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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

42nd meeting

Strasbourg, 29 November - 2 December 2022

Complaint on stand-by: 2020/06

**Presumed threat to Tagus Estuary Special Protected
Area from a new airport (Portugal)**

- COMPLAINANT REPORT -

*Document prepared by
SPEA - Sociedade Portuguesa para o Estudo das Aves*

To the kind attention of
Bern Convention Secretariat
Directorate General of Democracy
Council of Europe
F-67075, Strasbourg Cedex
Ms Ursula Sticker
Secretary of the Bern Convention

Lisbon, 18th February 2021

Reference: Complaint No. 2020/6, “Portugal: Presumed threat to Tagus Estuary Special Protected Area from a new airport”

COMPLAINANT REPORT

Dear Sirs,

I, on behalf of SPEA, refer to you with regard to the content of Report No. T-PVS(2021)12 of 6 October 2021 (the “**Report**”), concerning the meeting of the Bureau held on 15-16 September 2021, in connection with Complaint No. 2020/6, “*Portugal: Presumed threat to Tagus Estuary Special Protected Area from a new airport*” (the “**Complaint**”).

(i) Procedural aspects regarding Complaint No. 2020/6

With reference to the Complaint, the Report mentioned, *inter alia*, that “*the Bureau requested that the complainant also send any updates including on the procedures taking place with the Lisbon Administrative Court, as well as a response to the report of the authorities for the next meeting*”.

In this respect, it is firstly worth mentioning that, in compliance with the request of the Bureau of 30 April 2021, the complainant submitted, on 31 July 2021, its observations ([T-PVS/Files\(2021\)56](#)) to the report filed by the Portuguese Authorities (dated 24 February 2021), as well as an update on the procedures taking place with the Lisbon Administrative Court.

As per the above communication of 30 April 2021, the Portuguese Authorities had as well been requested by the Bureau to file, by the same date (31 July 2021), an updated report ahead of the Bureau meeting in September 2021. Nevertheless, although requested by the Bureau, the Portuguese Authorities have failed to provide any information/documentation in this regard, thus preventing the complainant to file with the Bureau any additional response at this instant.

In this latter respect, the complainant also notes that the Report referred to above emphasised that “*should no report be submitted by the national authorities to the Bureau at its next meeting, the Bureau would consider elevating the status of the case to a possible file. For the time being, the complaint is kept on stand-by*”.

With regard to the above, the complainant would like to raise its concerns on how the lack of responsiveness and cooperation shown by the Portuguese Authorities is jeopardising the correct conduct of the proceeding regarding the Complaint. The complainant, therefore, would like to ask the Bureau to elevate the status of the case to a possible file.

(ii) Updates on the procedures before the Lisbon Administrative Court

Without prejudice to the above and in addition to the information included in the communication filed on 31 July 2021 ([T-PVS/Files\(2021\)56](#)), the complainant would also like to take the occasion to provide further updates on the judicial proceeding which is taking place before the Administrative Court of Lisbon.

(a) The intervention of the Public Prosecutor

As described in the communication under [T-PVS/Files\(2021\)56](#), the Public Prosecutor, in April 2021, intervened in the judicial proceeding by filing an opinion, where it concluded that the Environmental Impact Statement (“EIS”) released in favour of the Montijo airport is invalid or null, as it was not based on the best technical-scientific criteria and distorted the true impacts on avifauna. It also pointed to the transboundary impacts on migratory birds which were unjustifiably suppressed in the EIS and emphasised the absence of an adequate technical analysis of the impacts on avifauna in the Tagus Estuary SPA, as well, as the lack of the appropriate assessment required by the Habitats (92/43/EEC) and Birds (2009/147/EC) Directives.

In this regard, the complainant would like to provide the Bureau with a summary of the opinion of the Public Prosecutor. The same is attached to the present communication under Annex 1.

(b) The Strategic Environmental Assessment procedure activated by the Portuguese Government

In parallel to the above, it must also be noted that the Portuguese Government, in July 2021, activated a proceeding to carry out a Strategic Environmental Assessment (“SEA”) for the location of the new Lisbon airport. In this frame, the Portuguese Government started a tender procedure to identify the subject that will carry out the SEA. The final decision on the SEA will be integrated in the future authorisation of the airport.

