



To:
Cc:
Bcc:
Subject: Fw: EU Ombudsman Complaint 813/2012/KM. Ref.(ACCC/C/2012/68).

Attached for your consideration and attention of the Committee, is the unacceptably late reply just received from the EU Ombudsman in which he closes the case. His conclusions are in direct variance to the rulings of the European Court as published on page 25 of their recent guide:- http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf

The late response received highlights two issues which are of concern but are not, consequently, new evidence as this process was already part of our UNECE communication.

Firstly it is already known by the Compliance Committee through ACCC/C/2008/32 that there are major limitations with regard to access to justice provisions in relation to the EU as a party to the Convention. In this regard the role of the EU ombudsman is especially important with regard to the obligations under Article 9(2) of the Convention:

- The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

The EU Ombudsman has taken over a full year to deal with this simple complaint raised in relation to the EU Commission's statements that 'there was nothing in the judgement (C-50/09) that would oblige the competent authorities to produce their own environmental assessment study'. This most certainly is not what one could consider 'timely' within the obligations defined by Article 9(4) of the Convention. While the Ombudsman may well have apologised for this time delay, that does not excuse the lack of adherence to his obligations in relation to 'timely.' Sadly the evidence to date, as found by others who have raised Aarhus related issues with him, such as in Communication ACCC/C/2010/54, is that such long extended time delays are the norm.

Secondly, in relation to 'fair' as defined in Article 9(4) of the Convention it is necessary to point out that his conclusion reached in this case, see below, was neither accurate nor fair:

- "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".

This is again, in complete variance to the established case law of the European Court, as highlighted in the original complaint to the EU Ombudsman. Indeed in the recent publication on the case law of the European Court in relation to the Environmental Impact Assessment Directive on page 25 dealing with Article 3 of the Directive, it is stated:

- In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case.
- That assessment obligation is distinct from the obligations laid down in Articles 4 to 7, 10 and 11 of Directive 85/337, which are, essentially, obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge before the courts. They are procedural provisions which do not concern the implementation of the substantial obligation laid down in Article 3 of that directive.
- http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf

There is a reason for this, not least in relation to Article 6(9) of the Convention with regard to "the reasons and considerations on which the decision is based", as -"the citizen must have the possibility of deciding, with full knowledge of the relevant facts, whether there is any point in applying to the Courts".

Indeed the Environmental Impact Assessment (Forestry) (Scotland) Regulations of 1999 in Section 15(3) state:

- In determining an application, the Commissioners shall take into consideration the environmental information, any representations received by them in relation to the application and any other material consideration, **including in particular their assessment of the direct and indirect effects of the relevant project on the environmental factors** specified in Schedule 4.
- <http://www.legislation.gov.uk/ssi/1999/43/regulation/15/made>

As has been highlighted several times in the Communication, with regard to both the Scottish administration and the of the EU, there has been a complete refusal to provide this assessment completed by the competent authority for planning in these circumstances.

Yours sincerely,

Mrs. V.C.K. Metcalfe.



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