

**ON BEHALF OF THE
REPUBLIC!**

--- Check against delivery ---

Regarding the complaints of Vienna International Airport and the federal state of Lower Austria against the order of the Federal Administrative Court of the 2 February 2017, where the approval of the establishment and operation of a 3rd runway at the Vienna International Airport and the associated relocation of the main road B 10 was refused, the Constitutional Court, in accordance with art. 144 of the constitutional law, holds that:

Due to the contested order, the complaining parties have been subjected to violation of the constitutionally guaranteed right to equality before the law.

The order is repealed.

The federal state of Lower Austria is obligated to compensate the Vienna International Airport through their legal representative for the legal costs amounting to EUR 2,856.00 within 14 days subject to execution otherwise.

Grounds for the decision

A. Legal position

In accordance with section 71(1) in the Aviation Act (Luftfahrtgesetz, LFG), a civilian airport authorisation is to be given, if the project is suitable from a technical standpoint and safe operation is to be expected (item a), the authorisation applicant is reliable and qualified for operating the business (item b), the financial means of the authorisation applicant ensure compliance with the obligations for the airport owner stated in this federal act (item c) and other public interests are not a hindrance (item d). Furthermore, a civilian airport authorisation for a public airport shall only be given in accordance with section 71(2) if there is a need for this. Airports shall only be authorised if their establishment is in the public interest. An airport is in that connection particularly not in the public interest if it is located less than 100 km in a bee-line from an already authorised and operational airport that would be suitable for carrying out the transport tasks in question (item a) and if the owner of the already existing airport would be able and willing to carry out the

tasks envisaged for the planned airport within six months (item b).

Regarding the term (other) "public interests" in section 71 in the Aviation Act, the Supreme Administrative Court has already interpreted this in the year 1970. In this order passed through a reinforced national council (VwSlg. (collection of orders and important decisions of the supreme administrative court) 7913 A/1970), the following is stated, among other things:

"The word 'other' means that this does not include the interests stated in items a) to c) of section 71(1) of the Aviation Act. Thus, there are other public interests to take into account which are to be observed in accordance with the Aviation Act. Such public interests can for example be protection of the general public (sections 92, 96 and 124 in the Aviation Act), maintenance of public tranquillity, order and safety (sections 5, 124, 126, 145), avoidance of endangerment of lives, health and property (section 133), assurance of the safety of persons and property (section 122), the safety of persons and objects on the ground (section 128), keeping away nuisance-causing influences for persons and objects (section 5) and avoidance of avoidable noise (section 14)."

This interpretation of the term "other public interests" has been assumed in connection with the Constitutional Court (cf. VfSlg. (collection of orders and important decisions of the Constitutional Court) 12.465/1990) as well as the Supreme Administrative Court (cf. the Supreme Administrative Court 30.9.2010, 2010/03/0110).

The wording of section 71(1)(d) of the Aviation Act – that there can be no other interests that are a hindrance to the authorisation of the airport initially causes the impression that every public interest that is a hindrance to the project, regardless of its prioritisation, will necessarily lead to refusal of the civilian airport authorisation. However, in order to avoid unfair results, this stipulation is to be interpreted in a way that ensures that the other public interests according to section 71(1)(d) leg.cit. and the public interests according to section 71(1)(a, b and c) as well as 71(2) leg.cit. should be weighed against each other, which means that a balancing of interests should be carried out.

The approach according to section 71 of the Aviation Act requires establishment of the type and extent of the effects on any legally protected rights regarding the public interests to be guaranteed in accordance with the Aviation Act caused by the project to be approved, and under which circumstances, to which degree and with which probability concrete effects are to be expected. In that connection, the national territory of Austria (cf. art. 3 in the constitutional law) is the ultimate reference framework regarding the establishment of emissions as well as their effect.

With the current constitutional law on environmental protection (since 2013: section 3 of the constitutional law on sustainability), the constitutional legislation authority has expressed that there is a qualified (“constitutionally established”): VfSlg. 13.102/1992) public interest in the preservation of the matters described there.

The Constitutional Court has already taken the constitutional law on environmental protection into account on several occasions when checking laws for their constitutionality and orders for their legality. However, it cannot be deduced from the constitutional law on environmental protection or (since 2013) section 3 of the constitutional law on sustainability that environmental protection interest take absolute precedence over other determining factors that are incumbent on the administration (cf. VfSlg. 16.242/2001).

Since the coming into force of the constitutional law on environmental protection in the year 1984 (since 2013, section 3 in the constitutional law on sustainability), the eligible “other public interests” that must be observed according to the Aviation Act and taken into account in connection with the balancing of interests in accordance with section 71 leg.cit. must be interpreted in the light of this state objective.

Therefore, it is constitutionally required to take into account the extensive environmental protection in connection with the interpretation of the relevant

interests that must be observed according to the Aviation Act as well as in connection with the following balancing of these interests, if the interests established as crucial are of relevance to environmental protection. However, the mentioned state objective does not mean that the interests to be taken into account are extended beyond the range of interests to be observed according to the Aviation Act; it also does not mean that this state objective results in expansion of the reference framework of emissions or effects that must be investigated according to the Aviation Act.

B. The contested decision

1. Incorrect consideration of “cruise emissions”

In its decision, the Federal Administrative Court does not just take the CO₂ emissions into account that come from the landing and take-off emissions of aeroplanes at Vienna International Airport, but also includes the total emissions during the flight in connection with international air traffic (so-called cruise emissions) in the total project of Vienna International Airport.

