Médiateur européen

Décision dans l'affaire 1532/2008/(WP)GG - Allégation de défauts dans la procédure d'infraction à l'encontre de l'Autriche concernant l'aéroport de Vienne

Décision
Affaire 1532/2008/(WP)GG - **Ouvert le** 30/06/2008 - **Décision le** 02/12/2009

Depuis 1999, l'infrastructure de l'aéroport de Vienne a été améliorée et étendue par le biais de plusieurs projets de construction. Les plaignants, 27 initiatives populaires, ont introduit leurs plaintes auprès de la Commission européenne. La Commission a conclu qu'une étude d'impact sur l'environnement (EIE) aurait dû être effectuée conformément à la directive 85/337/CEE du Conseil avant l'octroi de toute autorisation d'extension. Toutefois, étant donné que les projets étaient déjà achevés ou proches de leur terme, la Commission a accepté, dans le cadre de négociations avec l'Autriche, de s'abstenir de poursuivre la procédure d'infraction, cependant que l'Autriche était tenue de mener une «EIE *ex post* » simulant du mieux possible une EIE *ex ante* et permettant une évaluation complète de l'impact environnemental des projets concernés.

Dans leur plainte adressée au Médiateur, les plaignants ont principalement fait valoir que la Commission n'avait pas mené correctement la procédure d'infraction contre l'Autriche.

Au terme d'une enquête méticuleuse, le Médiateur a conclu que l'approche adoptée par la Commission était à la fois adaptée et raisonnable en principe.

Toutefois, le Médiateur a estimé que les modalités d'application de cette approche posaient de réels problèmes. Ces problèmes concernaient en particulier trois aspects de cette affaire. Premièrement, le Médiateur a remarqué que l'EIE *ex post* avait été confiée au même ministère que celui qui a délivré les permis relatifs au projet. Dans ces conditions, l'argument opposé par les plaignants, selon lequel l'implication de ce ministère constituait un conflit d'intérêt manifeste semblait a priori parfaitement fondé. Deuxièmement, la Commission a admis que c'est 1999 qui devrait être considérée comme année de base pour l'EIE *ex post* , même s'il s'agit de l'année de début des travaux et qu'il aurait donc été plus logique de choisir 1998. Troisièmement, l'article 10bis de la directive 85/337 prévoit que les citoyens peuvent, sous certaines conditions, former un recours devant une instance juridictionnelle ou un autre organe indépendant et impartial. Malgré l'importance du droit ainsi accordé, la Commission n'a pas cherché à obtenir de telles garanties explicites de la part de l'Autriche dans cette affaire. D'autre part, les réponses de la Commission aux questions précises du Médiateur dans cette affaire n'ont été ni claires, ni convaincantes.

Au vu de ce qui précède, le Médiateur a estimé qu'il était actuellement dans l'impossibilité de conclure que la Commission avait veillé à ce que l'EIE *ex post* soit effectuée dans les règles.

Toutefois, ni l'EIE *ex post* , ni l'enquête de la Commission n'étaient encore été terminées.

Le Médiateur a remarqué que la Commission avait réservé sa décision concernant la suite à donner à cette affaire tant qu'elle n'aurait pas reçu et examiné les résultats de l'EIE *ex post* . Dans la mesure où la Commission n'avait pas encore adopté de position définitive dans cette affaire, le Médiateur a estimé qu'il n'y avait pas lieu de la traiter pour l'instant.

Le Médiateur a toutefois ajouté qu'il faisait confiance à la Commission pour prendre en compte ses conclusions au moment où elle rendrait sa décision finale sur la plainte pour infraction des plaignants. Il a fait remarquer que les plaignants avaient la possibilité de le saisir à nouveau si la décision finale de la Commission ne leur donnait pas satisfaction.

THE BACKGROUND TO THE COMPLAINT

Complaint 1140/2008/WP

1. On 21 April 2008, the Ombudsman received a complaint against the European Commission (complaint 1140/2008/WP). This complaint concerned the way in which the Commission was dealing with a complaint alleging an infringement of Community law by Austria (infringement complaint 2006/4959). The complaint to the Ombudsman was submitted by an Austrian lawyer who pointed out that she was acting on behalf of 27 citizens' initiatives fighting against the negative consequences of the expansion of Vienna airport ("the complainants").

2. 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 its attention was drawn to these works, the Commission reached the conclusion that an environmental impact assessment ("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. [1] 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.

3. The complainants submitted that the Commission violated minimum standards of the rule of law by departing from standard infringement procedures in a way that strongly advantaged one

side and disadvantaged the other. They criticized that the Commission had included Flughafen Wien AG (the company running the airport of Vienna) as a *de facto* party in its negotiations, whereas it had denied a similar status to them. The complainants noted that they did not categorically object to the approach adopted by the Commission but argued that its implementation showed that it aimed at serving the interests of Flughafen Wien AG and of the Austrian government and at helping them to amend their infringement in the easiest possible way. According to the complainants, the Commission's behaviour was not in conformity with Directive 85/337 and the judgment of the Court of Justice of the European Communities (the "Court of Justice") in Case C-2/07. [2]

4. The complainants claimed that the Commission should either see to it that a proper *ex post* EIA was carried out, which in any event had to provide for proper monitoring in which the complainants had to be involved, or that it should bring the matter before the Court of Justice.

5. In their complaint to the Ombudsman, the complainants stated that on 9 April 2008 they had written to the Commissioner for Environment in relation to their case.

6. Given that fewer than two weeks had passed between the date that letter was sent out and the time when the complainants turned to the Ombudsman, the latter took the view that the complainants had not complied with Article 2(4) of his Statute. According to this provision, a complaint to the Ombudsman needs to be preceded by appropriate prior approaches to the Community institution or body concerned. This does not only mean that such approaches have to be made but also that the Community institution or body concerned has to be given a reasonable period of time to react.

