

ECJ: ENVIRONMENTAL IMPACT ASSESSMENT DECISIONS NOT BINDING ON NEIGHBOURS

In an eagerly awaited decision of 16 April 2015 (Case C-570/13), the ECJ held that declaratory environmental impact assessment decisions that *ex ante* deny an EIA obligation (*UVP-Feststellungsbescheide*; "**negative ex ante EIA decisions**") are not binding upon neighbours who did not have standing as a party in the previous administrative proceedings. In Austria, authorities had consistently denied such standing of neighbours as parties.

Accordingly, a negative *ex ante* EIA decision has no binding force upon a neighbour who could not lodge a complaint against this negative *ex ante* EIA decision. In our opinion, this also applies to negative *ex ante* EIA decisions issued before 16 April 2015. Therefore, neighbours could claim in other project-related permitting procedures (such as proceedings for trade law or construction law permits) that a certain project is subject to a mandatory EIA.

The decision raises numerous new legal questions and leaves significant aspects unaddressed, such as the question of which authority has to assess the need for an EIA in the case a neighbour claims that an EIA is mandatory. Furthermore, it remains open whether neighbours may initiate EIA proceedings, or if they only need to be called into the proceedings as parties by the public authorities. For instance, environmental pressure groups may not file a motion for a declaratory EIA decision under the wording of the law; however, the Austrian Federal Administrative Court (*Bundesverwaltungsgericht*) recently ruled the opposite (Decision of 11 February 2015, Case W104 2016940-1/3E, Biomass Thermal Power Plant Klagenfurt [*Biomasse-Heizkraftwerk Klagenfurt*]).

Conclusion

In the future, project developers will have to deal with the question of a mandatory EIA to an even larger extent. It is to be expected that the legislator will increase the number of parties involved in EIA proceedings aiming at declaratory EIA decision. Until then, the ECJ decision does not make EIA proceedings less important than before; on the contrary: While the ECJ declared that a negative *ex ante* EIA decision has no formal binding effect upon neighbours, the decision will have relevance from a substantive point of view, and the competent authority will most probably take it into consideration.

Neighbours will seize this new opportunity in the various permitting procedures.

Therefore, profound legal know-how regarding EIAs is not only crucial for the success of a project in EIA proceedings, but also in other permitting procedures (e.g., under Austrian Trade Act [*Gewerbeordnung*], the Austrian provincial Building Acts [*Bauordnungen*], or the Austrian Water Law Act [*Wasserrechtsgesetz*]), especially in the case of controversial projects.

Contact

If you have questions, do not hesitate to contact our experts:

PG Regulatory & Procurement



Kurt Retter
Partner
kurt.retter@wolftheiss.com
Tel. + 43 1 515 10 5240

PG Real Estate & Construction



Peter Oberlechner
Partner
peter.oberlechner@wolftheiss.com
Tel. + 43 1 515 10 5170



Wolfram Schachinger
Senior Associate
wolfram.schachinger@wolftheiss.com
Tel. + 43 1 515 10 5241



Birgit Kraml
Counsel
birgit.kraml@wolftheiss.com
Tel. + 43 1 515 10 5360

This memorandum has been prepared solely for the purpose of general information and is not a substitute for legal advice. Therefore, WOLF THEISS accepts no responsibility if – in reliance on the information contained in this memorandum – you act, or fail to act, in any particular way.

If you would like to know more about the topics covered in this memorandum or our services in general, please get in touch with the contacts listed above, or with:

WOLF THEISS Rechtsanwälte GmbH & Co KG
Schubertring 6
1010 Wien
Tel. +43 1 515 10 – 0

www.wolftheiss.com