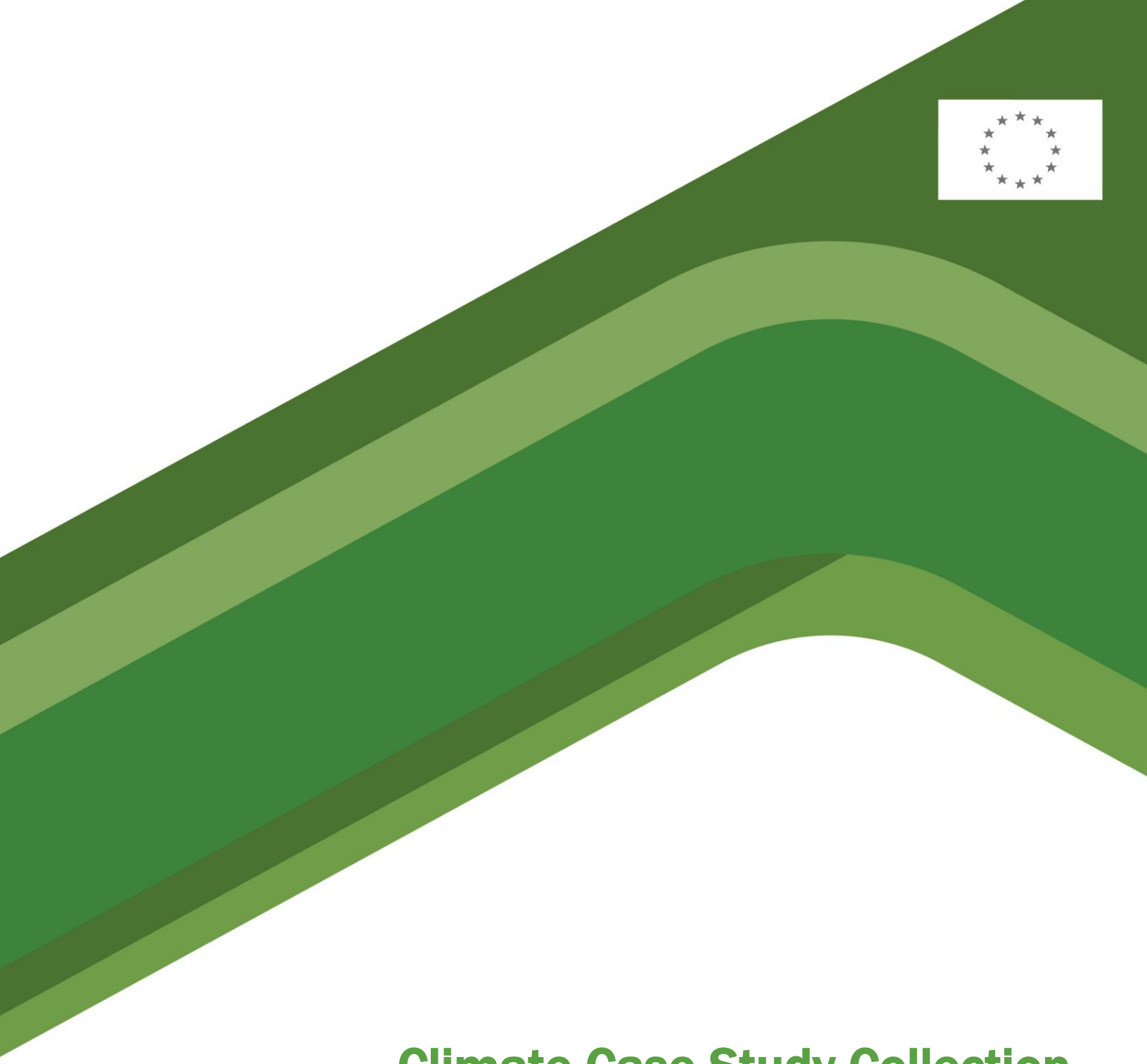

Climate Case Study Collection

Justice and Environment 2023

Udolni 33, 602 00, Brno, CZ | +36 1 322 84 62 | info@justiceandenvironment.org

CONTENTS

1. Introduction

Extreme weather events, drought summers and green meadows where there should normally be snow-covered ski slopes - the effects of man-made global warming are now also clearly noticeable in Central Europe. Political measures are lagging behind and, as things stand, will not be sufficient to limit the warming of the global average temperature to 1.5 degrees Celsius compared to pre-industrial levels - on the contrary, it can be assumed that the warming will amount to 2.8 degrees Celsius if the current political course is maintained. In view of this, more and more organisations, individuals and groups feel compelled to take legal action to protect the climate as a last resort. The decision in the Urgenda case, which for the first time obliged a state to set stricter climate protection targets, unleashed an avalanche of court cases in Europe (but also worldwide) for the purpose of climate protection. In the meantime, "climate lawsuits" have been or are pending in national courts in the Netherlands, the United Kingdom, Belgium, Spain, Italy, Germany, Finland, Sweden, Russia, Austria, Poland, France, the Czech Republic, Switzerland, Ukraine and many more. Climate litigation is here to stay and has been driven forward by J&E member organisations. This collection features climate cases from Austria, Estonia, Czechia and Hungary.

2. Austrian Climate litigation (AT)

SUMMARY

The individual applications, which were directed against provisions of the Value Added Tax Act (UStG) and the Mineral Oil Tax Act 1995 (MineralölsteuerG) as well as the Aviation Concessions Ordinance, were submitted to the Austrian Constitutional Court on 20 February 2020. In total 8.068 persons submitted the claim, five of whom are named in the application. In essence, the applicants claimed that the contested standards did not comply with the principle of equality and that the state did not fulfil its obligations to protect under Art 2 ECHR, Art 2 CFR and Art 8 ECHR, Art 7 CFR in view of the expected adverse effects of the climate crisis. However, the application failed to meet the admissibility requirements.

Due to the lack of immediacy of concern, the application was rejected as inadmissible, and the Constitutional Court did not deal with its substance. The application was submitted by attorney-at-law Michaela Krömer with the support of Justice and Environment member ÖKOBÜRO – Alliance of the Environmental Movement.