7. The Ombudsman therefore informed the complainants that he was at present unable to deal with their complaint. He advised them, however, that they could renew their complaint, if the Commission were to fail to provide a satisfactory reply to the letter of 9 April 2008 within a reasonable period of time.

Complaint 1532/2008/(WP)GG

8. On 25 May 2008, the complainants informed the Ombudsman that they had already approached the Commission on a number of occasions but that the latter was not ready to address their grievances. The complainants' letter of 25 May 2008 was therefore registered as a new complaint (complaint 1532/2008/(WP)GG).

9. The complainants enclosed copies of their correspondence with the Commission.

10. From this correspondence, it appeared that the complainants criticised in particular (i) that the Commission allowed Austria to use 1999 as the year on which to base the assessment, even this year had witnessed an increase of flights by 100% in comparison to 1998 as regards one of the runways, (ii) that no official document containing the results of the negotiations on the concept of the *ex post* EIA was published, but that the only available document was an unsatisfactory document published by Flughafen Wien AG on its website, and (iii) that the

assessment was not properly monitored.

11. In reply, the Commission essentially stated that it had always been clear that 1999 was to be the reference year, that the concept for the EIA had been produced by an external consultant and published online and that the Commission would follow the EIA procedure while Austria would regularly report on progress. The EIA would also undergo public consultation. The Commission stated that it would only propose the closure of the infringement procedure after the *ex post* EIA had been carried out and possible compensation measures, which could result from the EIA, had been implemented.

THE SUBJECT MATTER OF THE INQUIRY

12. In their complaint, the complainants submitted the following allegation:

(1) The Commission failed properly to conduct its infringement proceedings against Austria concerning Vienna airport. In support of this allegation, they submitted that the Commission, having found an infringement of Community law, (1) deviated from normal procedures by negotiating an " *ex post* EIA" with Austria, (2) included Flughafen Wien AG as a *de facto* party in these negotiations, but did not do the same for the complainants, which unfairly disadvantaged the latter, and (3) failed to ensure that the EIA was carried out properly. As regards the last point, the complainants criticised in particular (i) that the Commission wrongly allowed Austria to base the assessment on the year 1999 as a reference year, (ii) that no official document containing the results of the negotiations on the concept of the *ex post* EIA was published and (iii) that the assessment was not properly monitored.

13. The above-mentioned point (iii) was initially not taken up for inquiry by the Ombudsman. However, the Ombudsman subsequently arrived at the conclusion that this aspect also needed to be examined. During the course of the inquiry, the complainants put forward the following further allegation, which was also included in the inquiry:

(2) The Commission (i) was granting preferential treatment to Austria by refraining from bringing an action before the Court of Justice, even though it had found a manifest infringement of Community law and (ii) was trying to protect Austria and to cover up the infringement.

14. The complainants claimed that the Commission should either see to it that a proper *ex post* EIA was carried out, which in any event had to comprise a monitoring mechanism in which the complainants had to be involved or, should this not be possible, bring the case before the Court of Justice.

THE INQUIRY

15. On 30 June 2008, the Ombudsman opened an inquiry and asked the Commission for an opinion on the complaint.

16. On 6 (English original) and 21 October 2008 (German translation), the Commission sent its opinion. On 9 and 28 October 2008, the Ombudsman forwarded this reply to the complainants with an invitation to make observations, which they sent on 30 October 2008.

17. On 2 December 2008, the Ombudsman asked the Commission for further information concerning this case.

18. On 11 December 2008, the complainants provided further information to the Ombudsman.

19. The Commission replied to the request for further information on 11 (English original) and 23 February 2009 (German translation). On 17 and 27 February 2009, the Ombudsman forwarded this reply to the complainants with an invitation to make observations, which they sent on 27 February 2009.

20. On 16 March 2009, the Ombudsman addressed a second request for further information to the Commission.

21. On 4 May 2009, the complainants provided further information to the Ombudsman.

22. On 12 May 2009, the Ombudsman asked the Commission for an opinion on the additional allegation raised by the complainants.

23. On 13 and 28 July 2009, the complainants provided further information to the Ombudsman.

24. The Commission replied to the second request for further information on 14 July (English original) and 18 August 2009 (German translation). On 16 July and 8 September 2009, the Ombudsman forwarded this reply to the complainants with an invitation to make observations, which they sent on 12 August 2009.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

A. Allegation of failure properly to handle infringement proceedings

Arguments presented to the Ombudsman

25. The complainants alleged that the Commission failed properly to conduct its infringement proceedings against Austria concerning Vienna airport. In support of this allegation, they submitted that the Commission, having found an infringement of Community law, (1) deviated from normal procedures by negotiating an " *ex post* EIA" with Austria, (2) included Flughafen Wien AG as a *de facto* party in these negotiations, but did not do the same for the complainants, which unfairly disadvantaged the latter, and (3) failed to ensure that the EIA was

carried out properly. As regards the last point, the complainants criticised in particular (i) that the Commission wrongly allowed Austria to base the assessment on the year 1999 as a reference year, (ii) that no official document containing the results of the negotiations on the concept of the *ex post* EIA was published and (iii) that the assessment was not properly monitored.

