

## **Decision of the European Ombudsman on complaint 1561/2000/PB against the European Commission**

Decision

**Case 1561/2000/PB - Opened on 12/12/2000 - Decision on 02/10/2001**

Strasbourg, 2 October 2001

Dear Mr M.,

On 27 November 2000, you made a complaint to the European Ombudsman concerning the Kildare By-Pass Motorway in Ireland and infringement complaints that have been submitted to the Commission about the by-pass.

On 12 December 2000, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 26 February 2001. I forwarded it to you with an invitation to make observations, which you sent on 26 April 2001.

I am writing now to let you know the results of the inquiries that have been made.

To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that no action by any other authority or person may be the subject of a complaint to the Ombudsman.

The Ombudsman's inquiries into your complaint have therefore been directed towards examining whether there has been maladministration in the activities of the European Commission.

## **THE COMPLAINT**

In November 2000, an environmental organisation, 'EAA-I', made a complaint to the European Ombudsman concerning the Kildare Bypass Motorway in Ireland and infringement complaints that individuals and the EAA-I itself had submitted to the European Commission about the Bypass.



Two of the infringement complaints were submitted to the Commission in 1998. They alleged that the Irish authorities had failed to make an environmental impact assessment, and that the Kildare Bypass was still posing a threat to the environment. The infringement complaints therefore considered that there was a breach of EC Directive 85/337, the 'Environmental Impact Assessment Directive', and EC Directive 92/43, the 'Habitats Directive'.

The infringement complaints were registered by the Commission, which in June 1998 requested the Irish authorities for information on the matter.

On 16 March 2000, i.e. nearly two years later, the Commission sent a reply to one of the infringement complaints. The reply contained information about the information that the Commission had received from Ireland, and invited the person who had submitted the infringement complaint to make observations on that information. The person in question made observations, in which he contested that the required environmental impact assessment had been made.

Subsequently, the EAA-I made a new infringement complaint in July 2000. No reply has been received to that infringement complaint.

Finally, the EAA-I stated that the Commission is co-funding the Kildare Bypass.

On this basis, the EAA-I submitted the following allegations to the Ombudsman:

1. The Commission has wrongfully permitted the Irish authorities to breach EC Directive 85/337, by allowing the Kildare By-Pass Motorway project to begin without an environmental impact assessment having been made.
2. The Commission funds the Kildare By-Pass Motorway with 50 million Pounds in full knowledge of the breach of Directive 85/337.
3. The Commission has ignored the Article 226 complaint procedure, in particular by seemingly having taken a decision on the infringement complaints without informing the complainants.

## **THE INQUIRY**

### **The Commission's opinion**

The complaint was forwarded to the Commission, which submitted the following opinion.

The Kildare Bypass is one of the most important transport projects in Ireland, being part of a planned motorway link between Ireland's two main cities, Cork and Dublin. The Kildare Bypass is intended to address an important bottle-neck on this route.

The infringement complaints referred to by the complainant raised two related issues. The first concerned the alleged deficiency of the environmental impact assessment carried out on the Kildare Bypass project between 1993 and 1996. The second related to the possible adverse



effect of the project on Pollardstown Fen, a wetland of international importance situated close to the line of the Bypass.

Pollardstown Fen is Ireland's largest and best example of a fen (a priority for conservation under the Habitats Directive). It is a national nature reserve, and has been the subject of Community financial assistance for research and conservation. The Fen sits over Ireland's largest gravel aquifer (natural underground reservoir). The aquifer feeds calcium-rich water to the Fen by way of springs at the side of it, creating unusual conditions. The Fen hosts rare and endangered plants and animals.

The Kildare Bypass does not cross the Fen, but it involves a partial drainage of the aquifer which feeds it. In order to reduce impacts on neighbouring stud farms (the area is important for horse breeding), the Bypass was designed to run in a cutting beneath the level of the surrounding landscape. However, this meant that, as the route overlies the gravel aquifer, the base of the motorway would become water-logged. The design therefore entailed ongoing de-watering of the aquifer.

