

Decision of the European Ombudsman closing his inquiry into complaint 427/2011/MHZ against the European Commission

Decision

Case 427/2011/MHZ - Opened on 09/03/2011 - Decision on 22/11/2011 - Institution concerned European Commission (Critical remark) |

Regulation (EC) 2187/2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound requires the Commission to ensure, by 1 January 2008, that a scientific assessment of the effects of using, in particular, gillnets, trammel nets, and entangling nets on cetaceans is conducted and that its findings are presented to the European Parliament and Council.

The Commission asked a scientific institute to carry out such an assessment, but the latter was not able to do so due to the lack of relevant reports on incidental catches of cetaceans. These reports should have been submitted to the Commission by the Member States, pursuant to another regulation.

In 2009, the Commission adopted a communication in which it reported to the Parliament and the Council that the carrying out of the scientific assessment was not possible. The complainant, a Polish fisherman, argued that, as a result, the Commission failed to comply with its obligation under Regulation 2187/2005. The complainant therefore turned to the Ombudsman.

Throughout the Ombudsman's inquiry, the Commission did not justify why it had not used all the means at its disposal to ensure national compliance with the other Regulation and thus provide the scientific institute with the necessary data for the assessment required by Regulation 2187/2005. The Ombudsman considered that this failure constituted an instance of maladministration. He issued a critical remark to the effect that the Commission failed to demonstrate that it was objectively impossible for it to discharge itself of the obligation to ensure that, by 1 January 2008, a scientific assessment of the effects on cetaceans of using, in particular, gillnets, trammel nets, and entangling nets was carried out.

The background to the complaint

1. The complaint concerns the Commission's legal obligations under Article 27 of Regulation



(EC) 2187/2005 [1] for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound ('the Regulation'). The Regulation lays down technical measures for the conservation of fishery resources in the Baltic Sea. It prohibits, as from 1 January 2008, the keeping on board of vessels or the use of fishing driftnets [2]. Article 27 of the Regulation provides that "[b]y 1 January 2008, the Commission shall ensure that a scientific assessment of the effects of using in particular gillnets, trammel nets and entangling nets on cetaceans is conducted and its findings presented to the European Parliament and Council." In the Baltic Sea there is a very small population of harbour porpoises, which are cetaceans. Under Council Directive 92/43/EEC [3], commonly referred to as the Habitats Directive, all cetacean species benefit from a system of strict protection in their natural range.

2. On 16 July 2009, the Commission adopted a Communication to the European Parliament and the Council ('the Communication') on cetacean incidental catches in Fisheries [4]. The Communication essentially concerned the Commission's reporting obligations under Council Regulation (EC) No 812/2004 [5] ('Regulation 812/2004', that is, its obligation to submit a report on the implementation of certain provisions of Regulation 812/2004) and under Regulation 2187/2005 (that is, its obligation to report on the scientific assessment of the effects of using in particular gillnets, trammel nets and entangling nets on cetaceans in the Baltic Sea, as required by the Regulation).

3. In the Communication, the Commission explained that it decided to merge the report which it is required to draft under Article 27 of the Regulation with that which it is obliged to draft on the basis of Article 7 of Regulation 812/2004. The Commission referred to the Member States' obligation under Article 6 of Regulation 812/2004 [6], to send to the Commission a comprehensive annual report on the implementation of certain provisions of Regulation 812/2004 including "*estimates of the overall catches of cetaceans in each of the fisheries concerned*." It then explained that the information required for the scientific assessment of the effects of using in particular gillnets, trammel nets and entangling nets on cetaceans in accordance with the Regulation is very similar to the information which is to be provided in the national reports mentioned above.

4. The Commission further explained that it organised a workshop on incidental catches of cetaceans on 24-25 March 2009 in Brussels, the conclusions of which were to be included in the merged report. It added that due to this fact and also because the relevant national reports required by Regulation 812/2004 were delayed, the Commission could not "*deliver the required report as requested [sic] by [the Regulation] in due time*".

