

## **Decision of the European Ombudsman on complaint 789/2005/(GK)ID against the European Commission**

Decision

**Case 789/2005/(TN)(GK)(ID)(STM)CK - Opened on 11/04/2005 - Decision on 17/07/2008**

Strasbourg, 17 July 2008

Dear Mr K.,

By letter of 25 February 2005, you submitted a complaint to the European Ombudsman against the European Commission. Your complaint concerned the Commission's handling of an infringement complaint you had submitted to it against Greece, concerning the construction of a tramway in Athens. On 11 April 2005, I opened an inquiry into your complaint.

On 30 June 2005, I received the Commission's opinion on the complaint. On 27 September 2005, I received your observations on this opinion. On 7 December 2006, I made a friendly solution proposal as regards one aspect of your complaint. On 7 February 2007, I received the Commission's reply to this proposal. By letter dated 18 June 2007, you made comments on the Commission's reply. You also sent me certain additional letters concerning your case.

I am now writing to let you know of the result of my inquiries into your complaint. I apologise for the delay in the handling of your case.

### **THE COMPLAINT**

By letter of 29 May 2002, the complainant lodged with the European Commission's Representation in Greece an Article 226 complaint against the Greek authorities for infringing Community environmental law. This complaint concerned a planned project for the construction of a tramway in the area of Athens. The project was co-financed by the EU. In his Article 226 complaint, the complainant alleged that the environmental impact assessment ("EIA") report for the project was flawed as to its substance, and attached a note indicating the relevant inadequacies and shortcomings. In this regard, he also pointed out that there had been no study concerning the advisability of the project and that the cost-benefit analysis had been made after the EIA. Finally, he argued that citizens had not been informed and that the project lacked the approval of the concerned public.

As stated in the complainant's letter of 22 February 2005 to the Commission and not contested



by it, (a) by letter of 12 July 2002, the Commission replied that the complainant's Article 226 complaint would be examined under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended (1) ("the Directive"), and that the Commission services would keep him informed of the follow-up to his case; and (b) the Secretariat-General of the Commission informed the complainant, by letter of 26 July 2002, that the Commission would try to reach a decision on his complaint within one year.

By letter of 23 March 2004, addressed to the complainant, the Commission's Directorate-General for Environment ("DG Env") stated that it had completed its examination of his complaint and did not intend to propose to the Commission to initiate infringement procedures. It noted that the Directive does not empower the Commission to review the advisability of a project or the observance of the approved environmental conditions for the project. It further pointed out that the evaluation of the quality of an EIA for a project and the appropriateness of the approved environmental conditions are the responsibility of the Member States. DG Env added that these matters do not fall within the scope of review of the Commission, but rather of the competent national, administrative and judicial authorities.

DG Env also observed that, pursuant to Greek legislation, projects such as the one in question are subject to an EIA. Moreover, it appeared from its correspondence with the Greek authorities that, as regards the construction and operation of the project, procedural requirements provided for by Community law concerning the carrying out of an EIA had been met. More specifically, the file of the EIA study had been submitted to the competent authority and then conveyed to the competent Prefectural Boards and other competent bodies for their opinion. On 11 June 2001, the Prefecture of Athens asked the newspapers "Avgi" and "Imerisia" to publish an announcement, inviting citizens and their representative bodies to inform themselves of the EIA study for the project. The Commission thus concluded that the public concerned was given the opportunity to be informed of the request for the "development consent" for the said project and of any relevant information on the project, as well as to express its opinion before such consent was granted. Then the common ministerial decision that approved the environmental conditions for the project was issued. On 6 November 2001, the Prefecture of Athens asked the newspaper "Imerisia" to publish an announcement informing citizens and their representative bodies of this decision. Hence, the public concerned was duly informed. In light of the above, DG Env concluded that, as regards the procedure of the EIA, the Greek authorities had fulfilled their obligations under the Directive. Hence, the Directive had not been violated. Under these circumstances, DG Env indicated that it would propose to the Commission to close the case. However, in the event that the complainant was aware of other elements likely to prove the existence of an infringement, he was requested to make relevant submissions to DG Env within four weeks from the dispatch of its letter.

By letter of 19 October 2004, DG Env informed the complainant that, following its letter of 23 March 2004, the Commission had decided, on 13 October 2004, to close the case, and that he could address the Commission again regarding the matter, in the event that he found new elements proving an infringement.



By letter of 19 November 2004, the complainant asked DG Env to provide reasons for the Commission's above-mentioned decision. He pointed out that he had no knowledge of its letter of 23 March 2004, referred to in its letter of 19 October 2004. He also asked certain questions, including one relating to the time it had taken the Commission to complete the examination of the case.

DG Env replied by letter dated 10 December 2004. It attached to its letter a copy of its letter of 23 March 2004 to the complainant, which contained the reasoning of the Commission's decision to close the case. DG Env further stated that, as regards the duration of its examination of the case, it sent a relevant letter, dated 15 September 2003, to the Mayor of Palaio Faliro, and also informed the complainant about the matter and its views during the meeting of 2 February 2004 and in its letter of 23 March 2004.