In this respect, the complainant considers important to inform the Bureau that, in the tender documentation, the Portuguese Government unlawfully limited the SEA to three predetermined alternatives, thus distorting the true ratio of the SEA procedure, whose aim is to identify the most suitable option, not to limit potential options. Among such alternatives, the first is Montijo as main airport and the current Lisbon airport as complementary. The second alternative, Alcochete, was discarded a few years ago after an EIS (currently expired). And the third alternative is Montijo as complementary to the current Lisbon airport, for which the EIS has already been approved, and for which ANA, the developer of the project, has already requested to the National Authority of Civil Aviation its license to operate the airport, which is yet to be awarded.

In addition to this, the SEA procedure the Portuguese Government has commenced is also illegitimate because it is subsequent, and not previous, to the release of a favourable EIS to a preselected alternative, thus infringing not only the requirement of the SEA to be “strategic” (as explained above), but also “prior” (or, at least, concomitant) to the EIA. In the case at stake, in fact, the SEA comes downstream, already conditioned by a favourable (although unlawful) EIS and by a political option of general knowledge towards one of the listed alternatives, thus subverting the nature and purpose of the “strategic” assessment and compromising its effectiveness.

In this regard, the lack of SEA was one of the complementary grounds to the claim filed by SPEA before the Administrative Court of Lisbon in support of the unlawfulness of the EIS. The fact that the Portuguese Government has activated a SEA (although unlawfully limited) confirms that it was legally required. However, the outcome of this SEA cannot affect the original claim, as the main arguments on the unlawfulness of the EIS for breaching the Birds and Habitats Directive and other legislation remain unchanged. Therefore, the EIS, irrespective of the SEA, remains null and void in the frame of the court proceeding, and any final authorisation of Montijo airport based on this EIS will also be null and void.

Confident, in any case, that the lack of responsiveness by the Portuguese Authority will not in any event hinder the outcome of Complaint No. 2020/6, the complainant remains at the Bureau’s complete disposal should it need any clarification.

In faith,

José Augusto Alves

on behalf of SPEA - Sociedade Portuguesa para o Estudo das Aves

Annexes:

- 1) Communication with reference “*Complaint No. 2020/6: Stand by: Portugal: Presumed threat to Tagus Estuary Special Protected Area from a new airport*” submitted by the complainant to this Bureau on 31 July 2021; (See [T-PVS/Files\(2021\)56](#))
- 2) Summary of the opinion filed by the Public Prosecutor in judicial proceeding No. 970/2020 currently pending before the Administrative Court of Lisbon.

ANNEX I

OPINION OF THE PUBLIC PROSECUTOR (MP)

Montijo Airport

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Automatic translation from Portuguese

The Public Prosecutor's Office (MP), called to pronounce on the process of contestation of the Environmental Impact Declaration (EID) issued on the project regarding the construction of the Montijo complementary airport, filed by SPEA and other NGO's, which is under the scrutiny of the Administrative Court of Lisbon, case no. 970/20.2BELSB, issued an opinion in full agreement with the arguments raised in the above action, considering, therefore, that the EID is invalid.

The Public Prosecutor's Office considers that the conclusions reached in the first technical opinion of the ICNF - Institute for Nature Conservation and Forests, which was never sent to APA - Portuguese Environment Agency - that the project of a complementary airport in Montijo, in the dual solution Lisbon (Portela) + Montijo is unfeasible from an environmental point of view and that the EID should therefore have been unfavourable. In this regard, the Public Prosecutor's Office attached to its opinion two administrative documents from ICNF which prove that technicians and even middle management from this institution had a technical opinion unfavourable to the project, but that these positions were replaced by other opinions that pointed to the same negative and significant impacts, but without concluding that the project was environmentally unfeasible, on the contrary, opening the door to its viability. It should also be noted that the first ICNF opinion (and even a second opinion), indicated transboundary impacts, which were later omitted in the opinion that was eventually sent to the APA and attached to the EIA - Environmental Impact Assessment procedure.

