



Special Report of the European Ombudsman concerning his inquiry into complaint 2591/2010/GG against the European Commission

Special Report

Case 2591/2010/GG - **Opened on** 20/12/2010 - **Recommendation on** 29/07/2011 - **Special report on** 14/05/2012 - **Decision on** 14/05/2012 - **Institution concerned** European Commission (Closed after Special Report) |

Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1]
Summary

1. The present case concerns the way in which the European 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 ("the complainants"). The Commission reached the conclusion that the relevant works had been carried out without the obligatory environmental impact assessment ("EIA"). In order to remedy this omission, it agreed with the Austrian authorities that the latter would carry out an *ex post* EIA. The final report on this procedure was submitted to the Commission in February 2011.
2. The complainants were unhappy with the way in which the *ex post* EIA had been carried out. Among other things, they criticized that (i) that the authority in charge of the relevant procedure was the very same authority that had granted permits for the relevant works and thus found itself in a manifest conflict of interest and (ii) that they did not have access to a review procedure, as foreseen by the relevant EU directive.
3. In 2008, the complainants turned to the European Ombudsman. Having examined the matter, the Ombudsman took the view that the complainants' arguments concerning the above two issues appeared to be well-founded at first sight and that, at that point in time, he was therefore unable to conclude that the Commission had ensured that the *ex post* EIA had been carried out properly. However, given that the procedure was ongoing and that the Commission had stated that it would only close the infringement case when it was satisfied that the Austrian authorities had taken the necessary steps, the Ombudsman considered that there was no need for further action on his part at that stage. He therefore closed his inquiry in December 2009, making it clear that he trusted that the Commission would take his findings into account.
4. In November 2010, the complainants turned to the Ombudsman again. The Ombudsman opened a second inquiry, in the course of which he inspected the Commission's file. The



inspection showed that the file did not contain any other significant correspondence between the Commission and the Austrian authorities during the period when the *ex post* EIA was being carried out. In particular, there was nothing to suggest that the representations that the complainants had made during that period had been discussed in writing with the Austrian authorities. Nor did the Ombudsman's decision on complaint 1532/2008 appear to have given rise to any such correspondence. This state of affairs led the Ombudsman to the conclusion that the Commission failed to take his findings from the first inquiry into account. He therefore made a draft recommendation urging the Commission to reconsider its position. This draft recommendation was not successful.

5. The Ombudsman considers that the present case constitutes a deplorable example of a situation where the Commission (i) failed to take appropriate remedial action in relation to a clear infringement of EU law in an important case and (ii) chose to ignore the Ombudsman's advice. He therefore takes the view that it is appropriate to bring the matter to the attention of the European Parliament.

The background to the complaint

6. 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 authorities. When the complainants drew the Commission's attention to these works in 2006, the latter reached the conclusion that an EIA ought to have been carried out pursuant to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. [2] However, the Commission took the view that the purpose of Directive 85/337 could not be attained where the development consent had been given without an EIA having been carried out and where, as in the present case, the projects had already been realised or where construction was close to completion. In these circumstances, the Commission agreed in negotiations with Austria to abstain from further pursuing the infringement procedure while, in turn, Austria would elaborate an "*ex post* EIA" simulating in the best possible way an *ex ante* EIA and allowing for a full assessment of the relevant projects' environmental impact.

7. The complainants criticized the way in which the Commission proceeded in this case. They therefore turned to the Ombudsman (complaint 1532/2008/(WP)GG).

8. In his decision of 2 December 2009 closing his inquiry into this case, the Ombudsman *inter alia* reached the following conclusions:

- The authority that was entrusted with the *ex post* EIA was the Austrian Federal Ministry for Transport, Innovation and Technology ('BMVIT'). The Commission did not dispute that this Ministry had issued some of the permits for the projects concerned. This meant that the *ex post* EIA had been entrusted to an authority that initially seemed to have failed to ascertain that Directive 85/337 was respected. In these circumstances, the complainants' argument that the involvement of the BMVIT gave rise to a manifest conflict of interest at first sight seemed to be well-founded.

