

Advice case title: Rebuilding of the shelter "Europahütte - Rifugio Europa"

Full official name of the advised entity: EGTC European Region Tyrol-South Tyrol-Trentino

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I. Executive summary

The joint demolition and reconstruction of an alpine structure such as the Europahütte, which is located exactly on a national border (more precisely, the Europahütte currently consists of seven buildings, four of which are on Austrian and three on Italian territory), poses major organisational challenges for the parties involved.

For this reason, the "Europahütte" project is a unique example of cross-border cooperation in the European spirit. It requires close cooperation between the parties involved in order to regulate future ownership and joint management and to realise a joint construction project.

This report deals with the legal framework under construction and public procurement law to which the planned construction is subject.

As a result, the construction planning must comply with the building and administrative regulations of the Austrian legal system as well as those of the Italian legal system. In addition, two building authorisation procedures must be carried out in parallel: one in the province of Tyrol and one in the Autonomous Province of Bolzano South Tyrol. In South Tyrol, the local municipality is the competent building authority, while for Tyrol, the Innsbruck district authority (Bezirkshauptmannschaft Innsbruck) is responsible for issuing the building permit. In addition, the Permanent Mixed Austrian-Italian Commission for the Maintenance of Boundary Signs and the Surveying and Marking of the National Boundary must be involved in the building process.

II. Description of the obstacle with indication of the legal/administrative provisions causing the obstacle

In 1899, the Landshut section of the German and Austrian Alpine Association (DuOeAv) built the Landshuter Hütte (2693 m) as an alpine refuge below the Kraxentrager (2999 m, summit of the Zillertal Alps), directly on a ridge of the main Alpine ridge.

After 1919, the newly drawn state border ran directly through the shelter, which was reopened on the northern side in 1953 by the owner, the German Alpine Club - Landshut Section (in the original version DAV Landshut).

In 1978, the Sterzing section of the Club Alpino Italiano (i.e. CAI Vipiteno) was entrusted with the management of the refuge by the State Domain Administration-Military Branch. In 1987, agreement was sought with the DAV Landshut and the refuge has been run jointly since 1988, at the same time being renamed the "Europahütte". This makes the Europahütte a unique example of cross-border co-operation in Europe.

As part of the INTERREG project Fit4Co, which was supervised by the EGTC European Region Tyrol-South Tyrol-Trentino, a project working group was tasked with developing a concept for the future use of the Europahütte.

In the course of this project, a geological survey was also commissioned from the

Technical University of Munich and the Office for Geology and Building Material Testing of the Province of South Tyrol, which determined that the existing shelter was endangered as it had been built on a friable geological subsoil.

On 1 October 2020, a protocol of agreement on the future of the Europahütte was signed in Stams by the provinces of Tyrol and South Tyrol, the CAI Vipiteno, the DAV Landshut and the municipalities of Gries am Brenner and Pfitsch.

The ownership of the refuge on the South Tyrolean side had to be clarified prior to further planning for future use.

In 2020, the province of South Tyrol acquired the half of the refuge located on Italian territory, while the DAV Landshut remains the landowner on the north side.

In 2022, the two owners, the Province of South Tyrol and the DAV Landshut, as well as the Province of Tyrol established the "Europahütte" foundation, which will take over the management of the refuge from 2023.

Planning for the construction of a replacement building is now a priority, as the structural damage to the building is increasing due to the movement of the subsoil. The corresponding plans for a replacement hut at the same location are well advanced.

In addition, contracts were signed in May 2023, according to which the province of South Tyrol and the DAV Landshut will each be granted co-ownership of the building plot located on Austrian and Italian territory, respectively, in order to combine the ownership of the Europahütte of both owners. The co-ownership share for the province of South Tyrol is now 48% of the plots on both sides, while the DAV Landshut holds 52%.

The necessary new building is unique in the cross-border area, as the national border continues to run directly through the main building, which raises a number of legal questions regarding construction activities. The project for the new building also envisages that approximately half of it will be located on Austrian and half on Italian territory, which corresponds to the geologically best building site on the one hand and the desire to retain the unique location on a national border on the other.

The Autonomous Province of Bolzano South Tyrol intends to commission the DAV Landshut to handle the "Europahütte" construction project as the overall contractor.

Can the private market participant DAV Landshut use the DAV guidelines for the construction of mountain huts and the Austrian legal system for new construction, even if Italian territory is involved?

III. Description of possible solution(s)

1. Applicable building law

First of all, the question arises as to which building law is to be applied to the construction of a building that is and will continue to be located halfway across the Austrian-Italian border.

As the planned new building is not a separate structure, but an inseparable functional unit, the construction project must comply with both Austrian and Italian building regulations. The same applies to administrative regulations such as landscape protection or climate protection.

As this is a matter of public law, it cannot be waived by an agreement, such as a civil law contract between the Autonomous Province of Bolzano South Tyrol and the Province of Tyrol or the two municipalities on which the Europahütte is located. It would theoretically be possible to make a special arrangement by means of an international treaty between Italy and Austria, but this does not seem feasible in practice due to the associated complexity, such as the duration of such a procedure and the mandatory involvement of the state authorities. Such a project is probably too small for that.

