Decision of the European Ombudsman closing his inquiry into complaint 80/2009/BU against the European Commission

THE BACKGROUND TO THE COMPLAINT

1. The complainant represents the *Ecological Institute Veronica* of the Czech Association of Nature Conservationists.

2. On 14 November 2006, the complainant, acting on behalf of the above institute, sent a communication to the Commission consisting of (a) a completed infringement complaint form dated 14 November 2006; and (b) a completed form entitled 'Request for supplementary information', dated 22 November 2006. (Both (a) and (b) are referred to collectively throughout this Decision as the 'communication of 14 November 2006')


4. More precisely, according to the complainant, the planning of the section of the R52 motorway Pohořelice-Mikulov, which will be part of the Brno-Vienna highway connection, does not take into consideration alternative routes [1], which would have a less negative impact on Natura 2000 sites [2]. An alternative route, which could make use of the existing D2 highway Brno-Břeclav and the planned bypass of Břeclav and then continue to Austria, was not assessed.

5. He stated that the route of the R52 section in question was included in the Břeclavsko regional land use plan, and adopted by the South Moravian Regional Assembly on 9 November 2006.

6. Given that the complainant received no answer to the communication of 14 November 2006, on 14 May 2007 and 17 September 2007, he sent reminders to the Commission, but to
no avail.

7. On 14 March 2008, he thus complained for the first time to the Ombudsman about the Commission's failure to answer his communication of 14 November 2006 and the ensuing reminders. His first complaint to the Ombudsman was registered under reference 785/2008/BU.

8. Following the Ombudsman's intervention, on 23 April 2008, the Commission sent an answer to the complainant, in which it:
- apologised for the fact that, due to an administrative error, it had not answered his communication of 14 November 2006. Nevertheless, it assured him that his communication of 14 November 2006 was "duly registered (on 27 November 2006 under reference number A/21576)";
- stated that it had taken into account the information contained in the communication of 14 November 2006 and was assessing that information "in a wider context of the transport infrastructure in Southern Moravia (motorways R43, R52 and R55)";
- promised to inform him of further developments in the matter.

9. Based on the above outcome, the Ombudsman closed the complaint 785/2008/BU as settled by the institution.

10. Given that the complainant did not receive any subsequent written information from the Commission concerning the progress of the matter, on 9 January 2009, he submitted the present complaint to the Ombudsman.

THE SUBJECT MATTER OF THE INQUIRY

11. The complainant alleged that there have been unjustified delays in the Commission's handling of the issues raised in his communication of 14 November 2006.

12. He claimed that the Commission should contact the government of the Czech Republic and remind it of its obligation to assess all relevant variants stemming from the research study concerning the R52 motorway. If the government fails to comply with the Community legislation, the Commission should impose sanctions and stop financing the construction of the motorway on both the Czech side and the Austrian side.

THE INQUIRY


THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS
A. Alleged unjustified delays in the handling of the issues raised in the communication of 14 November 2006, and the related claim

*Arguments presented to the Ombudsman*

14. The complainant alleged that there have been unjustified delays in the Commission's handling of the issues raised in his communication of 14 November 2006.

15. He pointed out that he sent the above communication on 14 November 2006. However, besides the letter of 23 April 2008, which the Commission sent to him following the Ombudsman's intervention, the institution has neither resolved the matter nor informed him about how it is dealing with it.

16. Moreover, the complainant contacted, by telephone as well as through a personal visit in Brussels, the Director of Directorate B (Nature) of the Directorate-General for the Environment ('Environment DG'), who told him that the matter would not be resolved in 2009.

17. In its opinion, the Commission stated that the evidence presented by the complainant did not justify registering his communication of 14 November 2006 as a complaint for a number of reasons. First, according to the Commission, the EIA procedure for the project concerned formally started before the accession of the Czech Republic to the EU and, therefore, is not subject to Community law [3] As a result, it would have been perfectly correct for the Commission to close the file.