- The Commission had stated that the *ex post* EIA would be carried out pursuant to Articles 5 to 10 of Directive 85/337. In the complainants' view, however, Article 10a had to apply as



well. According to this provision, "members of the public" shall, subject to certain conditions, "have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive". The Commission explained that, when accepting that an *ex post* EIA was to be carried out, it did not seek explicit assurances from Austria concerning the applicability of Article 10a of Directive 85/337, since this provision constituted substantive law and could not be made the subject of an agreement with Member States. The Ombudsman was at a loss to understand this argument. Regardless of whether Article 10a constituted substantive or procedural law, it was difficult to see what could have prevented the Commission from seeking an explicit assurance from the Austrian authorities that this provision would be respected, provided that it was applicable in this case.

9. In view of those circumstances, the Ombudsman took the view that, at that point in time, he was unable to conclude that the Commission had ensured that the *ex post* EIA was carried out properly and that it had thus properly conducted its infringement proceedings against Austria concerning Vienna airport.

10. However, the Ombudsman also noted that neither the *ex post* EIA nor the Commission's investigation had been completed at that time. He further noted that the Commission had informed the complainants that it would only propose closing the infringement procedure after it was satisfied that possible relevant impacts from the various airport extensions had been adequately assessed and, in particular, that Austria had taken the necessary steps in order to give the findings of the impact assessment practical effect.

11. In these circumstances, the Ombudsman considered that, at that time, there were no grounds for further inquiries into the matter. However, in his decision closing his inquiry, which was adopted in December 2009, the Ombudsman pointed out that he trusted that the Commission would take due account of his findings.

12. On 30 November 2010, the complainants again turned to the Ombudsman (complaint 2591/2010/GG). In their new complaint, they pointed out that, as far as they knew, the Commission had not taken any further steps in pursuing the infringement proceedings against Austria since the Ombudsman's decision had been adopted.

The subject matter of the inquiry

13. The Ombudsman therefore decided to open a second inquiry concerning the following allegation and claim:

Allegation:

The Commission failed properly to conduct its infringement proceedings against Austria concerning Vienna airport, in particular by failing to ensure that the EIA was carried out properly.



Claim:

The Commission should either see to it that a proper *ex post* EIA is carried out, including a monitoring mechanism in which the complainants have the right to be involved or, should this not be possible, bring the case before the Court of Justice.

The inquiry

14. After having obtained the Commission's opinion and the complainants' observations, the Ombudsman decided to proceed to an inspection of the Commission's file.

15. On 29 July 2011, the Ombudsman addressed a draft recommendation to the Commission.

16. On 17 November 2011, the Commission submitted its detailed opinion on the Ombudsman's draft recommendation.

17. The complainants subsequently informed the Ombudsman that they did not wish to comment on the Commission's attitude anymore. They pointed out that they had put their arguments to the Commission time and again and queried whether the Ombudsman would be able to do anything for them or whether the aviation lobby was going to gain a final victory over the law and citizens' rights.

The Ombudsman's analysis and conclusions

A. Alleged failure properly to conduct infringement proceedings and related claim

Arguments presented to the Ombudsman

18. The complainants reiterated their view that the Commission failed properly to handle their infringement complaint. They criticized, in particular, that their right to appeal pursuant to Article 10a of Directive 85/337 had been violated.

19. In its opinion, the Commission reiterated its view that it was proportionate and reasonable for it to abstain from further pursuing the infringement procedure while Austria was carrying out an *ex post* EIA simulating in the best possible way an *ex ante* EIA. The Commission also described the steps that the Austrian authorities had taken in this context.

