

Decision of the European Ombudsman closing his inquiry into complaint 1437/2006/(WP)BEH against the European Commission

Decision

Case 1437/2006/(WP)BEH - Opened on 26/06/2006 - Decision on 04/12/2008

THE BACKGROUND TO THE COMPLAINT

1. The complainants are members of a citizens' action group for the protection of an environmentally sensitive site in Elze (near Hildesheim) in the German Bundesland of Lower Saxony ('the Land'). In April 2004, they submitted a complaint to the Commission under Article 226 of the EC Treaty, alleging that the authorities of the Land had infringed European environmental law by granting a permit for the establishment of a quarry in Elze (the 'pit'). The complainants felt that the German authorities' decision allowed for the burrows of field hamsters (an endangered species) on the pit's site to be destroyed. The permit was issued on 5 January 2004 and it appears that excavation works began in August 2004.

2. Following an investigation, involving meetings with both the German authorities as well as the complainants, the Commission concluded that there had been an infringement of Community law. No assessment, in accordance with Articles 12 and 16 of the Habitats Directive ('the Directive') (1) had been carried out before the permit was granted. In particular, the permit did not contain any assessment of alternatives or justification for overriding public interest within the meaning of Article 16 of the Directive. According to the Commission, the German authorities admitted that no such assessment had been carried out, but maintained that sufficient compensatory measures were in place to avoid harming the hamsters. In addition, a survey carried out between March and August 2004, that is, before the excavation works started, had shown that there were no longer any hamsters on the site. Since the Commission did not see any reason to doubt the accuracy of the survey and the information provided by the German authorities, it considered that there was no evidence that any hamsters were on the site when the excavation works began. It followed that there was no evidence of a breach of Articles 12 and 16 of the Directive at the decisive point in time. Consequently, and in view of the further monitoring and compensatory measures provided for in the permit, the Commission decided to exercise its discretionary power not to pursue the breach of Articles 12 and 16 of the Directive with regard to the permit. It therefore closed the case on 5 July 2005.



THE SUBJECT-MATTER OF THE INQUIRY

3. The complainants alleged that the Commission had failed properly to deal with their infringement complaint. They argued, in particular, that the Commission:

- disregarded relevant facts;
- abused its discretion when deciding to close the case;
- failed to reply to certain letters; and
- wrongly discontinued its correspondence with them.

The complainants claimed that the Commission should re-open the case and objectively assess the alleged infringements of EU law.

4. In their observations on the Commission's supplementary opinion (see paragraph 5 below), the complainants claimed that the Commission's decision to exclude the 'Finie' site (2) from the proposed list of habitats, on the basis of economic instead of environmental reasons, would have to be investigated. In his letter of 6 December 2007, proposing a friendly solution to the Commission (3), the Ombudsman noted that this was a further claim, which had not been raised by the complainants in their initial complaint to him. Article 2(4) of the Statute of the European Ombudsman requires complainants to make appropriate prior administrative approaches to the institution concerned. Given that the complainants had not submitted the said claim to the Commission, this aspect of the case will not be examined in this decision. It appears useful to add that the complainants, after having made relevant administrative approaches to the Commission, submitted a new complaint to the Ombudsman with regard to this issue on 8 August 2008 (complaint 2211/2008/BEH).

THE INQUIRY

5. The complaint was forwarded to the Commission for an opinion, which it sent on 15 September 2006. The opinion was forwarded to the complainants, with an invitation to make observations. In their observations, the complainants informed the Ombudsman that they had submitted new information to the Commission. In light of this new information, they felt that the Commission should have re-opened their case. Consequently, the Ombudsman felt that further inquiries were necessary. Accordingly, he asked the Commission for a supplementary opinion. On 30 April 2007, the Commission sent its supplementary opinion, which was forwarded to the complainants with an invitation to make observations. The complainants sent their observations on 18 June 2007.

6. The Ombudsman was not satisfied that the Commission had responded adequately to the complainants' claim. Accordingly, on 6 December 2007, he submitted a proposal for a friendly solution to the Commission, proposing that, in light of the new information presented by the complainants, it could consider re-investigating the factual situation with regard to the existence of a hamster population on the site of the pit.



7. In reply, the Commission stated that re-opening the infringement complaint would be pointless. However, it suggested an alternative form of friendly solution, namely, to verify, on an exceptional basis, whether the German authorities had complied with the additional voluntary prevention and monitoring measures they had adopted.

8. On 12 May 2008, the complainants sent their observations on the Commission's reply and expressed their dissatisfaction with the Commission's alternative proposal. On 28 August 2008, the Commission informed the complainants of its findings relating to whether the German authorities had complied with the aforementioned additional voluntary measures. The complainants subsequently informed the Ombudsman of the Commission's aforementioned letter and reiterated their rejection of the Commission's alternative offer.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks

9. In their correspondence with the Commission prior to lodging the present complaint, the complainants appeared to suggest that the Commission had suppressed evidence. The Commission firmly rejected this accusation. The Ombudsman found that the complaint submitted to him did not include an allegation concerning this issue. In their observations on the Commission's opinion, the complainants pointed out that they wished to refrain from judging whether evidence had been suppressed. Given that the complainants still appear to believe that the Commission may have suppressed evidence, the Ombudsman will address this issue when examining the allegation that the Commission disregarded relevant facts.

