does not offer it to Member States that chose to use the National level (such as Greece) to implement the single payment scheme. As a result, farmers in those countries do not have the right to single payment entitlements for hectares under multiannual and permanent crops in the reference period (2000-2002).* " Article 3b(5), referred to by the complainant, provides the following in points (c) and (d):

" *5. Without prejudice to Article 60 of Regulation (EC) No 1782/2003, where a Member State makes use of the option referred to in Article 59 of that Regulation,*

[...]

(c) for the purpose of Article 59(4) of Regulation (EC) No 1782/2003 land planted with permanent crops and which is also subject to an application for the aid for energy crops provided for in Article 88 of Regulation (EC) No 1782/2003 shall be considered as eligible hectares for the establishment of payment entitlements;

(d) for the purpose of Article 59(4) of Regulation (EC) No 1782/2003 land planted with multiannual crops, shall be considered as eligible hectares for the establishment of payment entitlements. "

18. Article 59, referred to in these provisions, is found in Section 1 'Regional implementation' of Council Regulation 1782/2003.

19. In this context, the complainant concluded that the eligibility provided for in Commission Regulation 1701/2005 only applied to the Member States that (unlike Greece) opted for the

regional model. His understanding of the legislation appeared to have been shared by the relevant Greek authority, which, in a reply to the Greek Parliament (referred to further above), made the following points:

" *Regulation (EC) No 1701/2005 amending Regulation (EC) No 795/2004 to which you refer, and specifically Article 3b, clarifies eligibility in relation to the corresponding articles of Regulation (EC) No 1782/2003.*

Given that our country applies the single payment scheme at the national level and not the regional level, paragraph 5 of the above article is not relevant to us, since it refers to Articles 59, 60 and 63, which relate to the possibility of regional implementation of the single payment scheme. "

20. The complainant stated that this was the inequality that he was concerned about. He asked for corrective measures to be taken.

21. The relevant part of the Commission's reply to the complainant's letter was as follows:

" *We have the pleasure to inform you that Regulation (EC) 795/2004 already foresees the eligibility of multi-annual and permanent cultivations in the Historical model [i.e. the national model] as in the case in the Regional model.*

You will find this in Article 3b paragraph 2 of Regulation 795/2004, where it is stipulated [consolidated version]: 'For the purpose of Article 51 of Regulation (EC) No 1782/2003, set-aside land planted with permanent crops used for the purposes referred to in Article 55(b) of that Regulation and land planted with permanent crops and which are also subject to an application for the aid for energy crops provided for in Article 88 of that Regulation shall be considered as eligible hectares for the use of, respectively, set-aside entitlements and payment entitlements'. "

22. The Commission's opinion on the complainant's allegation in the present case contained the following comments:

(a) The Commission observed that the complainant's request for information had a somewhat general nature. In light of the focus of the complainant's letter, the Commission limited its reply to the question concerning the equal treatment of permanent crops on set-aside land in both the national and regional models in respect of the above-mentioned provision.

(b) It was also unclear to the Commission which varieties of multi-annual and permanent crops the complainant was really concerned about. The Commission outlined that a general reference to multi-annual or permanent crops was not sufficient in the context of Regulation (EC) No 1782/2003 to determine if the areas used for these plants were eligible for payment or not. For this reason, it gave the complainant general information on the eligibility conditions for permanent crops under the single payment scheme. The Commission was of course ready to provide any further clarifications if the complainant approached it with such a request.

(c) The complainant did not contact the Commission with such a request, and the Commission therefore took the opportunity to provide clarifications in its opinion on the present complaint.

(d) Areas planted with permanent crops are, in principle, excluded from the single payment scheme both in the national model and in the regional model under Article 44(2) of Regulation (EC) No 1782/2003. Multi-annual crops covered under point (d) of Article 2 of Regulation (EC) No 795/2004 are not considered as permanent crops (point (c) of Article 2 of Regulation (EC) No 795/2004) and therefore areas under multi-annual crops are, in principle, eligible.

(e) However, it is not permitted to use eligible areas to produce fruit and vegetables because Council Regulation (EC) No 1782/2003 excludes the products referred to in Article 1(2) of Regulation (EC) No 2200/96 and in Article 1(2) of Regulation (EC) No 2201/96. Notwithstanding this article, fruit and vegetable production is specifically permitted in the context of regional implementation. This distinction between the two models was foreseen in order to avoid " *that in case of regionalisation this does not lead to a disruption of the production whilst minimizing any effect on distortion of competition* " (recital 33 of Regulation (EC) No 1782/2003).

