Report on the legislative and jurisprudential developments in Greece

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A. Introductory Remarks

The starting point for the analysis is that the EU Membership in the early eighties was of critical importance for the development of the Greek Environmental Law and that the EU contribution has been critical in terms of developing the necessary legislative and institutional arrangements and of promoting models of participatory environmental governance (Tsaltas/Rodotheatos,2011, p.146; Lekakis/ Kiousi, 2013, p. 7). Despite the positive EU influence, the relevant body of law has been characterized by the lack of a coherent and systematic approach concerning its regulatory content, which can be attributed mainly to the way that the EU Directives have been transposed into the national legal system[1] (Karageorgou, 2009, p. 191).

The deep economic crisis emerged in late 2008, which was characterized by the difficulties to finance public sovereign debt, signalized a "paradigm shift" on the regulative content of the environmental legislation. This can be attributed, to a certain extent, to the fact that the simplification and acceleration of the relevant procedures for granting environmental, building and operation licenses and the reform of the Spatial Planning Law towards ensuring more flexibility in land development were regarded as necessary growth enhancing reforms in the relevant Memorandums of Understanding, which were signed by the then Greek government as a precondition to receive financial assistance (Karageorgou 2014, p.72 ff). This regulatory trend[2] exerted significant influence on many pieces of the Environmental and Planning Legislation that were introduced in the last five years, such as the Law 4014/2011 for the environmental authorization procedures[3], the Law 3986/2011 for the development

[1] The implementation of the environmental legislation has also been ineffective for reasons relating to the endemic characteristics of the political and administrative system (insufficient monitoring and enforcement mechanisms) and to the comparatively late emergence of the civil society mobilization as well as to the "quality" of the relevant regulations (Koutalakis, 2004, p. 755ff).

[2] The widely accepted view according to which certain reforms in the Greek environmental legislation were necessary for increasing its coherence and streamlining and accelerating the relevant licensing procedures, (but not at the expense of the environment), also excerpted certain influence on the emergence of this tendency.

[3] Law 4014/2011(Hellenic Government Gazette Issue A/209/21.09.2011) for the environmental authorization procedures, provides for the reduction of the categories of the projects subject to environmental impact assessment from 4 to 3 (Article 1) and for the shortening of the deadlines for both the expression of the opinions by the authorities involved (Article 3 par.2 for the projects of the A1 category) and for the issuance of the environmental permits (Article 3 par.2 lit.f). Furthermore, Law 4014/2011 simplified and "relaxed" to a significant extent the EIA procedure for the projects classified in the Category B, namely projects that are expected to have significant 'local" effects on the environment (Article 8).

of Special Planning Regimes that have to be elaborated for each public property under privatization and the Law 3894/2010, as it is in force, [fast-track Legislation[4]]

B. Recent legislative developments

The relevant legal developments last year (2014) reflect the above described regulatory trend. A characteristic example of a legislative intervention which creates conditions for unsustainable interventions in the natural environment is the Law 4280/2014 that introduced a series of changes to the then existing legislative framework for the protection of the forests (Law 998/1979, as it was modified). It is worth noting that despite its deficiencies relating to the lack of a systematic approach and the existence of "single-case" provisions, the previous legislative framework, also through its interpretation by the Council of State, provided a quite satisfactory level of protection for the sensitive forest ecosystems (Koutoupa-Rengakou, 2007,p.163ff). The most significant changes introduced by the new Law are the following: 1) the abolition of the absolute protection which land declared for re-forestration after a fire or clearing, enjoyed in accordance with Article 117 par.3 of the Greek Constitution, and the allowance for its use under certain conditions, especially for certain infrastructure projects, such as roads, dams and renewable energy installations (Articles 46,48 and 53 of the Law 998/1979, as modified by Law 4280/2014) 2) the expansion of the already provided uses of protected forest lands under certain conditions for industrial, mining, energy and tourist installations and for infrastructural projects, such as roads, energy and transport networks (Articles 47, 47A, 48, 49, 50 and 53 of the Law 998/1979, as modified by Law 4280/2014) 3) the possibility of the clearing of forest land up to 30 hectares for the cultivation of certain types of plants and trees (Article 47 paras. 1 and 2 of the Law 998/1979, as modified by Law 4280/2014) 4) the expansion of the allowed uses of the parks within the cities which enjoy the same level of protection as the forest eco-systems (Articles 58 and 59 of the Law 998/1979, as modified by Law 4280/2014) 5) the allowance for building residential houses within forests lands by housing cooperatives (Article 60 para.1), although the Council of State held in previous cases that the constitutional protection of the forests does not allow such a use.

