

“Crisis”: Austrian court prevents construction of third runway due to climate change

Austrian Report by Verena Madner

In its judgment dated 2 February 2017,¹ the Austrian Federal Administrative Court has overturned a decision to grant a development consent for the construction of a third runway at Vienna International Airport. In balancing the public interests involved, the Court concluded that ultimately the public interest in reducing CO2 emissions in Austria and complying with EU and international law obligations would outweigh the public benefits of the project.

The case, labelled as (one of) the first court case(s) in which climate change was used as an argument to reject a project,² attracted national and international attention. In my brief report, I will contextualise the judgment, outline the court’s reasoning, and touch on some criticism voice towards this judgment and present some of my own observations as well.

Context

Only in 2014, Austria had introduced a new two-tier administrative court system. Since then, administrative decisions are subject to legal review by the administrative courts of first instance, depending on the subject-matter by either one of the nine Administrative Courts of the *Laender*, the

¹ Judgment available in German at https://www.bvwg.gv.at/amtstafel/291_ERKENNTNIS_2.2.17_ee.pdf?5te9fg.

² Micner, ‘Courts now at frontline in battles over climate change’, CS monitor, 29 March 2017, available at <http://www.csmonitor.com/Environment/Inhabit/2017/0329/Courts-now-at-front-line-in-battles-over-climate-change>; GreenAir Communications, ‘Austrian federal court rejects Vienna Airport’s third runway plans on climate protection grounds’, 21 February 2017, available at <http://www.greenaironline.com/news.php?viewStory=2339>; Hoffmann, ‘Austrian court blocks Vienna airport expansion’, 15 February 2017, available at <http://atwonline.com/eco-aviation/austrian-court-blocks-vienna-airport-expansion>; Berwyn, ‘Climate Change Concerns Prompt Court to Block Vienna Airport Expansion’, 15 February 2017, available at <https://insideclimatenews.org/news/14022017/climate-change-vienna-airport-paris-climate-agreement-james-hansen>; Gundlach, ‘No 3rd runway at Vienna International Airport because adverse climate impacts outweigh short-term economic benefits: Austrian court’, 10 February 2017, available at <http://blogs.law.columbia.edu/climatechange/2017/02/10/no-3rd-runway-at-vienna-airport-because-adverse-climate-impacts-outweigh-short-term-economic-benefits-austrian-court/>; Airportwatch, ‘Court in Austria blocks 3rd runway at Vienna airport, as climate harm outweighs a few more jobs’, 10 February 2017, available at <http://www.airportwatch.org.uk/2017/02/court-in-austria-blocks-3rd-runway-at-vienna-airport-as-climate-harm-outweighs-few-more-jobs/>.

Federal Administrative Court or the Federal Fiscal Court. Matters of EIA though fall within the competence of the Federal Administrative Court only.

Contrary to the tribunals and administrative review bodies before, the new administrative courts are now equipped with full competence to review cases on the merits. This competence includes exercising the discretion granted by law initially to the administrative authority in case this authority had exercised it contrary to the law. Consequently, the administrative courts can replace an authority's assessment and decision with their own – a novelty for the Austrian administrative (legal) system.

The Case

The project proposing a third runway at Vienna International Airport in Schwechat (further 'project') required an EIA which in Austria is conceptualised as a one-stop-shop. This means that the EIA authority applies all national laws – environmental and others such as the Austrian Aviation Act – that are relevant to the implementation of the project in this one procedure;³ with the resulting EIA permit, no further (sectoral) permitting is required.

Initially, the Lower Austrian government as competent EIA authority had assessed the project, and in 2012 issued a positive development consent. A number of environmental organisations, citizens' initiatives, individuals and also the City of Vienna as neighbouring municipality challenged the decision and filed for legal review with the Austrian Federal Administrative Court. The main argument presented by the appellants was negative impacts on (their) health due to noise from increased air traffic which constitutes a subjective-public right within the understanding of Austrian administrative law; the request for legal review was thus found admissible.

