

Decision of the European Ombudsman closing the inquiry into complaint 1348/2013/EIS against the European Commission

Decision

Case 1348/2013/EIS - **Opened on** 13/08/2013 - **Decision on** 25/03/2015 - **Institution concerned** European Commission (No maladministration found) |

The case concerned the method for calculating a quality index of durum wheat on the basis of which a premium was paid to farmers in the EU until 2009 under the Common Agricultural Policy. The premium was paid only in the case of durum wheat suitable for use in the manufacture of semolina and pasta products. The complainant wrote to the Commission and argued that the contested method was erroneous and had a distortive effect, but the Commission did not modify it. He complained to the European Ombudsman that the Commission had failed to provide him with an adequate reply. The Ombudsman inquired into the issue and found no maladministration by the Commission.

The background to the complaint

1. The complainant is an Italian citizen who is a stakeholder in a company that owns the commercial rights of several varieties of durum wheat.
2. In 2003, the complainant contacted the Commission to complain about a statistical method that the Commission had proposed at that time for calculating the quality index for durum wheat varieties. The Commission's proposal was essentially based on a proposal by the Italian authorities. According to the method, the quality index resulted from the sum of four differently weighted separate parameters: (i) weight per hectolitre (10 per cent of the index value); (ii) protein content (40 per cent of the index value); (iii) gluten index (30 per cent of the index value); and (iv) yellow index (20 per cent of the index value). In the complainant's view, the method was erroneous and had a distortive effect, since it failed to standardise the parameters involved, as each of them had a different range of variation and substantial changes in one parameter could have a very limited impact on the final index, while small changes in another could have a considerable effect.
3. In the end, the method was adopted without amendments in Commission Regulation 2237/2003 [1] and was later confirmed in Commission Regulation 1973/2004 [2], which



repealed the former one.

4. The complainant subsequently contacted the Commission anew on several occasions between July 2003 and November 2006, enclosing several reports and technical studies (the 'technical studies') by a researcher in Statistics at an Italian university with a view to demonstrating the alleged distortive effects of the approved methodology. Within the same timeframe, the French Ministry of Agriculture sent a letter to the Commission in which it drew the Commission's attention to the alleged distortive effects based on the difference in the possible range of variation of the parameters involved. However, the Commission did not deem it appropriate to change the method without any practical experience of its implementation.

5. On 1 January 2009, upon the entry into force of Regulation 73/2009 [3], the contested statistical method was repealed and replaced by a single income support scheme for farmers. As the complainant wished the Commission to declare that it would not re-adopt the contested method in the future, he wrote to the Commission a number of times making very clear his interest in receiving a reply.

6. In particular, on 24 October 2012, the complainant submitted eight specific questions to the Commission, asking the latter to take a position on the method and to explain why the Commission did not take any action to modify or correct it despite the information it had received from him over the years. The questions raised by the complainant were as follows:

(1) Was the method for calculating the quality index for durum wheat varieties which the Commission adopted in Regulation 2237/2003 and Regulation 1973/2004 correct or not?

(2) Does the Commission consider that the method was correct although it failed to standardise the data involved? Why?

(3) When proposing the adoption of Regulation 73/2009, did the Commission intend to repeal the existing method because it considered it erroneous or distortive?

(4) Why did the Commission ignore and not respond to the complainant's repeated and specific criticism of the method?

(5) Why did the Commission not assess the correctness of the method when it was proposed by the Italian authorities, even though it had been criticised since 1995?

(6) Why did the Commission never reply to the complainant's letter of 18 August 2006 asking it to reconsider the method or to respond to his assertions that it was incorrect?

(7) Why did the Commission never reply to the complainant's letter of 16 November 2006 in which he urged the Commission to take a position on the correctness of the method?

(8) Why did the Commission not re-examine, modify or correct the method, despite the note of the French Ministry of Agriculture pointing to the risk of distortions were the method to be used



and proposing to standardise the data involved?