(f) As a general remark, the Commission highlighted that Member States were fully aware of the differences between the regional and national models before opting for either of them. Article 51 of Regulation (EC) No 1782/2003 provided that permanent crops were excluded from payments in both models. The same provision applied to exclude fruits and vegetables unless Article 60 of Regulation (EC) 1782/2003 authorised payments for them in the regional model. For the above reasons, most of the multi-annual crops were treated accordingly because they fell into one of the two categories. When the Member States made their choice of model, they had the above information at their disposal. Therefore, allegations of any discrimination in the subsequent implementing regulations have to be ruled out.

(g) The difference mentioned with respect to the eligibility of fruits and vegetables is no longer relevant today. In the context of the Fruit & Vegetable Reform, land planted with fruit and vegetables can already be eligible for the single payment scheme as of 1 January 2008 or later, depending again, on the decision of the Member State.

(h) As regards Article 3b of Regulation (EC) No 795/2004 (inserted by Commission Regulation 1701/2005, Article 1), the Commission noted that the purpose of this Article was to specify (a) the application of the definitions of permanent crops and multi-annual crops in relation to the eligibility conditions for the single payment scheme for set-aside land used for the production of raw materials and (b) which crops are allowed for energy purposes on land subject to an application for the single payment scheme. Different subparagraphs of Article 3b apply to regional and national regimes and create an equal system of eligibility for energy crops in both models. To this end, the Commission informed the complainant that multi-annual crops are equally eligible for single payment scheme payments in both models for situations covered by Article 3b of Regulation (EC) 795/2004 (energy crops grown on set-aside land).

23. In his observations, the complainant maintained his allegations and made a number of detailed comments regarding the different regulations mentioned above. Specifically, he

considered that the Commission had still not addressed the object of his original request, namely, the (alleged) differences in entitlements resulting from the reference to the regional models only in Article 3b(5) of Regulation 1701/2005 (amending Regulation 795/2004). Additionally, the complainant expressed his confusion over the fact that the Commission did not address at all the Greek authority's statement, quoted above in paragraph 19. In a reply sent to the Greek Parliament, this authority adopted the same legal interpretation as the one held by the complainant.

The Ombudsman's assessment leading to the draft recommendation

24. The applicable principles of good administration are clear and set out in the relevant codes on good administration. The code specifically adopted by, and applicable to, the European Commission provides that "[t] *he Commission undertakes to answer enquiries in the most appropriate manner and as quickly as possible* " [6] . The generally applicable European Code of Good Administrative Behaviour lays down that "[t] *he official shall be service-minded, correct, courteous and accessible in relations with the public. When answering correspondence, telephone calls and e-mails, the official shall try to be as helpful as possible and shall reply as completely and accurately as possible to questions which are asked* " (Article 12) [7] . The present case does not raise a dispute regarding the applicability of these principles as such.

25. The practical application of the above principles must take account of the relevant circumstances. Relevant considerations include (and these are well illustrated in the present case) the complexity of the area concerned; the complexity and seriousness of the object of the individual's enquiry, and the degree of clarity of its object; the nature/status of the individual concerned (for instance, professional or private, expert, non-expert, immediately interested or not); and the nature of any purported evidence or other supporting documentation submitted with the enquiry.

26. In the present case, the complainant, who works in the farm industry, addressed a letter to the Commission which:

(a) concerned the complex area of agricultural aid entitlements,

(b) raised a serious and complex issue of possible discrimination resulting from a Commission regulation;

(c) was formulated in relatively clear terms and included references to the legislation concerned, and

(d) was, furthermore, supported by what seem to be directly pertinent and formal statements made by a relevant national authority to the national parliament.

27. In these circumstances, it appeared to have been both possible and appropriate for the

Commission to produce a reply that precisely and helpfully addressed the legal issues involved.

The reply that the Commission sent to the complainant on 7 June 2007 did not properly address the object of the complainant's enquiry. It did not specifically provide information on the legal issue raised by the complainant. Nor did it, as it should have done, clarify whether the Greek national authority referred to above had misunderstood the legislation involved.

