

## **Auken Report on Ombudsman's Special Report**

### Preliminary remarks by the rapporteur

There is no doubt that the circumstances at the origin of the complaint to the Ombudsman raise serious questions as regards the implementation by the Austrian authorities of Directive 85/337 (now codified in Directive 2011/92).

Furthermore, it is not the first time the Committee on Petitions has come across similar situations, where projects have been authorised, started and carried out without a required assessment of its impact on the environment.

It is neither the first time that an 'ex-post' assessment has been part of the conditions set by the Commission to close an infringement procedure without bringing an action before the Court of Justice (see, for instance, the M-30 city-highway in Madrid).

Your rapporteur would like to return to these issues in the form of concrete conclusions, which can be drawn from the background case in the resolution to the report from the point of view of the forth-coming revision of the EIA Directive.

The case shows, basically, two weaknesses in the EIA Directive:

- Firstly, the problem of how to deal with projects that are difficult to reverse because already realised or with great investments - and environmental damage - already made

From a more general point of view the Vienna airport case is a clear - but by far not the only example, as shown by petitions to the European Parliament - of the dilemma that we face when national authorities simply do not carry out EIAs when this would have been required under the Directive.

This should be taken into consideration in the revision of the EIA Directive. The situation created by the Austrian government's failure to apply the directive points - once again - to the need to have efficient means available for the public in the member states to seek the suspension of the authorisation of projects when basic requirements of the directive have clearly not been complied with, which could include the possibility of injunction measures to avoid irreversible damage through the execution of such projects.

- Secondly, lessons can be learned also from the aspect of the case which concern the - reasonable - allegations of a conflict of interest when the same ministry of transport, which originally had failed to require a regular EIA was put in charge of the ex-post one.

In view of the revision of the Directive this highlights the need to ensure objectivity and impartiality in the carrying out EIAs and granting authorisation for projects which require impact assessments. These needs have already been pointed out by the Petitions Committee when adopting its annual report for 2011:

*19. Invites the Commission to ensure that the Environmental Impact Assessment*

*Directive is strengthened by providing clearer parameters as regards the independence of expert studies, common EU thresholds, a maximum timeframe for the process, including effective public consultation, the requirement to justify decisions, the mandatory assessment of reasonable alternatives and a quality control mechanism;*

The problems that this complex case raises also point to the potential usefulness of clarifying the procedures followed in infringement proceedings through the adoption of a general regulation on the administrative procedure of the EU's own administration and the inclusion of these proceedings in the scope of such a regulation, as already proposed by the Committee on Petitions in its opinion to the Committee on Legal Affairs' own-initiative report on the subject.

However, it is necessary to emphasise that neither the actions by the Austrian authorities nor, for instance, the Commission's agreement about carrying out an ex-post assessment - a procedure not known by the Directive or EU law in general - do, as such, constitute the subject of the disagreement between the Ombudsman and the Commission.

The Special Report alleges two instances of maladministration in the way the Commission handled the infringement proceedings against Austria and Parliament has been called upon by the Ombudsman to support this position, expressed in his recommendations to the Commission.

Thus, the questions to consider are not whether the Austrian authorities acted wrongly - the origin of citizens' complaints to the Commission and its subsequent action - but whether the Commission failed in its obligations when investigating and acting on the complaint it had received, and in response to the Ombudsman's recommendations and requests.

It can be useful to recall the definition of 'maladministration' by the first European Ombudsman, Jacob Söderman, that is, a failure to comply with a rule or principle an institution or other body is obliged to comply with, be it on the basis of a self-commitment, such as through the codes of good administrative behaviour adopted, among others, by the Commission (on the initiative of the Ombudsman and with the support of PETI and Parliament).

Your rapporteur would, furthermore, like to point out that also the exercise of discretionary powers - such as those enjoyed by the Commission in respect at least to the decision of whether or not to bring an action before the Court of Justice against a Member State - should respect general principles of administrative law, such as objectivity, neutrality and proportionality, which have been recognised by the CJEU as general principles of EU law.

However, one also needs to bear in mind that the powers of the Commission, as 'guardian of the treaties' is limited to monitoring the compliance by Member States with EU law and that requirements laid down, for instance, in codes of conduct of EU institutions cannot be used, as such as norms that oblige the Member States.

Concerning the first allegation of maladministration it is correct, as the Commission has stated, that the project was initiated long before Article 10(a) of the EIA Directive became binding upon Austria. However, an ex-post environmental impact assessment is, as such, not a procedure recognised by Directive 85/337 and, thus, not regulated by EU law. Bearing this in mind, and the fact that the right to review of impact assessments had become binding upon Austria one can argue, as the Ombudsman has, that the Commission should have sought to replicate as favourable conditions of an EIA as possible at the moment of the *ex-post* assessment when negotiating the *suis generis* procedure of the ex-post EIA, bearing in mind that the new provisions of the modified EIA directive (2003/35/EC), in article 10a, had already been due to be transposed in national law by 25th June 2005.

However, bearing in mind that the decisions authorising the projects had already become final, the review could probably only have concerned the mitigation measures proposed. Your rapporteur might also need to request information about how the review would have fit into the Austrian law on judicial procedure.

Concerning the second allegation of maladministration one can agree with the Ombudsman that the ministry of transport, as the authority responsible for the infringement of Directive 85/337 through authorising the project without an EIA was not neutral in respect to the requirements set by the Commission to seek, as far as possible, to limit the consequences of its own initial failure to respect the directive.

However, unfortunately the current EIA Directive is silent as regards requirements of objectivity and impartiality of the authorities responsible for authorisation, and does not either set any such requirements on the body carrying out the impact assessment. As your rapporteur already mentioned, this area could be subject of improvement in the forthcoming revision of the Directive.

Bearing in mind, furthermore, that Article 197(2) TFEU excludes the harmonisation of Member States' laws and regulations in the field of administrative procedure means that it is not immediately evident on which basis the Commission would have had the power to require the Austrian government to transfer the responsibility to another authority.

Nevertheless, one also needs to consider the nature of the process, against which the complaint to the Ombudsman was directed. What took place was, in fact, a kind of negotiation, where the Commission had the option of going to court as a 'stick' but chose to seek a compromise with the Austrian government (not really lacking in 'inventiveness', as the Ombudsman seemed to consider when he presented the Special Report to the Committee, rather the contrary, if one believes that regularity in procedures has a value, as such).

In such as context one could agree with the Ombudsman that, perhaps, the Commission could have made supplementary efforts as regards the question of availability of judicial review and conflict of interest of the Ministry for Transport.

It would also seem advisable, as a matter of good administration and in the interest of all parties, including the Commission itself to seek to keep and up-date written records of procedures relating to enquiries by the Ombudsman.

(For the record it should be mentioned that by now an EIA has been done for a third run-way of the Vienna airport, which the Austrian government claims included the consideration of the cumulative effects of earlier, non assessed enlargements. The decision authorising the run-way has been challenged by 28 complainants, including the complainant to the Ombudsman, who at least now will have the right to judicial review)