

To the
Federal Ministry for Digital and Economic Affairs
Stubenring 1
1010 Vienna

Via mail:

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Vienna, 17.08.2018

Re: BMDW-15.875/0091-Pers/6/2018

Statement on the draft for the Federal Law on the Development and Advancement of the Economic Location Austria („Standort-Entwicklungsgesetz – StEntG“)¹

Dear Sir or Madam,

With this letter, ÖKOBÜRO – Alliance of the Austrian Environmental Movement, puts forward its statement on the draft for the Federal Law on the Development and Advancement of the Economic Location Austria („Standort-Entwicklungsgesetz – StEntG“).

ÖKOBÜRO is the Alliance of the Austrian Environmental Movement. This includes 16 Austrian environmental, nature and animal protection organisations such as GLOBAL 2000, Greenpeace, Nature Conservation Association, VCÖ Mobility with a Future, FOUR PAWS or the WWF. ÖKOBÜRO works on a political and legal level for the interests of the environmental movement.

The statement on the draft is as follows:

1. The StEntG is in violation against European Union law, Public International Law and Constitutional Law

The StEntG is contrary to European, international and constitutional law and violates multiple norms. It would therefore in practice lead to unimaginable legal uncertainty and procedural

¹ Please note, that this is a translated version of the German original. The draft does not have an official English title.

delays for project applicants. This way, the law achieves exactly the opposite of what it is intended to achieve.

1.1. Violation of EU legislation

1.1.1. Violation against the Charter of Fundamental Rights of the European Union

The first paragraph of Article 47 of the GRC states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article".

The provisions on a fair trial under Article 47 of the European Charter of Fundamental Rights would be violated by the application of the StEntG, since in §§ 11 et seq. of the StEntG reviews of compliance with rights guaranteed under Union law would be limited to "fundamental legal questions". A substantive review of procedural errors could no longer take place. The parties would thus also be deprived of their statutory judges.

1.1.2. Infringement of the Treaty on European Union

Article 19(1), third sentence, reads as follows: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". This stipulates the right to a fair trial and the statutory judge as defined in Art. 6 or Art. 13 ECHR. The restrictions of the legal protection according to §§ 11 et seq. StEntG violate this right to a fair trial and to the fact that an instance authorized for the collection of all facts and control of the interpretation of law is appealed by limiting their authority to "legal questions of fundamental importance".

1.1.3. Violation of the EIA-Directive²

The StEntG proposes, that certain projects requiring an environmental impact assessment under the EIA directive, are automatically given approval after 12 months' time, if the government deems them "relevant for economic growth". The public authority then has no choice but to approve the project. This is not in line with European Union law, especially the EIA directive and Article 47 of the Charter of Fundamental Rights of the European Union. According to the EIA directive, a project falling under its scope requires an impact assessment and a legal permission. Exceptions to this, as proposed by the StEntG and mentioned in the accompanying documents, are possible, if the goals of the directive are upheld. This exemption called for by the StEntG is clearly not given, as the assessment of the environmental impact is foregone entirely, without assuring its environmental compatibility.

In addition, the StEntG violates the obligation of public participation under the EIA Directive, since the objections of the public would not be discussed, i.e. they would not be taken into account. The restriction of the legal protection in the StEntG is also not compatible with Art 11 of the EIA Directive and also violates the principle of effectiveness of the European Court of Justice, which is explained in the cases ECJ 33/76, Rewe, C-295/04 to C-298/04, Manfredi and others. Accordingly, national courts must ensure the protection of Union rights. This would no

² Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance

longer be the case under the StEntG as the provisions of the EIA Directive would not apply and thus be a clear violation of Union law.

The restriction of legal protection in §§ 11 following StEntG also infringes Article 11 of the EIA Directive, since members of the public concerned must have access to a review procedure in order to challenge "the substantive and procedural legality of decisions".

1.1.4. Violation of the SEA-Directive³

The preparation of a list of projects or the identification of projects which would be exempted from the EIA requirement would in any case require a strategic environmental assessment (SEA) in accordance with Art 3 of the SEA Directive. This directive stipulates that strategic planning of projects subject to EIA must be subject to a SEA. This SEA would have to include an assessment for an alternative and public participation. The StEntG draft does not provide for SEAs or any public participation.