28. The Commission's opinion in the present inquiry does not make up for the above-mentioned shortcoming in its letter of 7 June 2007. Although the opinion contains a certain amount of detailed information, it did not clearly address the central issue raised by the complainant. Specifically, it does not refer to and deal with the cross references to the regional models in Commission Regulation 1701/2005 (amending Article 3 of Commission Regulation 795/2004). This is the case, in spite of the fact that the consequences flowing from these cross references constituted the main concern and background to the complainant's enquiry. With regard to the national authority's above-mentioned statement, the opinion merely mentioned the fact that a copy of this statement was submitted by the complainant. However, it did not clarify whether that authority had wrongly interpreted the legislation. Additionally, the Ombudsman notes that the opinion contains a statement that could appear to recognise, albeit implicitly, the existence of a difference in entitlements. However, it does not specifically explain this with reference to the issue raised by the complainant: " *Member States made their* choice of model *having the above information,* therefore *allegations of any discrimination in the subsequent implementing regulations* [have] *to be ruled out.* " (emphasis added)

29. In light of the foregoing, the Ombudsman considered that the Commission's response to the complainant's enquiry in the present case did not fully comply with the principles of good administration set out above. Since there was scope for remedying this through a more precise and helpful reply, the Ombudsman made the corresponding draft recommendation below.

C. The draft recommendation

30. On 9 July 2009, the Ombudsman made the following draft recommendation to the Commission, in accordance with Article 3(6) of his Statute:

(1) The Commission should recognise that its failure to reply to the complainant in his language was not acceptable, and that the usual and, therefore, foreseeable busy periods of the translation services are, in principle, not a valid ground for disrespecting the obligation here concerned.

(2) The Commission should provide the complainant with a more precise and helpful reply in response to his enquiry of 18 April 2007. In doing so, the Commission should:

(a) specifically address the legal interpretation presented by the complainant and also contained in the Greek national authority's statement enclosed with the complainant's letter of 18 April 2007; and

(b) if, in line with the interpretation presented to it by the complainant, it concludes that there is a difference in the relevant entitlements depending on whether a given Member State opted for the national or the regional model, clarify whether this, in the Commission's view, amounts to discrimination in a legal sense and, if so, state the relevant justifications.

The arguments presented to the Ombudsman after his draft recommendation

31. With regard to the first part of the draft recommendation, the Commission recognised in its opinion that sending a reply to the complainant only in English was a mistake. It emphasised that its normal practice is to address citizens in their own language, and pointed out that it had apologised to the complainant for its mistake (see the letter below).

32. With regard to the second part of the draft recommendation, the Commission referred to a letter that it subsequently sent to the complainant. It is useful to set out the text of this letter in full:

" *With respect to the Ombudsman's recommendation to the Commission following your complaint 2293/2007/(ID)PB, I should like to revert to you in regard to your concerns about the allocation of entitlements for multi-annual crops.*

The statement given in the original letter "Thank you for your letter referring to the subject matter. We have the pleasure to inform you that Regulation (EC) No 795/2004 already foresees the eligibility of multi-annual and permanent cultivations in the historical model as is the case in the regional model." was valid in itself and correct.

This first paragraph of my letter had the intention of reassuring you that in the historical model the possibility also existed under Commission Regulation (EC) No 795/2004 -amended by Commission Regulation (EC) No 1701/2005 - to use land cultivated with multi-annual crops but for the activation of payment entitlements for set-aside. Indeed there are differences related to the models implemented by the Member State (MS).

In the second paragraph of my letter, the Article which is relevant to the historical model is quoted in detail and the link is made to Council Regulation (EC) No 1782/2003, "You will find this in Article 3b paragraph 2 of Regulation (EC) No 795/2004 where it is stipulated: "For the purpose of Article 51 of Regulation (EC) No 1782/2003, set aside land with permanent crops used for the purposes referred to in Article 55(b) of that Regulation and land planted with permanent crops and which are also subject to an application for the aid of energy crops provided for in Article 88 of that Regulation shall be considered as eligible hectares for the use of, respectively, set-aside entitlements and payment entitlements. "

In regard to the specific interest for the situation of asparagus as in the complaint to the Ombudsman, in your original request there is a reference to multi-annual crops in general and

asparagus is mentioned between brackets, which was understood, as an example among other multi-annual crops that could have interested you.

So far as the interpretation of the OPEKEPE on the meaning of Article 3b(5) as introduced by Article 2 of Regulation (EC) No 1701/2005 is concerned, indeed the Commission can confirm that this specific paragraph of Article 3b was addressed to the MS applying the regional model. Land with multi-annual crops in MS applying the historical model could only be used for the activation of set aside entitlements according to paragraph 4 of that same Article.