20. The Commission pointed out that the Austrian authorities transmitted the final report on the *ex post* EIA on 15 February 2011. It reiterated that the infringement case would only be closed once it was satisfied that possible relevant impacts from the various airport extensions had adequately been assessed and, in particular, that Austria had taken the necessary steps in order to give practical effect to the findings of the impact assessment, that is to say, after possible compensation measures resulting from the EIA had been implemented.

21. In their observations, the complainants took the view that the Commission still



maintained that the *ex post* environmental impact report, which had been submitted, was acceptable, even though it did not even remotely correspond to an *ex post* environmental impact assessment. The complainants argued that the Commission disregarded all the arguments submitted to it and that it also ignored the Ombudsman's references to the deficiencies of the relevant procedure.

22. The complainants submitted that the Commission did not take into account the fact that, in a report concerning Vienna airport, the Austrian Court of Auditors had reached the following conclusion as regards the *ex post* EIA carried out in this case: "As regards the possibilities for citizens to participate and the possibilities of legal protection, this procedure does not meet the standard of an EIA procedure".

23. The complainants argued that the Commission acted as the servant of the aviation sector. For four years, it had allowed Austria illegally to extend Vienna airport. The costs of the investment by now amounted to around EUR 1.5 billion. All the relevant works had been carried out without an EIA.

24. In the complainants' view, there was manifest maladministration.

25. Having examined the above submissions, the Ombudsman took the view that it was necessary to inspect the Commission's file.

26. The inspection, which was carried out in June 2011, showed that the concept for the *ex post* EIA had been submitted to the Commission in March 2008 and that the Austrian authorities had reported to the Commission on the progress of the *ex post* EIA in September 2008, June 2009, November 2009 and July 2010.

27. The inspection further showed that the file did not contain any other significant correspondence between the Commission and the Austrian authorities during the period when the *ex post* EIA was being carried out. In particular, there was nothing to suggest that the representations that the complainants had made during that period had been discussed in writing with the Austrian authorities. Nor did the Ombudsman's decision of 2 December 2009 on complaint 1532/2008/(WP)GG appear to have given rise to any such correspondence.

28. In their observations on the inspection report, the complainants stated that the inspection confirmed that their arguments had either not at all or not properly been dealt with.

29. On 25 July 2011, the complainants forwarded to the Ombudsman the reply that Mrs B., the Austrian Federal Minister for Transport, Innovation and Technology had, on 8 July 2011, provided to a number of questions put to her by members of the Austrian parliament. In this reply, Mrs B. confirmed that, given the legal nature of the *ex post* environmental assessment report, no remedies were available under Austrian law as regards this report.



The Ombudsman's assessment leading to a draft recommendation

30. The Ombudsman noted that the Commission had reiterated that it would only close the infringement case once it was satisfied that possible relevant impacts from the various airport extensions had adequately been assessed and, in particular, that Austria had taken the necessary steps in order to give practical effect to the findings of the impact assessment. It was this reassurance that led the Ombudsman to close his first inquiry into this matter in December 2009.

31. However, when that decision was taken, the *ex post* EIA carried out by the Austrian authorities was ongoing. At that stage, it would therefore have been easy for the Commission to intervene with the Austrian authorities in order to address the issues which the Ombudsman raised in his decision of 2 December 2009.

32. However, the inspection of the Commission's file carried out in June 2011 showed that the Commission had not taken any further action but simply waited for the final report to be submitted to it by the Austrian authorities.

33. The Ombudsman stressed that some of the issues he had raised concerned the very foundation of the *ex post* EIA. In particular, the Ombudsman had pointed out that, in light of the circumstances of the case, the complainants' argument that the involvement of the BMVIT gave rise to a manifest conflict of interest appeared to be well-founded at first sight. Moreover, the Ombudsman had stressed the importance of Article 10a of Directive 85/337 and underlined that it was far from sure that citizens would be able to make use of a review procedure under Austrian law as regards the *ex post* EIA.

