

## Translation<sup>1</sup>

### Austrian Court Decision regarding „Third Runway in Vienna“

#### 4.5. Defining public interest in the construction of the third runway according to the Aviation Act (LFG)

##### 4.5.1. Defining public interest in line with the Aviation Act:

According to § 17 para (1) EIA Law 2000 the decision about the permit application needs to apply the foreseen approval requirements of the relevant administrative provisions and of para (2) to (6) of this provision (*Baumgartner/Petek, EIA Law 2000, 165*). They order that the applicable substantive law provisions are applied on top of the additional approval requirements of the EIA Law 2000. This means that all substantive law approval criteria must also be fulfilled during the EIA procedure to ensure the approvability of the project. If this should result in varying strict requirements, each of the requirements must be fulfilled individually. Therefore each approval requirement needs to be assessed separately, while each fact has to be interpreted based on its specific systematic context. As a result, each approval requirement can result in a reason for failure of the application as a whole (*Madner, EIA, in: Holoubek/Potacs, Öffentliches Wirtschaftsrecht II, 924; N. Raschauer, in: Ennöckl/Raschauer/Berthaler<sup>3</sup>, Commentary on the EIA Law § 17 Rz 6; concerning the legal approval requirement in forestry for the EIA procedure, see e.g. Supreme Admin. Court Coll. 15.702 A/2001; Fed.Admin. Court W104 2000178-1, Kötschach-Mauthen, heavy current line, and further Supreme Admin. Court 24.02.2015, Ro 2014/05/0097*).

According to § 68 para (1) Aviation Act, which is co-applied in the EIA procedure, a license is needed for operating civil airports (civil airport permit). The same applies for any change to the operational volume of a civil airport which had been permitted in the original decree.

According to § 71 para (1) Aviation Act, the civil airport license has to be issued when the project is fit from a technical point of view and safe operations can be expected (a), the applicant is reliable and suited to lead the operation (b), the financial means of the applicant guarantee fulfil the requirements for airport operators according to the relevant Federal law, and (c) it is not opposed by other public interests (d).

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<sup>1</sup> Translation of the last part of the court decision, pages 107-128. Original version to be found here: [https://www.bvwg.gv.at/amtstafel/291\\_ERKENNTNIS\\_2.2.17\\_ee.pdf](https://www.bvwg.gv.at/amtstafel/291_ERKENNTNIS_2.2.17_ee.pdf)

According to § 71 para (2) Aviation Act, proving the demand is another precondition for issuing a civil airport license for a public airfield. Airports can be permitted only when their construction is in the public interest.

According to § 72 para (1)(e) Aviation Act, the decree about the civil airport permit (among others) determines the conditions and restrictions where these are necessary with respect to the conditions of § 71 (1) Aviation Act and in particular concerning the transport task of the airport.

Therefore an airport license can only be issued when “*there is no other opposing public interest*”.

The construction of the airport must also be in the public interest, this is a precondition for issuing a civil airport license according to para (2) of this provision. Both preconditions are also valid for each change to the licensed operational volume of the airport, which also requires a civil airport license (§ 68 (1) Aviation Act). As the third runway at the Vienna airport would significantly increase the operational volume of the airport, this is subject to approval according to § 71 para (1)(d) Aviation Act. Therefore no other public interest must oppose the construction of the third runway in this appeal proceeding.

The Aviation Act does not provide a more detailed definition of those “*other public interests*” (in contrast to § 17 para (3) Forestry Law and §§ 104(a) and (105) Water Law 1959, for example); nor does the Aviation Act define an objective, which could be used for interpretations (e.g. as do various provincial nature protection laws, see § 1 (1) Upper Austrian Nature Protection Act, § 1 (1) EIA Law 2000. However, public interests are those which put the interest of the common good above the interest of the individual (see more details below under page item III.4.5.14). When it comes to interpreting § 71 (1) (d) Aviation Act, it is therefore up to the administrative authority to define what the public interest is for this particular administrative decision.

The Supreme Administrative Court examined the question of what should be understood by the “*other public interests*” in terms of § 71 (1) (d) Aviation Act, and explained in its decision Supreme Administrative Court Coll. 7913 1/1970:

“The word ‘*other*’ indicates that the interests are not those which are listed in the Aviation Act para 1 (a) to (c). Therefore other public interests need to be taken into consideration, which have to be safeguarded under the Aviation Act. Protection of the general public (§§ 92, 92 and 124 Aviation Act), maintenance of peace, public order and security (§§ 5, 124, 126, 145), the prevention of risk to life, health and property (§ 133), guarantee of safety for people and property (§ 122), safety of persons and objects on the earth (§ 128), avoidance of disruptive impacts on persons and objects (§ 5) and

avoidance of avoidable noises (§ 14) can be considered as those public interests.

Moreover, the existence of a demand is a precondition for issuing an airport license for a public airfield according to § 71 (2) LFG (Aviation Act). Airports must not be licensed, unless their construction is in the public interest. An airport is not in the public interest, in particular when

- a) it is less than 100 km away from an airport which is already licensed and operating and would therefore be suited to endangering its transport task, and
- b) if the entrepreneur of this existing airport himself is able and willing to take over the tasks foreseen for the planned airport within a period of six months.