1.1.5. Violation of the Environmental Information directive⁴

In view of the reference to official secrecy in the draft, it is to be expected that the documents of the Site Development Advisory Board ("Standortentwicklungsbeirat") will not be publicly accessible. This is likely to be in direct contradiction to the right of access to environmental information. In any case, the discussion and selection of projects that are automatically permitted to have significant impacts on the environment without the need for conditions falls under the concept of environmental information. According to the principles of Art 4 and 5 of the Aarhus Convention and the EU's Environmental Information Directive, states are also obliged to actively provide environmental information. This does not seem to be respected by the draft and constitutes a potential violation of the Aarhus Convention and Union law.

1.1.6. Further violations of EU directives

Failure to examine protection requirements arising from Union law could also mean that all other environmental matters under Union law are at risk of being infringed. Interventions in air quality, water quality and protected species as well as habitats would then be breaches of the Air Quality Directive⁵, the Water Framework Directive⁶ or the Habitats⁷ and Birds⁸ Directives respectively. All these legal acts provide for considerations and conditions for intervention that an automatic mechanism would not grant.

³ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

⁴ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

⁵ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.

⁶ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy.

⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

⁸ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

These clear and structural infringements of Union law lead to the fact that the provisions of the StEntG may either not be applied by the authorities or that the approvals obtained in this way would have to be revoked by the ECJ in the course of referral proceedings. In addition, the StEntG would in any case be suitable for initiating infringement proceedings against Austria by the European Commission. An interpretation of the StEntG in conformity with European law is inconceivable due to the far-reaching infringements against basically all environmental directives. The consequences for project applicants are foreseeable: massive legal uncertainty when applying the automatic nature of the StEntG and loss of licences obtained in this way.

1.2. Violations of the Austrian Constitution

The StEntG in its current version contains several breaches of Austrian constitutional law, including but not limited to fundamental rights enshrined in constitutional law.

1.2.1. Right to a fair trial or right to a legal judge in accordance with Art 6 ECHR

Persons whose subjective rights are violated have the right to be heard and to appeal. The draft of the StEntG assumes that projects are to be approved automatically after expiration of a short period of time, the decision-making is thus withdrawn from the public authority and it can no longer respond to objections of other parties. Apart from the fact that it is unclear what constitutes the basis for the decision of the approving authority and what may be taken into account, hence the objections and applications of other parties would possibly be ignored altogether. The right to be heard and thus the fair procedure would no longer be guaranteed.

In particular, § 12 para 2 StEntG, which restricts the possibility to appeal to "legal questions of considerable importance" and thus creates a kind of second supreme court, constitutes a violation of Art 6 ECHR in any case. The right to a fair trial and to "equality of arms" in the trial cannot be regarded as guaranteed if a party automatically "wins" with the passage of time.

1.2.2. Violation of the Principle of Rule of Law

The fundamental principle of the rule of law obliges the legislature to ensure that the shaping of individual legal relationships is tied to a legal form that permits legal protection as provided by constitutional law.⁹ Although the approval of an annex in the form of an official decision, forced by the StEntG, would in principle be permissible as a legal form, the legal protection for this official decision is, however, inadmissibly restricted by the law in § 12, so that the legal protection provided by constitutional law pursuant to Art 129 et seq. is not guaranteed. The draft of the StEntG therefore violates the principle of the rule of law.

Art 18 B-VG obliges the legislature to sufficiently define the content of administrative action in laws. Statutory regulations that are too vague violate the Constitution. It cannot be inferred from the draft of the StEntG how the authority is to deal with the fiction of approval, i.e. whether it is nevertheless possible to reject the proposal due to a lack of documents, how to proceed with conditions established as necessary until then or afterwards and what is to happen with objections of other parties. This ambiguity makes the law factually impracticable and is a violation of Art. 18 B-VG.

⁹ Vlg Öhlinger/Ebnerhard, Verfassungsrecht¹⁰, 2014, 81a.