26. In its opinion, the Commission pointed out that it was faced with a situation in which development consent had already been given for all parts of the project concerned and where the works had either been completed or were at a stage close to completion. In these circumstances, it was evident that an *ex ante* EIA, as foreseen by Directive 85/337, was no longer possible. The Commission argued that it would evidently have been disproportionate to ask the Member State concerned, in order to go back to the situation before development consent had been given, to either demolish what had been built or to halt the construction works where they had not been completed yet. According to the case-law of the Community courts, Member States are required to nullify the unlawful consequences of a breach of Community law. Where a project should have been subject to an EIA, the competent authorities of the Member State concerned were obliged to take all general or particular measures for remedying the failure to carry out such an assessment. [3]

27. According to the Commission, it therefore appeared proportionate and in line with the spirit of the said case-law 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 allow it to determine on a scientific basis whether compensatory measures had to be taken.

28. The Commission stated that, after a letter of formal notice to Austria and after a reply from the Austrian authorities, a meeting had been held between its services and the Austrian State Secretary for Transport, in which it was agreed that Austria should carry out an *ex post* EIA with public participation regarding the construction activities carried out since 1999, including the nearly completed "Skylink" terminal. It was further agreed that, after the submission of an outline of the *ex post* EIA fully addressing all elements of an EIA, the Commission would signal whether it would put the infringement procedure on a halt. On 14 March 2008, Austria sent the final concept for an *ex post* EIA, which had been published and made fully accessible to the public. [4]

29. The Commission explained that, as was common practice, the EIA would be carried out by an external specialised consultant, who would produce a comprehensive environmental report reflecting the results of the EIA. The project would be carried out within one year, so that the final results could be expected by March 2009. The *ex post* EIA would simulate, in the best possible way, an *ex ante* EIA and be carried out pursuant to Articles 5 to 10 of Directive 85/337. The EIA would be subject to public consultation, as explained in Section 8.10 of the concept submitted by Austria. The assessment's result would be implemented, which meant that any possible damage to the environment would be compensated. The Commission took the view that this agreement was a perfectly reasonable step in the course of the infringement procedure with a view to finding an effective solution before the case would have to be taken to Court.

30. The Commission further stated that at no point in time had it included Flughafen Wien AG

as a *de facto* party to negotiations with Austria. Neither the airport nor the complainants could be a party to infringement proceedings pursuant to Article 258 TFEU [5] (ex- Article 226). A representative of the airport had been present only during one bilateral meeting between the Commission and Austria in order to respond to possible technical questions. Moreover, the complainants' lawyer and a colleague of hers had had a meeting with the Commission in August 2007. The Commission's services had also dealt with numerous letters and e-mails from them and had spent a good deal of time on the telephone with them, discussing the merits of their case in great detail. All arguments brought forward by them had been duly taken into account. In the Commission's view, the allegation that it had conducted the proceedings in a way that would have unfairly disadvantaged the complainants was therefore unfounded.

31. The Commission further submitted that it was reasonable to use 1999 as a base line for the EIA because this was the year the first construction measure started. It was perfectly in line with the purpose of Directive 85/337 to choose as a reference period the closest date prior to the launching of the project.

32. The Commission also noted that the complainants had requested access to a document which they called an "agreement between the Commission and Austria about the carrying out of an *ex post* EIA". However, the complainants had been informed by letter of 5 May 2008 that, apart from the concept for the EIA as published on the internet, no such separate agreement existed. According to the Commission, the result of the negotiations was fully reflected in the concept.

33. In view of the above, the Commission concluded by stating that it considered the complaint to be unfounded. The Commission observed that it was within its discretion when acting in its role as guardian of the Treaty to adopt decisions in pending infringement proceedings by taking into consideration a Member State's willingness to assume its duties in a way that gives the most practical effect to the allegedly infringed provision of Community law.

34. In their observations, the complainants pointed out that Flughafen Wien AG had carried out far-reaching measures without a prior EIA and that this had been possible because the Land Vienna and the Land Lower Austria were the main shareholders in Flughafen Wien AG. According to the complainants, authorities of the Land Lower Austria had deliberately ignored the duty to proceed to an EIA. They noted that even though there had been clearly an infringement of Community law, the Commission had refrained from taking the case to the Court of Justice.

35. As regards the concept for an " *ex post* EIA" that had been submitted to the Commission, the complainants considered that it had clearly been drawn up by representatives of Flughafen Wien AG. The complainants further argued that this concept had never been published by the Austrian authorities, but only been placed on a hidden page of the airport website. They also noted that citizens' representatives were not given the opportunity to comment on the concept, which they had only discovered by chance after it had already been adopted. The complainants pointed out that there was no declaration on the part of the Austrian authorities that they committed themselves to carrying out an EIA. Moreover, the concept referred to an

"Umweltverträglichkeits bericht " (environmental impact *report*) rather than to an "Umweltverträglichkeits prüfung " (environmental impact *assessment*) and was thus misleading. The contents of the relevant document aimed at denying that there was an obligation to carry out an EIA. The complainants further noted that the concept merely stated that the authority in charge of the *ex post* EIA would be determined at a later stage. They added that there was no mechanism for checking if the EIA was carried out properly. In particular, there seemed to be no right of appeal for the parties and it was not clear who had the status of a party to the procedure.

36. The complainants noted that 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 (concerning access to a review procedure for members of the public with an interest in the EIA), which had been introduced in 2003 and had to be implemented by 2005, had to apply as well.

37. According to the complainants, both Flughafen Wien AG and the competent Austrian State Secretary continued to declare in public that an EIA was not necessary. They further observed that the authority which, according to Austrian law, was in charge of "normal" EIAs had stated that, in this case, the procedure at issue did not consist of an *ex post* environmental impact assessment but of an *ex post* environmental impact report , which did not have any of the legal effects of an EIA.

38. The complainants submitted that they had drawn the Commission's attention to these issues, but had not received a satisfactory reply.

