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REPORT

on the Special Report of the European Ombudsman concerning his inquiry into complaint 2591/2010/GG against the European Commission (Vienna Airport) (2012/2264(INI))

Committee on Petitions

Rapporteur: Margrete Auken

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on the Special Report of the European Ombudsman concerning his inquiry into complaint 2591/2010/GG against the European Commission (Vienna Airport) (2012/2264(INI))

The European Parliament,

- having regard to the Special Report from the European Ombudsman to the European Parliament,
 - having regard to Article 228 of the Treaty on the Functioning of the EU,
 - having regard to Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994, on the regulations and general conditions governing the performance of the Ombudsman's duties¹, in particular Article 3(7) thereof,
 - having regard to Rule 205(2), first sentence, of its Rules of Procedure,
 - having regard to the report of the Committee on Petitions (A7-0022/2013),
- A. whereas Article 228 of the Treaty on the Functioning of the European Union empowers the European Ombudsman to receive complaints from any citizen of the Union concerning instances of maladministration in the activities of the Union institutions or bodies;
- B. whereas complaints submitted by EU citizens constitute an important source of information on possible infringements of EU law;
- C. whereas, according to Article 41 of the Charter of Fundamental Rights of the European Union, 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union';
- D. whereas neither the Treaties nor the Ombudsman's Statute define maladministration, thus leaving this task to the European Ombudsman, subject to the interpretative authority of the Court of Justice; whereas, in his first Annual Report, the Ombudsman introduced a non-exhaustive list of conduct that would amount to maladministration;
- E. whereas, following a subsequent invitation by Parliament to define a precise and clear definition of maladministration, the European Ombudsman stated in his Annual Report for 1997 that 'maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it';
- F. whereas this definition was supplemented by a statement to the effect that, when investigating whether a Community institution or body has acted in accordance with the rules and principles which are binding upon it, his first and foremost task must be to establish whether it has acted lawfully;

¹ OJ L 113, 4.5.1994, p. 15.

- G. whereas the Ombudsman also monitors the application of the codes of good administrative behaviour that institutions have signed up to and which express general principles of administrative law, including elements of the service principle, as well as the Charter of Fundamental Rights, which is fully applicable to all parts of the EU's own administration;
- H. whereas, having submitted 18 special reports in 16,5 years, the Ombudsman has so far acted very cooperatively and responsibly by using such reports to the European Parliament only as ultimate political tool, thus demonstrating his general spirit for consensual solutions;
- I. whereas this special report concerns the way in which the Commission handled a complaint submitted to it in 2006 by 27 citizens' initiatives fighting against what they perceived to be the negative consequences of the expansion of Vienna Airport;
- J. whereas Article 2 of the EIA Directive¹ states that 'Member States shall adopt all measures necessary to ensure that [...] projects likely to have significant effects on the environment [...] are made subject to a requirement for development consent and an assessment with regard to their effects';
- K. whereas the Commission concluded that the works for the expansion of the airport had been carried out without the obligatory environmental impact assessment (EIA) and addressed a letter of formal notice to Austria on 21 March 2007 for having omitted the EIA; whereas in its reply of 7 May 2007 Austria could not refute the fact that the infrastructure measures at stake had led and were still leading to a significant increase in air traffic and nuisance due to plane traffic over Vienna, i.e. that these measures had significant environmental effects;
- L. whereas, in the light of the fact that the works had either been completed or were close to being finalised, the Commission preferred – rather than bringing Austria before the CJEU – to seek an agreement with the Austrian authorities which would as far as possible remedy this omission; whereas the Commission agreed with the Austrian authorities that the latter would carry out an *ex post* EIA in order to determine *inter alia* what mitigation measures would be needed to reduce the effects of noise on the population living near the airport;
- M. whereas the Ombudsman accepted this choice by the Commission; whereas the complainant was unhappy with the way in which the *ex post* EIA had been carried out, criticising in particular the fact that he did not have access to judicial redress as foreseen by the EIA Directive and that the authority in charge of the EIA, the Austrian Ministry for Transport, was the same authority which had previously granted the permits for the relevant works and thus found itself in a conflict of interest;
- N. whereas, after his investigation, the Ombudsman took the view that he was unable to conclude that the Commission had ensured that the *ex post* EIA had been carried out properly; whereas he nevertheless closed the case, considering that no further action was

¹ Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC), as amended.

needed on his part as the procedure was ongoing and the Commission had stated that it would close its infringement case only when it was satisfied the Austrian authorities had taken the necessary steps;

