

## **Decision of the European Ombudsman on complaint 552/2001/IJH against the European Commission**

Decision

**Case 552/2001/IJH - Opened on 08/05/2001 - Decision on 11/02/2002**

Strasbourg, 11 February 2002

Dear Mr R.,

By letters dated 17 April 2001 and 19 April 2001 and by fax dated 20 April 2001, you contested the Ombudsman's decision of 22 March 2001 closing case 1372/98/OV and made a new complaint to the Ombudsman against the European Commission, alleging that the Commission supplied incorrect information to the Ombudsman during his inquiry into case 1372/98/OV. Your new complaint was registered as 552/2001/IJH.

On 8 May 2001, I informed you that the Ombudsman had received a similar complaint from Mr P. (500/2001/IJH) and that the two complaints would be investigated jointly. In the same letter, I responded to the arguments which you made concerning the Ombudsman's decision of 22 March 2001 closing case 1372/98/OV.

Also on 8 May 2001, I forwarded your complaint 552/2001/IJH to the President of the European Commission. By letter dated 3 May 2001, received on 10 May 2001, you sent a letter containing an additional allegation. On 23 May 2001, the Commission sent its opinion on complaint 500/2001/IJH. On 6 June 2001, I wrote to the Commission to request that its opinion on complaint 552/2001/IJH should also comment on the additional allegation contained in your letter of 3 May 2001. On 13 May 2001, I wrote to inform you of the action I had taken and enclosed a copy of the Commission's opinion on complaint 500/2001/IJH.

On 31 July 2001, the Commission sent its opinion on your complaint 552/2001/IJH and I forwarded it to you with an invitation to make observations. In the same letter, I invited you also to submit observations on the Commission's opinion on complaint 500/2001/IJH. You sent your observations on 29 October 2001.

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

## **THE COMPLAINT**



The complainant is a member of the Isle of Wight Council in the United Kingdom.

*The previous complaint 1372/98/OV*

In December 1998, the complainant submitted, jointly with the Leader of the Council, a complaint to the European Ombudsman on behalf of the Isle of Wight Council. The complaint, which was registered as 1372/98/OV, concerned the decision of Eurostat not to classify the Isle of Wight as a separate Level 2 area in the NUTS system of statistical classification (1). This is of concern to the complainant because only areas identified at the NUTS 2 level can be eligible for Objective 1 funding from the EU Structural Funds.

On 13 March 2000, the Ombudsman made a draft recommendation to the Commission in case 1372/98/OV that it should reconsider the matter of the NUTS classification of the Isle of Wight. On 22 March 2001, the Ombudsman closed case 1372/98/OV on the basis that the Commission had duly executed the draft recommendation, even though the Commission had confirmed its decision to classify the Isle of Wight only at NUTS level 3, not at level 2.

In April 2001, the complainant sent letters and faxes to the Ombudsman concerning the decision to close case 1372/98/OV. The complainant alleged that an additional opinion, which the Commission had submitted to the Ombudsman on 5 December 2000, contained certain incorrect information. He also argued that the Ombudsman should have sent the Commission's additional opinion to the complainant in case 1372/98/OV for possible observations. The complainant claimed that the Ombudsman should set aside his decision in case 1372/98/OV and re-open the case.

*The Ombudsman's reply concerning the procedure used in case 1372/98/OV and the claim that the case should be re-opened.*

In reply to the complainant's argument that the Ombudsman should have sent the Commission's additional opinion to the complainant in case 1372/98/OV for possible observations, the Ombudsman stated that he is always conscious of the need for fair procedure. However, it is necessary to conclude every inquiry at some point, which means that one of the parties must have the last word. In this case, the Ombudsman considered that it was unnecessary to send the Commission's further opinion to the complainant for possible observations (which could in turn have necessitated sending such observations to the Commission for a further opinion) since the points made in the Commission's additional opinion had already been made in substance in its detailed opinion on the draft recommendation, on which the complainant had already made observations. The Ombudsman therefore declined to re-open case 1372/98/OV.

As regards the allegations of incorrect statements in the Commission's additional opinion, the Ombudsman informed the complainant that they had been registered as a new complaint against the Commission with the registration number 552/2001/IJH.

