Decision of the European Ombudsman on complaint 39/2002/OV against the European Commission

Decision
Case 39/2002/OV - **Opened on** 06/02/2002 - **Decision on** 15/10/2002

Strasbourg, 15 October 2002
Dear Mr D.,

On 6 January 2002, you made a complaint to the European Ombudsman concerning the Commission's handling and closing of complaint 2000/4895 - Anglesey Race Track.

On 6 February 2002, I forwarded the complaint to the President of the Commission. The Commission sent its opinion on 8 May 2002. I forwarded it to you with an invitation to make observations, which you sent on 8 June 2002. On 6 August 2002 you also sent an additional e-mail.

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

THE COMPLAINT

According to the complainant, the relevant facts were as follows:

The complainant lodged a complaint with the Commission for violation of the Council Directive 85/337/EEC of 27 June 1985 (better known as the "Environmental Impact Assessment (EIA) Directive (1)) by the UK authorities. The complaint was registered in October 2000. In his complaint the complainant alleged that a planning permission for the Anglesey Motor Racing Track had been granted without an environmental impact assessment being carried out.

On 14 August 2001, DG Environment informed the complainant that *"Whilst it would have been desirable for the local planning authority to have carried out an EIA under Directive 85/337/EEC before planning permission was granted in 1992, the information available to us does not reveal that there was a breach of the Directive when the planning authority exercised their discretion not to require such an assessment".* The letter stated that the case would be closed, unless the complainant sent new information within 1 month. The complainant replied on 27 September 2001 with some delay as he was on vacation. Finally, on 8 November 2001, the complainant was informed by the Commission that the case had been closed.

The complainant observes that DG Environment's interpretation of the Directive appears to be unsatisfactory, as instead of invoking it to protect the rights of citizens and the environment, it appears to take the view that the Directive is in no way binding on Member States. However, the Directive, which uses the wordings "shall", "should be" and "must be" provides clearly that Member States should undertake EIA before projects receive approval. The complainant alleges that no reasons were communicated by the Commission why this particular project was exempted from an environmental impact assessment.

The complainant refers to a lengthy 1998 Report from the Local Government Ombudsman of Wales (2) containing a clear and explicit conclusion of maladministration by the local Council. Paragraph 64 of this Report clearly states that *". the track owners should have been required (but were not required) to submit an environmental assessment of their proposals with their planning application".* This was not taken into account by DG Environment which did not even refer to this Report.

On 6 January 2002 the complainant wrote to the European Ombudsman and made the following three allegations:

1. The Commission did not take into account in its evaluation the 1998 report from the Local Government Ombudsman of Wales which found to maladministration.

2. The closure of the case by the Commission is based on a wrong interpretation of the Directive.

3. The Commission did not communicate the reasons why this particular project was exempted from an environmental impact assessment.

THE INQUIRY

The Commission's opinion

As regards the first allegation that the Commission did not take into account in its evaluation the 1998 Report from the Local Government Ombudsman of Wales which found maladministration, the Commission observed that it took knowledge of this report, but that there was nothing in it which provided evidence of a breach of Community law, in particular Directive 85/337/EEC. Indeed, in its letter to the complainant of 26 January 2001, the Commission had pointed out to the complainant that the designation of an Area of Outstanding Natural Beauty was purely a national one. Since the designation had no legal basis in Community law, it was considered to have no relevance to this particular complaint.

As regards the second allegation that the closure of the case was based on a wrong interpretation of Directive 85/337/EEC, the Commission observed that the complaint related to a 1992 decision of the local planning authority to grant planning permission for a racetrack without an environmental impact assessment under the above Directive. The complaint concerned thus the provisions of that Directive before its amendment by Directive 97/11/EC.

Article 2(1) of the Directive as originally enacted provides that *"Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size and location are made subject to an assessment with regard to their effects. These projects are defined in Article 4".*

Article 4(2) of the Directive provides that *"Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require. To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be the subject to an assessment in accordance with Articles 5 to 10.*

"Permanent racing and test tracks for cars and motor cycles" are a category of projects listed in Annex II, paragraph 11(b) of the Directive.