- O. whereas in November 2010 the complainants turned to the Ombudsman again and a second inquiry was opened, in the course of which the Ombudsman conducted an inspection of the Commission's file; whereas the Ombudsman considered that the file did not show that the representations which the complainants had made during the period in which the *ex post* EIA was being carried out had been discussed with the Austrian authorities, nor that the Ombudsman's decision in the first complaint had given rise to any further correspondence besides the reports on the EIA from Austria;
- P. whereas this state of affairs led the Ombudsman to the conclusion that the Commission had failed to take his findings from the first inquiry into account, in particular that it had not been consistent in its replies to the Ombudsman concerning the possibility of legal redress against the *ex-post* EIA and that it had not insisted on appointing an entity to conduct the EIA other than the Ministry of Transport, which had authorised the works;
- Q. whereas the Ombudsman made a draft recommendation to the Commission, urging it to 'reconsider its approach as regards the handling of the complainants' infringement complaint concerning Vienna airport and address the deficiencies highlighted by the Ombudsman' and pointing out that this meant 'that the Commission's further actions in the infringement proceedings should take into account the obligation of the national authorities to ensure that (i) the complainants have access to a review procedure and (ii) steps are taken to deal with a manifest conflict of interest in the application of Directive 85/337';
- R. whereas the Commission argued in its reply to the Ombudsman on the first issue that it had raised the issue of legal redress with the Austrian authorities but had accepted their position that this would have raised problems in terms of the national law of judicial procedure, and pointed out that the Austrian authorities had committed themselves to ensure that the cumulative effects of the previous, only *ex post* assessed works, would be fully taken into account in an EIA of a new third runway against which full judicial review would be possible;
- S. whereas the Commission's argument concerning the second allegation of maladministration was that the EIA Directive did not establish any provisions regarding the distribution of competences in respect of the EIA procedure to be conducted in the Member States; whereas in line with the principle of subsidiarity it is entirely for the Member States, being responsible for the organisation of their own administration, to decide which authority should be in charge of procedures under the EIA Directive, and whereas it is a general principle of administrative law in all Member States that an authority which has taken an unlawful decision which has been subject to an administrative appeal or court ruling is in charge of remedying the situation;
- T. whereas the draft recommendation was, thus, not successful and the Ombudsman considered that the present case was an example of a situation where the Commission, in relation to a clear infringement of EU law, had failed to take appropriate remedial action by ensuring that the *ex-post* environmental impact assessment was carried out impartially

and where it had not appropriately followed up the Ombudsman's advice concerning access to legal redress against this assessment;

- U. whereas the Ombudsman therefore took the view that it was appropriate to bring the matter to the attention of Parliament;
- V. whereas the Commission adopted a proposal for a review of the EIA Directive on 26 October 2012; whereas its Committee on Legal Affairs has drafted a legislative initiative report requesting a general regulation on administrative procedure for the EU's own administration;

The Ombudsman's recommendation

1. Welcomes the Ombudsman's special report, which highlights important issues relating to problems concerning the application of the EIA Directive and the conduct of the infringement proceedings;
2. Recalls that maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it;
3. Notes that the alleged maladministration concerned the way in which the Commission handled the infringement proceedings against Austria, notably its failure to ensure both, that the authority which had issued permits for works without the required impact assessment would not be responsible for conducting the *ex-post* EIA and that the complainant would have access to legal redress against this assessment;
4. Stresses that this special report does not deal with the question of whether the Austrian authorities acted wrongly, but addresses the question of whether the Commission failed in its obligations when investigating and acting on a complaint it had received and in its response to the Ombudsman's requests and recommendations from his first investigation into this case;
5. Shares the Ombudsman's concern about the potential negative impact of conflicts of interest in the carrying out of environmental impact assessments and agrees that means should be sought to address this issue while at the same understanding the Commission's worries about exceeding its competences if it had required the Austrian authorities to appoint another entity to be responsible for the *ex-post* assessment;
6. Advises competent authorities in the Member States to pay attention to potential conflicts of interest already within the present state of the law and to prepare for eventual changes in EU law in this respect; stresses the role of national Ombudsmen as important mediators in helping citizens take action against potential conflicts of interest and cases of maladministration in general within Member States' administrations;
7. Considers, with regard to the Ombudsman's second allegation, that an honest, active and comprehensive inclusion of the local population in the application of the EIA Directive is on the whole essential and thus believes that open and transparent mediation procedures should be carried out more frequently ahead of projects with a potential major impact on the local environment and human health; in this context, acknowledges the public

mediation which took place ahead of the EIA concerning the construction of a third runway at Vienna Airport and which also took account of the cumulative impact, e.g. the noise nuisance, of those enlargements affected by the infringement case at hand, for which a full review procedure is available;