**The allegations in complaint 552/2001/IJH**

The complainant alleged that, in dealing with a previous complaint (1372/98/OV) concerning the NUTS level classification of the Isle of Wight, the Commission supplied incorrect information to the Ombudsman. According to the complainant:

1 There are fifteen islands classified at NUTS level 2, not seven as stated by the Commission.



2 Contrary to the information provided by the Commission, only one of the six other islands identified by the Commission has a higher density of population than the Isle of Wight.

3 The Commission wrongly interprets Article 158 EC as relating only to "least favoured islands", whereas it applies to all islands, as is made clear by Declaration 30 attached to the Treaty of Amsterdam and paragraph 57 of the Presidency conclusions of the Nice meeting of the European Council.

The complainant also suggested that the Ombudsman should organise a tripartite meeting between the complainant, the Ombudsman and Commissioner BARNIER.

As regards the complainant's third allegation, the Ombudsman noted that the complainant's underlying claim is that, on the basis of a comparison with other islands, the Isle of Wight should be classified at NUTS level 2. Since the question of legal interpretation raised by the complainant's allegation appeared to have no bearing on the comparison between the Isle of Wight and other islands, the Ombudsman informed the complainant that he did not consider that there were grounds, as required by Article 195 EC, for him to inquire into the matter.

As regards the complainant's suggestion of a tripartite meeting, the Ombudsman informed the complainant that he only seeks to organise meetings which could have a precise purpose in dealing with a complaint and that he did not consider such a meeting appropriate at this stage.

The Ombudsman therefore opened an inquiry only into the first and second of the above-mentioned allegations. Since the second allegation appeared similar to the allegation in case 500/2001/IJH, the Ombudsman decided to conduct a joint inquiry.

The complainant subsequently sent a further letter making an additional allegation that the Commission had failed to apply its announced criteria for classification at NUTS level 2. To support this allegation, the complainant referred to a table showing ranges, deciles and quartiles of EU-wide data for NUTS level 2, taken from a document entitled "*When is an island not an island?*", which the Isle of Wight Council prepared for the Island Regeneration Partnership on 15 October 1998. The table shows, amongst other things, that the statistics for minimum population (in 1992), area and population density (in 1992) for NUTS level 2 regions in the EU are respectively 24,920, 31.0 square kms and 1.6 per square km, whereas the comparable statistics for the Isle of Wight are respectively 125,000, 380.0 square kms and 328.0 per square km. The Ombudsman forwarded the additional allegation to the Commission for an opinion.

## THE INQUIRY

### The Commission's opinion

The Commission's opinion on the two cases that were the subject of the inquiry was, in summary, as follows.

As regards the number of islands classified at NUTS level 2, the Commission argued that there are only eight islands which are classified in their own right at NUTS level 2: Crete, Corsica,



Guadeloupe, Martinique, Réunion, Sicily, Sardinia and Åland. The other cases cited by the complainant are regarded as archipelagos made up of a number of islands and thus cannot be compared directly with the Isle of Wight. The Commission argued that including these geographic entities in a comparison could only strengthen its case since they have a higher population than the Isle of Wight.

As regards the question of population density, the relevant part of the Commission's opinion to the Ombudsman in case 1372/98/OV was in French (2) . The correct translation of the relevant part of the Commission's opinion is as follows:

*"Classifying the Isle of Wight at NUTS level II would put this region at the same level as Crete, Corsica, Guadeloupe, Martinique, Réunion, Sicily, Sardinia and Åland, the only islands in this class in their own right, all of which have a much larger population (with the exception of Åland) and much larger area"*

In accordance with normal procedure, the Commission later sent a translation into the language of the complaint, English. Unfortunately, the above sentence was inaccurately translated, with the French expression "beaucoup plus peuplées" being rendered as "far denser population" rather than the correct "much larger population".