10. In their letter of 12 May 2008, the complainants pointed out that it was doubtful whether the Commission had discretion to decide that only inhabited hamster burrows were protected by the Directive. In accordance with the Directive, hamster burrows were also to be protected during times in which they were not inhabited. The Ombudsman is unsure as to the precise meaning of the complainants' statement. They appear to imply that, according to the Commission, only inhabited burrows were protected by the Directive. In its opinion, the Commission stated that there were no hamsters on the site when the excavation works commenced. However, in its letter of 20 May 2005, informing the complainants of its intention to close the case, the Commission stated that no hamster burrows could be found on the site in 2004. This understanding appears to have been confirmed in further letters to the complainants, for example, the Commission's letter of 1 July 2005. Consequently, there appears to be no indication that, in the Commission's understanding, only inhabited burrows were protected by the Directive. Therefore the Ombudsman sees no need for further steps on his part with regard to this aspect of the complaint.

11. After receiving the Commission's proposal for an alternative friendly solution, the complainants argued that the requirement to conduct an environmental impact assessment pursuant to the Directive also required searching areas adjacent to the project site. Article 2(4) of the Statute of the European Ombudsman requires complainants to make appropriate prior



administrative approaches to the institution concerned. It appears that the complainants have not raised this aspect with the Commission before. It will therefore not be examined in the present inquiry.

12. The same considerations apply to the complainant's argument that an alleged relocation of hamsters in successive stages was not in conformity with the Directive. This argument was submitted in their observations on the Commission's proposal for an alternative friendly solution.

13. Given that they are based on the same facts, the Ombudsman deems it appropriate to examine the allegations against the Commission together.

A. Alleged disregard to relevant facts and alleged abuse of discretion *Arguments presented to the Ombudsman*

14. According to the complainants, the official in charge of their case at the Commission's Directorate-General Environment (DG Environment) denied, during a meeting with them, that the permit for the pit granted by the Land included permission to destroy hamster burrows. This was in spite of the fact that the permit made express reference to ten hamster burrows which could be destroyed. They argued that the Commission had thus disregarded relevant facts. In addition, the complainants alleged that the Commission had abused its discretion when deciding to close the case.

15. In its opinion, the Commission pointed out that, when deciding to close the case, it had taken into account the permit's negative consequences on the hamster population. It also explained that Articles 12 and 16 of the Directive had been breached when the permit was granted. In spite of the presence of hamsters on the site, no assessment pursuant to Articles 12 and 16 of the Directive had been carried out. However, on the basis of a report on a hamster survey carried out in 2004 ('the 2004 Report'), there was no evidence that hamsters were on the site when the excavation works began. As a consequence, there was no evidence of a breach of Articles 12 and 16 of the Directive at that point in time. In view of these considerations, the Commission argued that it had not abused its discretion.

16. In their observations, the complainants stated that the Commission's assumption regarding the absence of hamster burrows and a hamster population at the start of the excavation works was incorrect. In support of their view, they stressed that the report forming the basis of the Commission's decision was not prepared by a hamster expert. Furthermore, the B.U.N.D. (a German association working for the protection of the environment) had only partly participated in its preparation. The complainants also drew attention to the opinion of a hamster expert, commissioned by them to analyse the 2004 Report, which concluded that the said Report had not been drafted by a hamster expert. Moreover, they expressed the view that the existence of a hamster population was evidenced by the permit, and that hamster burrows had been destroyed before excavation works on the site began. In their comments on the Commission's alternative proposal, the complainants also pointed out further alleged insufficiencies in the 2004 Report, which would have been recognisable by the German authorities. According to them, the Commission had not given enough consideration to these alleged insufficiencies.



17. In their observations on the Commission's alternative proposal for a friendly solution, the complainants further explained that 14 days had elapsed between the concluding date of the hamster survey in 2004, namely, 10 August 2004, and the starting date of the excavation works, namely, 24 August 2004. According to the complainants, the hamsters were still active on the site during this period of time. They also reiterated that the permit was granted without considering the existing hamster burrows, which were identified in 2002 and still existed in 2004. In the complainants' view, the Commission's assessment that there were no hamsters on the site was neither supported by the hamster survey carried out in 2002 (according to which there were eight burrows), nor by the 2004 Report (according to which there was one burrow on the site of the pit, which had only partly been searched for burrows).

The Ombudsman's assessment

18. In the present case, the Ombudsman is called upon to assess whether, when closing the complainants' case on 5 July 2005, the Commission disregarded relevant facts and/or abused its discretion. The Ombudsman took the view that the complainants' allegations appeared to relate to two distinct but intertwined elements, namely, (i) the interpretation of the permit itself and (ii) the question of whether hamster burrows existed on the site at the time the excavation works started.

19. Given that the Commission could not have knowledge of facts and circumstances which only came to light at a later stage, the relevant point in time for the Ombudsman's assessment must be 5 July 2005, that is, the date of the Commission's decision.

20. In its letter of 20 May 2005 to the complainants, the Commission explained that the Land had breached Articles 12 and 16 of the Directive by not examining the possible consequences for the hamster population in the area in question of the decision to issue the permit. The Commission added that it had not found sufficient evidence that there was a breach of Articles 12 and 16 of the Directive at the time the works began. At that time, there appeared to be no hamsters and no hamster burrows on the site. In their complaint to the Ombudsman, the complainants alleged that the Commission failed to take due account of the permit's contents, which had been granted by the German authorities.

21. The relevant permit has not been submitted to the Ombudsman. However, according to an excerpt of the document in question that was supplied by the complainants, the relevant passage, describing the compensatory measures, reads as follows: "*By creating optimal habitat conditions for the field hamster, it is assumed that the settling will be successful and that the concentration of hamster burrows can be increased. Thus, the loss of a maximum of 10 hamster burrows can be compensated, albeit with a delay of around 5 years, until the outer mound [of the quarry] will be designed to meet the needs of the hamster. "*

22. There is disagreement between the complainants and the Commission as regards the implications of the quoted passage. The complainants believed that the permit allows for the destruction of hamster burrows. The Commission has consistently pointed out that it merely



related to compensatory measures and could not be taken as permission to destroy hamster burrows.