ARGUMENTS OF THE APPLICANTS

8.063 of the applicants are persons who had agreed in advance via an online form to also submit an individual application with the same content to the Constitutional Court. This was communicated in the media as a "class action", but formally it was a bundling of individual applications to lend symbolic weight to the cause. The persons named in the application were a climate researcher, a student and activist of the Fridays for Future movement, the managing director of Greenpeace Austria and the moderator (and long-time "voice" of Austrian Railway Services) Chris Lohner, all of whom publicly promoted the climate lawsuit. The remaining applicant is not a public figure but suffers from a form of multiple sclerosis that worsens with rising temperatures and is now involved in a climate lawsuit before the ECtHR after the application was rejected by the Constitutional Court. The applicants requested the repeal of wordings of Value Added Tax Act (UStG) and the Mineral Oil Tax Act 1995 (MineralölsteuerG) as well as the Aviation Concessions Ordinance. Section 6(1)(d) Value Added Tax Act regulates the exemption from VAT of passenger transport services by ship and aircraft in cross-border transport. Section 4(1)(1) of the Mineral Oil Tax Act provides for an exemption from mineral oil tax for fuels supplied to air carriers for the provision of aviation services.

Regarding their right to equality under Article 20 CFR and the obligation of the legislator under Article 2 StGG, Article 7 B-VG (Federal Constitutional Act) to treat equal things equally and unequal things unequally, the applicants argued that due to the exemption from paraffin tax pursuant to section 4(1)(1) of the Mineral Oil Tax Act and the passing on of the value added tax for cross-border rail journeys to consumers, passengers would have to pay a higher net ticket price for a train journey than for an air journey. In this way, consumers who aim to follow the

national goal of environmental protection and choose a climate-friendly means of transport are financially disadvantaged.

The applicants also argued that the contested provisions were also counterproductive towards the State's duty to protect the applicants right to life and physical integrity according to article 2 ECHR, article 2 CFR. In view of the foreseeable or partially realised threat to the right to life of the applicants due to extreme weather events, natural disasters and deterioration of soil, water and air quality, the legislator was obliged to create a legal situation that would lead to a reduction of greenhouse gas emissions.

