

## **Afgørelse i sag 1618/2007/JF - Kommissionens påståede undladelse af at give behørigt begrundelser for at godkende en medlemsstats forklaringer i en overtrædelsessag**

Afgørelse

**Sag 1618/2007/JF - Indledt den 31/10/2007 - Afgørelse af 13/01/2010**

Klageren klagede i 2005 til Kommissionen over påstået brug af antibegroningsmalinger indeholdende forbudte kemiske stoffer til behandling af fiskerfartøjers skrog i havnen i Nazaré i Portugal. Kommissionen vurderede de portugisiske myndigheders forklaringer og arkiverede dernæst klagen.

Klageren påstod, at Kommissionen havde undladt at give ham behørigt begrundelser for, hvorfor den anså de forklaringer, der var afgivet af de portugisiske myndigheder, for tilfredsstillende. Ifølge klageren havde Portugal afgivet urigtige oplysninger til Kommissionen. Han påpegede, at han var i besiddelse af resultaterne af laboratorieanalyser, som beviste, at mængden af forbudte stoffer i farvandene ved havnen i Nazaré var tilstrækkelige til at udgøre en alvorlig trussel mod såvel folkesundheden som miljøet generelt.

Ombudsmanden indledte en undersøgelse og underrettede den portugisiske ombudsmand om klagen. Sidstnævnte besluttede også at indlede en undersøgelse af, hvordan de nationale offentlige myndigheder kontrollerede og førte tilsyn med salget og brugen af de pågældende kemiske stoffer.

Ombudsmanden var tilfreds med Kommissionens forklaringer og afsluttede sagen. Han bemærkede, at den portugisiske ombudsmands undersøgelser stadig pågik, og besluttede, at han ville fremsende dennes konklusioner, når han modtog dem, til Kommissionen med henblik på hensigtsmæssige foranstaltninger.

## **THE BACKGROUND TO THE COMPLAINT**

1. The complainant represents a private company operating in the area of food products and sea cultures.
2. In 1997, the Portuguese authorities [1] granted the complainant authorisation to breed seeds



of bivalves. In 2001, the complainant opened a nursery [2] of bivalves in the public maritime domain of the port of Nazaré [3]. During that year, the port of Nazaré was transformed, from a small, recreational, fishing port into a port for unloading boats equipped with fishing nets, which, consequently, resulted in a significant increase in boat traffic.

3. Within a few months of opening the nursery, the complainant registered a significant increase in the mortality rate of the bivalves. The complainant had the harbour water analysed. The disappearance of phytoplankton and sediment, present when the nursery opened, was confirmed. Furthermore, the analysis indicated the presence of toxic substances.

4. In 2002, following the complainant's request, the Portuguese Fish and Maritime Research Institute (*Instituto de Investigação das Pescas e do Mar* - IPIMAR), a public entity, carried out analyses of the complainant's nursery, and the sediment and waters of the port of Nazaré. It confirmed the presence of organotin compounds, notably monobutyltin (MBT), dibutyltin (DBT), and tributyltin (TBT) [4]. The latter is used in anti-fouling paints applied to ships' hulls.

5. The complainant then addressed the Portuguese Ministries of Environment and Public Works regarding the contents listed on the label of one particular brand of paint sold on the Portuguese market.

6. At the beginning of July 2005, the complainant submitted a complaint against Portugal to the European Commission concerning the alleged use of anti-fouling paints on fishing boats in the port of Nazaré, and the effect of the anti-fouling paints on the local fauna, flora, and public health in general. In his complaint, the complainant emphasised that, despite the fact that TBT paints are prohibited by the International Maritime Organisation ('IMO'), the Community, and national legislation, anti-fouling paints are still sold freely in a number of ports in central Portugal, including the port of Nazaré.

7. The complaint (reference: 2005/4769), was registered with Commission Directorate-General ('DG') Environment. In February 2006, DG Environment requested information from the Portuguese authorities on the port of Nazaré, namely, its structure and operation, as well as the use of ship-maintenance products, including anti-fouling products, and their potential effect on the quality of the water, and nurseries of bivalves and shellfish in the vicinity. On 31 March 2006, it informed the complainant that his complaint was also being assessed under the provisions of Council Directive 79/923/EEC of 30 October 1979, on the quality required of shellfish waters ('Directive 79/923/EEC') [5].

