

## **Decision of the European Ombudsman on complaint 813/98/(PD)/GG against the European Commission**

Decision

**Case 813/98/GG - Opened on 04/09/1998 - Decision on 30/03/2000**

Strasbourg, 30 March 2000 Dear Mr Q., On 1 July 1998, you lodged, on behalf of Southport 2000, a complaint with the European Ombudsman. The complaint mainly concerned the alleged failure of the Commission of the European Communities to enforce rules of Community law in the environmental field in respect of projects concerning the coast road in Southport. Already on 10 April 1997, Mr Richard Corbett MEP had made a similar complaint to the European Ombudsman on behalf of Save Our Shoreline Southport Association (SOS). This complaint (298/97/PD) also concerned projects in relation to the Coast road in Southport. In your complaint of 1 July 1998 and in subsequent submissions you stressed that you intended to rely on the evidence submitted by Mr Corbett MEP and SOS to support your complaint. On 4 September 1998 I forwarded your complaint to the Commission for its comments. On 4 and 14 October 1998, you sent me further submissions. On 20 October 1998 you sent me a letter containing further information which was marked confidential. I concluded therefrom that you wished me to treat your complaint as being confidential. On 2 November 1998, you sent me a further submission. In a letter of 5 November 1998, SOS submitted further evidence in support of your complaint. The Commission sent its opinion on your complaint on 13 November 1998. This opinion was received by me on 23 November 1998. On 27 November 1998, you sent me a further submission. On 15 December 1998, I forwarded the Commission's opinion to you with an invitation to make observations, if you so wished. On 7 January 1999, you sent me your observations on the Commission's opinion. On 15 January and 6 February 1999, you sent me further submissions. Further information relating to your complaint was submitted by Mr Corbett MEP on 24 February and 9 March 1999. SOS sent a further submission on 17 March 1999 in which it asked me to acknowledge receipt of previous submissions. On 13 September 1999, I wrote to you in order to establish whether you still wished me to treat your complaint as being confidential. Also on 13 September 1999, I wrote to SOS in order to acknowledge receipt of their submissions. On the same day, I sent a request for further information to the Commission. I also forwarded various submissions that you, SOS and Mr Corbett MEP had sent to me to the Commission. You, SOS and Mr Corbett MEP were informed accordingly in letters sent the same day. On 17 September 1999, you sent me a letter in which you provided further information. You also informed me that the complaint did not have to be treated as confidential any longer. A further submission was sent by you on 26 October 1999. SOS sent me a further submission on 16 November 1999. The Commission replied to my request for further information on 16 November 1999. On 18 November 1999, I forwarded this reply to you, SOS and Mr Corbett



MEP, together with an invitation to submit comments by 31 December 1999. SOS sent me its comments on 28 November 1999. No comments appear to have been received from you. I am now writing to you to let you know the results of the inquiries that have been made. To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions or bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman. The Ombudsman's inquiries into this complaint were therefore directed towards examining whether there had been maladministration in the activities of the European Commission.

## THE COMPLAINT

The complaint essentially concerns the obligations arising for the member states of the EU and for the European Commission from Article 6 (3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (1) . This directive envisages the setting up of a coherent European ecological network of special areas of conservation ("SACs") which is referred to as Natura 2000. Article 4 (1) of the directive calls on member states to propose a list of sites on their territory which are suitable for inclusion in this network. This list is to be transmitted to the Commission within three years of the notification of the directive. According to Article 4 (2) of the directive, the list of sites selected as sites of Community importance shall be drawn up by the Commission within six years of the notification of the directive. Article 4 (5) of the directive provides that as soon as a site is placed on this list, it shall be subject to Article 6 (2), (3) and (4) of the directive. Article 6 (3) of Directive 92/43/EEC provides as follows: "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public." The Natura 2000 network shall also include the special protection areas ("SPAs") classified by member states pursuant to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (2) . Article 7 of Directive 92/43/EEC provides that obligations arising under its Article 6 (2), (3) and (4) of this directive also apply to these SPAs. The complaint concerns the strengthening of two bridges on the road which runs alongside the coast near Southport (the "coast road"). In the South, it crosses an area which is constituted by two sites of special scientific interest ("SSIs"), Southport Sand Dunes and Foreshore SSI and Ainsdale Sand Dunes and Foreshore SSI, which together have been recognised by the British authorities as a candidate SAC and are known as "Sefton Coast candidate SAC". In the North, the road appears to cross Ribble Estuary SPA (3) . On both ends, the coast road joins up with the A565 trunk road which runs through Southport. The coast road appears to have been a minor road in the past. Over the last years, however, the local authorities have carried out various works in relation to this road. A concrete sea defence wall was built near Southport. This project gave rise to complaint 298/97/PD. In the first half of 1998, the Marine Lake Sluice Gates bridge was strengthened to an extent that it can