The applicants also argued that duties to protect regarding Art 8 ECHR and Art 7 CFR were violated. They argued that the legislature was obliged to create a legal situation that limited environmental damage that had a negative impact on health, physical integrity, or private and family life.

THE COURT'S DECISION

The Constitutional Court first examined the admissibility requirements of the application. An individual application is admissible if a regulation or a law directly interferes with the legal sphere of the person, if the interference is clearly determined by the regulation or the law itself, i.e. directly, if it currently impairs the legally protected interests of the person and if there is no reasonable way around it, i.e. the applicant has no other reasonable way to defend him/herself against the alleged interference.

Regarding the immediacy of concern, the applicants had stated that passengers were directly affected insofar as the value added tax had to be paid by train travellers to companies in the context of the ticket purchase. According to the Constitutional Court, however, this was not sufficient to demonstrate a direct violation of the law. In the given context, the extent to which the tax liability could be passed on to passengers depended on many factors. The obligation to pay VAT in connection with cross-border passenger transport by rail is in any case incumbent on the owner of the tax warehouse. In addition, the Constitutional Court also examines possible violations of the rights of persons who are not addressed by the contested provison - especially if these are constitutionally guaranteed rights. In this case, however, such an examination was out of the question, as the applicants, according to their own statements, did not want to use the transport services of airlines. Accordingly, the applicants could in no way be the addressees of the challenged standards, which were only relevant for air transport and not also for rail transport. Due to the lack of immediacy of concern, the application was rejected as inadmissible.

SOURCES

Verdict of the Austrian Constitutional Court (in German)

3. Estonian Climate litigation (ET)

SUMMARY

In May 2020, the Tartu Administrative Court allowed a complaint by Fridays for Future Estonia (officially MTÜ Loodusvõlu), an organization of young Estonian climate activists, seeking to nullify a permit issued to the state-owned energy group Eesti Energia for the construction of a new shale oil plant. Fridays for Future alleges that the municipality of Narva-Jõesuu issued the construction permit without adequately assessing its climate impacts and the commitments made under the Paris Agreement, as well as the European Union's objective to achieve climate neutrality by 2050. The court named two Eesti Energia subsidiaries as third parties, and the Ministry of the Environment as an administrative body. The application was filed by MTÜ Loodusvõlu with the support of Justice and Environment member Estonian Environmental Law Center. The case was not upheld by courts of lower instances and, as at August 2023, it is pending before the Supreme Court of Estonia.

ARGUMENTS OF THE APPLICANTS

Firstly, the applicant argues that the construction of new fossil fuel infrastructure in the middle of the climate crisis conflicts with international agreements, namely the Paris Agreement and the Sustainable Development Goals, and with EU law (especially the Green Deal). As there is no national climate law in Estonia, the argumentation can't be based on breaching domestic climate targets. However, the applicant asserts that the fact that the project is compatible with outdated domestic strategic development documents that include both climate targets and plans for expanding oil production does not remedy the conflict with international agreements and EU law.

Secondly, the applicant claims that the environmental impacts related to the plant have not been assessed properly. The applicant argues that when issuing a construction permit, the authority must not only take into account the impacts that result from the construction process, but also the impacts that arise from the use of the plant. In this case, the carbon emissions that result from the operation of the plant and burning the oil produced in the plant have not been taken into consideration, although the plant is constructed specifically to produce shale oil (a fossil fuel). Furthermore, the plant's vulnerability to climate change had not been assessed at all. The strategic impact assessment carried out to assess the impacts of four such plants and an oil refinery is not precise enough to substitute an environmental impact assessment of the plant. The impacts on a nearby Natura 2000 area were not properly assessed either, which led to the temporary suspension of the construction permit.

Thirdly, the applicant claims that due to the magnitude of the plant's impacts, the decision to construct the shale oil plant should have been made by a national designated spatial plan (Planning Act, § 27), not a regular zoning plan. The institute of the specific national development plan was established in 2015 precisely for situations in which the project under

question is significant for the whole country and allows wider public participation than a regular local zoning plan. In this case, the decision would have been in the hands of the government who would have been better equipped to assess all impacts thoroughly than a small municipality like Narva-Jõesuu.