1.2.3. Violation of the Legality Principle („Legalitätsprinzip“)

The authority would be obliged to issue a permit notice, even if the project in its present form still violates material laws. However, since the authorities are only allowed to act on the basis of applicable laws, this automatism constitutes a violation of the principle of legality.¹⁰

1.2.4. Breach of the Principle of Equality and the Principle of Objectivity respectively

According to Art. 7 B-VG¹¹, procedures must comply with the principles of equality and objectivity. With the function of an automatic approval after expiration of time a party of the procedure is clearly preferred, even receives motivation for delaying the procedure, since in the end an approval without conditions beckons. It is also unclear how the unequal treatment of projects or project applicants with and without "priority" can be justified. The economic significance and other positive effects of projects are already today included in all considerations, and a further boost is to be expected with the newly created instrument of the office of an economic advancement lawyer ("Standortanwalt").

The Federal Administrative Court's decision period for appeals against decisions following the StEntG draft will be shortened from 6 to 3 months by Section 12 para 3 of the StEntG. While EIA procedures already represent the largest and most complex infrastructure procedures in Austria, the StEntG projects are probably once again the largest EIA projects. The fact that it is precisely these procedures that are to be decided by the Federal Administrative Court in half the time is grossly unobjective.

1.3. Violation of Public International Law

1.3.1. Violation of the Aarhus Convention

Article 6 of the Aarhus Convention requires the effective involvement/participation of the public in procedures concerning projects with potentially significant environmental impacts, as is certainly the case with EIA procedures according to Art 6 para 1 lit a. This participation must respond to the submissions of the public concerned and discuss them, which would not be the case with an automatic approval.

Furthermore, the limitation of legal protection in the StEntG violates Article 9 paragraph 2 of the Convention. According to this Article, the States Parties to the Aarhus Convention must give the public concerned access to administrative judicial review. According to Article 9, paragraph 4, this legal protection must also be "effective", i.e. enforceable and de facto effective. Restricting this control to mere "legal questions of considerable importance" would in any case contradict this provision.

Proceedings against Austria for non-compliance with the Convention are still pending at the Conference of the Parties to the Aarhus Convention and the ACCC respectively. Non-compliance with a focus on legal protection was already established in 2014 and confirmed

¹⁰ The Principle of Legality states, that all acts by public authority must follow the law.

¹¹ Bundes-Verfassungsgesetz, Austrian Constitutional Act.

once more in 2017. A further weakening of access to justice would probably lead to a warning under international law and to the proceedings not being concluded positively.

1.3.2. Violation of the Espoo Convention

The Espoo Convention on Public Participation in Transboundary EIA Procedures also provides for effective involvement of the public, who would be undermined if automatic authorisation were granted without any objections being raised.

1.3.3. Breach of obligations under other international treaties

In addition, the automatic approval mechanism of the StEntG is also suitable for violating other international treaties, such as the Alpine Convention, the Ramsau Convention and others, if the substantive assessment of the effects on the protected goods mentioned in these conventions is not sufficiently carried out.

1.4. Violation of national laws

Finally, the StEntG is also suitable for granting permits that violate the protection standards of national environmental laws. Examples include the nature conservation laws of the federal states, national park laws, the Water Act, the Forestry Act and the MinRoG.

2. The StEntG is not suited for its goal to speed up proceedings

2.1. Speeding up proceedings is possible, but not with the StEntG

The aim of the StEntG is allegedly to accelerate large infrastructure projects requiring an EIA. The reason for this seems to be a few infrastructure projects of the present and past, the approval of which, for various reasons, takes considerably more time than usual. A positive counter-example is the three environmental impact assessments (one each for rail, urban and road construction) required for the construction of Vienna's main railway station. The parallel procedures conducted in 2007/08 already ended after 6 to 10 months in each case. Neighbours lodged appeals against the decisions for urban development and roads, which were dismissed or rejected after 6 and 7 months respectively.

The purpose of the EIA procedure is to bring large construction projects in line with environmental law and, if necessary, to minimise their environmental impact by setting conditions. The approval rate is correspondingly high. Since 2000, only 4% of all completed EIA procedures (including the simplified procedures) have ended in a negative decision. In a further percent of the procedures, the projects were rejected for formal reasons. On the other hand, 89% of the procedures ended with a positive decision. The remaining 6% were withdrawn by the project applicants.¹²

¹² https://www.bmnt.gv.at/umwelt/betriebl_umweltschutz_uvp/uvp/materialien/berichte_rundschr.html; calculations based on the ministry's official EIA report 2015.