now carry 40 tonne heavy goods vehicles. The Ainsdale Pinfold bridge was also to be strengthened to the same standard and widened. These works appear to have been carried out in the meantime. According to SOS, the highway authorities have furthermore erected signs at each end of the coast road which direct all through traffic travelling to Preston in the North or Liverpool in the South, including heavy goods vehicles, away from the A565 trunk road and onto the coast road. SOS further claimed that signs had been put up which directed all tourist traffic to Southport and to destinations in town away from the A565 and onto the coast road. Both the complainant and SOS put forward the view that the local authorities had pursued a policy of development of the coast road in the form of a succession of minor projects, none of which had been of a sufficient size or prominence to trigger the need for an ecological assessment. However, taken together these projects constituted a radical transformation in the nature of the road. The complainant and SOS took the view that the true nature and purpose of the bridge strengthening scheme was to create a bypass for Southport. SOS referred to a "policy of development by stealth" in this context. According to SOS, the local authorities had taken the following further measures with regard to parts of the coast road and particularly of its southern section which were relevant in this context: A drainage system had been built in order to take surface water away from the road; the road had been widened, resurfaced with new tarmac and encroaching dunes had been mechanically removed; marram grass had been planted along the top of the tall mobile sand dunes which were located along the seaward side of the road in order to prevent sand being naturally blown landward, and thus onto and across the coast road. The concerns which were raised by the complainant and by SOS may be summarised as follows: The sand dunes on the landward side of the coast road were being replenished by sand from mobile sand dunes on the seaward side. Turning the coast road from a minor road into a major route destined in particular for all through traffic by way of strengthening the two bridges and by taking concomitant measures like stabilising the mobile dunes or even removing parts thereof cuts off this supply and thus threatens the survival of the landward dunes. All these measures taken together could be expected to have a significant effect on the site which call for an environmental assessment. SOS also expressed the view that it was not enough to prohibit further projects. Already at its present level of development, the coast road was causing serious damage to the integrity of the candidate SAC. It was therefore necessary to assert the primacy of the SAC's conservation objectives and to make the objectives of the road subordinate to the former. The complainant furthermore claimed that there was an alternative inland route which could serve as a bypass for Southport and which would be much more direct and economical. It also claimed that the strengthening of the Pinfold Bridge would cause serious disturbance to a colony of Sand Lizards. The complainant and SOS rely in particular on comments contained in a Draft Site Management Statement which was drawn up by English Nature (the UK authority in charge of environmental matters at that time) in 1996 which read as follows: "The maintenance of Coast Road by sand excavation, re-grading dune profiles with associated vegetation stripping and construction and maintenance of sand-trap fences starves the Birkdale Sandhills to the east of the road of its natural dune building supply of sand. The road effectively acts as a physical barrier to the gradual landward migration of sand upon which the dynamic dune system depends, rendering Birkdale Sandhills as a relic dune feature. In turn, this degrades the sand lizard habitat and poses a serious threat to the survival of the sand lizard population on this part of the SSII." The complainant and SOS asked the Commission to intervene, alleging that the local authorities had infringed both national and Community law. The Commission carried out an



investigation in relation to the construction of the sea wall defence. On 30 September 1996, it came to the conclusion that there had been no infringement of Community environmental law in that respect. As mentioned above, SOS complained to the Ombudsman in 1997 against this decision. In his decision adopted on 30 April 1999, the Ombudsman came to the conclusion that there appeared to be no maladministration on the part of the Commission. He stressed, however, that his examination had focused exclusively on the issues relating to the construction of the sea wall defence and that the other issues would be considered in his inquiry into the present complaint. In so far as the other issues raised by the complainant and SOS were concerned, the Commission considered that the best way of treating them was to open a new case. This case was registered under number 98/4564 in the summer of 1998. In its complaint lodged in July 1998, the complainant in substance made the following claims: 1) The Commission had failed properly to acknowledge receipt of its submissions 2) The Commission failed to call a halt to the bridge strengthening programme 3) The Commission failed to protect the integrity of both the SPA and the candidate SAC.