In 1993, the Kildare Bypass project was proposed by the developer, Kildare County Council, and underwent an environmental impact assessment procedure with public consultation. One of the public authorities consulted, Ireland's Office of Public Works (which at the time was responsible for nature conservation nationally), was very critical of the developer's information. The Office of Public Works considered that the information did not properly assess the impact on the aquifer and Fen, and that the Bypass would have a significant negative impact. It advised that the Bypass should either be redesigned or that a fresh environmental impact assessment should be undertaken. Nonetheless, in 1996 the project received development consent from the decision maker, Ireland's Minister for the Environment. A key condition for consent was further groundwater and ecological investigation by way of a monitoring programme, and a commitment to any necessary remedial measures.

On the basis of the infringement complaints submitted in 1998, the Commission contacted the Irish authorities. Since the Commission began its inquiries into the infringement complaints, significant developments took place. These developments help to explain the length of time that the Commission's inquiries have taken so far. In particular, further to the terms of the 1996 development consent, several additional studies were made. These studies became available in 1999. The results of the studies found that drainage associated with the project could cause a drop of up to 30 cm in groundwater levels at the Fen. A report by a Dutch expert indicated that the risk to the ecology of the Fen, including a snail protected under the EC Habitats Directive, must be regarded as serious.

The potential risk identified was regarded as unacceptable by the developer, Kildare County Council and Ireland's National Roads Authority (which co-ordinates the building of motorways). They therefore decided that the Kildare Bypass:

a) should not be constructed in the manner originally envisaged, and



b) should only be implemented if the scheme could be modified to provide for reduced de-watering in a way that would avoid significant environmental impact on the Fen.

Various remedial measures were identified, and these were presented to the Dutch expert. In a new report, the Dutch expert concluded that with the adoption of a number of additional measures, there was no serious risk for the integrity of the habitats of the Fen.

Notwithstanding the Dutch expert's report, the competent Irish nature conservation authority (now the National Park and Wildlife Service) continued to have concerns. It therefore advised the Irish Minister for the Environment and Local Government that the new design of the Bypass ought not to be proceeded with. At the same time, the Authority indicated that it would accept the Minister's decision in the matter. At the end of 1999, the Minister confirmed that the Bypass project could proceed on the basis of the new safeguard outlined.

On this basis, the Commission addressed the three allegations made by the complainant in the present case:

1. The Commission considers that the case raises an issue of the adequacy rather than the existence of an environmental impact assessment. In that respect, the post-1996 studies bear out the criticism of the Irish Office of Public Works that the original environmental impact assessment was inadequate. However, it cannot validly be argued that there was no environmental impact assessment.
2. The decision to give Community funds to the Kildare Bypass pre-dates the infringement complaints referred to and the outcome of the Commission's investigations. There is therefore no basis for the suggestion that the Commission knowingly approved the use of Community funds for a project in breach of Directive 85/337. The Commission only granted support to Stage II of the Bypass in 1996 when it was reassured that the environmental impact assessment had been conducted. The inadequacy of the assessment was only confirmed in 1999 by the additional reports mentioned. The Commission added that due to some mismanagement and delays in the project, it had significantly reduced the Community funding.
3. At the date of the submission of the infringement complaints, the Commission had neither decided to close the infringement complaints, nor to initiate an infringement procedure. The only decision made by the Commission was to keep the inquiries open. Such a decision would normally not be notified to persons who made the infringement complaint, since the Commission's system of complaint-handling allows complainants to assume that a complaint remains open until they have received a fore-warning of an intention to close the inquiry. No such fore-warning was issued in this case, and the first two complainants were kept informed of key stages of the unfolding inquiry.

Furthermore, on 10 January 2001, the Commission decided to send a letter of formal notice to Ireland under Article 226 of the EC Treaty, concerning the Kildare Bypass. In particular, the Commission was concerned that a practice of deferring key studies relating to possible impact of a major project until after the development consent was given was contrary to Directive



85/337. This is because the system of the Directive requires the assessment of impacts to take place before rather than after a project has been approved. It is intended to inform the complainants of this decision following the sending of the letter of formal notice.

Finally, although the Commission has decided to draw attention to a problem of correct application of the Directive, the Commission has not decided to challenge the Kildare Bypass as such. This reflects several factors, including the interval between the grant of the development consent (1996) and the receipt of the infringement complaints (1998-2000) and the clear efforts by the Irish authorities to try to improve the design of the Bypass in order to avoid negative impacts on the Fen.