A precondition for the licensing (expansion) of an airport is not only that there is a demand for it, but that the project is of public interest at all.

The Supreme Administrative Court therefore comes to the conclusion that the construction of an airport (as well as an expansion) can be licensed only where there are no opposing public interests within the meaning of § 71 para 1 Aviation Act, and that there is a public interest within the meaning of § 71 para 1 Aviation Act.”

Moreover, the Supreme Administrative Court adjudicated that each increase in aviation safety lies in the public interest (Supreme Administrative Court 15.06.1994, 92/03/0141). With its decision of 25.06.2008, 2007/03/0181, the Supreme Administrative Court stated that the authority competent to issue a civil airport license in accordance with § 68 para. 2 must examine whether the requirements according to § 71 Aviation Act for issuing a civil airport license are fulfilled, including whether there are other opposing public interests. Similarly, the authority is also obliged to prevent threats to life, health and property. The Supreme Administrative Court repeated in its decision of 30.09.2010, 2010/03/0110 that the protection of the general public, the prevention of threats to life, health and property are public interests; including the avoidance of avoidable noise.

Public interest in the construction of the third runway at the Vienna airport must exist and there must not be another overriding public interest. Such a legitimate public interest can be based on many reasons, such as the expectation of an additional demand due to an increase in flight movement, increasing air safety, creation of additional jobs, an increase in levies and taxes, or the improvement of Austria as a business location, in particular in the area of greater Vienna. However, the public interests opposing the license must also be considered, such as the reduction of greenhouse gas emissions necessary to achieve the so called “*two degrees goal*” (see more below under

item III.4.5.8.) and to limit the greenhouse gas effect, or to avoid land consumption.

As a general rule, public interests can be any interest oriented towards the well-being of the general public. Strictly private interests are excluded at this point. When the law explicitly prescribes that only public interests be considered, then the consideration of private interests must be omitted (see *Stolzlechner, Verwaltungsrechtliche Abwägungsentscheidung, Rechtsfragen der Berücksichtigung öffentlicher und privater Interessen bei individuellen Verwaltungsentscheidungen, ZfV 2000/521*). Concerning the construction and operation of the third runway various public interests exist; moreover there is the private interest of the first party involved in profit-making. A private developer's project may be of public interest if their realization simultaneously serves public interests and there is evidence of this.

With respect to public interest in a third runway, the first party involved as the applicant stated (Project Description of January 23, 2008, Dokument 01.01, Purpose of the Project, p. 7) that the project was needed due to the worldwide increase in flight movements and passengers. The third runway was needed to ensure the hub function, in particular for Eastern Europe, to ensure competitiveness, because of Vienna Airport's current runway system's limited possibilities to fulfil this growing demand. Taking into consideration the safety requirements, the capacity of the existing runway system was said to be limited; it was limited to 72 starts or landings during peak hours. Vienna Airport's growth was claimed as a key factor in the long-term positive development of the whole region. Already over 14,000 people (including external companies) were employed at the site of the airport. An increase in passengers would also lead to an increase in jobs. Vienna Airport has already secured over 29,000 jobs in the Austrian economy as a whole. The added-value brought about by the Vienna Airport would reach € 2.8 billion per year (as of 2005). The planned project would definitely support growth and many new jobs would be created in the coming years. Each job at the site would create another one in the Austrian economy. By offering transport infrastructure the airport is contributing significantly to the dynamics of the region. To keep up their competitiveness, many companies need worldwide flight connections. A key factor during the planning consisted in achieving a commonly accepted understanding of the development of air traffic in the region and the involvement of the people acutely or potentially affected by the growing air traffic. Therefore a mediation procedure had been conducted in order to generate as much citizen participation as possible. The mediation procedure covered the organization of the air traffic with the existing two-runway-system as well as the construction of another (third) runway at Vienna Airport.

On the issue of public interest the contested decision (p. 362 ff) stated that this is in the public interest, due to the need to cover the increasing number of flight movements. Moreover, this project helps to secure and strengthen the airport's function as a key air transport hub and to support economic development, as well as securing and creating jobs in the neighbourhood of the airport. Overall, the issue of whether the construction of the third runway was a public interest had to be answered with yes. Other public interests, like maintenance of peace, public order and security and protection of the general public, did not stand in the way of issuing a licence for the third runway.

Other opposite public interests, which cannot be met by adequate measures – e.g. avoiding noise, land consumption, or the emission of greenhouse gas by the additional planes at the airport – have not been included in the weighing of interests.

During the official procedure the appellants raised various opposing interests, like the lack of demand, increase in Green House Gas emissions, land and water consumption and health damages caused by air pollutants, noise emission and electromagnetic fields (see more details above under item I.3.1).