34. The Ombudsman therefore considered that it would have been appropriate for the Commission to assess the issues that he had raised in his decision on complaint 1532/2008. He failed to understand why the Commission did not appear to have taken any action in this regard. It was true that, in his said decision, the Ombudsman had stated that he trusted that the Commission would take due account of this decision when adopting its final decision on the complainant's infringement complaint. However, and given the nature of the issues raised by the Ombudsman, the Commission could hardly interpret this as meaning that it should postpone dealing with these issues till the very end.

35. The Ombudsman added that, as regards Article 10a of Directive 85/337, the doubts concerning the availability of means of review in the present case that the Ombudsman had expressed in his decision of 2 December 2009 had in the meantime been reinforced by the above-mentioned statements made by the Austrian Court of Auditors and the Austrian Federal Minister for Transport, Innovation and Technology.

36. In view of the above, the Ombudsman considered that the complainants' allegation that the Commission manifestly failed properly to conduct its infringement proceedings against Austria concerning Vienna airport was indeed well-founded.



37. 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 arguments presented to the Ombudsman after his draft recommendation

38. In its detailed opinion on the draft recommendation, the Commission recalled that, when it was made aware of the infringement, most of the relevant projects at the Vienna airport had either been completed or were in the final stage of completion. The Commission used its discretion to refrain from further procedural steps against Austria under the condition that the Austrian authorities carry out an EIA of these projects on an *ex post* basis. The primary consideration was that impacts that had possibly occurred during the relevant projects could no longer be the subject of remedial actions, but that impacts that were caused by the use of the built airport infrastructure could still be identified and addressed by corrective measures. An *ex post* EIA could thus help to identify possible actions that are appropriate to avoid, minimise or compensate such likely significant impacts.

39. The Commission submitted that the Ombudsman's draft recommendation could be interpreted as a request to restart the entire *ex post* EIA procedure. In the Commission's view, this would not be feasible and disproportionate. The Commission further argued that the cumulative environmental impacts of the relevant projects were integrated in the regular EIA procedure for the new third runway which was currently being carried out in full conformity with the EIA Directive, including Article 10a.

40. The Commission explained that it had in the meantime completed its assessment of the report submitted by the Austrian authorities and had asked the latter for further information and clarifications. In particular, the Commission had asked the Austrian authorities to confirm that the public was duly informed and that the results of the procedure would officially be made available to the public. In this context, the Commission mentioned that it did not consider the BMVIT's final report as a formal decision on the results of the *ex post* EIA and the compensatory measures. For the sake of clarification and taking into account the comments of the Ombudsman, the Commission had also asked Austria to explain whether the decision by the authorities on the results of the *ex post* EIA, notably on the compensatory measures, could be subject to a legal review. Finally, the Commission had sought confirmation from Austria that the competent environmental authorities had been involved in the *ex post* EIA process, as foreseen in Article 6(1) of the EIA Directive for an *ex ante* EIA, and pointed out that the final report had not been clear in that respect.

41. In their reply, the Austrian authorities had explained that, as regards the possibilities of legal remedies in the context of the *ex post* EIA, the Vienna Airport operator had committed



itself to implement all the measures identified in the process and that the implementation would be monitored by the BMVIT. In case the mitigation measures were not properly carried out, the authorities could enforce them on the basis of Article 141 of the Austrian air traffic act ("Luftfahrtgesetz"). In addition, the Austrian authorities had referred to the agreement concluded as a result of the mediation process that had been carried out in the context of the extension of the airport. The mitigation measures agreed in this process could be enforced on the basis of civil law by those citizens who joined the agreement. Finally, the Austrian authorities had pointed to the EIA for the projected third runway of the Vienna airport that would also take into account the effects of the projects subject to the *ex post* EIA. This procedure would be concluded with a decision which could be legally reviewed according to the requirements of Article 10a of Directive 85/337.