The complainant replied by letter dated 22 February 2005, complaining about the reasoning of the Commission's decision to close the case. He argued that the requirements of the Directive concerning the need to inform and consult with the public concerned (Articles 5, 6 and 9) had not been observed in the project at issue. The announcements concerning the EIA, made in the newspapers "Avgi" and "Imerisia" on 12 June 2001, were faulty, considering that (i) they were published in the pages of those newspapers that feature companies' balance sheets and calls for auctions or tenders; (ii) "Imerisia" is a financial newspaper and both "Avgi" and "Imerisia" have a national but very limited circulation (around 1,750 copies each); (iii) part of the tramway would be constructed in Neo Faliro, which is part of the area of Piraeus, and, hence, the name of the project, as announced, should be "tramway in the areas of Athens and Piraeus" (and not "tramway in the area of Athens"); (iv) for this reason, similar announcements should also have been made by the Prefecture of Piraeus; (v) the public was invited simply to become cognisant of the EIA, not to express its views on it; (vi) no announcement at all was published in any of the eight local newspapers of Palaio Faliro, no exhibition with drawings, tables, models, and so on, was organised in Palaio Faliro, and no public opinion survey was carried out. Nor were its almost 70 000 inhabitants invited to submit written suggestions. Relatedly, the complainant observed that the Joint Ministerial Decision 75308/5512/1990, which transposed the Directive, did not envisage the provision of the information to the public by means other than publication in the local press. The complainant also considered inadequate the second announcement, published only in "Imerisia" on 7 November 2001 and concerning the common ministerial decision that approved the environmental conditions for the project.

The complainant further noted that, even in the event that one of the citizens concerned had visited the Prefecture to be informed of the project, he/she would have been able to conclude very little from a technical EIA study of hundreds of pages which was not accompanied by a non-technical summary of its contents.

Moreover, the Council of the Prefecture did not, as required by the relevant Greek legislation, submit to the competent Directorate of the Ministry for the Environment, Planning and Public Works the public's views on the project, accompanied by its own opinion. Consequently, the lack of response from the Councils of the Prefectures of Athens and of Piraeus was, in the joint ministerial decision which approved the EIA, arbitrarily considered to constitute positive opinion



from the public regarding the construction of the tramway.

In addition, the tram route specified in the approved EIA study was subsequently modified in a number of points. The assessment should thus have been re-approved, after the public concerned had been duly informed. The complainant stated that this was not done, because the Greek authorities were in a hurry to complete the construction of the project at all costs before the Olympic Games were to take place.

The complainant expressed his astonishment that DG Env considered that the Greek authorities had complied with their obligations under the Directive. He also contested the propriety of the Commission's argument, contained in its letter of 23 March 2004, that the Prefectural Board's opinion was not binding, noting that Article 8 of the Directive requires that "*information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure*".

Finally, the complainant made a number of observations on the issue of the timeliness of the Commission's decision on his Article 226 complaint and on certain matters pertaining to his correspondence with the Commission.

Subsequently, the complainant filed a complaint on the matter with the European Ombudsman.

By letter dated 5 April 2005, the Commission answered the complainant's letter of 22 February 2005. The Commission, first, referred to the issue of the duration of its examination of the case and replied to one of the complainant's observations regarding the references to webpages containing environmental Community legislation it had given him. As regards the substance of the case, the Commission noted that the Directive imposes the obligation to inform, and consult with, the public, but leaves to the discretion of the Member States the specific modalities that this information and consultation should take. The Directive encourages the public's participation in the decision-making procedure for environmental issues, but the opinion expressed by the public is not binding on the administration. Thus, the rejection of a project by the concerned public cannot constitute an infringement of Community law. However, the participation of the public in the procedure of the EIA enables the citizens to contest the substantive or procedural legality of the pertinent decisions by means of judicial or other proceedings. After all, citizens of Palaio Faliro, who were obviously informed of the imminent construction of the tram project, referred the matter to the competent national court, namely, the Council of State, which rejected their application as lacking merit and ruled, *inter alia*, that the publicity requirements of the Greek legislation had been complied with.

By letter dated 27 May 2005, the complainant made a number of comments on the content of the Commission's letter of 5 April 2005, challenging its propriety. The Commission replied by letter dated 11 July 2005 and the complainant responded by letter of 27 July 2005.

By letter dated 25 February 2005, the complainant filed the present complaint. He stated that the Commission had wrongly and belatedly rejected his Article 226 complaint and attached to his complaint the relevant correspondence with the Commission. The Ombudsman opened an



inquiry into the following allegations made by the complainant:

- The Commission had failed to deal properly with his Article 226 complaint of 29 May 2002 concerning a possible infringement by the Greek authorities of Directive 85/337/EEC in relation to a tramway project in Athens.
- The Commission was guilty of avoidable delay in dealing with his Article 226 complaint.

As regards the first allegation, the complainant argued, in particular, that the Commission failed to take into proper consideration the Directive's requirements concerning: (a) the opportunity for the public concerned to express an opinion before the project is initiated; and (b) the EIA, which the complainant considers to be inadequate. The complainant also argued that the Commission failed to give proper justification for its decision to close the case.

## THE INQUIRY

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

In its opinion, the Commission made the following comments as regards the complainant's first allegation.

The object of the complainant's Article 226 complaint, namely, the authorisation of the project for the construction of a tramway in Athens, had already been the object of court proceedings before the Greek Council of State in plenary session. The Commission stated that the national judge, who is also responsible for the application of Community law, rejected as unfounded the application for annulment of the decision approving the project.

