

Decision of the European Ombudsman closing his inquiry into complaint 2587/2009/JF against the European Commission

Decision

Case 2587/2009/JF - Opened on 13/01/2010 - Decision on 27/09/2011

The background to the complaint

[1]

1. The complainant keenly follows the implementation of the environmental *acquis* in Ireland. He is the author of a number of publications, including a book entitled "*Ireland's Choice: EU Environmental Policy or Green Economy*".

2. In mid 2009, the complainant wrote to the Commission's Representation in Ireland (the 'Dublin Office') referring to minutes of a meeting between Commission officials and environmental Non-Governmental Organisations ('NGOs') that had taken place in Ireland. He attached a paper which he had presented to the Irish Parliament and referred to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters concluded at Aarhus, Denmark, on 25 June 1998 (the 'Aarhus Convention') [2]. The complainant was concerned about the incorrect application of EU environmental policy and law in Ireland. He wished to follow up the matter with the Commission officials who attended the above meeting, with regard to the situation in Ireland and how it could be improved.

3. The Dublin Office forwarded the complainant's above-mentioned correspondence to the Commission's Directorate-General ('DG') Environment.

4. On 13 September 2009, the complainant again wrote to the Dublin Office. Among other things, he pointed out that in his opinion the Irish authorities obstructed the implementation of the EU environmental *acquis*. He also considered that the Irish authorities made no effort to address the problem of access to justice or that of compliance with the Aarhus Convention. In his view, this led to huge business opportunities for those engaged in exploiting a dysfunctional energy policy. Irish technical resources and the Irish economy were suffering from this behaviour, which was contrary to EU legislation. These issues needed to be addressed quickly in light of the job losses being caused as a result.



5. On 18 September 2009, DG Environment invited the complainant to make suggestions as to how to improve the application of EU environmental legislation in Ireland, notably in light of the Aarhus Convention. It suggested that it could be useful if the complainant were to work together with an environmental NGO in Ireland which shared similar aims to his. Nevertheless, were the complainant to have specific complaints concerning potential breaches of EU environmental legislation in Ireland, he could raise these complaints directly with DG Environment, by providing it with a summary of the issues and the relevant legislation which he considered had been breached.

6. The complainant replied that in his view the Irish authorities did not comply with the EU legal framework in general. This was clearly attested to by the large number of cases brought before the Court of Justice of the European Union against Ireland. The complainant provided the Commission with examples of national authorities to which he had sent a number of documents and requests under the Aarhus Convention and/or with which he had lodged complaints. According to the complainant, some simply ignored his Aarhus requests. Others refused to answer. Public funds were being used to misinform the public about the contribution that the scientific and technical resources were making to Irish society. In this respect, the complainant referred to the "Irish Wind Energy programme", a EUR 30 billion project which, according to the complainant, was approved without informing the public of its costs, benefits, impact or of any alternatives to it. In the complainant's view, the huge financial costs of the programme had no justification under the environmental *acquis*. It would have been much easier to obtain the benefits of the *acquis* with other technologies such as waste combustion. However, according to him, the use of such technologies was obstructed by the Irish administration. The complainant referred to the right to good administration provided for in the Charter of Fundamental Rights of the EU and took the view that citizens had such a right with respect to matters relating to the implementation of the environmental *acquis*. He asked how the Commission was going to address that issue.

7. On 5 October 2009, the complainant again wrote to DG Environment about the wind energy programme in Ireland. According to him, the programme had no sound economic or technical basis. It also breached basic EU legislation since the public was not informed of its true costs and benefits and of available alternatives to it. In the complainant's opinion, the Irish authorities obstructed other more economical and beneficial options capable of reaching the targets set out in the Directive on electricity from renewable energy [3], or in the subsequent Renewable Energy Directive [4], notably waste biomass combustion and anaerobic digestion of wastes. According to the complainant, the wind energy programme was furthermore in breach of the EU guidelines on State Aid for Environmental Protection [5]. In addition, many suppliers and operators of the wind energy industry behaved unethically. In this respect, the complainant referred to senior representatives from other Member States who, according to him, had conveyed incorrect information to the Irish media to influence public opinion and sales of wind technology. Relatedly, the complainant had addressed to the embassy of a Member State in Dublin a number of requests for access to information concerning the installation of seven turbines off the Irish East Coast, designed by one university of that Member State. However, these requests were simply ignored. According to the complainant, wind energy technology is unsuitable for meeting carbon dioxide reductions. The Charter of Fundamental Rights of the EU



establishes the right to a reply, to proper administration, and to damages in cases where policies of the EU are not properly implemented.