8. Agrees with the Ombudsman that keeping and updating clear records forms part of good administration as it enables, for instance, the European Ombudsman to verify that his recommendations have been appropriately taken into account;
9. Considers it also advisable, as a relevant element of good administrative practice, to maintain an appropriate, clear and consistent correspondence with the complainants during infringement procedures and with the Ombudsman during his investigations;
10. Welcomes the Commission's statement that it intends to improve its practice on both these issues – written records and thorough correspondence – in order to avoid the problems in communication experienced in the case at hand;
11. Stresses that neither the Commission nor the Austrian authorities were violating any existing European legislation when carrying out the ex post EIA, which was based on an ad hoc negotiated sui generis procedure; points out, however, that, as EU law does not provide any legal basis for such a procedure, this is to be considered as exceptional and a consequence of a previous failure to comply with the directive, which cannot be remedied;
12. Considers that, in its negotiations with the Austrian authorities, the Commission could have made greater efforts with regard to the availability of a judicial review, bearing in mind the transposition of the relevant provisions (Article 10a) in Austrian law in 2005, as well as with regard to the conflict of interest in the Austrian Ministry responsible, bearing in mind the overarching principle in EU case-law that not only the letter of the law is to be followed but that the purpose and spirit of the legislation should also be taken into account;

The Vienna Airport case, the review of the EIA Directive and the Regulation on good administration

13. Considers that the circumstances which gave rise to the opening of the Commission's infringement procedure and consequently to the complaint to the European Ombudsman raise serious questions as regards the implementation by a Member State, in this case Austria, of Directive 85/337 at that time; welcomes the fact that the 2009 revision of the Austrian federal law implementing the EIA Directive duly took into account, inter alia, the findings of the infringement procedure at hand and thereby brought Austrian legislation into conformity with EU law in this respect;
14. Recalls that over the years several cases in which Member States allegedly allowed projects to be authorised and carried out without the required EIA have been brought to the attention of its Committee on Petitions;
15. Believes that, in cases where projects are highly likely to infringe basic requirements of the EIA Directive, the public concerned should have effective legal instruments available to it to seek immediate clarification by the EIA authority responsible concerning the

compliance of the projects with EU rules, so as to prevent irreversible environmental damage when such projects are implemented;

16. Notes also that the notion of an *ex post* EIA does not appear in the current EIA Directive and that this instrument was negotiated by the Commission in an attempt to deal with a *de facto* situation, in which permits had already been granted and works carried out;
17. Points out that the Vienna Airport case highlights weaknesses in the current EIA Directive, such as how to deal with projects which are practically irreversible because they have already been implemented, with possible environmental damage already having been done, and the problem of conflicts of interest within responsible authorities, as alleged in the case at hand;
18. Refers to the Annual Report 2011 of its Committee on Petitions, which stressed the need to ensure objectivity and impartiality with regard to EIAs; recalls that the Commission was asked to ensure that the EIA Directive would be ‘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’;
19. Welcomes the Commission’s proposal for a revision of the EIA Directive with a view to strengthening it; expresses its commitment to fully engaging with the Commission and Council in the procedure in order to ensure that this important directive serves its purpose in an ever more efficient and objective manner¹;
20. Notes that the current directive does not contain requirements relating to the objectivity and impartiality of the authorities responsible for authorisation and does not set any such requirements for bodies which carry out an EIA; notes that it does not contain any provisions either about how to proceed when a project has already been implemented or is close to finalisation or about how the concerned public could, by means of a clear and non-bureaucratic procedure, obtain immediate clarification from the EIA authority responsible about the conformity with EU rules of such projects, which are very likely to infringe basic provisions of the EIA Directive; considers therefore that the review of the EIA Directive offers a good opportunity to introduce such requirements and provisions;
21. Considers that this case also shows that, in addition to measures to strengthen the provisions of the EIA Directive, clearer procedures are required for infringement proceedings, preferably through the adoption of a general regulation on administrative procedures for the EU’s administration, thereby strengthening the position of the complainant; considers that such a regulation would be an appropriate means of clarifying the authorities’ obligations when communicating with complainants in an infringement case or with bodies representing European citizens, such as the Petitions Committee and the Ombudsman, e.g. by introducing an obligation to respond as soon as possible to recommendations of the Ombudsman in order to avoid misinterpretations, such as those which occurred in the case at hand;

¹ COM(2012)0628.