The European Court of Justice has held that the second subparagraph of Article 4(2) of the Directive confers on Member States a measure of discretion to specify certain types of projects which will be the subject of an EIA or to establish the criteria or thresholds applicable. However, the limits of that discretion are set out in Article 2(1) which states that projects likely, by virtue of their size, nature and location, to have significant effects on the environment are to be subject of an EIA (see case C-435/97 World Wildlife Fund & others v. Autonome Provinz Bozen & others, paragraph 36).

The Commission wrote to the UK authorities on 31 January 2001 seeking an explanation from them as to whether consideration had been given as to the need for an EIA in this case to address in particular the issue of noise nuisance. In their response of 26 March 2001, the UK advised that the relevant local planning authority at the time had considered that the proposed development would be unlikely to have a significant effect on the environment and accordingly did not require the developer to prepare an EIA. On the question of ongoing noise pollution, the UK authorities correctly observed that although the Directive did not require an EIA after a project had been given development consent, noise monitoring had nevertheless subsequently been carried out on the site and, as a result, 2 new acoustic barriers had been constructed there.

In the light of the UK's response, the Commission considered that there was no evidence to suggest that the UK had acted in breach of the Directive as originally enacted and, in the absence of further evidence from the complainant about such a breach, the complaint was unfounded.

As regards the third allegation that the Commission did not communicate the reasons why this particular project was exempted from an EIA, the Commission stated that in its letter of 14 August 2001, it provided a full explanation to the complainant of the UK's response to the complaint and gave him the opportunity for further comment. Although the complainant did write to the Commission on 27 September 2001 to set out his concerns about the Commission's

handling of this case, his letter disclosed no additional evidence which the Commission could relevantly consider. Accordingly, in the absence of additional evidence from the complainant that the UK had acted in breach of the Directive, the Commission decided to close the complaint file, and advised the complainant accordingly by letter dated 15 October 2001. In doing so, the Commission reiterated that, given the date of the development consent application in this case, it had to assess the case on the basis of the Directive as originally enacted, rather than as subsequently amended by Directive 97/11/EC, which lays down more stringent constraints on Member States' exercise of discretion under Article 4(2).

The Article as now amended requires Member States to ensure that any determination under Article 4(2) should be made available to the public. This was not a requirement under the Directive at the time of the development consent application in this case.

The complainant's observations

With regard to the first allegation concerning the report of the Local Government Ombudsman of Wales, the complainant is of the opinion that the Commission was wrong to say that *"there was nothing in the Report which provided evidence of a breach of Community law, in particular Directive 85/337/EEC".* This report stated that it was wholly unsatisfactory that the local authority chose to ignore the warnings of its own Director of Environmental Health and also deplored the lack of an EIA. The complainant wonders what clearer evidence of a breach of Community law the Commission requires?

As regards the Commission's position that the UK designation of an Area of Outstanding Natural Beauty had no relevance for the evaluation of the complaint as it was a purely national designation which had no legal basis in Community law, the complainant stated that the Commission was wrong in ignoring the signal sent out by this national designation.

The complainant also drew attention to the Commission's somewhat ironical phrase that *"it would be reasonable to imagine that the issue of noise pollution would have been more profoundly addressed had an EIA been carried out for this development before permission was granted".*

With regard to the second allegation, the complainant observed that the Commission had interpreted Directive 85/337/EEC in a manner contrary to both the letter and the spirit of the Directive. The complainant referred to the words "should" and "must" which are repeated several times in the preamble of the Directive. This leaves no doubt that the protection of the environment is a matter of legal obligation for the Member States.

With regard to the discretionary power of the Member States concerning the EIA - to which the Commission referred -, the complainant observed that "permanent racing and test tracks for cars and motor cycles" are clearly mentioned as one of the many "projects subject to Article 4(2)".

