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Highest Austrian court abolishes EIA permit - but EIA appeal proceeding with regard to transport projects appears ineffective

Thomas Alge, Dieter Altenburger

1 Introduction

This article demonstrates structural flaws in the Austrian EIA permit proceedings on federal motorway projects, based on recent proceedings and court decisions as well as on the results of *Justice and Environment* studies that were published in December 2006¹. The EIA proceedings discussed here are part of a large-scale motorway investment programme in the Vienna region. The legal position and practise on public participation and access to justice have led to the situation in which a project cannot be halted, although public-concerned court appeals were successful.

2 Background facts

A motorway (“A5 Nordautobahn”) is supposed to connect the Austrian capital Vienna (Wien) and the south Moravian capital Brno (Czech Republic).² The distance between the two regions is approximately 110 km. The motorway is part of a TEN-T corridor. The Czech part of the projected motorway connection is supposed to be the existing R52 highway that would have to be extended to four lanes, if the Czech Republic follows the Austrian plans.³ In addition, Austria plans and has constructed a motorway belt around Vienna under the project name “Regionenring”⁴. The north eastern part of this motorway belt (“S1 Wiener Aussenring Schnellstrasse”) would affiliate the A5 motorway.⁵

The southern part of the A5 motorway as well as north eastern part of the S1 motorway are funded by the EIB (European Investment Bank) and run under the project name of “Package 1 („Ypsilon“): S 1 Korneuburg – Süßenbrunn, A 5 South, S 2 Süßen-

brunn Bypass”⁶. Additional affiliations would be necessary to complete the Regionenring project; the two billion € plan⁷ to construct a 15 km tunnel under the Natura 2000 site and national park “Danube meadows”⁸ as well as to construct a section of “Danube Bridge Traismauer” through a Natura 2000 site in the west of Vienna are of key importance. The latter project is already under construction in the Natura 2000 site, even though the EIA appeal and the nature protection appeal are pending and a complaint has been submitted to the European Commission.

However, serious resistance has built up against those projects on a political and a legal level. Ten thousands of signatures were collected against the project and there were demonstrations and campaigns. In addition, the public concerned has participated in EIA permit proceedings as well as countless other environmental proceedings and appealed against decisions.

3 Legal framework for the projects

The above-mentioned projects and plans have not been subject to an SEA (Strategic Environmental Impact Assessment) since most of the plans became legally binding before the SEA Directive (Directive 2001/42/EC) entered into force or because project plans are not legally binding papers and thus do not fall within the scope of the SEA Directive (Article 2 paragraph (a)). A5 motorway and its southern affiliations (S1 motorway) were sliced into six different sections (23 km, 13km, 10km, 4,5km, 25km, 9km) and into EIA proceedings that basically ran parallel in time and overlapped.⁹ For the purpose of this article we focus on these six sections.

The public concerned (affected groups, individuals, NGOs) has participated in most of EIA permit proceedings and appealed against EIA as well as subsequent decisions. Only two of the four EIA permit proceedings were initiated after the introduction of the Public Participation Directive (Directive 2003/35/EC) that implements the second pillar of the UNECE Aarhus Convention¹⁰.

¹ See <http://www.justiceandenvironment.org/jje-international/eit/> for download and details. See also Pavel Czerný, Jerzy Jendroska, “Transposition and Implementation of EIA Directive in some Member States”, *elni review* 1/07, p. 18

² Justice and Environment network (J&E) has published legal case studies on both the Austrian and Czech part of the planned motorway in December 2006. They are available on the following Websites: <http://www.justiceandenvironment.org/jje-international/eit/> http://doku.cac.at/jje2006_eit_casesstudies.pdf

³ Austria has already pursued EIA permit proceedings to affiliate R52. However, the Czech Republic and the European Commission are currently negotiating an alternative assessment on how to connect Vienna and Brno.

⁴ Please see the map on the website of the ASFINAG, the state-owned company that plans, finances, builds, maintains and operates the entire network of motorways and expressways in Austria: <http://www.asfinag.at/index.php?idtopic=74>

⁵ Please see the map on the website of the ASFINAG: <http://www.asfinag.at/index.php?module=Pagesetter&type=file&func=get&tid=288&fid=pdf&pid=1>

⁶ For details, please see <http://www.asfinag.at/index.php?idtopic=788>

⁷ Please see the map: <http://www.asfinag.at/index.php?module=Pagesetter&type=file&func=get&tid=287&fid=download1&pid=49>

⁸ See <http://www.donauauen.at/html/english/index.html>

⁹ See J&E cases studies on EIA/transport 2006 for details.