22. Instructs its President to forward this resolution to the Council, the Commission, the European Ombudsman, the European Network of Ombudsmen and the parliaments of the Member States.

EXPLANATORY STATEMENT

Since 1999 the infrastructure at the airport of Vienna has been undergoing improvements and an extension through a series of building projects which were authorised by the Austrian Federal Ministry for Transport, Innovation and Technology (BMVIT). When the complainants first submitted a complaint to the Commission in 2006¹ the Commission concluded that an EIA under Directive 85/337/EEC (the 'EIA Directive') should have been carried out.

The Commission also took the view that as the development consent had been given and the projects had already been realised or were close to completion the purpose of the EIA Directive could not be attained. In negotiations with the Austrian authorities the Commission agreed not to pursue its infringement procedure, on the condition that Austria would carry out an *ex post* EIA which would simulate in the best possible way an *ex ante* EIA and would allow for a full assessment of the environmental impact of the projects.

The complainants were critical of the way the Commission was handling the case and submitted a complaint to the European Ombudsman. The Ombudsman closed his inquiry on 2 December 2009 with the following conclusions:

- The BMVIT which was to carry out the *ex post* EIA was the same authority which had granted the permits for the projects. As this was also the authority which initially had failed to make sure that the provisions of Directive 85/337/EEC were adhered to, this means that the involvement of the BMVIT gave rise to a conflict of interest.
- The Commission had stated that the *ex post* EIA would be carried out in accordance with Articles 5 to 10 of the EIA Directive. The complainants considered that Article 10a should apply as well. Article 10a stipulates that members of the public shall "*have access to a review procedure [...] to challenge the substantive or procedural legality of decisions acts or omissions subject to the public participation provisions of this Directive*". The Commission did not request specific assurances from Austria concerning the applicability of Article 10a. The Ombudsman found it hard to see why the Commission had not requested an explicit assurance.

The Ombudsman considered that he was not able to conclude that the Commission had ensured that the *ex post* EIA was carried out properly and, in consequence, that its infringement procedure had been properly conducted. He noted that the Commission had indicated that it would not close the infringement procedure until it was satisfied that the possible environmental impacts had been adequately assessed and the Austrian authorities had given the necessary follow-up to the findings of the EIA. At this point he considered that there were no grounds for further inquiries into the matter and in December 2009 he decided to close his inquiry stipulating that he trusted the Commission would take due account of his findings.

On 30 November 2010 the complainants again turned to the Ombudsman, who opened a

¹ Complaint 1532/2008/(WP)GG.

second inquiry¹ concerning i) the allegation that the Commission failed properly to conduct its infringement proceedings against Austria, in particular by failing to ensure that the EIA was carried out properly, and ii) the claim that the Commission should ensure that a proper *ex post* EIA would be carried out, including a monitoring mechanism in which the complainants would have the right to be involved or, should this not be possible, bring the case before the Court of Justice.

The Ombudsman's assessment leading to a draft recommendation

The Ombudsman's decision to close the inquiry of the first complaint in December 2009 was based on the Commission's undertaking that it would only close its infringement procedure once it was satisfied that the environmental impacts of the airport extension works had been adequately assessed and Austria had taken the necessary steps to implement the required measures. At that time the *ex post* EIA was still ongoing. The Ombudsman therefore considered that it would have been easy for the Commission to intervene with the Austrian authorities to address the issues raised in his closing decision. However, the inspection of the file showed that the Commission had not taken such action but had waited for the final report by the Austrian authorities.

The Ombudsman had pointed out that he considered the complainants' argument that the role of the BMVIT gave rise to a manifest conflict of interest appeared to be well-founded. He had stressed the importance of Article 10a and had underlined that it was far from sure that citizens would be able to make use of a review procedure for the *ex post* EIA under Austrian law.

The Ombudsman considered that it would have been appropriate for the Commission to assess the issues he had raised in his decision on the first complaint and wondered why it had not done so. He added that his doubts as regards the availability of a review under Article 10a had been reinforced by the reply of the Austrian Minister and the Austrian Court of Auditors.

