



P. Nikiforos Diamandouros
European Ombudsman

Avich & Kilchrenan Community Council, Argyll
attn Ms Veronica Christine Kay Metcalfe
Taigh a Luana
Loch Avich
Taynuilt
Argyll PA35 1HJ
ROYAUME UNI

luanam@btinternet.com

Strasbourg, **21-06-2013**

Decision of the European Ombudsman concerning complaint 813/2012/KM
against the European Commission

Dear Ms Metcalfe,

I refer to the complaint you submitted on 20 April 2012 on behalf of Avich & Kilchrenan Community Council, against the European Commission, concerning the Commission's handling of your infringement complaint. In your complaint, you raised the following allegations and claim:

Allegations:

1. The Commission wrongly rejected your infringement complaint.

In support of this allegation, you argued that the Commission's decision to reject the complaint was not in line with the case-law of the Court of Justice of the EU.

2. The Commission breached Article 11(2) of the Treaty on European Union by failing to maintain an open, transparent and regular dialogue with civil society.

Claim:

The Commission should reverse its decision to reject your infringement complaint.

On 24 May 2012, I informed you of my preliminary view that the Commission's analysis of Article 3 of the EIA Directive seemed reasonable and asked you to clarify your complaint. I also invited you to submit the supporting documents needed further to examine your complaint.



You replied on 24 June 2012. I apologise for the length of time it has taken since then to deal with your case.

I note that neither your original complaint nor the additional information you supplied on 24 June 2012 provides any evidence to show that your second allegation has been brought to the Commission's attention. This allegation must therefore be considered inadmissible as you have not shown that appropriate approaches have been made to the Commission before the complaint was made.

Let me also note that compliance by the Executive Agency for Competitiveness and Innovation with Regulation 1367/2006 will be examined in my inquiry 1052/2012/KM and therefore does not need to be addressed in the present decision.

As regards your first allegation, I note that, in its letter of 11 November 2011, the Commission stated that the area in question is not a special protection area and that, in consequence, the only obligations of the national authority were to ensure that "deliberate disturbance" of the protected species is avoided and to show that the project developer considered the main alternatives. It is indeed that case that Article 5 of the "Birds" Directive 2009/147/EC, which protects birds outside special protection areas, provides that deliberate disturbance is to be avoided, and that an obligation to show that there are no alternatives to a project only arises where special protection areas are concerned. I therefore consider the above explanation by the Commission to be reasonable.

I also maintain my view expressed in my letter of 24 May 2012 that the Commission's interpretation of the EIA Directive 85/337/EEC (as codified by Directive 2011/92) is also correct.

As the Court of Justice explained in Case C-75/08, to which you have also referred, Article 4 of Directive 85/337/EEC does not require that a decision that it is unnecessary to subject a project to an environmental impact assessment must itself be reasoned. In the present case, the Forestry Commission did not determine that no EIA was necessary. Rather, it relied on the assessment produced by the project developer. Thus, the above-mentioned case-law does not appear to be relevant to your complaint.

You also mentioned paragraphs 36 to 40 of the judgment of the Court of Justice in Case C-50/09, which relate to the definition of what an EIA needs to contain, as provided for by Article 3 of Directive 85/337/EEC. However, the provision which is relevant to your argument that the national authority should have carried out its own assessment is Article 5(1). The latter merely provides, however, that the information specified in Annex III of the Directive is supplied by the project developer. On the basis of these considerations, I conclude that the Commission's view that there was no legal requirement for the national competent authority to carry out another assessment, and therefore no breach for it to pursue, was reasonable.

Finally, your arguments against wind power generators and renewable energy projects do not appear to relate to the subject matter of the present



complaint and thus are not part of my inquiry.

I have therefore decided to close the present case with a finding that no further inquiries are justified.

Yours sincerely,

P. Nikiforos Diamandouros