¹⁰ Convention on access to information, public participation in decisionmaking and access to justice in environmental matters, *Official Journal L 124*,

4 The Austrian EIA permit proceeding scheme for federal transport projects

The Austrian EIA proceeding is at the same time the permit proceeding for a specific project.¹¹ The permitting authority for federal motorways is the Federal Ministry of Transport.¹² The same authority is responsible for the planning and implementation of motorway projects; this might lead to a conflict of interests in practice.

However, for federal motorway projects initiated before June 2005 the EIA decision was issued in the legal form of a regulation and not as an “individual decision”. The Austrian highest administrative court ruled in 2003 that the legal form of a regulation is not a “permit” with regard to the EIA Directive of the EC (Directive 85/337/EC) and is thus an infringement of EC environmental law.¹³ One of the main reasons was that in a “regulation” it cannot be legally ensured that EIA requirements are sufficiently considered in the concrete project – it is above all not possible to stipulate the licensing requirements in a legally binding way. The court referred decision *WWF/Bolzano airport and others*¹⁴ to the *European Court of Justice* (ECJ).

Two years after the highest court’s judgement, the Austrian EIA Act was amended and adapted to the court’s decision. Proceedings that were initiated after June 2005 are decided in the legal form of an individual decision.¹⁵ Just before the June 2005 deadline quite a few motorway-related EIA proceeding were initiated. Four of the above-mentioned six sections fell under the “old” permitting scheme and would thus just be invalid by this argument.¹⁶

5 Limited access to justice against EIA permit decisions in the field of transport projects

We have already indicated that the EIA permit is simultaneously the development consent for a motorway projects¹⁷ and the permit is issued by the same authority that plans and maintains motorways (the Ministry of Transport). The permit is final after it has been issued and has no suspensive effect. As for appeals, one has to distinguish between decisions in proceedings before and after the 2005 amendment of the Austrian EIA Act (June 2005). The only legal

redress body in respect of resisting decisions that ended in the legal form of a regulation (old scheme) is the Highest Constitutional Court (VfGH). The appeal body against later decisions (new scheme) is the Highest Administrative Court (VwGH).¹⁸

Both appeal bodies are “courts of cassation” and focus on “significant legal problems” only by its nature. But it has not been so arranged that the courts go into substantive project details. The average duration of appeal proceedings at the Constitutional Court is 8.5 months, at the administrative court 22 months.¹⁹ Both appeal bodies are reluctant to grant interim relief; in practice this does not happen at all in environmental law-related appeal proceedings. As a result, once the Ministry of Transport has issued an EIA permit, constructions for a motorway can basically start. This is what happens in practice, as for example in the cases of the A5 and S1 motorways. This might lead to a situation in which the public concerned may win the case at court, although the respective motorway is already under construction and constructions can neither legally²⁰ nor factually be halted any more, since this would mean tremendous losses for a lot of companies and would raise pressure against the public concerned on the basis that they are causing damage of this kind.

6 Practical experience of ineffective legal redress: Court decision “S1 West” (received in July 2007)

We mentioned above that four of the six EIA permits serve as one PPP project that is funded by the EIB (European Investment Bank). Since 2006 an Austrian, Czech and European NGO coalition²¹ has been in contact with the EIB and the European Commission, alleging that EIA proceedings are subject to serious deficiencies and faults.²² Both institutions argued that the projects are fine since EIA permits had been issued and the projects were thus in compliance with environmental law. Though NGOs claimed that appeal proceedings were pending, the institutions regarded it as irrelevant. Thus the EIB granted the loan at the end of 2006 and constructions started subsequently.

17/05/2005 P. 0004 – 0020; see also <http://www.unece.org/env/pp/welcome.html>

¹¹ See J&E legal analysis on EIA/transport 2006, p. 9 for details.

¹² The EIA permit scheme for other projects is different (and better).

¹³ VwGH 21.10.2003, 2003/06/0078; see *Ennöckl/Raschauer*, § 23a Rz 2

¹⁴ ECJ C-435/97 of 16. Sept 2006

¹⁵ Until now only one decision, if at all, has been issued in the form of an individual decision.