The initial appellant is a recognised environmental organization according to § 19 para 7 EIA Law 2000. The second, fifth, sixth and eighth to eleventh appellants are citizens' initiatives according to § 19 para 4 EIA Law 2000.

Each of the appellants has the right to plead environmental protection rights during the procedure. Therefore they can argue that the construction or enlargement of the airport contradicts public interests (§ 71 para 1 (a) to (d) Aviation Act) or that construction or expansion are not in the public interest (§ 71 para 2 Aviation Act).

During its procedure the Federal Administrative Court examined other public interests which have not been clarified in the official procedure, or only insufficiently, but have been raised in the complaints. Therefore the Federal Ministry of Finance delivered supplementary information on the additional levies and taxes and the Federal Ministry for Transport, Innovation and Technology (BMVIT), as the Supreme Civil Aviation Authority, was asked in writing to deliver a statement on the issues concerning public interest raised during the procedure (see item I.3.2.5). Moreover, the court commissioned studies on the additional GHG emissions (I.3.2.3) from Professor STURM, and on the demand or the prognosis on the development of flight movements from Mr. WIPF (I.3.2.6).

On the issue of the existence of public interest, the BMVIT stated that, apart from the general safety interests (e.g. the protection of the general public against hazards and irritating impact from air transport), the Aviation Act also explicitly lists economic interests, such as the interest of the air transport economy as a

public interest. The interest of the air transport economy consists of the “appropriate” or “economical operations” and the “fulfilment of transport tasks” or satisfying demand and preventing uncoordinated competition.

The “Road Map Air Transport 2020”, the strategic concept of the Austrian government, enshrines the “development of an efficient and sustainable infrastructure” as one of the three fundamental targets of the strategic focus of Austrian air traffic. By realizing the individual measures listed, among them the “construction of the third runway, project developer: VIE”, the maintaining and strengthening of Austria as an air transport location is secured. From a strategic point of view, the availability of a third runway at Vienna airport is seen as key to the continuation of the successful development of the Airport Vienna as a hub, and for Austria as a location for economy and air traffic. Only by securing an efficient infrastructure will it be possible to make the adequate capacities available to meet the future developments of a growing market in the best manner and to guarantee connectivity in the form of a strong network of routes from Vienna Airport.

And finally, the Ministry of transport’s letter referred to the settled case law of the Supreme Administrative Court, in which any improvement serving to increase aviation safety represents a public interest. The current design of the two runways at the Vienna Airport causes significant dependencies during the starting and landing of aircrafts. However, the construction of the third runway would make possible independent parallel operations without operational limitations during starting and landing. This would significantly increase aviation safety at Vienna airport. When these aspects are taken into account, then construction of the third runway is in the public interest, which according to the explanations in § 71 of the original version of the Aviation Act includes the demand.

#### **4.5.2. The authority’s assessment being unlawful**

According to para 130 (3) B-VG (Fed. Admin. Law) unlawfulness does not occur where the law permits the administrative authority to apply discretion and where this discretion is applied within the meaning of the law. The issue of whether weighing interests against one another amounts to applying discretion at all remains unclear (against: e.g. *Dünser*, Ermessenskontrolle durch Gerichte? in: *Larcher*, Handbuch Verwaltungsgerichtsbarkeit, 229, 245, with further references to verwaltungsgerichtlicher Judikatur; BVwG 21.01.2016, W113 2017242-1, *Handalm Windpark*; tending in favour, e.g. *Fuchs*, Verwaltungsermessen und Verwaltungsgerichtsbarkeit: Rückblick und Ausblick, in: *Holoubek/Lang*, Das Verfahren vor dem Bundesverwaltungsgericht und dem Bundesfinanzgericht, 232, 263).

As the authority which issued the challenged ruling only considered those public interests which spoke in favour of the project, while ignoring other public interests such as climate protection which opposed the project, it was deemed that the application of discretion had not been conducted properly by the authority which issued the challenged ruling.

According to § 28 para 2 VwGVG (Supreme Administrative Court Law), the Supreme Administrative Court decides a case itself once the decisive facts have been clarified or where direct clarification by the Supreme Administrative Court is in the interests of swiftness or represent a significant cost saving. In such cases the Supreme Administrative Court may make changes to the decision in any respect; the Supreme Administrative Court can exercise discretion or make additions.

If the result of the authority's exercise of discretion, as in the case at hand, is not in line with the meaning of the law, because the decisive circumstances have not been fully determined, then the Supreme Administrative Court is entitled to exercise its own discretion where the preconditions for a decision are present in the case itself (§ 28 para 2 VwGVG) (VwGH 01.03.2016, Ra 2015/11/0106; 26.04.2016, Ro 2015/03/0038), if necessary after completing the investigation proceeding.

As the Environmental Senate and later the Federal Administrative Court had already been required to make a number of additions to the investigation proceeding, referring the case back in order to conduct a further discretion exercise would have caused another delay and additional effort as the relevant facts had already been clarified after conducting an additional hearing of the parties and no additional investigations were needed. Therefore the Federal Administrative Court must review the weighing of interests conducted by the authority which issued the challenged ruling during the airport licensing procedure according to the Aviation Act (LFG) and – unless already done so during the administrative procedure – conduct this review itself and add to it.

