

## **Decision of the European Ombudsman on complaint 245/2002/JMA against the European Commission**

Decision

**Case 245/2002/JMA - Opened on 19/02/2002 - Decision on 04/09/2002**

Strasbourg, 4 September 2002

Dear Messrs G. E. and B. A.,

On 10 January 2002, you lodged a complaint with the European Ombudsman against the European Commission, on behalf of "Asociación Coordinadora de Itóiz". Your complaint concerned the Commission's handling of your complaint of 27 March 2000 (file number 2000/4378) regarding the non-compliance of a projected dam in Itóiz (Navarra) with several EC environmental directives.

On 19 February 2002, I forwarded your complaint to the President of the European Commission with a request for comments by 31 May 2002. On 7 May 2002, the Commission sent its opinion, which I forwarded to you on 27 May 2002, with an invitation to make observations. On 14 May 2002, I received additional information from you. You sent me your observations on the Commission's opinion on 27 June 2002.

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

### **THE COMPLAINT**

The complainants complained to the Ombudsman on 16 November 2001 (ref.: 1670/2001/JMA). According to the complainants, the Commission had not properly handled their complaint of 27 March 2000 (Commission's reference 2000/4378) in which they denounced the non-compliance of a dam being built in Itóiz (Navarra) with several EC environmental directives, in particular Directive 85/337/EEC (environmental impact assessment).

In view of the information submitted by the complainants in their first complaint, the Ombudsman considered that there were no grounds to pursue an inquiry. The complainants were informed by a letter dated 8 January 2002.

On 10 January 2002, the complainants forwarded a new complaint with additional information (ref.: 0245/2002/JMA). The Ombudsman decided to open an inquiry into the matter. According



to this complaint, the facts of the case are as follows:

On 5 March 1996, the complainants submitted a complaint to the European Ombudsman (complaint 472/6.3.96/XP/ES/PD) involving also the dam being built in Itóiz (Navarra). The complainants alleged that the Commission had not properly handled their formal complaint (Commission's file P/92/4758) regarding the non-compliance of the projected dam with several EC directives. The complainants recalled that, as a result of his inquiry, the Ombudsman concluded that the Commission's decision to close the case constituted an instance of maladministration.

On 31 May 1999, the complainants sent a scientific report drafted by a geology expert to the Commission concerning the stability of the Itóiz dam. The study concluded that the stability of the left bank of the dam was at risk. On 28 January and 16 February 2000, the complainants requested EC funding in order to complete a thorough assessment of the geological risks posed by the dam. By letters dated 24 February and 7 March 2000, the Commission services informed the complainant that no funds were available for this type of activities.

On 27 March 2000, the complainants lodged a formal complaint with the Commission (ref.: 2000/4378). They alleged that the environmental impact of the dam was fundamentally flawed in that no proper assessment of the geological effects of the project had been carried out. Accordingly, the complainants requested that the Commission, on the basis of Council Decision 1999/847/EC establishing a Community action programme in the field of civil protection, finance a technical assessment of the dam and its geological effects, and that experts from the Commission visit the site.

On 31 August 2000, the complainants forwarded a scientific report on the geological instability of the dam to the Commission services responsible for Legal Affairs and Civil Protection matters in DG Environment. The study outlined the design flaws of the dam, its instability and the potential risk of collapse. In the complainants' view, these findings demonstrated that the environmental impact assessment of the dam had been incorrect, and that the intervention of the Commission's civil protection team would have been justified.

From August 2000, the complainants had numerous exchanges with the Commission services. On 14 December 2000, they again requested to have a Commission's civil protection team visit the site. The reply from the Commission's responsible services of 12 February 2001 rejected both requests. It stated that the type of study proposed by the complainant was not foreseen by Decision 1999/847/EC. Thus, the Commission could not finance such initiative. The Commission explained that sending a civil protection team was foreseen in point D of the Annex to the Decision, but only following serious accidents. This was not the case of the Itóiz dam.

On 21 February 2002, the complainants forwarded the reply to Commissioner Wallström, requesting a reconsideration of the decision. On 26 February 2002, the Head of DG ENV's Legal Service replied to the complainants' letter. He informed them that the Commission services had requested information on the problem from the Spanish authorities.



On 19 September 2001, the complainants forwarded a new study to the Commission. A progressive deterioration of the dam mostly visible through cracks in its outer walls was indicated. This had already been foreseen in their report from April 2000.

The complainants noted that despite the amount of available information, the Commission had not taken any action during the 17 months following the formal registration of their complaint. They alleged that this long delay was excessive and in breach of the institution's commitment to deal with complaints within one year. In the complainant's view, the fragile geological structure of the dam showed that the environmental impact assessment carried out by the Spanish authorities was flawed and did not respect the provisions of Directive 85/337/EC.