8. On 6 October 2009, DG Environment replied that it would be helpful if the complainant could give a summary of the specific EU legislation that was at stake. It explained that the Renewable Energy Directive was to be transposed by the Member States by 5 December 2010. DG Energy, which is a separate department of the Commission, is the body responsible for the follow-up of the directive's implementation. Were the complainant to consider that the matters relating to his requests for access to environmental information raised issues of misapplication of the Directive on public access to environmental information [6] , for which it was responsible, he should summarise the requests in question, as well as the alleged failures, and the Commission would raise them with the authorities of the Member States concerned.

9. On the same day, the complainant replied taking the view that the Irish authorities disregarded the definitions of " *renewable energy* " and " *biomass from waste* " provided in the Directive on electricity from renewable energy. The implementation of the renewable energy programme in Ireland was, according to the complainant, extremely biased towards obtaining the maximum technical extent of wind generated electricity. More than half of the projected 4 million tonnes in Greenhouse Gas savings could be obtained by moving from landfill-based waste disposal to " *waste to energy technologies* " , thus enabling compliance with the " *Landfill Directive* " [7] . Additional reductions could be obtained by implementing anaerobic digestion-based biogas projects leading to environmental improvements within the scope of the " *Water Framework Directive* " [8] . According to the complainant, the above measures at a cost of less than EUR 1 billion would achieve the same reductions in Greenhouse Gas savings, improve the environment by enabling compliance with other Directives in the environmental *acquis* , have a far longer operational lifespan and result in lower electricity charges. However, the complainant's efforts to publicise this information have always been obstructed. In particular, the Irish administration had routinely denied his requests for information.

10. On 18 October 2009, the complainant approached the Ombudsman.

The subject matter of the inquiry

11. The complainant alleged that the Commission failed properly to deal with his communication of 5 October 2009. He appeared to consider this as a complaint concerning the infringement of EU environmental and energy legislation in Ireland, namely, the Directive on electricity from renewable energy and the Directive on public access to environmental information.

12. The complainant claimed that the Commission should deal properly with his complaint.

13. On 12 March 2011, the complainant informed the Ombudsman that he had initially submitted an application for public access to documents to DG Environment and DG Energy and, later, also to DG Climate Action ('DG Clima'). DG Clima informed the complainant on 3



March 2011 that it would reply to his application by 23 March 2011.

14. If by submitting the above information the complainant wished to lodge a new allegation, the Ombudsman cannot deal with it. He notes that, at the time of the complainant's communication with him regarding this matter (12 March 2011), the Commission had still not reached a decision on that request [9] . Should the complainant be dissatisfied with the Commission's final decision on his request for access to documents [10] , he may consider submitting a new complaint to the Ombudsman.

The inquiry

15. On 13 January 2010, the Ombudsman forwarded the complaint to the President of the Commission for an opinion.

16. On 20 April 2010, the Ombudsman received the Commission's opinion, which he forwarded to the complainant with an invitation to make observations. The Ombudsman received the complainant's observations on 28 April and 10 May 2010.

17. On 29 October 2010, the Ombudsman opened further inquiries into the complaint, by asking the Commission specific questions and forwarding to it the complainant's observations.

18. The Commission replied on 22 December 2010. The Ombudsman forwarded the Commission's reply to the complainant for his observations.

19. In the meantime, on 2 November and 4 December 2010, the complainant submitted further information and, on 16 and 28 January, 12 March, and on 15 July 2011, he sent his observations on the Commission's above-mentioned reply [11] .

The Ombudsman's analysis and conclusions

Preliminary remark

20. The Ombudsman notes the complainant's occasional references to matters falling under the responsibility of national authorities [12] .

21. For the sake of clarity, the Ombudsman emphasises that actions of national public authorities are outside his mandate. The Ombudsman can only receive complaints about alleged maladministration in the activities of the Union institutions, bodies, offices and agencies.

A. Allegation of failure properly to deal with the infringement complaint and related claim



Arguments presented to the Ombudsman

22. In its opinion, the Commission argued that the information provided by the complainant in his email of 5 October 2009 was very broad in nature and that at no time did he refer to specific correspondence or documentation that could assist it in identifying a possible breach of EU environmental legislation.

23. Consequently, in the Commission's view, it is not in the interests of good administration to expend limited EU resources on following up and attempting to answer every question, however vague, that is raised in the context of a complaint.

24. Notwithstanding the above, the Commission assured the Ombudsman that it was committed to pursuing the correct implementation of EU environmental law and was ready to examine all documented claims of breaches of EU law. In this respect, it emphasised that it had made repeated requests for the complainant to provide further details.

