



LEGAL BRIEFING – Real Estate

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Judgment C-280/18 of the European Court of Justice on the Greek environmental permitting process and the concerns it raises today

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With its Judgment of 7 November 2019, *Flausch and Others*, C-280/18, the Court of Justice of the European Union (CJEU) responded to the request for a preliminary ruling submitted by the Greek Council of State (Decision 674/2018), regarding the compliance of Greek legislation with Articles 6, 9 and 11 of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (“the EIA – Environmental Impact Assessment – Directive”), read in combination with the provisions of Article 47 of the Charter of Fundamental Rights of the European Union CFREU. The request was composed of two closely related questions.

For the record, the dispute in the main proceedings before the referring court rose from a Decision for the Approval of Environmental Terms (DAET) for the construction of an integrated touristic resort on the island of Ios, which falls under the South Aegean administrative Region, adopted by Greek authorities in August 2014.

The first question submitted before the CJEU was whether Law 4014/2011 -and the relevant Joint Ministerial Decisions issued thereafter-, providing that the procedures of public information and consultation are to be conducted

and monitored primarily by the wider administrative unit (Region) and not the Municipality concerned, meet the standards set in the Directive. It should be noted that under Greek law, as applicable at the time, an invitation to participate in the EIA) was made public through the posting of a notice in the Regional headquarters and publication in a local newspaper, while the related files could only be accessed before the relevant authorities. The applicants before the Council of State were residents of Ios, and, therefore, for the purposes of gaining access to the related files, they would need to travel to the island of Syros, where the Regional headquarters are situated. Given the procedural autonomy granted to the Member States in respect of the national measures to be implemented for the public's information and participation, the CJEU refrained from a clear judgment and ruled that it is a matter for the national court to determine whether the rights of the public concerning environmental permitting are effectively fulfilled at the level of an administrative Region.

The second question submitted before the CJEU was whether Article 19a of Law 4014/2011 providing that the DAET be posted on a special website of the Ministry of the Environment (<http://aepo.ypeka.gr/>) simultaneously giving rise to the presumption that every interested person has knowledge thereof and enabling them to lodge a petition for annulment before the court within 60 days, is compatible with the Directive's requirements that the public concerned be appropriately informed about the consent of the competent authorities and able to access review procedures. The CJEU referred to its settled case-law, whereby relevant deadlines start to run only from "*the date on which the person concerned was aware or at least ought to have been aware of the announcement*". This condition, however, may not be deemed as fulfilled unless the public concerned has been adequately informed and invited to be consulted with prior to the issuance of a DAET. Therefore, the Court ruled that the proper and adequate involvement of the public is dependent on whether the measures preceding the publication of a DAET may be considered as sufficient.

In anticipation of the Council of State's final decision, one should be aware that the legal regime of the public consultation procedure has drastically changed with the launch, on 5 July 2018, of the Digital Environmental Registry (DER), as envisaged in Article 18 of Law 4014/2011. While already operating as digital platform, as of 1 January 2021 the DER shall serve as the sole means for conducting the public consultation procedure and shall be the exclusive site for the submission of "*all documents regarding the issuance, renewal or amendment of DAET.*]" (Art. 6 of Law 4685/2020). According to the justification report accompanying the respective bill public consultation is to be conducted "*exclusively*" through the DER.

In light of the above:

- It is worth mentioning that the two conventional methods through which the public is informed by the Regional authorities (bill posting and press) are not the only ones ordered by the Ministerial Decision of 2014 governing the matter. Although not referred to in the Judgment of the CJEU – perhaps because it did not arise from the facts of this specific case – the Ministerial Decision also calls for an announcement on the official website of the Regional authorities. These three obligations are not affected by Art. 6 of Law 4685/2020, and they continue to apply concurrently with providing information on the DER. Even if the Council of State renounces the actions performed by Regional

authorities in the case at hand as ineffective, the obligation of posting announcements on two different websites creates a totally different storyline for future cases.

- If, beginning next year, public consultation on environmental permitting matters is indeed carried out solely online, to the exclusion of the means of written submissions still available today, one could arguably wonder if the principle of effectiveness will be challenged, given that every single member of the public concerned will be required to have internet access and digital literacy.

All in all, the digitization of the environmental permitting process appears as a double-edged sword in the hands of the legislature: particularly useful and promoting the rights of the public concerned when complementing conventional administrative procedures, yet dangerous and debatable when fully replacing them. Unfortunately, the imminent decision of the Council of State is not expected to assist us in determining the true nature and role of the digital process, as it is expected to be based on a legal framework that is now obsolete. The interpretations of the CJEU on the EIA Directive, however, will remain relevant for future cases.