42. The Commission stated that it had carefully re-assessed the Ombudsman's decision of 2 December 2009 in light of the final report on the *ex post* EIA submitted by the Austrian authorities and the further information provided by them.

43. The Commission acknowledged that the wording used by the Austrian authorities for the procedure agreed with the Commission - " *ex post* EIA report " instead of " *ex post* EIA assessment " - could initially indeed have been misleading. It stressed, however, that the common understanding had been that the exercise undertaken covered an *ex post* assessment process ("ex-post Umweltprüfung"), and was not limited to simply producing an assessment report.

44. Regarding the involvement of the BMVIT in the *ex post* EIA procedure as the authority which authorised some of the projects at stake, the Commission believed that the Ministry, as an administrative body, was acting on the basis of the principle of legality and the rule of law. The mere fact that the BMVIT had issued some of the permits concerning Vienna airport could in its view not justify the allegation of a manifest conflict of interest.

45. As regards the applicability of Article 10a of Directive 85/337, the Commission indicated that it had looked again at the issue and remained convinced that there was no legal basis under EU law which could have obliged the Austrian authorities to apply this provision when negotiating the concept for the *ex post* EIA, which was aiming at simulating, as far as possible, an *ex ante* EIA. Therefore, the application of Article 10a could only have been considered and eventually required if that provision had been applicable in the case of an *ex ante* EIA for the extension works at stake. However, Article 10a was introduced by Directive 2003/35/EC to be implemented by 25 June 2005. According to the information provided in the concept for an *ex post* EIA, the applications for the relevant projects were submitted to the Austrian authorities before that date, and most of them had even been completed by June 2005. However, the Commission believed that this deficiency could be remedied by the ongoing EIA for the new third runway at Vienna airport. This new assessment had to take into account the cumulative effects of already existing buildings and facilities, including the ones covered by the *ex post* EIA. For this regular EIA, Article 10a fully applied.

46. The Commission added that it did not approach the Austrian authorities again on these issues before receiving the final report on the *ex post* EIA as it had already communicated its



views on these mainly legal questions in the context of the Ombudsman's inquiry into complaint 1532/2008/(WP)GG. The Commission, therefore, considered it reasonable to carry out a final assessment of the relevant issues only after analysing the final report, taking into account the remarks in the Ombudsman's decision.

47. The Commission concluded by stating that it was of the opinion that, as illustrated by the clarifications provided above, its approach in dealing with this case was correct.

48. As mentioned above, the complainants did not submit any substantive observations on the Commission's detailed opinion.

The Ombudsman's assessment after his draft recommendation

49. The Ombudsman considers it useful to recall that, in his decision on complaint 1532/2008/(WP)GG, he acknowledged that, in the circumstances of the case, the Commission's decision to ask Austria to carry out an *ex post* EIA which would objectively assess the project's environmental impact following the criteria laid down in Directive 85/337 and render it possible to determine on a scientific basis whether compensatory measures had to be taken was both appropriate and reasonable in principle. What needs to be examined here, thus, is whether the Commission ensured that this *ex post* EIA was indeed carried out properly.

50. In this context, the Ombudsman further recalls that the doubts he expressed in this regard both in his decision on complaint 1532/2008/(WP)GG and in his draft recommendation in the present case focused on two issues in particular, namely, (i) the applicability of Article 10a of Directive 85/337 and (ii) the conflict of interest in which the authority carrying out the *ex post* EIA found itself.

51. The Ombudsman regrets to have to conclude that the Commission's detailed opinion did not dispel these doubts.

52. As regards the first of the above issues, the Commission put forward that Article 10a of Directive 85/337 would not have been applicable *ratione temporis* if the relevant works had been subjected to an EIA before they were carried out. The Ombudsman considers that this argument is plausible.