As regards the response from the UK authorities that *"the relevant local planning authority at the time had considered that the proposed development would be unlikely to have a significant effect on the environment and accordingly did not require the developer to prepare an EIA",* the

complainant stated that, in the light of his complaint which showed that the race track had been a source of complaint and irritation by local residents, the Commission should have treated this claim with scepticism. The complainant asks whether there could have been any doubt in the mind of a reasonable person that a full-blown motor racing track would have a major impact on the environment, and thus should have been subject to an EIA?

The complainant does not consider that the Commission has satisfactorily communicated the reasons why this particular project was exempted from an EIA. He states that the Commission could at least have endorsed the Local Government Ombudsman's clear identification of maladministration. The complainant's perception was that of a bureaucracy that is resourceful and ingenious not in defending the public interest and the environment, but only in finding excuses why EU Directives should not be implemented and enforced. The complainant concluded that this state of affairs can only alienate EU citizens from their institutions.

THE DECISION

1 The Commission's alleged failure to take into account the report from the Local Government Ombudsman of Wales

1.1 The complainant alleged that the Commission did not take into account in its evaluation the 1998 report from the Local Government Ombudsman of Wales which found maladministration.

1.2 The Commission observed that there was nothing in the report which provided evidence of a breach of Community law, in particular Directive 85/337/EEC. The Commission stated that the designation of an Area of Outstanding Natural Beauty was a purely national one and was considered to have no relevance to this complaint.

1.3 The European Ombudsman has studied the report of 9 March 1998 by the Local Government Ombudsman of Wales. The European Ombudsman notes that the Welsh Ombudsman's finding of maladministration refers to the terms of the Town and Country Planning (Assessment of Environmental Effects) regulations 1988. According to the explanatory memorandum accompanying these Regulations, they are concerned with the implementation in England and Wales of Directive 85/337/EEC.

1.4 Principles of good administration require that, when taking a decision, an institution takes into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration (3) .

1.5 By omitting to mention the report of 9 March 1998 by the Local Government Ombudsman of Wales in its letters to the complainant, despite the fact that the complainant has specifically drawn its attention to that report, the Commission has failed to take into account a relevant factor in its decision to close the case. This constitutes an instance of maladministration, and the Ombudsman makes the critical remark below.

2 The alleged wrong interpretation of the Directive

2.1 The complainant alleged that the closure of the case by the Commission was based on a wrong interpretation of the Directive.

2.2 The Commission stated that in the light of the UK's response - according to which the relevant local planning authority at the time had considered that the proposed development would be unlikely to have a significant effect on the environment and accordingly did not require the developer to prepare an EIA - , it had considered that there was no evidence to suggest that the UK had acted in breach of the Directive as originally enacted.

2.3 The Ombudsman notes that the Commission first wrote to the complainant on 26 January 2001 informing him that it had asked clarification from the UK authorities with regard to its application of Directive 85/337/EEC, and more particularly concerning the requirement of an EIA and the issue of noise nuisance.

2.4 On 14 August 2001, the Commission informed the complainant in a two pages letter of its assessment of the complaint, stating that it would propose the closure of the file, unless the complainant would submit new comments within one month. In this letter, the Commission stated that the UK authorities had replied that the local planning authority had reached the decision that an EIA was not necessary. The UK authorities also replied that noise level monitoring had been carried out by the Isle of Anglesey County Council and that two new acoustic barriers had been constructed. They furthermore informed the Commission that an application for planning consent was being prepared to make further fundamental changes to the race track to lessen the noise impact.