¹⁶ Please note that the Constitutional Court has a different legal opinion on the issue (see VfGH 22. 6. 2002, V53/01 - V73/01 = VfSlg 16567-16579).

¹⁷ Though some additional permits are necessary to implement an EIA-decision.

¹⁸ In contrast, the appeal body for other EIA projects (that are not federal transport projects) is the “Environmental Senate” (Umweltsenat). The Environmental Senate is a specific appeal body for EIA appeals only. This court is acknowledged for concise and elaborated decisions with accurate legal expertise. The court provides for effective procedural as well as substantive legal redress. See J&E legal analysis on EIA/transport 2006, p. 11, for details.

¹⁹ See J&E legal analysis on EIA/transport 2006, Austria for references.

²⁰ There is no right for the public to enforce court decisions.

²¹ GLOBAL 2000 (Austrian FoE), Greenpeace CEE, EPS (Ecogolizky Pravnis Servis), CEE Bankwatch, FoE Europe

²² See J&E case studies on EIA/transport 2006, pp. 20-27, for details.

During the proceedings, abutting owners of the relevant projects established citizens' initiatives. With regard to the permission of the projects²³ B 301 Süd²⁴, S1 West²⁵ and A5²⁶ S2²⁷ and S33²⁸ (by regulation), they decided to file a complaint at the Constitutional Court. They argued that there had been incorrect documentation, scope and prognoses; alternatives of traffic had also not been checked, prescriptive limits would be exceeded, several procedural provisions were ignored and, though particular Natura 2000 sites²⁹ were affected, there has not been an appropriate assessment and that the permission by regulation violates Community law.

In the meanwhile, some appeal proceedings were decided³⁰: With regard to the "B 301 Süd", the Constitutional Court rejected the complaint and argued that it sees no reason to abolish the EIA permit.³¹ In the two other decided cases, "A5"³² and "S2"³³, the Constitutional Court rejected the complaint of the "citizens' initiatives"³⁴, using an argument that seemed somewhat strange and very formalistic: the Court ruled that the citizens did not establish their initiatives lawfully, because the spokesperson or the concrete project was not clearly identifiable, the signature lists differed³⁵, the pages of the signature list were not numbered³⁶ and the comments were not adequate. Note: The appropriate authority had proved the signature lists and the comments, written a letter to the citizens' initiative and approved that they had been drawn up in a correct manner and that they were in a position to complain against the permission in the same way they did in the case of B 301 Süd (see above). When the citizens' initiatives referred to this affirmation of the Federal Ministry of Transport, the Court stated that this "letter" is not binding.

In July 2007 the Constitutional Court issued its decision on the EIA permit for the section S1 West motorway³⁷ section that is already under heavy construction. The court abolished the EIA permit due to procedural faults since the competent authority did not apply the correct legal position. Indeed it ignored the transitional provisions that were enacted in the 2005 amendment to the EIA Act.³⁸ When the Austrian EIA Act was amended, the law arranged that permission for all EIA projects launched by announcement before 31st May could be decided by regulation³⁹ and not by individual decision (official notification). The determining factor for this deadline was seen as the day of the "official announcement" for the EIA permit proceeding which constitutes the formal initiation act for an EIA proceeding in Austria. In the case of S1 West, the authority made a mistake with regard to the timeframe of the announcement. When the Federal Ministry of Transport tried to remove the mistake, the announcement came too late. Hence, they would have had to apply to the new rules. As they did not do that, the court abolished the EIA permit and a new EIA permit proceeding has to be initiated.

At the same time, the court set a deadline for the abolishment of the decision as 31st December 2007. This can be interpreted as some kind of "interim relief" for the authority to "repair" the decision. Such a decision is formally correct in the context of Austrian environmental law since the EIA permit was issued in the legal form of a regulation, whereas it would not be possible in individual decision appeal proceedings. It can be concluded that the idea of interim relief was turned on its head since it does not protect the appealing party but rather the permitting authority and the developer. In addition, a large media campaign in regional newspapers with interviews and information from regional governments has been launched against the public concerned in this case, indicating how much a new EIA appeal proceeding will cost.