18. Second, the Commission stated that, "*even so*," it carefully assessed the issues raised by the complainant.

19. The Commission also considered that there is insufficient evidence "*from studies*" about a significant impact of the preferred variant of the R52 motorway on Natura 2000 sites.

20. Moreover, at this stage, the R52 motorway project has not yet been authorised ("*building permit not issued yet*"). The Czech authorities have, therefore, not yet taken any action which could constitute an infringement of Community law.

21. The Commission also recognised that, in its first letter to the complainant dated 23 April 2008, it could have explained that it could not provide further information on the state of the assessment or on the further procedure, as long as the wider assessment of the transport infrastructure in Southern Moravia, mentioned in that letter, was ongoing.

22. However, the Commission pointed out that the complainant had been in contact with the Commission representatives in the course of the years 2007 and 2008 and acknowledged this in his complaints to the Ombudsman. He was thus aware that the handling of the issues
raised in his communication of 14 November 2006 was ongoing. There is, therefore, no reason to assume that the Commission did not inform him in a sufficient manner of the follow-up given to his file.

23. As regards the time taken to carry out the wider assessment of the transport infrastructure in Southern Moravia, the Commission pointed out that this is a very complex matter, which is why the assessment required more time. The Commission services have made considerable efforts to investigate thoroughly the various technical and legal aspects of the cases relating to highway infrastructure in Southern Moravia and to handle them as efficiently as possible.

24. This wider assessment resulted from the formal registration of another complaint, submitted by another Czech association, Environmental Law Service ('EPS'). This complaint was entitled 'Failure to comply with requirements of Directive 2001/42/EC (SEA Directive) during adoption of the Břeclavsko Regional Land Use Plan'. On 6 June 2008, it was formally registered under reference 2008/4493 and also concerns the R52 motorway [4] .

25. The Commission promised in its opinion that it would follow the issues relating to the R52 motorway and would inform the complainant in the present case of any decision taken in relation to the above complaint 2008/4493.

26. The Commission also referred to the legal proceedings pending before the Supreme Administrative Court of the Czech Republic concerning the same matter.

27. Finally, the Commission stated that, on 27 April 2009, it sent a new letter to the complainant. In that letter, a copy of which it attached, it informed him that it did not register his communication of 14 November 2006 as a complaint, and explained the reasons for not doing so:
- Moreover, it stated that the EIA Directive is not applicable to this project, because the procedure concerning the construction of the relevant R52 section formally started before the accession of the Czech Republic to the EU ("announcement of the project" [6] dated 29 January 2003). Moreover, according to the information available to the Commission, "the construction permit for the project of the R52 motorway Pohořelice - Mikulov has not yet been issued by the competent Czech authorities".
- The Commission pointed to the formally registered complaint 2008/4493, referred to in paragraph 24 above. Although the facts giving rise to that complaint are not necessarily identical to the issues raised in the complainant's communication of 14 November 2006, they are indeed related. Therefore, the Commission added the issues raised by complainant to the file concerning complaint 2008/4493.
- Until the final authorisation is granted, the Commission could not assess whether the obligations arising from the Birds Directive and the Habitats Directive were fulfilled with respect to the Special Protection Areas 'Střední nádrž Vodního díla Nové Mlýny' and 'Pálava' and the proposed Site of Community Importance 'Mušovský luh', which are likely to be affected by the proposed R52 section.
- As regards the possible cross-border impact of the project, the Commission received no information that the concerned Member State (Austria) would request the application of the procedure foreseen in Article 7 of the EIA Directive [7]. That procedure is applicable only where the project is likely to have significant effects on the environment in another Member State. The Commission has no evidence in this regard.