8. On 21 April 2006, DG Environment raised the complainant's case during a meeting with the Portuguese authorities pertaining to a number of different infringement cases. At that meeting, the Portuguese authorities explained the following. First, the waters of the port of Nazaré are classified as non-shellfish waters. Second, its *Inspecção Geral das Actividades Económicas* ('IGAE') was alerted to the potentially high levels of TBT in a particular brand of paint. In June 2005, it carried out tests on samples of anti-fouling paints. In January 2006, it concluded that these paints did not contain organostannic compounds. It then conducted a further inquiry into various other brands of anti-fouling paints to ensure that they all carried the words "IMO



*Anti-fouling System Convention Compliant* " on their labels. Third, the port of Nazaré implemented measures to protect the sea water from the adverse effects of activities carried out in the port, notably hull-maintenance work.

9. The above conclusions were further confirmed by a letter dated 25 April 2006, from the Portuguese authorities to the Commission. In that letter, the Portuguese authorities explained that, in 1995, they authorised use of the public maritime domain in the port of Nazaré for purposes of aquaculture for a period of 10 years. They also emphasised, however, that the waters in the port of Nazaré could not be considered as shellfish waters given that "*no bivalves' culture developed there*" [6] . They further attached copies of the results of the water analysis carried out in March 2005, in the basin of the port of Nazaré.

10. On 9 October 2006, DG Environment informed the complainant that in 1995 an aquaculture installation was authorised in the port area, but the waters in the port of Nazaré were not shellfish waters as defined in Directive 79/923/EEC. Moreover, "*no production of bivalves was authorised in those waters*" [7] . Furthermore, the local shipyard sanitation system filtered and poured off residual waters. The analysis of the waters in the port of Nazaré did not indicate the presence of any organisms harmful to human health. In this respect, the bathing waters of the beach near the port respected the parameters set out in Council Directive 76/160/EEC of 8 December 1975, concerning the quality of bathing water ('Directive 76/160/EEC') [8] . In light of the Portuguese authorities' explanations, DG Environment considered that Community environmental legislation had not been breached. Nevertheless, DG Environment decided to forward the file to DG Enterprise, which it considered to be competent to analyse the complainant's further allegations that two Council Directives were breached. The first of these was Council Directive 76/769/EEC of 27 July 2006, on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations ('Directive 76/769/EEC') [9] , and the second, Commission Directive 1999/51/EC of 26 May 1999, adapting to technical progress for the fifth time, Annex I to Directive 76/769/EEC (tin, PCP and cadmium) ('Directive 1999/51/EC') [10] .

11. On 7 February 2007, DG Environment informed the complainant that it intended to close his case, which had been assigned reference number 2005/4769. DG Environment repeated its previous conclusions on the compatibility of the waters of the port of Nazaré with Directive 79/923/EEC, concerning the quality of shellfish waters, and the results of the inspections carried out by the Portuguese authorities. It further added that it did not find any breach of Commission Directive 2002/62/EC of 9 July 2002, adapting to technical progress for the ninth time Annex I to Directive 76/769/EEC (organostannic compounds) ('Directive 2002/62/EC') [11] , nor any breach of the maximum limits set out in Council Directive 76/160/EEC, concerning the quality of bathing water. Finally, it invited the complainant to comment, within a one-month deadline, on its intention to close his case.

12. The complainant disagreed with DG Environment's intention to close the case. On 12 March 2007, he informed it that he was going to submit the results of an analysis of water taken from the port of Nazaré, that had been carried out by an independent laboratory with expertise in the



field of maritime pollution ('the laboratory').

13. On 21 March 2007, DG Environment closed the complainant's case, reference 2005/4769. It subsequently informed the complainant that, even if the independent analysis, to which the complainant referred in his correspondence of 12 March 2007, were to indicate the presence of polluting substances incompatible with the production of bivalves (which the complainant had not been able to demonstrate to be the case up to that date), this would be irrelevant, because, it stressed, the waters in the port of Nazaré were not shellfish water. If the forthcoming analysis were, however, to indicate the presence of TBT, DG Environment invited the complainant to forward the results to DG Enterprise [12] .

14. On 17 May 2007, the complainant sent the following reports from the independent laboratory to DG Environment: " *Report on the sampling of biota, sediments and water in Nazaré, Portugal* " and the " *Investigation on organotin compounds and heavy metals in samples of sediment, water and mussels taken in and around the harbour of Nazaré, Portugal* " ('the Reports'). The Reports revealed the presence of heavy metals such as MBT, DBT, TBT, tetrabutyltin (TTBT), monooctyltin (MOT), dioctyltin (DOT), tricyclohexyltin (TCyT) and triphenyltin (TPHT). The complainant also enclosed a letter from the Independent Board of Harbours of Centre Portugal (" *Junta Autónoma dos Portos do Centro* "), dated 12 July 1995, which attested that the Regulation of the Harbour of Nazaré prohibited, " *clearly and unequivocally* ", the dumping of waste and any other harmful residual substances. He further attached photographs which, according to him, showed local authorities disguising a waste site in the proximity of the port. Finally, he took the view that all the foregoing proved that the Portuguese authorities were providing DG Environment with false information and that its decision to close his case was, therefore, a mistake.