23. The Ombudsman considers that arriving at definitive conclusions concerning this issue would require an examination of the permit in its entirety. This is not possible, since only an excerpt of this document has been provided to him. However, on the basis of the information available to him, it seems clear that, when granting the permit, the German authorities considered and accepted the possibility of a potential loss of up to 10 hamster burrows. This would also explain why the permit appears to provide for certain compensatory measures, which logically presuppose a prior loss. The interpretation of the relevant provision by the Commission is, therefore, not convincing at first sight. However, the Commission pointed out that various compensatory measures had been foreseen in the permit in light of significant negative effects on the hamster population found by a hamster survey in 2002. It therefore appears to have taken into account these negative effects on the hamster population. As a result, it is doubtful whether the Commission really disregarded the fact that hamster burrows might be destroyed as a consequence of issuing the permit.

24. Even if the Commission failed to grasp the real significance of the permit as regards this issue, any such mistake would not have been detrimental to the complainants. They had argued that, by granting the relevant permit, the German authorities had infringed Community law. However, and as mentioned above, the Commission concluded that such an infringement had occurred, since it unequivocally stated that the German authorities had, by granting this permit, infringed Community law. It appears useful to add that, in these circumstances, there is nothing to suggest that the Commission suppressed relevant evidence.

25. Turning to the alleged abuse of discretion, it follows from established case-law that the Commission is not obliged to commence infringement proceedings in every single case where a Member State has violated Community law. The Ombudsman cannot and must not substitute his own appraisal for that of the Commission, which alone is entitled to exercise its discretion. However, the Ombudsman is able to ascertain whether the factual basis of the Commission's decision was correct and whether it manifestly went beyond the limits of its discretionary powers in this field.

26. The Commission's decision to close the case was a valid exercise of its discretion, as long as the facts on which its decision was based were not unsound or incorrect. By relying on the 2004 Report, the Commission based its decision of 5 July 2005 on relevant and accurate facts. The said Report stated that there were no hamsters on the site ("*Auf der geplanten Abbaustätte wurde 2004 kein Bau nachgewiesen*"). The Commission apparently took the view that the loss of hamster burrows could no longer be remedied by starting infringement proceedings. By taking this stance, the Commission did not deny that Germany had violated Articles 12 and 16 of the Directive, but lawfully relied on its discretion not to pursue the case. Therefore it did not exceed the limits of its discretion when deciding to close the case.

27. It is true that the complainants have questioned the reliability and accuracy of the 2004 Report, by referring to the opinion of a hamster expert critical of the report, the alleged lack of



involvement of the B.U.N.D., as well as the discovery of two dead hamsters on or close to the project site, as documented by photographs. However, the information and arguments on which the complainants rely in this context were only brought to the Commission's attention after 5 July 2005. They could obviously not be taken into account in the decision adopted by the Commission on that day. In their comments on the Commission's proposal for an alternative friendly solution, the complainants pointed out further alleged insufficiencies in the 2004 Report, which would have been recognisable for the German authorities. However, even if these insufficiencies existed, the Ombudsman is not convinced that they would have been intelligible to the Commission on the day it decided to close the case.

28. In their observations on the Commission's alternative proposal for a friendly solution, the complainants explained that 14 days had elapsed between the concluding date of the hamster survey in 2004, and the starting date of the excavation works. According to the complainants, the hamsters were still active on the site during this period of time. However, the Ombudsman is not convinced that this piece of information could call into question the Commission's reliance on the 2004 Report, which was concluded shortly before the start of the actual interference and could thus be legitimately taken to give an accurate impression of the situation on the site at that time.

29. There is nothing to suggest that the Commission should have doubted the reliability and accuracy of the 2004 Report at the time it rejected the complainants' infringement complaint. In these circumstances, the Commission's decision not to open infringement proceedings appears to be reasonable.

30. The situation may well have been different if there had been hamsters on the site at the time when the permit was granted, if these hamsters had been eliminated before the survey was carried out, and if the German authorities had known this. In such a case, a decision not to open infringement proceedings would be tantamount to rewarding a Member State for having created a *fait accompli*. The complainants believe that this is indeed what happened in the present case. However, there appears to be no concrete evidence to support this view.

31. In light of the above, the Ombudsman finds no maladministration by the Commission as regards this aspect of the complaint.

B. Claim to re-open the case *Arguments presented to the Ombudsman*

32. According to the complainants, the Commission should, in light of new evidence submitted by them to the Commission, re-open their case.

33. First, the complainants pointed to their discovery of a dead hamster near the project site in August 2005.

34. Second, they referred to the opinion of a hamster expert, commissioned by them to analyse the 2004 Report, which they had submitted to the Commission in January 2006. According to this opinion, the survey had by no means complied with scientific standards and was an entirely



inappropriate basis for administrative decisions of any kind. The disappearance of the hamsters by natural causes was highly unlikely. Since the 2004 Report appeared to have been the principal basis for the Commission's decision to close their complaint, the complainants asked the Commission to re-open the procedure in view of this new information.

35. Third, the complainants stated that B.U.N.D. representatives had not been present during the survey leading to the 2004 Report. They had only searched parts of the site a few days later. Therefore, the B.U.N.D. had not been in a position to draw up a report on the matter.

36. Fourth, the complainants pointed out that they had informed the Commission in September 2006 that they had recently found a dead young hamster directly next to the gate of the pit. Given that there appeared to be a hamster population on the site, which constituted a new fact, they asked the Commission to take immediate action.