Furthermore, the already described trend for the simplification of the environmental authorization procedures underpins the recent legal developments in this field. In particular, the already provided possibility for the extension of the environmental permits, which were valid at the time of the publication of the Law 4014/2011 for projects and activities belonging to category A (namely those with the most significant environmental impacts) until the completion of 10 years after the time point of their issuance under certain conditions (no substantial alteration or

[4] The relevant legislative framework is underpinned by the introduction of special rules in deviation from the ordinary ones in order to facilitate the realization of the project proposals that are characterized as "Strategic Investments" (Karageorgou, 2014, p. 74ff).

compatibility with the new situation [Article 2 para. 8 lit.b of the Law 4014/2011] was further simplified through the issuance of a relevant Circular (161484/2014). The above-mentioned Circular stipulates that the extension of the permit can be granted after the submission of a declaration of the operator concerning the compatibility of the project with the new factual situation, while the administrative control is very limited, raising thereby along with the legislative provisions compatibility issues with various provisions of the EU Environmental Law, such as Article 21 of the Directive 2010/75. Furthermore, the Joint Ministerial Decision 170225/2014 specifying the standards that the EIA Study for projects belonging to the category A[5] should have, is a characteristic example of an "one-dimensional" simplification of the EIA procedures first of all because **the requested information for the EIA Study as regards the effects of a project is limited by the introduction of certain criteria concerning the concrete area in which the estimated effects of the project are analyzed (Annex II, point 8.1-Area Study) and the pre-determination of the information sources of the EIA (Annex II, point 8.1 ,8.3.5). Furthermore, significant issues concerning the capacity of the competent authority to make an appropriate assessment are raised, because the information required as regards the effects on certain elements of the environment, such as forests within the framework of the EIA Study is much less demanding and extensive than those required by the previous legislative framework for the authorization of an intervention in a forest area[6] (Law 998/1979, as modified). Finally, the introduction of exceptional and simplified environmental authorization procedures for certain kind of projects and the provision for the continuous operation of certain activities even without the necessary environmental license can also be observed as a regulatory trend in this field[7].**

The above-mentioned Ministerial Decision (170225/2014) also set out the requirements for the "Appropriate Impact Assessment" (AIA), named as "Specific Ecological Assessment" for projects and activities belonging to the category A within the framework of the EIA procedures. The relevant provisions of the JMD demonstrate that the transposition of Article 6 para. 3 of the Habitats Directive still

[5] Joint Ministerial Decision 170225/2014 "Specification of the content of the files for the environmental authorization of projects and activities belonging to category A of the Ministerial Decision 1958/2012, as it is in force, in accordance with Article 11 of the Law 4014/2011 and every other detail" (Hellenic Government Gazette Issue B/135/27.01.2014).

[6] In accordance with the provisions of the Law 4014/2011 the permit for the intervention in a forest is incorporated in the environmental permit.

