

## **Decision of the European Ombudsman on complaint 1671/2003/GG against the European Commission**

Decision

**Case 1671/2003/GG - Opened on 17/09/2003 - Recommendation on 20/02/2004 -  
Decision on 21/06/2004**

Strasbourg, 21 June 2004

Dear Mr G.,

On 4 September 2003, you submitted a complaint against the European Commission to me. This complaint concerns the Commission's handling of a complaint against Austrian authorities that you had addressed to the Commission on 22 December 2000.

On 17 September 2003, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 13 November 2003. I forwarded it to you on 19 November 2003 with an invitation to make observations by 31 December 2003. I received your observations on 6 January 2004. On 19 January 2004, you wrote to inform me that you had sent your observations already on 22 December 2003, that is to say before the deadline set in my letter of 19 November 2003.

On 4 February 2004, Mr Grill of my services sent you a fax requesting you to contact him by telephone. In your reply letter of 5 February 2004, you pointed out that you preferred to communicate by mail.

On 12 February 2004, Mr Grill sent a further fax to you, explaining that you were requested to contact him with a view to discussing a possible friendly solution concerning your complaint.

In the absence of a reply I addressed, on 20 February 2004, a draft recommendation to the Commission. You were informed accordingly the same day.

On 25 February 2004, I received a letter you had sent me on 19 February 2004 and in which you stated that you did not wish to complain against the Commission but that your grievances concerned Austrian authorities.

On 10 March 2004, I asked you to confirm that your complaint was not against the Commission. In this letter, I informed you that I would in this case close my inquiry, given that the European Ombudsman can only deal with complaints against Community institutions or bodies, but not



with complaints directed at national authorities.

On 12 March 2004, I forwarded to you a German translation of the draft recommendation I had addressed to the Commission on 20 February 2004.

On 17 March 2004, you replied to my letter of 10 March 2004. You explained that your principal complaint was against national authorities but that your secondary complaint was directed at the Commission.

In my reply of 29 March 2004, I informed you that I was not competent to deal with your complaint against national authorities. As regards your complaint against the Commission, I drew your attention to the fact that I had submitted a draft recommendation to the Commission and that the latter was due to submit an opinion by 31 May 2004.

On 5 April 2004, I received a further letter from you dated 24 March 2004. In this letter, you expressed the view that my draft recommendation contained serious factual inaccuracies. In my reply of 7 April 2004, I informed you that I had taken note of your comments and that I had forwarded a copy of your letter to the Commission.

On 29 April 2004, the Commission sent me its opinion regarding my draft recommendation. I forwarded it to you on 5 May 2004 with an invitation to make observations which you sent on 3 June 2004.

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**

According to Article 4 of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (1), Member States may choose between an authorisation procedure and a tendering procedure regarding the construction of new generating capacity. Both types of procedure must be conducted in accordance with objective, transparent and non-discriminatory criteria.

It appears that Austria has opted for an authorisation procedure, and that the Directive has been



implemented by legislation by the Elektrizitätswirtschafts- und organisationsgesetz 1998 (“EIWOG”, law on the electricity sector and its organisation) on the federal level and by legislation on the level of the Länder (regions).

Article 5 (1) of Directive 96/92/EC provides that Member States shall lay down the criteria for the grant of authorisations for the construction of electricity-generating capacity in their territory. These criteria may inter alia relate to the protection of the environment (point b) and to land use and siting (point c). According to Article 5 (2), the detailed criteria and procedures shall be made public. Article 5 (3) provides that applicants shall be informed of the reasons for any refusal to grant an authorisation and that these reasons must be well-founded and substantiated. These reasons must be forwarded to the Commission for information. The provision further stipulates that appeal procedures must be made available to applicants.

