

**Decision of the European Ombudsman on complaints
1086/96/VK, 1092/96/VK, 1095/96/VK, 1097/96/VK,
1104/96/VK, 1112/96/VK, 1113/96/VK, 1124/96/VK,
1134/96/VK, 1135/96/VK, 1139/96/VK, 1/97/VK, 4/97/VK,
9/97/VK, 12/97/VK, 13/97/VK, 28/97/VK, 34/97/VK,
43/97/VK, 58/97/VK, 72/97/VK, 88/97/VK, 161/97/VK
against the European Commission**

Decision

Case 1086/96/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 1092/96/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 1095/96/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 1097/96/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 1104/96/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 1112/96/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 1113/96/VK - Opened on 27/02/1997 - Decision on 16/07/1998

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Case 1135/96/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 1139/96/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 1/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 4/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 9/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 12/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998



Case 13/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 28/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 34/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 43/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 58/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 72/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 88/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Case 161/97/VK - Opened on 27/02/1997 - Decision on 16/07/1998

Strasbourg, 16 July 1998 Dear X, On (date), you made a complaint to the European Ombudsman concerning a letter which Commissioner Karel Van Miert had addressed to the German Minister of Economic Affairs Mr. Rexrodt, asking the German Government to reconsider its policy as regards the German law in favour of the production of renewable energies, (Stromeinspeisegesetz). On 27 February 1997, I forwarded the complaint to the President of the European Commission. The Commission sent its opinion on 15 May 1997 and I forwarded it to you with an invitation to make observations, if you so wished. I received your observations on the Commission's opinion on (date) 1997. I am writing now to let you know the results of the inquiries into your complaint. Your complaint is one of many that I received concerning the subject. In order to deal with it as effectively and as promptly as possible, I have treated it jointly with the others that are listed at the end of this letter. To avoid misunderstanding, it is important to recall that the EC Treaty empowers the European Ombudsman to inquire into possible instances of maladministration only in the activities of Community institutions and bodies. The Statute of the European Ombudsman specifically provides that *no action by any other authority or person may be the subject of a complaint to the Ombudsman*. My inquiries relating to Commissioner Van Miert's letter on the Stromeinspeisegesetz have therefore been directed towards examining whether there has been maladministration in the activities of the European Commission. The Stromeinspeisegesetz case is also the subject of petitions to the European Parliament. A petition may concern any matter which comes within the Community's field of activity. The Ombudsman does not usually deal with a matter pending before the Committee on Petitions of the European Parliament unless, with the consent of the petitioner, that Committee transfers it to the Ombudsman. In this case, however, the Ombudsman has also received many complaints from citizens who have not addressed petitions to the Parliament.

THE BACKGROUND TO THE COMPLAINT



On 1 January 1991 the Stromeinspeisegesetz entered into force. The law imposes a purchase obligation for electricity generated from renewable energies on electricity supply companies and obliges the electricity supply companies to pay a guaranteed minimum price to producers of renewable energies depending on the nature of energy. Article 3 (2) of the Stromeinspeisegesetz prescribes the minimum price of electricity generated from wind power to be 90 % of the average revenue per kWh of electricity which the supply companies generated by sale of electricity in the penultimate calendar year. The law was notified to the Commission in 1990 under the state aid rules in accordance with Article 93 (3) of the EC-Treaty and it was approved under Article 92 (3) letter c) of the EC-Treaty. As from July 1995 the Commission started receiving several complaints from German electricity suppliers concerning the support of wind energy. The complainants put forward that the guaranteed price for wind energy was no longer justified; they would face considerable losses, if the guaranteed price for wind energy remained the same, and if the plans of the German Länder to extend wind power capacity up to 4000 MW in the year 2005 would be pursued. In November 1995 the Commission asked the German government for its comments on the matter. The German government submitted a report made by the German Ministry for Economic Affairs which stated that problems were occurring in the area of wind energy because of the considerable increase of wind power. During spring and the summer 1996, several meetings with all parties concerned were held. Subsequently, producers of wind energy informed the Commission that they could not see any reason to amend the price mechanism since the market share of renewable energy was small (under 1% of the total electricity revenue in Germany). Wind energy producers would face bankruptcy without the guaranteed prices provided in the Stromeinspeisegesetz. It is against this background that Commissioner Van Miert sent the mentioned letter to Minister Rexrodt on 25 October 1996. In his extensive letter he asked the Minister to examine whether the support mechanism in favour of wind energy in the Stromeinspeisegesetz should be amended in a way which would, on the one hand, consider the still existing need of wind energy producers to receive support, but on the other hand be less trade distortive. Among others, he proposed the reduction of the remuneration for wind power from 90% per kWh to at least 75% per kWh as a relatively simple and quick change of the current situation. It was this letter of Commissioner Van Miert to Minister Rexrodt which caused German wind energy producers to complain to the European Ombudsman.