5. In the section entitled "*Content and methodology of current report*", the Commission stated that the International Council for the Exploration of the Sea (the ICES) was asked to conduct the scientific assessment of the effects of using in particular gillnets, trammel nets and entangling nets on cetaceans in the Baltic Sea. The Commission then stated that "[t]his report contains the results of this assessment as well as other available data on incidental catches of cetaceans in the Baltic Sea."

6. In the section entitled "*Scientific assessment of [t]he effect of gillnets, trammel nets and*



entangling nets on cetaceans in the Baltic Sea ", the Commission stated that in April 2008, the ICES reported to the Commission " *that the data supplied by Member States were insufficient to make a scientific assessment on the effect [of those nets] on cetaceans in the Baltic Sea.* " The Commission further stated that "[t] *here is also an obvious lack of other information on incidental catches of cetaceans in fishing gear in the Baltic Sea.* " Available information essentially concerns stranded animals with marks which suggest that the animals have died in the nets. Data on stranding is however not enough because it does not give information on where and in which gear the animals were trapped. The Commission concluded that " *at this stage, no precise conclusions on the effect of gillnets, trammel nets and entangling nets on cetaceans in the Baltic Sea can be drawn* ".

7. In section 4.1 of the Communication, entitled " *Discussion* ", the Commission referred to the findings in the ASCOBANS [7] Recovery plan for Baltic Harbour Porpoises which led the Commission to state that " *it would be quite hazardous to conclude that no reporting of by-catch means that there is no problem with by-catch.* " The last two sections of the Communication refer to Regulation 812/2004 (" *Workshop on the implementation of (EC) Regulation 812/2004* " and " *Conclusions and way forward* ".)

8. On 20 August 2010, the complainant, a Polish fisherman and a member of the Association of Polish fishermen, sent a letter to the Commission in which he called upon it to act in pursuance of the provisions laid down in Article 27 of the Regulation.

9. The Commission replied to that letter on 26 November 2010. It first admitted that in accordance with Article 27 of the Regulation, it was obliged to conduct, by 1 January 2008 at the latest, a scientific assessment of the effects of using in particular gillnets, trammel nets and entangling nets on cetaceans and to present its findings to the European Parliament and Council. One of the relevant sources of information for such scientific assessments is however the information on by-catches derived from the " *At-sea observer schemes* " implemented by Member States on the basis of Article 4 of Council Regulation 812/2004. According to that Regulation, Member States are duty-bound to send to the Commission each year, by 1 June, a comprehensive annual report on the implementation of the observer schemes. In order to fulfil its obligation under Article 27 of the Regulation, the Commission requested the ICES to undertake a scientific assessment of the effects of the use of these nets on cetaceans. In order to ensure that this assessment was based on the latest relevant information, the assessment could begin once all Member States had submitted their annual reports on the implementation of the at-sea observer schemes. However, several Member States did not submit their annual reports, forcing the Commission to first postpone the report and then to draft it on the basis of limited information. The report drafted on the basis of this limited information was thus completed and submitted to Parliament and the Council, in the form of the Communication of 16 July 2009. In the meantime, " *in order to have a full scientific assessment of the situation* ", the Commission supported a LIFE Nature project called SAMBAH (Static Acoustic Monitoring of the Baltic Sea Harbour porpoise). Once completed, the project will estimate the abundance of the species, its migration patterns and distribution. It requires that fishermen report all incidental catches of cetaceans. The Commission concluded its letter by " *encouraging* " Polish fishermen to cooperate with this project.



10. The complainant did not agree with the Commission's explanation of its obligation under Article 27 of the Regulation and turned to the Ombudsman [8] .

The subject matter of the inquiry

11. The complainant alleged that the Commission failed to justify why it had not ensured the carrying out of a scientific assessment of the effects of using in particular gillnets, trammel nets and entangling nets on cetaceans and the presentation of its findings to the European Parliament and Council (Article 27 of the Regulation).