#### **4.5.3 On demand and forecast of flight movements:**

According to § 71 para 2 Aviation Act (LFG), existing demand is the precondition for issuing a civil airport permit. A civil airport license is also necessary for significant civil airport expansion – such as the third runway in this case – and therefore evidence of the corresponding demand is also necessary. This demand exists in the case of the Vienna Airport.

According to § 71 para 2 Aviation Act (LFG) the license precondition “*demand*” indicates a public interest directly expressed in the LFG. By creating the relevant legal precondition with certain license preconditions, the legislator has already weighed the affected interests (*Pabel* in: Jahrbuch des österreichischen und europäischen Umweltrechts 2012, Interessenabwägung im österreichischen Umweltrecht. p. 143).

The fact that § 71 para 1 LFG specifies the question of additional demand as a licensing precondition constitutes the legal assumption that the project is of public interest.

With regard to the meaning of the term “*demand*”, the Supreme Administrative Court explained in the context of conceding coercion rights that this term

describes a deficiency (VwGH 02.06.2005, 2004/07/0148; most recently the finding 29.01.2009, 2005/07/0041).

The procedure conducted by the authority which issued the challenged ruling showed that demand for a third runway exists. The plausibility assessment conducted by the Federal Administrative Court also confirmed this demand. The LFG links the licensing of a civil airport with the precondition of a demand. The LGF already determines this as a legitimating public interest. The successful demonstration of a demand for the Vienna Airport (see item III.3.2 above) assumed that a public interest exists.

#### **4.5.4 On improving the east of Austria as a business location and providing transport infrastructure:**

Building the third runway maintains the attraction of Vienna Airport internationally, even increasing this attraction as a result of the greater capacity for flight movements and the increased availability of international flight connections and transfer options. Building results in important improvements to the east of Austria as a business location and of the flight transport infrastructure at the Vienna Airport, allowing it to meet the foreseeable increase in demand in the coming years (see point III.3.3 above). The construction of the third runway lies both in the interest of the region and of Austria's national economy.

Several international organisations are based in Vienna (the Vienna International Center is home to four UN headquarters, as well as the Organisation for Safety and Cooperation in Europe (OSCE); Organization of Petroleum Exporting Countries (OPEC) and several non-governmental organisations). An improved connection to the international air transport network keeps Vienna attractive as a location for international conferences. This is in Austria's foreign policy interest. Moreover, those international organisations directly and indirectly generate around 10,000 jobs which itself has direct and indirect monetary effects and influences the national economy. Again, this is in the public interest.

The construction of the third runway is in the public interest because an improved air transport infrastructure raises the status of the east of Austria as a business location, and of the City of Vienna as a seat for international organisations and location for international conferences.

#### **4.5.5. On the creation of additional jobs:**

As noted above, maintaining and improving the air transport infrastructure will improve the economic conditions in the east of Austria. This will have a positive impact on the employment situation in particular. Moreover, additional jobs will be created directly at the Vienna Airport, as well as in the surrounding area (see above item III.3.4.).

#### **4.5.6. Air safety:**

The construction of the third runway leads to an increase in aviation safety (see item III.3.5. above). According to the judicature of the Supreme Administrative



Court, every increase in aviation safety lies in the public interest (see judicature reference under item III.4.5.1.).

Finally, according to the national and international ICAO rules (§ 74 Aviation Act (LFG) and their implementation in the civil airport operation order), the authorities concerned, such as the airport and Austro Control in their role as traffic controllers, must always prioritise aviation safety while overseeing air traffic. This can lead to delays and rejections of air traffic if the airport as a hub in the transport network has insufficient capacity reserves. Long-term transport planning needs to take this into account.

#### **4.5.7 On the Vienna Airport's obligation to operate:**

According to the BMVIT statement (item I.3.2.6.), the construction of the third runway secures the Vienna Airport's obligation to operate, which is public interest. However, operations at Vienna Airport are also secured without construction of the third runway. Congestion can occur at the Airport Vienna any time irrespective of the runway system, making it impossible to keep its operations running smoothly. Long-term planning, however, must take this into account.

#### **4.5.8. On the project's contribution to the greenhouse effect:**

In its decision of 24.08.2011, 2010/06/0002 on the construction of the Schrick-Poysbrunn section of the A5 northern motorway, the Supreme Administrative Court shared the opinion of the authority that, with regard to the "*Kyoto Protocol*" targets, solutions need to be found at national and international level. The serious environmental pollution defined in § 24f para (4) EIA Law 2000 (this provision corresponds to the type of project under consideration, in this case to the 2nd section of EIA Law 2000 of the provision in § 17 para (5) EIA Law 2000) refers to the environmental pollution in the area directly impacted by the project. The Kyoto protocol cannot be interpreted to assume that projects resulting in a certain increase in the emission of climate-relevant gases would not be acceptable.