As regards the allegation that it had failed to apply its announced criteria for classification at NUTS level 2, the Commission first commented on the question of eligibility for the Structural Funds. It pointed out that since the Isle of Wight has not been classified at the NUTS level 2 it could not be eligible for Objective 1 funding. As far as Objective 2 funding is concerned, the Commission pointed out that the UK authorities did not propose that the Isle of Wight be included in the list of eligible regions for the current programming period. The Commission nonetheless believes that the special situation of the various territories of the EU, including islands, warrants more detailed analysis. For that reason, the Commission produced a declaration for the meeting of the Council on 31 May 2001. The declaration, which the Commission quoted in full in its opinion, includes the information that the Commission has launched a study with a view to acquiring in-depth information on the situations of islands in the EU by the end of 2001.

The Commission also pointed out that the document " *When is an island not an island?* ", including the table concerning characteristics of NUTS level 2 regions, already formed part of the file on case 1372/98/OV. The Commission added that:

*"Given the absence in the United Kingdom of a geographical administrative level which could serve as the basis for drawing up level 2 of the classification, this level was based, as in the past, on aggregations of smaller administrative units (counties or unitary authorities). These groupings were carried out in such a way as to avoid forming overly small units, particularly in terms of population. In this context, the population of the Isle of Wight (125,000 inhabitants) was considered too low for level 2 (in Europe as a whole, the average population of NUTS 2 units is some 1.8 million, while within the United Kingdom it is 1.6 million). It should, moreover, be noted that among the more than 200 level 2 regions in the EU, only two have a smaller population*



*than the Isle of Wight : Åland in Finland and the Valle d'Aosta in Italy. Both of these, however are defined within the national structure used as the basis for constituting the NUTS level 2 of their respective countries ("Suuralueet" in Finland and "Regioni" in Italy)."*

The Commission therefore maintained that the decision it took in agreement with the UK authorities not to classify the Isle of Wight at NUTS level 2 is in accord with the basic principles underlying the NUTS system: i.e. using the country's administrative structure and ensuring as far as possible that regions are comparable in terms of population size.

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

The complainant in case 500/2001/IJH did not make any observations on the Commission's opinions.

The complainant in case 552/2001/IJH observed, as regards the number of islands classified at NUTS level 2, that the Commission had applied an aggregating procedure by classifying islands as archipelagos. The complainant argued that this procedure is not open to the Isle of Wight, which has therefore been assessed only by its geographic location, with its actual needs being ignored completely.

The complainant also referred to the Commission's proposal for a Regulation on the establishment of a common classification of Territorial Units for Statistics (NUTS) (3) and the Opinion of the Economic and Social Committee on the Commission's Proposal (4) . The complainant pointed out that the Commission's explanatory memorandum on the proposed NUTS Regulation states:

*"The NUTS classification has so far no legal basis of its own, i.e. there is no Regulation yet setting out in detail the rules for compiling and updating the system. These matters are settled so far by "gentlemen's agreements" between the Member States and Eurostat, sometimes after long and difficult negotiations"*

The complainant also referred to Article 6 of the proposed Regulation, which provides for the Commission to take the necessary measures to ensure the consistent management of the NUTS classification, including examination of problems arising from the implementation of NUTS in the Member States' classifications of regions. The complainant pointed out that the Commission's discretionary powers in relation to NUTS classification would have enabled it to make an examination of this kind, even before the enactment of the Regulation. Furthermore, he argued that the Commission enjoyed unlimited discretionary powers in relation to NUTS classification and that it should have exercised those discretionary powers in relation to the Isle of Wight. The complainant asked why the Commission did not exercise its discretionary powers in relation to the Isle of Wight, especially as the UK Office of National Statistics had clearly demonstrated to Eurostat the effects this would have on the Island and its community not only in relation to EU funding, but also national funding.

The complainant then referred to the Commission's Second Report on Economic and Social Cohesion (5) , which lists suggested priorities, including areas with severe geographical or natural handicaps. He also mentioned the *Opinion of the Economic and Social Committee*:



*Guidelines for integrated actions on the island regions of the European Union following the Amsterdam Treaty (Article 158) (6)* . According to the complainant, this Opinion contains a most telling and damning opinion of how the Commission has failed to address the problems of the EU islands.