Article 3b had been introduced by Regulation (EC) No 1701/2005 amending Regulation. (EC) No 795/2004 regarding the eligibility of some types of crops to allow for land eligible to direct payments before the Common Agriculture Policy (CAP) reform to become eligible for the Single Payment Scheme.

Evidently, the choice of the Greek authorities to implement the historical model entailed the application of Article 3b(4) of Regulation (EC) No 795/2004 in Greece.

Concerning the current interpretation of the Regulation, as further modifications and reforms have been introduced, the situation has changed. The fruit and vegetables reform have made these crops eligible as of January 2008. Another change is that the scheme of set aside - as control supply instrument - has been abolished in the meantime in the review of the CAP instruments (commonly known as the "Health Check") which has also led to a number of modifications, which are included in Council Regulation (EC) No 73/2009 on direct payments published on 31 January 2009.

Therefore, today land cultivated with asparagus, as possibly is your case, can be used for the activation of payment entitlements under the Single Payment Scheme in the historical model.

In regard to your statement concerning unequal treatment of the MS and consequently of the European citizens by the EU legislation, the Commission's services cannot share your views for the following reasons.

Firstly, Council Regulation (EC) No 1782/2003 provided the MS with a variety of systems to choose from (historic, regional and hybrid) in the course of implementing the CAP at national level. The reform of the CAP explicitly offered a certain discretional margin of manoeuvre to the MS as the different agricultural aspects in the MS such as farming diversify in terms of structures, crops, practices and traditions, variety in climatic conditions, etc., by nature lead to differences for individual farmers.

Each model had its own conditions, thus allowing the MS in accordance with the existing conditions in each one of them to accommodate in the best possible manner the needs of their farming communities. Hence, one may say that unequal treatment would have occurred if the EU legislation provided for only one system. In the case of Greece, the competent authorities have decided to go the path of the historical model.

Moreover, under the principle of non-discrimination between community producers, which is enshrined in the second subparagraph of article 34 (2) of the EC treaty [8] , and according to the prohibition of discrimination on grounds of nationality laid down in the first paragraph of article 12 of the EC treaty, comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. As mentioned above, Member States were granted a broad margin of discretion in choosing the model. Accordingly, different Member States apply different models and the resulting differences in treatment cannot therefore constitute unequal treatment.

Furthermore, Regulation (EC) No 73/2009 provides MS that had chosen to apply the historical model with the possibility to amend their original decision and adjust their systems towards a more regionalised arrangement. To date, the Commission's services have not been made aware of any such decision taken by the Greek authorities.

In any event, it is important to underline that the Commission's services are unable to make binding interpretations of Community law, which only the European Court of Justice may do.

Finally, we apologise for any inconvenience caused, acknowledging our failure to respond immediately to your letter in your mother tongue."

33. In his observations, the complainant did not further pursue the first allegation regarding the Commission's use of English in its correspondence with him.

34. With regard to the second allegation, the complainant essentially maintained his grievances. He took the view that the Commission's reply to the Ombudsman's draft recommendation did not give a clear answer as to whether there was discrimination in the treatment of Member States following the amendments to Council Regulation 1782/2003. He also held that the Commission and did not give adequate grounds for its view. His remarks can be summarised as follows (paragraphs 35 to 42).

35. The Commission continued to insist that Commission Regulation 795/2004 was valid and already provided for the eligibility of multiannual and permanent crops under the historical as well as the regional model. However, Regulation 795/2004 only provided the definitions, that is, it defined multiannual crops and permanent crops for the purposes of Title III of Council Regulation 1782/2003 and specifically for the purposes of set-aside. It did not specify the eligibility of land. This was the reason for the subsequent adoption of Commission Regulation 1701/2005, which did not amend the whole of Article 2 of Regulation 795/2004, but only points (c) and (d) of that article, with the inclusion of Article 3b, containing six paragraphs, under the heading 'Eligibility'. The fifth of those paragraphs specifies that, where a Member State makes use of the provisions of Articles 60 and 59 of Regulation 1782/2003, point (d), worded as follows, becomes applicable: " *for the purpose of Article 59(4) of Regulation (EC) No 1782/2003 land planted with multiannual crops, shall be considered as eligible hectares for the establishment of payment entitlements.* " The provisions of articles 59 and 60 of Regulation 1782/2003 clearly only apply to the regional model and not to the historical model. Thus, the set-aside referred to in Regulation 795/2004 is one thing, while the granting of new payment

entitlements, specified in the amendment in Regulation 1701/2005, is another.