7. Having received no reply, the complainant submitted a complaint to the European Ombudsman. This complaint was registered under reference number 456/2013/ER. The Ombudsman contacted the Commission and, after the complainant received a reply on 14 June 2013, closed the case.

8. In its reply, the Commission apologised for the delay in replying and the fact that it did not explicitly address the issue of the correctness of the method in its earlier replies. As the complainant's questions about Regulations 2237/2003 and 1973/2004 aimed at obtaining a declaration that the method was erroneous and that the said Regulations were thus illegal, it pointed out that it is not for the Commission but solely for the Court of Justice of the European Union ('CJEU') to review the legality of legislative acts. Had the Commission decided to assess the validity of the method, it would have encroached upon the CJEU's competence. Furthermore, since the complainant had raised the issue of the legality of the said Regulations in the context of national judicial proceedings before an administrative tribunal, it was appropriate for the Commission not to deal with the issue of the correctness of the method.

9. Concerning the technical studies mentioned by the complainant, the Commission contended that they did not criticise the fact that the quality index was defined as the weighted sum of the four criteria, but that the different criteria were not standardised. It added that the arguments and criticism contained in the studies were "*not absolute*" and "*pertained typically to a scientific analysis*", the solutions envisaged were "*strictly mathematical or statistical in nature*" and were presented "*in hypothetical or alternative terms*". On this basis, it concluded that there was no relation between the arguments raised in the studies and the "*radical statements*" made by the complainant. The French authorities did not refer to the issue again either. As the Commission considered that the new explanations "*justified its conduct as regards the complainant's questions concerning Regulations 2237/2003 and 1973/2004*", his question about the repeal of these Regulations had become obsolete. However, it apologised to the complainant for the initial failure to reply, which had occurred due to an oversight.

10. Dissatisfied with the replies received from the Commission, the complainant submitted this complaint to the European Ombudsman on 10 July 2013.

The inquiry

11. The Ombudsman opened an inquiry into the complaint and identified the following allegation and claim:

1) The Commission failed to provide a complete and reasonable reply to the complainant's letter of 24 October 2012. In particular, the Commission (i) failed to address the arguments raised by the complainant that the method for calculating the quality index of durum wheat varieties was incorrect, and (ii) did not provide valid reasons as to why it did not modify that method.



2) The Commission should provide a complete and reasonable reply to the complainant's letter and, in particular, acknowledge that: (i) the calculation method for the quality index of durum wheat varieties applied in accordance with Regulation 2237/2003 and Regulation 1973/2004 was erroneous and distortive; and (ii) the Commission had failed to modify that method.

12. In the opening letter, the Ombudsman also invited the Commission to address the following specific points:

1) First, the Commission argued in its reply of 14 June 2013 that it did not deem it appropriate to take into consideration the technical studies referred to by the complainant because of their mere mathematical or statistical nature or of the hypothetical or technical language used in their drafting. At first, the Ombudsman found it difficult to understand why mathematical or statistical arguments should not be relevant when assessing the validity of the statistical method.

2) Second, the Commission argued that only the CJEU may review the legality of EU legislative acts. However, the complainant made it clear that his request was aimed at ascertaining whether the method was erroneous and not that the relevant Regulations are invalid. Moreover, the competence of the CJEU to review the legality of EU legislative acts would not appear to prevent the Commission from proposing amendments to existing legislation.

13. In the course of the inquiry, the Ombudsman received the Commission's opinion on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

Allegation that the Commission failed to provide a complete and reasonable reply to the complainant and related claim

Arguments presented to the Ombudsman

14. The complainant argued that he wished the Commission to declare the method erroneous, so as to avoid it being considered correct and being re-adopted by the Commission in the future. He clarified that he had never asked the Commission to declare Regulations 2237/2003 and 1973/2004 invalid but only to affirm that the method was erroneous with a view to taking the necessary steps. In his view, the fact that the CJEU is vested with the statutory competence to review the legality of EU acts does not prevent the institution that adopted the act from amending, rectifying or revoking it. He also contended that the fact that he had raised the issue in the context of national judicial proceedings did not prevent the Commission from taking action at the EU level. Furthermore, it was not until 2007, that is, well after the Commission was informed of the flaws in the method, that the judicial proceedings at issue were initiated in Italy.