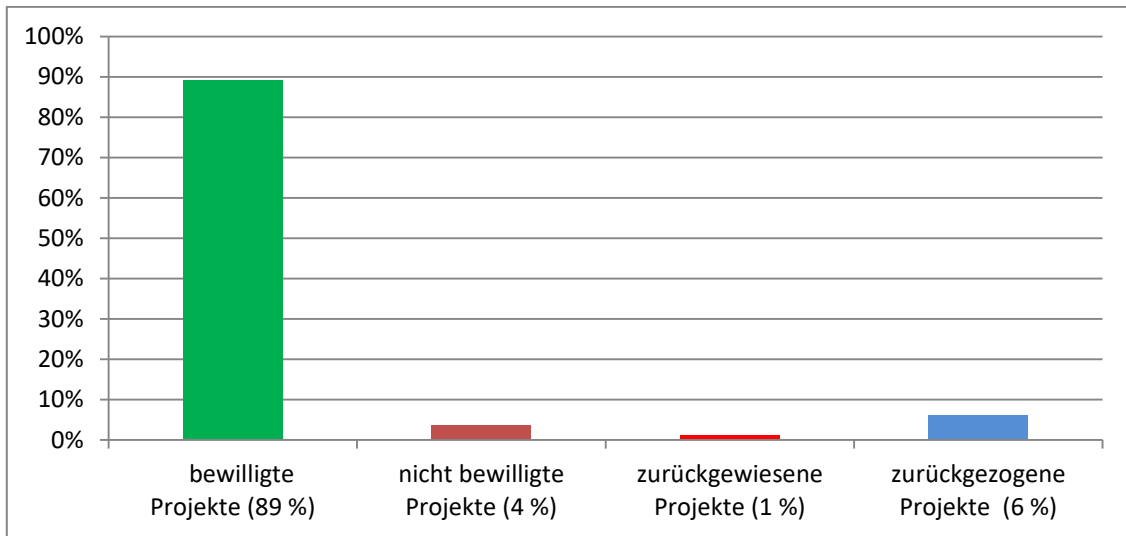


Illustration 1: 89 % of all EIA procedures end with a permission

Statistics show that the vast majority of procedures are granted very quickly once the applicants have submitted all the necessary documentation. Between 2009 and 2016, 78 EIA procedures were completed in the first instance. The average duration of the procedure from the completeness of the documents by the project applicant to the decision was twelve months.¹³ For the 95 simplified procedures in the same period, the average duration of the procedure was only 7 months from completeness of the documents.¹⁴

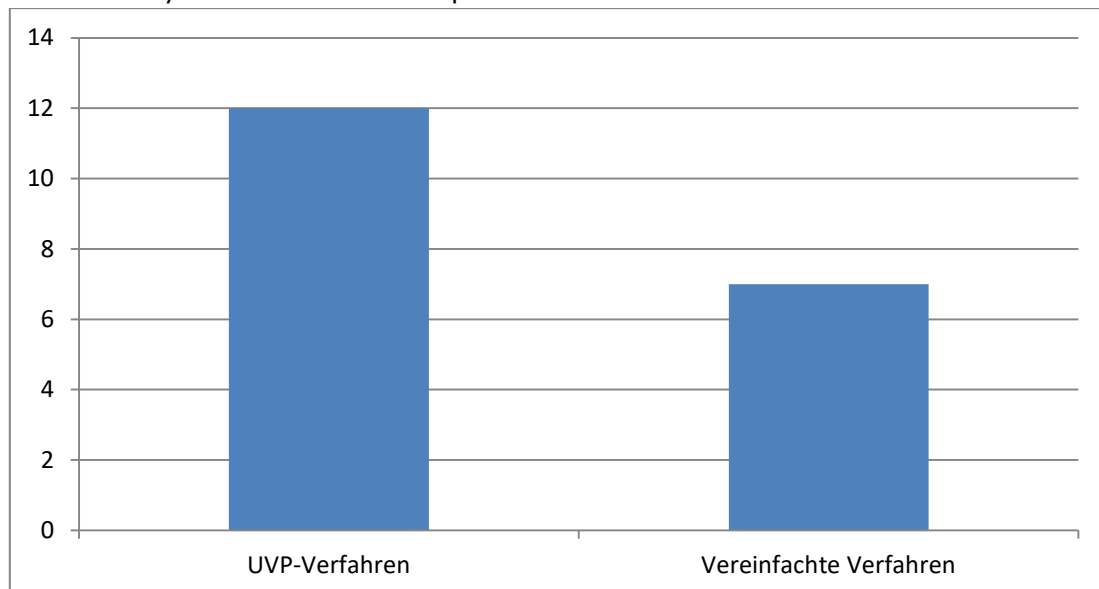


Illustration 2: EIA procedures take an average of 12 months to be decided, after the required documents are submitted. With simplified EIAs the number is 7 months.