39. As regards the issue of the reference year, the complainants insisted that they had provided the Commission with ample factual information proving that 1999 was an exceptional year in which flight activity had doubled as regards the Western entry lane. The official reason that had been given for this increase was the renovation of the second runway. However, the increase had subsequently never completely subsided. The complainants submitted that the reference number of flights mentioned in the concept was the highest Vienna had ever seen and thus rendered all comparison with the airport's possible future activity absurd.

40. The complainants concluded by stating that the duty to give practical effect ("effet utile") to Directive 85/337 had been disregarded.

41. Having examined these submissions, the Ombudsman considered that he needed further information. He therefore asked the Commission (1) how it ensured that the impact assessment was carried out objectively, given that, at first sight, the concept for the *ex post* EIA gave the impression of having been drawn up by Flughafen Wien AG itself, in collaboration with a consulting firm; (2) to comment on the statement of the *Bezirkshauptmannschaft Wien-Umgebung* (an Austrian public authority) that the procedure in the case at issue consisted of an *ex post* environmental impact report and not of an *ex post* environmental impact assessment , which, according to the authority, meant that the procedure did not have the legal effects of an assessment; (3) to explain which Austrian authority was in charge of the

procedure; (4) to comment on the complainants' view that Article 10a of Directive 85/337 should be applicable to the *ex post* EIA; and (5) to explain whether and, if so, in what form members of the public with an interest in the matter had access to a review procedure.

42. In its reply, the Commission pointed out that it was common practice that the EIA should be carried out by the project promoter himself and then submitted to the relevant national authority for further scrutiny. The national authorities did not have the resources to carry out a full EIA themselves for all projects submitted for development consent. This did not jeopardise the objectivity of the process, since it still fell under the relevant authority's responsibility to draw the appropriate conclusions from the EIA as submitted. The Commission added that there was no evidence for it to assume that Austria would not assume its responsibilities.

43. The Commission further submitted that it was implicit in the nature of an *ex post* EIA that it could not follow the rules for an *ex ante* EIA. The term " *ex post* EIA" was not a legal term. It had been used non-technically for what stood for a simulation of an " *ex ante* EIA" as foreseen by Directive 85/337. According to the Commission, Austria had avoided the term " *ex post* impact assessment" and had chosen instead the term " *ex post* environmental impact report" only in order to signal that development consents that had already been issued would have to be respected.

44. The Commission pointed out that the Austrian Federal Ministry for Transport, Innovation and Technology (the "BMVIT") had taken charge of the " *ex post* EIA".

46. According to the Commission, Article 10a of Directive 85/337 had not been the subject of an agreement between its services and Austria. However, Austria had committed itself to making the " *ex post* EIA" subject to public consultation and it would have to scrutinize the results of the " *ex post* EIA". The Commission believed that those aspects covered by the " *ex post* EIA" could be subject to legal scrutiny as mentioned under Article 10a of Directive 85/337.

47. The Commission added that the lawyer who had submitted the present complaint had indicated that she represented 27 citizens' initiatives. One of these was AFLG ("Antifluglärmgemeinschaft Verein gegen entschädigungslose Grundentwertung durch Flugverkehr"). The Commission noted that, in June 2008, an Austrian citizen who was a member of the AFLG, had asked the Austrian Constitutional Court to hold that Austria had failed correctly to apply Directive 85/337 and claimed compensation for allowing the extension of Vienna airport to go ahead. The Commission argued that this plaintiff was also represented by the complainants in the present case and that there was a link between the case brought before asked the Austrian Constitutional Court and the present complaint. The Commission submitted that the present complaint should therefore be declared inadmissible on the basis of Article 1(3) of the Ombudsman's Statute.

48. In their observations, the complainants noted that project promoters did not submit an environmental impact *assessment* to the competent authority, but an environmental impact *declaration* . The competent authority then gave interested parties the possibility to comment on this declaration.

49. The complainants pointed out that it was the BMVIT that had issued the permits for the works which were subsequently carried out at Vienna airport. If the Ministry had acted in accordance with the law, it would have had to proceed to an EIA beforehand. There was thus a manifest conflict of interests. According to Austrian law, the authority in charge of the EIA for the Vienna airport would have been the regional government of Lower Austria.

50. The complainants added that, under Austrian law, an environmental impact 'report' was not an act that could be made the object of a review procedure. Even if a formal act were to be adopted at the end of the present procedure (which did not appear to be the intention), this act could not be challenged by citizens. There was therefore no possibility of review as foreseen by Article 10a of Directive 85/337.

51. The complainants pointed out that they did not understand the Commission's argument that the present complaint should be considered inadmissible. They stressed that the subject-matter of the case pending before the Austrian Constitutional Court differed from that of the present complaint.

52. Having examined the Commission's reply and the complainants' observations, the Ombudsman reached the conclusion that further information was needed in order to enable him to deal with this case. He, therefore, asked the Commission (1) to comment on the complainants' argument that the involvement of the BMVIT constituted a manifest conflict of interest; (2) to specify, in light of the complainants' comments, why it believed that Article 10a of Directive 85/337 could be applicable in the present case and to explain why it did not seek explicit assurances from Austria concerning the applicability of this Article when accepting that an *ex post* EIA was to be carried out; and (3) to explain why 1999 was the proper reference period, if "the closest date prior to the execution of the project" was to be chosen. The Ombudsman further invited the Commission to comment on point (iii) of the complainants' allegation concerning the monitoring of the ongoing EIA, which had initially not been taken up for inquiry.

53. In its reply, the Commission pointed out that Article 1(3) of Directive 85/337 left it fully to the discretion of Member States to determine the authorities competent to carry out an EIA. Moreover, it was common practice that the administration responsible for the authorization of a project was also responsible for the assessment of the environmental impact of this project. According to the Commission, the fact that the BMVIT had issued some of the permits concerning Vienna airport could not justify the conclusion that it was biased. In any event, the BMVIT had only authorised part of the projects. Finally, it should be noted that the competence for determining whether an EIA had to be carried out or not fell within the competence of the regional government of Lower Austria, and not of the BMVIT.