However, it is necessary to examine the existence of public interest as early as the level of special administrative law (§ 71 para (2) Aviation Act (LFG)), without the need to apply § 17 para (5) EIA Law 2000 which states that an application must be rejected in spite of having complied with individual conditions if the overall assessment results in serious environmental damage which cannot be sufficiently prevented or minimized with side provisions. A limitation of the public interests which must be taken into account according to the Aviation Act, however, is not evident.

With the Climate Protection Law (KSG), Austria set itself the goal of achieving a total reduction in greenhouse gas (GHG) equivalents from 51.5 to 48.8 million tons between 2015 and 2020; this would be a reduction of 5.24%. In the transport sector the reduction should be from 22.2 % down to 21.7%; a decrease of 2.25 %. The construction and operation of the third runway would, however, lead to an increase of 1.79 % (assuming the WEM scenario) or 2.02 % (assuming

the WAM scenario) of total GHG emissions throughout Austria (see item III.3.6.6.). During the procedure conducted by the authority which issued the challenged ruling the GHG emissions were not mentioned and not taken into account. However, the GHG emissions must be taken into account.

The remarks made under III.3.6 above show that climate change is already taking place in Austria and will have far reaching impacts on humans, animals, plants and the environment in future. A failure to meet reduction targets will result in significant property value losses, job losses, in particular in tourism and agriculture and forestry, flooding disasters and a sharp increase in extremely hot days. Furthermore, significant production losses in agriculture and forestry must be expected. The consequence will be the loss of animal and plant species as well as additional human deaths and severe health damage. Serious damage to Austrian agriculture must be expected. However, a significant reduction in the additional GHG emissions resulting from the third runway project cannot be achieved by emission reduction measures suggested by the first applicant party, or by the incidental provisions in the Federal Administrative Court decision.

The third runway project is in conflict with the public interest of environmental protection, in particular climate protection.

#### **4.5.9. On the additional taxes and levies:**

That the Vienna Airport does not directly pay any significant taxes and levies is the will of the legislator and cannot be argued as an opposing public interest toward the first party.

Therefore with respect to taxes and levies there are neither legitimating nor opposing interests associated with the third runway project.

#### **4.5.10. Land consumption:**

The construction of the third runway will render 661 hectares of high quality “*chernozem*” agricultural soil unusable for plant production. Land is a scarce resource, which cannot be replicated (see item III.3.9.).

The consumption of this area of high-quality land runs counter to the public interest.

In addition, it is important to understand that this shifts agricultural production further away from the consumer, the metropolitan area of Vienna, thereby reducing local supply, which is counter to the public interest.

The official expert explained in the section of the expert statement on agriculture that the problem does not consist in the consumption of 661 hectares but, as in many other areas too, in the cumulative effect. Land is consumed in Austria every year, most likely at a scale similar to that in other EU and non-EU states. The solution for this cannot be found in specific cases, but needs to be solved via strategic planning. In reality the issue of losing agricultural land due to land

consumption is not an agricultural issue, but one of land use planning. The “*Austrian Sustainable Development Strategy*” sets out the target of reducing the growth of permanently sealed areas to a maximum of one tenth of today’s value (referring to 2002) until 2010 and sets out the key task of future land use planning as ensuring a location optimisation for the socio-economically necessary, resource-consuming uses that takes all the relevant aspects of sustainability into account.

The paper on spatial planning in the EIS (Environmental Impact Statement) shows that land use planning is not yet implementing the protection of agricultural areas. There is short statement on this issue: “*The land consumption caused by the project remains as residual damage. The project, however, mainly affects agricultural areas and existing traffic areas*”. The title itself only specifies man as the protected property. It remains the task of politics and land use planning to decide which of the conflicting interests of land used for agriculture or for expanding the airport (including forest conservation and reforestation, ecological compensation areas, etc.) takes priority: maintaining and expanding the economic factor airport, or retaining the land for agricultural production.

Overall, the large area of land consumed by the project counters the public interest of maintaining the population’s livelihood.

#### **4.5.11. Protection of plants and animals**

The procedure of taking evidence showed (III.3.8.) that there will be no direct damage to plants and animals.

The protection of plants and animals is not opposed to the project.

#### **4.5.12. Other aspects concerning the third runway:**

Noise emissions from land-based transport occur along the entire route of a journey. In contrast, air transport noise is limited to the airport surroundings. Land-based transport offers an alternative to air transport only for short and some medium distance travel. Here, too, land-based transport options also have an environmental impact, in particular noise emissions and the “*fragmentation effect*” of a traffic route on the landscape structure. In the areas surrounding roads and rail tracks, noise emissions are generated of a similar intensity to those at an airport, although spread out along the entire route.

In terms of long distance travel, compared to land-based transport there is a public interest in the construction of a third runway.

#### **4.5.13 Commercial aspects:**

The first party’s commercial interests in the construction and operation of the third runway are not to be considered when taking the weighing decision. Thus the Federal Administrative Court stated in its decision of 09.11.2016, Ro 2014/10/0043, on the refusal of a clearance permit, that purely commercial usefulness or expedience are not sufficient to justify public interest in a different

use of woodland (see also Federal Administrative Court decision 18.06.2013/2012/10/0133, with further references).