15. DG Environment forwarded the complainant's correspondence dated 17 May 2007 to DG Enterprise, with a view to analysing whether TBT compounds were used in the harbour of the port of Nazaré [13] .

16. On 3 July 2007, during a meeting of the Commission's " *Working Group on Restrictions on the Marketing and use of Dangerous Substances and Preparations* ", held in Brussels, DG Enterprise asked Member States' representatives to report on the enforcement of the restriction relating to TBT in anti-fouling paints. It also referred to the complainant's case. France indicated that controls were carried out by a number of Member States in the context of the Chemicals Legislation European Enforcement Network ('CLEEN'). Very few cases of non-compliant products were found. According to the United Kingdom, the presence of TBT in sediments is long-lasting. It stated that a potential source of pollution in the Portuguese case, namely, the complainant's case, could be the result of an "historic burden".

17. On 12 July 2007, DG Enterprise replied to the complainant's letter dated 17 May 2007. In its view, the Reports revealed that (i) the levels of concentration of organotins such as MBT, DBT and TBT in the waters of the port of Nazaré and its surroundings were not exceptionally high in comparison with those registered in other harbours; and (ii) the concentration of organotin and heavy metals registered in the samples of water and mussels decreased as the distance from



the harbour zone increased. Although polluting elements were found in the waters, the Reports submitted by the complainant did not establish with certainty the source of that pollution. There was no clear indication that the source corresponded to the use of anti-fouling paints containing the above-mentioned substances. DG Enterprise then quoted the legislation applicable to placing anti-fouling paints containing the above pollutants on the market: Directive 76/769/EEC and Regulation (EC) No 782/2003 of the European Parliament and the Council of 14 April 2003 on the prohibition of organotin compounds on ships ('Regulation 782/2003') [14]. According to Directive 76/769/EEC, since 1990, organotin compounds cannot be used in the preparation of anti-fouling paint, for boats of less than 25 metres, and since 2003, for any boats whatsoever. According to Regulation 782/2003, as from 1 July 2003, the use or re-use of organotin compounds in anti-fouling systems on ships is prohibited. Thus, anti-fouling paint containing these substances cannot be placed on the EU market, or used within the EU. The Portuguese authorities assured the Commission that, in 2005, they carried out controls of anti-fouling products sold and used locally. The results, made available in January 2007, confirmed that the products complied with the applicable restrictions. Nonetheless, it is known that the presence of organotins and heavy metals persist for a long time in the maritime environment. It is, therefore, possible that the concentrations registered in the Reports represent the historic burden from earlier usage of these substances. According to Regulation 782/2003, until 1 January 2008, ships previously treated with anti-fouling paints could still enter EU waters and, therefore, inevitably released certain quantities of these substances. This could be the case with the waters of the port of Nazaré. Thus, DG Enterprise concluded that it did not possess enough evidence to conclude that the situation described by the complainant corresponded to a breach of Directive 76/769/EEC, regarding the restriction of the marketing and use of certain dangerous substances and preparations. Nevertheless, it added that Member States are obliged to carry out surveillance of the anti-fouling paint market.

18. On 14 August 2007, DG Enterprise wrote to the Portuguese authorities and reminded them that they had to remain vigilant to ensure that anti-fouling products sold and used in Portugal comply with Community legislation, notably Directive 76/769/EEC and Regulation 782/2003. It further requested them to keep the Commission informed about the surveillance activities undertaken to comply with the above.

19. On 18 September 2007, the complainant wrote to DG Enterprise and expressed the view that the Reports confirmed that the levels of contamination registered in the waters of the port of Nazaré, a small fishing port, were comparable to those of the port of Hamburg, a major, world port. DG Enterprise could not, therefore, have concluded that the concentration of organotins in the waters of the port of Nazaré and its surroundings were not exceptionally high in comparison with those registered in other ports in Portugal. Similarly, the complainant could not accept that he had not proved that the source of the pollution was anti-fouling paint. He stated that all ship-gear shops in the vicinity of the port of Nazaré sell paints containing organostannic compounds, and that these paints are used on ships without any kind of control being carried out. These paints, he claimed, are incorrectly labelled. The Reports revealed the existence of such substances in the waters of Nazaré and contradicted the Commission's conclusion that Community legislation was not breached. The Portuguese authorities were, therefore, providing wrong information to the Commission and were not carrying out any controls in the area. The



complainant purchased some of the said paint to send to a laboratory for expert analysis. He stated that he would forward the results to the Commission to provide it with the evidence it needed.