15. Concerning the merits of the criticism of the method, the complainant argued that his requests were based on the results of technical studies drafted in scientific language and made



reference to hypothetical examples and real data. In his view, his criticism was clear and precise, but the Commission failed to address it.

16. In its opinion, the Commission raised an objection of inadmissibility based on the first sentence of the second subparagraph of Article 228(1) TFEU [4] and Article 2(7) of the Statute of the European Ombudsman [5]. Since, in 2007, the complainant had initiated legal proceedings before an Italian court in a case whose subject matter was essentially identical to his complaint, the Commission considered that the Ombudsman should end her examination of this complaint. In this respect, the Commission referred to the Ombudsman's decision in case 1047/2013/BEH [6], in which the Ombudsman considered that there were no grounds for further inquiries into the complaint, as its main aspects were the subject of ongoing legal proceedings. Furthermore, the Commission pointed out that the complainant and a member of his family had lodged a petition with the European Parliament on the same subject matter in 2004, which would also make this complaint to the Ombudsman inadmissible. In support of this view, the Commission referred to the Ombudsman's decision in case 1821/2012/ANA [7].

17. The Commission added, however, that in the event that the Ombudsman were not to uphold the Commission's objection of inadmissibility, it intended to counter the complainant's substantive comments as follows. The Commission had already provided the complainant with a number of substantive replies to his queries. In the area of the Common Agricultural Policy (CAP), the Commission enjoys a wide margin of discretion. This has been confirmed by the CJEU. According to case-law, one needs to prove the existence of a manifest error in the exercise of its discretion in order for the Commission to be considered to have committed an instance of maladministration. The Commission went on to state that its margin of discretion has also been recognised by the Ombudsman in her decisions [8]. However, the complainant did not submit any evidence of such manifest error.

18. Concerning the contested support scheme, the Commission stated that the cultivation of durum wheat suitable for use in the manufacture of **semolina and pasta products** only was eligible for that aid. This political choice, together with the weighted quality criteria, was considered the most appropriate with a view to taking into account different interests, such as competitiveness, efficiency, maintenance of the production zones and financial requirements. The various documents the Commission had provided to the complainant showed the different interests expressed by the various actors and stakeholders in the course of the procedure that led to the adoption of Regulation 1973/2004. The technical aspects of the Regulation, from plant yields and their variation to qualitative, commercial and technological aspects of the products, were thoroughly analysed by the Commission. Moreover, an exchange of correspondence took place between the administrative and the political levels of the decision-makers. From this point of view, the Commission considered that the contested method was fully legitimate and in line with the aims and requirements of the legal framework. Furthermore, the Commission did not share the complainant's interpretation of the letter from the French government to the Commission about the alleged distortive effects of the contested method based on the difference in the possible range of variation of the parameters involved, as the letter merely pointed to a "*potential*" risk in the future or a risk based on the very first results obtained by the national experts after applying the method.



19. As regards the technical arguments raised by the complainant, the Commission rejected the view that it did not deem it appropriate to consider them. It referred to the contents of its letter of 14 June 2013 to the complainant, in which it explained that the complainant's general arguments raised against the contested scheme and validity claims could not be taken into account in that context, as they touched upon the competence of the CJEU and not that of the Commission. Furthermore, the Commission pointed out that the complainant was arguing from his own perspective whereas the Commission had taken a more general view: for example, the complainant referred to **bread** production, which the legislator explicitly excluded from the scope of the scheme in this specific context. As regards the experts mentioned by the complainant, the Commission explained that it was clear that the solutions or conclusions they proposed were often presented as alternatives, hypotheses or possibilities, and the professor referred to by the complainant did not contest the four parameters used in the method as such. All in all, the technical explanations offered by the complainant did not support his legal arguments. While the Commission acknowledged that the complainant's technical arguments could not be summarily rejected, any criticism of the method should be precise, clear and convincing. The complainant's criticism was not, since it was not specifically connected to the criteria or the objectives of the method, as set out in Article 5 of the repealed Regulation 1973/2004.

