Climate Change protection goes local - remarks on the Vienna Airport Case

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Climate Change was brought before the Austrian Federal Administrative Court in the beginning of 2017. The judgement concerning the construction and operation of a third runway acknowledges the current development in the UNFCCC process and, as such, is of special importance and without precedence: According to the Court, the fight against Climate Change and its consequences for Austria overrides the public interest in the expansion of the Vienna Airport.

In numerous jurisdictions environmental activists and organisations are fighting against Climate Change and trying to see its importance and urgency acknowledged by the Courts. This time, their tenacity during the long process beginning in 2001 with the plan to expand the airport, was successful.

According to §§ 58 (3), 68, 75 of the Austrian Aviation Act, every construction, operation or enlargement of a civil airport requires a permit by the competent authority. § 71 (1), (2) indicates the conditions under which the permit is to be granted: A public interest in favour of the construction (that is: the demand for such a project) is required, but 'other public interests' have also to be taken into account. According to the Court, this means that the different public interests need to be balanced – which, crucially, allows the Court to fully review the discretion exercised by the competent authority. The Court has no trouble to accept the public interests in favour of the expansion of the airport: As flight traffic, in line with a general trend in Europe, will continue to rise and the capacity of the airport will meet its limits by 2025, the demand for the construction is out of question. The expansion would also help improving the development of the eastern region of Austria, creating jobs and raising flight security.

The Court, though, puts opposing weight in the balance, which is the contribution of the project to the greenhouse gas (GHG) effect. While the same Court in a decision from 2011 has stated that solutions for the aims set by the Kyoto Protocol were to be searched on the national and international level, it assumes now that all public interests need to be taken into account. As the Act itself does not define 'public interests', every interest that covers the common good and is not of individual nature (such as commercial interests) has to be considered. Referring to the detailed examinations of GHG emissions resulting from the project (increase of 2,2% of Austria's national GHG emissions compared to the scenario where mitigation measures are being taken; 1,79% compared to the scenario of the status quo, p. 77) as well as the impacts of Climate Change on Austria, the public interest to protect the environment and especially to mitigate the consequences of Climate Change, oppose the construction of the third runway.

On the basis of this wide range of public interests, the question of balancing is of special importance: This is where legal scholars and other Courts may learn from a good Kelsenian tradition. As the Aviation Act does not indicate any criterion for weighing the interests, the Court refers to the manifestation of values by authorities vested with democratic legitimacy (such as decisions by the Federal Government) and the hierarchy of the legal system. The European Union and Austria are parties to the Paris Agreement and, yet, it is not apparent how Austria is going to meet its obligation under the Climate Protection Act (implementing supra- and international obligations) to reduce its GHG emissions. On the EU level, Art. 37 Charter of Fundamental Rights claims for a high level of protection of the environment. With respect to the

national and state constitutions, the importance of Climate Change protection is emphasized, too.

According to the Court, this needs to be reflected in the interpretation of the public interests: Whereas at the times of the adoption of the Aviation Act (1957) the economic aspects related to the development of aviation constituted the overriding public interest, today "Climate Change is one of the most urgent problems" (p. 124). Many different sectors and people in Austria are already and will be affected by the consequences of Climate Change: negative impacts on human health and life, on the economy (agriculture, forestry and tourism), on ecosystems or even on social peace (due to migration) as well as the high risk of extreme weather events lead, according to the Court, to a change in the balancing of public interests. This change is embodied in different Acts and decisions by the Austrian Federal Government, constituting state objectives and as such giving orientation to the Court's interpretation.

It is because of the urgency of the problem (for the Court a "well-known fact", p. 79, 90) as well as the serious aggravation of Climate Change by the aviation sector that the Court judges the public interest in limiting GHG emissions as prevailing and rejects the request for the construction of the third runway.

Against the backdrop of a detailed scientific assessment of the consequences of Climate Change and the role played by the traffic sector, the Court's reasoning acknowledges the local dimension of Climate Change protection. The objective to reduce emissions, resulting from international obligations and implemented into the national legal system, finds its place in the decision making process of a concrete project. As traffic remains the sector with the biggest discrepancy to the climate goals and as the contribution to Climate Change by airplanes is, according to the IPCC, especially high and impossible to mitigate, the airport cannot be expanded. So far, these arguments have never been made in such a clear way by any Court. Thus, the Court does not take upon itself the political dimension of the question, but, on the contrary, refers to the government and takes the political decisions seriously. This allows the Court to address and discuss current problems and to give Climate Change protection the place within legal reasoning that its urgency asks for.

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