

## **Decision of the European Ombudsman in case 1371/2019/KT on how the European Commission handled a complaint that Ireland had breached EU environmental law**

Decision

**Case 1371/2019/KT - Opened on 23/07/2020 - Decision on 23/07/2020 - Institution concerned** European Commission ( No maladministration found ) |

Dear Mr X,

In July 2019, you submitted a complaint [1] to the European Ombudsman against the European Commission on how it dealt with your infringement complaint CHAP(2017)2191 against Ireland.

In your complaint to the Commission, you alleged that, by allowing the semi-state company 'Bord na Móna' to continue operating a peat-fired power plant in County Offaly (Midlands Region, Ireland) until 2023, Ireland had breached EU environmental legislation, in particular the Environmental Impact Assessment (EIA) Directives [2] and the Habitats Directive [3]. You contended that environmental aspects in relation to that power plant had not been properly considered, neither when the permission had initially been granted in 1998 nor when it was extended in 2016. You further alleged that, because of the extension of this permission, Ireland had also breached a Memorandum of Understanding signed between the Commission and the Irish Government in 1995 ('Memorandum of Understanding') [4], according to which the operation of the power plant would cease by the end of 2015.

In your complaint to the Ombudsman, you argue that the Commission did not handle your infringement complaint properly, as it failed to address some of the aspects that you raised. You claim that, as a co-funder of the project of peat extraction for power generation, the Commission has the responsibility to ensure that the activity of the power plant ceases and that peatland is rehabilitated and returned to the local communities.

After a careful analysis of all the information you provided with your complaint, we have decided to close the inquiry with the following conclusion:

**The evidence and information provided in the complaint to the Ombudsman does not indicate any maladministration by the European Commission. In view of the latest developments on the matter, no further inquiries are justified.**



The Commission has wide discretion in dealing with infringement complaints [5] . Its policy and priorities when dealing with infringements of EU law are set out in its communication *EU law: Better results through better application* [6] . It is not the role of the Ombudsman to question the Commission's policy choices in this regard. The Ombudsman may seek to ensure that the Commission *has explained properly* how it has exercised its discretion but the Ombudsman cannot interfere in the Commission's exercise of its wide discretion.

The Ombudsman may thus examine whether the Commission has clearly explained its position on an infringement complaint and whether the Commission has given the complainant the opportunity to provide comments before the Commission closes a case. However, the Commission is not obliged to engage with a complainant on every issue or argument raised in the infringement complaint. Rather, it suffices that the Commission explains clearly why it has taken the position it has taken.

We note that the Commission gave you the opportunity to comment on its position before it closed the case. We also consider that **the Commission provided you with clear information as regards why it closed your infringement complaint :**

#### **On the EIA Directives**

The Commission said that an environmental impact assessment had taken place in 1999 and that, at the time, environmental concerns had been addressed as part of the procedure. The Commission also said that in a ruling in 2016, the High Court of Ireland granted clearance regarding the extension of the permission [7] . It is primarily the responsibility of the Member State concerned, and in particular its judicial authorities, to verify implementation of EU law, since those authorities are generally better placed to assess the facts of a particular case.

In this context, the Commission also informed you of its settled practice to focus, as a matter of priority, on the most significant breaches of EU law that reveal a *general , persistent and systematic* non-compliance [8] . **The Commission has sufficiently explained why it does not consider your infringement complaint to reveal a *general , persistent and systematic* non-compliance. The Commission has the discretion to take this view .**

#### **On the Habitats Directive**

The Commission took the view that a causal link between the power plant and a threat to the habitat of the River Barrow was not sufficiently proven. Regarding, in particular, the "freshwater pearl mussels", an endangered species protected under the Habitats Directive, the Commission considered that there were multiple explanations for the decline of its population in the River Barrow. Based on this assessment, the Commission concluded that there was not sufficient evidence to demonstrate Ireland's failure to comply with the Habitats Directive.

**Also on this aspect of your infringement complaint, the Commission has sufficiently explained its position. It is not the role of the Ombudsman to reassess matters of a**



**scientific and technical nature. There appears to be, however, no manifest reason to question the Commission's assessment on the matter.**

#### **On the Memorandum of Understanding**

The Commission has set out the view that the Memorandum of Understanding is not a legal instrument open to legal challenge. According to the Commission, it is for the Irish Government to enforce the long-term development plan under the agreed conditions. The Commission considers that compliance with the Memorandum of Understanding should rather be viewed as a condition for receiving EU funding. In case of non-compliance with the agreed conditions, recuperation of some of the funding may be imposed.

**We find no grounds to question the Commission's position on this matter, which we find reasonable .**

#### **Open infringement proceedings on related matters**

The Commission informed you that it had an open infringement case against Ireland regarding failure to establish the necessary conservation measures for Sites of Community Interest, which correspond to the ecological requirements of the natural habitat types and species under the Habitats Directive. That infringement complaint concerned, among other species, the freshwater pearl mussels. The Commission also informed you that it had an open infringement case against Ireland regarding activities in protected sites for Raised Bogs and that it had raised concerns with the Irish authorities about lack of environmental assessments and general enforcement in relation to peat extraction activities.

**The Commission has the discretion not to pursue an infringement complaint when it has already opened similar infringement proceedings.**

#### **Further developments**

The Commission pointed out that, in late 2018, Bord na Móna announced that it would close all active peatlands within seven years [9] . We note that Bord na Móna has recently started suspending its peat extraction activities and that a peatland rehabilitation scheme is about to be implemented [10] . In this context, we also note that Ireland has recently adopted a "Just Transition Plan" to deal with the challenges faced by the Wider Midlands region as it transitions away from peat as an energy source [11] .

Having considered your latest submissions of June 2020 and in light of the above developments, which are directly related to the issues raised in your infringement complaint to the Commission, we consider that no further inquiries are justified.

For the above reasons, the Ombudsman has closed the case.



While you may be disappointed with the outcome of the case, we hope that you will find the above explanations helpful. We apologise for the length of time it has taken to complete this inquiry.

Yours sincerely,

Tina Nilsson Head of Inquiries - Unit 4

Strasbourg, 23/07/2020

[1] Full information on the procedure and rights pertaining to complaints can be found at <https://www.ombudsman.europa.eu/en/document/70707> [Link].

[2] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment ( <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1565160310657&uri=CELEX:32011L0092> [Link]) and Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ( <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001L0042&qid=1593974465961> [Link]).

[3] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ( <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31992L0043> [Link]).

[4] Memorandum of Understanding between the European Commission and the Minister for Transport, Energy and Communications of Ireland on Community Structural Funding for Peat Fired Electricity Generation (signed on 12 April 1995).

[5] See judgment of the Court of 14 February 1989, 247/87, *Starfruit v Commission* .

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

[7] <https://www.irishtimes.com/news/ireland/irish-news/bord-na-m%C3%B3na-cleared-to-use-edenderry-power-plant-ur> [Link].

[8] See the Commission communication *EU law: Better results through better application*



[9] <https://www.theguardian.com/world/2018/nov/27/ireland-closes-peat-bogs-climate-change>  
[Link]. [Link]

[10]

<https://www.bordnamona.ie/company/news/articles/bord-na-mona-to-commence-enhanced-peatland-rehabilitation-s>  
[Link],  
<https://www.irishexaminer.com/breakingnews/ireland/bord-na-mona-suspends-peat-harvesting-and-begins-bog-rest>  
[Link].

[11]

<https://www.dccae.gov.ie/en-ie/climate-action/topics/climate-action-plan/just-transition/Pages/Just-Transition.aspx>  
[Link].