

Decision in case 2207/2019/EIS on how the European Commission handled an infringement complaint concerning the impact of a road construction project in Poland on the European hamster

Decision

Case 2207/2019/EIS - Opened on 02/04/2020 - Decision on 28/05/2020 - Institution concerned European Commission (No maladministration found) |

The case concerned how the European Commission handled an infringement complaint against the Polish government regarding a road construction project. The complainant, a Polish NGO, argued that the relevant Polish law does not allow it to challenge the project at national level effectively. The Commission considered that the complaint did not concern a systemic infringement of EU law and closed the case.

The Ombudsman noted that the complainant had raised an important matter which touches upon a significant body of EU law and concerns a recognised protected species, the European hamster. The complainant was therefore right to bring the matter to the Commission's attention to check whether the Commission could do anything for the protection of the species.

Following consideration of all the facts and an inspection of the Commission's file on the complaint, the Ombudsman found that the Commission's decision was in line with the discretion it enjoys in dealing with infringement complaints. The Commission provided the complainant with a detailed explanation of its decision and showed that it is assessing the Polish law on access to justice for NGOs in the context of an ongoing infringement procedure. The Commission further stated that it is ready to reopen the matter if Poland were to ask for EU funding for the same project

The Ombudsman thus closed the case with a finding of no maladministration.

The infringement complaint

1. In August 2019, the complainant, a Polish animal protection NGO, lodged an infringement complaint with the European Commission regarding a road construction project in the region of Lesser Poland. It contended that the project could have detrimental consequences on the European hamster (*Cricetus cricetus*) , a species protected under the Habitats Directive [\[1\]](#) [\[Link\]](#)



2. In the complainant's view, the project posed a direct threat to the species, which had not been addressed adequately in the environmental impact assessment. The assessment did not identify any hamsters in the area and concluded that the local authority had taken adequate precautionary measures. Furthermore, under the applicable national law, NGOs do not have any effective judicial remedy to challenge the project. This was because the EU Environmental Impact Assessment (EIA) Directive [2] has not been correctly transposed into national law in Poland.

3. On 29 August 2019, the Commission replied to the complainant. It confirmed that the European hamster is indeed a 'species of Community interest', subject to a strict protection regime pursuant to the Habitats Directive [3] [\[Link\]](#). National authorities can apply a derogation from the protection regime, only if cumulative conditions [4] are met.

4. However, since the reported case did not amount to a systematic failure to comply with EU law, the Commission informed the complainant that the national authorities and judicial system would be better placed to address the matter [5] [\[Link\]](#). Furthermore, the development permit was still pending before the Polish authorities. The Commission thus decided not to take any further action, unless the complainant provided new evidence, within the applicable timeframe of four weeks, that would change the Commission's assessment.

5. On 16 September 2019, the complainant replied to the Commission, informing it that the Polish authorities had since granted the permit with immediate effect. The construction works had started on 10 September 2019 and some European hamster burrows had been destroyed. The contractor had not applied for a derogation from the Habitats Directive. The complainant thus asked the Commission to take immediate action.

6. On 29 October 2019, the complainant informed the Commission that half of the active hamster burrows had been destroyed in the meantime.

7. By letter of 4 December 2019, the Commission reiterated its decision not to open an infringement case. In accordance with its 2017 Communication '*Better results through better application*' [6] (the '2017 Communication'), the Commission does not pursue individual cases where EU law is alleged to have been incorrectly applied, but looks only at systemic misapplication of EU law. However, the Commission added that, in 2016, it had already launched a formal infringement procedure into how Poland had transposed the EIA Directive into national law, in particular concerning 'access to justice' (case 2016/2046).

8. Furthermore, it stated that should the Polish authorities apply for EU co-financing for the project, the Commission would assess whether it complied with the relevant EU law, based on the documentation provided by the Polish authorities.

9. Dissatisfied with the Commission's position, the complainant turned to the European Ombudsman on 4 December 2019.



The inquiry

10. The Ombudsman's inquiry team discussed the case during a meeting with the Commission and inspected the Commission's file.

11. Following the meeting, the Commission forwarded to the Ombudsman a further reply it had sent to the complainant in the meantime. In the letter, the Commission provided the complainant with a detailed explanation of its decision not to pursue the case. The Commission also gave the complainant an additional four weeks, should it wish to submit any new evidence.

Information gathered during the inspection meeting

12. In reply to a question about the application of the precautionary principle [\[7\] \[Link\]](#) in the protection of the environment, the Commission explained that this complaint concerned an individual case: the protection of **one** species in the context of **one** individual road investment project. There was no evidence in this complaint that there is a systemic infringement of EU law, which would allow the Commission to intervene.