28. In his observations, which he sent after having received the Commission's above letter and a copy of the opinion, the complainant insisted that the Commission did not provide him with sufficient information on the progress of its handling of his communication of 14 November 2006. He also argued that, for two years, it was practically inactive in the matter. He went on to argue that the Commission could not refer to his informal contacts with the Director of Directorate B (Nature) of the Environment DG in support of its arguments. The Director merely told the complainant that the DG had been assigned the communication of 14 November 2006, but did not know how the DG was dealing with it. The complainant received this information only following his question regarding when he would receive a written answer to his communication, which he posed during his personal visit to Brussels.

29. The complainant rejected the Commission's reasons for not registering his communication of 14 November 2006 as a complaint. He first disagreed that the EIA procedure for the project formally started before the accession of the Czech Republic to the EU. According to the complainant, the preparation process of the Břeclavsko regional land use plan started with two orders, which were sent on 25 February 2005 to the supplier of the land use plan and to the supplier of the environmental impact assessment. Moreover, the only resolution of the South Moravian Regional Assembly which mentions the land use documentation for the area in question (the ‘Strategy of procuring the land use documentation of the South Moravian Region’, ref. 1204/04/Z27) is dated 23 September 2004. This is also after the accession of the Czech Republic into the EU.

30. Second, the complainant referred to the Commission's argument that, although the EIA procedure for the project is not subject to Community law, it still carefully assessed the issues he raised. He found it unreasonable that the Commission used this argument as one of the reasons for not registering his communication of 14 November 2006 as a complaint.

31. Third, the complainant considered misleading the Commission's statement that the evidence derived from studies about the significant impact of the preferred R52 variant on Natura 2000 sites was insufficient. This is because the Commission did not specify the studies it was referring to. According to the complainant, the only Natura 2000 study concerning the Břeclavsko regional land use plan is a 2005 study of Mgr. Mudra. According to this study, the Břeclavsko land prognosis as a whole will have a significant negative impact on Natura 2000 system. The study also states that the R52 section will have a significant negative impact on the Special Protection Area 'Střední nádrž Vodního díla Nové Mlýny'. Moreover, the Commission has in its possession several studies demonstrating that the alternative route through Břeclav would be more advantageous, both economically and ecologically. For example, the Commission possesses a 2007 study of Mgr. Wolf [8], to which it referred in the annex to its letter ref. REGIO F.2/MBO/vk D(2008) 790085, sent on 29 May 2008 to the Czech Minister of Transport [9]. In the annex of this letter, the Commission
asked the Minister why the above alternative route appears to have been disregarded, despite the recommendations made by several expert studies.

32. Fourth, the complainant considered untrue and misleading the Commission’s argument that the R52 motorway project has not yet been authorised and thus no action has yet been taken which could constitute an infringement of Community law. The adoption of the Břeclavsko regional land use plan is a measure of a general character. Community legislation has been violated through the adoption of that land use plan, and the Commission cannot excuse its inactivity by referring to a possible future construction permit. The Commission is certainly aware that the construction permit is preceded by a land use permit, following which irreversible steps, such as buyouts or expropriations of land, take place. Also, the land use plans of municipalities need to be put in line with the Břeclavsko regional land use plan, which is also an irreversible step affecting the rights and obligations of citizens. Luckily, such irreversible steps have not yet been taken [10].

33. As regards the Commission’s reference to the legal proceedings pending before the Supreme Administrative Court in the Czech Republic, the complainant stated that the mechanism of investigating infringement complaints does not require that the matter be dealt with first by the Czech courts.

34. The complainant also pointed to the results of a control carried out by the Supreme Audit Office of the Czech Republic (‘the NKÚ’) (No 08/26, ‘Financial resources for procuring the motorway connection Brno-Vienna (R52)’). The complainant attached a printout of the NKÚ findings, which point to several shortcomings [11]. He added that the Commission also has in its possession a critical report by the Czech Public Defender of Rights, which the Defender submitted to the South Moravian Region, but which remains ignored [12].