54. The Commission observed that, in order to give practical effect to the findings of the *ex post* EIA, Austria had committed itself, within the possibilities of its legal system and while respecting its procedural autonomy, to take these results into account and, where necessary, to ask the airport to request the appropriate alteration of the development consent. In the Commission's

view, this course of action was in line with the findings of the Court of Justice in its judgment in Case C-201/02. Regarding the question as to the way in which the results of the *ex post* EIA had to be taken into account and whether changes whatever needed to be made to the existing development consent, the Commission considered that Austria would have to take an administrative decision after public participation had taken place and the results, as well as the procedure, had been scrutinized by Austrian public authorities. According to the Commission, such an administrative decision should normally be subject to a review procedure under Austrian law, at least as far as neighbours are concerned. The Commission added that Article 10a of Directive 85/337 might have to be interpreted 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.

55. 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.

56. As regards the choice of the reference year, the Commission submitted that the earliest construction measure, which started in 1999, was the improvement of runway 16/34. It was logical that the remaining runway (runway 11/29) had to serve a significantly increased air traffic while temporarily replacing runway 16/34. According to the Commission, there was, however, no significant overall increase in air traffic between 1998 and 1999. The Commission further submitted that the discussion of whether to use 1998 or 1999 as the base year was not really relevant. The base year was only to be used for the calibration of the model serving as a prognosis about the presumed effects of the 15 projects over a period lasting until 2020. The year 1999 had been chosen because reliable data were available for that year.

57. The Commission pointed out that it had asked Austria to provide a further progress report showing that the results of the *ex post* EIA had been published and that a process of consultation had been started as foreseen. It added that, in line with the principles set out by the Court of Justice in its judgment in Case C-201/02, it would follow up on the outcome of the *ex post* EIA and its eventual implementation. The Commission confirmed that it would only close the infringement case when 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.

58. In their observations, the complainants pointed out that the BMVIT had authorised the most relevant parts of the project. They further argued that Article 6(4) of Directive 85/337 stipulated an immediate participation of the public in the proceedings before the *competent* authority. According to the complainants, however, the competent authority was the regional government of Lower Austria.

59. As regards the Commission's statement that Austria would act "within the possibilities of its legal system", the complainants argued that the Austrian authorities had the power to initiate a (proper) EIA on their own initiative but that they were all reluctant to do so.

60. The complainants pointed out that they did not understand the Commission's comments as regards Article 10a of Directive 85/337.

61. The complainants accepted that the choice of 1998 or 1999 was not relevant, if one considered the overall number of flights. However, the assessments and expert opinions concerning the present case were made on the basis of the distribution of flights between the runways. The complainants argued that using the figures for 1999, when flight movements concerning runway 11/29 had nearly doubled compared to 1998, without making an appropriate adjustment rendered the *ex post* EIA totally useless.

62. The complainants added that the Austrian Constitutional Court had rejected the application to which the Commission had referred and that the admissibility of the present complaint could thus not be doubted.

The Ombudsman's assessment

Preliminary remarks

63. The Ombudsman notes that the Commission has argued that the present complaint should be considered inadmissible on the basis of Article 1(3) of his Statute. In order to support this conclusion, the Commission referred to the fact that an Austrian citizen, who was a member of one of the 27 citizens' initiatives which have submitted the present complaint, had asked the Austrian Constitutional Court to hold that Austria had failed correctly to apply Directive 85/337 and claimed compensation for allowing the extension of Vienna airport to go ahead.

64. Article 1(3) of the Ombudsman's Statute provides that the Ombudsman "may not intervene in cases before courts or question the soundness of a court's ruling". Article 2(7) of the Ombudsman's Statute further stipulates that the Ombudsman must declare a complaint inadmissible or terminate his inquiry into such a complaint where legal proceedings are instituted "concerning the facts which have been put forward" in the complaint to the Ombudsman.

65. The present case concerns the way in which the Commission handled an infringement complaint submitted to it by the complainants. The Ombudsman considers it obvious that the subject-matter of the present complaint is thus different from that of the case which appears to have been submitted to the Austrian Constitutional Court. In these circumstances, the Commission's view that the present complaint should be considered inadmissible is unfounded.

66. During the course of the inquiry, the complainants have made a number of critical remarks as regards the behaviour of the Austrian authorities and of Flughafen Wien AG in this case. To avoid any misunderstanding, it is important to recall that the Treaty on the Functioning of the EU empowers the Ombudsman to inquire into possible instances of maladministration only in the activities of Union institutions, bodies, offices or agencies. The Statute of the Ombudsman specifically provides that no action by any other authority or person may be the subject of a

complaint to the Ombudsman. The present decision, therefore, exclusively concerns the question whether there has been maladministration in the activities of the Commission.

As regards the approach adopted by the Commission in general

67. The Ombudsman notes that the Commission and the complainants agree that Austria's failure to carry out an *ex ante* EIA in relation to the project concerning Vienna airport constituted an infringement of Directive 85/337. He further notes that the complainants do not dispute that the relevant works had already been completed or reached an advanced stage by the time the Commission became aware of this infringement.

68. It follows from the case-law of the Court of Justice that Member States are required to nullify the unlawful consequences of a breach of Community law and to make good any harm caused by the failure to carry out an EIA. The detailed procedural rules to be followed in such cases "are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness)". [6]

69. The Commission submitted that it was both proportionate and in line with the spirit of the said case-law 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.