36. It must be emphasised that the present complaint does not concern set-aside, but the question of the non-application of Article 3b(5)(d) of Regulation 1701/2005 to the historical model. This is a regulation which came into force two years *after* Council Regulation 1782/2003, when the Member States had already chosen their models, with whatever differences existed between them. If the Member States choose their models, and the Commission subsequently adopts a regulation which grants land eligibility only to *one* model, then this creates inequality, which was the reason for the present complaint. The Commission does not, however, appear to recognise the difference between set-aside and the granting of *new* entitlements provided for by the addition of Regulation 1701/2005.

37. The Commission pointed out that Greece chose the historical model in order to make use of Article 3b(4) of Regulation 1701/2005 (and not paragraph 5). This is not only mistaken, but also illogical. When the Member States made their choice of models in 2003 under Regulation 1782/2003, no one knew what would follow in 2005 under Regulation 1701/2005. If Greece had known what was going to happen in 2005, it is inexplicable why it did not make a choice that would enable it to benefit from Article 3b(5) of Regulation 1701/2005. The new payment entitlements were assigned to areas of land with multiannual crops, of which Greece has a large number.

38. Thus, the inequality does not arise from Council Regulation 1782/2003 or from the model systems, but from the subsequent amendments introduced by the Commission, such as those in Regulation 1701/2005, which favours only one model.

39. The Commission pointed out that each model specified in Regulation 1782/2003 had its own clauses enabling Member States to adapt it in the best possible way to the needs of their farming communities. However, in Council Regulation 1782/2003, there was no clause specifying that, after a Member State had chosen a model, it could modify its choice to favour one particular model.

40. The Commission cited a recent regulation, Council Regulation 73/2009, and stated that this Regulation allows Member States applying the historical model to amend their original decision and change to the regional model. The complainant argued that the encouragement to change models was an admission that inequality existed. In other words, the Commission accepted that the historical model did not enjoy the benefits of the regional model, and suggested a change of model as a means of obtaining such benefits. However, a change of model did not eliminate inequality.

41. Inequality, in fact, could be eliminated easily if the Commission modified Article 3b(5) of Regulation 1701/2005 by including the articles relating to the historical model in addition to Articles 59 and 60 of Regulation 1782/2003. It would then be possible to apply paragraph 5(d) to both models.

The Ombudsman's assessment after his draft recommendation

42. With regard to the first allegation, the Ombudsman notes that the Commission apologised for its failure to initially reply to the complainant in Greek. The Commission recognised that the normal practice is to reply to EU citizens in the official language that they have used. The Ombudsman therefore concludes that the Commission has adequately implemented the first part of his draft recommendation.

43. With regard to the second part of his draft recommendation, the Ombudsman notes that the Commission provided a more detailed account of its position in relation to the issues raised by the complainant. In particular, the Commission confirmed in clear terms that the relevant Greek national authority's understanding of the legal situation was correct. The Commission also addressed more specifically the complainant's argument regarding possible unlawful discrimination.

44. With regard to the issue of discrimination, the Commission pointed out, in summary, that since Greece opted for one subsidy model (the 'historical' model), its farmers could not be considered to be in the same situation as farmers in Member States that had opted for the 'regional' model. It took the view that the difference in entitlement identified by the complainant basically resulted from the difference in models.

45. The complainant remained unsatisfied with the Commission's response. He found that it was unclear in what sense the choice of model made by the Member States in relation to the CAP reform in 2003 could validly result in the difference in entitlements that, as he saw it, stemmed from a regulation adopted subsequently by the Commission in 2005. In his view, the Commission did not explain how the difference in entitlement resulted from the Council Regulation and thus, as the Commission argued, specifically from the difference in the model-based system of agricultural subventions. He noted that, in its last response, the Commission pointed out that Article 51 of Regulation 1782/2003 does not provide for eligibility of areas used for the production of fruit and vegetables but, notwithstanding this, such eligibility is specifically provided for in the context of regional implementation. The complainant could however not understand why this interpretation was correct: "[but] *if the distinction already existed, then why was a second distinction created through Regulation (EC) No 1701/2005?* "

46. At this point, the Ombudsman considers it useful to make the following remarks regarding the object of the present inquiry.