On 25 August 1999, the complainant, an Austrian citizen, asked the competent authority in Burgenland (one of Austria’s Länder) for authorisation to build electricity-generating facilities run by wind power with a capacity of 15 MW. The Landesregierung (government of the relevant Land) informed the complainant on 26 November 1999, referring to Article 11 (4) of the Burgenländisches Elektrizitätswesengesetz 1999 (“EIWG”, law regarding the electricity sector of the Land), that the authorisation could not be granted since the relevant plot was listed in the land-use plan as “greenland - used for agricultural purposes”. According to the Landesregierung, the dedication of the relevant plots had to be changed before an authorisation could be granted.

Article 11 of the EIWG contains a number of criteria for the grant of authorisations. Article 11 (4) provides that a site is inappropriate if the construction or the running of generating capacity is prohibited under regional law (“landesrechtliche Vorschriften”) at the time when the decision is taken.

On 15 May 2000, the complainant requested that his application should be dealt with by the national Ministry of Economic Affairs. According to the complainant, this meant that competence for dealing with the matter passed from the Land to the national Ministry. Whilst the Ministry apparently did not deal with this application, a regional authority decided on 23 January 2001 that the complainant’s application could not be granted in so far as the rules on the protection of nature were concerned. According to the complainant, the relevant authority was not competent to adopt this decision. An appeal, however, was unsuccessful.

On 22 December 2000, the complainant turned to the European Commission. On 18 January 2001, he received an acknowledgement of receipt from the Commission. In the absence of a reply on the substance of his letter, the complainant wrote to the Commission again on 29 July 2002, submitting further documents.

By letter of 23 September 2002, the Commission’s services informed the complainant that, in their view, there was nothing to suggest that there had been an infringement of Community law in general and of Directive 96/92/EC in particular. The Commission pointed out that, according to Article 5 of the Directive, Member States could make the issue of an authorisation subject to



the fulfilment of certain criteria, including criteria relating to land use and siting. The complainant was therefore advised to turn to the Austrian courts for help.

On 10 December 2002, the complainant again addressed himself to the Commission in order to renew his complaint. The complainant submitted that the procedure by the Austrian authorities had failed to comply with the requirements of Directive 96/92/EC. He took the view that the rejection of his application had been based on a criterion that had not been established and published in accordance with Article 5 of the Directive, that the EIWG did not specify any possibilities of appeal and that the rejection of his application had not been communicated to the Commission. In the complainant's view, there had been a violation of Article 6 of the Treaty on European Union and of Articles 10, 17 (2) and 249 (4) of the EC Treaty as well as an infringement of Directive 96/92/EC.

In the absence of a reply, the complainant sent a reminder to the Commission on 24 April 2003.

In his complaint to the Ombudsman lodged in September 2003, the complainant basically alleged that the Commission had failed to handle his complaint of 22 December 2000 properly and to reply to his letter of 10 December 2002.

## **THE INQUIRY**

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

In its opinion, the Commission made the following comments:

The complainant's letter of 22 December 2000 could not be found in the archives of the Commission. Also, the complainant had not attached a copy of this letter in his later letters to the Commission or in his complaint to the Ombudsman. An acknowledgement of receipt had been issued in January 2001. It could not be established whether a further substantive reply had been made to the complainant's letter, nor whether his letter had actually required a substantive reply. Given that the first negative decision of the Austrian authorities had been transmitted only in January 2001, the Commission had in substance only been able to reply on this issue thereafter.

The Commission had replied to the complaint of 29 July 2002 by letter of 23 September 2002. On 5 November 2002, the Commission had received a reply from the complainant to its letter of 23 September 2002. In this reply, the complainant had reiterated his allegations that the refusal of the authorisation and the rejection of his administrative appeal against this decision constituted an infringement of Community law.

The Commission had replied to this further letter on 21 November 2002. Since the complainant had not submitted any new facts, the complainant had been referred to the conclusions set out in the Commission's previous letter of 23 September 2002.