12. The complainant also alleged that the Commission's proposed method of obtaining the relevant data by supporting the SAMBAH project is inappropriate in light of the obligation under Article 27 of the Regulation.

13. He claimed that the Commission should issue a valid scientific assessment of the effects on cetaceans of using gillnets, trammel nets and entangling nets in the Baltic Sea and present its findings to Parliament and to the Council so they can annul the prohibition on the use of driftnets.

The inquiry

14. The Ombudsman asked the Commission to submit its opinion by 30 June 2011. That very day, the Commission sent its opinion in English and the translation of its opinion into Polish. The translation was forwarded to the complainant for observations, which he submitted on 4 August 2011. The complainant attached to his observations a paper drafted by two Polish scientists in 2011 [9] .

The Ombudsman's analysis and conclusions

A. Alleged failure to comply with a legal obligation to ensure a scientific assessment and related claim

Arguments presented to the Ombudsman

15. In support of this allegation, the complainant referred to Article 27 of the Regulation, which establishes the Commission's obligation to ensure that a scientific assessment of the effects on cetaceans of using the nets specified therein is conducted by 1 January 2008.

16. He argued that the Commission's letter dated 26 November 2010 only reiterated the



position it took in its Communication of 16 July 2009 to the effect that, in summary, the above assessment is not possible because of the lack of relevant data.

17. Furthermore, he argued that in the Communication, the Commission did not properly justify why it had not ensured that a proper scientific assessment be conducted pursuant to Article 27 of the Regulation. In his view, the Commission should not have tolerated the fact that Member States had not submitted reports as required by Regulation 812/2004.

18. In support of his claim that the Commission should carry out the scientific assessment mentioned in Article 27 of the Regulation and present its findings to the European Parliament and to the Council in the view of a possible cancellation of the ban on driftnets, he argued that the ban has a significant negative impact on the economic situation of Polish Baltic Sea fishermen. According to the complainant, Polish fishermen used to make use of the specific floating gillnets/driftnets (called " *plawnice* " in Polish), which are now prohibited, in order to catch salmon and sea trout in the Baltic Sea. Catches of both species used to be their main source of income.

19. In its opinion, the Commission pointed out that the main sources of data on fishery and by-catch interactions are normally: (i) the national reports required under Article 6 of Regulation 812/2004; (ii) monitoring of the effectiveness of acoustic deterrent devices in the fisheries and areas concerned, including the Baltic Sea, under Article 2 of that Regulation, and specifically for driftnets (before they were phased out in 2008); (iii) reports from logbooks that all fishermen who use driftnets were required to keep under Article 8(b) of that Regulation. The combined information resulting from these sources is considered by the Commission to provide appropriate data on by-catch levels in the Baltic Sea.

20. The Commission did not agree with the complainant's view that it failed to ensure the carrying out of the scientific study foreseen in Article 27 of the Regulation. The Commission stated that it had in fact carried out such a scientific study and had presented its findings in the Communication. As stated in the Communication, "*ICES was also asked to conduct a scientific assessment of the effects of using, in particular, gillnets, trammel nets and entangling nets on cetaceans in the Baltic Sea. This report contains the results of this assessment as well as other available data on incidental catches of cetaceans in the Baltic Sea.*"

21. " *Unfortunately* ", ICES reported that the data supplied by the Member States were insufficient to make a scientific assessment and there was also an obvious lack of information on incidental catches of cetaceans in fishing gear in the Baltic Sea.

22. However, taking into account the fact that harbour porpoises are classified as critically endangered in the Baltic Sea and that an earlier report of the STECF [10] , issued in 2001, had indicated salmon driftnet fisheries in the Baltic Sea as being responsible for incidental catches of harbour porpoises, the precautionary approach to fisheries management made it necessary to keep in place the ban on the use of driftnets in order to protect cetaceans.