2.5 The Commission concluded that *"whilst it would have been desirable for the local planning authority to have carried out an EIA under Directive 85/337/EEC before planning permission was granted in 1992, the information available to us does not reveal that there was a breach of the Directive when the planning authority exercised their discretion not to require such an assessment. It also appears that action is being taken to ameliorate the noise pollution emanating from the site. In coming to this decision we have also taken into account the fact that the permission for the site was given almost 10 years ago and the race track has been in operation for a considerable number of years".*

2.6 On 27 September 2001, the complainant replied to the Commission's letter of 14 August 2001, expressing his disappointment with the Commission's conclusion and the apparent position according to which the Directive had no binding force. On 15 October 2001, the Commission replied referring to the Member States' wide discretion in deciding the need for an EIA under Directive 85/337/EEC before its amendment by Directive 97/11/EC. On 8 November 2001, the Commission finally informed the complainant of the definitive closure of the case.

2.7 Considering a) the case-law of the Court of justice according to which the Member States have a measure of discretion under Directive 85/337/EEC with regard to the requirement of an EIA (4) , b) the fact that the rules applicable to the racing track in question - approved in 1992 - were these of Directive 85/337/EEC and not these of Directive 97/11/EC which lays down more stringent constraints on the Member States' exercise of this discretion, but is only applicable for projects submitted after 14 March 1999 (5) , and c) the answers given by the UK authorities themselves which the Commission had to take into account, the Ombudsman finds that the

Commission's conclusion that there was no infringement of the Directive appears reasonable. No instance of maladministration was therefore found with regard to this aspect of the case.

3 The Commission's failure to communicate the reasons why the project was exempted from an EIA

3.1 The complainant alleged that the Commission did not communicate the reasons why this particular project was exempted from an environmental impact assessment.

3.2 The Commission observed that, in its letter of 14 August 2001, it provided a full explanation to the complainant of the UK's response and gave him the opportunity for further comment.

3.3 The Ombudsman notes that, in its letters of 14 August and 15 October 2001, the Commission has, with the exception of an explanation with regard to report of the Local Government Ombudsman of Wales (see point 1 above), provided reasons to the complainant to understand its conclusion that in this case, considering the discretionary powers of the Member States with regard to the requirement of an EIA, there appeared to be no infringement of the Directive. No instance of maladministration was therefore found with regard to this aspect of the case.

4 Conclusion

On the basis of the Ombudsman's inquiries into part 1 of this complaint, it is necessary to make the following critical remark:

Principles of good administration require that, when taking a decision, an institution takes into consideration the relevant factors and give each of them its proper weight in the decision, whilst excluding any irrelevant element from consideration.

By omitting to mention the report of 9 March 1998 by the Local Government Ombudsman of Wales (6) in its letters to the complainant, despite the fact that the complainant has specifically drawn its attention to that report, the Commission has failed to take into account a relevant factor in its decision to close the case. This constitutes an instance of maladministration.

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 Commission will also be informed of this decision.

Yours sincerely,

Jacob SÖDERMAN

(1) Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175/40.

(2) Commission for Local Administration in Wales, Report by the Local Government Ombudsman on an investigation into complaint nos 97/0471/AN/032, 97/0665/AN/041, 97/0987/AN1/019 & 97/0988/AN1/020 against the former Isle of Anglesey Borough Council and the Isle of Anglesey County Council, 9 March 1998.

(3) See Article 9 (Objectivity) of the Code of Good Administrative Behaviour, as approved by the European Parliament in its Resolution of 6 September 2001.

(4) See case C-435/97, WWF & others v. Autonome Provinz Bozen & others, [1999] ECR I-05613, paragraph 36: "The second subparagraph of Article 4(2) of the Directive confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria or thresholds applicable. However, the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (see Case C-72/95 Kraaijeveld and Others v Gedeputeerde Staten van Zuid-Holland [1996] ECR I-5403, paragraph 50, and Case C-301/95 Commission v Germany [1998] ECR I-6135, paragraph 45)".

(5) Article 3.2 of Directive 97/11/EC.

(6) Report by the Local Government Ombudsman on an investigation into complaint nos 97/0471/AN/032, 97/0665/AN/041, 97/0987/AN1/019 & 97/0988/AN1/020 against the former Isle of Anglesey Borough Council and the Isle of Anglesey County Council, 9 March 1998.