## THE INQUIRY

**The Commission's opinion** In its opinion, the Commission made the following comments with regard to the complaint: In its letter to the complainant of 25 August 1998, the Commission had explained the reason for what had seemed to be a duplicated acknowledgement of the complainant's letter of 3 June 1998, namely the fact that it had decided to open a new case (98/4564) in respect of which a separate acknowledgement had been sent. When the Commission considered that a member state had failed to fulfil an obligation under the EC Treaty, it could take action under Article 169 (now Article 226) of the EC Treaty. The Commission had indeed raised the matters referred to by the complainant with the UK authorities and had granted the latter a reasonable period to make observations in connection with these allegations. The Commission did not however have the power to grant interim relief to stop projects in member states. **The complainant's observations** In its observations, the complainant maintained its complaint. It also lodged what it referred to as a further objection in which it asked the Ombudsman to investigate why the Member of the Commission in charge of environmental matters had not used her powers in order to intervene in the present case. In two subsequent letters, the complainant raised two further claims. First, the Ombudsman should investigate why the inland strategic route had not been signposted and used for its correct traffic purposes. Second, the Ombudsman should investigate why the Commission had failed to examine the Coast Management Plan which had been completed by the UK authorities.

## FURTHER INQUIRIES

On 6 February 1999, the complainant sent to the Ombudsman a copy of a letter dated 25 January 1999 which the Commission had addressed to it. In this letter, the Commission pointed out that it had been assured by the UK authorities that the bridge strengthening works were required for genuine health and safety reasons and were not to increase usage of the coast road by heavy goods vehicles or other vehicles. According to the UK authorities, these works would not have a significant effect on the candidate SAC or an adverse effect on the populations of protected species. In this context, the Commission pointed out that the sand lizard referred to by the complainant was a species listed in Annex IV and not in Annex II of Directive 92/43/EEC and was therefore not part of the reasoning behind the UK proposing this



site as an SAC. Furthermore, the Commission considered that there was currently no substantive evidence to show that even if there was an increase in the volume of traffic on the Coast road how this would have a significant impact on the conservation values for which the site had been proposed as an SAC. The Commission pointed out that it was satisfied that the UK authorities had properly concluded that the bridge strengthening works did not have a significant effect on the conservation objectives of a protected area under Directive 92/43/EEC or were likely to have a significant impact on the environment under Directive 85/337/EEC (4) . It concluded that in the light of these considerations it proposed to close the case. However, it invited the complainant to submit its comments within one month upon receipt of this letter. On 16 February 1999, SOS (which had received a letter with identical contents from the Commission) sent a letter to the Commission in which it set out the reasons for which it believed the inquiry should not be closed. In the light of the submissions of the various parties, the Ombudsman came to the conclusion that he needed further information in order to deal with this case. He therefore asked the Commission 1) to explain in detail on what basis it arrived at its conclusion that there was no substantive evidence to show that even if there was an increase in the volume of traffic on the coast road this would have a significant impact on the conservation values for which the site had been proposed as an SAC and 2) to comment on the allegation of the complainant and of SOS according to which the local authorities had put up traffic signs directing all through traffic and all traffic bound for tourist sites within Southport away from the A 565 and onto the Coast road with a view towards using this road as a bypass, and on the question whether such re-routing of traffic (if established) would be compatible with Article 6 of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. In its reply to this request for information, the Commission made the following comments: The principal purpose of investigating a complaint was to establish whether a breach of Community law had occurred. In this respect, the Commission had to take into account that if it decided to use the infringement procedure laid down in Article 226 (formerly Article 169) of the EC Treaty, the burden of proof lay with it and it had to be able to discharge that burden. Any recourse to Article 226 would thus only be possible on the basis of substantive and substantial scientific evidence. In formal legal terms, the provisions of Article 6 (2), (3) and (4) of Directive 92/43/EEC would only become applicable on the inclusion of the relevant site on a list of sites of Community importance, which had yet to be done, and Article 6 (1) would only become applicable when the site was formally designated pursuant to the same directive. In so far as the existing coast road (which remained unchanged) presented any conservation issues, these were related to the existing habitat fragmentation effect of the road. Any such effects would be within the scope of Article 6 (1) and (2) of the directive, as distinct from Article 6 (3) and (4). The Commission was satisfied that the UK authorities had taken and were taking extensive measures to address the requirements of Article 6 (1) and (2) of the directive. In the context of already existing substantial measures for Article 6 (1) and (2), the Commission could not identify any additional measures that might be required by an increase in usage of the existing coast road. The Commission was unable to establish any potential significant issue of cause and effect between an increase in usage and the conservation needs of the site. Thus, even if it were to be argued that an increase in usage amounted to a new plan or project, the Commission would not be in a position to demonstrate that it would be likely to have a significant effect on the conservation values of the site. In its observations on these statements by the Commission, SOS made the following comments: Article 6 (2), (3) and (4) of Directive





92/43/EEC were applicable in the present case by virtue of its Article 4 (5). The development of the coast road to carry all traffic up to 40 tonnes and all tourist traffic at all times of the year was a development within the meaning of Article 6 (3) of the directive. The character and volume of traffic using the coast road had changed dramatically since 1996. All that SOS was asking for was to apply Article 6 (3), that is to say, examine whether the development was likely to have a significant effect, and if so, whether it would have an adverse impact on the site. The two concepts were separate and had to be distinguished. Some of the measures taken by the UK authorities under Article 6 (1) and (2) were to be welcomed. However, they had no relevance for the issue to be resolved here.