23. The Commission then referred to Point 1.3 of the Communication. It stated that, in that



point, the following reason was given for the delayed report: "*Following a preliminary assessment of the Member States' reports by the Commission and in an interest to improve the application of the Regulation, the Commission proposed to organise a workshop on incidental catches of cetaceans (24-25 March 2009, Brussels). It was agreed that conclusions of the workshop should be included in the merged report to make it as complete as possible on the basis of all available information. Due to this circumstance and the delayed reception of some Member States reports it was not possible to deliver the required report as requested [sic] by [the Regulation] in due time.*"

24. Furthermore, the Commission put forward that, in order to (i) improve the reporting quality of national reports on cetacean by-catch required by Article 6 of Regulation 812/2004 and (ii) support improvement in future fisheries management initiatives, it has proposed that Member States use a standard format for reporting and it expects to receive standardised information from all Member States in future.

25. According to the Commission, the Regulation does not impose any obligation upon the Commission to present a new report. Nevertheless, at present, the Commission is working on a new Communication on incidental catches of cetaceans in fisheries based on the Member States' reports and on recent scientific information. The Commission plans to adopt the Communication in the course of 2011. This evaluation will also serve as a basis for developing further initiatives, if appropriate.

26. Finally, the Commission took a stance on the claim. The Commission stated that from the wording of Article 9 (ban on driftnets) and Article 27 (report) of the Regulation, it appears that the provisions in question have a different scope. The ban concerns driftnets, which are defined as a type of gillnet, while the report concerns "*also*" other gear: gillnets (including driftnets), entangling nets and trammel nets. The Regulation does not envisage any link between these two provisions. The existence of a ban on driftnets is not conditioned by the content of the report.

27. Given that the prohibition of driftnets appears to be a worldwide practice, as well as an international obligation resulting from a Resolution of the UN General Assembly [11] , and that it has existed within all other EU waters since 1 January 2002, in accordance with Regulation (EC) 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources [12] , it seems unlikely that the ban will be limited or lifted in the future.

28. The Commission's obligations under Article 27 of the Regulation (to ensure a scientific assessment and to report its findings) are intended to protect cetaceans rather than to assess the effects of driftnets with a view to managing their use in future. The assessment and the report must take into consideration various types of gear and they concerns in particular gillnets (driftnets, and also other types of gillnets) entangling nets and trammel nets. The assessment and the report are thus clearly aimed at evaluating the use of all gear which might have a harmful effect on cetaceans.

29. In his observations, the complainant pointed out that in his complaint, he did not assert that



the Commission did not adopt the Communication but that, in the Communication, it failed to submit the findings of the scientific assessment of the effects of using in particular gillnets, trammel nets and entangling nets on cetaceans. The Commission itself stated in the Communication that "*at this stage, no precise conclusions on the effect of gillnets, trammel nets and entangling nets on cetaceans in the Baltic Sea can be drawn*". It is therefore clear that to date, the findings of the scientific assessment mentioned above were not submitted to Parliament and to the Council, contrary to the obligation imposed on the Commission by Article 27 of the Regulation.

30. In the complainant's view, at present, the Commission is not undertaking any action which aims at effectively fulfilling its legal obligation referred to above. The only way to obtain the relevant data would be to oblige Member States to submit reports pursuant to Regulation 812/2004 and also to include in the assessment the effects on cetaceans of using *plawnice*. The complainant considers that Article 27 of the Regulation was adopted in order to assess whether the ban on the use of driftnets, such as *plawnice*, is justified. It would be so justified if one could prove that the use of driftnets has a negative impact on the cetacean population. In the complainant's view, it does not. In this respect, the complainant referred to the findings of two Polish scientists in a paper written by them, of which he enclosed a copy with his observations. These scientists argue, in substance, that due to consecutive very cold winters in the past, during which the Baltic Sea had been completely frozen over, the harbour porpoise population migrated from the Baltic Sea to the North Sea. It is therefore not clear whether there now exists an autonomous Baltic population.