53. However, the Ombudsman is not convinced by the Commission's further argument that Article 10a of Directive 85/337 could thus not be applicable to the *ex post* EIA either, since the latter was supposed to resemble as closely as possible an *ex ante* EIA. The relevant provision does not concern the assessment that is to be carried out, but the remedies that are to be made available to citizens in this respect. In the Ombudsman's view, there is no compelling reason why this provision should not be applicable to an *ex post* EIA such as the one carried out in the present case. It was the authorities of the Member State concerned which omitted to proceed to an EIA when it should have been carried out. Given that the law



has evolved since then, it would only seem fair to take the view that these changes need to be taken into account, in the interest of the citizens concerned, when proceeding to an *ex post* EIA.

54. What is more, the Ombudsman cannot but note that this position initially seems to have been shared by the Commission. The wording used in the detailed opinion, according to which the Commission "remained convinced" that Article 10a was not applicable in the present case suggests a continuity of approach that simply did not exist. During his inquiry into complaint 1532/2008/(WP)GG, the Ombudsman specifically asked the Commission for its views on this issue. 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 of the EIA Directive "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." [3] [90]

55. In its opinion on the present complaint, in which the complainants laid particular emphasis on the issue of the applicability of Article 10a of Directive 85/337, the Commission did not address this issue at all. The Ombudsman notes that it was only in its detailed opinion on the draft recommendation that the Commission argued, for the first time, that the said provision was not applicable in the present case. The Commission would thus appear to have raised a completely new argument, nearly three and a half years after it had first been confronted with the matter by the Ombudsman.

56. In the Ombudsman's view, a comparison of the Commission's submissions suggests that the Commission either did not consider it necessary thoroughly to examine whether or not Article 10a of Directive 85/337 was applicable to the *ex post* EIA or made statements that were bound to induce the complainants and the Ombudsman to believe that the said provision 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. He therefore considers that Parliament should be given the possibility to consider the matter.

57. In its detailed opinion, the Commission suggested that the fact that the remedies foreseen in Article 10a were not available as regards the *ex post* EIA could be remedied by the ongoing EIA for the new third runway at Vienna airport [4] . The Ombudsman is at a loss to understand how an EIA for a specific new project could remedy the deficiencies of an EIA concerning another project. In fact, the EIA for the new runway at Vienna airport is intended to assess the impact of this new project, and not that of earlier projects.

58. As regards the second of the issues referred to in point 50 above, the Ombudsman cannot but reiterate his view that an authority which, in the absence of the necessary EIA, granted permits for works to be carried out, will necessarily find itself in a conflict of interest if it is then asked to carry out an *ex post* EIA.



59. In its detailed opinion, the Commission basically argued, in so far as this issue was concerned, that the relevant Ministry was acting on the basis of the principle of legality and the rule of law. The Ombudsman considers it useful to recall again that the said Ministry granted some of the permits for works to be carried out even though the necessary EIA had not been carried out. The Commission's argument is thus obviously not convincing.

60. The Ombudsman is therefore led to the conclusion that the Commission has patently failed properly to address the complainants' argument that the Ministry concerned found itself in a manifest conflict of interest in the present case. Given the importance of this issue, the Ombudsman considers that Parliament should be seized of this issue as well

B. The Ombudsman's recommendation

The Ombudsman therefore makes 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.

The European Parliament could consider adopting a resolution accordingly.

P. Nikiforos Diamandouros

Done in Strasbourg on 14 May 2012

[1] Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15; last amended by the Decision of the European Parliament of 18 June 2008 (OJ 2008 L 189, p. 25).

[2] OJ L 175, p. 40. This directive was amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ L 156, p. 17) and Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 (OJ L 140, p. 114).

[3] See point 90 of the Ombudsman's decision on complaint 1532/2008/(WP)GG.

[4] It is interesting to note that the Commission refers to a 'deficiency' in this context. The wording used by the Commission might indicate that the Commission itself has doubts about the wisdom of its position that Article 10a of Directive 85/337 was not applicable to the ex



post EIA.