In reviewing the case on the merits, the court found that the Lower Austrian government had exercised its administrative discretion provided by one of the laws applicable, the Austrian Aviation Act (Luftfahrtgesetz, LFG), contrary to this law: § 71(1) of the Austrian Aviation Act provides that a development consent for an airport (expansion) shall be granted if there are 'no other opposing public interests'; a definition of what constitutes a public interest is not given. It would thus require the deciding authority to identify other public interests, and conduct a weighing and balancing of the public interests at stake. However, according to the court, the Lower Austrian government had only identified those public interests in favour of the project, not those opposing the project. As the Lower Austrian government had failed to exercise its discretion lawfully, the court found itself competent to exercise it and take the decision instead.

³ § 3(3) *EIA Act* 'consolidated development consent procedure'.

The court then very thoroughly examined the various impacts and benefits in the context of the project and identified the public interests involved. It found that a public interest to consider was the negative impacts of climate change on human health, food supply, biodiversity, agriculture etc, and that CO₂ emissions also from aviation contributed to these effects. With different legal instruments at national, EU and international level, Austria had committed to reducing its emissions and to according importance to the issue of climate change. This would allow concluding that climate protection can constitute a public interest for the purpose of § 71(1) of the Austrian Aviation Act. In balancing all the public interests involved, those in favour of the project and those opposing the project, the public interest in reducing CO₂ emissions in Austria and complying with EU and international obligations would outweigh the public benefits of the project.

The project developer has already filed a complaint with the competent Administrative Court to have this judgment by the Federal Administrative Court annulled. It thus remains to be seen whether the judgment will be upheld.

Criticism against the ruling that may serve as a starting point for our discussion

#1: Can courts have a role in (advancing) climate policy?

Similar to earlier climate change cases like the *Urgenda case*, the judgment has been criticised based on the argument that the judges have acted as decision-makers, or regulators. Some argued that it is not for judges to regulate or make climate policy decisions. This touches upon a very delicate issue that is the balance of powers or distribution of powers among administration, legislators and courts. It is above all an issue to be determined in the constitution and legal framework what the role of courts is and how far they are to be involved.

#2: Including aviation in climate commitments?

Commentators have argued that emissions from international aviation cannot be subject to national climate change efforts, particularly not in the context of individual (infrastructure) projects. They refer to the Kyoto Protocol which requires parties in its Art 2.2 to agree on a mechanisms for reducing emissions from international aviation under the auspices of the ICAO (International Civil Aviation Organisation). In the understanding of these commentators, this would exclude any unilateral action of parties in this area, especially since recently with the market-based mechanism CORSIA an agreement was reached within the ICAO. The mechanism at EU level would underline this conclusion as only emissions from EEA flights are covered by the EU-ETS while emissions from other (international) flight are not. This division is maintained even in the Commission's proposal aiming to prepare for CORSIA's implementation in the EU.

3: Relationship of individual projects to climate change?

A counterargument presented against the ruling was that passengers who could in the future no longer fly from Vienna due to capacity problems without the third runway would simply commute to Bratislava airport. The CO₂ emissions would thus simply occur in another country and hence still contribute to climate change; they could thus not be used as an argument against the third runway in Vienna.

Further Observations

Operationalising the Paris Agreement by interpreting national laws accordingly

The case is of course embedded in the Austrian constitutional framework, it is thus not per se a precedent for other countries. However, what is of global importance is that it shows how the commitments policymakers make to protect the climate and to fight climate change can make a difference on the ground, i.e. when it comes to interpreting constitutional provisions, or legislation that is open to interpretation by courts.

From the point of view of climate policy the decision is of tremendous importance because it spelled out loud and clear that the 2°C goal that has been agreed upon in Paris will not be reached without a profound action on the ground. It reminds the public and politics that if the Paris Agreement and the commitments made are to be taken seriously than symbolic legislation will not be sufficient.

Role of citizens' in enforcing climate commitments

The court's judgment, the mere fact that it could review the Lower Austrian government's decision, was only possible because the public – environmental organisations, citizens' initiatives and concerned individuals – used their right for access to justice and filed a legal review.

However, this was only possible because the project was subject to an EIA. In this particular procedure, the public has the right to participate in the permitting proceedings and is accorded, explicitly, the right to legal review. In the Austrian legal system this is a special case, in particular for environmental organisations, although international law commitments would dictate otherwise.

The present case underlines the importance of public participation and their access to justice in environmental matters.