The Ombudsman's assessment

31. Article 27 of the Regulation requires the Commission to do two connected things: first, to ensure that the relevant scientific assessment is carried out and, second, to present the scientific findings to Parliament and Council, by 1 January 2008. The Ombudsman notes in this regard that these provisions of the Regulation constitute obligations, not mere "requests". In the Ombudsman's view, a presentation of 'no findings' because no scientific assessment has been possible can hardly constitute the proper fulfilment of the above-mentioned legal obligation, regardless of the date of that presentation. Considering otherwise would deprive EU law of its effectiveness (*effet utile*) and the Ombudsman regrets that the Commission has taken a different stance.

32. The next question which arises is whether the reasons given by the Commission for why the scientific assessment at issue could not be made, justify its position that it was objectively impossible for it to comply with its legal obligation (*ultra posse nemo obligator* [13]). In other words, the question is whether the Commission demonstrated that it did its utmost to ensure that the scientific assessment was carried out.

33. The Ombudsman considers that the Commission did well to organise in Brussels (albeit only in 2009) workshops on incidental catches. It acted equally correctly in asking a reputable scientific institute (the ICES) to perform the assessment required by the Regulation.



34. That institute was, however, not able to do so. In its opinion, the Commission essentially indicated two reasons for this: first, the lack of relevant reports on incidental catches of cetaceans which should have been drafted by the Member States in compliance with Regulation 812/2004 and, second, the lack of relevant data originating from other sources.

35. While the Ombudsman agrees that the lack of relevant data, such as records kept by fishermen on their incidental catches of cetaceans, or data provided by acoustic devices, may indeed be beyond the Commission's control, the same cannot be said of data that should have been provided by Member States in order for them to comply with EU law.

36. The Commission has at its disposal different means to ensure national compliance, starting from its working contacts with the national administrations and ending with proceedings on the basis of Article 258 TFEU. The Commission failed to explain in the opinion and in its correspondence with the complainant which measures, if any, it had taken to ensure that the relevant national reports were properly drafted with an eye to being used by the ICES for its 2008 assessment. The Commission was well aware that the ICES needed detailed national reports, drafted in accordance with Regulation 812/2004, in order to conduct the scientific assessment to which the Regulation refers.

37. In addition, nothing prevented the Commission from providing, well before 1 January 2008, a standard format for reporting which, reasonably, could have facilitated the timely submission of proper national reports as required by Regulation 812/2004.

38. In light of the above, the Ombudsman concludes that the Commission failed to demonstrate that it was objectively impossible for it to ensure that the scientific assessment of the effects of using in particular gillnets, trammel nets and entangling nets on cetaceans was carried out by 1 January 2008. This was an instance of maladministration and a critical remark will be made below.

39. Since, in a communication to Parliament and the Council, the Commission declared that in 2011 it would submit a report on the effects of using driftnets on cetaceans, the Ombudsman does not consider that either a proposal for a friendly solution, or a draft recommendation, would serve any useful purpose in the present case.

40. Furthermore, in view of the Commission's declaration mentioned above, it is unnecessary for the Ombudsman to pursue the complainant's claim. In addition, although the Ombudsman is not convinced by the Commission's argument that the ban on the use of driftnets, which took effect on 1 January 2008, is wholly unrelated to the obligation to report on the effects of using (*inter alia*) driftnets on cetaceans before that date, the ban on driftnets as such is not and cannot be part of his inquiry. Indeed, the ban in question amounts to a decision taken in the exercise of the political authority of Parliament and of the Council and a complaint which concerns the soundness of such a decision does not raise an issue of maladministration. Nevertheless, the Ombudsman will provide the Commission with a copy of the complainant's observations and of the aforementioned Polish scientists' paper of 2011, which was enclosed



with them, for its consideration.

B. Alleged inappropriate method of obtaining relevant data by supporting the SAMBAH project

41. In the complainant's view, the Commission wrongly considered the SAMBAH project as a method of obtaining data on incidental catches of cetaceans. According to the complainant, the SAMBAH project consists in placing acoustic detectors at the bottom of the sea, which helps to register the existence of cetaceans, but does not assess whether the use of driftnets has any impact on the cetacean population.