Considering commercial interests when issuing a permit is not foreseen under the Aviation Act (LFG).

#### **4.5.14. Overall assessment:**

According to Art. 130 para 1 clause 1 Federal Constitutional Law (B-VG), the administrative courts, among others, decide on complaints against an administrative authority's decisions regarding unlawfulness. Para 3 of this constitutional law provision states that unlawfulness is not present – except in administrative criminal matter and matters within the competence of the Federal Court of Finance – as long as the law allows the administrative law discretion and this discretion has been applied in accordance with the law. Therefore according to § 28 para 2 in connection with the Administrative Procedure Act (VwGVG) the Federal Administrative Court must conduct a new weighing of public interest (see more details above under item III.4.5.2.).

The construction or expansion of an airport can only be permitted (among others) where there are no other public interests as defined in § 71 para 1 (d) Aviation Act (LFG) opposing it, and where there is public interest as defined in para § 71 para 2 Aviation Act (LFG) (III.4.5.1.). The different public interests must be weighed against each other.

#### **Weighing criteria:**

In many cases the legal provisions have already implemented a weighing of interests. On the one hand, this is determined by defining the goal (e.g. nature protection laws) and on the other, by the affected civil rights (*Pabel* in: Jahrbuch des österreichischen und europäischen Umweltrechts 2012, Interessenabwägung im österreichischen Umweltrecht. p. 144, referring to *Berka*, Verfassungsrecht 3 [2010] Rz 1550). In the Aviation Act (LFG) § 71 para 2 only demand is expressly defined as a legitimizing public interest. The LFG, however, does not provide any clear definition of the criteria for weighing “*other public interests*” which, according to § 71 para 1 (d) LFG, must not oppose the issuing of a civil airport permit. In any event, public interests are those in which individual interests are overridden in favour of the common good. In the case at hand, these are the interests listed under item III.4.5.3. to III.4.5.11. Consequently, commercial interests may not be included in the weighing of interests.

Even though § 71 does not provide any criteria for the weighing of interests, and this arrangement is criticised in literature regarding para 18 B-VG (Federal Constitutional Law ) ((*Stolzlechner*, Verwaltungsrechtliche Abwägungsentscheidung, Rechtsfragen der Berücksichtigung öffentlicher und privater Interessen bei individuellen Verwaltungsentscheidungen, ZfV 2000/521), the Constitutional Court considered the provision in the heritage preservation law to be unobjectionable in this case ( Constitutional Court Coll. 11.019/1986; see further Constitutional Court Coll. 9883/1983 with further references).

Where the special administrative law – in this case the Aviation Act (LFG) – does not provide criteria, the weighing must be oriented on the values formulated by democratically legitimate authorities or the hierarchy of the legal system. Such values are indicated in decisions made by the Federal Government or resolutions made by the parliament, European Union rules, as well as provisions from the federal and provincial constitutions.

### **Public interests legitimizing the project**

The public interest giving legitimacy to the project is the increasing demand for the growing number of flight movements in eastern Austria in the near future. The demand is explicitly stated as a public interest and a permit precondition in § 71 para 2 Aviation Act (LFG) (III.4.5.1. and III.4.5.3.).

There is also a strong public interest in the construction of the third runway with respect to Austria's regional and national economic interests in high-quality transport infrastructure to connect with the international air transport network for the Austrian economy and tourism. This will secure jobs and create new ones (item III.4.5.4.).

With respect to foreign policy, having a high-quality connection between Vienna and the international air transport network for those international organisations with their seat in the Austrian capital is in the public interest (see items III.4.5.4.).

Finally, the third runway will also create jobs directly or indirectly at the airport itself (III.4.5.5.). However, this is of lesser importance in the weighing, because construction of this type of infrastructure is not for the purpose of creating jobs at the Vienna Airport. It was not possible to assess the extent to which realizing the project could result in job losses for other types of transport or in other regions.

No specific public interest in the construction of the third runway exists with respect to taxes and levies. The procedure showed that airports enjoy an exceptional status concerning taxes and levies which is legally enshrined and therefore based on the legal and political will of the democratic legislator (see item III.4.5.8.).

### **Public interests opposing the project:**

The public interest in avoiding or reducing climate change and its consequences is clearly opposed to the stated interests in the construction and operation of the third runway. Austria is already particularly affected by climate change. The global average temperature is currently 0.85°C higher than at the end of the 19<sup>th</sup> century. In Austria the temperature rise has been twice the global average, and has already reached 2°C. Another increase of 1-2°C is expected by 2050. Achieving the two-degrees-goal represents an increase of almost 4°C for Austria.

Austria is an alpine state and therefore affected severely and in a multitude of ways by the consequences of climate change; this will lead to the destruction of wealth and jobs as well as landscape changes. The disastrous and far-reaching

consequences of climate change have been listed in a Federal Government decision dated October 23<sup>rd</sup> 2012 (for more details see item III.3.6.).