The complainant concluded his observations by arguing that the Commission acted unfairly and unreasonably in not exercising its discretionary powers and in not taking into account relevant geographic, economic and social considerations. The complainant argued that the Commission is therefore guilty of maladministration.

## THE DECISION

### **1 The allegation concerning the number of islands classified at NUTS level 2**

1.1 The complainant alleged that the Commission supplied incorrect information to the Ombudsman in dealing with a previous complaint concerning the NUTS level classification of the Isle of Wight. According to the complainant, there are fifteen islands classified at NUTS level 2, not seven as stated by the Commission.

1.2 In its opinion, the Commission replied that there are only eight islands which are classified in their own right at NUTS level 2: Crete, Corsica, Guadeloupe, Martinique, Réunion, Sicily, Sardinia and Åland. The other cases cited by the complainant are regarded as archipelagos made up of a number of islands and thus cannot be compared directly with the Isle of Wight. The Commission also pointed out that including these geographic entities in a comparison could only strengthen its case, since they have a higher population than the Isle of Wight.

1.3 In his observations, the complainant argued that the Commission had applied an aggregating procedure by classifying islands as archipelagos. The complainant argued that this procedure is not open to the Isle of Wight, which has therefore been assessed only by its geographic location, with its actual needs being ignored completely.

1.4 The Ombudsman does not consider that it is misleading or artificial for the Commission to present information in a form that distinguishes between archipelagos and "*islands classified in their own right*". The Ombudsman therefore finds no maladministration in relation to this aspect of the complaint.

### **2 The allegation concerning density of population.**

2.1 The complainant alleged that, in dealing with a previous complaint concerning the NUTS level classification of the Isle of Wight, the Commission supplied incorrect information to the Ombudsman. According to the complainant, contrary to the information provided by the Commission, only one of the other islands identified by the Commission has a higher density of population than the Isle of Wight.

2.2 The Commission explained that its opinion to the Ombudsman in the previous complaint was in French and that the translation into English which it later sent to the Ombudsman contained an error, in that the French expression "*beaucoup plus peuplées*" was rendered as "*far denser population*" rather than the correct "*much larger population*".



2.3 The Ombudsman considers that the Commission is responsible for the translations which it supplies to the Ombudsman and notes that the language of this complaint is English. The complainant was therefore correct to point out the error in the information supplied in English by the Commission. However, the evidence available to the Ombudsman is that the Commission formulated its policy towards the Isle of Wight on the basis of correct information and that it intended to communicate correct information to the complainant. Furthermore, the Commission's opinion in the present case has identified and corrected the translation error that occurred. In these circumstances, the Ombudsman finds no maladministration in relation to this aspect of the complaint.

**3 The allegation that the Commission failed to apply its announced criteria for classification at NUTS level 2.**

3.1 The complainant alleged that the Commission failed to apply its announced criteria for classification at NUTS level 2. The complainant referred to a table showing ranges, deciles and quartiles of EU-wide data for NUTS level 2. The table shows, amongst other things, that the statistics for minimum population (in 1992), area and population density (in 1992) for NUTS level 2 regions in the EU are respectively 24,920, 31.0 square kms and 1.6 per square km, whereas the comparable statistics for the Isle of Wight are respectively 125,000, 380.0 square kms and 328.0 per square km.

3.2 In its opinion to the Ombudsman, the Commission defended its decision not to classify the Isle of Wight at NUTS level 2. The Commission stated that there is no geographical administrative level in the United Kingdom which could serve as the basis for drawing up level 2 of NUTS. This level was therefore based, as in the past, on aggregations of smaller administrative units, carried out in such a way as to avoid forming overly small units, particularly in terms of population. In this context, the population of the Isle of Wight, 125,000 inhabitants, was considered too low for level 2. According to the Commission, the average population of NUTS 2 units in Europe as a whole is some 1.8 million, while within the United Kingdom it is 1.6 million. The Commission also pointed out that among the more than 200 level 2 regions in the EU, only two have a smaller population than the Isle of Wight : Åland in Finland and the Valle d'Aosta in Italy. Both of these, however are defined within the national structure used as the basis for constituting the NUTS level 2 of their respective countries ("Suuralueet" in Finland and "Regioni" in Italy)." The Commission therefore maintained that the decision not to classify the Isle of Wight at NUTS level 2 is in accord with the basic principles underlying the NUTS system: i.e. using the country's administrative structure and ensuring as far as possible that regions are comparable in terms of population size.