THE COURT'S DECISION

The courts of first and second instance did not uphold Fridays for Future's complaint, stating that the construction permit does not cover carbon emissions from the use of the oil produced in the plant, but only the impacts of the construction activity itself. The administrative court ruled that the Paris Agreement is too vague and therefore the municipality was not obliged to assess the plant's compatibility with it. The court found that despite the construction of the plant, Estonia is on track to reach its targets set under the Green Deal and that the plant is compatible with Sustainable Development Goals.

Tartu Circuit Court stated that the law does not specify the order in which permits must be issued. Therefore, the municipality of Narva-Jõesuu did not act illegally when it issued the construction permit while the integrated permit has not yet been issued and it is not certain whether the construction can be allowed to operate upon completion. In the view of the court, the municipality had adequate information about the impacts of the plant (based on the SEA carried out for the zoning plan) that it could issue the construction permit.

The courts denied two requests for preliminary injunction to halt the construction of the plant as not currently justified because the plaintiff's claims relate to impacts that would occur during the plant's operation, rather than construction. However, Tartu Circuit Court granted a preliminary injunction in May 2021 and temporarily suspended the construction permit after it appeared that the impacts of the construction to the nearby Natura 2000 area had not been thoroughly assessed. Two months later, Eesti Energia submitted additional evidence demonstrating that proper appropriate assessment had been carried out and the court lifted the injunction. The plant is planned to begin operation in early 2024. As of August 2023, the case has been declared admissible by the Supreme Court of Estonia and is awaiting a ruling.

SOURCES

Press release by Fridays For Future Estonia

4. Czech Climate litigation (CZ)

SUMMARY

The Czech climate litigation, filed in April 2021, represents a significant legal endeavor seeking to address climate change's pressing challenges through the judicial system. This initiative is driven by a diverse group of plaintiffs: concerned citizens, farmers, activists, environmental organizations and a municipality, who have come together to hold the Czech government accountable for its actions in the realm of climate policy. The plaintiffs are represented by Frank Bold Attorneys, a sister organisation of Frank Bold Society, a member of the Justice and Environment movement. The litigation centers on the argument that the defendants' (the government's and four ministries') current efforts to combat climate change are insufficient and fail to align with its obligations under national and international laws, as well as its commitments to global climate accords such as the Paris Agreement.

The core contention of the case revolves around the assertion that the government's inadequate climate policies and actions (or the lack of these) directly contribute to environmental degradation, which in turn causes breach of the plaintiffs' fundamental rights – the right to environment, right to life, health protection, private life, property rights and right to economic activity. The plaintiffs highlight the scientific consensus on the detrimental impacts of climate change and underscore the legal imperative to act swiftly and decisively to avert its most catastrophic consequences.

ARGUMENTS OF THE APPLICANTS

The plaintiffs in the Czech climate litigation have utilized administrative law tools, specifically employing a legal remedy known as a "complaint against unlawful intervention." Their argument hinges on the violation of their fundamental rights (enshrined both in Czech constitutional law and the ECHR), which are directly impacted by the state's unlawful actions. By resorting to this legal avenue, the plaintiffs seek to challenge and rectify the government's inadequate response to the climate crisis.

Central to the case are scientific arguments, prominently featuring the concept of a carbon budget meticulously prepared by experts from the University of Manchester. Moreover, they present compelling evidence detailing the repercussions of climate change, such as the comprehensive report prepared by the ClimateAnalytics think tank. Through this litigation, the plaintiffs aimed to secure dual outcomes: first, a definitive judicial declaration affirming the illegality of the intervention, and second, a court-mandated cessation of the contested intervention.

According to the plaintiffs' contentions, terminating the intervention could be achieved by fulfilling two cumulative demands. Firstly, the defendants would have to adhere to the carbon budget, entailing a substantial reduction of greenhouse gas emissions by approximately 85%

by the year 2030. Secondly, it the defendants would have to implement robust adaptation measures.

1ST INSTANCE COURT DECISION

In a landmark decision in June 2022, the first-instance court, the Municipal Court in Prague, partially ruled in favor of the plaintiffs in the Czech climate litigation. The court acknowledged the plaintiffs' legal standing and engaged substantively with the dispute at hand. It determined that there had been an unlawful infringement upon their rights, thus marking a crucial validation of the plaintiffs' claims. The court issued an order directing the defendants to implement measures aimed at reducing CO2 emissions by 55% by the year 2030, in alignment with the climate target set by the European Union. While falling short of the full extent of the plaintiffs' demands, this ruling stands as a momentous triumph for the Czech climate movement, underscoring the potency of citizen-driven initiatives in influencing environmental policy.