In view of this the Ombudsman considered that the complainants' allegation that the Commission failed to conduct its infringement proceedings against Austria was well-founded. The Ombudsman therefore made the following draft recommendation to the Commission:

The Commission should correct its approach as regards the handling of the complainants' infringement complaint concerning Vienna airport, address the deficiencies highlighted by the Ombudsman in his decision of 2 December 2009 on complaint 1532/2008 and conclude its assessment as rapidly as possible.

The Ombudsman's assessment after the draft recommendation

Evaluating the parties' arguments received after the draft recommendation the Ombudsman recalls that he had already indicated that given the circumstances the Commission's decision to ask Austria to carry out an *ex post* EIA was both appropriate and reasonable in principle. The question to be examined therefore is whether the Commission ensured that this *ex post* EIA was carried out properly.

¹ Complaint 2591/2010/GG.

In this context the Ombudsman's doubts focus on two main issues:

1. the applicability of Article 10a of EIA Directive;
2. the conflict of interest of the authority carrying out the *ex post* EIA.

The Commission states that Article 10a would not have been applicable if the works had been subjected to an *ex ante* EIA, as the article was introduced by Directive 2003/35/EC to be implemented by 25 June 2005. The Ombudsman considers this argument to be plausible but is not convinced that the article should not be applicable to the *ex post* EIA either, since the aim of the *ex post* EIA was to simulate in the best possible way an *ex ante* EIA. Moreover, the article concerns the remedies available to citizens.

The Ombudsman sees no compelling reason why the article should not be applicable to the *ex post* EIA. The Austrian authorities omitted to conduct an EIA and, given that the law has evolved since, it would only seem fair that these changes would be taken into account, in the interest of the citizens concerned.

The Ombudsman notes that the Commission stated that it “*remained convinced*” that Article 10a was not applicable. In his inquiry into the first complaint the Ombudsman had specifically asked the Commission for its views on this issue and in its reply the Commission stated that it believed “*that those issues covered by the ‘ex post EIA’ can be subject to legal scrutiny as mentioned under Article 10a of the Directive*”. When the Ombudsman asked the Commission for further explanations on this issue, it added that Article 10a “*might have to be interpreted, even within the framework of an ex post EIA, as giving access to justice in relation to the administrative decision regarding potential further action in consequence of the findings of the ex post EIA.*”

In the Ombudsman's view, a comparison of the Commission's submissions suggests that the Commission either did not consider it necessary to thoroughly examine whether or not Article 10a was applicable to the *ex post* EIA, or made statements that would lead the complainants and the Ombudsman to believe that the article was applicable even though the Commission thought it was not. The Ombudsman considers that either of these possible interpretations would highlight a serious failure to comply with principles of good administration.

The Commission suggested that the fact that the remedies foreseen in Article 10a were not available for the *ex post* EIA could be remedied by the ongoing EIA for the new third runway.

As regards the conflict of interest the Ombudsman reiterates that an authority which, in the absence of the necessary EIA, granted permits for works to be carried out, finds itself in a conflict of interest when requested to carry out an *ex post* EIA.

The Commission argued that the Ministry was acting on the basis of the principle of legality and the rule of law. The Ombudsman finds the Commission's argument not convincing and his conclusion is that the Commission has patently failed properly to address the complainants' argument that the Ministry found itself in a manifest conflict of interest.

The Ombudsman made the following recommendation to the Commission:

The Commission should reconsider its approach as regards the handling of the complainants' infringement complaint concerning Vienna airport and address the deficiencies highlighted by the Ombudsman. This means that the Commission's further actions in the infringement proceedings should take into account the obligation of the national authorities to ensure that (i) the complainants have access to a review procedure and (ii) steps are taken to deal with a manifest conflict of interest in the application of Directive 85/337/EEC.

RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	22.1.2013
Result of final vote	+: 19 -: 0 0: 0
Members present for the final vote	Margrete Auken, Elena Băsescu, Heinz K. Becker, Victor Boştinaru, Giles Chichester, Nikolaos Chountis, Carlos José Iturgaiz Angulo, Peter Jahr, Lena Kolarska-Bobińska, Miguel Angel Martínez Martínez, Ana Miranda, Chrysoula Paliadeli, Angelika Werthmann, Tatjana Ždanoka
Substitute(s) present for the final vote	Zoltán Bagó, Birgit Collin-Langen, Jaroslav Paška, Axel Voss
Substitute(s) under Rule 187(2) present for the final vote	Jan Kozłowski