The document on the Federal Government decision of October 23, 2012 (*"Austrian Strategy of Adapting to Climate Change" - Part 2, Action plan, Recommendations for action*) explained: *"Heat waves lead to a higher mortality, however, they will also have impacts on morbidity, performance and well-being. Children, elderly people and persons with cardiovascular diseases in particular are considered to be most affected."* Moreover, it is assumed that the risk of skin tumours and cancer will increase (see item III.3.6.6.). It is expected that climate change will result in severe health issues and an increase in heat-induced deaths. The project represents a significant contribution to the increase in GHG emissions. Thus it counteracts the goal of reducing GHG emissions in Austria. However, health and life may not be weighed against other opposing public interests [see *Schmelz/Schwarzer, UVP-G (EIA Law) (2011), § 17, RZ 147, Altenburger/Berger, UVP-G (EIA Law) Umweltverträglichkeitsprüfungsgesetz (2010), RZ 48*].

At the same time, Austria has entered into national and international commitments to reduce GHG emissions. Austria has failed this goal by a large margin and will not reach its stated goal by 2025 (III.3.6.7.).

Moreover, the construction and the operation of the third runway will require significant land consumption (III.3.11.).

### **Weighing criteria based on EU law:**

The European Union (and the Republic of Austria) has signed the Paris Climate Protection Agreement. Furthermore, in this case the effort-sharing-decision (decision 406/2009/EU of the European Parliament and the Council of April 23, 2009) must be considered. Therefore EU law must be applied in addition to Art. 37 of the Charter of Fundamental Rights of the European Union (CFR). This provision aims to secure a high level of environmental protection and clearly includes the environmental media air, water and soil (as well as § 3 para 2 second sentence Federal Constitutional Law - see below). Environmental protection is also defined in Art. 37 CFR as the principal of sustainable development, which also aims at protecting the interests of future generations at the European level.

In addition, according to Art. 37 GRC environmental protection is defined by the principle of sustainable development, which at European level is directed in particular at the interests of future generations. The explicit reference to the improvement of environmental quality in Art. 37 GRC is an indication that environmental measures must not only serve to protect and preserve the environment in its current state, but must also be taken to improve environmental conditions. Art. 37 GRC and the federal objectives of the BVG Sustainability must be considered when weighing interests. The Constitutional

Court also applies GRC provisions for interpretive guidance (e.g. Constitutional Court Coll. 19.632 / 2012).

### **Weighing criteria based on federal and provincial constitutional law:**

Weighing public interest is not absolute and changes over time. When the relevant provision of the Aviation Act (LFG) was issued in the Federal Law Gazette No. 253 in 1957, climate change and the prevention of GHG emissions were not yet considered. Back then in economic terms air was largely a free commodity. Meanwhile it has been recognized that GHG emission increases and the associated costs to society need to be considered at the level of international law, Union law, as well as Federal and Provincial legislation. Climate change is now one of today's most pressing issues.

Due to this change in circumstances, the interpretation of the term "public interest" has also changed. The predominance of air transport expansion and its associated economic aspects, typical of the time in which the Aviation Act was issued, are being replaced by a stronger focus on environmental protection. This is already expressed in the "*Federal constitutional law on the comprehensive environmental protection of 27 November 1984*" which was passed and published in the Federal Law Gazette No. 491/1984 (BVG Umweltschutz) and introduced the protection of the environment as a national objective. In 2013 this law on the protection of the environment was incorporated and replaced by the "*Federal constitutional law on sustainability, animal protection, comprehensive environmental protection, safeguarding the water and food supply and research*" (BVG Nachhaltigkeit), Federal Law Gazette I No. 111/2013. The Constitutional Law on Sustainability (BVG Nachhaltigkeit) must therefore be applied in interpreting public interest as a national objective.

According to the Sustainability Law, the Republic of Austria (federal, provinces and municipalities) recognizes the principal of sustainability in the use of natural resources in order to ensure the best possible quality of life for future generations (§ 1) as well as comprehensive protection of the environment (§ 2 para 1). Comprehensive protection of the environment is defined as the reservation of the natural environment as mankind's livelihood from damaging impacts. Comprehensive protection of the environment consists in particular in measures to keep the air, water and soil clean and to avoid noise pollution (§ 2 para 2).