70. The Ombudsman considers that this approach is both appropriate and reasonable in principle. He notes that the complainants themselves have explained that they do not categorically object to this approach and that they agree that what needs to be done is to ensure that practical effect ("effet utile") is given to Directive 85/337 in the present case.

71. However, it remains to be examined whether the implementation of this approach was in conformity with Community law and with principles of good administration.

As regards the way in which the approach adopted by the Commission was implemented

72. The Ombudsman notes that, in so far as the implementation of the approach adopted by the Commission is concerned, the complainants submitted two specific arguments and one more general allegation.

73. As regards the complainants' argument that the Commission deviated from normal procedures by negotiating an " *ex post* EIA" with Austria, the Ombudsman considers it sufficient to refer to what he already said in relation to the Commission's approach in general. Quite clearly, an EIA ought to be carried out before a project is implemented. In the present case, however, the Commission was confronted with the problem that no such EIA had been carried out and that the relevant works had already been completed or had reached an advanced stage

by the time it became aware of the issue. As noted above, the Ombudsman considers that the way in which the Commission proposed to deal with this situation was both appropriate and reasonable in principle.

74. The complainants further reproached the Commission for having included Flughafen Wien AG as a *de facto* party in its negotiations with the Austrian authorities, but did not do the same for them, which, in their view, unfairly disadvantaged them. In its opinion, the Commission submitted (i) that it had at no point in time included Flughafen Wien AG as a *de facto* party in its negotiations with Austria, (ii) that neither the airport nor the complainants could be a party to infringement proceedings pursuant to Article 226 of the EC Treaty and (iii) that a representative of the airport had been present only during one bilateral meeting between the Commission and Austria, in order to respond to possible technical questions. The Ombudsman takes the view that the complainants have not put forward any evidence to refute the Commission's arguments. In these circumstances, this aspect of the complainants' allegation cannot be considered as having been established.

75. The complainants also alleged that the Commission failed properly to conduct its infringement proceedings against Austria concerning Vienna airport because it failed to ensure that the " *ex post* EIA" was carried out properly. As regards the last point, the complainants criticised, in particular, (i) that the Commission wrongly allowed Austria to use 1999 as the reference year for its assessment, (ii) that no official document containing the results of the negotiations on the concept of the *ex post* EIA was published and (iii) that the assessment was not properly monitored.

76. As regards the second of the above-mentioned aspects, i.e., point (ii), the Commission explained that the complainants had requested access to a document which they called an "agreement between the Commission and Austria about the carrying out of an *ex post* EIA". The Commission stressed, however, that it had informed the complainants that, apart from the concept for the EIA as published on the internet, no such separate agreement existed. According to the Commission, the result of the negotiations was fully reflected in the said concept. The Ombudsman notes that the complainants have not disputed the Commission's statement that, in the present case, there was no official document containing the results of its negotiations with the Austrian authorities. The complainants' above-mentioned argument must thus fail. The Ombudsman notes, however, that the way in which the Austrian authorities proceeded to carry out the *ex post* EIA agreed between themselves and the Commission has given rise to a number of doubts and questions. In the Ombudsman's view, it is highly likely that these difficulties could easily have been avoided, if the exact contents of the agreement had been clarified in good time, for instance, by a letter from the Commission to the Austrian authorities setting out precisely the scope of the *ex post* EIA and the rules it had to follow.

77. The complainants allegation that the Commission failed to ensure that the " *ex post* EIA" was carried out properly necessarily comprises two components, namely, (i) that the Austrian authorities failed properly to carry out the *ex post* EIA and (ii) that the Commission failed to comply with the duties incumbent on it in this field. It is clear that the Ombudsman is only entitled to consider the second of these aspects, given that, as already mentioned in point 66

above, he can only examine the behaviour of Union institutions, bodies, offices or agencies.

78. However, it is equally clear that, in order to ascertain whether the Commission has complied with its duties to ensure that the *ex post* EIA is properly carried out, the Ombudsman also needs to look at the deficiencies of the *ex post* EIA alleged by the complainants, without, however, assessing the substance of these allegations. All that the Ombudsman can, and must, do in this context is to assess whether the Commission has reacted adequately to these allegations.

79. The Ombudsman considers that four main issues can be identified as regards the shortcomings which the complainants alleged to exist as regards the way in which the Austrian authorities were carrying out the ex post EIA. These four issues concern (i) the terminology used by the Austrian authorities, (ii) the authority in charge of the *ex post* EIA, (iii) the reference year used for the purposes of the *ex post* EIA and (iv) the question whether citizens are able to challenge the results of the *ex post* EIA in court.

80. As regards the *first* of the above-mentioned issues, the Ombudsman notes that the Austrian authorities consistently refer to an "Umweltverträglichkeits bericht " (environmental impact *report*) rather than to an "Umweltverträglichkeits prüfung " (environmental impact *assessment*). At first sight, and as the complainants correctly suggest, there would appear to be a marked difference between these terms. Whereas the term 'report' is commonly used to denote a description or summary of existing facts, the term 'assessment' implies that a set of given facts is examined on the basis of certain criteria. The Commission is certainly right in arguing that the term " *ex post* EIA" is not a legal term and that it was meant to be used non-technically a procedure meant to serve as a simulation of an " *ex ante* EIA" as foreseen by Directive 85/337. According to the Commission, Austria had avoided the term " *ex post* impact assessment" and chosen the term " *ex post* environmental impact report" only in order to signal that the development consents that had already been issued would have to be respected.