The construction planning must therefore - in addition to the intended voluntary application of the guidelines of the German Alpine Association for the construction of mountain huts - observe both the building and administrative regulations of the Austrian legal system as well as those of the Italian legal system.

As far as the planning permission procedure is concerned, two must also be carried out in parallel: one in the province of Tyrol and one in the Autonomous Province of Bolzano South Tyrol.

In practice, this means that the stricter legislation must be applied to the entire building. To give an example: the fire protection regulations in Italy are very rigid and no distinction is made as to whether the building is located in a city or, as in our case, in high alpine terrain

For South Tyrol - unless the construction is classified as "of supra-municipal or provincial interest" within the meaning of Article 70(1)(c) of the Provincial Law of 10 July 2018, No. 91 (Space and Landscape) - the municipality is the competent building authority within the meaning of Article 76 of the aforementioned Provincial Law, whereby in any case it is a composite administrative procedure in which the province and municipality each participate in order to control compliance with the building and administrative regulations in their area of responsibility.

According to § 62 of the Tyrolean Building Code, the mayor or the municipality is the authority responsible for issuing building permits. For construction projects in the area of the state border, however, an exemption permit is required in accordance with § 7 Para. 1 of the State Border Act, Federal Law Gazette No. 9/1974, last amended by Federal Law Gazette I No. 161/2013. Therefore, it is not the mayor but the Innsbruck district authority (Bezirkshauptmannschaft Innsbruck) that is responsible. The affected municipality of Gries am Brenner has party status in the construction process to safeguard the interests of local spatial planning.

In this case, the Permanent Mixed Austrian-Italian Commission for the Maintenance of Boundary Signs and the Surveying and Marking of the State Border must also be involved in the construction process.

2 Law applicable to the award of the contract

As the Autonomous Province of Bolzano South Tyrol is a 48% co-owner of the property and will also contribute 48% of the construction costs with taxpayers' money, the question also arises as to whether public procurement law is applicable and, if so, whether it is Italian or Austrian public procurement law.

The Landshut section of the German Alpine Club is an association under private law and as such is not subject to public procurement law.

Article 2(3) of the South Tyrolean Provincial Law on Public Procurement of 17 December 2015, No. 16 stipulates the following:

"This Act shall also apply to the following other entities that are contracting authorities or contractors for the award of contracts in the province's sphere of interest:

...

b) private entities that award contracts for construction services and contracts for the construction of health and social facilities, sports, recreational and leisure facilities, schools and universities and public administration buildings, the total contract value of which exceeds one million euros and the realisation of which is subsidised by the entities referred to in paragraph 2 by an updated direct and specific interest or capital contribution of more than 50 percent of the amount of the construction services".

The order volume for the new building is well over one million euros, but the Autonomous Province of Bolzano South Tyrol's share is only 48%, so this provision does not apply.

The Austrian Federal Procurement Act contains a comparable regulation in Section 4 (3), also with a 50% threshold for direct subsidisation of construction with public funds.

As a result, the Landshut section of the German Alpine Club is not obliged to apply public procurement law under either Italian or Austrian law.

The Autonomous Province of Bolzano South Tyrol is only a 48% co-owner and therefore holds a minority stake in the property. It also only bears a minority of the construction costs incurred (48%).

On 19 January 2024, a contract was concluded between the Autonomous Province of

Bolzano South Tyrol and the Landshut section of the German Alpine Association, which regulates the cooperation between the two co-owners in the realisation of the new construction of the Europahütte. In particular, the Landshut section of the German Alpine Club was assigned the role of building owner by the minority owner and it was explicitly stipulated that the Landshut section would be responsible for the planning, the award procedure and the construction work. The Landshut section therefore places the orders and concludes the contracts. The Autonomous Province of Bolzano South Tyrol reimburses the costs in proportion to its co-ownership - i.e. 48%.

As a result, all contracts for the construction of the new Europahütte will be awarded privately.

3. What measures would have to be taken to make it easier to realise such a project?

a) Harmonisation of building permit procedures in the Member States of the European Union

The EU has already implemented a number of harmonisation measures in the area of construction law in order to ensure a uniform legal framework for construction projects in the member states. This harmonisation mainly concerns aspects of building regulations, construction product standards and construction quality standards. Some of the most important areas in which the EU has harmonised construction law to date are:

Building regulations: it has issued directives and regulations that set minimum requirements for construction works, such as Regulation (EU) No 305/2011 of 9 March 2011 laying down harmonised conditions for the marketing of construction products and Directive 2010/31/EU of 19 May 2010 on the energy performance of buildings (the recast version of which was adopted by the Council on 12 April 2024). These provisions lay down standards that must be applied directly by the member states (in the case of regulations) or transposed into national law.

Construction product standards: The EU has developed a large number of harmonised standards for construction products to ensure that products manufactured and approved in

one Member State can also be freely traded in other Member States. This is achieved, among other things, through the CE marking of construction products in accordance with Regulation (EU) No 305/2011 of 9 March 2011 laying down harmonised conditions for the marketing of construction products (Construction Products Regulation - CPR).