[7] In this context, Article 13 para. 3 of the Law 4179/2013 as modified by Article 19 para. 2 of the Law 4249/2014 foresees that operators of ski resorts can obtain operation license after a declaration of the submission of the EIA Study within nine months. Furthermore, the already simplified procedure for the environmental authorization of construction works and projects within the territory of Port Authorities, has been further simplified by the provision of Article 40 para.1 lit D' of the Law 4256/2014, according to which the environmental authorization of certain projects relating to the extension or modification of the port does not presuppose even the Opinion of the Committee of Planning and Development of the Ports, which substitutes the opinions of all other authorities ordinary ordinarily involved in the authorization process.

remains problematic in the Greek legal system[8]. In this context, the JDM which sets substantially more extensive requirements for the "Specific Ecological Assessment" for the projects belonging to the Category A than those provided for the projects belonging to category B[9] does not comply with the requirements of the AIA first because it is provided that their compilation should be based on certain pre-determined kind of data (maps of the sites, Implementation Reports and Specified Environmental Studies), which do not exist in the majority of cases, while only the significant impacts are assessed (Annex 3.2.1 and 3.2.2 of JMD). Furthermore, the relevant JMD limits the required information through a not well-documented classification of the protected areas into two categories, namely those for which there are reliable data especially of the last decade (Annex 3.2.2) and those for which there are no such data (Annex 3.2.1), so that reduced information standards are set for the Specific Ecological Assessment of projects to be implemented in areas of the first category.

C. Recent jurisprudential developments

a. Council of State Decision 26/2014-Plenary (Acheloos Case): The relevant Decision constitutes the final act of a long judicial battle, which set an end to an unfinished project for an inter-basin water transfer[10] and reviewed the legality of the composite project in the light of the findings of the relevant CJEU Ruling[11] after the request for a preliminary ruling. The Court ruled that the relevant legislative provisions enabling the implementation of the diversion project through the

[8] The central element which characterizes all relevant legislative efforts (Article 6 of JMD 33318/3028/1998, Article 10 of the Law 4014/2011) is that the procedure for "AIA" is not regarded as a distinct assessment procedure, but as a part of the EIA procedure. In particular, Article 11 para. 9 of the Law 4014/2011 sets that the Specific Ecological Assessment (AIA) for projects belonging to the category A is attached as an Annex to the EIA Study and as an integral part of the latter, while the Specific Ecological Assessment (AIA) for projects belonging to the category B, which are subject to "Standard Environmental Commitments" is submitted independently. Such an approach does not seem to be compatible with Article 6 para. 3 of the Habitats Directive, as interpreted by CJEU (CJEU Judgment: C-258/2011, *Sweetman* [2013]). Moreover, the provisions of Article 11 paras. 8, 9 and 10 of the Law 4014/2011 make the requirements for the content of the Specific Ecological Assessment dependant on the category to which the project belongs according to the EIA legislative framework, an approach which does not seem to be in harmony with Article 6 para.3 of the Habitats Directive, as interpreted by the CJEU, because the only requirement for the application of the "AIA" is the prior assessment of the plan or project's significance to the integrity of the site (Balias, 2014, p. 591-593).

[9] Joint Ministerial Decision 52983/1952/2013 '"Standards for the Specific Ecological Assessment for Projects and Activities belonging to category B of Article 10 of the Law 4014/2011".

[10] Since the eighties a major composite project which involved several dams and other interventions (pipelines) was planned and started partially being implemented in the upper reaches of the Acheloos River, one of the biggest rivers in Greece. The main aim of the project was to divert water from the Upper Acheloos River to the Pinios River and from there to the Plain of Thessaly, the biggest agricultural region of Greece, in order to boost agricultural production. The Council of State annulled the relevant environmental licenses granted for specific components of the diversion project on the grounds of the violation of both the EIA legislation (Decisions 2759/1994 and 2760/1994) and the relevant international [Granada Convention] and constitutional provisions for the protection of the cultural heritage (Decision 3478/2000). Another environmental license was later annulled on the grounds that it was not based on the directions set in the Regional Programmes for the Utilization of water resources for the critical basins, as required by the then existing water legislation interpreted in the light of the Water Framework Directive (Decision 1688/2005).