The complainant had again written to the Commission on 10 December 2002 and on 24 April 2003, repeating his allegations but again without providing any new factual elements. As the



correspondence had been pointless and repetitive, the Commission's services had not replied to these letters.

As regards substance, there had been no violation of Directive 96/92/EC. The Directive expressly provided for the possibility for Member States to make the grant of an authorisation subject to compliance with land-use and siting rules, as contained in national and regional legislation. In practice, all Member States made use of this possibility. It was obvious that electricity plants, including wind turbines, could not be sited just anywhere but needed to be in compliance with existing planning rules.

Nor was there any violation of primary Community law. In this context, it should be noted that all the decisions taken by the Austrian authorities had been duly reasoned and that the complainant had not made use of all his appeal possibilities under Austrian law.

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

In his observations, the complainant maintained his complaint.

## **THE OMBUDSMAN'S DRAFT RECOMMENDATION**

### **The draft recommendation**

On 20 February 2004, the Ombudsman addressed the following draft recommendation to the Commission:

The Commission should consider registering the complainant's letters of 22 December 2000, 29 July 2002 and 10 December 2002 as a complaint and handling this complaint in accordance with its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (2) .

This draft recommendation was based on the following considerations:

#### *1 Alleged failure properly to handle the complaint of 22 December 2000*

1.1 The complainant alleges that the Commission failed properly to handle a complaint which he claims to have lodged on 22 December 2000. In this complaint, the complainant alleged that Austria failed to comply with Community law, in particular with Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (3) .

1.2 As regards procedural aspects, the Commission submits that the complainant's letter of 22 December 2000 cannot be found in the archives of the Commission. It further argues that the complainant did not attach a copy of this letter in his later letters to the Commission or in his complaint to the Ombudsman. The Commission also submits that it cannot be established whether a substantive reply was made to this letter, nor whether this letter actually required a substantive reply.

1.3 The Ombudsman is unable to understand the Commission's position regarding this point. The Commission accepts that it sent an acknowledgement of receipt of the complainant's letter of 22 December 2000 in January 2001 (4) . It is thus clear that the Commission received the



relevant letter, which it appears to have lost subsequently. The Commission's contention that the complainant never sent it another copy of this letter is surprising, given that the Commission acknowledged having received this letter and only appears to have informed the complainant that it lost this letter in its opinion on the present complaint. The contention is furthermore contradicted by the fact that together with its opinion, the Commission submitted a copy of the complainant's letter of 29 July 2002 which contains, in its annex "A", a copy of the complainant's letter of 22 December 2000. Upon examining this letter, the Ombudsman notes that it comprises four detailed pages, is headed "Complaint to the European Commission about a failure to comply with Community law" and that it is based on the Commission's own complaints form for such cases (5). It is therefore difficult to understand why this letter was not registered as a formal complaint by the Commission, either upon its first receipt in December 2000/January 2001 or when the complainant submitted a further copy thereof in his letter of 29 July 2002.

1.4 As regards the substance of this complaint, the Commission maintains that there was no violation of Directive 96/92/EC since the Directive expressly provides for the possibility for Member States to make the grant of an authorisation subject to compliance with land-use and siting rules, as contained in national and regional legislation.

1.5 The Ombudsman takes the view that although the complaint appears to raise a number of issues, it will be sufficient for present purposes to focus on one of these aspects.

1.6 The complainant's letter of 22 December 2000 contains several references to Article 5 (2) of the Directive which provides that "the detailed criteria and procedures shall be made public". In this context, the complainant refers to a "prohibition on surprises" ("Überraschungsverbot") and submits that Article 11 (4) of the Burgenländisches Elektrizitätswesengesetz 1999 ("EIWG", law regarding the electricity sector of the Land) is in clear contradiction ("in krassem Widerspruch") to Article 5 (2) of the Directive. The meaning of these references to Article 5 (2) of the Directive becomes even clearer when one considers the complainant's letter to the Commission of 10 December 2002. In this letter, the complainant explicitly acknowledged that Article 5 (1) (c) of the Directive allowed Member States to use criteria related to "land use and siting". He took the view, however, that Member States had to establish these criteria in accordance with Article 5 (1) of the Directive and publish them in detailed form pursuant to Article 5 (2) of the Directive. The complainant submitted that Article 11 (4) of the EIWG did not comply with these requirements.