## THE DECISION

**1 Failure of proper acknowledgement of submissions** 1.1 In its complaint, the complainant claimed that the Commission failed properly to acknowledge its submissions. This claim was based on the fact that the Commission sent two letters in which it referred to the complainant's letter of 3 June 1998. The complainant appears to have found this confusing. 1.2 The Commission points out that in its letter to the complainant of 25 August 1998, it explained the reason for what seemed to be a duplicated acknowledgement of the complainant's letter of 3 June 1998, namely the fact that it had decided to open a new case (98/4564) in respect of which a separate acknowledgement of receipt was sent. 1.3 The explanation provided by the Commission is reasonable, and the complainant has not reverted to the issue in the subsequent correspondence. 1.4 On the basis of the above, there appears to have been no maladministration on the part of the Commission in so far as the first allegation put forward by the complainant is concerned. **2 Failure to call a halt to the bridge strengthening**

**programme** 2.1 In its complaint, the complainant claimed that the Commission should have intervened to stop the bridge strengthening programme. 2.2 In its opinion, the Commission explained that when it considered that a member state had failed to fulfil an obligation under the EC Treaty, it could take action under Article 169 (now Article 226) of the EC Treaty. It did not however have the power to grant interim relief to stop projects in member states. 2.3 The Commission's reply appears to be correct. 2.4 On the basis of the above, there appears to have been no maladministration on the part of the Commission in so far as the second allegation put forward by the complainant is concerned. **3 Failure to protect the integrity of the SPA and the candidate SAC** 3.1 The complainant essentially alleges that the Commission failed to ensure that the UK authorities complied with their obligations under Article 6 (3) of Directive 92/43/EEC in so far as the bridge strengthening scheme was concerned. According to this provision, an environmental assessment has to be carried out for any plan or project not directly connected with or necessary to the management of a site protected pursuant to the directive that is "likely to have a significant effect thereon". The Ombudsman considers that the other issues raised by the complainant form part of this main allegation and do not need to be discussed separately. 3.2 SOS had originally made what appeared to be a more comprehensive claim by arguing that the very existence of the road was the problem. However, in its letter of 28 November 1999 SOS points out that what it is asking for is the application of Article 6 (3) of the directive to the development of the road. 3.3 The Commission claims that Article 6 of Directive 92/43/EEC is not yet applicable to the site concerned. It takes the view that, if the existing coast road presented any conservation issues, these would in any event be within the scope of Article 6 (1) and (2) of the directive, as distinct from Article 6 (3) and (4). The



Commission was satisfied that the UK authorities had taken and were taking extensive measures to address the requirements of Article 6 (1) and (2) of the directive. It was satisfied that the conclusion of the UK authorities according to which the bridge strengthening works would not have a significant effect on the candidate SAC was correct. The Commission was unable to establish any potential significant issue of cause and effect between an increase in usage and the conservation needs of the site. Thus, even if it were to be argued that an increase in usage of the coast road amounted to a new plan or project, the Commission would not be in a position to demonstrate that it would be likely to have a significant effect on the conservation values of the site.