81. The Ombudsman is not entirely convinced by this explanation. As a matter of fact, it is difficult to see what would have prevented the Austrian authorities from using the term ' *ex post* EIA', whilst at the same time making it clear that existing development consents had to be respected. Moreover, it emerges from the case-law of the Court of Justice that it is for national courts "to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337". [7] It thus does not follow from Community law that consents already granted necessarily have to be respected, even though an EIA that ought to have taken place was not carried out. It nevertheless appears appropriate to underline that the terminology used by the Austrian authorities is in any event only of secondary importance compared to the substance of the *ex post* EIA.

83. As regards the *second* of the above-mentioned issues, the Ombudsman notes that the authority that was entrusted with the *ex post* EIA is the BMVIT and that the Commission does not dispute that this ministry issued some of the permits for the project concerned. Given that (a) Directive 85/337 provides that such permits should only be granted if an EIA has been

carried out, where such an EIA is necessary, and (b) the Commission agrees that an EIA ought to have been carried out in the present case, it follows that the *ex post* EIA was entrusted to an authority that initially seems 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 would, at first sight, seem to be well-founded.

84. None of the arguments that the Commission has put forward in this context so far is convincing. *First* , it is certainly true that it is entirely a matter for the discretion of Member States to determine the authorities competent to carry out an EIA. It could, of course, be queried whether that means that a Member State is free to designate an authority, even if doing so could give rise to a potential conflict of interest. The Ombudsman considers, however, that there is no need further to examine this issue here, since the Commission itself has stressed that the competence for determining whether an EIA had to be carried out or not in this case fell within the competence of the regional government of Lower Austria, and not of the BMVIT. The Ombudsman notes that the Austrian authorities thus appear to have entrusted the *ex post* EIA to an authority other that the one that would have been in charge of the *ex ante* EIA which ought to have been carried out. In these circumstances, the Ombudsman is not convinced that issues such as a potential conflict of interest on the part of the authority designated to carry out the *ex post* EIA could not be addressed by the Commission. *Second* , the Ombudsman has no reason to doubt the Commission's argument that it is common practice that the administration responsible for the authorization of a project is also responsible for the assessment of the environmental impact of this project. However, no possible conflict of interest can arise when a project is authorised after an EIA has been properly carried out. The problem raised by the present case was caused by the fact that the authority concerned first authorised the project and was subsequently entrusted with an *ex post* EIA. *Third* , the fact that the BMVIT had only issued some of the permits concerning Vienna airport may well lessen the potential conflict of interest. In the Ombudsman's view, however, this circumstance is not sufficient entirely to remove such a potential conflict of interest.

85. To avoid possible misunderstanding, the Ombudsman considers it useful to add that he does not suspect the BMVIT to be biased. However, the Ombudsman fully understands that the complainants consider a conflict of interest to be present where an authority is entrusted with an *ex post* EIA after having previously issued some of the permits for the project concerned.

86. As regards the *third* of the above-mentioned issues, the Ombudsman notes that the Commission initially argued that it was reasonable to use 1999 as a base line for the EIA because this was the year the first construction measure started. In the Ombudsman's view, however, it would have been more logical to choose 1998 as the reference year in the present case, i.e., the year immediately preceding the commencement of the project. In reply to a specific question to that effect, the Commission, apart from noting that reliable data were available for 1999, limited itself to stating that there had been no significant overall increase in air traffic between 1998 and 1999 and that the discussion of which year to use as the base year was thus not really relevant. In this context, the Commission explained that the earliest construction measure, which started in 1999, had been the improvement of runway 16/34 and that it was thus logical that the remaining runway (runway 11/29) had to serve significantly

increased air traffic while temporarily replacing runway 16/34. The complainants have not disputed that the choice of 1998 or 1999 is not relevant if one considers the overall number of flights. However, they have stressed that the assessments and expert opinions concerning the present case were based on the distribution of flights between the runways and that flight movements concerning runway 11/29 had nearly doubled in 1999 compared to 1998. This would appear to be a pertinent argument, given that it appears possible that the distribution of flights among runways can clearly have repercussions on the impact of these flights on the environment. In light of the above, the Ombudsman takes the view that the Commission has not sufficiently explained why it was appropriate to use 1999 rather than 1998 as the reference year.

87. As regards the *fourth* of the above-mentioned issues, the Ombudsman notes that, in their final observations, the complainants stated that they did not understand the Commission's position in this respect. Having carefully examined the relevant statements, the Ombudsman feels obliged to point out that, even after having asked the Commission to specify its position concerning this issue, he shares the complainants' feeling.

88. Article 10a of Directive 85/337, which was introduced in 2003 by Directive 2003/35, [8] provides that "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."

89. The Ombudsman considers that the right thus granted is of significant importance when it comes to ensuring that environmental impact assessments required by Directive 85/337 are carried out properly. He therefore finds it difficult to understand that the issue of the applicability of Article 10a of Directive 85/337 in the present case does not seem to have been covered by the agreement reached by the Commission and the Austrian authorities. This is all the more so, bearing in mind that this article was only inserted in 2003 whereas work on the project already started in 1999. The Commission has explained that it did not seek explicit assurances from Austria concerning the applicability of Article 10a of Directive 85/337 when accepting that an *ex post* EIA was to be carried out, since this provision constituted substantive law and could not be made the subject of an agreement with Member States. The Ombudsman is at a loss to understand this argument. Regardless of whether Article 10a constitutes substantive or procedural law, it is 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 the present case.

90. As regards this last issue, which is clearly essential, the Ombudsman notes that, in reply to a question put to it to that effect, 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 and better particulars concerning this issue, it expressed the view "that Austria will have to make an administrative decision after public participation had taken place and the results, as well as procedure, have been scrutinized by Austrian public authorities. Such an administrative decision should normally

be subject of a review procedure under Austrian law, at least as far as neighbours would be concerned. Article 10a of the EIA Directive, giving effect to Article 9(2) of the Aarhus Convention, 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."