As regards the various arguments made by the complainant, the Commission recalled the remarks it had made in its correspondence with him. The Commission noted that the Directive establishes a series of procedures which have to be respected in the context of the EIA of certain projects likely to have a notable impact on the environment. However, the Directive does not grant the Commission competence to intervene as regards the advisability of a project or to review the quality of an EIA study and the appropriateness of the conditions imposed for the project.

In the case concerned, the project was subjected to an EIA, within the meaning of the Directive, and the procedures provided for in the Directive were respected. At the end of the EIA procedure, Joint Ministerial Decision 105061/29.8.2001, approving the environmental conditions for the project, was adopted. The public was informed and had the possibility to express its opinion before the final approval of the project. In addition, following the approval of the project, the competent authorities informed the public and made all the necessary information available to it.

The Commission therefore concluded that it duly took into account the requirements of the Directive and provided adequate reasoning for its decision to close the case.

The Commission also made comments on the complainant's second allegation, which it rejected.



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

In his observations on the part of the Commission's opinion concerning the substance of the case and of its decision to close it, the complainant made, in summary, the following comments. As regards the Commission's argument pertaining to the judgment of the Greek Council of State, the complainant noted that the Commission first put this argument forward in its letter of 5 April 2005, namely, six months after its rejection of his Article 226 complaint, which shows that his complaint was not rejected on the basis of this argument. Relatedly, he referred to his letter of 27 May 2005, in which he dealt with this argument. He recalled that the Greek Council of State did not authorise the construction of the tram project and that it only rejected an application for the annulment of the ministerial decision approving the EIA study, on the basis of which development consent was granted for the project. The complainant further noted that, contrary to what the Commission held, the Council of State accepted that the public concerned was not informed of the EIA study.

The complainant acknowledged that the Commission does not have the power to decide on the advisability of a public works project, or to review the quality of an EIA study. However, he did not ask it to do so. By contrast, the Commission is obliged to verify whether the procedural requirements laid down in the Directive were observed.

As regards the Commission's argument that the public was informed and had the possibility to express its opinion before the final approval of the project, the complainant observed that the Commission repeated this statement without providing any supporting evidence, implying that the public did not object to the project. The complainant argued that the Commission ignored the evidence to the contrary provided in his letters of 22 February, 27 May 2005, and 27 July 2005.

The complainant also made comments on the part of the Commission's opinion regarding his second allegation.

### **The Ombudsman's efforts to achieve a friendly solution**

After careful consideration of the opinion and observations, the Ombudsman was not satisfied that the Commission had responded adequately to the complainant's first allegation. On the basis of a reasoned analysis of the relevant issues (see point 1.2 et seq. of the present decision), he, thus, proposed to the Commission a friendly solution, in accordance with Article 3(5) of the Ombudsman's Statute. More specifically, the Ombudsman suggested that the Commission could (a) consider examining the complainant's arguments regarding the adequacy and propriety of the EIA of the project at issue; (b) reconsider, in light of the announcements made in the newspapers "Avgi" and "Imerisia", its position that there was no violation of (the provisions of Articles 6(2-3) and 9 of) the Directive.

In its reply to the Ombudsman's friendly solution proposal, the Commission presented its views on the above-mentioned issues. In his observations on the Commission's reply, the complainant expressed his disagreement with the Commission's positions and maintained his complaint.

## **THE DECISION**



## **1 Allegation that the Commission failed to deal properly with the substance of the complainant's Article 226 complaint**

1.1 As regards his first allegation, the complainant argued, in particular, that the Commission failed to take into proper consideration the requirements of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended (2) ("the Directive") concerning: (a) the opportunity for the public concerned to express an opinion before the project is initiated; and (b) the EIA, which the complainant considers to have been inadequate. The complainant also argued that the Commission failed to give proper justification for its decision to close the case. The Commission, which considered that the Directive was applicable in the case (3), rejected both these arguments and the complainant's allegation.

1.2 In the relevant part of his analysis contained in his friendly solution proposal in this case, the Ombudsman, first, recalled that the Directive provides in relevant part:

*" Article 3*

*The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:*

*- human beings, fauna and flora; - soil, water, air, climate and the landscape; - material assets and the cultural heritage; - the interaction between the factors mentioned in the first, second and third indents.*

*Article 5*

*1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:*

*(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;*

*(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.*

*2. (...)*

*3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:*

*- a description of the project comprising information on the site, design and size of the project, - a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, - the data required to identify and assess the main effects which the project is likely to have on the environment, - an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the*





*environmental effects, - a non-technical summary of the information mentioned in the previous indents.*

*4. (...)*

#### *Article 6*

*1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To this end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.*

*2. Member States shall ensure that any request for development consent and any information gathered pursuant to Article 5 are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.*

*3. The detailed arrangements for such information and consultation shall be determined by the Member States, which may in particular, depending on the particular characteristics of the projects or sites concerned:*

*- determine the public concerned, - specify the places where the information can be consulted, - specify the way in which the public may be informed, for example by bill-posting within a certain radius, publication in local newspapers, organization of exhibitions with plans, drawings, tables, graphs, models, - determine the manner in which the public is to be consulted, for example, by written submissions, by public enquiry, - fix appropriate time limits for the various stages of the procedure in order to ensure that a decision is taken within a reasonable period.*

#### *Article 8*

*The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.*

#### *Article 9*

*1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:*

*- the content of the decision and any conditions attached thereto, - the main reasons and considerations on which the decision is based, - a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects. (...)"*

