AVOSETTA MEETING

25-26 May 2018, Vienna

Report on recent developments

AUSTRIA

Verena Madner

Vienna University of Economics and Business (WU Vienna)

A. Legislative and Policy Initiatives

The following update on policy initiatives regarding Austria as a business location and the initiative regarding deregulation have also been included in the questionnaire.

1. Update on a state objective of 'preserving Austria as a business location', and the Business Location Ombudsman

Coinciding with (and presumably as a consequence of) the refusal of an EIA permit for Vienna airport's third runway due to climate change considerations,[1] several legislative and policy initiatives were discussed in Austria to strengthen the economy.

One of these initiatives is seeking to introduce a constitutional provision (state objective) acknowledging the importance of economic growth, employment and representing a competitive business location in order to ensure prosperity;[2] the same law in which this provision is planned to be introduced to already contains a state objective requiring comprehensive environmental protection. The legislative initiative is currently discussed in parliament. While many statements submitted during the public consultation period were dissuasive or at least doubting the benefits of such a provision,[3] it is expected that the initiative will become law in the next few months.

A second initiative was requested by the Austrian Economic Chambers, the (mandatory) representative body for business owners in Austria. They have claimed that 'just as much as' for environmental interests – there is a need for a representative of business interests in permitting procedures in order to ensure the competitiveness of Austria as a business hub. A so-called 'Business Hub Ombudsman' (*Standortanwalt*) should thus be party to such proceedings. The new coalition government, in effect since December 2017, has included this initiative in its government manifesto.[4] While a legislative

[1] See below and, for a more detailed account, the report on recent developments in Austria submitted for the 2017 Avosetta meeting, available at http://avosetta.jura.uni-bremen.de/madner2017.pdf.
[2] The parliamentary material is available at https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00110/index.shtml#tab-Uebersicht.
[3] The submitted statements are available at https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00025/index.shtml#tab-Stellungnahmen.
[4] Government manifesto available at https://www.oevp.at/download/Regierungsprogramm.pdf.

initiative has not been passed yet, we still expect the 'Business Location Ombudsman' to be implemented under the current coalition government.

2. Speeding up proceedings for infrastructure projects

The Federal Ministry for Digital and Economic Affairs (Bundesministerium für Digitalisierung und Wirtschaftsstandort, BMDW) proposed the introduction of a new law aiming to make Austria more attractive as a businesslocation.[5] The envisaged law would allow to identify projects which have a significant positive effect on the Austrian economy. Project developers would be required to submit their project to the BMDW which subsequently decides on the relevance of this project for the Austrian economy taking into account the recommendations of an expert panel. For projects, which were considered being in the interest of the Austrian economy, permitting proceedings should be accelerated by ordinance. How this 'speeding up' of procedures is to be achieved has not been specified. The government ministers agreed in April 2018 to bring the proposal before the parliament;[6] a draft law is yet to be expected.

3. Deregulation Agenda, including no goldplating of EU law

Already in 2017, the federal legislator adopted a law on the 'General Principles of Deregulation':[7] When proposing new legislation it has to be ensured ia that the administrative burden and financial impact of legislation on businesses are reasonable and proportionate. Furthermore, following the principle of 'one in, one out', new burdensome legislation, if possible, shall be compensated by the removal of existing 'burdensome' legislation. In transposing EU law, implementing more stringent measures ('gold-plating') shall only be possible in exceptional cases (§ 1 (4) Deregulierungsgrundsätzegesetz).

The new coalition government, in effect since December 2017, also puts an emphasis on deregulation. In particular, it seeks to identify legislative provisions, which can be considered as gold plating.[8] An emphasis lies on labour and environmental law. A legislative initiative in this regard is yet to be expected.

The *Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice* has suggested a legislative initiative with the aim of annulling laws and ordinances in Austria, which have become redundant and/or irrelevant over time. All such federal laws, which have been introduced before 1 January 2000 und are still in force should be annulled by 31 December 2018. The Ministry estimates that with this law about 2500 legal provisions can be annulled.[9] A ministerial draft law has been passed which is currently available for commenting during the public consultation period.[10]

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[5] Report of Minister for Digital and Economic Affairs Margarete Schramböck, BMDW-10.70/0010-IM/a/2018.
[6] Beschlussprotokoll des 15. Ministerrates vom 25. April 2018, available at https://www.bundeskanzleramt.gv.at/-/beschlussprotokoll-des-15-ministerrates-vom-25-april-2018.
[7] Bundesgesetz über die Grundsätze der Deregulierung (Deregulierungsgrundsätzegesetz), Federal Law Gazette I 45/2017.
[8] Government manifesto available at https://www.oevp.at/download/Regierungsprogramm.pdf.
[9] Report of Minister of Constitutional Affairs, Reforms, Deregulation and Justice Josef Moser, BMVRDJ-601.121/0032-V 1/2018.
[10] Ministerial draft law available at https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00042/index.shtml#tab-Stellungnahmen.