91. The Ombudsman notes that the Commission further stated that Austria had committed itself, within the possibilities of its legal system and bearing in mind its procedural autonomy, to taking the results of the *ex post* EIA into account "and that where necessary it would ask the airport to request the appropriate alterations of development consent".

92. The above statements are based on the assumption that the *ex post* EIA will culminate in an "administrative decision" to be adopted by the Austrian authorities. Judging from the evidence submitted by the complainants, the Ombudsman considers it far from certain that such a decision will be taken. Even on the assumption that this will indeed be the case, the Ombudsman considers the views put forward by the Commission so far to be unsatisfactory. If such a decision were taken, it would (following the logic described by the Commission) be limited to *asking* the airport to request appropriate alterations of the developments consents. According to the Commission, such a decision "should normally" be the subject of a review procedure under Austrian law, and Article 10a of Directive 85/337 "might" have to be interpreted as giving access to a review procedure in such cases. In the Ombudsman's view, it thus seems that the Commission itself is not certain whether the outcome of the *ex post* EIA can be reviewed in accordance with Article 10a of Directive 85/337. The relevant statements, moreover, create the impression that the Commission intends to leave it to interested parties, i.e., to the citizens concerned, to find out whether such a possibility exists or not. The Ombudsman does not consider this to be a particularly citizen-friendly approach. In any event, the Commission has so far refrained from commenting on whether a review procedure pursuant to Article 10a of Directive 85/335 would, if it is available at all in the present case, also cover the possibility that the Austrian authorities may conclude that no further action needs to be taken or the situation that citizens may consider the action taken by the Austrian authorities to be insufficient.

Conclusion

93. In view of the above circumstances, the Ombudsman takes the view that, at the present point in time, he is unable to conclude that the Commission has ensured that the *ex post* EIA was carried out properly and that it has thus properly conducted its infringement proceedings against Austria concerning Vienna airport.

94. However, regard needs to be had to the fact that neither the *ex post* EIA nor the Commission's investigation have been completed so far.

95. As regards the *ex post* EIA, it emerges from information that the complainants provided to the Ombudsman on 21 October 2009 that the " *ex post* environmental assessment report" has now been made available on the website of the BMVIT [9] and that observations concerning this report can be submitted by 3 December 2009.

96. As regards the investigation carried out by the Commission, the Ombudsman notes that, prior to the opening of the present inquiry, the Commission informed the complainants that it would only propose the closure of the infringement procedure after the *ex post* EIA had been carried out and possible compensation measures which could result from the EIA had been implemented. In its reply to the Ombudsman's second request for further information in this case, the Commission pointed out that, in line with the principles set out by the Court of Justice in its judgment in Case C-201/02, it would follow up on the outcome of the *ex post* EIA and its eventual implementation. The Commission confirmed that it would only close the infringement case when 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.

97. Even though the way in which the Commission has handled the complainants' infringement complaint so far is not satisfactory, the Ombudsman notes that the Commission has reserved its decision as to how to proceed in the present case until it has received the results of the *ex post* EIA carried out by the Austrian authorities and examined these results. The Ombudsman has no reason to doubt the statements to that effect made by the Commission. Given that the Commission has thus not yet adopted a final position in this case, the Ombudsman takes the view that it would not, at present, make sense for him to proceed further with this case, in so far as the present allegation is concerned.

B. Alleged granting of preferential treatment and protection to Austria

98. The complainants alleged that the Commission (i) was granting preferential treatment to Austria by refraining from bringing an action before the Court of Justice, even though it had found a manifest infringement of Community law and (ii) was trying to protect Austria and to cover up the infringement.

99. In its opinion, the Commission submitted that this allegation was unfounded. It explained that in those cases where a Member State failed to carry out an EIA pursuant to Directive 85/337 before giving a development consent, it had been its practice for years to seek a solution by means of an ' *ex post* EIA'. For example, this approach had been used as regards infringement cases 2004/2080 (concerning the construction of a motorway in Spain) and 2004/5143 (concerning a waste disposal installation in Italy).

100. In their observations, the complainants observed that it was the Commission's complete disregard of Austria's obvious unwillingness to conduct a proper EIA which annoyed them and made them believe that preferential treatment had been granted to Austria.

101. The Ombudsman considers the Commission's explanations to be reasonable. In these circumstances, he takes the view that the complainants have not established their allegation.

C. Conclusions

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

With respect to the allegation that the Commission failed properly to handle its infringement proceedings against Austria in relation to Vienna airport, there are at present no grounds for further inquiries into this case.

No maladministration is found as regards the allegation that the Commission granted preferential treatment to Austria and tried to protect this Member State.

The Ombudsman trusts that the Commission will take due account of the present decision when adopting its final decision on the complainants' infringement complaint. The complainants of course remain free to turn to the Ombudsman again, if the Commission's final decision were to fail to satisfy them.

The complainant and the Commission will be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 2 December 2009

[1] OJ L 175, p. 40. This directive was last 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).

[2] Case C-2/07 *Paul Abraham and others* [2008] ECR I-1197.

[3] Case C-201/02 *Delena Wells* [2004] ECR I-723, paragraphs 64-66 and 68.

[4] A copy of this document was submitted to the Ombudsman.

[5] Treaty on the Functioning of the European Union.

[6] Case C-201/02 *Delena Wells* [2004] ECR I-723, paragraphs 64 and 66-67.

[7] Case C-201/02 *Delena Wells* [2004] ECR I-723, paragraphs 64 and 66-67.

[8] See footnote 1 above.

[9] At http:///www.bmvit.gv.at/verkehr/luftfahrt/flughaefen/verfahren/index.html [Lien]. According

to the report (see its p. 16), the relevant projects are to be considered as compatible with the environment.