Legal opinion

Environmental decision in the investment process – general issues and planned legal changes

Under the Act of 3 October 2008 on access to environmental (protection) information, public participation in environmental protection, and environmental impact assessments (hereinafter referred to as "Act"), certain projects require a decision on environmental conditions, also known simply as an environmental decision. According to the Act, the environmental decision determines environmental conditions of investment implementation. The purpose of the environmental decision is to indicate to the investor how to go about the project to ensure it has as little harmful impact on the environment as possible.

Environmental decisions have to be obtained for projects that always have a significant impact on the environment (or potentially have a significant impact). Types of projects that meet this designation are listed in the Regulation of the Council of Ministers of 9 November 2010 on projects that may have a significant impact on the environment. They include e.g. motorways and expressways, industrial and residential projects of a certain size, conventional power plants, or ski lifts, among others. An environmental decision may also be required in the case of an expansion or redevelopment of an investment that has already been implemented or is being implemented. Obtaining an environmental decision is the first step in the investment process. It has to be obtained before applying for a decision on building conditions, for a building permit, or for a change of use of a building, among others.

The environmental decision is an administrative decision issued by a relevant public authority. Depending on the type of project, it can be the Regional Directorate of Environmental Protection, the Regional Directorate of State Forests, the General Directorate of Environmental Protection, or the district, municipal, or communal government. A number of documents have to be enclosed when applying for an environmental decision, including e.g. a cadastral map, an excerpt from the land register, and an environmental impact assessment report (or a project fact sheet in the case of projects that potentially have a significant impact on the environment). The environmental decision proceeding is not just a matter between the applicant and the authority to which the application is submitted. Any entity that holds a right to a property located within the impact area of the planned project – be it freehold, perpetual usufruct, easement, etc. – is entitled to become a party to the proceeding. The authority has to identify all such potential parties and notify them about the proceeding. The authority carries out its own environmental impact assessment. This is obligatory for projects that always have a significant impact, and optional for projects that potentially have a significant impact on the environment. As well as verification of the applicant's environmental impact assessment report, this stage involves the authority seeking external opinion and advice, and inviting input from the public.

The procedure for obtaining an environmental decision is widely perceived as formalistic and onerous for investors. However, this year could bring significant changes and facilitate proceedings regarding the environmental decision. Two pieces of legislation

are in the works, which could change the situation for the better[1]. Under one of the draft bills, fewer documents would have to be enclosed when applying. The applicant would no longer be required to enclose both a cadastral map and a map showing the location and impact area of the planned project; the latter would be enough. And where the number of parties to the proceeding exceeds 20, the requirement to submit an excerpt from the land register would not apply (the other legislative proposal goes further, reducing the maximum number of parties where this is required to 10.) Furthermore, the bill gives the applicant the right to dispute the authority's conclusion that it has to carry out an environmental impact assessment (where this is optional). At the moment, the applicant can do that only as part of its appeal against the environmental decision, so the change could potentially save investors' time and money.

The other legislative proposal introduces other notable changes. It regulates more precisely what the impact area of a planned project is. This is important, because the number of parties depends on it. The proposal adopts a 100 m radius as a baseline definition. Any property located within 100 m of a planned project's boundaries would be automatically considered as the area of the impact. Also, other criteria would remain unchanged. Furthermore, the draft bill proposes a removal of a ruling on no obligation to carry out an environmental impact assessment. Once the authority concludes that it does not need to carry out an environmental impact assessment, it will not have to issue an official statement to this effect; it will simply issue the environmental decision. That would facilitate and speed up the procedure for projects, which potentially have a significant impact on the environment, that do not require an environmental impact assessment. Also, the applicant would be given the right to request suspension of the environmental decision proceeding, but no other party would have that right.

The government's Committee on European Affairs completed work on the former draft bill two months ago. The latter draft bill, meanwhile, has already cleared the public consultation phase and is currently in the opinion phase.

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[1] Draft bill of 27 September 2018 amending the Environmental Protection Act and some other acts (no UC134) and draft bill of 19 March 2019 amending the Act on access to environmental (protection) information, public participation in environmental protection, and environmental impact assessments, and some other acts (no UD490).