Conversely, the court did not accede to the plaintiffs' requests concerning the implementation of adaptation measures, deeming the demand premature. Moreover, the court's ruling positioned climate-related matters within the purview of the defendant ministries, leading to the dismissal of a portion of the lawsuit directed against the Czech government. This ruling reflects the nuanced nature of the legal proceedings, showcasing both the successes and limitations of the litigation while highlighting the growing recognition of climate issues within the legal framework. As the case advances, its outcomes are poised to reverberate beyond the courtroom, shaping the landscape of climate policy advocacy and litigation in the Czech Republic and potentially inspiring similar efforts worldwide.

Both the defendants and the plaintiffs challenged the decision before the Supreme Administrative Court.

SUPREME ADMINISTRATIVE COURT DECISION

In February 2023, the Supreme Administrative Court quashed the initial verdict from the first-instance court. The higher court's ruling hinged on several key points. Firstly, it stipulated that the commitment to reduce emissions by 55% by 2030 could not be directly applied to the Czech Republic in isolation, as this obligation constitutes a broader mandate for the entire European Union. Consequently, the court opted to annul the earlier judgment and remanded the case for reconsideration to the Municipal Court in Prague. However, the Supreme Administrative Court refrained from preemptively influencing the upcoming decision of the Municipal Court.

This turn of events places the onus back on the Municipal Court, which will once again grapple with the complex legal issue of delineating the extent of obligations on the part of the defendants in the realm of CO2 emissions reduction. According to the Supreme Administrative Court, the climate obligations of the defendants can, in principle, stem from human right obligations, international climate law, European and Czech environmental law – these are the areas of law that the Municipal Court should explore in the renewed proceedings.

CURRENT DEVELOPMENTS

Currently, the Czech climate litigation is pending before the Municipal Court in Prague, with a judgment expected at the end of 2023 or in the first half of 2024.

SOURCES

The official webpage of the Climate Litigation civil association

The 1st instance court judgment (Czech original)

The 1st instance court judgment (unofficial English translation)

The Supreme Administrative Court judgment (Czech original)

5. Hungarian Climate Litigation (HU)

SUMMARY

In June 2021, the Municipality of the Village of Tihany (hereafter: the Municipality) submitted a request to the environmental authority (Veszprém County Government Office) for an EIA screening procedure regarding a planned tourist development near Lake Balaton, the largest freshwater lake in Central Europe. The project included a visitor centre aiming a concentration of the visitors, with an open-air visitor area, and a car parking lot. While the concentration of the car traffic (1,1 million passengers per year) would serve the protection of the inward historical areas of the old Tihany Village, with accompanying new tourist services (on 20.000 m2) the project would enhance the overall traffic in a significant amount. Moreover, large area of trees would be clear-cut without re-planting.

The screening documentation covered several issues, ranging from noise via air pollution to nature conservation. Regarding climate issues, the documentation – handling only half of the issue – briefly found that the implementation of the project would not be influenced by climate change. The Veszprém County Government Office issued a decision in July 2021, declaring that the planned project would have no significant impact on the environment and therefore there would be no need to perform an Environmental Impact Assessment.

At issue: one possible way of climate litigation is challenging EIA decisions which fail to properly address climate issues – both mitigation of GHG emission growth and accommodation issues. Individually such cases might have less contribution to a given country's climate policy, while the regular and consequential claim to consider climate effect substantially in each and every environmental impact assessment procedure might amount to a considerable effect.