B. Case law

1. Constitutional Court on refusing the EIA permit for Vienna airport's third runway

As reported in last year's submission,[11] Austria has seen its first 'climate change lawsuit' in 2017 when an administrative court of first instance (BVwG) refused the EIA permit for Vienna airport's third runway based on climate change considerations. In a balancing exercise, foreseen in the applicable Austrian Aviation Act,[12] this administrative court found that the public interest in reducing CO2 emissions in Austria and complying with EU and international climate law obligations would outweigh the other public benefits of the project.

The Austrian Constitutional Court (VfGH), however, which was seized by the project developers to provide judicial review, found that these considerations were unlawful.[13] The main argument of the VfGH was that 'climate change' was not one of the 'other public interests' to be considered in the balancing exercise provided for in the Austrian Aviation Act. These 'other public interests' to consider are only the ones already reflected in the Act itself such as the explicitly mentioned interest in 'the protection of the general public' and 'the prevention of negative effects on life, health and property'. These public interests must indeed be interpreted in light of § 3 of the Austrian Federal Constitutional Act on Sustainability, which requires 'the prevention of harmful effects on the natural environment as the basic resource of the human being'. However, such an interpretation of 'other public interests' could not result in reading the term as including public interests not already reflected in the Act, including 'climate protection'. The lower court, however, had done exactly that and thus – in the terminology of the VfGH – comprehensively misjudged the applicable law. This amounted to a constitutionally relevant error. The VfGH consequently annulled the BVwG's refusal of the EIA permit.[14]

With the annulment of its judgment, the lower court was required to decide anew on the EIA application for the third runway project. However, in this new decision, the lower court was bound by the VfGH's views, as set out in its judgment. In March 2018 the lower court subsequently decided to grant the EIA permit for the third runway project.[15] On the issue of the balancing exercise provided for in the Austrian Aviation Act, the lower court simply held that it was bound by the VfGH's views to the effect that climate change aspects could not be taken into account. While it could include the public interest in 'avoiding avoidable noise' and in 'the prevention of negative effects on life, health and property' in its balancing exercise, it could not include climate change considerations.[16]

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[11] See Report on recent developments in Austria submitted for the 2017 Avosetta meeting, available at http://avosetta.jura.uni-bremen.de/madner2017.pdf.

[12] §71(1) of the Austrian Aviation Act requires a permit for civil airfields to be granted if – ia – 'other public interests do not oppose'.

[13] VfGH, Judgment of 29 June 2017, E 875/2017, E 886/2017. The VfGH criticised several aspects of the lower court's judgment. For a more detailed account see Birgit Hollaus, 'Austrian Constitutional Court: Considering Climate Change as a Public Interest is Arbitrary – Refusal of Third Runway Permit Annulled' [2017] International Constitutional Law Journal 467. Madner/Schulev-Steindl, 'Dritte Piste - Klimaschutz als Willkür?' [2017] ZÖR 589.

[14] Birgit Hollaus, 'Country Report for Austria. Courts at the frontline' [forthcoming] IUCN E-Journal.

[15] BVwG, 23 March 2018, W109 2000179-1/350E.

[16] BVwG, 23 March 2018, W109 2000179-1/350E, 130. Arguing, however, that the lower court could have relied on another line of reasoning despite being bound by the VfGH's view, Birgit Hollaus, 'Country Report for Austria. Courts at the frontline' [forthcoming] IUCN E-Journal.

2. CJEU on access to justice and NGO participation in Austrian water permitting procedures ('Protect')

In Austrian administrative law, only those individuals or organisation who have subjective public rights can participate as a party to the proceedings of first instance, and have the subsequent right to access to justice, ie to challenge the decision before the administrative courts.[17] Environmental NGOs, however, only have the right to participate as a party in matters falling within the scope of the national laws implementing the EIA- and IPPC-Directive. Thus, in all other matters, environmental NGOs do not have standing, and consequently no right to legal review. In *Protect*,[18] the CJEU has recently found this situation to be contrary to EU law and international law commitments.

