



Le juge administratif
et
le droit communautaire
de l'environnement

National administrative courts
And
Community
Environmental law

Slovaquie-Slovak Republic

Réponse au questionnaire
Answer to
The questionnaire

SEMINAR FOR COUNCILS OF STATE AND SUPREME ADMINISTRATIVE JURISDICTIONS

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QUESTIONNAIRE

(Contribution from the Slovak Republic)

1. Information and public participation in environmental issues

Secondary Community law makes provision for procedures to inform the public of environmental data and for citizen participation in the development of projects that are likely to impact the environment.

The two main texts in force are 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; and Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment as later amended.

Other international texts, such as the Aarhus Convention of 25 June 1998 or Article 8 of the European Convention for the protection of Human Rights and Fundamental Freedoms also apply and the European Court of Human Rights ruled, on the basis of these texts, that member states had an obligation to provide information on environmental matters.

A - Application of regulations

Has the respective application scope of these texts, and the Community directives in particular, led to disputes? How has national case law clarified the concepts contained in these texts considering, in particular, the case law of the Court of Justice of the European Communities?

For example, has the establishment of the party to be consulted, as provided for under Directive 85/337 and referred to as the "public concerned", ever been the subject of litigation? If so, how did your court settle the matter? Do you feel that the explanations provided on this matter by Directive 2003/35/EC, which modified the previous directive, such as the concepts of the public "likely to be affected" by a project or "having an interest in" a procedure to authorise a given project, clarify the scope of the text?

ANSWER:

Firstly, the Slovak Republic belongs to new Member states and there have been still no rich list of judgments in area EU law in particular environmental protection. Apart this negative aspect the national report will present two remarkable judgments which relate to above mentioned law area.

The terms « **public concerned** » presents itself as a very foggy terms with a broad interpretation generating the great legal uncertainty because an administrative authority are not able in due manner to define all parties of proceedings. Fresh definition "**likely to be affected by a project**" or "having an interest in a procedure to authorise a given project" in no case helps to administrative authority or even national court to determine parties, because the first cited definition (public concerned) is implicitly joined with the project or other execution of construction works or of other installations as well as schemes.

The status, obligations and duties of parties to proceedings in Slovak administrative justice are governed in Part Five of the Code of Civil Procedure. Under Article 250 of the Act parties to the proceedings are the claimant and the respondent.

The definition of the claimant is based on principle of direct or indirect affecting a law. **Firstly** it means that claimant is anyone (natural person or a legal person) who claims about oneself that to this person as a party to the administrative proceedings its rights were curtailed (affected) by the decision and/or procedure of the administrative body.

Secondly the claimant can be also a natural person or a legal person which was not treated in the administrative proceedings as a party to the proceedings, although it should have been considered for a party to the proceedings. This definition tries to improve the lack of clearness of the term "likely to be affected" and "lets open room" for anyone who would be affected in his/her rights.

Extra procedural situation is created when several persons consider themselves for persons the rights of which were affected by a decision and procedure of the administrative body; then they can file a joint claim.

Special procedural role plays associated persons who neither has filed claim nor took into their consideration any information of foregoing administrative procedure although their rights are closely linked with the claimant's contested rights. The associated persons are always the parties to the proceedings because the decision of the court must also apply to them due to the inseparable body corporate of rights with the claimant.

It is very easy to designate a respondent in administrative justice proceedings. In case of a decision of the administrative body issued within the administrative proceedings, the respondent is that administrative body which decided at the level of the last instance.

The Slovak procedural law permits to file a claim "in public interest" so called "action popularis procedure". Thus the party to the proceedings concerning a claim involving the prosecutor is also the prosecutor himself/herself as claimant besides above mentioned parties to the administrative proceedings.

From the point of Slovak court's view the other criterion is dominated – whether the person is directly or indirectly concerned. Any person is directly concerned if his/her rights are affected seriously and this consequence has lasted at time of judging of the rights. For example if applicant would be dissatisfied with a high level of noise during a construction of a bridge and court finds out that he daily drives around the construction site in that case the court probably to deny the applicant's motion on the grounds that his right for healthy environment has not been affected and therefore is not granted to be party to proceedings.

On the other hand this legal situation would change if applicant proved to live next to the construction site. The distance "next" means within area with high noise. Everyday presence of noise obviously could affect his/her right for healthy environment and especially for its protection.

Only for these reasons the Slovak court could accept individual application and deal with it.

As an interesting example seems a K. case (No. 1 Sz-o- NS 134/2004), in which The Slovak Supreme Court tried to determine scope of standing.

PROCEDURE before the Supreme Court of the Slovak Republic, five member's Chamber

The circumstances of the case:

Environmental District Authority in Slovak city Pezinok on a proposal of company producing bricks to open new waste landfill site in this city reassessed its previous administrative decision granting an approval for this company to operate an installation for waste disposal in this city and decided to annul above mentioned approval and not grant new approval for carrying out

other landfill site and simultaneously grant approval to close down a landfill site and perform its reclamation including subsequent monitoring.

Both company producing bricks and Mr. K. resided in above mentioned Slovak city Pezinok challenged this administrative decision. Mr. K. sought to be approved as a party to pending administrative proceedings. The final decision was made by the Ministry of the Environment of the Slovak Republic, which denied the Mr. K. requirement.

Claim:

Mr. K. as the plaintiff in this case brought an action against a decision of the Ministry of the Environment of the Slovak Republic (hereinafter “the Ministry”) as defendant at the Supreme Court of the Slovak Republic (hereinafter “Supreme Court”). The Ministry ruled in this contested decision that Mr. K. is not party to pending proceedings concerning a granting approval by District Authority to operate an installation for waste disposal (especially building up a landfill site).