20. In the meantime, he turned to the Ombudsman.

## **THE SUBJECT MATTER OF THE INQUIRY**

21. The complainant alleges that the Commission failed to provide it with adequate reasons as to why it considered the Portuguese authorities' explanations to be satisfactory. The complainant submitted the following arguments in support of this allegation: (i) it was obvious that the Portuguese authorities provided the Commission with false information; (ii) the analysis conducted by an independent laboratory confirmed the presence of TBT in the waters of Nazaré harbour, and (iii) the levels of contamination damaged the complainant's nursery of bivalves and are dangerous to public health and the environment in general.

22. The complainant claims that the Commission should provide him with explanations as to why it considered the Portuguese authorities' explanations to be satisfactory.

## **THE INQUIRY**

23. In light of the facts and statements submitted by the complainant, the Ombudsman decided that it would be useful also to inform the Portuguese Ombudsman about the present complaint, so that he could consider whether it would be appropriate to open an inquiry into the conduct of the Portuguese authorities. Therefore, after obtaining the complainant's agreement, on 31 October 2007, the Ombudsman forwarded the complaint to the Portuguese Ombudsman. On the same day, he also informed the Commission of the complaint and asked it to submit its opinion on it within a three-month deadline.

24. On 12 December 2007, the Portuguese Ombudsman informed the Ombudsman that he had decided to request explanations from the Portuguese authorities responsible for the surveillance and control of the use of anti-fouling paints on boats.

25. On 11 March 2008, the Ombudsman received the Commission's opinion in English. On 1 April 2008, he received the Portuguese translation, which he forwarded to the complainant with an invitation to submit observations. A copy was sent to the Portuguese Ombudsman for his information.

26. The complainant sent his observations on 29 May 2008, which the Ombudsman forwarded to the Portuguese Ombudsman for his information.

27. On 30 June 2008, the Ombudsman received a note from the Portuguese Ombudsman informing him that the facts available to him were not sufficient to impute responsibility to the



Portuguese authorities for any damage that might have been caused to the complainant's nursery of bivalves. In this regard, the Portuguese Ombudsman emphasised that he considered the complainant's claims duly safeguarded, since the complainant had initiated proceedings against the national authorities in the competent administrative court.

28. Notwithstanding the above, the Portuguese Ombudsman decided to investigate, in light of the applicable Community and national legislation, how national public authorities control and inspect the sale and use of organotin compounds in general. On 11 March 2009, the Portuguese Ombudsman's services informed the European Ombudsman's services by telephone that the above inquiry was still ongoing.

29. On 20 May 2009, the Ombudsman asked the Commission to provide additional comments, enclosing the complainant's observations. The Commission replied on 11 August 2009, in English, and on 15 September 2009, in Portuguese. This latter version was forwarded to the complainant for observations, and to the Portuguese Ombudsman for his information.

30. On 15 October 2009, the complainant submitted his observations on the Commission's additional comments, which were also forwarded to the Portuguese Ombudsman, for his information.

## **THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS**

### **Preliminary remarks**

31. The Ombudsman, first, emphasises that the Treaty on the Functioning of the European Union and his Statute empower him to conduct inquiries exclusively into the activities of Union institutions, bodies, offices and agencies. Consequently, the Ombudsman has no power to investigate national authorities of Member States. Therefore, the conclusions below relate to the Commission's actions vis-à-vis the complainant only, and will not encompass any assessment of the positions adopted by the Portuguese authorities. The latter are covered by the relevant investigation initiated by the Portuguese Ombudsman, in accordance with the Portuguese Ombudsman's mandate.

32. In light of the above, the Ombudsman does not consider it useful to recommend that the Commission, as suggested by the complainant in his observations, should visit the port of Nazaré to ascertain *in situ* the veracity of the Portuguese authorities' statements. Nevertheless, the Ombudsman finds it of utmost importance that the Commission is fully aware of the conclusions drawn from the Portuguese Ombudsman's inquiry and that, if necessary, it should take appropriate action on the basis of those conclusions. The Ombudsman will, therefore, forward the results of the Portuguese Ombudsman's inquiry to the Commission, once he has received them.