¹³ https://www.bmnt.gv.at/umwelt/betriebl_umweltschutz_uvp/uvp/materialien/berichte_rundshr.html; calculations based on the 6th official EIA report 2015: 78 proceedings took a total of 918 months.

Own

¹⁴ https://www.bmnt.gv.at/umwelt/betriebl_umweltschutz_uvp/uvp/materialien/berichte_rundshr.html; calculations based on the 6th official EIA report 2015: 95 simplified proceedings took a total of 651 months.

Own

Incomplete documentation by the project solicitors delay the EIA proceedings for nine months on average, eight when it comes to simplified EIAs.¹⁵ Until the official permission is granted, it takes an average of 21 months, 15 in simplified procedures.

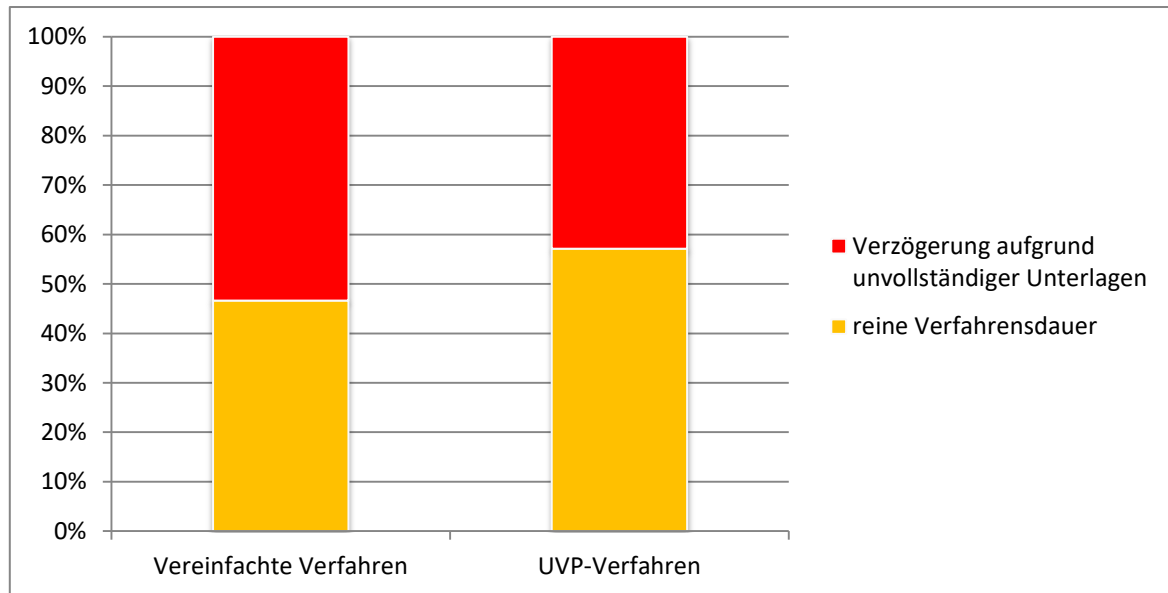


Illustration 3: About half of the time in EIA procedures is due to incomplete documentation by project solicitors.

Parties to the proceedings have the right to appeal against first-instance decisions. According to Federal Environment Agency statistics, the average duration of these appeal proceedings in the years 2009 to 2017 was just 5 months.¹⁶

From 2009 to 2013, a total of 49 cases were pending before the Environmental Senate in the second instance. From 2014 to 2017, a further 53 appeal proceedings were heard by the Federal Administrative Court (Bundesverwaltungsgericht), which has been competent since then.

Environmental NGOs have had legal standing in EIA procedures since 2005. Since then, an average of two appeals per year have been lodged by environmental organisations, as the then Environment Minister Andrä Rupprechter confirmed in a parliamentary question in June 2016.¹⁷ The remainder is accounted for by other procedural parties such as citizens' initiatives, neighbours and the local communities.