3.4 The Commission's claim that the provisions of Article 6 of Directive 92/43/EEC are not yet applicable to the site concerned appears to be correct on a purely literal interpretation of the relevant provision. Article 4 (5) of the Directive provides that Article 6 (2), (3) and (4) shall be applicable as soon as a site is placed on the list referred to in the third subparagraph of paragraph 2. The list thus referred to is the list to be established by the Commission, on the basis of the lists to be established by the member states. According to the Commission, this list has not yet been drawn up. However, the Ombudsman considers that it does not follow that Article 6 (3) is of no relevance for the present case. Article 4 (3) of Directive 92/43/EEC directs the Commission to establish the said list within six years of the notification of this directive which may be assumed to have taken place shortly after the adoption of the directive in May 1992. The Commission thus effectively argues that since it failed to comply with its own obligations under the directive, Article 6 (3) does not apply. The Ombudsman considers that such an argument can hardly be accepted. The Commission itself has, on another occasion, put forward arguments which militate against its present stance. In its opinion of 18 July 1997 on complaint 298/97, the Commission referred to the protection of SPAs under Directive 79/409/EEC which provides for a similar mechanism. According to the judgement of the Court of Justice in Case C-355/90, a member state has to comply with the obligations arising under Article 4 (4) of that directive, which concerns the protection measures relating to such an area, even before that site had been formally classified (5) . The Court reasoned that otherwise the objectives of protection pursued by the directive could not be achieved. In its opinion on complaint 298/97, the Commission concluded as follows: "For [candidate SACs] there is no such established protection. However, it would be natural to consider the impacts due to its possible special status." The Ombudsman considers, therefore, that the Commission's argument based on the non-applicability of Article 6 of Directive 92/43/EEC is wrong.

3.5 The Commission furthermore appears to query, albeit in cautious terms, whether an increase in the usage of a road could constitute a "plan" or "project" to which Article 6 (3) of Directive 92/43/EEC applies. The Ombudsman is of the view that this question does not need to be resolved here (6) . What is at stake in the present case is not the increased usage of the coast road as such but the strengthening of the two bridges and the measures allegedly taken by the local authorities to re-direct the traffic, and there can hardly be any doubt that these schemes can be considered as "plans" or "projects" within the meaning of Article 6 (3) of the directive. It has to be stressed that this provision expressly directs the member states to assess such plans or projects, where necessary, "in combination with other plans or projects".

3.6 The decisive question to be answered is thus whether the Commission was right in concluding that the UK authorities had not infringed Article 6 (3) of Directive 92/43/EEC in the present case.

3.7 In cases like the present one, the Commission's assessment is normally limited to verifying whether national authorities have complied with procedural rules, whether the



facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of power. The examination of the Ombudsman in turn is thus limited to verifying whether the Commission's assessment appears to be reasonable and whether it took into account all the relevant factors. 3.8 It appears that the site concerned has been proposed as a SAC on account of the dunes that are to be found there. There is nothing to suggest that the bridge strengthening works as such were likely to have a significant effect on the site in view of the latter's conservation objectives. It is therefore necessary to examine whether these works could have such an effect if they are considered "in combination with other plans or projects". The complainant, Mr Corbett MEP and SOS have put forward what would appear to be strong arguments to show that the actions of the local authorities were in fact motivated by the wish to create a bypass for Southport. The alleged negative impact of using the coast road as a bypass for Southport would appear to consist in the fact that it cuts off the dunes on the landward side from their supply of sand from the dunes on the seaward side. However, this effect would seem to flow to a large extent from the very existence of that road. This is confirmed by the Draft Site Management Statement drawn up by English Nature in 1996 on which the complainant and SOS rely. The view taken by the Commission according to which it was unable to establish that the increased usage would potentially cause significant effects with regard to the conservation objectives of the site does therefore not appear to be unreasonable. 3.9 The Ombudsman does not exclude that such negative effects could possibly arise from the further measures that the local authorities have, according to the complainant and SOS, taken in relation to the usage of the coast road as a bypass (e.g. planting grass on the top of dunes on the seaward side of the road). However, there is nothing to suggest that the Commission did not take these measures into account when it formed its opinion as to whether or not there would be a likelihood of a significant effect on the site concerned. 3.10 On the basis of the above, there appears to have been no maladministration on the part of the Commission in so far as the third allegation put forward by the complainant is concerned. **4 Conclusion** On the basis of the European Ombudsman's inquiries into this complaint, there appears to have been no maladministration on the part of the Commission of the European Communities. The Ombudsman therefore closes the file. The President of the European Commission will also be informed of this decision.

Yours sincerely Jacob SÖDERMAN

(1) OJ 1992 L 206, page 7.

(2) OJ 1979 L 103, page 1.

(3) Only the southern part of the road is called Coastal Road whilst the northern part is known as Marine Drive. For the sake of convenience, the term coast road will be used here to denote the whole length of the Coastal Road/Marine Drive.

(4) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175, page 40.

(5) Judgment of 2 August 1993 in Case C-355/90, *Commission v Spain*, [1993] ECR I-4221, paragraph 22.

(6) It is interesting to note, however, that Advocate-General Fennelly recently put forward the





view that the expression "plan" in that provision had to be interpreted extensively, pointing out that a narrow interpretation would be contrary both to the wording and the aim of the provision (Opinion of 16 September 1998 in Case C-256/98, *Commission v France* , not yet in ECR, paragraph 33).