Construction quality standards: The EU promotes the development of construction quality standards and best practices to improve the quality of construction works in the Member States. This is often done by funding research projects and providing technical assistance. The legal basis for the EU's power to harmonise construction law lies mainly in the internal market, which aims to remove barriers to the free movement of goods between Member States. According to the EU Treaties, in particular Articles 26 and 114 of the Treaty on the Functioning of the European Union (TFEU), the EU has the competence to take measures necessary to create and maintain a single internal market. In addition, under Article 194 TFEU, environmental and energy efficiency considerations can form the basis for EU legislation in the construction sector, as is the case with the Energy Performance of Buildings Directive.

On this basis, the EU could also harmonise building permit procedures in the Member States of the European Union.

b) Bilateral agreements between neighbouring States

Another way of making it easier to realise construction projects directly on the national border would be to conclude bilateral agreements between the bordering countries.

There are border areas in the European Union where cities grow together directly on the state border and form a common urban region. A well-known example is the urban region of Gorizia in Italy and Nova Gorica in Slovenia, which are closely linked historically and culturally and are separated by the political border between Italy and Slovenia. Despite this border, they form a coherent urban region in which the neighbourhoods of the two cities often merge seamlessly. Similar examples are the cities of Haparanda (Sweden) and Tornio (Finland) on the Swedish-Finnish border, the cities of Stubice (Poland) and Frankfurt an der Oder (Germany) on the German-Polish border and the cities of Valga (Estonia) and Valka

(Latvia) on the Estonian-Latvian border.

These cross-border urban areas are often the result of close economic, social and cultural interdependence across the border and reflect the increasing integration and co-operation in the European Union.

Bilateral agreements could introduce simplified building authorisation procedures in the border area.

c) Facilitating the joint public procurement of public works contracts through bilateral agreements

Article 39(4) of Directive 2014/24/EU of 26 February 2014 on public procurement provides as follows:

'Several contracting authorities from different Member States may jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system. They may also, to the extent set out in the second subparagraph of Article 33(2), award contracts based on the framework agreement or on the dynamic purchasing system. Unless the necessary elements have been regulated by an international agreement concluded between the Member States concerned, the participating contracting authorities shall conclude an agreement that determines:

(a) the responsibilities of the parties and the relevant applicable national provisions;

(b) the internal organisation of the procurement procedure, including the management of the procedure, the distribution of the works, supplies or services to be procured, and the conclusion of contracts.

A participating contracting authority fulfils its obligations pursuant to this Directive when it purchases works, supplies or services from a contracting authority which is responsible for the procurement procedure. When determining responsibilities and the applicable national law as referred to in point (a), the participating contracting authorities may allocate specific responsibilities among them and determine the applicable provisions of the national laws of

any of their respective Member States. The allocation of responsibilities and the applicable national law shall be referred to in the procurement documents for jointly awarded public contracts.

In practice, each state has its own specific administrative practice for the award of public contracts, despite the strong harmonisation by the EU directives. In order to bring this Article 39(4) of the Directive to life, it is therefore necessary to conclude the aforementioned international agreements between states in order to eliminate inconsistencies and uncertainties and to facilitate the award of contracts by contracting authorities from different Member States, especially in border regions.

IV. A full list of all legal provisions relevant to the case with the correct citation both in original language and in English

Austria: Kundmachung der Landesregierung vom 19. April 2022 über die Wiederverlautbarung der Tiroler Bauordnung 2018, LGBl. Nr. 44/2022 / Proclamation of the provincial government of 19 April 2022 on the re-publication of the Tyrolean Building Code 2018, LGBl. No. 44/2022

Bundesgesetz vom 30. November 1973 zur Durchführung zwischenstaatlicher Vereinbarungen über die Vermessung und Vermarkung der Staatsgrenze und zur Regelung bestimmter Angelegenheiten der Staatsgrenze (Staatsgrenzgesetz), BGBl. Nr. 9/1974 / Federal Act of 30 November 1973 on the Implementation of Intergovernmental Agreements on the Surveying and Marking of the State Border and on the Regulation of Certain Matters of the State Border (State Border Act), Federal Law Gazette No. 9/1974

Bundesgesetz über die Vergabe von Aufträgen (Bundesvergabegesetz 2018 - BVergG 2018), Federal Law Gazette I No. 65/2018 / Federal Act on the Award of Contracts (Federal Procurement Act 2018 - BVergG 2018), Federal Law Gazette I No. 65/2018

South Tyrol / Italy: Provincial Law of 10 July 2018, No. 91 (Space and Landscape), Supplement 3 to the Official Gazette of 12 July 2018, No. 28 / Provincial Law of 10 July 2018, No. 91 (Space and Landscape), Supplement 3 to the Official Gazette of 12 July 2018,

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Provincial Law of 17 December 2015, No. 16 (Provisions on public procurement), Official Gazette of 22 December 2015, No. 51, Supplement No. 3 / Provincial Law of 17 December 2015, No. 16 (Provisions on public procurement), Official Gazette of 22 December 2015, No. 51, Supplement No. 3.

Kind regards

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