#### **The complainant's observations**

The Commission's opinion was sent to the complainant for observations.

In its observations, the complainant maintained its allegations. In particular, it maintained that the Commission knew, as a matter of fact, that the Irish authorities breached Directive 85/337 before 1999; and that in light of this knowledge, the Commission should not have funded the Kildare Bypass.

## **THE DECISION**

### **1 The existence of an Environmental Impact Assessment**

1.1 The complainant alleges that the Commission wrongfully permitted the Irish authorities to breach EC Directive 85/337, by allowing the Kildare Bypass Motorway project to begin without an environmental impact assessment having been made. The Commission considers that the case raises an issue of the adequacy rather than the existence of an environmental impact assessment. In its view, it cannot validly be argued that there was no assessment.

1.2 According to the evidence before the Ombudsman, the Irish Office for Public Works criticised an environmental impact assessment which had been made for the Kildare Bypass. That is to say, the Irish Office for Public Works would not appear to have concluded that no environmental impact assessment had been made, but rather that the assessment was inadequate. In light of this, the Ombudsman considers that the Commission's conclusion that an environmental impact assessment had been made appears reasonable.

1.3 Against this background, the Ombudsman considers that there has been no maladministration on the Commission's part in regard to this aspect of the complaint.

### **2 Funding despite breach of Directive 85/337**

2.1 The complainant alleges that the Commission funds the Kildare Bypass Motorway in full knowledge of the breach of Directive 85/337. The Commission has responded that the decision to give Community funds to the Kildare Bypass pre-dates the infringement complaints referred to and the outcome of the Commission's investigations. In its view, there is therefore no basis for the suggestion that the Commission knowingly approved the use of Community funds for a project in breach of Directive 85/337.

2.2 The allegation made by the complainant raises two issues. First, whether the Commission



was aware at the time of deciding to fund the Bypass that Directive 85/337 was being breached. Second, whether the Commission's later awareness of the inadequacies of the environmental impact assessment should have led it to cancel its funding of the Bypass.

2.3 Council Regulation No. 1164/94, establishing a Cohesion Fund (1) , provides that projects should be financed " *in keeping with* the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning environmental protection..." (Article 8.1, emphasis added). This creates an obligation on the Commission to take into account, amongst others, EC environmental legislation when funding projects under the Cohesion Fund.

2.4 The obligation set out in the legislation does not appear to allow the Commission to fund projects which detriment the substantive aims of the relevant Community law. However, in the Ombudsman's view, it appears that the Commission may be left with a margin of discretion in cases where only procedural errors are concerned, and where significant remedial action has been taken.

2.5 In regard to the first issue raised by the complainant's allegation, i.e. whether the Commission was initially aware of any breach of Directive 85/337, the Ombudsman notes that he has not been presented with conclusive evidence to this effect.

2.6 In regard to the second issue, it shall first be recalled that on 10 January 2001, i.e. subsequent to the lodging of the present complaint, the Commission decided to send a letter of formal notice to Ireland. The Commission states that it has taken this action to correct a procedural aspect of the Irish authorities' practice for producing environmental impact assessments. This procedural aspect appears to have been a reason why the inadequacies of the environmental impact assessment made for the Kildare Bypass in 1993-1996 only became clear much later.

2.7 Furthermore, the Commission has explained that its decision not to challenge the Bypass as such reflected several factors, including the interval between the grant of the development consent (1996) and the receipt of the infringement complaints (1998-2000) and the clear efforts by the Irish authorities to try to improve the design of the Bypass in order to avoid negative impacts on the Fen.

2.8 Thus, it appears from the Ombudsman's inquiries that the Commission did not know of the breaches when it initially decided to fund the Bypass. It investigated the matter in depth later on the basis of the infringement complaints. The Ombudsman considers that the Commission has given a reasonable explanation for its view that the funding of the Kildare Bypass can continue. It therefore appears that there has been no maladministration by the Commission in regard to the second allegation.