37. The Commission submitted that the hamster expert's opinion, quoted by the complainants, seemed to have mixed up the results of the hamster surveys of 2002 and 2004. Moreover, he had not undertaken his own study, but instead only commented on the 2004 Report. As concerns the B.U.N.D.'s involvement in the 2004 Report, the Commission noted that it had participated in almost all stages of the hamster survey in 2004. Even if it had not been involved at all, however, this could have no bearing on the validity of the survey's results. The Commission finally pointed out that photographs of dead hamsters could not be considered as constituting valid evidence of a hamster population. In the Commission's view, the existence of such a population could only be established by a study.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

38. The Ombudsman observed that the complainants had brought a number of new factual elements to the Commission's attention. These aimed to question the accuracy of the 2004 Report, and establish the actual existence of a hamster population on the site.

39. As regards the B.U.N.D.'s involvement in the study leading to the 2004 Report, the Ombudsman found no reason to object to the Commission's view, namely, that the validity of the results of a scientific study cannot be dependent on the participation of a non-governmental organisation in its drafting.

40. As regards the opinion of the hamster expert, the Ombudsman noted the fact that it is highly critical of the 2004 Report, which served as the basis for the Commission's decision to close the case. He observed that the hamster expert criticised, *inter alia*, the terminology used in the 2004 Report and, what he perceived to be shortcomings regarding the precise indication of the area surveyed. He further noted that, following his analysis of the data contained in the 2004 Report, the hamster expert concluded that there had indeed been a hamster population on the site when the hamster survey took place.

41. The Ombudsman took the view that it is good administrative practice for the Commission to examine carefully any new factual elements that are brought to its attention in such cases. This



also applied to the opinion of the said hamster expert. The Commission considered that the expert's opinion contained inaccuracies and did not call into question the findings of the 2004 Report. Given that he does not have the expertise to decide on the respective merits of scientific studies or opinions, the Ombudsman limited his examination in this context to the question whether the Commission's position was reasonable. He noted that the hamster expert appeared to have raised some serious issues regarding potential shortcomings of the 2004 Report. At first sight, it was not certain whether the Commission's assessment of the relevant comments made by the hamster expert was completely plausible. However, the Ombudsman felt that he did not need to take a definitive stance on this issue, given that there were other factual elements which should have made the Commission reconsider its position.

42. In their observations on the Commission's opinion, the complainants pointed out that they had found a dead adult hamster in the immediate proximity of the site in August 2005 (4) . Whilst the Commission explained that it was not informed of this fact at the time, the Ombudsman considered that it had by now been brought to its attention by the complainants.

43. In September 2006, the complainants informed the Commission of the discovery of a second dead hamster, this time a young hamster, which had been found directly next to the gate of the pit (5) . They forwarded relevant photographs to the Commission.

44. The Ombudsman accepted that the discovery of two hamsters on or in proximity to the site could not in itself be regarded as conclusive evidence that a hamster population existed on the site. Nevertheless, he considered that it clearly lent credibility to the complainants' argument that there was indeed a hamster population there. In addition, from the information provided to him, a survey carried out in 2002 had found that such a population existed at that time.

45. The existence of a hamster population on the site could probably only be established by a new survey. However, by requiring the complainants to submit a scientific study before agreeing to reconsider the matter, the Commission set the threshold for proving the actual existence of a hamster population at a level that is almost impossible for the complainants to pass. In the Ombudsman's view, it was unlikely that a local citizens' action group would have been able to finance a scientific study by itself. In addition, even if financing a study were feasible in principle, it seemed far from certain that access to the site would be granted by the operator of the pit.

46. Good administrative practice requires the Commission to review its assessment of an infringement complaint where a complainant puts forward relevant new evidence. In the Ombudsman's view, this was the case here. The Commission agreed that an infringement of Community law had occurred and that the decisive reason for not pursuing the matter appeared to have been the consideration that there were no more hamsters on the site requiring protection. However, the evidence submitted by the complainants clearly suggested the possibility that this consideration was incorrect.

47. In these circumstances, the Ombudsman considered that it would have been appropriate for the Commission to try and ascertain the complainants' view that, notwithstanding the results of the 2004 Report, there was a hamster population on the site. At the very least, the Commission



could have contacted the German authorities and asked for clarifications and comments as regards the new evidence that had been put forward by the complainants. However, it appeared that the Commission did not do this.

48. On the basis of the above, the Ombudsman arrived at the provisional conclusion that the Commission's decision not to re-open the case, notwithstanding the new evidence submitted by the complainants, could constitute an instance of maladministration. Accordingly, on 6 December 2007, the Ombudsman made the following proposal for a friendly solution to the Commission:

" In light of the new factual elements presented by the complainants, the Commission could consider re-investigating the factual situation with regard to the existence of a hamster population on the site of the chalk pit. "

The arguments presented to the Ombudsman after his friendly solution proposal

49. The Commission stated that the further evidence submitted by the complainants did not justify the conclusion that a hamster population might still exist on the site of the pit. In particular, it maintained its criticism of the hamster expert's opinion. It further pointed out that the discovery of two dead hamsters in the vicinity of the site could neither prove that a hamster population existed, nor justify re-opening the investigation. According to the Commission, there was no evidence to justify re-opening the investigation " *at the relevant time* ".

50. In addition, it would be practically impossible at this stage to ascertain whether hamster burrows existed on those areas of the pit's site where excavation activities are ongoing. An investigation of those parts would therefore make no sense. As regards those areas of the site where excavation would only commence at a later point in time, the Commission noted that the permit contained a legally binding obligation for the operator of the pit. This foresees that, prior to the start of further activities, an investigation into the existence of hamsters is carried out by a hamster expert, with the participation of the B.U.N.D. The additional voluntary measures adopted by the German authorities had therefore already taken into account the risk that hamster burrows might exist on the pit site. The permit provided an appropriate safeguard for an adequate hamster survey, as well as for the adequate protection of hamsters that may have still existed on those parts of the pit's site where no excavation has taken place.