33. Similarly, in light of the fact that the complainant has initiated legal proceedings against





Portugal, the complainant's argument concerning the alleged damage to his nursery of bivalves, and the Commission's corresponding position on that argument will not be assessed in the context of the present inquiry [15] .

## A. The allegation concerning the Commission's failure to provide adequate reasons justifying its acceptance of the Portuguese authorities' explanations and the related claim

### *Arguments presented to the Ombudsman*

34. The Ombudsman understands the complainant's allegation as follows: the Commission failed to provide convincing reasons for considering the Portuguese authorities' explanations to be satisfactory, when stating that the waters in the vicinity of the port of Nazaré did not contain TBT originating from any illegal anti-fouling paint sold on the local market. The Portuguese authorities provided these explanations after the complainant submitted an infringement complaint to the Commission against Portugal.

35. The complainant argued that the Commission should not have closed his infringement complaint on the basis of explanations which, for the following three reasons, he believed to be obviously untrue: First, the reports of an independent laboratory confirmed the presence of TBT in the waters of the port of Nazaré. Second, this pollution, which endangers public health and the environment in general, and in particular, has caused damage to his nursery, resulted from incorrectly-labelled anti-fouling paints which are sold and used freely in the area. Third, the Portuguese authorities authorised the cultivation of bivalves in the waters in question.

36. The complainant thus claimed that the Commission should provide a satisfactory justification for accepting the Portuguese authorities' explanations.

37. In its opinion, the Commission clarified that it examined all the information provided by the complainant, and that the issues raised in his complaint were discussed with a number of Member States collectively, and with the Portuguese authorities individually. No other complaints were received, and there was no evidence to suggest that anti-fouling paints containing organostannic compounds were still available on the Community market between 2005 and 2007, and, therefore, also in Portugal.

38. The Commission further found credible the Portuguese authorities' explanations concerning the quality of the waters of the port of Nazaré. In its opinion, the Commission did not dispute that these waters contained organostannic compounds. It disagreed, however, that the source of this pollution was the continued use of illegal anti-fouling paints. In fact, organostannic compounds, namely, TBT and heavy metals, are persistent in the marine environment and accumulate in the sediments. The presence of such substances in the waters of the port of Nazaré may have resulted from emissions from ships that entered the port in the past. This pollution was expected to start diminishing in 2008, when the relevant provisions of the Regulation 782/2003 on the prohibition of organotin compounds on ships became applicable to





all ships entering Community ports and offshore terminals.

39. Finally, according to the Commission, the presence of organostannic compounds in bathing waters does not have a direct negative impact on public health. Public health is endangered by the absorption of organostannic compounds from sources such as contaminated food, or contact with objects containing these compounds. The waters in question complied with the rules on the quality of bathing water.

40. Nonetheless, the Commission admitted that pollution caused by organostannic compounds can have a negative impact on fauna and flora. For this reason, both the Commission and the IMO took action to prohibit their use in anti-fouling paints. Nevertheless, irrespective of the presence of toxic products in the waters of the port of Nazaré itself, the waters in the vicinity of Nazaré were not classified as shellfish waters. Therefore, Directive 79/923/EEC, which applies to shellfish waters, did not apply in this case.

#### *The Ombudsman's assessment*

41. At the outset, the Ombudsman points out that the complaint to the Commission against Portugal concerned the infringement of (a) *Directive 76/160/EEC, concerning the quality of bathing water*; (b) *Directive 76/769/EEC, relating to restrictions on the marketing and use of certain dangerous substances and preparations, and the relating Directives 1999/51/EC (tin, PCP and cadmium), and 2002/62/EC (organostannic compounds), adapting to technical progress for, respectively, the fifth and the ninth times Annex I to Directive 76/769/EEC*; and (c) *Directive 79/923/EEC, concerning the quality required of shellfish waters*.

42. It is not disputed that the complainant's infringement complaint was registered by the Commission, in accordance with its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law [16]. It was dealt with it by two competent DGs, namely, DG Environment and DG Enterprise, which examined and replied to the complainant's allegations. In April 2006, DG Environment met with the Portuguese authorities and was given official, written explanations on the issues relating to the complaint. On 9 October 2006, it reported these explanations to the complainant. On 3 July 2007, DG Enterprise also met with different Member States. On 12 July 2007, DG Enterprise replied to the complainant's letter of 17 May 2007 and to the Reports he had enclosed along with that letter. On 14 August 2007, it requested further information from the Portuguese authorities.