The Ombudsman went on to note the following. The Commission had pointed out that the Directive does not give it competence to review the quality of an EIA study. This is true. Nevertheless, the question is not whether this Directive gives the Commission the above-mentioned competence, but whether the Commission, in properly fulfilling its responsibilities under Article 226 of the EC Treaty, has the power to examine whether a





Member State has complied with the obligations the Directive imposes on it as regards the adequacy and appropriateness of the EIA for the project at issue. The Commission itself has clearly considered that it possesses such a power, since it brought, before the Court of Justice, infringement proceedings against a Member State precisely in a case in which it considered that the EIA of a specific project did not meet these requirements (4) . In this case, the Court examined the Commission's arguments, in light of Articles 2, 3, 5 and 8 of the Directive, and concluded that the Commission's application was unfounded, because the Commission " *should have specified on what specific points the requirements of the directive were not complied with during the procedure for consent for the project at issue and should have provided appropriate evidence of non-compliance.* " (5)

Furthermore, the Ombudsman remarked that the aims of the Directive are better served when arguments regarding the adequacy and propriety of an EIA, which are made in view of the provisions of Articles 3 and 5 of the Directive, are submitted to, and considered by, the competent national authorities in the context of the development consent procedure, pursuant to Articles 6 and 8 of the Directive. The Ombudsman notes that, in its capacity as guardian of the Treaty, the Commission must ensure compliance with Article 8 of the Directive. In light of the above obligation, the Commission should deal diligently with an allegation made in an Article 226 complaint that a Member State granted development consent in violation of Article 8, namely, that the Member State failed to take into consideration the results of certain consultations and specific information gathered pursuant to Articles 5-7, and in particular, information and opinions submitted by the public regarding the adequacy and propriety of the EIA provided by the developer.

However, where allegations about non-compliance with the provisions of Articles 3 and 5 of the Directive are submitted *directly* to the Commission, through an Article 226 infringement complaint, the Commission's review of the adequacy and propriety of an EIA may normally be limited, in light of the scientific and technical nature of its content, to verifying whether the Member State has committed a manifest error of assessment in considering that the EIA met the requirements of Articles 3 and 5 of the Directive. For example, such an error is likely to be found when the EIA does not include, as the complainant has argued with regard to the EIA of the project in question, a non-technical summary of the information mentioned in the first four indents of Article 5(3) of the Directive, although such a summary is required by the fifth indent of Article 5(3).

The Ombudsman, further, recalled that the Directive covers "modifications to development projects" such as tramways, since its purpose would be undermined if "modifications to development projects" are so construed as to enable certain works to escape the requirement of an EIA when, by reason of their nature, size or location, they are likely to have significant effects on the environment (6) . In the present case, the complainant argued that the tram route specified in the approved EIA study was subsequently modified in a number of points and, therefore, a new EIA should have been made. Nevertheless, the Commission failed to address this issue.

In light of the above, the Ombudsman, in the analysis contained in his friendly solution proposal,



concluded that the Commission had failed to demonstrate that it had properly examined the complainant's arguments regarding the adequacy and propriety of the EIA of the project at issue and that this could be an instance of maladministration. Accordingly, the Ombudsman suggested that the Commission could consider examining the complainant's arguments regarding the adequacy and propriety of the EIA of the project at issue.

1.3 In the relevant part of its reply to the Ombudsman's friendly solution proposal, the Commission noted, in particular, the following. On the basis of his own technical and scientific evaluations of the project, the complainant made a number of arguments against the EIA of the project at issue. The EIA did contain a non-technical summary of the project. This was not a case where the competent national authority had committed a manifest error of assessment in relation to the fulfilment of the obligations resulting from Articles 3 and 5 of the Directive, but a case where the Commission would have to undertake an evaluation of the scientific and technical quality of the EIA study (7) .

In his observations on the Commission's reply, the complainant made various points expressing his disagreement with the Commission's argumentation. However, he did not put forward any specific, duly substantiated arguments challenging, in a cogent way, the Commission's position that this was not a case in which the competent national authority had committed a manifest error of assessment in relation to the fulfilment of the obligations provided for in Articles 3 and 5 of the Directive.

1.4 In its reply to the Ombudsman's friendly solution proposal, the Commission made, in particular, the following remarks regarding the complainant's argument that the tram route specified in the approved EIA study had subsequently been modified in a number of points and, therefore, a new EIA should have been carried out. According to Annex II, point 13, of the Directive, modifications in a project already approved would necessitate a relevant EIA in the event that they could have significant adverse effects on the environment. In this regard, the competent national authorities have a certain margin of discretion. In order to establish that the national authorities committed a manifest error of assessment in such a context, the Commission must present specific evidence for establishing significant adverse environmental effects due to the modifications. The complainant's general arguments about the modification of the tram route were not sufficient, in this regard.

In his observations on the Commission's reply, the complainant was not satisfied with the Commission's approach and made a number of points in support of his above-mentioned argument.

The Ombudsman notes that the complainant does not appear to have first submitted his above argument to the competent national authorities, who could have examined the matter and provided relevant explanations. Rather it seems that he submitted it directly to the Commission. And the argument was formulated in general terms. However, the assessment of whether changes in a project already authorised, like the ones here concerned, " *may have significant adverse effects on the environment* ", in the sense of Annex II, point 13, of the Directive, depends largely on the precise content of these changes and normally involves evaluations



based on pertinent environmental data.