51. The Commission concluded that re-opening of the infringement complaint would not be useful. However, as a sign of its willingness to cooperate with the Ombudsman, and as an alternative from of friendly solution, the Commission proposed to verify whether the German authorities had complied with the additional voluntary prevention and monitoring measures they had adopted in the permit.

52. In their observations, the complainants welcomed the Commission's willingness to cooperate with the Ombudsman. They, however, stressed that asking the German authorities for further information concerning the voluntary measures could not be considered as a valid alternative to protecting the hamsters' habitat, whose destruction had been authorised in 2004.



The complainants also observed that neither the Directive nor relevant national law provided a basis for voluntary prevention measures. The Commission's alternative proposal would therefore only allow the violations of Article 12 and 16 of the Directive to continue.

53. The complainants recalled certain of their positions taken in previous correspondence. They felt that the following arguments in particular had not been sufficiently considered by the Commission: Conducting hamster surveys in the future could not remedy the lack of a stringent system of hamster protection; the allegedly binding obligation to take protective measures could not satisfy the requirements of Article 12 of the Directive; and the expert opinion of the hamster expert was not contradictory and received particular weight from the standing of its author.

54. In conclusion, the complainants stated that those burrows, which had not yet been destroyed, should still be considered as under the protection of the Directive. They therefore repeated their claim that the Commission should re-open their complaint.

55. In its letter of 28 August 2008, the Commission informed the complainants that it had, in line with the announcement made in its letter of 11 March 2008, contacted the German Government regarding the implementation of the additional measures provided for in the permit. Following the Commission's request, the German Government replied as follows:

" On the basis of an opinion of the Land of Lower Saxony, the Federal Government transmits the following pertinent information: In the excavation area of the project no hamsters have been found so far. The excavation site borders an adjacent large hamster population, which is mainly situated in the northern loess area. The incidental provision in Article 4.2 was included in the permit as a precautionary basis for catching and relocating field hamsters in case they were to be found.

The hamster monitorings foreseen by the incidental provision were and will be performed, according to sectors, before the start of excavation in a given sector. So far, no evidence of the existence of hamsters has been found. Therefore, no hamsters have been caught or relocated so far.

The allegation that the project had a negative impact on the population of field hamsters could not be established. " (6)

The Commission concluded by stating that it had no information, which would give reason to doubt the statement provided by the German Government.

56. In their letter of 9 September 2008, the complainants commented on the Commission's letter of 28 August 2008. They reiterated their rejection of the Commission's proposal for an alternative friendly solution and emphasised that the German authorities had merely confirmed that no hamsters had been found in the excavation area. This was not surprising, given that the loess soil had already been removed there. The reference to a large hamster population bordering the excavation area confirmed the accuracy of the hamster expert's report. According to the complainants, the additional measures foreseen in the permit rendered Articles 12 and 16



of the Directive ineffective. They also explained that the hamster expert's report made it likely that the projected site contained circa 11 hectares of intact habitats for hamsters. As far as the 5 hectares were concerned which, according to the complainants, had already been destroyed, the complainants felt that the excavation activities should be cancelled and the habitats should be restored.

The Ombudsman's assessment after his friendly solution proposal

57. The Commission did not accept the Ombudsman's friendly solution proposal, but made an alternative proposal.

58. In their additional observations, the complainants praised the Commission's willingness to cooperate with the Ombudsman, but rejected the Commission's alternative proposal.

59. The Ombudsman's attempts to achieve a friendly solution were not successful. Nevertheless, the Commission proposed to verify compliance with the voluntary prevention and survey measures stipulated in the permit. The results of the Commission's analysis have been communicated to the complainants and to the Ombudsman.

60. Before assessing the Commission's position, it appears useful to recall that the question here under examination is whether, in light of new factual circumstances, the Commission should re-open the complainants' infringement case. The Commission has not disputed that a breach of Article 12 and 16 of the Directive has actually occurred (see paragraph 2 above). In his friendly solution proposal, the Ombudsman identified the consideration that there were no more hamsters on the site as the likely reason for the Commission not pursuing the infringement complaint brought by the complainants. As a consequence, the issue to be dealt with by the Ombudsman is whether, in light of new factual elements brought to the Commission's attention, the latter should have reconsidered the complainants' case. The Ombudsman therefore needs to examine whether the Commission's position not to re-open the complainants' infringement case is reasonable.

61. In his friendly solution proposal, the Ombudsman observed that the complainants presented certain new factual elements to the Commission. On the basis of these new facts, he proposed that the Commission could consider re-investigating the factual situation regarding the existence of a hamster population. He pointed out that, at the very least, the Commission could contact the German authorities and ask for clarification concerning the new evidence submitted by the complainants.

62. The Commission appears to have contacted the German Government in the meanwhile. It is true that the Commission's correspondence apparently related to the issue of compliance with certain additional monitoring and protection measures foreseen in the permit. At the same time, the information received from the German Government, as quoted in the Commission's letter to the complainants of 28 August 2008, clearly sheds light on the issue of the existence of hamsters on the site.



63. On the basis of this additional information, it seems clear that the pit consists of parts where excavation works are currently ongoing, and other parts where works are foreseen at a later stage.

64. Turning to those parts of the site where excavation activities are ongoing, according to the information received from the German Government, no evidence of the existence of hamsters has been found so far. In their letter of 9 September 2008, the complainants did not dispute the information obtained from the German authorities. According to them, it was not surprising that, on the site where excavation works were currently ongoing, no hamsters have been found, since the loess soil where they live has already been removed. In view of these circumstances, the complainants and the Commission appear to agree that there is no hamster population on the site where excavation activities are ongoing. At this point in time, it would indeed be difficult, if not impossible, to ascertain whether hamsters and their burrows existed on this part of the site before the start of excavation work.