43. In light of the above, it appears that the Commission took appropriate steps to clarify the issues raised by the complainant. However, the complainant considers that the Commission wrongly assessed the situation because it took into account false information provided by the Portuguese authorities. In the complainant's view, the investigative steps referred to above were, therefore, insufficient to justify the Commission's decision to close his infringement complaint.

44. It is not disputed that the Commission relied on explanations provided by the Portuguese



authorities when it concluded that the Directives referred to in paragraph 41 at (a) and (b) were not infringed, and that the Directive referred to at (c) does not apply to the complainant's case. In this respect, the Ombudsman considers it useful to refer to the principle of sincere co-operation imposed on Community institutions and its Member States by Article 4(3), paragraph 3, of the Treaty on the European Union, as referred to by the Court of Justice of the European Union [17] in the context of the infringement procedure under Article 258 of the Treaty on the Functioning of the European Union. The above Article provides that Member States shall abstain from any measure which could jeopardise the attainment of the Union's objectives.

45. The complainant considers that the Portuguese authorities provided the Commission with false information. In his view, if the Commission had acted with due diligence, it would have been aware of this. The Ombudsman will, therefore, analyse the position taken by the Commission on the basis of the above explanations with regard to the alleged infringement of the Directives referred to in paragraph 41 at (a), (b), and (c).

46. As regards (a) *Directive 76/160/EEC concerning the quality of bathing water*, the Ombudsman considers the Commission's overall explanation reasonable. On the basis of the information provided by the Portuguese authorities, the Commission finally agreed with the complainant that the water was polluted with organostannic compounds. Although it contested the claim that the above pollution had a direct negative impact on public health, the Commission accepted that it could potentially harm flora and fauna, and, therefore, also bivalves. Nevertheless, it did not consider that this Directive was infringed because the levels of such compounds in the water remained within the limits stipulated by the Directive.

47. In this respect, the Ombudsman notes and appreciates that, by making further requests for information, notably during its meeting of 3 July 2007, and through its letter of 14 August 2007, the Commission was able to retract its initial position, as expressed in its letter to the complainant dated 14 May 2007, that the Portuguese authorities did not confirm the presence of TBT in the waters of the port of Nazaré. Furthermore, it confirmed that it accepted, as already expressed in its letter of 12 July 2007, that the Reports confirmed the presence of organotins in those waters.

48. As regards (b) *Directive 76/769/EEC relating to restrictions on the marketing and use of certain dangerous substances and preparations, and the relating Directives 1999/51/EC (tin, PCP and cadmium) and 2002/62/EC (organostannic compounds) adapting to technical progress for, respectively, the fifth and the ninth times Annex I to that Directive*, the Ombudsman notes that the Commission's conclusion that there were no anti-fouling paints with TBT available on the Portuguese market resulted from information provided to it by the Portuguese authorities.

49. On the other hand, in accordance with the evidence available to the Ombudsman, the Commission's references to the historic burden and past pollution to justify the presence of TBT in the waters of the port of Nazaré were based on explanations given by Member States other than Portugal, notably the United Kingdom and France. In this regard however, it is worth noting that the United Kingdom advanced this explanation only as a possibility, and not as a fact.



Similarly, France confirmed that, although in " *very few cases* ", some " *non-compliant products were found* " on the Community market. [18] The Ombudsman is, therefore, surprised at the Commission's assertive position, expressed in its opinion, that it " *did not receive any complaint or evidence that in the years 2005 to 2007 anti-fouling paint containing organostannic compounds were still being placed on the market of the European Community* ".

50. Nevertheless, the Ombudsman notes that, in the present case, the Commission considered this issue further, and on 14 August 2007, also referred the Portuguese authorities to Regulation 782/2003 on the prohibition of organotin compounds on ships, reminding them that it was their responsibility to carry out surveillance of anti-fouling products on the national market. It did not, however, inform the Ombudsman, in the context of the present inquiry, whether the Portuguese authorities replied to this letter. It follows that it is not clear whether, in addition to the inspection made in 2005, the Portuguese authorities actually conducted any further surveillance activities to ensure that anti-fouling products sold and used in Portugal comply with Directive 76/769/EEC and Regulation 782/2003. It further follows that, ultimately, even if it cannot be excluded that the historic burden and past pollution are, indeed, the real causes of the TBT pollution in the port of Nazaré, neither can it be confirmed that no non-compliant anti-fouling paint is still available in the area.