1.7 Article 11 (4) of the EIWG provides that a site is inappropriate if the construction or the running of generating capacity is prohibited under regional law ("landesrechtliche Vorschriften"). There is no express reference to criteria related to "land use and siting". If Article 5 (2) of the Directive should indeed require that the implementing provisions adopted by Member States contain an express and precise reference to the criteria to be fulfilled by applicants, the complainant's submission that Article 11 (4) of the EIWG is not compatible with the Directive would certainly carry some weight and would have merited closer examination by the Commission. It should however be noted that the Commission has not dealt with this aspect of the complaint, even after having received the complainant's letter of 10 December 2002.



1.8 The Ombudsman therefore concludes that the Commission's failure properly to examine the complaint submitted to it by the complainant constitutes an instance of maladministration.

#### *2 Failure to reply to letter*

2.1 The complainant alleges that the Commission failed to reply to his letter of 10 December 2002.

2.2 The Commission notes that it replied to the complaint of 29 July 2002 by letter of 23 September 2002 and that it replied to a further letter it received from the complainant on 5 November 2002 by letter of 21 November 2002. It submits that the complainant's letters of 10 December 2002 and 24 April 2003 repeated his allegations but again did not provide any new factual elements. Since in the Commission's view the correspondence was pointless and repetitive, it did not reply to these letters.

2.3 The Ombudsman notes that the complainant's letter of 10 December 2002 contains four pages with detailed information on the relevant provisions of Community law and of Austrian law. The letter also expanded on the complainant's view that there was an infringement of Article 5 (2) of the Directive (see point 1.5 above). Given that the Commission had not yet dealt with this issue, the Ombudsman is unable to accept the Commission's position that the correspondence was "pointless and repetitive" and that no reply was needed. It is good administrative practice for the Commission to reply to letters it receives from citizens. In the Ombudsman's view, there is nothing to indicate that there might have been exceptional circumstances relieving the Commission of this duty.

2.4 In his complaint, the complainant also mentioned the Commission's failure to reply to his letter of 24 April 2003. In the absence of further indications (6), the Ombudsman did not consider that the complainant intended to submit an allegation regarding this matter. In its opinion, the Commission nevertheless also addressed the issue of its failure to reply to the letter of 24 April 2003 and provided a copy of this letter. The Ombudsman therefore considers that his inquiry can and should be extended to this issue as well.

2.5 The Ombudsman notes that in his letter of 24 April 2003, the complainant politely asks whether he had been able to convince the Commission, through his letter of 10 December 2002, of the existence of the infringements he claimed to exist and whether the Commission had taken a position on his complaint at all. The Ombudsman cannot see any justification for not replying to such a letter requesting information.

2.6 The Ombudsman thus concludes that the Commission's failure to reply to the complainant's letters of 10 December 2002 and 24 April 2003 constitutes a further instance of maladministration.

#### **Further correspondence with the complainant**

On 25 February 2004, the Ombudsman received a letter dated 19 February 2004 in which the complainant stated that he did not wish to complain against the Commission but that his grievances concerned Austrian authorities.

On 10 March 2004, the Ombudsman asked the complainant to confirm that his complaint was





not against the Commission. In this letter, the Ombudsman informed the complainant that he would in this case close his inquiry, given that he could only deal with complaints against Community institutions or bodies, but not with complaints directed at national authorities.

On 17 March 2004, the complainant explained that his principal complaint was against national authorities but that his secondary complaint was directed at the Commission.