The Ombudsman’s assessment

35. At the outset, the Ombudsman notes that the complainant submitted his communication to the Commission on 14 November 2006, and the Commission acknowledged its receipt in April 2008, following the Ombudsman’s intervention. In its letter of April 2008, the Commission stated that the complainant’s communication of 14 November 2006 was registered on 27 November 2006 under a specific reference number. However, it did not clearly point out that it had not registered the communication as a complaint. Only in its opinion on the present complaint, and in its second letter to the complainant of 27 April 2009, did the Commission inform him that it had not registered his communication of 14 November 2006 as a complaint, and explained the reasons for not doing so.

36. The Ombudsman recalls that the Commission’s communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law (COM/2002/0141 final) (‘the Communication’) does not stipulate any time-limit within which the Commission should inform complainants that it will not formally register their correspondence as a complaint [13]. Nevertheless, the Ombudsman considers that the relevant general rules apply to such a situation. According to Article 17 of the European Code of Good Administrative Behaviour [14], the official shall
ensure that a decision on every request or complaint is taken within a reasonable time-limit, without delay, and in any case no later than two months from the date of receipt. If a request or a complaint cannot, because of the complexity of the matters which it raises, be decided upon within the above mentioned time-limit, the official shall inform the author thereof as soon as possible. Moreover, according to point 4 of the Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public ('the Commission's Code'), the Commission is obliged to answer correspondence within fifteen working days from the date of its receipt by the responsible Commission department. If the reply cannot be sent within the above deadline and in all cases where the reply requires other work on it, such as interdepartmental consultation or translation, the Commission should send a holding reply, indicating a date by which the addressee may expect a reply.

37. In the Ombudsman's view, complainants may reasonably expect that the time-limit within which the Commission will inform them of its decision not to register their correspondence as a complaint will not be substantially longer than one calendar month, which the Communication foresees for correspondence formally registered as a complaint. In any case, complainants may expect that the Commission will inform them of its decision not to register their correspondence as a complaint within the two-month time-limit stipulated in Article 17 of the European Code of Good Administrative Behaviour.

38. If the Commission becomes aware that the complexity of a matter raised in a correspondence will substantially increase the period of time it needs to decide whether or not to register the correspondence as a complaint, it should inform the complainant, as required by Article 17 of the European Code of Good Administrative Behaviour and point 4 of the Commission's Code.

39. In the present case, even though the Commission registered the complainant's communication of 14 November 2006 on 27 November 2006, it did not inform him until 27 April 2009, that it had not registered that correspondence as a complaint and did not provide the reasons for this decision until the latter date. Moreover, the Commission failed to provide the complainant with any written information on the state of progress of the matter from 23 April 2008 (date of the initial acknowledgement, in which it promised to do so) to 27 April 2009 (decision not to register the correspondence as a complaint). As rightly pointed out by the complainant, such written information cannot be substituted by his personal contacts with the Commission's officials, which were made on his own initiative. The Commission's above failure constitutes a violation of Article 17 of the European Code of Good Administrative Behaviour and point 4 of the Commission's Code, and thus an instance of maladministration. Given that this aspect of the present case concerns specific events in the past, and the Commission finally informed the complainant by letter of 27 April 2009, the Ombudsman does not consider it appropriate to seek a friendly solution or make a draft recommendation in this regard. However, he will make a critical remark below.

40. The Ombudsman further notes that the complainant does not agree with the Commission's reasons for not registering his communication of 14 November 2006 as a complaint.
41. The Ombudsman recalls in this respect that point 3 of the Communication stipulates that correspondence shall not be registered as a complaint, if:

"- it is anonymous, fails to show the address of the sender or shows an incomplete address;

- it fails to refer, explicitly or implicitly, to a Member State to which the measures or practice contrary to Community law may be attributed;

- it denounces the acts or omissions of a private person or body ...;

- it fails to set out a grievance;

- it sets out a grievance with regard to which the Commission has adopted a clear, public and consistent position ...;

- it sets out a grievance which clearly falls outside the scope of Community law. "

(emphasis added)

42. Even if the evidence available to the Ombudsman does not enable him to assess substantively the Commission's view that Community law did not apply to the present case, this reason alone would be, in principle, a sufficient ground not to register the complainant's correspondence of 14 November 2006 as a complaint.