Furthermore the complainants alleged that the Commission's interpretation of Decision 1999/847/EC was biased and legally wrong. They therefore asked the institution to reconsider sending a civil protection team to verify these conditions.

In their complaint, the complainants alleged in summary that the Commission,

- (i) did not respect its one-year rule for the handling of their complaint (file number 2000/4378);
- (ii) unduly rejected their urgent request for the expedition of a civil protection team to the area where the project was being developed.

## THE INQUIRY

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

In its opinion of 7 May 2002, the Commission referred to the two allegations made by the complainants.

As regards the handling of complaint number 2000/4378, the institution explained that information on the administrative guarantees granted to complainants had been included in its acknowledgement of receipt of 16 May 2000. Point (c) of that letter indicated that the Commission would try to take a decision on the substance of the case (either to close the case or to launch infringement proceedings) in a twelve-month delay from the date of registration of the complaint by the Secretariat General.

The Commission pointed out that it is not always possible to comply with this delay in particular in the environmental area, and especially as regards certain Member States. In this instance, the Commission explained that its services had had to review the information submitted by the Member State as well as numerous communications forwarded by the complainant. The opinion listed as an annex the numerous exchanges between the institution and the complainants.

The institution stressed that the complaints had raised some complex legal questions which had to be subject to a thorough consideration. In particular, its services had to ponder whether, in the light of Directive 85/337/EEC, the environmental impact assessment of the project carried out by the Spanish authorities should be questioned since the resulting project presented



design flaws. The European Parliament had raised the same issue through a written question (E-01/0983) dated 30 March 2001. The Commission's reply, published in the Official Journal of 11 December 2001 (OJ C 350, p.66), explained that the technical quality of a resulting project goes well beyond the aim of Directive 85/337/EEC which only addresses the assessment of environmental impacts of a planned activity. Accordingly, the Commission, in its role of guardian of the Treaty under Art. 211, had no legal basis to intervene in the Itóiz dam.

On this basis, the Commission decided to close the case. By letter dated 24 January 2002, the Commission informed the complainants of its intention to close the case, unless new information or additional reasons could be furnished. The decision to close the case was adopted on 20 March 2002.

In relation to its refusal to dispatch a civil protection team to the site of the dam, the Commission explained that the request did not meet the criteria laid down in Decision 1999/847/EC. The Annex to the Decision states that in emergency cases, a group of experts can be mobilised if a Member State or a Third country faces a natural or technological catastrophe. On the other hand, the Decision sets out a number of criteria to trigger its application, which include, among others, that Community actions be of interest for a significant number of Member States.

The Commission therefore confirmed that the requests made by the complainants did not meet the criteria set out in the Decision, and thus that its refusal to grant the complainants' requests were duly grounded.

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

After the Commission sent its opinion dated 7 May 2002, the Ombudsman received additional information from the complainants on 14 May 2002. They described an exchange of correspondence held with the Commission services between 24 January 2002 and 24 April 2002 concerning the decision taken by the institution to close their formal complaint. The complainants considered that the closing of the case was wrong and had not been properly justified. In their view, the Commission had misinterpreted the provisions of Directive 85/337/EEC so as to conclude that the situation denounced in the complaint was not governed by EC law. The complainants referred to several provisions of the Directive which should apply to the situation and which the Spanish authorities had ignored, in particular Arts. 3 (description and evaluation of environmental impacts), 5 (projects to be subject to an environmental impact assessment and information to be submitted by the developer) and 6 (public information). They referred to the progressive deterioration of the dam, which resulted from its faulty technical conception. The complainants thus stressed that the implementation of the project's technical plan could not be dissociated from its environmental impact assessment. Accordingly, the deficient environmental impact assessment prepared by the developer and approved by the Spanish authorities could not have respected the provisions of the Directive. The Commission, in their view, should not have ignored these elements in its legal analysis of the complaint. They asked the Ombudsman to take into consideration this new allegation in his inquiry.

On 27 June 2002, the complainants formally sent their observations on the Commission's opinion. They indicated that, in its reply to the Ombudsman's inquiry, the institution had not raised any new argument. The complainants therefore did not deem it necessary to add any



further comment, and referred to the evidence and explanations already submitted in their previous correspondence with the Ombudsman.

## THE DECISION

### **1. Preliminary issue: the new allegation submitted by the complainants concerning the Commission's decision to close their complaint**

1.1 In the course of the Ombudsman's inquiry, the Commission informed the complainants of its intention to close their complaint unless new information or additional reasons could be furnished. On 20 March 2002, the institution formally decided to close the case. In a letter received by the Ombudsman on 14 May 2002, the complainants described the new situation, criticised the Commission's legal assessment of Directive 85/337/EEC and its decision to close the case. They therefore asked the Ombudsman to take into consideration this new allegation in his inquiry.