At the end of August 2007, a new EIA permit proceeding was initiated. It is unclear if there will be a decision before the end of the year. Furthermore, it is uncertain that constructions would be halted if there is no decision before the end of the year because we know from experience: When permission of the law pertaining the water concerning the project "B 301 Süd" had been abolished by the Highest Administrative Court⁴⁰ the constructions still continued. More than a year later – a few days before

²³ The first four projects are arranged around Vienna. The project S 33 is about 80 km away from Vienna.

²⁴ B 301 Wiener Südrandstraße (now redefined as S 1 Süd).

²⁵ S 1 Wiener Außenring Schnellstraße West.

²⁶ A 5 Nord Autobahn.

²⁷ S 2 Wiener Nordrand Schnellstraße (a by-pass of the A 5).

²⁸ S 33 Donaubrücke Traismauer.

²⁹ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

³⁰ But complaints of other persons (e.g. landowners) are still pending.

³¹ In this case, the Constitutional Court did not exceedingly deal with the position of the citizens' initiative. It argued that it has no reason to doubt that the citizen lawfully set up the initiative because the appropriate authority had proved the signature list and the comments.

³² See VfGH 14. 12. 2006, V14/06.

³³ See VfGH 2. 3. 2007, V66/06.

³⁴ Such groups can get standing in EIA permit proceedings. Please see J&E legal analysis on EIA/transport 2006 for details.

³⁵ E.g. different e-mail addresses had been provided by the contact persons in order to handle the huge amount of the return.

³⁶ The Constitutional Court argued that you do not know which page is the first and whether all persons had read the first page.

³⁷ See VfGH 22. 6. 2007, V40/06.

³⁸ Please see above for details.

³⁹ Even though this contradicts EC environmental law (please see above).

⁴⁰ See VfGH 24.2.2005, 2004/07/0170.

the motorway was opened up⁴¹ – the authority issued the EIA permit.

However, if there were a decision by the end of the year, the public concerned could appeal to the Highest Administrative Court (new permit scheme). As mentioned above, the average court proceeding duration at this court is 22 months and the court does, in 99 % of environmental cases, not grant interim relief. For the case in question, this would mean that the court would decide three years after motorway constructions have started. At this time the constructions would already be completed. This raises the question as to whether there is any sense in public participation and access to justice with regard to motorway projects in Austria. The legal situation has changed and the “regulation” permit will soon be history. But similar problems are likely to occur in the future with regard to the long duration of court proceedings and the interim relief procedure.

7 Non-compliance with the Aarhus Convention?

Participation and court proceedings require a lot of personal and financial resources of the public concerned. If there is no effect in practice, it is not only frustrating for the concerned groups and individuals, but it might also be an infringement of the Aarhus Convention and the Public Participation Directive of the EC. The Aarhus Convention provides in Article 9/4 that Access to Justice “*shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*”. It can be doubted that the proceeding scheme and practice with regard to federal transport projects fulfil these provisions.

8 Conclusions

It can be concluded that the legal position and court practice with regard to EIA permitting proceedings for federal motorway projects are subject to serious deficiencies regarding public participation and access to justice. The main problem is that highest courts appear to not be adequate appeal bodies for EIA proceedings and do not grant interim relief in practice. It seems unacceptable that constructions of a motorway may continue after the highest court ruled that there is no valid EIA and project permit. Large-scale projects are sliced into fractional sections; this leads to cost- and time-intensive public participation and access to justice. Similar problems occur in other Member States as Justice and Environment studies 2006 discovered.

In the field of transport projects the public concerned is confronted with a powerful constellation of

planning and permitting authorities that control motorway developing companies and provide comprehensive business for banks and construction companies. Altogether, they appear to form an “entity” that one must not oppose. Effective public participation and appropriate access to justice would be an important tool to somehow ensure democratic balance and accordance with constitutional principles as well as environmental justice in such constellations of political and economic might. The lack of this balance leads to a feeling of dead faint, as described by *Franz Kafka* in his novels.

Austria provides a lot of administrative resources in transport EIA proceedings. The latter are time- and resource-intensive not only for the public concerned, but also for the competent authority and the developer. On the basis of our understanding, the used resources would seem more appropriate if access to justice in respect of EIA permits was effective.

⁴¹ That means: all constructions were completed.

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:

- **European environmental policy**
 - Research on implementation of European law
 - Effectiveness of legal and economic instruments
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- **Environmental advice in developing countries**
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 - Know-how-transfer
- **Companies and environment**
 - Environmental management
 - Risk management

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brus-

sels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

ElNi Website: elni.org

On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.