25. Moreover, the Commission explained that on " 21 February 2010 ", the complainant sent it a further e-mail where he again referred to the general failure of the Irish authorities to comply with requests for access to environmental information. The following day, the Commission requested the complainant to provide detailed information on the nature of the individual requests made and the response of the Irish authorities. The complainant then submitted detailed observations on 24 February 2010.

26. In this respect, the Commission emphasised that on 18 March 2010, it registered the above correspondence as a complaint in its central registry (CHAP) and that, at the time it sent its opinion to the Ombudsman, it was still examining the correspondence. The Commission also stated that where the information provided by the complainant identified cases raising issues of non-compliance with the provisions of the Directive on public access to environmental information and the review mechanisms of that Directive had been exhausted, it would raise them with the Irish authorities directly. It would also inform the complainant in due course of the outcome of its examination of the issues relating to access to environmental information.

27. In its reply to the Ombudsman's request for further information, namely, to

" explain, having regard to the DG Environment's e-mail of 6 October 2009, whether DG Environment forwarded the complainant's concerns to DG Energy relating to the Irish authorities' compliance with [the Directive on electricity from renewable energy] or with [the Renewable Energy Directive, and, in case] it did, [to] please explain whether its statement in its opinion that, in summary, it had addressed the complainant's 'repeated requests to provide further details' as regards the alleged infringement of EU environmental and energy legislation in Ireland, mean [t] that no action was in the meantime taken by DG Energy [and, also, to] please provide details of the above 'repeated requests' since the Ombudsman [was] aware of only one such request following the complainant's correspondence to the Commission dated 5



October 2009 "

the Commission referred to all the correspondence exchanged with the complainant and stated that DG Environment did not forward to DG Energy the complainant's initial concerns of 5 October 2009 relating to the Directive on electricity from renewable energy. This was because, at that stage, the Commission was waiting for the complainant's response to its invitation to provide it with further information. Nevertheless, DG Environment clearly informed the complainant that it was DG Energy that dealt with the Directive on electricity from renewable energy. The complainant could have therefore contacted it directly.

28. The Commission added that both DG Environment and DG Energy had scheduled a joint meeting with the complainant for 3 December 2010. The complainant therefore had an opportunity to present and explain all his concerns directly to the officials of both DGs.

29. In his observations on the Commission's reply, the complainant firstly added further concerns regarding the alleged situation in Ireland relating to energy, waste, industrial development and access to environmental information. He enclosed a number of new documents relating to his requests for access to environmental information, which he had sent to the Irish authorities.

30. Secondly, the complainant stated that he was disappointed by the meeting of 3 December 2010. Although he had been able to explain the situation of maladministration and of "*Aarhus non-compliance*" in Ireland, the Commission officials had clearly not reviewed "*the contents of the extensive documentation submitted on the complaint procedure CHAP (2010) 00645*" and were not prepared to pursue the matters raised.

31. Thirdly, the complainant found inadequate the Commission's position that it would only raise cases of non-compliance with the Directive on public access to environmental information once he identified those cases and exhausted the mechanisms of review provided for in that directive. He requested that DG Environment meet again with him and a number of other experts he identified in his observations.

32. Finally, the complainant informed the Ombudsman that he had submitted to the Secretariat of the Aarhus Convention a communication concerning EU compliance with certain provisions of the Convention in connection with the renewable energy programme in Ireland. The Aarhus Convention Compliance Committee found the complainant's communication admissible and addressed a request for information in this regard to DG Environment [13]. The latter replied to the Aarhus Convention Compliance Committee in late June 2011.

The Ombudsman's assessment

The complainant's concerns relating to the Directive on public access to environmental information



33. The Ombudsman examined the relevant correspondence, which the Commission enclosed with its opinion and reply to his request for further information. In its e-mail dated 22 February 2010, DG Environment informed the complainant that it intended to launch a complaint procedure in relation to his allegations of non-compliance with the requirements of the Directive on public access to environmental information. DG Environment invited the complainant to provide it with the details of the individual requests, notably the dates of the original requests, the authorities addressed and the environmental information requested. It also asked the complainant to further provide it with the dates of the national authorities' responses and the reasons (if any) for not granting him access to the requested information, as well as the details of any appeal procedures he might have launched.

34. The complainant provided the requested information. As a result, on 18 March 2010, the Commission registered that information as complaint " *CHAP (2010) 00645* " and informed the complainant that it would examine it.