Nevertheless, there is potential to make EIA procedures more efficient without reducing the quality of the environmental assessment or the rights of the public, in particular environmental organisations.

¹⁵ https://www.bmnt.gv.at/umwelt/betriebl_umweltschutz_uvp/uvp/materialien/berichte_rundschr.html; Own calculations based on the 6th official EIA report 2015.

¹⁶ http://www.umweltbundesamt.at/umweltsituation/uvpsup/uvpoesterreich1/verfahrensmonitoring/dauer_rm/

¹⁷ https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_08498/imfname_536883.pdf

1. Implementation of **Strategic Environmental Assessments (SEA)** with a focus on particularly intensive public participation (e.g. Vienna Round Table Model of SEA) in foreseeable controversial plans (e.g. expansion of electricity grids, hydropower and wind power) in order to relieve the subsequent EIA procedures.
2. Establishment of an **EIA authority** (e.g. at the BMNT) **which is not bound by instructions** and which will in future carry out all EIA procedures in full concentration. In addition to the reduction of friction losses in the interaction of different administrative units, advantages of such a design would be the centralisation of experience and competence in process management as well as the prevention of the appearance of too much political proximity - currently the case, for example, if the BMVIT is responsible for EIA processes of Asfinag or ÖBB or the Länder for processes of the regional energy supply companies.
3. Improvement of process management by **providing the EIA authority with more resources, in particular with more official experts**, in order to avoid delays or excessive process costs through the use of private experts. In addition, professional procedural support (communication and participation) for smooth processes with clearly defined possibilities and rules for all stakeholders involved.
4. **Reform of the pre-proposal process** to give more support to project applicants and to allow them to submit as complete an application as possible for the EIA process.
5. A comprehensive analysis of which reasons, apart from a lack of acceptance, could be jointly responsible for this, which is why individual projects have far above-average process durations. In the area of electricity grids, this could also be due to the fact that the legal framework in Austria only defines inadequate specifications and standards to which all parties involved in the procedure can orient themselves (e.g. threshold values for electromagnetic radiation or noise) and therefore it is often disputed in the procedures which values are considered reasonable and corresponding expert opinions are intended to underpin the respective own position. The lack of a structured and transparent route dedication procedure also seems to lead to resistance and thus delays in the EIA procedure.

A comparable instrument to the StEntG, which followed the idea of acceleration of large projects regarded as economically significant, already existed once in the form of "preferred hydraulic engineering" in the Water Law Act (WRG). There, too, selected projects could be accorded an overriding interest as particularly important. Decades ago, however, this instrument was abolished as inefficient. One such project was the Hainburg power plant, which also proves that the instrument of speeding up large procedures is not suitable for resolving conflicts.¹⁸

¹⁸ The Hainburg project was never build and led to huge protests, protest camps in the woods and clashes with state and federal police.

2.2. The StEntG is likely to cause legal uncertainty and delays

The principle of the StEntG is fraught with numerous legal problems and violations of international, Union and constitutional law. As a result, it is very likely that permits obtained in this way will not be valid before the highest courts and would therefore be revoked if this were to happen at all. This legal uncertainty, the constant threat that a licence already granted would be revoked, undermines the greatest advantage of EIA procedures: The power of existence. After a successfully obtained EIA approval, as is the result of a good 90% of all EIA procedures, all parties can be sure that the approval is correct and secure. Project applicants can build and rely on legal certainty. It is precisely this legal certainty that strengthens confidence in investment and is indispensable for it.

Permanent revisions at the highest courts by various violations of the StEntG against international, union and constitutional law, or fundamental rights are also suitable to delay and always send the projects back to the start even though they actually want to speed up the procedures.

2.3. Issues of civil law with the StEntG

Civil law provides special protection for approved installations which gave the public concerned the opportunity to take part in the proceedings by §§ 364, 364a ABGB¹⁹: once approved installations are protected against civil law and thus potentially expensive injunctive relief claims, as these claims have already been discussed by neighbours. Exactly this protection would however no longer be effective if the claims were not discussed by automatic approval. In proceedings with potentially several hundred or even thousands of persons affected, each of these persons has access to a civil law procedure, which then has to be fought out individually. A legal uncertainty and cost risk for which no project applicants will be grateful.