In that last respect, the European Court of Justice has held the following. First, the Court has explained what is necessary in order to demonstrate that the national authorities exceeded the limits of their discretion by failing to require that an EIA be carried out before giving consent for a specific project. In this respect, the Commission cannot limit itself to general assertions, without presenting specific evidence to demonstrate that the national authorities concerned made a manifest error of assessment when they gave consent for a project. Second, the Commission must furnish at least some evidence of the effects that the project is likely to have on the environment (8) . This implies that the Commission could reasonably decide to take no further action in relation to the complainant's above-mentioned general argument, which was not accompanied by sufficient, pertinent data about the nature of the changes in question and, in particular, their likely effects on the environment (9) . Under these circumstances, the above approach taken by the Commission in its reply to the Ombudsman's friendly solution proposal is reasonable.

1.5 Moreover, in the analysis contained in his friendly solution proposal, the Ombudsman observed that, under the Directive, Member States must ensure that any request for development and any information gathered pursuant to Article 5 are made available to the public, in order to give the public concerned the opportunity to express its views before the development consent is granted (Article 6(2) of the Directive). In addition, these views must be taken into consideration in the development consent procedure (Article 8 of the Directive). Although the detailed arrangements for such information of, and consultation with, the public are determined by the Member States (Article 6(3) of the Directive), the discretion the Member States enjoy in this context must be exercised in a way that is consonant with the purpose of the provisions of Articles 6(2) and 8 of the Directive and the need to ensure their "useful effect" ( *effet utile* ). This implies that a Member State exceeds the limits of its relevant discretion when its arrangements regarding the way in which the public concerned may be informed are not reasonably suitable to attaining the objective of (a) making the *public concerned* aware of the project and its environmental implications, on the basis of specific information, and (b) giving it the possibility to prepare adequately and express its opinion, before the development consent is given.

Similarly, Article 9 of the Directive leaves to the Member States the task of specifying the "appropriate procedures" for informing the public of a decision to grant a development consent. But procedures which are not reasonably suitable for their intended purpose of informing the public concerned of such a decision cannot be deemed "appropriate", within the meaning of Article 9.

In the present case, the Commission considered, in essence, that, in light of the announcements made in the newspapers "Avgi" and "Imerisia", inviting citizens and their representative bodies to inform themselves of the EIA study for the project, there was no violation of the provisions of Article 6(2-3) of the Directive. The complainant argued, in essence, that these announcements were not reasonably suitable to attaining the objective mentioned above, noting, in particular, that (i) "Imerisia" is a financial newspaper and both "Avgi" and



"Imerisia", have a national but very limited circulation (around 1,750 copies each); (ii) no announcement at all was published in any of the eight local newspapers of Palaio Faliro; (iii) although part of the tramway would be constructed in Neo Faliro, which is part of the area (Prefecture) of Piraeus, the name of the project, as announced, was simply "tramway in the area of Athens" and the announcements were made only by the Prefecture of Athens. Nevertheless, the Commission failed to address specifically these arguments. As such, these arguments did not appear to be without merit. The Commission equally failed to address specifically the complainant's argument that Article 9 of the Directive was not observed, to the extent that the announcement concerning the common ministerial decision that approved the environmental conditions for the project was published only in "Imerisia".

Under these circumstances (10), the Ombudsman considered that the Commission's failure to specifically address the complainant's arguments that the above-mentioned announcements made in the newspapers "Avgi" and "Imerisia" did not meet the requirements of Articles 6 (2-3) and 9 of the Directive could be an instance of maladministration. Accordingly, the Ombudsman suggested that, in light of the above-mentioned announcements made in the newspapers "Avgi" and "Imerisia", the Commission could reconsider its position that there was no violation of (the provisions of Articles 6(2-3) and 9 of) the Directive.

1.6 In the relevant part of its reply to the Ombudsman's friendly solution proposal, the Commission noted, in particular, the following. The public's "right" to benefit from the information and consultation procedure, as provided for in Article 6(2-3) of the Directive, is limited, since the Member States are empowered to establish the specific content of this procedure. The same is true, by way of analogy, with regard to Article 9 of the Directive. The wide margin of discretion the Member States enjoy in this context is, nevertheless, limited by the need to ensure the useful effect of the Directive.

In the case at hand, the public was informed and had the possibility to express its opinion before the approval of the project. The Prefecture of Athens placed the EIA study at the disposal of the public, in its building. It also informed the municipalities of Athens, Nea Smyrni, Palaio Faliro and Glyfada and made a relevant announcement in the newspapers "Avgi" and "Imerisia". The decision approving the project was published in "Imerisia". Hence, the Commission did not have sufficient elements to initiate an infringement procedure. Moreover, the above newspapers have a good reputation and a national circulation. They are often used for this kind of announcement. And it is not evident that local newspapers would have better furthered the objectives of the Directive, since they are not always daily and have a limited circulation and significance. Besides, since the project did not concern only one municipality, but a number of them and, in essence, the whole area of Athens, the choice of a newspaper of national circulation appeared to be justified.

Moreover, this was a project concerning infrastructure and was, in addition, of major importance, since it was related to the organisation of the Olympic Games. The relevant studies had already started in 1995 and, in 2000, the project was discussed in the Greek Parliament, which enacted a law concerning the establishment of an entity responsible for the study, construction and management of the tram. It is, thus, difficult to accept that the Greek



authorities wanted to hinder public information about the project. By contrast, an active and interested public had the possibility to be informed and be heard.

