AVOSETTA RIGA MEETING

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Report on recent developments

AUSTRIA

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A. Case-law

1. Scope of Art 11 EIA-Directive

CJEU, Case C-570/13 *Gruber* [2015] ECLI:EU:C:2015:231
Judgment of the Administrative Court (*Verwaltungsgerichtshof*) 22.6.2015, 2015/04/0002
Amendment to the Austrian EIA Act (Federal Law Gazette I 4/2016)

In a preliminary ruling, the CJEU found a specific of the Austrian EIA regime to be in conflict with Art 11 EIA Directive: The Austrian EIA Act provides for a procedure in which the EIA authority examines and decides whether a particular project requires an EIA ('declaratory procedure'). In case the authority comes to a negative decision, i.e. no EIA is required, neighbours do not have a right to contest this administrative decision. Additionally, they do not have the right to bring an action directly against this administrative decision in any later permitting procedure to which they are parties; thus, the administrative decision not to conduct an EIA is having 'binding effect' on neighbours.

The CJEU confirmed that Member States dispose of a wide margin of discretion when implementing Art 11 of the EIA Directive. However, it underlined that this discretion is limited by the need to respect the objective of ensuring wide access to justice for the public concerned, expressed in Art 11(3) EIA Directive and Art 9(2) Aarhus Convention.

The Austrian legislator has exceeded the bounds of its discretion: According to the CJEU, current law precludes a majority of persons being part of the 'public concerned' and satisfying the criteria laid down by national law concerning 'sufficient interest' or 'impairment of a right' from bringing any action against the decision not to conduct an EIA. Thus, provided 'neighbours' as defined by the relevant Austrian law satisfy the criteria set out in Art 1(2) EIA Directive, a decision declaring that a particular project does not require an EIA must not be binding on them.[2]

[1] The author would like to thank *Birgit Hollaus* and *Julia Kager* for their assistance in preparing this report.
[2] CJEU, Case C-570/13 *Gruber* [2015] ECLI:EU:C:2015:231 para 42 et seq.

The referring Austrian Court did follow-up with the CJEU's judgment in the national court proceeding. Similarly, the Austrian legislator amended the Austrian EIA Act accordingly (Federal Law Gazette I 4/2016): Neighbours now have the right to contest an administrative decision not to conduct an EIA for a particular project at the Federal Court of Administration (*Bundesverwaltungsgericht*).

2. **Right of environmental NGOs to request a declaratory procedure: diverging case-law**
   affirmative: Federal Court of Administration 11.2.2015, W104 2016940-1/3E
   negative: Federal Court of Administration 28.10.2015, W225 2112512-1/3E

The Austrian EIA Act provides for a procedure in which the EIA authority examines and decides whether a particular project requires an EIA ('declaratory procedure'). An environmental NGO cannot request this declaratory procedure to be conducted nor does it have party right provided such a procedure is taking place. However, in case the competent authority comes to a negative decision, i.e. no EIA is required, an environmental NGO can contest this decision and file a complaint with the Federal Court of Administration (*Bundesverwaltungsgericht*). This legal remedy however is only effective, if a declaratory procedure is conducted. In any other case, an environmental NGO has no possibility to voice its concerns. Thus, the question was raised whether environmental NGOs must have a right to request such a declaratory procedure.

The situation has lead to diverging case-law by the competent court of first instance, the Federal Court of Administration (*Bundesverwaltungsgericht*), where the judges are taking their decision by panels: One panel found that indeed environmental NGOs must have a right to request a declaratory procedure; otherwise, effective legal protection as requested by EU law is not guaranteed. Another panel found however, that such a right must not be accorded by the courts given the clear choice of the legislator not to do so in the first place.

3. **Reference for a preliminary ruling concerning Art 9(3) Aarhus Convention**
   Administrative Court 26.11.2015, Ra 2015/07/005 (CJEU, Case C-663/15)

The Austrian Administrative Court made a reference for a preliminary ruling with regard to several questions on the participation and access to justice for environmental NGOs in permitting procedures under the Austrian Water Management Act, which implements the Water Framework Directive (WFD).