20. In his observations, the complainant reiterated his view that the Commission deliberately interpreted his comments about 'validity' within the legal meaning of the term, although he had made it very clear from the very beginning that he referred to the term in a mathematical/statistical context. He argued that the Commission has still not justified the mathematical validity of the calculation method it adopted, even though concerns had also been raised by the French government. The complainant also pointed out that he never intended to question the Commission's discretion in this respect, but simply referred to the erroneous and distortive mathematical calculations due to the lack of standardisation of the data, which in his view, unlike the choice of differently weighted separate parameters, are not a matter of discretion.

21. As to the objections of inadmissibility put forward by the Commission, the complainant contended that his complaint to the Ombudsman concerned the Commission's bad administrative behaviour. With regard to the first objection of inadmissibility based on ongoing legal proceedings before an Italian court, the complainant argued that the subject matter of that case related to the legality of the procedures of the Italian ministry, whereas the inquiry into this case concerned the issue of whether the Commission had provided a complete and reasonable reply to the complainant's letter. No reference for a preliminary ruling to the CJEU had however been made in the pending Italian case.

22. Concerning the second objection of inadmissibility put forward by the Commission concerning the petition the complainant and a member of his family had lodged with the Committee on Petitions of the European Parliament, the complainant pointed out that the subject matter of the petition did not relate to the Commission's behaviour. In his petition, he essentially raised arguments relating to the alleged distortion of competition in the durum wheat seed market. In fact, the Commission did not even address the issue of the calculation method



and the mathematical correctness of the calculations in its reply of 30 November 2005 to the Petitions Committee.

23. In conclusion, the complainant took the view that the arguments put forward by the Commission were unfounded and misleading as, by concentrating on the weighted separate parameters instead of the calculation method, the Commission put the debate on the wrong track. He also criticised the Commission for not being sufficiently familiar with the specificities of the topic, as it ignored the fact that both pasta and bread are produced from semolina.

The Ombudsman's assessment

As regards the Commission's objections of inadmissibility

24. The Ombudsman considers that, in his observations, the complainant sufficiently clarified the subject matter of the proceedings before the Italian court and his petition to Parliament. In light of these clarifications, the objections are not grounded.

As regards the substance of the complaint

25. As the Commission rightly pointed out, it enjoys a broad margin of discretion in matters relating to agriculture [9]. The Ombudsman has consistently taken the view that, whenever an institution exercises its margin of discretion, she will find maladministration only if it is shown that there was a manifest error of assessment in relation to the exercise of that margin of discretion. The Ombudsman will not substitute her own assessment for that of the Commission, but in the event that she finds maladministration, she may request that the matter be re-examined by the institution in order to address the contested issues.

26. The Ombudsman has however taken the view that the exercise of a discretionary power cannot lead to arbitrariness [10]. This means that a public authority must always be able to explain why a particular course of action has been chosen, and there must be good reasons for choosing one course of action over another. In this case, the issue is whether the Commission provided an adequate reply to substantiate its view that, contrary to the complainant's assertion, the method was correct and there was no need to change it before the new Regulation was adopted.

27. In support of his position, the complainant essentially invoked (i) the alleged distortive effects of the approved methodology, and (ii) the wrong mathematical calculation methods. He also put forward that the allegedly erroneous and distortive mathematical calculations based on the lack of standardisation of the data were not a matter of discretion. The Ombudsman does not share this view. In this case, the Commission agreed that each of the parameters had a different range of variation. Accordingly, it also agreed that it was possible that substantial changes in one parameter could have a limited impact on the final index, while small changes in



another could have had a considerable effect. The Ombudsman does not see why this choice should be considered unreasonable and, in any event, the Commission acted within its discretionary powers when it decided upon it.