43. The Ombudsman does not consider that the Commission's further arguments, contained in its letter of 27 April 2009 to the complainant and in its opinion on the present complaint, constitute additional reasons for why it did not register the complainant's communication of 14 November 2006 as a complaint. On the contrary, the Ombudsman understands that, by submitting these arguments, the Commission wished to show that it dealt with the matter which the complainant referred to it in a broader context.

44. The Commission's argument that, according to the information available to it, the construction permit for the R52 section in question has not yet been issued, shows that the Commission is at least monitoring the situation.

45. In addition, it emerges from the material attached to the complainant's observations that, in the context of its broader assessment of the transport infrastructure in Southern Moravia, the Commission contacted the Czech Minister of Transport by letter of 29 May 2008, inviting the Minister to comment on the following issues relating to the R52 motorway:

"...Commission services are wishing to be informed if a comparative study regarding the alternative alignments between "Brno-Mikulov-Vienna" and "Brno-Breclav-Vienna" is under consideration by the Czech authorities. According to the adopted OP Transport, a comparison of alternative routings should be made before an application for a grant is submitted to the Commission and the economic and environmental findings of the comparison should be included in the application for a grant. However, several NGO's are defending the position that the Ministry
of Transport is attempting to push through at Government level the "Brno-Mikulov-Vienna" variant, without any prior full assessment of the above-mentioned two alternative routings. Moreover, we have been informed that from an economical analysis undertaken so far by RSD [Ředitelství silnic a dálnic, the Motorways and Highways Directorate] it appears that the "Brno-Breclav-Vienna" is considered to be more sustainable. This raises questions why an alternative variant, via Břeclav, appears to have been disregarded despite the recommendations of several expert studies...

The Commission then referred to three studies, including the study made by Mgr. Wolf, which the complainant mentioned in his observations.

46. Furthermore, the Ombudsman understands the Commission's reference to the legal proceedings before the Czech Supreme Administrative Court [16], which are still pending, as an explanation why, at this stage, additional actions on the Commission's part are not necessary. The Ombudsman considers this approach reasonable. The Commission thus appears to believe that the situation in question can be still remedied at the national level. The Ombudsman recalls in this regard that the primary responsibility for the implementation of the Community law lies with the Member States, and the aim of any infringement procedure is to make the Member States comply with Community law voluntarily. It is also worth recalling that the national courts are part of the European jurisdictional system ensuring respect of Community law.

47. Finally, the Ombudsman considers reasonable the Commission's procedural decision to add the complainant's case to the file concerning complaint 2008/4493 entitled 'Failure to comply with requirements of Directive 2001/42/EC (SEA Directive) during adoption of the Břeclavsko Regional Land Use Plan', which it had formally registered and which also concerns the R52 motorway. Complaint 2008/4493, which is available to the Ombudsman in the file of the complaint 822/2009/BU, concerns violations of Community law (the SEA Directive, the Habitats Directive and the Birds Directive) by the Czech Republic (South Moravian Regional Assembly and the Ministry of Environment) during the preparation and approval of the Břeclavsko regional land use plan. The Ombudsman agrees with the Commission that the issues raised in the complainant’s communication of 14 November 2006 are related to those raised in complaint 2008/4493. The Ombudsman also notes that, in his communication of 14 November 2006, the complainant referred to actions taken by EPS (the author of the complaints 2008/4493 to the Commission and 822/2009/BU to the Ombudsman) at the national level. Relatedly, in complaint 2008/4493, EPS referred to the complainant’s communication of 14 November 2006 concerning "a similar matter relating to the violation of the law of the European Communities during the environmental impact assessment of the Břeclavsko regional land use plan ".