2. Taking not applicable international and EU law regulation regarding climate protection into account

For the assessment of the established emissions and also subsequently in connection with balancing of the interests, the Federal Administrative Court has also taken reference values into consideration from not immediately applicable sources of law or non-constitutional regulations that are relevant to other sectors (than the aviation sector) or which explicitly exclude CO₂ emissions from aeroplanes:

a) The Kyoto Protocol, the Paris Agreement on climate change

Firstly, the Federal Administrative Court refers to the Kyoto Protocol regarding United Nations Framework Convention on Climate Change as well as Construction, Federal Law Gazette for the Republic of Austria III 89/2005, as well as the Paris Agreement on climate change, Federal Law Gazette for the Republic of Austria III 197/2016. However, both agreements have (in Austria) the reservation that they are to be complied with through the introduction of laws; thus, they only create an international obligation for Austria and are not immediately applicable nationally. Add to this that the Kyoto Protocol –

which in addition to this only establishes legal obligation until the year 2012 – does not include international aviation.

b) Effort-Sharing-Decision, climate protection law

Furthermore, the contested decision relies on the climate protection law that implements the decision 406/2009/EC of the EU Parliament and Council on the effort of Member States to reduce their greenhouse gas emissions (the so-called Effort Sharing Decision). However, this EU law decision is not applicable on aviation. Therefore, aviation is also exempt from the scope of the climate protection law.

c) Trade with emission allowances

Finally, the Federal Administrative Court also refers to the EU system of greenhouse gas emission allowances. With the Directive 2008/101/EC, aviation was also included in this system; however, the responsibility to meet the obligations resulting from this directive only applies to aircraft operators, who – as stated in the directive – "have the most direct control over the type of aircraft in operation and the way in which they are

flown". Thus, airports do not fall within the scope of the law regarding emission allowances.

d) Intermediate result

Hence, the Federal Administrative Court has in its assessment of the established CO₂ emissions placed significant impact on the overall co-responsibility of Austria for the global climate protection. However, no negative conclusions for the approval of the project can be deduced from the presumed lacking achievement of the climate goals – without an explicit legal order.

3. Consideration of "public interests" which are not rooted in the Aviation Act

The Federal Administrative Court states in the contested decision that it is not defined further in the Aviation Act what "other public interests" in section 71 of the Aviation Act means. Furthermore, there is no objective in the Aviation Act that can be taken into account in connection with interpretation. At any rate, public interests means interests that put the matters of the common good over individual

interests. Regarding the interpretation of section 71 (1)(d) of the Aviation Act, it is therefore a matter for the administration to determine the public interests that are crucial for this administrative ruling.

Correspondingly, the Federal Administrative Court assumes that public interests can basically be all interests focused on the common good, regardless of the type. Because of this position, the Federal Administrative Court assumes that in connection with the granting of a civilian airport authorisation according to the Aviation Act, interests regarding climate protection or land recycling must be taken into account in the balancing of interests.

However, these interests are not rooted in the actual Aviation Act. Regardless of this, it can in no way be deduced which rule of law the interest in sparse land use presumed by the Federal Administrative Court is based on.

4. Consideration of not competence-relevant state objectives and not normative documents in connection with the balancing of interests

After establishment of the crucial public interests, a legally authorised balancing of interests requires investigation of the criteria for the balancing of interests. These must be predetermined on the grounds of the legal system; they are evident from currently applicable relevant laws or from immediately associated state objectives. In any case, the investigation of the criteria for the balancing should be carried out through an interpretation of positive law.

In its decision, the Federal Administrative Court presumes that the criteria for balancing of public interests are not determined further in the Aviation Act. If no criteria can be found in a relevant law, the balancing of interests must be carried out through orientation towards utterance of values by democratically legitimised bodies or based on the stepwise structure of the legal system. These points of reference would be evident from enactments of the federal government, decisions of the national council, regulations of EU law as well as provincial and constitutional regulations. In that connection, the Federal Administrative Court, in addition to the constitutional law on sustainability, also refers to Art. 37 GRC, Art. 4 Z 2 of the provincial constitution for Lower Austria of 1979, a decision of the council of ministers for the Austrian federal government from the

23 October 2012 (“The Austrian strategy for adaptation to the climate change” – part 2, action plan, action recommendations for the implementations), the “Road map for aviation 2020” created by BMVIT, which was adopted by the federal government in the year 2011, as well as a decision of the national council from the 12 November 2015 regarding Austria's contribution to an ambitious result of the climate conference in Paris in December 2015.

According to Art. 4 Z 2 of the provincial constitution for Lower Austria of 1979, the environmental protection and the climate protection are of particular significance. However, according to the division of competences of the federal state, this kind of stipulation of constitutional objectives can only have an effect within the independent scope of the country. Thus, Art. 4 Z 2 of the provincial constitution for Lower Austria of 1979 cannot be used for interpretation of the Aviation Act.

This is even more the case for non-normative documents, which the Federal Administrative Court has also attributed significance as relevant for the decision-making.

C. Result

Thus, the Federal Administrative Court has grossly mistaken the legal position in several ways in connection with the contested decision, where the approval of the establishment and operation of a so-called 3rd runway at the Vienna International Airport was refused. This accumulated misinterpretation of the legal position burdens the contested decision with arbitrariness; it subjects the parties to violation of their right to equality before the law. Therefore, the contested decision is repealed.

The further grounds for this decision can only be found in the written copy, which will be drawn up as quickly as possible.