As argued by the NGOs in the process, the Public Prosecutor also considers that since the EIS recognises - despite the shortcomings and errors of the same and of the EIS - the serious negative impacts it should, consistently and necessarily, have concluded by not authorising the project from an environmental point of view.

The MP recalls that minimization measures and compensation measures do not serve to prevent the affectation of the integrity of the site by the project. And so, the EIS "should conclude that the project is not environmentally acceptable under Article 6.3 of the Habitats Directive applicable to SPAs and that, in light of that provision, it cannot be approved. Compensatory measures would be considered for the hypothesis that the political decision-maker, despite this negative opinion and with his political legitimacy, understands to base the approval of the project on another imperative public interest (since the environmental interest is also a public interest) and to recognize the lack of alternative solutions, under the assumption, of course, that there had been a study of these other environmental alternatives and that these did not exist.

Like the NGOs, the MP is also assertive in the recognition of global, transboundary impacts, and considers that: "*The omission of the EIS on this aspect prejudiced the exercise of consultation with potentially affected States, under the terms of the EIA regime, art. 32 et seq., and therefore a manifest procedural error arising from the error in the assumptions occurs, generating nullity*".

The lack of a comparative study of location alternatives under the EIA is also an illegality of the EIS.

The lack of an assessment of cumulative effects is another flaw highlighted in the MP's opinion. It is cited:

"Having adopted the dual solution (Lisbon + Montijo) an assessment of cumulative impacts shall have been carried out by virtue of Annex V point 6 of DL no. 151-B/2013.

Thus, the AM evaluates its ex novo movements which are 24 and the eventual AIA of the AHD will evaluate its enlargement, from 38 to 48, i.e. 10; or, at best, 48 accumulated, and no more than 48, because then the argument could be that the environmental impact of Montijo is already evaluated in an AIA procedure with its own object, i.e. 24. But the populations of the Lisbon area, maxime, the urban areas south of the Tagus, are not subject to 24 and 48, they are subject to 72."

The MP agrees with the ONGs that a sectoral programme is due under the RJIGT - Juridical Regime of Territorial Management Instruments and that this is not likely to exempt SEA - Strategic Environmental Assessment. It adds that even if it is maintained that such a sectoral programme is not due, SEA is still due.

One of the aspects highlighted by the Public Prosecutor's Office is the violation of territorial planning regulations, namely the PNPOT - National Plan for Territorial Planning Policy, the PROT AML - Regional Plan for Territorial Planning of the Lisbon Metropolitan Area and the Plano de Ordenamento da Reserva Natural do Estuário do Tejo (PORNET). In particular:

"It should be borne in mind that the creation of the areas making up the Natura 2000 network SPAs respect ornithological criteria: these areas are not created so that birds can go there, they are demarcated because the birds are already there, since they have Automatic translation from Portuguese found a favourable habitat there since time immemorial and this is the fact that the Member States must recognise, ensuring the maintenance of habitats and preventing their deterioration and significant disturbance of species. The same logic is present to the designation of Ramsar areas".

The Public Prosecutor considers that there is an illegal inversion of logic and of the legal regime of territorial planning: first the location of the airport is decided and then, in the EID, a new territorial plan is recommended with alterations to the various existing legal instruments of territorial planning. This is when planning should first take place and the airport decision should be based on it.

One of the aspects most emphasized by the MP is the risk of serious accidents: both those involving hazardous substances (SEVESO regime), those resulting from collision with birds (bird strike); and the risks due to the occurrence of Earthquakes, tsunamis and soil liquefaction. As regards the former, the project implies new Seveso establishments, namely the installation of a Fuel Operating Group (GOC), initially composed of three tanks, to which a fourth tank will later be added, not in the immediate vicinity of the project, but within the airport infrastructure area itself, and yet "172. (...) it is not discussed to what extent the installation of four tanks of dangerous substances and the inherent risks of accidents identified - fire, emissions - is considered compatible with the presence of the natural area to be protected...".