ARGUMENTS OF THE APPLICANTS

Represented by EMLA (member organisation of Justice and Environment) lawyer, Friends of the Earth Hungary (hereafter: the plaintiff) filed a lawsuit against the Veszprém County Government Office (the defendant in the administrative court revision case) in August 2021. In its file, the plaintiff, as a primary claim, argued that the climate chapter of the screening documentation lacked content. The plaintiff claimed that since the planned project was obviously linked to water related tourism, including enhanced car traffic and the inherent greenhouse gas emission, and as such, will have significant climate effects. Moreover, on the accommodation side – contrary to the brief statement in the decision – the facility would be heavily influenced by climate change. Water related activities, especially near such shallow lakes as the Balaton Lake, are especially exposed to the climate related weather extremities. FoE has concluded that due to this, the decision that the project did not require an Environmental Impact Assessment was unlawful and breachd the Government Decree on EIA that requires the detailed presentation of climate change related information in screening

documentations before decision-making. Five private persons, residents in Tihany village, joined the case on behalf of the plaintiff and supported its arguments.

The defendant in its counter-argument claimed that the project would be implemented further away from the waterfront and not directly at the lake shore; therefore, any climatic change in the lake would not have an effect on the project and the project would not be sensitive to climate change. As concerns the emission of cars, rationalisation of the car traffic might decrease the pollution through eliminating long lines waiting for admittance to the village. The municipality that intervened on behalf of the defendant agreed and added a procedural argument, too: in the municipality's view, when civil participants fail to take part in the administrative procedure, they have no right to intervene in the court proceedings.

COURT'S DECISION

In November 2021, the court declared its judgment and annulled the decision of the defendant, while ordering the defendant to restart the screening process and reassess the need for an Environmental Impact Assessment, putting more emphasis on the climate change aspects of the project. The court spelled out the following in its judgment:

"The court found from the content of the documentation that climate protection analyses or climate risk assessments other than a brief table are not included, and the data of the latter table contradicts to known facts."

The court called attention to Annex 4, Point h) of the EIA Governmental Decree, which is detailed enough concerning the data and analysed what the climate chapter of a preliminary environmental impact statement should contain: *"Detailed sensitivity analysis, the exposure of the site and impact area of the project, the evaluation of certain impacts, the evaluation of risks and the adaptation of the planned project to climate change are not included. Presentation of how the planned project will have an effect on the area's adaptation potential is also missing."* The court also pointed out that the table on climate changes attached to the environmental impact statement contains only yes-no answers, which failed to fulfil the purpose of a lawful climate chapter of an environmental impact study. Furthermore, the defendant should have taken into consideration that the Office of the Prime Minister had issued a Guiding Document on Climate Analyses in Environmental Impact Studies, which also suggests much more detailed professional data processing and analyses.

The environmental authority failed to demand better, more substantial climate analyses, and therefore, as the court stated *"the defendant's decision is heavily unlawful with regard to clarifying the facts of the case and providing a reasoning to the decision."*

The procedural side of the case is also important. The court dismissed the defendants' claim about lack or limited standing of the plaintiffs in the case. Furthermore, the court established that the faulty chapters in the EIS and in the decision of the Defendant represent not only an infringement of the underlying substantive EIA laws and guidance, but also breach Article 62

of the Administrative Procedural Code of Hungary, which prescribes the detailed clarification of the factual bases of the decisions of the authorities. Consequently, the authority also failed to fulfil the requirement of Article 81 about the proper reasoning of the decision.

CURRENT DEVELOPMENTS

The financial support of the project was time-bound and the sponsors were not willing to lengthen the expiry date. In some similar cases the investors try to acquire an environmental permit anyway, hoping that other financial support might be found. In this case, however, the investor seem to have abandon the whole project. As concludes, no new environmental impact study has been prepared and submitted to the environmental authority.

SOURCES

https://climatecasechart.com/non-us-case/friends-of-the-earth-hungary-v-veszprem-county-government-office-municipality-of-the-village-of-tihany/

Court decision No. 101.K.700.968/2021/30-II. (original Hungarian text)

Útmutató projektek klímakockázatának értékeléséhez és csökkentéséhez - a Miniszterelnökség megbízásából a Klímapolitika Kft. által összeállított tanulmány (A guide to evaluation and mitigation of climate related risks of projects – prepared by Climate-policy Ltd. upon the request of the Prime Minister's Office) (original Hungarian text)

Contact

Association of Justice and Environment
European Network of Environmental Law Organizations
33 Udolni, 602 00 Brno, Czech Republic
Zsuzsanna Berki & Veronika Marhold
(Co-leaders / Climate Topic Team)
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

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