48. In this respect, the Ombudsman trusts that, in the future, the Commission will keep the complainant informed of the progress in its handling of complaint 2008/4493. The Ombudsman suggests that the Commission could adopt a general policy, according to which it will provide information on its progress in the handling of a registered infringement complaint not only to the complainant who submitted it, but also to those interested citizens and associations, whose complaints, although not formally registered as such, were added to
the file of the registered complaint. The Ombudsman will make a further remark in this regard below.

49. In light of the considerations in paragraphs 44-48 above, the Ombudsman concludes that the complainant’s claim cannot be sustained.

B. Conclusion

On the basis of his inquiries into this complaint, the Ombudsman makes the following critical remark:

Between 23 April 2008 (date of the acknowledgement of receipt regarding the complainant’s communication of 14 November 2006) and 27 April 2009, the Commission did not inform the complainant of its decision not to register the communication of 14 November 2006 as a complaint and its reasons for not doing so. As a result, the Commission did not provide the complainant with any written information during the above period on its progress in the matter. This constitutes a violation of Article 17 of the European Code of Good Administrative Behaviour and point 4 of the Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public, and thus an instance of maladministration.

The complainant and the Commission will be informed of this decision.

Further Remark

The Commission could consider adopting a general policy, whereby it provides information about its handling of a registered infringement complaint to both:
- the complainant(s) who submitted the complaint in question; and
- those interested citizens and associations whose complaints, although not formally registered, were added to the file of the registered infringement complaint.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 26 November 2009

[1] Article 6, paragraph 4 of the Habitats Directive: "If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of
a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. " (emphasis added)


[4] On 24 March 2009, EPS also submitted a complaint to the Ombudsman, who registered it under reference 822/2009/BU. EPS alleged that there had been unjustified delays in the Commission’s handling of its complaint 2008/4493. On the date of the present decision, the Ombudsman’s inquiry into the complaint 822/2009/BU is still ongoing.

[5] The Commission explained that the absence of an assessment of an alternative solution during the Natura 2000 environmental impact assessment of the project does not mean that the EIA procedure is invalid.

[6] In Czech: "oznámení projektu ".

[7] "Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall forward the information gathered pursuant to Article 5 to the other Member State at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between two Member States on a reciprocal and equivalent basis."

[8] The complainant attached to his observations the abstract of this study, according to which the R52 variant has worse impact on Natura 2000 sites than the variant through Břeclav.

[9] The complainant attached a copy of this letter. In this letter, the Commission stated the following, among other things: "Our services have been made aware of the findings of the Czech Supreme Audit Office (NKU) in relation to the construction of some transport projects in Czech
Republic. According to the NKU findings, there are some procedural failures concerning the implementation of transport projects in the Czech Republic. Some of the findings are related to projects which are planned to be co-financed from the Structural funds and therefore it is very important for us to understand your position on these issues. Furthermore, some of these projects have also been the subject of a number of complaints addressed to the Commission. We therefore include a list of points in the attached annex on which we kindly requesting [ sic ] to have a detailed response directly from your services."


[13] The second paragraph of point 4 of the Communication only provides a one-month time-limit (from the date of the initial acknowledgement) to acknowledge again the correspondence which the Commission formally registers as a complaint.


[15] OJ 2000 L 267, p. 64. See the second and third paragraph under the heading 'Correspondence'.

[16] The action submitted to the Supreme Administrative Court is available to the Ombudsman in the file of the complaint 822/2009/BU. It is entitled "Proposal for annulment of a measure of a general character - the Břeclavsko regional land use plan, approved by a resolution of the Assembly of the South Moravian Region of 9.11.2006, No. 921/06/ Z 14" and is directed against the South Moravian Region as defendant. In the action, the plaintiffs alleged that the Břeclavsko regional land use plan was not approved in accordance with not only the Czech law, but also the SEA Directive, the EIA Directive, the Birds Directive and the Habitats Directive. They claimed the annulment of the Břeclavsko regional land use plan in its entirety.