1.2 As this aspect was not part of the original complaint, and since the institution has therefore had no opportunity to comment upon it, the Ombudsman does not consider it appropriate to deal with the new allegation in the framework of this decision. The complainants may consider lodging a new complaint with the European Ombudsman concerning this aspect of the case.

### **2. The Commission's handling of the complaint**

2.1 The complainants stated that despite the amount of available information, the Commission had not taken any action during the 17 months following the formal registration of their complaint. They alleged that the Commission had not respected its one-year rule for the handling of their complaint (file number 2000/4378).

2.2 The Commission explained that it is not always possible to comply with this delay in particular in the environmental area, and especially as regards certain Member States. In this instance, the Commission justified the long time it took to deal with the case on the grounds that it had to review the information submitted by the Member State as well as numerous communications forwarded by the complainants.

2.3 The procedural rules to be followed by the Commission in its handling of citizens' formal complaints are set out in the annex attached to its standard complaint form (1) .

One of these rules is that,

*"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. (2) "*

The annex attached to the Commission's complaint form explains the procedural safeguards which result from the registration of a letter as a complaint:

*"(c) The Commission will endeavour to take a decision on the substance [...] within twelve months of registration of the complaint [...]. (d) The complainant will be notified in advance by the*



*relevant department if it plants to propose that the Commission close the case."*

2.4 The Ombudsman notes that the Commission's undertaking to take a decision on the substance of a complaint within one year, also allows for exceptions in special cases, where the reasons must be stated.

In the present case, the complainant alleged that the institution had not taken a decision on the substance of the case for more than 17 months. It appears that the Commission has given sufficient justifications for this long delay. The Ombudsman points out that the complaint involved complex aspects related to the assessment of environmental impacts of a large project. The amount of information pertaining to the file included several hundred-page annexes.

It appears from both the information provided by the complainant and the details contained in the Commission's observations that from the date at which the complaint was registered (27 March 2000), the Commission has actively pursued its inquiry into the case, and informed the complainants of any development. The Ombudsman notes that, after having registered the complaint and gathered relevant information, the Commission requested the opinion of the Spanish authorities, and exchanged correspondence with the complainants. From 27 March 2000 until 13 March 2002, more than fifty written exchanges of information between the complainants and the Commission appear to have taken place.

2.5 It appears thus from the above that there were stated reasons for the long investigation period, and thus no instance of maladministration has been established.

### **3. Commission's refusal to expedite a civil protection team to the area**

3.1. The complainants alleged that the Commission unduly rejected their request for the expedition of a civil protection team to the area where the project was being developed.

3.2. The Commission justified its position on the basis that the complainants' request did not meet the criteria laid down in Decision 1999/847/EC, as the Annex to the Decision states that, in emergency cases, a civil protection team can be mobilised only if a Member State or a Third country faces a natural or technological catastrophe. The Commission also argued that the criteria which may trigger this action (interest for a significant number of Member States) had not been met.

3.3 Council Decision 1999/847/EC establishes a Community action programme in the field of civil protection (3) . Actions under the programme are described in the Annex to the Decision. They include major projects of general interest, training, mobilization of expertise and other actions (pilot projects, support actions, information, and others). Under point C.2 of the Annex, the only eligible support actions are " *those interesting all Member States or a significant number of them* ". As for actions involving the mobilization of a civil protection team, point D of the Annex states that they should only " *intervene in the event of an emergency situation* ".

3.4 The Ombudsman notes that, on the basis of Decision 1999/847/EC, the Commission took the view that the complainants' request to have a civil protection team sent to the area where the Itóiz dam was being developed, did not meet these criteria. In view of the type of actions



described in the Decision's Annex as regards support actions and mobilization of a civil protection team, the Ombudsman considers that the Commission's view appears to be well reasoned.

The Ombudsman therefore finds no maladministration in relation to this aspect of the case.

#### **4. Conclusion**

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

The Ombudsman therefore closes the case.

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

Yours sincerely,

Jacob SÖDERMAN

(1) Failure by a member State to comply with community law: standard form for complaints to be submitted to the European Commission; OJ C 119, 30.04.1999, p.5.

(2) Decision in the own initiative inquiry 303/97/PD, European Ombudsman's Annual Report for 1997, pp. 271-272.

(3) Council Decision 1999/847/EC of 9 December 1999 establishing a Community action programme in the field of civil protection; OJ L 327 of 21/12/1999, p.53.