THE COMPLAINT

Taking the complaints sent to the Ombudsman as a whole, there are in substance two allegations:

- Commissioner Van Miert was not entitled to send such a letter as the one in question, in which he requested to change the Stromeinspeisegesetz by reducing the remuneration for wind energy from 90% to 75% because the Stromeinspeisegesetz had been approved by the Commission in a binding decision under Article 92 (3) letter c) of the EC Treaty. The complainants consider that the contents of the letter amounts to an alteration of the Commission decision which may only be made by way of another Commission decision.
- Commissioner Van Miert had wrongly assessed the legal and economical situation for wind energy producers in Germany because the Commissioner apparently based his argumentation only on data and figures provided by the German electricity suppliers without verifying whether these figures were correct. According to the complainants, the effects of the Commissioner's



proposal would be disastrous for the wind energy producers, as the reduction of the remuneration level, provided by the *Stromeinspeisegesetz*, would jeopardize wind energy plants and with them, the actual employment situation. Research in this field would also suffer and this would consequently have a negative impact on the environmental and technical developments. Competition in fact would be distorted and a monopolistic structure would arise.

THE INQUIRY

The Commission's opinion In its opinion on the complaints, the Commission has stated as follows:

- The letter of Commissioner Van Miert to Minister Rexrodt does not have any legal consequences for the German government. It is a non-binding recommendation to modify the law. It was considered that a non-legal action would be the best solution since it allows the German government to solve the problem of competition internally. The letter lies fully within the measures that the Commission may take pursuant to Article 93 of the EC Treaty.
- The data concerning the number of wind power stations, their capacity and the production used by DG IV were based on the information provided by the German government to the Commission. Furthermore, the Commission received information from a hearing held in the German Bundestag with representatives from both sides, the wind energy producers as well as the main energy suppliers. In addition to this, several extra meetings with all parties concerned were held. The Commission took the opinions of all parties into account. The Commission considered it necessary to re-assess the current situation after it had received complaints on the matter. It appeared that both the real and the legal conditions had changed between 1990, the time of approval of the *Stromeinspeisegesetz* by the Commission and October 1996. The support mechanism for wind energy in the *Stromeinspeisegesetz* had led to a very considerable increase of wind energy production, particularly in the coastal regions of Germany. Since the enactment of the *Stromeinspeisegesetz* the amount of plants as well as their capacity had considerably increased, thus raising costs for energy suppliers. Another factor for the Commission's re-assessment was that the technology for new wind power plants had been improved. New plants are therefore more efficient and the production of wind power is less costly.

The complainants' observations Taken the observations sent to the Ombudsman as a whole, the complaints were upheld. You gave extensive criticisms of the Commission's observations.

THE DECISION

1 The complainants' first claim 1.1 The complainants' first claim, in substance, is that the Commission infringed the Treaty by using the wrong procedure. According to the complainants, the letter to the German government amounted to an alteration of the Commission's decision, made under Article 92 (3) (c) of the EC Treaty, that the *Stromeinspeisungsgesetz* is compatible with the common market. They claim such alteration could only validly be made by way of a further Commission decision. 1.2 The provisions of the EC Treaty concerning State aids require a Member State which proposes to grant a new aid to give prior notification to the Commission, which then makes a decision as to whether it considers the aid to be compatible with the



common market. The Stromeinspeisungsgesetz received approval through this procedure in 1990 and thus became an *existing* system of aid. 1.3 Article 93 EC provides two procedures through which the Commission may seek modification of an existing scheme of aid. The first procedure is by proposing measures to the Member State concerned under Article 93 (1). Such proposals have no binding force. The second procedure is to address a binding decision to the Member State concerned requiring it to abolish or alter the aid, following the procedure of Article 93 (2). 1.4 There is no legal basis for considering that the Article 93 (1) procedure cannot be used in cases where the Commission has previously approved an aid under Article 92 (3). 1.5 The letter in question does not purport to be binding on the Member State, nor does it purport to alter the Commission's 1990 decision concerning the Stromeinspeisungsgesetz. The letter does not therefore appear to contain any element which exceeds the competence of the Commission under Article 93 (1). 1.6 The Ombudsman's inquiry into the complainants' first claim has, therefore, revealed no maladministration. 2 *The complainants' second claim* 2.1 The complainants' second claim is, in substance, that the Commission wrongly assessed the legal and economic situation of wind energy producers because it relied on unverified data supplied by the German electricity industry. 2.2 Article 93 (1) does not lay down specific requirements concerning the Commission's cooperation with Member States to keep under review existing systems of aid. However, as a matter of good administrative practice, the Commission should base its technical and economic assessments on accurate information and ensure, when appropriate, that there is opportunity for critical appraisal of relevant data and that different opinions are heard. 2.3 In its opinion the Commission provided an account of its activities which has not been contradicted by the complainants. According to the Commission, it informed the German government about complaints it had received concerning the system of aid for wind energy and asked for its comments. After a hearing in the German Parliament to discuss whether or not amendments to the law were necessary, the Commission received the comments of all participants, among them representatives of the governments of the German Länder, of energy supply companies and of associations in favour of renewable energies. In addition to this, several meetings with all concerned parties, including representatives of wind energy producers, took place. 2.4 On the basis of the above, it appears that the Commission took reasonable steps to ensure that its technical and economic assessments were based on accurate information and that there was opportunity for critical appraisal of relevant data and that different opinions were heard. The Ombudsman's inquiry into the complainants' second claim has, therefore, revealed no maladministration. 3 *Conclusion* On the basis of the European Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman therefore closes the case. Yours sincerely Jacob Söderman Copy to: Mr. Santer, President of the European Commission Mr. Eeckhout, Secretariat General of the European Commission