With its questions, the Court essentially wants to know whether Art 4 WFD or the Directive as whole confers on an environmental NGOs rights for the protection of which it has access to justice, as set out in Article 9(3) Aarhus Convention. The Court then asks whether an environmental NGO must also have the possibility to assert those rights already at the stage of the administrative (permitting) procedure. If so, whether national legislation can provide that – in case the organisation does not raise any objections during this procedure – it loses its status as party and is precluded from access to justice.

4. **Right of individuals to request an air quality plan**
   Administrative Court 28.5.2015, 2014/07/0096-8

Up to now, Austrian authorities and courts follow a rather strict approach when it comes to recognising individual rights, based on the tradition of the "*Schutznormtheorie*". This was demonstrated for example in a case concerning the failure to establish an air quality action plan, which has been brought to court by an individual (VwGH 26.6.2012, 2010/07/0161) and was dismissed on the basis that the individual had no subjective public right to ask for such an action plan.

However, recently the Austrian Administrative Court came to a different conclusion in taking a less restrictive approach. The Court held that, provided certain air quality limits are not complied with and individuals are directly affected by this exceedance, the individuals do have a right to request an air quality plan to be drawn up in accordance with Art 23(1)(2) Air Quality Directive. According to the Court, an exceedance of air quality limits is only established if the Member State's competent authority was not granted a postponement of the respective deadline.

B. Legislation

5. National implementation of the EU-Regulation on trans-European energy infrastructure (Regulation (EU) No 347/2013)

Federal Law Gazette I 4/2016

In Austria, the requirements of the so-called TEN-E-Regulation (Regulation (EU) No 347/2013) were implemented through an amendment to the Austrian EIA Act, to cover those energy infrastructures requiring an EIA, and through the Energy Infrastructure Act, to cover all other projects. The first category is relevant for the majority of current projects of common interest (PCIs).

The permitting procedure for both categories consists – as required by the Regulation – of two procedures, the pre-application procedure and the statutory permit granting procedure. The combined maximum duration of the two procedures is set at 3.5 years.

The Austrian Minister of Science, Research and Economics (BMWFW) is acting as Energy Infrastructure Authority: With regard to projects not requiring an EIA, he is competent to conduct the pre-application procedure and to coordination the following individual permitting procedures. With regard to projects requiring an EIA, the respective *Land* government as EIA authority is competent for the permitting procedure. The Energy Infrastructure Authority is acting as 'co-operating authority' and is regularly updated on the progress of the proceeding.

Regarding circuit systems running accross *Länder* boarders, the Energy Infrastructure Authority has the right to issue and administrative order, that for a period of five years new projects or project modifications within the projected area need the approval of the Energy Infrastructure Authority.

6. GMOs

Gentechnikgesetz, Federal Law Gazette I 2015/92; Gentechnik-Anbauverbots-Rahmen-Gesetz, Federal Law Gazette I 2015/93

EU law has recently introduced an opt-out-possibility regarding the authorisation for the cultivation of GMOs (Directive (EU) 2015/412, OJ L 2015/68, 1). Austria, one of the Member states pushing for this change in law, aimed to implement this so-called opt-out to the widest extent possible; its federal structure and the shared legislative competences between the Federation and the *Länder* being a particular challenge:

The competence for an opt-out during the authorisation process (Art 26b(2) of the Directive) lies with the Minister of Health (Gentechnikgesetz, Federal Law Gazette I 2015/92). Regarding already authorised GMOs (Art 26b(3) of the Directive), the nine *Länder* are competent to legislate on the possibility to take opt-out measures with regard to their respective territory. Once the conditions for opt-out measures are fulfilled for the entire Austrian territory, the Minister of Agriculture, Forestry, Environment and Water Management is competent to adopt these measures; he needs the approval of an Advisory Board, comprising representatives of the Federation and the *Länder*, stakeholders and civil society organisations (Gentechnik-Anbauverbots-Rahmen-Gesetz, Federal Law Gazette I 2015/93).