Finally, it follows clearly from paragraph 12 of judgment 2173/2002 of the Greek Council of State, concerning the joint ministerial decision approving the construction of the project, that the procedure for the publicity of this decision had been respected.

In light of the above, the Commission concluded that a violation of Articles 6(2-3) and 9 of the Directive had not been established.

1.7 In his observations on the Commission's reply, the complainant challenged, in a reasoned way, its above conclusions. He noted, in particular, that, while the Member States enjoy wide discretion in relation to how the public is informed and consulted, they have to apply at least one of the methods referred to in Article 6(3) of the Directive, which was not done in the case at hand.

1.8 As regards this last point made by the complainant, the Ombudsman notes the following. Under Article 6(2-3) of the Directive, Member States enjoy a considerable margin of discretion as regards the determination of the detailed arrangements for public information and consultation. In particular, Member States simply "may" specify the way in which the public is informed, "for example" by one of the ways mentioned in the third indent of Article 6(3). Hence, contrary to what the complainant has argued, Member States are not bound to follow at least one of these ways.

On the other hand, it must also be noted that the complainant had specifically drawn the Commission's attention to the fact that the Greek Joint Ministerial Decision 75308/5512/1990 ("the JMD"), which had been issued in the context of the Directive's implementation, provided for the publication in the local press of the announcement regarding the EIA study (11). Indeed, Article 1 of the JMD states explicitly that the JMD is designed to harmonise Greek law, *inter alia*, with the provisions of Articles 6 and 9 of the Directive. Moreover, Article 2(2) of the JMD provides that the Council of the Prefecture that has received an EIA study (from the competent Department of the Ministry of Environment, Planning and Public Works) is responsible for the "publication in the local press" ("*δημοσίευση στον τοπικό τύπο*") of an announcement regarding the EIA study. It is also responsible for publishing in the press an invitation to citizens and to entities representing them to be informed of this study and present their views on its content within a period of time not exceeding 15 days from the publication. Hence, Greece exercised the above-mentioned discretion it enjoyed under Article 6(2-3) of the Directive by requiring, *inter alia*, that a relevant publication be made in the local press. Relatedly, it is also worth noting that the Greek Council of State considers that this requirement constitutes an essential element of the procedure of the approval of the relevant project and that non-compliance with it vitiates the decision approving (the environmental conditions for) the project (12). In the case at hand, it seems that the publication concerning the EIA study was made only in newspapers of national circulation. Hence, one could reasonably conclude that the above-mentioned requirement of the national legislation was not complied with.



1.9 However, such a conclusion does not necessarily imply that the Commission committed maladministration by deciding not to initiate an infringement procedure about the matter. In this regard, it must, first, be recalled that the Commission enjoys a discretionary power in deciding whether to institute infringement proceedings, under Article 226 of the EC Treaty (13) . The Ombudsman considers that, when the Commission makes this decision in a case, such as the one here at issue, which concerns compliance with the provisions of Article 6(2-3) of the Directive, it would not exceed its above discretion, if, instead of focussing on whether a specific relevant requirement of the applicable national legislation had been respected or not, it were to examine whether the Member State concerned acted in such a way as to offer sufficient guarantees of compliance with the provisions of Article 6(2-3) of the Directive and with the need to ensure their useful effect. This is what the Commission appears to have done in the case at hand.

1.10 Here, the Commission reached, in essence, the conclusion that it had not been established that the Member State had failed to comply with its obligation, under Article 6(2) of the Directive, to ensure that the public concerned would be given the opportunity to express an opinion before the development consent decision was taken. The Commission based this conclusion on the following points, presented in point 1.6 above: (a) the Prefecture of Athens placed the EIA study at the disposal of the public, in its building; (b) the Prefecture of Athens also informed the municipalities of Athens, Nea Smyrni, Palaio Faliro and Glyfada; (c) the Prefecture of Athens made a relevant announcement in the newspapers "Avgi" and "Imerisia", which have a good reputation and a national circulation and are often used for this kind of announcement; (d) it is not evident that local newspapers would have better furthered the objectives of the Directive, since they are not always daily and have a limited circulation and significance; and (e) the EIA concerned a project of infrastructure of major importance, related to the organisation of the Olympic Games; the relevant studies had already started in 1995 and, in 2000, the project was discussed in the Greek Parliament.

1.11 The Ombudsman considers that the above points (a) - (e) are clearly insufficient to show that, as regards the project in question, Greece met its positive obligation provided for in Article 6(2) of the Directive. The useful effect of this provision implies that the way the public concerned is informed should be reasonably suitable to attain the double objective of making the *public concerned* aware of the existence and availability of the EIA study and of giving it a fair opportunity to prepare adequately and express its opinion, before the development consent is given. In relation to point (a) of the Commission's argumentation, it suffices to note that the mere fact that the Prefecture of Athens placed the EIA study at the disposal of the public was not enough, if it were not accompanied by appropriate measures designed to alert the public concerned of the existence and availability of the EIA study and the possibility to express an opinion on it. With regard to point (b), it is evident that the provision of relevant information to the municipalities concerned by the project might be relevant for the purposes of discharging the obligation imposed by Article 6(1) of the Directive. However, it is not, by itself, pertinent with regard to Article 6(2) of the Directive, since it does not refer to the provision of information to the *public* concerned. Similarly, point (c) is not convincing. The fact, invoked by the Commission without any specific supporting information, that these two newspapers were often used for announcements concerning EIA studies does not constitute common knowledge and has been