35. In addition, DG Environment officials met personally with the complainant.

36. Therefore, although he notes that the complainant considers, in summary, that he has already provided sufficient information to the Commission in his earlier communications and that DG Environment has been unwilling properly to investigate the matter, the Ombudsman finds that the Commission has ultimately complied with its own Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (hereafter, 'the Communication') [14] .

37. Article 3 of the Communication, entitled 'Recording of complaints', provides that

"[a] ny correspondence which is likely to be investigated as a complaint shall be recorded in the central registry of complaints kept by the Secretariat-General of the Commission... "

Relatedly, Article 4 of the Communication, entitled 'Acknowledgement of receipt', provides that

"[c] orrespondence registered as a complaint shall be acknowledged again by the Secretary-General within one month from the date of dispatch of the initial acknowledgement. This acknowledgement shall state the case number of the complaint, which must be quoted in any correspondence... "

The Ombudsman notes that the Commission's acknowledgement of receipt of 18 March 2010 is signed by a Head of Unit at DG Environment and refers to correspondence from the complainant " *of 17.02.2010* ".

38. Although there appears to be a certain discrepancy regarding the actual date of the complainant's relevant complaint (17 or 21 February 2010), the fact remains that ultimately the Commission acted in an appropriate way and responded to the complainant's claim that it should deal with his complaint of infringement of the Directive on public access to environmental



information.

39. Consequently, the Ombudsman considers that no further inquiries are justified as regards this aspect of the complaint.

The complainant's concerns relating to the Directive on electricity from renewable energy

40. As regards the complainant's allegation and related claim concerning infringement of the Directive on electricity from renewable energy (or, relatedly, of the Renewable Energy Directive), it was undoubtedly up to DG Energy and not to DG Environment to follow up these matters.

41. However, DG Environment did not forward to DG Energy, for an appropriate follow-up, the information it received from the complainant. Although the Ombudsman agrees that the Commission must be mindful of the manner in which it applies its resources when dealing with complaints alleging an infringement of EU law, he also emphasises that this should not be done to the detriment of the principles of good administration. In this respect, he refers to Article 15 of the European Code of Good Administrative Behaviour ('Obligation to transfer to the competent service of the Institution') and emphasises that

" 1. If a letter or complaint to the Institution is addressed ... to a Directorate General ... which has no competence to deal with it, its services shall ensure that the file is transferred without delay to the competent service of the Institution. 2. The service which originally received the letter or complaint shall notify the author of this transfer and shall indicate the name and the telephone number of the official to whom the file has been passed. 3. The official shall alert the member of the public or organisation to any errors or omissions in documents and provide an opportunity to rectify them. "

42. In order to comply with the above-mentioned principle of good administration, DG Environment should have forwarded the complainant's relevant grievances to DG Energy immediately upon receiving them, instead of assuming that he would eventually do so himself. The information initially provided by the complainant was sufficient to identify properly the competent DG. There was therefore no need for DG Environment to wait for any additional information from the complainant in order to transfer his relevant grievances to DG Energy. DG Environment's failure to do so constitutes an instance of maladministration.

43. The aforementioned instance of maladministration is, nevertheless, without any serious consequence as it is undisputed that the complainant was able to meet personally with an official of DG Energy on 3 December 2010. During that meeting, the complainant submitted all the information he considered useful to allow DG Energy to follow up on his complaint relating to the alleged infringement of the Directive on electricity from renewable energy. Consequently, by convening the above meeting, the Commission was also ultimately able to deal with the complainant's concerns relating to infringement of the Directive on electricity from renewable



energy. The Ombudsman therefore finds that no further inquiries are necessary as regards this aspect of the complaint either.

44. Additionally, the Ombudsman notes the Commission's commitment, expressed in its opinion to him, that it will "*pursue the correct implementation of environmental law throughout the EU, and that it will examine all documented claims of breaches of EU law.*" In this respect, the Ombudsman refers to the voluminous documentation which the complainant has sent him and emphasises the considerable time and effort invested by the complainant in trying to provide the Commission with information relating to the alleged failure on the part of the Irish authorities properly to implement EU environmental legislation. Having regard to the Commission's assurances that it will continue fully to endorse its role as "Guardian of the Treaties", the Ombudsman trusts that the Commission will give due consideration to the information provided by the complainant on 2 November and 4 December 2010, and on 16 and 28 January, 12 March, and 15 July 2011 in the context of the complaint procedure CHAP (2010) 00645. He therefore forwards the above-mentioned information to the Commission for appropriate consideration and follow-up. The Ombudsman will make a further remark in this regard.

B. Conclusion

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

No further inquiries into the complaint are justified.

