

Decision in case 1317/2017/PB on the European Commission's follow-up to EU Court judgments relating to requests to increase the capacity of Irish fishing vessels

Decision

Case 1317/2017/PB - Opened on 10/10/2017 - Decision on 27/02/2019 - Institution concerned European Commission (No maladministration found) |

The case concerned the European Commission's follow-up to EU Court judgments annulling the Commission's decisions refusing requests made in 2001 to increase the capacity of a number of Irish fishing vessels.

The complainants claimed that the Commission should have proposed to the EU's legislature that it adopt new legislation to create a legal basis for taking a decision on the requests, or pay compensation.

While the Ombudsman is mindful that mistakes were made and that the complainants have suffered from a lack of legal certainty since 2001, her focus in this case was on verifying what, if any, action the Commission could take.

The Ombudsman finds that the Commission has adequately explained why it decided not to propose new legislation. She also finds that the Commission's refusal to pay compensation was based on a reasonable interpretation of the rules in question. This part of the Ombudsman's assessment did not involve a full examination of whether the strict conditions set out in EU law for paying damages have been fulfilled. In light of the very unusual circumstances of the case, and the amounts involved (30-50 million euros), that review could be carried out by the Court alone, in response to an action for damages by the complainants.

As a result, the Ombudsman closes this case with a finding of no maladministration.

Background to the complaint

1. In 1997 the EU adopted rules for restructuring the fisheries sector with a view to achieving a balance on a sustainable basis between resources and their exploitation. Those rules state that:



*“ In the Multiannual Guidance Programmes for Member States, increases in **capacity** resulting **exclusively from safety improvements** shall justify, on a case by case basis, an increase by the same amount of the objectives for fleet segments where they do not increase the **fishing effort** of the vessels concerned. ” [1] (Emphasis added.)*

2. In 2001, the Irish authorities applied to the European Commission for additional safety tonnage in relation to a number of fishing boats that some fishermen had refurbished or bought to replace their existing boats ('Ireland's 2001 tonnage application'). The new boats were larger than the boats previously operated by the fishermen.

3. The Commission rejected Ireland's tonnage application [2] . This meant that the number of days the fishermen could use the new boats ('days at sea') was reduced. The complainants challenged the Commission's decision before the EU Court. The Court annulled the Commission's decision because the Commission had applied a number of criteria (on what constituted a safety improvement) for which there was no basis in the applicable legislation [3] .

4. The Commission then issued new decisions in 2010, in which it sought, this time, to apply correctly the criteria for evaluating Ireland's 2001 tonnage application. Save for one, these 2010 decisions were all negative.

5. The complainants went to court again.

6. The Court identified a new problem with these new decisions: By the time these new decisions were taken, the EU legislature had adopted new legislation that did not make provision for the award of additional safety tonnage.

7. The Court therefore annulled the Commission's 2010 decisions [4] .

8. The Commission then considered that it could take no further action.

9. The complainants turned to the European Ombudsman. They claimed that the Commission should have followed up on the Court's annulment of its decisions by either proposing to the EU's legislature that it introduce new legislation to create a legal basis for taking a decision on Ireland's 2001 tonnage application, or give them compensation.

The inquiry

10. The Ombudsman opened an inquiry, during which her inquiry team met with the Commission to discuss the case. The Ombudsman subsequently received and reviewed copies of the Commission's full internal (confidential) exchanges on the case.

11. At the meeting with the Ombudsman's inquiry team, the Commission stated that it would serve no purpose to propose to the EU's legislature that it adopt new legislation to create a legal basis for taking a decision on Ireland's 2001 tonnage application.



12. The Commission pointed out that even if new legislation were adopted regarding additional safety tonnage, the Commission would again have to reject the complainants' applications (since, in its view, the increased tonnage could not be fully justified by safety improvements). In addition, the Commission noted that it was uncertain that Parliament and Council would agree to adopt legislation allowing the Commission to take decisions on additional safety tonnage.

13. With regard to paying compensation, the Commission pointed out that the Court had annulled the Commission's decisions due to the lack of a *legal basis* for those decisions [5] . The Court had not, however, examined the *substance* of the case, and thus had not taken any view as to whether the additional safety tonnage *should have* been granted (had there been a proper legal basis for the Commission's decisions). Since the Commission remained convinced that the additional safety tonnage should not have been granted, there was no reason for it to consider paying financial compensation.

14. The Commission more generally noted the very strict conditions for damages claims in EU law [6] . It was clear to the Commission that none of these conditions was fulfilled in the circumstances of this case.

15. The Commission acknowledged, however, that the situation was very peculiar and that there were regrettably no measures it could imagine taking in response to the judgments.

16. The Commission finally referred to its last letter to the complainants, in which it made reference to the right of the complainants under the provisions of Article 268 and 340(2) TFEU to bring an action for damages against the European Union.

17. The Ombudsman wrote to the complainants in October 2018 to set out her preliminary views in this case.

The Ombudsman's assessment

The focus of the Ombudsman's assessment

18. The Ombudsman has assessed whether there was maladministration in how the Commission followed up on the Court's annulment of its 2010 decisions.

19. The Ombudsman has first assessed whether the Commission acted with maladministration by not proposing legislation which would provide a legal basis for (finally) adopting a decision on Ireland's 2001 application for safety tonnage. This part of her assessment is necessarily limited to a review of the Commission's explanations on this matter. The actual act of proposing new legislation is a political decision which is not covered by the scope of maladministration.