42. In its opinion, the Commission explained that the SAMBAH project is only one of the methods used in the framework of the relevant study on cetaceans. The overall objective of the SAMBAH project is principally to provide data for a reliable assessment of distribution and habitats of harbour porpoises in the Baltic Sea and not necessarily to provide information on the interactions of this species with fishing gear.

43. In his observations, the complainant did not comment on the Commission's view outlined above. The authors of the scientific paper enclosed with the observations refer to the SAMBAH project on page 23. They take the view that it would be good if the SAMBAH project could be supplemented by the long-term monitoring of the displacements of harbour porpoises from the Baltic Sea to the North Sea and the Straits of Denmark in order to establish whether an autonomous population of Baltic harbour porpoises indeed exists.

The Ombudsman's assessment

44. The Ombudsman infers that the complainant is satisfied with the Commission's explanation of the purposes of the SAMBAH project and he does not consider that further inquiries into this allegation are justified.

C. Conclusions

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

The Commission failed to demonstrate that it was objectively impossible for it to discharge itself of the obligation to ensure that, by 1 January 2008, a scientific assessment of the effects on cetaceans of using, in particular, gillnets, trammel nets and entangling nets was carried out.



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

P. Nikiforos Diamandouros

Done in Strasbourg on 22 November 2011

[1] Council Regulation (EC) 2187/2005/EC of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound, amending Regulation (EC) No 1434/98 and repealing Regulation (EC) No 88/98, OJ 2005 L 349 p. 1.

[2] Driftnets are any floating gillnets which drift with the current or the vessel to which they may be attached. They are maintained at water level or at a certain level below this by floating devices. They may be equipped with devices to stabilise the net or limit the extent of their drift.

[3] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206, p. 7.

[4] COM(2009) 368 final of 16 July 2009, not published in the Official Journal. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0368:EN:NOT> [Link]

[5] OJ 2004 L 150, p.12.

[6] Article 6(1) of Regulation 812/2004 reads as follows:

" Each year, Member States shall send the Commission, by 1 June, a comprehensive annual report on the implementation of articles 2,3, 4 [Article 4: Member States shall take the necessary steps to collect scientific data on incidental catches of cetaceans using observers on board the vessels flying their flag] and 5 during the previous year ... "

Article 7(1) of Regulation 812/2004 reads as follows:

" One year at the latest after the submission by the Member States of their second annual report, the Commission shall report to the European Parliament and the Council on the operation of this Regulation in the light of the information available as a result of the application of Article 6 ... "

[7] Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas.

[8] This is the third complaint submitted on the matter to the Ombudsman by the same complainant. The earlier complaints were considered inadmissible. As regards complaint 2191/2008/MHZ, the complainant submitted the matter to the Court (which in the meantime found the action inadmissible) and the Ombudsman closed the case on the basis of Article 228



TFEU. As regards complaint 1608/2010/MHZ, it was not preceded by the appropriate administrative approaches to the Commission.

[9] Prof. dr hab. Wawrzyniec Wawrzyniak i Prof. dr hab. Izabella Dunin, „Nowe aspekty ochrony morswinow (*Phocoena phocoena*, L, 1758) w Bałtyku, Raport“, Zachodniopomorski Uniwersytet Technologiczny w Szczecinie, Szczecin 2011.

[10] SEC(2002)376. Scientific, Technical and Economic Committee for Fisheries (STECF) Subgroup on Fishery and Environment (SGFEN) Incidental Catches of Small Cetaceans. Brussels 10-14, 2001. Available at:
http://www.eurocbc.org/IncidCatchesSmallCetaceans_sec_2002_376_en.pdf [Link]

[11] Resolution of the UN General Assembly (A/REC/44/225) on large-scale pelagic driftnet fishing.

[12] OJ 1997 L 132, p. 1.

[13] See Case 13/83 *Parliament v Council* [1985] ECR 1513, paragraph 48.