28. As regards the reasons provided by the Commission for its position, the Ombudsman notes that the Commission acknowledged that the complainant's technical arguments could not be summarily rejected but took the view that his criticism of the method was not precise, clear and convincing because it was not specifically connected to the criteria or the objectives of the method, as set out in Article 5 of the repealed Regulation 1973/2004. The complainant appeared to argue, in turn, that mathematical arguments are independent from legal or political criteria and objectives, and that the calculation method was wrong from the mathematical point of view in this case.

29. While the Ombudsman notes that Article 18 of the European Code of Good Administrative behaviour obliges institutions to state the grounds of decisions, indicating clearly the relevant facts and the legal basis of the decision, this duty is not limitless. In this case, the Commission has explained (i) the purpose of the contested scheme and why it did not deem it appropriate to change its position on the basis of the complainant's arguments, and (ii) that it indeed took into account the complainant's technical arguments, but the way they were put forward did not support his legal arguments. Against this background, the Ombudsman takes the view that the Commission has given reasons for its position on the complainant's mathematical arguments and has adequately answered the Ombudsman's question about the validity of the mathematical or statistical arguments as well.

30. Finally, concerning the complainant's criticism about the Commission's lack of familiarity with the field concerned, the Commission explicitly explained that durum wheat for use in the production of bread was **not** eligible for the aid. The complainant's comment that both pasta and bread are produced from semolina does not call into question this explanation as, in order to be eligible, the product needed to be suitable for use in the manufacture of **semolina and pasta products**.

31. In light of these considerations, there is nothing to suggest that the Commission's actions were not within the limits of its legal authority. In view of the above, the Ombudsman considers that no manifest error occurred in this case and the Commission has provided the complainant with a reasonable reply. She thus concludes that there was no maladministration in the Commission's conduct in this case.

Conclusion

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

There was no maladministration in the Commission's conduct.



Emily O'Reilly

Strasbourg, 25/03/2015

[1] Commission Regulation (EC) No 2237/2003 of 23 December 2003 laying down detailed rules for the application of certain support schemes provided for in Title IV of 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 2003 L 339, p. 52.

[2] Commission Regulation (EC) No 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials, OJ 2004 L 345, p. 1.

[3] Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003, OJ 2009 L 30, p. 16.

[4] "*In accordance with his duties, the Ombudsman shall conduct inquiries for which he finds grounds, either on his own initiative or on the basis of complaints submitted to him direct or through a Member of the European Parliament, **except where the alleged facts are or have been the subject of legal proceedings***" (emphasis added).

[5] "*When the Ombudsman, because of **legal proceedings in progress or concluded** concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point shall be filed definitively*" (emphasis added).

[6] Available at:

<http://www.ombudsman.europa.eu/cases/decision.faces/en/51888/html.bookmark> [Link]

[7] Available at:

<http://www.ombudsman.europa.eu/cases/decision.faces/en/50793/html.bookmark> [Link]

[8] In this respect, the Commission referred to the Ombudsman's decision closing the inquiry into complaint 526/2011/(ELB)RA, available at:

<http://www.ombudsman.europa.eu/cases/decision.faces/en/50802/html.bookmark> [Link]

[9] See Case C-295/03 P *Alessandrini Srl and Others v Commission* [2005] ECR-I-5673,



paragraph 75.

[10] See the Ombudsman's decisions on complaint 3307/2006/(PB)JMA (<http://www.ombudsman.europa.eu/cases/decision.faces/en/4653/html.bookmark> [Link]); on complaint 995/98/OV (<http://www.ombudsman.europa.eu/decision/en/980995.htm> [Link]); on complaint 1999/2007/FOR (<http://www.ombudsman.europa.eu/decision/en/071999.htm> [Link]); and on complaint 526/2011/RA (<http://www.ombudsman.europa.eu/cases/decision.faces/en/50802/html.bookmark>).