20. Second, the Ombudsman has assessed whether the Commission acted with



maladministration by not paying financial compensation to the complainants. The Ombudsman understands that the claim for compensation is related, primarily, to costs of having purchased tonnage on the market to replace safety tonnage requested but not granted, and in some cases costs flowing from days lost at sea.

21. This part of the Ombudsman's assessment is in the first place limited to a review of whether the Commission should clearly have granted Ireland's 2001 tonnage application. The Commission itself has referred to this as a factor when considering the issue of compensation. The reasoning is that, if the Commission should have granted the application in the first place, its formal errors that led to the annulment of its first decision had the consequence of making it impossible ever to adopt a legally valid decision granting Ireland's 2001 tonnage application.

22. This part of the Ombudsman's assessment does not, however, constitute a full examination of whether the strict conditions for paying damages in EU law have been fulfilled. In light of the very unusual circumstances of the case, and the amounts involved (30-50 million euros), that review could only be carried out by the Court in response to an action for damages by the complainants.

New legislation

23. The Ombudsman finds convincing the Commission's explanations as to why it would not be appropriate to propose to the EU's legislature that it introduce new legislation to create a legal basis for taking a decision on Ireland's 2001 tonnage application. The outcome of such a legislative proposal is entirely unforeseeable. Moreover, as noted by the Commission, it is more likely than not that the EU's legislature would not adopt provisions that would allow the Commission to grant Ireland's 2001 safety tonnage application as this would entail a fundamental modification of the Common Fisheries Policy.

24. The Ombudsman therefore finds that there is no maladministration in the Commission's explanations for not proposing legislation which would provide a legal basis for adopting a decision on Ireland's 2001 tonnage application.

Compensation: the Commission's view on the 2001 application

25. The Commission has taken the view that, even if legislation were adopted giving it a legal basis to adopt new decisions, it would have to reject the applications for additional safety tonnage. In its decisions of 2010, it stated that Article 4(2) of Council Decision 97/413/EC provides that "*increases in capacity resulting exclusively from safety improvements shall justify, on a case by case basis, an increase by the same amount of the objectives for the fleet segments where they do not increase the **fishing effort** of the vessels concerned*". It then stated that the concept of 'fishing effort' has to be understood in the light of Article 6(2) of Council Regulation 2792/1992 [7], which was also in force at the time the application was received. This provision



states that *"Member States can submit a request for a clearly identified and quantified increase in the capacity objectives for measures to improve safety (. . .) provided that these measures do not result in an increase in the exploitation rate of the resources concerned ."* In other words, the Commission argued, increased safety tonnage can be granted only if the increased 'capacity' of a vessel is due exclusively to safety improvements, and that increase in capacity does not increase the vessel's ability to catch fish.

26. In seeking to apply this principle, the Commission asked the Irish authorities, in 2010, for detailed information on the precise characteristics of the new boats, including details on engines, power, fishing equipment, displacement, storage and hold capacity. Since the Irish authorities did not provide this information, the Commission considered that it had no option but to rely on the information in the original 2001 applications, which was essentially related to increases in the volume under the main decks of the boats. The Commission analysed this information and concluded that the significant increases in the volume under the main decks of the boats allowed, for example, for bigger fish holds, more storage for fuel and supplies, and more powerful engines. On this basis, the Commission concluded that there was an increase in the ability of the boats in question to catch fish (that is, an increase in 'fishing effort').

27. The complainants criticised the above approach. They took a narrower view, namely that increases in tonnage or engine power **only** should be taken into account in assessing whether there has been an increase in the 'fishing effort'.

28. The Ombudsman finds that the Commission's approach was based on a reasonable interpretation of the rules but it is for a Court to determine the correct interpretation in the event of a dispute. Therefore the Ombudsman cannot conclude that the Commission should clearly have granted Ireland's 2001 tonnage application. It follows from this that she cannot either consider proposing that the Commission pay compensation to the complainants.

Conclusion

There was no maladministration by the European Commission.

The Ombudsman therefore closes her inquiry .

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

Emily O'Reilly

European Ombudsman

Strasbourg, 27/02/2019



[1] Article 4(2) of Council Decision 97/413/EC of 26 June 1997 concerning the objectives and detailed rules for restructuring the Community fisheries sector for the period from 1 January 1997 to 31 December 2001 with a view to achieving a balance on a sustainable basis between resources and their exploitation; OJ L 175, 3.7.1997, p. 27.

[2]

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1538037185844&uri=CELEX:32003D0245>
[Link]

[3] Judgment of the Court of First Instance (First Chamber) of 13 June 2006, *Cathal Boyle and Others v Commission of the European Communities*

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1538037593422&uri=CELEX:62003TJ0218>
[Link]

[4] Judgment of the Court (Grand Chamber) of 14 June 2016, *European Commission v Peter McBride and Others*,

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1538037809863&uri=CELEX:62014CJ0361>
[Link]

[5] Judgment of the Court (Grand Chamber) of 14 June 2016, *European Commission v McBride and Others*, Case C-361/14 P,

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1538037809863&uri=CELEX:62014CJ0361>
[Link]

[6] In one of the related court cases, the Advocate-General stated that “ *I add that an action for damages would not be without difficulties. The burden is on the applicant (here the vessel owners) to establish: (i) unlawful conduct; (ii) loss; and (iii) causation. (...) Furthermore, it would still be necessary to establish that such conduct caused loss*”, Opinion of Advocate General Sharpston of 19 January 2016, *European Commission v McBride and Others*, paragraph 73,

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1547718378135&uri=CELEX:62014CC0361>
[Link],

[7] Council Regulation (EC) No 2792/1999 of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector; OJ L 337, 30.12.1999, p. 10.