3.3 The Ombudsman understands the complainant's allegation of failure to apply announced criteria to be based on the fact that there are certain regions, including one island (Åland) which are classified at NUTS level 2, but which have smaller population, area, and population density than the Isle of Wight. The Ombudsman considers the Commission's explanation that the situation of the regions concerned is different from that of the Isle of Wight because those regions are defined within the national structure used as the basis for constituting the NUTS level 2 of their respective countries to be reasonable. The Ombudsman is not aware of any rule or principle which could prevent the Commission taking this factor into account in determining





NUTS classifications.

3.4 In his observations, the complainant also argued that the Commission could have exercised its discretionary powers in order to reach an agreement with the UK authorities classifying the Isle of Wight at NUTS level 2. The complainant pointed out the effects this would have on the Island and its community not only in relation to EU funding, but also national funding. According to the complainant, the Commission acted unfairly and unreasonably in not exercising its discretionary powers and in not taking into account relevant geographic, economic and social considerations.

3.5 The evidence available to the Ombudsman does not appear to contradict the complainant's argument that the Commission could have exercised its discretionary powers in order to reach an agreement with the UK authorities classifying the Isle of Wight at NUTS level 2. The Ombudsman points out, however, that the essence of a discretionary power is that the decision-making authority has the possibility to choose legally between two or more possible courses of action. Maladministration in the exercise of a discretionary power occurs if the institution or body concerned steps outside the limits of its legal authority. The relevant question for the Ombudsman is not, therefore, whether the Commission could have decided differently, but whether the Commission was legally entitled to decide as it did.

3.6 As the Ombudsman's previous inquiry (case 1372/98/OV) made clear, the Commission must take all relevant factors into account in considering the exercise of discretionary powers. The weight to be accorded to the various relevant factors is a matter for the exercise of discretion: it could constitute maladministration only if it were manifestly unreasonable or unfair, or otherwise contrary to law. The Ombudsman does not consider that the evidence supplied by the complainant and drawn from various reports by the Commission and opinions by the Economic and Social Committee could demonstrate unreasonableness, unfairness or other unlawful action by the Commission in its decision not to classify the Isle of Wight at NUTS level 2. The Ombudsman did not therefore request further information from the Commission on the basis of the arguments raised in the complainant's observations.

3.7 For the reasons stated above, the Ombudsman finds no maladministration in relation to this aspect of the complaint. The Ombudsman points out however, that the complainant could pursue his claim to NUTS level 2 status for the Isle of Wight by presenting a petition to the European Parliament, which can take political and moral arguments into account as well as legal ones.

#### **4 Conclusion**

On the basis of the Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the Commission. The Ombudsman therefore closes the case.

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

Yours sincerely,





Jacob SÖDERMAN

(1) This system divides each Member State into a number of NUTS 1 regions, each of which is subdivided into NUTS 2 regions and so on. NUTS is the acronym of Nomenclature des Unités Territoriales Statistiques

(2) "Or classer l'Ile de Wight au niveau II de la NUTS mettrait cette région au même niveau que la Crète, la Corse, la Guadeloupe, La Martinique, la Réunion, la Sicile, la Sardaigne et Åland, seules îles individuellement dans ce cas, et qui sont toutes beaucoup plus peuplées (à l'exception d'Åland) et beaucoup plus grandes"

(3) COM/2001/0083 final - COD 2001/0046, 2001 OJ C 180 E/108

(4) 2001 OJ C 260/57

(5) Report from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions COM(2001) 24 final, Brussels, 31.1.2001

(6) ECO/029, 12 July 2000, available on the website of the Economic and social Committee at: [http://www.cese.europa.eu/pages/avis\\_prin/eco/029/ces805-2000\\_ac\\_en.pdf](http://www.cese.europa.eu/pages/avis_prin/eco/029/ces805-2000_ac_en.pdf) [Link]