The case resulted from a national permitting procedure in which the environmental NGO Protect asked the water permitting authority to be admitted as a party to the permitting procedure regarding a snow-production facility.[19] The authority refused standing for Protect who subsequently challenged the permit granted for the facility. The competent national court however argued that Protect had no right to challenge the decision as it had (factually) not participated as a party to the permitting procedure.

The CJEU, which was seized by the national court of second instance, had to examine the question whether the Water Framework Directive and the Aarhus Convention require Austria to grant a right to a legal remedy to environmental NGOs, and if so, whether this also means environmental NGOs must have standing in the initial permitting procedure. In essence,[20] the CJEU found that Art 9(3) Aarhus Convention read in conjunction with Article 47 of the EU Charter of Fundamental Rights requires that environmental NGOs must be able to contest a decision granting a permit for a project that may be contrary to the obligations stemming from the Water Framework Directive. While Art 9(3) of the Aarhus Convention in itself does not require those environmental NGOs to have standing in the initial permitting procedure, this is necessary in the particular context of the current Austrian legal system: As the Austrian administrative legal system links standing in permitting procedures and the subsequent right to a legal remedy, only parties to permitting procedures are in a position to later challenge the permit issued in that procedure. Due to this link, the CJEU found that the Aarhus Convention indeed requires standing and party rights for environmental NGOs in permitting procedures; otherwise, those environmental NGOs would not be in a position to exercise their right to a legal remedy as foreseen by Art 9(3) of the Aarhus Convention and that right would ultimately remain ineffective.

The competent national court has meanwhile followed up with the CJEU's judgment and has annulled the respective judgment of the court of first instance which had refused Protect the right to a legal remedy.[21] The court of first instance is now required to decide the case anew, and in the

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[17] An exception from this general rule exists in the context of EIA screening decision as a consequence of EU law requirements and CJEU caselaw. Environmental organisations and neighbours who are both not parties to the proceedings which establish whether a project is required to undergo an EIA were granted the explicit right to challenge this decision before the competent administrative court of first instance, see § 3(7a) Austrian EIA Act.
[18] Case C-664/15 *Protect Natur-, Arten-, und Landschaftsschutz* (CJEU, 20 December 2017).
[19] For details on the underlying case see the report on recent developments in Austria submitted for the 2016 Avosetta meeting, available at http://avosetta.jura.uni-bremen.de/austriard2016.pdf.
[20] For a more detailed account see Birgit Hollaus, 'Country Report for Austria. Courts at the frontline' [forthcoming] IUCN E-Journal.
[21] VwGH, 28 March 2018, Ra 2015/07/0055.

process has to consider Protect's objections to the project.[22] Further court cases are currently ongoing or are expected to be brought before the courts.

The CJEU's ruling in *Protect* has also had broader impact that goes beyond the case at hand. In a recent court case relating to the request of an environmental NGO that the Governor of Salzburg should draw up an adequate air quality action plan, the deciding court relied on the reasoning in *Protect*:[23] In Austrian administrative law there is no right of an individual or organisation to ask for an ordinance such as an air action plan to be issued by the competent authority.[24] Accordingly it would be impossible for an environmental organisation to challenge acts and omissions contrary to national laws relating to the environment, even where like in the present case, the continuous failure to stay within air quality limit values would prove the situation to be contrary to EU and national air quality law.[25] The deciding court consequently granted the environmental organisation a right to request an ordinance containing an adequate air quality action plan to be drawn up.

[22] In a similar case in which the court of first instance has refused an environmental NGO's request to be acknowledged as a party to the initial water permitting procedures, the court of second instance has annulled the lower court's decision. The *Protect* case would however indicate that the environmental NGO would have had to be acknowledged as a party to the initial proceedings, VwGH, 28 March 2018, Ra 2015/07/0152.
[23] VwGH, 19 February 2018, Ra 2015/07/0074.
[24] See on this issue the report on recent developments in Austria submitted for the 2016 Avosetta meeting, available at http://avosetta.jura.uni-bremen.de/austriard2016.pdf.
[25] On this deficit see already the study on the implementation of Art 9 Aarhus Convention in Austria, available at http://ec.europa.eu/environment/aarhus/access_studies.htm.