65. As regards those parts of the site where excavation works are foreseen at a later stage, according to the information received from the German Government, the excavation site borders an adjacent large hamster population, which is mainly situated in the northern loess area. In the complainants' view, this supports the hamster expert's opinion, since it suggests that hamsters actually exist in the remaining parts of the project site.

66. The location of the large hamster population referred to by the German Government is not precisely defined in the information transmitted by it. As the relevant information refers to the project site (" *Abbaufläche* ") as merely bordering an adjacent hamster population, the Ombudsman considers that the existence of a hamster population on the project site has not been established. This appears to be in line with the 2004 Report, which located two hamster burrows 250 metres north of the project site. It receives further support from point 4.6 of the permit, according to which the northern part of the deposit is not included in the project site, so as to protect the prevailing hamster population in this area. Consequently, the Ombudsman is not convinced that the information received from the German Government can support the hamster expert's statements.

67. At the same time, the German authorities do not rule out that hamsters may be found on the site. As the German Government explained, it was for this reason that Article 4.2 was included in the permit as a precautionary basis for catching and relocating hamsters if they were found. According to the German Government, hamster surveys were performed in certain sectors before excavation works began. This will also happen for those sectors which still have to be excavated. This appears to be consonant with the information submitted by the complainants who, relying on information received from the competent German authorities, stated that a hamster survey was foreseen before the start of the second phase of the excavation. In its letter of 20 May 2005, the Commission summarised the consultations it had had with the German Government in December 2004. During these consultations, the German Government explained that it envisaged carrying out regular hamster surveys.

68. In its comments on the friendly solution proposal, the Commission pointed to the legally



binding obligations for the operator foreseen in the permit. An investigation into the existence of hamsters had to be carried out by a hamster expert, with the participation of the B.U.N.D., prior to the start of further excavation activities, and at a point in time when the vegetation period was suitable for carrying out hamster surveys. Furthermore the Commission explained that the permit provided for an adequate hamster survey, as well as for the adequate protection of any existing hamsters on those parts of the site where excavation activities had not yet started. According to the Commission, the voluntary measures adopted by the German authorities had taken into account that hamster burrows might exist on the site of the pit, in which case the permit provided for appropriate safeguards for an adequate hamster monitoring and protection. Therefore re-opening the infringement complaint would not be useful.

69. In his friendly solution proposal, the Ombudsman arrived at the provisional conclusion that the Commission's decision not to re-open the case, despite the new evidence submitted by the complainants, could constitute an instance of maladministration. In light of the further information obtained, the Ombudsman considers, however, that the Commission's position is reasonable and based on relevant and accurate facts. As a consequence, the Ombudsman finds no maladministration in the Commission's activities regarding the complainants' claim.

C. Alleged failure to reply *Arguments presented to the Ombudsman*

70. The complainants pointed out that, on 14 January 2005 and subsequent to their meeting with DG Environment, they sent an e-mail to its services. In this e-mail, they drew attention to the paragraph in the permit concerning compensatory measures following the destruction of hamster burrows. They also asked whether hamster burrows were in fact not protected by "EU-Guidelines", as long as the national authorities permitted their prior destruction. They alleged that they did not receive a reply to this e-mail.

71. In its opinion, the Commission did not directly address this allegation. However, it pointed out that it had corresponded with the complainants throughout the complaint procedure and also well after the closure of the complaint. The Ombudsman therefore asked the Commission for a supplementary opinion on this allegation. In its reply, the Commission pointed out that the relevant passage of the permit concerned the maximum compensation capacity of the foreseen compensatory measures, but not the number of hamsters "allowed" to be destroyed. Referring to the position that had been adopted by DG Environment at its meeting with the complainants, the Commission explained that this had been a legal explanation, which had nothing to do with the fact that the permit had been thoroughly assessed by the Commission services.

72. In their observations on the supplementary opinion, the complainants explained that they had now finally received an answer to the question asked in their e-mail of 14 January 2005. At the same time, they disagreed with the position taken by the Commission.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

73. In his friendly solution proposal, the Ombudsman noted that, according to point 4 of the Commission's Code of Good Administrative Behaviour ('the Commission's Code of Conduct'), a



reply to a letter addressed to the Commission shall be sent within fifteen working days from the receipt of the letter by the responsible Commission department. He observed that the Commission had provided an answer to the complainants' e-mail of 14 January 2005. However, it was clear that the Commission had not respected the deadline set out in the Commission's Code of Conduct. As he had already made a proposal for a friendly solution, the Ombudsman took the view that there was no need to examine this issue further if the Commission agreed to his proposal.

74. In view of the fact that the Commission did not do this, it is necessary to consider the complainants' allegation further.

The arguments presented to the Ombudsman after his friendly solution proposal

75. The Commission apologised for not replying to the complainant's e-mail of 14 January 2005 within 15 working days from receipt of this e-mail. However, it also pointed out that it had eventually replied to the said e-mail and corresponded extensively with the complainants both throughout the entire complaint procedure and well after the closure of the complaint.

76. In their observations on the Commission's comments, the complainants took note of the Commission's apology. They pointed out, however, that the Commission only replied to them after the Ombudsman's intervention. They went on to state that they continued to disagree with the substance of the Commission's answer and stressed that, on 7 December 2005, namely, the date when the Commission decided to discontinue its correspondence with the complainants, they had not yet received a reply.