The Lower Austrian constitution (NÖ LV 1979) – the third runway project is located in Lower Austria – also emphasizes the protection of the environment, in particular climate protection. Under the title "Objectives and principles of state action" para 4 (2) ("*living conditions*") it specifies the following:

*"In its sphere of action the Province of Lower Austria must ensure that the livelihood of the Lower Austrian population in the individual municipalities and regions of the province are ensured with respect to their economic, social and cultural needs. Creating and maintaining adequate working conditions and social conditions, recognizing the principal of maintaining*

*Sundays as a day of rest from work, ensuring the best possible health system and sufficient housing, protection and care for the environment, nature and village appearances are of particular importance."*

And finally the last sentence of this provision clarifies: "*Climate protection is of particular importance.*" The constitutions of the provinces of Vorarlberg, Tyrol, Salzburg, Upper Austria and Carinthia also underline the importance of environmental protection and climate protection as an objective and principle guiding state action. Moreover, under the heading "*Economy*", Art. 4 clause 3 of the Lower Austrian constitution states: "*The Province of Lower Austria must support the development of the economy while taking into account the social, ecological and regional needs.*"

Thus the legislators at federal level and at the level of the Lower Austrian constitution have underlined the protection of the environment – and climate protection in particular – as a specific objective. While such definitions of the national objectives are primarily directed towards the legislator, these constitutional provisions should be used as an aid to interpretation (see the judicature on the provision preceding the Sustainability Law, the Federal Constitutional Law on comprehensive protection of the environment, Federal Law Gazette No. 491/1984; Supreme Administrative Court 25.01.1996, 95/07/0230, Constitutional Court Coll. 14.323 A/1995, und Constitutional Court Coll. 12.009/1989 and 14.895/1997 with further references; Umweltsenat 21.03.2002, US 1A/2001/13, Arnoldstein; weiters Gutknecht in: Korinek/Holoubek [Hrsg], Bundesverfassungsrecht BVG Umwelt; Kerschner [Hrsg], Staatsziel Umweltschutz [1996]). State objectives are primarily directed towards the legislator, however, they can be applied as an interpretation maxim when considering non-defined legal terms (such as "public interest") (see Budischovsky (see Budischowsky, The Commitment to Water Supply as a State Goal, RdU 2015/113 p 182, Köhler, Nature Conservation Law, p. 24 with further details, Supreme Administrative Court Coll 13.466 A / 1991).

### **Weighing based on decisions or resolutions of state authorities:**

With the Council of Ministers resolution of 23.10.2012 the Austrian Federal Government adopted a strategy for adapting to climate change. Accordingly, all possible consequences of climate change must also be taken into account in all relevant planning and decision-making processes, from national down to local level, by the authorities, the commercial sector and individuals (p. 127).

In the hearing before the Federal Administrative Court, the "*Air Transport Road Map 2020*" prepared by the Transport Ministry (BMVIT) was submitted by the first party. In 2011 the Federal Government in the Council of Ministers took due note of this strategy. This strategy paper presents the Federal Government's overall concept for the optimal development of Austrian aviation up to the year 2020. In the "*Air Transport Roadmap 2020*" the construction of the third runway was assigned the fourth highest category in a five-stage scale. The construction of the third runway is therefore not the highest priority.



Furthermore, during the 102<sup>nd</sup> session of the Austrian parliament, the resolution of 12.11.2015 with respect to Austria contributing to an ambitious result at the Climate Conference COP 21 in Paris (114 / E XXV. GP) was adopted by a majority. Accordingly, the Federal Government, and in particular the Federal Minister of Agriculture, Forestry, Environment and Water Management, were called to promote efforts, within the framework of the European Union and its objective of reducing European Greenhouse gas emissions by at least 40% by 2030 against the 1990 status, to achieve an ambitious, global, legally binding climate protection agreement for the post-2020 period at the COP 21 climate conference in Paris, one which is consistent with the objective of limiting the increase in global average temperatures to below two degrees Celsius compared to preindustrial values.

### **Ruling:**

With respect to the construction of the third runway, the public interest lies in additional air transport connections and the related improvement in the eastern region of Austria as well as the better supply of transport infrastructure and the creation of additional jobs.

The third runway would be a benefit also in terms of flight safety, however, the authorities always have to give priority to safety.

No special public interest in the construction of the third runway exists from the point of view of taxation and duties.

In the Austrian Federal Constitution, as well as the Lower Austrian Constitution, environmental protection -- and climate protection in particular - is assigned special priority. EU law also aims at a high level of environmental protection through Art. 37 of Governance, Risk management und Compliance (GRC).

As climate change is associated with severe damage to health, an increase in heat-related deaths as well as severe impairments to the Austrian economy and agriculture, and as the project will lead to a significant increase in GHG emissions, the public interest in realizing the project must be secondary to the public interest in protecting against the negative effects of climate change and land use.

On the whole, the public interest in there being no further significant increase in GHG emissions in Austria as a result of the construction and operation of the third runway prevails, together with the public interest in Austria upholding its national and international commitments to reduce GHG emissions, overrides the various public interests that commend the project. Also, the preservation of valuable arable land to provide food for future generations is imperative.

The overriding public interest in the construction of the third runway is thus largely lacking. The application submitted by the parties concerned must therefore be dismissed in its entirety.

Against this background, it is no longer necessary to address the other applications and submissions made by the plaintiffs. Since the application submitted by the parties concerned must be dismissed in the light of the complaints lodged by the appellant non-governmental organization and the citizens' initiatives, the complaints lodged by the other appellants need not be considered further. These are natural persons who can only assert the violation of subjective rights.

## **Translation with friendly support of Heinrich Böll Stiftung**

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System Change, not Climate Change!