contested by the complainant, who has correctly indicated that "Imerisia" focuses mostly on financial matters. More importantly, it is not in dispute that the newspapers "Avgi" and "Imerisia" have a national and quite limited circulation. This kind of circulation is not likely to offer sufficient guarantees that the above-mentioned double objective would be attained. Further, the publication of the announcement in these newspapers only took place once. As regards point (d), the Commission did not rebut the complainant's argument that there was a significant number of local newspapers which could have been used to inform the public concerned by the project. Besides, even assuming that the local press was such as to be unlikely to further the objectives of Article 6(2), such a point would not justify the use of other means of publicity that would not be reasonably suitable to attain these objectives. Finally, as regards point (e), the mere fact that the project in question was a major one and might have received publicity through parliamentary discussions or the media cannot create a presumption that the same objectives were met.

1.12 In light of the above, the Ombudsman concludes that the Commission failed to deal properly with the complainant's argument concerning a violation of Article 6(2) of the Directive and that this failure, which amounts to maladministration, was not remedied in the course of the present inquiry, despite his efforts in this regard. However, taking into account the nature of this instance of maladministration, the fact that the construction of the major project in question was completed a long time ago and the Commission's discretionary power indicated in point 1.9 above, the Ombudsman does not consider it justified further to pursue the matter. Accordingly, he will close this aspect of the case with a relevant critical remark.

1.13 As regards the complainant's argument concerning violation of Article 9 of the Directive, the Commission, in its reply to the relevant part of the Ombudsman's friendly solution proposal, noted that it follows clearly from paragraph 12 of judgment 2173/2002 of the Greek Council of State, regarding the decision approving the construction of the project, that the procedural rules for the publicity of this decision had been respected. The Ombudsman notes that the Council of State did, indeed, affirm that the procedure provided for in Article 3 of the JMD regarding, *inter alia*, the publication in the press of the decision approving the environmental conditions for the project had been complied with. Article 3 of the JMD provides, *inter alia*, that a relevant announcement should be published in the local press. The Greek Council of State reached the above conclusion, while stating, at the same time, that it had been provided with a copy of the relevant newspaper " *where the name of the newspaper [was] not visible*. " In fact, it seems that this newspaper was "Imerisia", which has a national and quite limited circulation (see also point 1.11 above). The Commission, thus, appears to have relied on the above conclusion reached by the Council of State, without, however, taking properly into account the relevant remark made by the Court. In any event, the Council of State did not address the issue whether the requirement of Article 9 of the Directive had been complied with.

1.14 In light of the above and of his relevant analysis in point 1.5 of the present decision, the Ombudsman concludes that the Commission failed to deal properly with the complainant's argument concerning a violation of Article 9 of the Directive and that this failure, which amounts to maladministration, was not remedied in the course of the present inquiry, despite his efforts to the contrary. However, taking into account (i) the nature of this instance of maladministration; (ii)





that the construction of the major project in question was completed a long time ago; and (iii) the Commission's discretionary power indicated in point 1.9 above, the Ombudsman does not consider it justified to further pursue the matter. Accordingly, he will close this aspect of the case with a relevant critical remark.

## **2 Allegation about avoidable delay in the Commission's dealing with the complainant's infringement complaint**

2.1 The Annex to the Commission's "Communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law" (14) provides, inter alia, that "[a]s a general rule, Commission departments will investigate complaints with a view to arriving at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint by the Secretariat-General." (point 8).

2.2 In the case at hand, the complainant's infringement complaint appears to have been registered by the Commission's Secretariat-General at the end of June or the beginning of July 2002. The Commission appears to have sent its assessment to the complainant by letter dated 23 March 2004 (15). In its opinion on the complaint, the Commission admitted that it did not contact the Greek authorities immediately after the registration of the infringement complaint in question. In fact, the Commission appears to have requested from the Greek authorities information about this complaint only in March 2003, namely, around nine months after its registration. The Commission has explained this delay by referring to the workload of DG Environment, and by noting that this DG deals with almost 50% of the infringement complaints handled by the Commission. However, this is not a satisfactory explanation. Apart from the fact that it is formulated in general terms, it must be noted that the Commission should have taken appropriate steps regarding the organisation and functioning of DG Environment, in order to ensure that this DG would be able to deal properly, and in a timely fashion, with the considerable number of its infringement cases. In light of the above, the Ombudsman, thus, considers that there has been unjustified delay in the Commission's handling of the complainant's case (16). This was an instance of maladministration and the Ombudsman will make a relevant critical remark below (17).

## **3 Conclusion**

On the basis of his inquiries into this case, the Ombudsman makes the following critical remarks:

*For the reasons explained in points 1.5 and 1.11-1.14 above, the Commission failed to deal properly with the complainant's arguments concerning a violation of Articles 6(2) and 9 of Directive 85/337. This failure amounts to maladministration.*

*For the reasons explained in point 2.2 above, the Commission took an unjustified time in order to deal with the complainant's infringement complaint. This was an instance of maladministration.*

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

Yours sincerely,



P. Nikiforos DIAMANDOUROS

(1) OJ 1985 L 175, p. 40, as amended by Council Directive 97/11/EC of 3 March 1997, OJ 1997 L 73, p. 5.