The Ombudsman's assessment

77. The complainants' allegation requires the Ombudsman to assess whether the Commission replied to their e-mail of 14 January 2005 in good time. The substance of the Commission's reply does not form part of this allegation.

78. In its comments on the friendly solution proposal, the Commission admitted that it had failed to reply to the complainants' e-mail within 15 working days of receiving it.

79. However, it apologised for its failure in this regard. The Ombudsman therefore considers that there is no need for further action regarding this aspect of the complaint.

D. The Commission's decision to discontinue its correspondence with the complainants

Arguments presented to the Ombudsman

80. The complainants argued that the Commission had referred to their correspondence as improper since it was repetitive, abusive and/or pointless. They pointed out that they had contacted Commissioner Dimas via a German Member of the European Parliament. The MEP had attached to her own letter a letter, which one of the complainants' wives had addressed to Commissioner Dimas.



81. The complainants explained that they did not know which part of the attached letter could be regarded as abusive. In addition, they argued that relying on the help of an MEP to forward a letter to the Commission could hardly serve as a reason to discontinue correspondence with them. If the relevant letter had to be regarded as abusive, it would surely not have been forwarded by the MEP.

82. Against this factual background, the complainants alleged that the Commission was wrong to discontinue its correspondence with them, without giving valid reasons.

83. In its opinion, the Commission pointed out that the complainants had never accepted the results of its assessment and had repeatedly complained about the closure of their case, but did not provide any new evidence. The Commission confirmed its view that the letters addressed to it by the complainants during the six months preceding its decision to discontinue correspondence had been repetitive and, in part, abusive. The reasons for discontinuing the correspondence had been explained to the complainants. Nevertheless, despite its decision to discontinue correspondence, the Commission had examined the subsequent correspondence sent by the complainants.

The Ombudsman's preliminary assessment leading to a friendly solution proposal

84. In his friendly solution proposal, the Ombudsman pointed out that point 4 of the Commission's Code of Conduct provides as follows: "*These rules [that is, the rules on correspondence with the Commission] do not apply to correspondence which can reasonably be regarded as improper, for example, because it is repetitive, abusive and/or pointless. Then the Commission reserves the right to discontinue any such exchanges of correspondence. "*

85. By letter of 7 December 2005, the Commission informed the complainants that it refused to accept allegations regarding the suppression of evidence, as well as personal offences against Commission officials. These had been expressed in the letter of the wife of one of the complainants, and in a fax sent by one of the complainants to a Mr B. Referring to point 4 of its Code of Conduct, the Commission took the view that there was a case of improper correspondence, for which reason it had decided to discontinue its correspondence with the complainants.

86. The rule concerning the discontinuance of correspondence, contained in point 4 of the Commission's Code of Conduct, is an exception to the Commission's general duty to correspond with complainants. As an exception, it should be narrowly construed. The Ombudsman considered that good administrative practice requires the Commission to apply the exception with the utmost care and to give reasons when it decides to discontinue a correspondence.

87. In its letter informing the complainants of its decision to discontinue correspondence, the Commission gave reasons for its decision. On the one hand, it pointed to four of the complainants' letters, dated 6 June, 16 June, 3 August and 6 October 2005 respectively, which,



in its view, contained no new arguments to justify a different assessment of the case. On the other hand, it referred to unjustified allegations and personal offences, contained in the letter of one of the complainants' wives and in the fax to a Mr B.

88. The Ombudsman was not in a position to ascertain the repetitive character of the complainants' correspondence, given that the letters referred to by the Commission were not submitted to him. As a general remark, however, he stressed that he understands the relevant provision in the Commission's Code of Conduct as signifying that the right to discontinue writing to a complainant presupposes that the latter's correspondence can " *reasonably* " be considered as " *improper* ". In the Ombudsman's view, it is not sufficient that a letter is repetitive in the sense that it simply repeats arguments that have already been put forward beforehand. It thus could not be excluded that the contents of the four letters referred to by the Commission were not such as to entitle the latter to discontinue its correspondence with the complainants.

89. As regards the issue of unjustified allegations and personal offences, the Ombudsman considered it doubtful whether the remarks made by the complainants about suppressing evidence and a " *loop-system* " in the Commission, which were contained in the letter of one of the complainants' wives and in the fax to a Mr B., could be regarded as personal offences.

90. In view of the above, the Commission may have been wrong in deciding to discontinue its correspondence with the complainants. As he had made a proposal for a friendly solution, the Ombudsman took the view that there would be no need to examine this issue further if the Commission agreed to the Ombudsman's friendly solution proposal.

91. Given the fact that the Commission has not accepted the Ombudsman's friendly solution proposal, it is necessary to consider the complainants' allegation further.

The arguments presented to the Ombudsman after his friendly solution proposal

92. In its comments on the friendly solution proposal, the Commission submitted that, in its view, correspondence qualified as repetitive and pointless, if " *the repetitive nature of the correspondence does not only fail to provide the Commission with relevant new information, but amounts to a continuing refusal to accept the Commission's decision to close a case* ". In such circumstances, the Commission could not be reasonably expected to continue repetitive correspondence with a complainant. In its view, the complainants' letters of 6 June, 16 June, 3 August and 6 October 2005, which it enclosed, were merely a refusal to accept the Commission's decision to close the case.

93. In their observations on the Commission's comments, the complainants pointed out that the Commission had informed them on 7 December 2005 of its decision to discontinue correspondence. At this time, however, they had not yet received a reply to their e-mail of 14 January 2005. They thus appeared to imply that, since they had not yet received a reply to their aforementioned e-mail, their correspondence could not have been considered as abusive and repetitive.



The Ombudsman's assessment

94. The Ombudsman will first examine whether unjustified allegations or personal offences by the complainants entitled the Commission to discontinue correspondence. Thereafter, he will assess whether the four letters sent by the complainants between June and October 2005 were "*improper*" within the meaning of the Commission's Code of Conduct.