51. As, however, has already been stated above, it is the Portuguese Ombudsman and not the European Ombudsman who is investigating how local authorities are carrying out control and inspection activities within the national organotin market. The Ombudsman, therefore, considers that no further inquiries into this aspect of the complaint are justified.

52. Finally, as regards (c) *Directive 79/923/EEC concerning the quality required of shellfish waters* , the Ombudsman notes that the Commission considered that this Directive was not applicable in the present case because the Portuguese authorities informed it that the waters in the vicinity of the port of Nazaré are not shellfish waters.

53. According to its Article 1, Directive 79/923/EEC " *concerns the quality of shellfish waters and applies to those coastal and brackish waters designated by the Member States as needing protection or improvement in order to support shellfish ( bivalve and gasteropod molluscs) life and growth and thus to contribute to the high quality of shellfish products directly edible by man* ". (emphasis added)

54. The Portuguese authorities explained to the Commission that they did not classify the waters of the port of Nazaré as shellfish waters. Although in 1995 , they authorised the use of the public maritime domain for a period of 10 years for the existing aquaculture facilities in the port of Nazaré, those waters were not shellfish waters given that that " *no bivalves' culture developed there* " [19] . On 9 October 2006, the Commission conveyed this explanation to the complainant and emphasised that the production of bivalves was not authorised in those waters [20] .

55. However, according to the evidence submitted to the Ombudsman by the complainant and forwarded to the Commission when the present inquiry was opened, the complainant was



authorised by the same Portuguese authorities, since 1997 , to reproduce bivalves in the public maritime domain in the vicinity of the port of Nazaré for, at least, five years [21] . The Ombudsman, therefore, found it useful to query the Commission in this respect.

56. In its reply to his request for further information, the Commission stated that (i) Directive 79/923/EEC does not include provisions relating to the authorisation for the production of shellfish; and (ii) the fact that a licence existed for the production of bivalves in an area that was not later designated as shellfish water under the above directive cannot be considered to constitute a breach of EU Law, but should, rather, be assessed under the relevant Portuguese legislation.

57. In light of his preliminary remark made in paragraphs 31 and 32 above, the Ombudsman must, therefore, again conclude that the actions under scrutiny relate exclusively to Portuguese authorities and, therefore, no further inquiries are justified, on his part, into this aspect of the complaint.

## B. Conclusion

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

No further inquiries are justified.

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 13 January 2010

[1] The authorisation issued in the Portuguese Official Journal *Diário da República* , enclosed with the complaint and forwarded to the Commission for its opinion, provides for the following wording (in the original Portuguese): " ... *autoriza-se* [the complainant] *a instalar um estabelecimento de culturas marinhas (...) numa parcela de terreno do domínio público marítimo localizada junto ao porto da Nazaré, concelho da Nazaré, jurisdição marítima da Capitania do Porto da Nazaré. (...) Para tanto, pelo presente despacho conjunto é autorizada (...) a utilizar a identificada parcela, no regime de licença, pelo prazo de cinco anos, renovável nos termos da legislação em vigor. (...) O estabelecimento vai funcionar no sistema de monocultura, em regime intensivo, para reprodução de bivalves e crustáceos cirrípedes. (...). 17 de Julho de 1997. - Pelo Ministro da Agricultura, do Desenvolvimento Rural e das Pescas. (...) - O Ministro do Equipamento, do Planeamento e da Administração do Território. (...).* "

[2] In the original Portuguese: " *maternidade* ".



[3] Nazaré is a small town situated on the Atlantic coast in central Portugal.

[4] In accordance with the IPIMAR's "*Níveis de composto de butil-estanho em bivalves existentes na Mundinaqua Lda, em água para abastecimento da "nursery" e sedimentos do Porto da Nazaré*" document, enclosed by the complainant in his complaint to the Ombudsman and forwarded to the Commission for its opinion.

[5] Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters, OJ 1979 L 281, p. 47-52.

[6] In the original Portuguese: "*[n]o ano de 1995 [the competent authority] concedeu autorização para utilização do domínio hídrico, por um período de 10 anos, à instalação de aquicultura existente no Porto de Nazaré (todavia convém esclarecer que as águas da Nazaré não se podem considerar conquícolas, dado nelas não se desenvolver a cultura de bivalves .*" (emphasis added).

[7] In the original Portuguese: "*(...) não tendo igualmente sido autorizada a produção de bivalves nas [águas da localidade de Nazaré]*" (emphasis added).

[8] Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, OJ 1976 L 31, p. 1-7.