### **3 Failure to follow the Article 226 procedures**

3.1 The complainant considers that the Commission has ignored the Article 226 complaint procedure in taking a decision on the infringement complaints without informing the complainants. The Commission has responded that at the date of the submission of the



infringement complaints, it had neither decided to close the infringement complaints, nor to initiate an infringement procedure. The Commission had only decided to keep the inquiries open. Such decision would not normally be notified to persons who have made an infringement complaint, since the Commission's system of complaint-handling allows a complaint to assume that their complaint remains open until they have received a fore-warning of an intention to close the inquiry. No such fore-warning was issued in this case, and the first two complainants were kept informed of key stages of the unfolding inquiry.

3.2 The Commission clarified its Article 226 complaint procedures in the Ombudsman's own initiative inquiry 303/97/PD. The procedure which must be followed contains the following parts:

1. the receipt of complaints is acknowledged;
2. the complainant is kept informed about the action taken by the Commission;
3. a decision to close the file without taking any action or a decision to initiate official infringement proceedings must be taken within a maximum period of one year from the date when the complaint was registered, except in special cases, the reasons for which must be stated. These reasons may relate to the time taken by necessary discussions with national authorities concerned and awaiting reply to the Commission's requests for information from the same authorities.

3.3 In regard to the first part of the procedure, the complainant has referred to the registration numbers of the infringement complaints. It appears, therefore, that the Commission had informed the complainants about its registration of the complaints. Thus, no maladministration appears to have taken place in regard to this aspect of the complaint.

3.4 In regard to the second part of the procedure, the complainant has indicated that, concerning the first two infringement complaints, the Commission provided no information about its inquiries for nearly two years, i.e. until 16 March 2000.

3.5 The Commission has undertaken to inform complainants about the essential developments in its inquiries into infringement complaints. The Commission should therefore always inform the complainant if, and why, the one-year time limit for reaching a decision (cf. below) cannot be complied with. In the present case, the Commission has not explained why it did not observe this obligation. It appears, therefore, that there has been maladministration on the part of the Commission because it failed to inform about the delay. The Ombudsman makes a critical remark below.

3.6 In regard to the third part of the procedure, the Commission has explained that the complexities of the case caused the delay. As stated above, a longer period of inquiry may be justified in special cases, provided that the Commission provides adequate explanations (2). In the present case, it appears that the Commission investigated the infringement complaints thoroughly, and that important developments did take place subsequent to the lodging of the infringement complaints. Furthermore, the Commission has on 10 January 2001 sent a letter of





formal notice to Ireland to correct faulty procedures that it discovered as a result of the infringement complaints. Against this background, the Ombudsman considers that the Commission has justified its exceeding of the one-year time limit, and that no maladministration has taken place on the part of the Commission.

3.7 In regard to the complainant's point that the Commission has taken a decision on the infringement complaints without informing the complainant, the Ombudsman notes that the Commission would not appear to have taken a final decision on the matter. The Commission has therefore given a reasonable explanation in regard to this aspect of the complaint. Furthermore, the Ombudsman notes that the Commission has promised to inform the complainants about its decision to send a letter of formal notice to Ireland. Thus, no maladministration appears to have taken place in regard to this aspect of the complaint.

#### **4 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

The Commission has undertaken to inform complainants about the essential developments in its inquiries into infringement complaints. The Commission should therefore always inform the complainant if, and why, the one-year time limit for reaching a decision cannot be complied with. In the present case, the Commission has not explained why it did not observe this obligation. It appears, therefore, that there has been maladministration on the part of the Commission because it failed to inform about the delay.

Given that this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter. The Ombudsman therefore closes the case.

The President of the European Commission will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN

(1) OJ L 130 of 16 May 1994. See also Annex, Article B(2), following amendments by Council Regulation (EC) No 1265/1999 of 21 June 1999.

(2) Cf. Decision on complaint 1060/97/OV against the European Commission (adequate justification), Annual Report for 1999, p 75, para 2.3 - 2.5. Webpage: <http://www.ombudsman.europa.eu/decision/en/971060.htm> [Link]; and Decision on complaint 783/01.08.96/LBR/ES/KH(JMA) against the European Commission (failure to justify), Annual Report for 1998, p. 212, para 2. Webpage: <http://www.ombudsman.europa.eu/decision/en/960783.htm> [Link].