95. Unjustified allegations and personal offences can, in principle, render correspondence improper and entitle the Commission to discontinue further communication with the complainant involved. However, the Ombudsman is not convinced that the complainants' reference to a suppression of evidence and the existence of a "*loop system*" in the Commission, regardless of their accuracy, could be regarded as abusive. In the given context, it appears particularly important to note that the complainants' remarks were intrinsically linked to the facts of the case and, thus, cannot be considered as personal offences.

96. Turning to the issue of the repetitiveness of the complainants' correspondence, the Ombudsman considers it useful to review the relevant aspects of the complainants' correspondence with the Commission:

97. By letter of 20 May 2005, the Commission informed the complainants that there had been a violation of Articles 12 and 16 of the Directive. However, exercising its discretion, the Commission would not pursue this violation. This was because it did not have sufficient information to prove that a violation of the said articles had occurred at the decisive point in time, namely, when the excavation works on the site began.

98. Replying to the Commission's letter of 20 May 2005, the complainants, in their letter of 6 June 2005, brought certain "*new facts*" to the Commission's attention. They submitted that, in light of an inspection of hamster burrows in 2003, it appeared credible that hamster burrows were destroyed immediately after the permit had been issued. These destructions violated Community law. They therefore asked the Commission to make their case a star case and commence infringement proceedings against Germany.

99. In its reply, the Commission reiterated its reasoning contained in its letter of 20 May 2005. It further explained that there was no evidence that hamster burrows had been destroyed immediately after the permit had been issued. According to the surveys available to the Commission, no hamster burrows could be found on the projected site at the beginning of the excavation works.

100. In their letter of 16 June 2005, the complainants stated that certain "*avoidance and compensatory measures*" foreseen by the competent authorities were limited to zones where excavation activities had not yet started. In the complainants' view, this was to say that hamster burrows in these zones would be deliberately destroyed, which was not in conformity with the Directive.

101. In its reply of 1 July 2005, the Commission essentially observed that the complainants'



letter did not contain any new elements to suggest a violation of Community law had occurred.

102. In a letter of 3 August 2005, the complainants explained, in detail, what in their view was to be considered a violation of the Directive. They also detailed the reasons why the Commission should commence infringement proceedings.

103. In its reply of 8 September 2005, the Commission observed that the complainants had not submitted any new arguments which would suggest a violation of Community law had occurred.

104. In their letter of 6 October 2005, the complainants reiterated their view that the competent national authorities had consented to the destruction of hamster burrows. They also asked for a more reasoned answer from Commissioner Dimas and pointed out that, in spite of the fact that the Commission had acknowledged a violation of the Directive, the competent authorities had failed to remedy the consequences of this violation. The complainants also raised the question as to why the destruction of hamster burrows in other Member States had given rise to proceedings initiated by the Commission, whereas it remained inactive with regard to Germany. They finally questioned the soundness of the Commission's position to require them to submit new arguments in support of a violation of Community legislation, given that it had already accepted that a violation had occurred.

105. The right to discontinue correspondence with a complainant presupposes that the latter's correspondence can "*reasonably*" be considered as "*improper*". It is therefore not sufficient that a letter is repetitive in the sense that it simply repeats arguments that have already been put forward before. At the same time, the Ombudsman considers that repetitive correspondence may indeed become improper. This, for instance, is the case where a complainant repeatedly refuses to accept the Commission's decision to close a case but does not submit any factual elements beyond those already considered by the Commission.

106. As an exception to the Commission's general duty to correspond with citizens, the rule on discontinuing correspondence must be narrowly construed. Given the paramount importance of corresponding with citizens, discontinuing correspondence must therefore be regarded as a means of last resort. It seems useful to add that, in cases of repetitive correspondence, the Commission can easily reply by referring to its position explained in previous letters.

107. The Ombudsman considers that it is not necessary for him to take a definitive view on the issue of whether the complainants' correspondence could be considered as improper. The Commission would, in any event, have been required to inform the complainants of its intention to discontinue corresponding with them prior to actually doing so. This obligation is inherent in the Commission's right to discontinue correspondence. If this were not the case, complainants would have no chance of knowing that it was because of the Commission's deliberate discontinuance of correspondence that it did not reply. The Ombudsman notes that the Commission appears not to have informed the complainants of its intention to discontinue corresponding with them.

108. At the same time, the Ombudsman considers that he need not take a definitive stance on



the question whether the Commission was right to discontinue its correspondence with the complainants. In the given context, it is important to note that the Commission sent a number of replies to the complainants, in which it explained its decision not to start infringement proceedings against Germany and gave reasons for it. Moreover the Commission fully cooperated in the Ombudsman's inquiry and provided further information on its position. The Ombudsman therefore concludes that the complainants had the benefit of a full explanation of the Commission's position, even though they continue to disagree with it. In view of these circumstances, the Ombudsman considers that no further inquiries are justified with regard to this aspect of the complaint.

E. Conclusions

On the basis of his inquiries into this complaint, the Ombudsman considers that there has been no maladministration as regards the complainants' first and second allegations and their claim. As regards the Commission's alleged failure to reply and its allegedly incorrect decision to discontinue corresponding with the complainants, there is no need for further action on the Ombudsman's part. The Ombudsman therefore closes the case.

The complainants and the President of the Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 4 December 2008

(1) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206, p. 7.

(2) In the Ombudsman's understanding, the pit here at issue is located at the 'Finie' site.

(3) See paragraph 6 below.

(4) See paragraph 33 above.

(5) See paragraph 36 above.

(6) Ombudsman's translation from the German original.