13. The Commission pointed out that, if the project involved EU funds, this would allow the Commission to address **the specific issue raised by the complainant**. Even if this would not constitute a general practice, the financial interests of the EU would justify the intervention. The Commission confirmed that, at the time of the meeting, it had not received any application to co-finance the project.

14. The Commission further stressed that it has been pursuing the general issue of 'access to justice' and the incorrect transposition of the EIA Directive into Polish law under the infringement procedure 2016/2046. It outlined the steps taken so far, including recent correspondence exchanged with the Polish authorities with a view to resolving the matter.

The European Ombudsman's findings

15. The complainant has raised an important matter which touches upon a significant body of EU law and concerns a recognised protected species, the European hamster. The complainant was therefore right to bring the matter to the Commission's attention in these circumstances to check whether the Commission could do anything for the protection of the species.

16. It is the task of the Commission, as the "guardian" of the Treaties to ensure that EU law is upheld within the Union. The infringement procedure is instrumental to this end.

17. The Commission enjoys wide discretion in deciding whether and when to commence infringement proceedings [\[8\]](#). The Ombudsman can ask the Commission to explain how it has exercised its discretion but cannot call into question how the Commission exercises this wide



discretion as such.

18. How the Commission handles infringement complaints is governed by the 2017 Communication. In accordance with this, the Commission does not pursue individual cases of incorrect application of EU law, unless they raise wider issues of principle or reveal systemic infringements of EU law. Thus, the Commission can decide to pursue cases whose impact is more likely to provide a general solution to the matter.

19. In this case, the Commission has explained both in its letter to the complainant dated 4 December 2019 and during the inspection of documents why it does not consider the complaint to demonstrate **systemic** non-compliance by Poland with EU law.

20. In the course of the Ombudsman's inquiry, the Commission gave the complainant an additional four-week deadline to submit new evidence. It also informed it that it is ready to act on the basis of new decisive evidence. While, undoubtedly, the evidence the complainant provided so far gives rise to serious concerns, the assessment of whether such evidence is sufficient to open infringement proceedings falls within the Commission's above discretion.

21. The Commission has also explained that it is pursuing the general issue of 'access to justice' in the ongoing infringement procedure 2016/2046. The Ombudsman's inspection showed indeed that the Commission sent a reasoned opinion to the Polish government in March 2019, and the latest exchange of correspondence between the two took place in March 2020.

22. Finally, the complainant pointed out in his complaint to the Ombudsman that the project is foreseen for EU co-funding. According to the Commission, Poland has not made any such application yet. The Commission has made it clear, during the inspection of documents, that once it has received such an application, it is ready to act on the case. The Ombudsman understands therefore that the Commission recognises the gravity of the matter and will apply a separate procedure to assess the environmental compliance of the project under Regulation 1303/2013 [\[9\]](#) [\[Link\]](#).

23. Finally, on a point of procedure, the Ombudsman notes that the complaint was not registered in the Commission's CHAP database for infringement complaints. As the complainant did not express any concerns in this respect and it did not demonstrably affect the Commission's handling of the case, there is no need to assess this matter further.

24. On the basis of the above, the Ombudsman finds that there was no maladministration in how the Commission handled the complainant's infringement complaint.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:



There was no maladministration in how the Commission handled the infringement complaint.

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

Emily O'Reilly

European Ombudsman

Strasbourg, 28/05/2020

[1] [Link] More information on the Habitats Directive and related EU initiatives for protecting nature: https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm [Link]

[2] [Link] Directive 2011/92/EU of the European Parliament and of the Council on the

assessment of the effects of certain public and private projects on the environment:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0092> [Link].

[3] [Link] Article 12 of Directive 92/43/EEC of the Council on the conservation of natural habitats and of wild fauna and flora:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0043> [Link]. The European Hamster is a species listed in Annex IV of the Habitats Directive, which are subject to a strict protection regime.

[4] [Link] Article 16 of the Habitats Directive allows the derogation in the following cases, among others: the measure is justified by any of the reasons provided therein; there is no satisfactory alternative; and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.

[5] [Link] More information on how the Commission deals with infringement complaints:

<https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/complaints-about-breaches> [Link].

[6] [Link] Commission Communication “ *EU law: Better results through better application* ” of 19 January 2017, available at:

[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119(01)&from=EN) [Link].

[7] [Link] The precautionary principle is a principle of EU environmental law enshrined in Article



191 TFEU. Its application is explained in the Communication from the Commission on the precautionary principle of 2 February 2000, COM (2000) 1 final:
<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0001:FIN:EN:PDF> [Link].

[8] [Link] Judgment of the Court in case 247/87, *Starfruit v Commission*, ECLI:EU:C:1989:58, paragraph 11.

[9] [Link] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590415255535&uri=CELEX:32013R1303> [Link].