3. On the provisions of the StEntG

3.1. On the relevant projects – § 2 StEntG

§ 2 StEntG specifies which projects are considered relevant to the location for selection. The paragraph only refers very generally to "strategic importance", "relevant extent" of economic indicators and the "decisiveness" of investments. Without providing more detailed information here, it therefore remains completely open in this section which threshold values are to be achieved.

3.2. On achieving the approval of the Federal Government - §§ 3 ff StEntG

§§ 3 et seq. StEntG regulate the procedure by which certain projects are declared to be "location-relevant projects in the special public interest of the Republic". The aim of the draft is to speed up the procedure; nevertheless, the planned procedure itself represents a not inconsiderable bureaucratic effort:

¹⁹ Austrian civil law code, Allgemeines Bürgerliches Gesetzbuch.

The application is submitted either by ministers or by a provincial governor. The next step is to obtain confirmation from the responsible ministry, after which the location advisory board is entrusted with the matter and makes recommendations within four weeks.

The Federal Government meets at least once every half calendar year and decides which projects are of particular public interest to the Republic. The selected projects are published in an ordinance in accordance with § 9 StEntwG.

The procedure for obtaining confirmation from the federal government is undemocratic and non-transparent, as it is conducted by the government alone without public participation and without the involvement of parliament, but confirmation leads to a far-reaching annulment of the EIA, as well as numerous procedural rights and legal protection. The fact that ministers both have the right to apply and ultimately vote on whether a project should be included also raises compatibility problems.

Furthermore, in view of the creation of a completely new law, advisory board and administrative expenditure, the draft's assessment of the law as "cost-neutral" is extremely questionable.

3.3.The advisory board for local economic development "Standortentwicklungsbeirat" - § 6

The location development advisory board is intended to "assess projects relevant to the location and make recommendations on them". Moreover, the role of the site development advisory board is not fully reflected in the draft. For example, it is not clear whether the government will have to comply with the recommendations of the advisory board.

The members of the location development advisory board are also proposed by certain ministers named in the law and appointed by the Minister for Digitisation and Business Location. They are neither independent nor exempt from instructions. The law speaks only of "experts", it is not clear which professional qualifications the members must meet, or whether they are subject to any kind of control, or whether and which rules there are about bias or incompatibilities. Whether the Advisory Board should be supported by environmental expertise or exclusively economic expertise is not clear from the draft law. In any case, the draft does not provide for obligatory persons with knowledge of environmental protection.

In view of the reference to official secrecy, it is to be expected that the documents of the Advisory Board will not be publicly accessible. This is likely to be in direct contradiction to the right of access to environmental information. In any case, the discussion and selection of projects which are automatically and possibly unconditionally permitted to make significant interventions in the environment fall under the concept of environmental information. According to the principles of Art. 4 and 5 of the Aarhus Convention and the EU's Environmental Information Directive, states are also obliged to actively provide information. This does not seem to be respected by the draft and constitutes a potential violation of the Aarhus Convention and Union law.

Finally, in terms of public participation, the Act does not provide for any involvement of civil society in the Advisory Council. This exclusion is contrary to Articles 7 and 8 of the Aarhus Convention, public participation in environmental plans, programmes and policies.

3.4.Submission of the decision - § 8

The StEntG only provides for informal notification of any rejection to the LH. Such decisions should in any case also be accessible to the public by making them available on a central website, such as the Federal Environment Agency's EIA database, and by placing them in the "Wiener Zeitung".²⁰

4. Conclusion

The draft of the StEntG is confronted with illegality at all levels of the legal system's structure and is not technically suitable to achieve the goal of speeding up the procedure. Apart from the many open questions on practical implementation, such as the basis of approval notices, all licences acquired by the StEntG are practically worthless, as they are immanently threatened with annulment by the Supreme Administrative Court, the Constitutional Court and the European Court of Justice. In addition, the StEntG in its present form is in any case capable of provoking infringement proceedings against Austria for numerous serious infringements of Union law.

ÖKOBÜRO therefore rejects the Location Development Act in its entirety due to the far-reaching legal and technically completely misguided infringements and expressly recommends that the draft be withdrawn.

With best regards,



Mag. Thomas ALGE
CEO ÖKOBÜRO – Alliance of the Austrian Environmental Movement

²⁰ The newspaper „Wiener Zeitung“ ist he official state journal for publication of legal documents.