[11] CEJU Judgment, Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, 2012, OJ C 355/2.

authorization of the RBMPs for the critical basins and the EIA Study for the composite diversion project violate several provisions of the EU Water and Environmental Legislation (Article 4 para. 7 of the WFD, Article 1 para.5 of the EIA Directive and Article 6 paras.3 and 4 of the Habitats Directive). Furthermore, the Court ruled that the diversion project as whole violates also the principle of sustainable development, as established in EU primary Law and in the national constitution, as well as the relevant international [Granada Convention] and constitutional [Article 24 para. 6] provisions for the protection of the cultural heritage.

b) Council of State Decision 376/2014-Plenary ("Mall'): In this long-term case, which gained prominence in the public debate**,** the Court was called upon to judge whether a single legislative provision granting planning, environmental and work consents for the construction of a big shopping center ("Mall") was compatible with the Greek constitution and the EIA directive. At the initial phase, the Plenary of the Court decided to wait the CJEU Ruling in the *Boxus and others* Case, as the central issue concerning the conformity of this legislative practice with the principle of effective judicial protection was closely related with the interpretation of Articles 1 para.5 and 10 a of the EIA Directive (Decision 4076/2010). In the recent decision it becomes obvious that the judicial review was mainly focused on the compatibility of the relevant legislative provision with certain constitutional provisions as a precondition for judging the acceptability of this legislative practice in accordance the requirements set in the relevant jurisprudence[12]. In this context, the Court came to the conclusion that there was an exceptional case, which justified the introduction of planning and environmental regulations by a legislative provision. It ruled though that the critical legislative provision violates Article 24 para. 2 of the Greek Constitution as regards the modification of the city plan in a concrete area, because this would lead to the deterioration of the urban environment. Furthermore, the Court ruled that the relevant Study which accompanied the relevant legislative provision granting the environmental license did not satisfy the requirements of the EIA Study, so that the relevant legislative provision violates the relevant definitions of the EU Law. The judicial review was not extended, though, on the compatibility of this legislative practice either with the principle of the effective judicial protection (Artice 20 para. 1 of the Greek Constitution, Article 10a of the EIA Directive) or with the fulfillment of the requirements for the application of the exception set in Article 1 para.5 of the EIA Directive.

c) Council of State Decision 807/2014: The Court ruled that the relevant provision of the Special Framework for Spatial Planning and Sustainable Development for Renewable Energy Sources (Article 6 para.3), which in principle allows the installation of wind mills in Specific Zones for the Protection of the Birds only after the elaboration of a specific ornithological ("bird-related') study, which, in addition to the EIA Study, can set specific requirements for the project implementation or even result in a refusal to grant authorization, is in line with the relevant provisions of the Birds Directive. The Court annulled, though, the omission of the Administration to introduce a specific provision in the above-mentioned Spatial Planning Framework, which would require the elaboration of a specific ornithological study as a

[12] In accordance with the relevant jurisprudence the practice of granting planning, environmental and work consents by a single legislative provision could be acceptable from a constitutional and a European Union Law perspective, only when the following conditions are satisfied: a) it is applied in exceptional cases and b) no individual rights, constitutional provisions and definitions of the EU law are violated (Council of State Decision 1847/2008-Plenary).

precondition for the authorization of the installation of wind mills in the "Significant Areas of Birds", as required by the Court Decision 1422/2013. Such a thesis was based on the assumption that such an omission contradicts the relevant provisions of the Birds Directive.

In conclusion, it should be underlined that the recent reforms and legislative interventions do not address the main deficiencies of the Greek Environmental Legislation relating to the lack of a coherent and principle-oriented regulatory approach and to the insufficient and fragmented transposition of the EU legislation, in order to contribute to its effective implementation. The jurisprudence of the Council of State is, to a significant extent, critical in terms of ensuring the effective implementation of the environmental legislation, also through the dialogue with the CJEU, and in setting limits to projects which raise serious "sustainability" issues.

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