47. Regulation 1782/2003 is legislation which was adopted by the Council. The other two instruments referred to in the present case, that is regulations 795/2004 and 1701/2005, contain rules adopted by the Commission for the implementation of the above-mentioned legislation. The Ombudsman, whose mandate is limited to issues of *maladministration* , cannot inquire into the content of legislation. Although the Ombudsman may find that an EU institution should provide citizens with factual information on EU legislation, it is not within his competence, in the context of a review of possible maladministration, to examine the institutions' choices that are contained in that legislation. It also follows from this that, when the Ombudsman reviews

possible maladministration in relation to implementing instruments, a basic element of his review is to determine whether the disputed part of the instrument in question essentially implements the legislation. If that is the case, the Ombudsman cannot question its validity.

48. It follows from the foregoing that, in the present case, the Ombudsman assesses whether the Commission properly communicated the relevant facts and explanations to the complainant, including explanations as to whether the differences in subsidy entitlements in the implementing regulations derived specifically from the EU legislation referred to above.

49. Having carefully examined the Commission's last reply to the complainant, which it made in response to the draft recommendation in this case, the Ombudsman considers that the Commission has provided a clear statement regarding the accuracy of the legal interpretation of the relevant national Greek authority (OPEKEPE), as the complainant requested, and made relevant efforts to provide additional information that it thought could be useful to the complainant's specific situation.

50. The Commission also addressed in more specific terms the issue of possible discrimination under Article 40(2), second paragraph, TFEU. The complainant emphasised in his observations that this was, and remained, the central issue. He recalled the Commission's statement that there could be no discrimination because the farmers of Member States that had chosen different models ('regional' or 'historical') in relation to the 2003 reform of the common agricultural policy were in different situations. However, in the complainant's opinion, this argument could not be logically invoked as an argument to reject his allegation of unequal treatment that the Commission itself introduced through implementing regulations adopted at a later stage.

51. The Ombudsman recognises that, at first sight, the complainant's argument appears to have merit. The Commission's explanation would clearly be inadequate if the Member States who opted for the different models simply did not, when they chose their model, have any means of knowing the consequences, including specifically the preferential treatment of the 'regional' model in relation to the agricultural products here concerned.

52. In this respect, the Commission's reply could perhaps have been more direct and clear. The difference in treatment – experienced by the complainant as discrimination – was effectively foreseen in Article 60(1) of Regulation 1782/2003, adopted by the Council. This provision referred to a general exclusion, in Article 51, of certain relevant crops under the single payment scheme, but specifically introduced optional preferential treatment " *by way of derogation* " when those crops were cultivated in the *regional* model. Furthermore, this preferential treatment was not limited to set-aside entitlements, since the above-mentioned Article 51 of the Regulation features in Chapter 4, Section 1, " *Use of the land* ", and not under Section 2, " *Set-aside entitlements* ".

53. Since the 2003 Regulation constitutes legislation adopted by the Council, the Commission presumably felt no need to further explain the legal validity of the difference in entitlement here in question. Similarly, the Ombudsman cannot, as explained further above, question the

Commission's implementation of rules or intentions adopted by the EU legislator.

54. In light of the above, the Ombudsman finds that the Commission has adequately rectified the instance of maladministration initially identified and he therefore closes the present inquiry.

C. Conclusions

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

The Commission has implemented the Ombudsman's draft recommendation, and no further inquiries are necessary.

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 16 December 2010

[1] Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy [...], OJ 2003 L 270, p. 1.

[2] See further information on http://europa.eu/scadplus/leg/en/lvb/l11089.htm [Link]

[3] Commission Regulation (EC) No 1701/2005 of 18 October 2005 amending Regulation (EC) No 795/2004 laying down detailed rules for the implementation of the single payment scheme provided for in Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, OJ 2005 L 273 p. 6.

[4] For a consolidated version see: http://eur-lex.europa.eu/LexUriServ/site/en/consleg/2004/R/02004R0795-20060831-en.pdf [Link].

[5] Part 4 of Annex to Commission Decision 2000/633, OJ 2000 L 267, p. 63.

[6] Part 4 of Annex to Commission Decision 2000/633, OJ 2000 L 267, p. 63.

[7] This code is available on the website of the European Ombudsman: http://www.ombudsman.europa.eu [Link].

[8] Now Article 40(2) of the Treaty on the Functioning of the European Union.