[9] Council Directive 76/769/EEC of 27 July 2006 on the approximation of the laws, regulations and administrative provisions of the member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, OJ 1976 L 262, p. 201-203.

[10] Commission Directive 1999/51/EC of 26 May 1999 adapting to technical progress for the fifth time Annex I to the Directive 76/769/EEC (tin, PCP and cadmium), OJ 1999 L 142, p. 22-25.

[11] OJ 2002 L 183, p. 58-59.

[12] The signed copy of the Commission's letter of 14 May 2007, provided by the complainant with his complaint and forwarded to the Commission for its opinion, provides, in its last paragraph, for the following wording (in the original Portuguese):

*" (...) se porventura as supra referidas análises vierem a assinalar a presença de compostos de TBT - que (...) não foi confirmado pelas autoridades portuguesas - deverá então apresentar a situação, para eventual complemento de averiguação, à Direcção-Geral Empresas (...). "*

[13] The unsigned copy of the Commission's letter of 14 May 2007, referred to in footnote 13 above, provided by the Commission with its opinion and forwarded to the complainant for his observations, provides, in its last paragraph, for the following wording (in the original Portuguese):



" ... tendo em vista o aprofundamento da análise da situação do ponto de vista da eventual utilização de compostos de TBT nos estaleiros navais do porto da Nazaré - o que ... não foi confirmado pelas autoridades portuguesas - decidi transferir a sua carta de 17 de Maio pp. à Direcção-Geral Empresas ... "

[14] Regulation (EC) No 782/2003 of the European Parliament and the Council of 14 April 2003 on the prohibition of organotin compounds on ships, OJ 2003 L 115. p. 1-11.

[15] In accordance with Article 1(3) of the Ombudsman's Statute: "[t] he Ombudsman may not intervene in cases before courts ... " Relatedly, according to Article 10(3) of the Ombudsman's Implementing Provisions: "[i] f legal proceedings are instituted in relation to matters under investigation by the Ombudsman, he closes the case. The outcome of any inquiries he has carried out up to that point is filed without further action. "

[16] COM(2002)141 final. The Communication provides, in accordance with paragraph 6 of its preamble, for a set of administrative measures with which the Commission undertook to comply when handling and assessing infringement complaints concerning Community law.

[17] See Case C-10/00 *Commission v Italy* [2002] ECR I-2357, paragraph 88.

[18] The minutes of the meeting of 3 July 2007, enclosed with the Commission's opinion and forwarded to the complainant for his observations, provide the following:

" COM informed the meeting that a company had complained to COM, because it had problems in installing a shell-fish culture plant in the vicinity of a port in PT, because of high levels of TBT, which adversely affected the shell-fish hatchery. It considered that the high levels were due to illegal used of TBT in the port for anti-fouling purposes on ships. Verifications by the Portuguese authorities had, however, not found any cases of non-compliance with existing rules.

COM asked all MS for information on the results of enforcement of the restrictions relating to TBT in anti-fouling paints. FR indicated that controls had been done by a number of MS in the frame of the CLEEN network. It appeared that very few cases of non-compliant products had been found . UK confirmed that the presence of TBT in sediments is long-lasting and that the historic burden could be a potential source in the Portuguese case ". (emphasis added)

[19] The original Portuguese version of the letter provides for the following wording " ... as águas da Nazaré não se podem considerar conquícolas, dado nelas não se desenvolver a cultura de bivalves ".

[20] In the original Portuguese: " ...não tendo igualmente sido autorizada a produção de bivalves nas mesmas. "

[21] In accordance with the copy of the Portuguese Official Journal *Diário da República* , enclosed with the complaint and forwarded to the Commission for its opinion. In the original



Portuguese: " ... *autoriza-se [the complainant] a instalar um estabelecimento de culturas marinhas ... numa parcela de terreno do domínio público marítimo localizada junto ao porto da Nazaré, concelho da Nazaré, jurisdição marítima da Capitania do Porto da Nazaré. ...Para tanto, pelo presente despacho conjunto é autorizada ... a utilizar a identificada parcela, no regime de licença, pelo prazo de cinco anos, renovável nos termos da legislação em vigor. ...O estabelecimento vai funcionar no sistema de monocultura, em regime intensivo, para reprodução de bivalves e crustáceos cirrípedes..... 17 de Julho de 1997. - Pelo Ministro da Agricultura, do Desenvolvimento Rural e das Pescas. ...- O Ministro do Equipamento, do Planeamento e da Administração do Território..... "*