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

Further remark

Having regard to the Commission's assurances that it will continue fully to endorse its role as "Guardian of the Treaties", the Ombudsman trusts that the Commission will give due consideration to the information provided by the complainant on 2 November and 4 December 2010, and on 16 and 28 January, 12 March, and 15 July 2011 in the context of the complaint procedure CHAP (2010) 00645. He therefore forwards the above-mentioned information to the Commission for appropriate consideration and follow-up.

P. Nikiforos Diamandouros

Done in Strasbourg on 27 September 2011



[1] The complaint, the complainant's observations on the Commission's opinion and those on its reply to the Ombudsman's request for further information are voluminous. Therefore, only the facts which are relevant to the allegation and claim identified below under 'The subject matter of the inquiry' are summarised in the present decision.

[2] United Nations, *Treaty Series*, vol. 2161, p. 447.

[3] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ 2001 L 283, p. 33.

[4] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ 2009 L 140, p. 16.

[5] Point 1.3.5 of the guidelines, titled 'Proportionality of the aid', provides that " (30) *Aid is considered to be proportional only if the same result could not be achieved with less aid. In addition, proportionality may also depend on the degree of selectivity of a measure* ", OJ 2008 C 82, p. 1.

[6] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ 2003 L 41, p. 26.

[7] The Ombudsman understands the complainant's reference to correspond to Council Directive 1991/31/EC of 26 April 1999 on the landfill of waste, OJ 1999 L 182, p. 1.

[8] The Ombudsman understands the complainant's reference to correspond to Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 2000 L 327, p. 1.

[9] DG Clima's e-mail of 3 March 2011 to the complainant includes the following statements: "[a)] *you have already sent an access to document request to DG ENER and DG ENVI ... on December 12th... b) in the context of the Commissioner Ms Hedegaard's intervention during a radio programme on February the 3rd regarding off-shore energy wind energy in Ireland, you request a ' copy of the documentation at the Commission for such developments ' . Due to internal delays, for which we sincerely apologise, your request was encoded yesterday ... Therefore, under the terms of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, you will receive a reply within the next 15 working days, precisely by March 23rd. Regarding point b) above, please note however that no background documentation is connected to your request, as the Commissioner's statement did not refer to any particular project or development, nor was it based on any or particular piece of documentation but on publically available information and her general experience, knowledge and political views... "*



[10] The Ombudsman draws the complainant's attention to the procedure provided for in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

[11] The Ombudsman notes that some of the complainant's observations are copied to, among others, DG Environment and the European Anti-Fraud Office (OLAF).

[12] Some of the complainant's correspondence, namely, that included with his observations on the Commission's reply to the Ombudsman's request for further information, includes the following statements: "[P] lease see recent Decisions published by the [Irish] Commissioner for Environmental Information... For instance the important documentation relating to the [Irish] Department of Communications, Energy and Natural Resources took a full year to get a decision on and relates to the substantive matter of Complaint 2587/2009/JF, as do the others. "

" In January 2010 the EU Ombudsman ... started a detailed investigation (2587/2009/JF) in my name related to the infringements of Environmental and Energy Legislation in Ireland. "

" For nearly two years now I have been requesting information on the performance of the existing 7 offshore wind turbines ... of the East coast of Ireland. The University ... who designed this technology refused to provide this information ..., as did the ... Authorities [of a Member State] . Such matters have formed one of the components of the current EU Ombudsman's detailed investigation 2587-2009-JF".

" Finally, the current renewable programme in Ireland is the subject of both a complaint process at the EU Ombudsman / Commission and at the United Nations Economic Commission for Europe (UNECE) ... The fact that this data [relating to the turbines in the Irish East coast] was not made available over a year ago is now one of the issues being investigated by the EU Ombudsman. [T] his data is not available in the [Strategic Environmental Assessment] and it most certainly should have been... "

[13] The request for information included the following questions:

" 1. What activities or steps have the European Union, the European Commission in particular, taken to monitor the implementation of the Convention in Ireland, and how do these activities or steps relate to the subject matter of the communication.

2. When taking the September 2007 decision to approve the ... program for state aid ... did the European Commission ascertain if the program was in compliance with the Convention?

3. When taking the March 2010 decision to allocate [amounts] to the interconnector between Ireland and the United Kingdom (Wales) did the European Commission ascertain if the decision-making process regarding the interconnector was in compliance with the Convention?



4. Has the European Union, the European Commission in particular, ascertained whether the Renewable Energy Action Plan submitted by Ireland to the European Commission was developed in compliance with the Convention? "

[14] OJ 2002 C 244, p. 5.