In his reply of 29 March 2004, the Ombudsman informed the complainant that he was not competent to deal with the complaint against national authorities. As regards the complaint against the Commission, the Ombudsman drew the complainant's attention to the fact that he had submitted a draft recommendation to the Commission and that the latter was due to submit an opinion by 31 May 2004.

On 5 April 2004, the Ombudsman received a further letter from the complainant dated 24 March 2004. In this letter, the complainant expressed the view that the Ombudsman's draft recommendation contained serious factual inaccuracies. In his reply of 7 April 2004, the Ombudsman informed the complainant that he had taken note of these comments and that he had forwarded a copy of the complainant's letter to the Commission.

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

In its opinion on the draft recommendation, the Commission accepted that the fact that the complainant did not receive a reply to his first letter of 22 December 2000 was not compatible with the principle of good administrative practice. The Commission expressed its doubts, however, as to whether refraining from replying to the complainant's further letters of 10 December 2002 and 24 April 2003 constituted an instance of maladministration. In the Commission's view, these letters did not contain any elements which had not already been submitted by the complainant in his earlier letters and which had been addressed by the Commission in its earlier replies.

The Commission further submitted that it had, in its letter of 23 September 2002, addressed the issue of a possible infringement of Article 5 (2) of the Directive.

On the basis of the above, the Commission concluded that it could not share the Ombudsman's conclusion that it had failed properly to examine the substance of the complaint.

The Commission added, however, that for the sake of transparency and good co-operation it accepted the Ombudsman's draft recommendation and would therefore register the complainant's letters of 22 December 2000, 29 July 2002 and 10 December 2002 as a complaint and handle this complaint in accordance with its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law.

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

In his observations, the complainant criticised the fact that the Commission was unable to recognise the infringements of primary and secondary Community law that in his view had been committed by the relevant authorities in Austria.





## THE DECISION

### **1 Failure properly to handle complaint and to reply to letter**

1.1 The complainant alleged that the Commission had failed properly to handle a complaint which he claimed to have lodged on 22 December 2000. In this complaint, the complainant had alleged that Austria had failed to comply with Community law, in particular with Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (7) . The complainant further alleged that the Commission had failed to reply to his letter of 10 December 2002 and of 24 April 2003.

1.2 In its opinion, the Commission basically took the view that the complaint was not founded.

1.3 On 20 February 2004, the Ombudsman addressed a draft recommendation to the Commission according to which the latter should consider registering the complainant's letters of 22 December 2000, 29 July 2002 and 10 December 2002 as a complaint and handling this complaint in accordance with its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (8) .

1.4 In its reply, the Commission informed the Ombudsman that it accepted the Ombudsman's draft recommendation and would therefore register the complainant's letters of 22 December 2000, 29 July 2002 and 10 December 2002 as a complaint and handle this complaint in accordance with its Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law.

### **2 Conclusion**

2.1 On the basis of his inquiries, the Ombudsman concludes that the Commission has accepted the Ombudsman's draft recommendation and that the measures taken by the Commission are satisfactory. In view of the Commission's acceptance of the draft recommendation, the Ombudsman considers it unnecessary to pursue the issue of the Commission's failure to answer to the complainant's letter's of 10 December 2002 and 24 April 2003.

2.2 The Ombudsman therefore closes the case. The President of the Commission will also be informed of this decision.

2.3 The complainant is of course free to renew his complaint if he should be dissatisfied with the final outcome of the Commission's examination of his infringement complaint.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

(1) OJ 1997 L 27, p. 20.



(2) OJ 2002 no C 244, p. 5.

(3) OJ 1997 L 27, p. 20.

(4) A copy of this acknowledgement of receipt was submitted by the Commission with its opinion.

(5) In Annex C, the complainant even added a reference to the textbook where he had found this complaints form.

(6) It should be noted that the complainant did not provide the Ombudsman with a copy of this letter.

(7) OJ 1997 L 27, p. 20.

(8) OJ 2002 no C 244, p. 5.