(2) See footnote 1.

(3) The Ombudsman's inquiry does not concern the question of whether and to what extent the Directive was applicable to the project at issue. However, the Ombudsman notes, in this regard, that the Greek Council of State, in its judgment 2173/2002, said, *inter alia* (para. 15), that the part of the project concerning the route Neo Faliro-Palaio Faliro-Glifada had been provided for in Law 1515/1985 ("Regulatory Plan of Athens"), which determined that this part of the tramway would be construed along the coastline of the bay of Faliro. This judgment, which rejected an action for annulment of the joint ministerial decision approving the environmental conditions for the project in question, did not deal with the above issue of the applicability of the Directive.

(4) See Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paras. 1 and 42. As noted in para. 42 of the judgment, the Commission considered that the "*assessment of the effects on the environment of the project at issue (...) did not comply with the obligation to take into account of the interaction between the factors referred to in the first and second indents of Article 3 of the directive (human beings, fauna flora, soil, water, air, climate and the landscape), an obligation which requires an overall assessment of those factors.*"

(5) See Case C-431/92 *Commission v Germany*, cited above, paras. 39, 43-45.

(6) Cf. Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, para. 39; Case C-435/97 *WWF* [1999] ECR I-5613, para. 40.

(7) The Commission also referred, *inter alia*, to its previous argument that, in its judgment 2173/2002, the Greek Council of State had rejected an action for annulment of the ministerial decision approving the environmental conditions of the project. In this regard, the Ombudsman notes that the Greek Council of State did not hold in this judgment that the requirements of Directive 85/337 (or the implementing national legislation) had, in general, been complied with. The Council of State, rather, dealt with and rejected as ill-founded the specific pleas in law presented by the applicants, which do not appear to cover in toto the concerns expressed by the complainant in relation to the project at issue.

(8) See Case C-508/03 *Commission v United Kingdom* [2006] ECR I-5517, para. 91, citing Case C-117/02 *Commission v Portugal* [2004] ECR I-5517, paras. 85, 87.

(9) Cf. Ombudsman's decision on complaint 3660/2004/PB, points 2.6 and 2.7.



(10) Relatedly, the Ombudsman reiterated that the Greek Council of State, in its judgment 2173/2002, did not address the issue of whether the requirements of (Articles 6 and 9 of) the Directive were complied with in this case. The Court simply considered (para. 12) that the mere fact that the publicity requirements of the national legislation for the challenged decision (approval of the environmental conditions for the project) had been met did not imply that the petitioners had become fully cognisant of this decision, for the purposes of examining whether the action for annulment had been filed in a timely manner.

(11) The JMD (more specifically its Article 3, concerning the publicity of the decision approving the environmental conditions of a project) was also referred to as applicable in judgment 2173/2002 of the Greek Council of State (para. 12).

(12) See judgment 970/2007, para. 12.

(13) See, in particular, Case 247/87 *Star Fruit v Commission* [1989] ECR 291, paragraph 11.

(14) COM(2002) 141 final, OJ 2002 C 244, p. 5.

(15) The complainant has stated that he did not receive this letter at that time. Apparently, he only received it in December 2004, after the Commission had informed him of the closure of the case. In the context of the present inquiry, the complainant expressed doubts as to whether the Commission had, indeed, sent him its letter of 23 March 2004, at the time of its issuance. He suggested that an internal administrative inquiry should be made and that the Ombudsman could investigate the matter. The Ombudsman recalls that the Commission's factual statement that it sent this letter to the complainant carries with it a (refutable) presumption of truthfulness (cf. Case T-311/00 *British American Tobacco v Commission* [2002] ECR II-2781, paragraph 35) and that the Commission enjoys, in general, wide discretion as regards the making of internal administrative inquiries. He also notes that there is nothing in the file of the case to suggest that the Commission might have deliberately failed to send to the complainant its letter of 23 March 2004. The Ombudsman, thus, considers that it would not be justified to extend the scope of his present inquiry into the above issue raised by the complainant.

(16) The Ombudsman does not consider it necessary to assess whether there was unjustified delay also in one of the subsequent stages of the Commission's handling of the case.

(17) In the course of the inquiry, the complainant asked the Ombudsman to consider whether the members of the Commission's staff who had committed maladministration in his case might be guilty of criminal or disciplinary offences. In this regard, the Ombudsman recalls that, under Article 195 of the EC Treaty, his role is to examine potential instances of maladministration in the activities of the Community institutions or bodies. He, thus, does not conduct criminal or disciplinary investigations with respect to the personnel of the Community institutions or bodies, the activities of which may be examined by him for maladministration. Under Article 4(2) of his Statute, the Ombudsman notifies the competent national authorities of facts which may relate to criminal law. In the case at hand, no such facts have come to the Ombudsman's attention. Moreover, pursuant to Article 4(2) of his Statute, the Ombudsman may inform the Community



Institution or body concerned of the facts calling into question the conduct of a member of their staff from a disciplinary point of view. In his present decision, which is communicated both to the complainant and to the Commission, the Ombudsman has presented the elements on the basis of which he has concluded that there has been maladministration by the Commission. It is, thus, up to the Commission, not to the Ombudsman, to evaluate whether the case also involves disciplinary offences.