In his action the plaintiff alleged, in particular, an infringement of his fundamental right of access to a impartial tribunal enshrined in Article 46 of Slovak Constitution as well as Article 6 (1) of the European Convention on protection of Fundamental Human Rights, and his right to use a good environment guaranteed by Article 44 (1) of the Slovak Constitution as well as Article 8 of the European Convention (right to respect for private and family life). The plaintiff proposed to revoke the impugned decision and return the matter to the defendant for further proceedings.

The 7th Panel of Supreme court acting like a first-level court complied with plaintiff’s demand because it decided to revoke both the contested decision of the Ministry and decision of a lower-level administrative body (District Authority) as well as returned the matter to the defendant for further proceedings. Further more the Supreme Court in its binding legal position ordered that Mr. K. has become participant “ab initio” in the administrative proceedings because the legal opinion proved beyond all doubts that the proposed landfill site would be seriously harmed the health of residents who will live closely to site. Mr. K. resides on the suburbs of the city Pezinok in distance approximately 1 kilometre from proposed site.

Appeal procedure:

The Ministry acting as a defendant challenged the above mentioned judgment of the Supreme Court and appealed against it. In its appeal the defendant argued, in particular, that a previous approval to operate an installation for waste disposal has not granted to citizens resided in city Pezinok but only to company producing bricks in this city. Hence citizens resided in this city cannot be directly affected in their rights and duties by the granting an approval and if it will

admit such idea they may be affected only indirectly. The defendant proposed to revoke the contested judgment and return the matter to panel in question for further proceedings.

The appellate panel of the Supreme Court did not take into account constitutional right of plaintiff to use good environment because administrative body could review whether installation of landfill site can or could negative influence in future environment relating to locality in which plaintiff has resided and whether plaintiff can be directly affected by this negative influence.

The appellate panel of the Supreme Court stated that there are no reasonable grounds for confirmation of arguments presented by plaintiff in proceedings. It means that merely opening a landfill site near the city in which the plaintiff has lived is not able itself to threaten any fundamental right of this individual.

The appellate court stressed in its conclusion that under Section 74 (4) of the Act on Waste a party to proceedings for the granting of approval to operate an installation for waste disposal is always (and only) the municipality in which the installation for waste disposal or the installation for waste recovery is situated or intended. Hence the appellate panel of Supreme Court changed the contested judgment in so manner that court dismisses an action as a not justified.

B - Judge control techniques

How much control does the administrative judge exercise over the administration's compliance with its obligations to inform citizens and facilitate public participation? In other words, how much discretion does it allow the administration in this regard? And what sanctions are issued when the judge observes that one of the obligations not been met?

The consultations provided for under Directive 85/337/EEC may take place during long and complex procedures before official permits are issued. Does failure to comply with obligations systematically lead to the simple annulment of the permit? Or does case law show that annulment is reserved for cases where the irregularities observed are substantial? Is it possible to make the entire or part of the procedure compliant?

ANSWER:

In no case any irregularities leads to annulment of the permit. The Slovak Court takes into account that the environment impact assessment procedure is very complex and long lasted one. Thus substantial irregularities are the only one legal ground for annulment of impugned permit.

Under Article 250i of Code of Civil Procedure is stipulated that when examining the lawfulness of the decision, those facts are decisive for the court that existed at the time when the appealed against decision was issued. The court may exceptionally render evidence, necessary for the review of the appealed against decision.

When reviewing the lawfulness and the procedure of the administrative body, the court must take into account only those defects (irregularities) of the proceedings in front of the administrative body which could have influence on the lawfulness of the appealed decision.

As an interesting example of serious procedural irregularity seems a S. case (No. 1 Sz-o- NS 194/2004), in which The Slovak Supreme Court tried to decide the question of right to inform.

Right to inform in environmental and public involvement is ensured in Slovak Republic during all stages of the assessment procedure. Act No. 127/1994 Coll. on environmental impact assessment constantly emphasises the involvement of public at large and expert public in the assessment process by effective informing at every stage of the process. After initial uncertainty concerning the interpretation of the concept of “informing in a manner usual in the municipality” the Supreme Court, considering the relevant provisions of community law, ruled that all means the municipality commonly uses to inform the public in other cases shall be used in informing the public and shall include mainly local radio, local newspapers or local cable TV, the website of the municipality together with organising thematic and sufficiently open exhibitions of plans and models of the proposed structure. Thus public is not duly informed if state body announced information concerning construction with presumed negative effect for environmental only by way of its official panel.

C - Open question

In addition to the two previous questions, has your court issued other decisions on waste law or polluting installations law that should be noted? If yes, please summarise these decisions in a few lines.

ANSWERS:

We have no other cases relating to waste law or problems arising in polluting installations law.

2. Pollution law (example of polluting installations)

Secondary Community law on waste and polluting installations represents an attempt to reconcile economic growth with environmental protection.

The two main texts in force in this regard are framework Directive 2006/12/EC of the European Parliament and the Council of 5 April 2006 on waste (which replaces Directive 75/442/EEC) and Directive 96/61/EC of the Council of 24 September 1996 concerning integrated pollution prevention and control.

A - Application of regulations

How are responsibilities distributed under your national legislation in connection with the restoration of polluted sites? Does the selection of the party responsible (operators of sites or holders of waste) raise problems? Moreover, is it possible, in certain cases, to question the responsibilities of the public authorities in charge of applying the regulation in the event that they have not sufficiently exercised their powers to monitor and control industrial manufacturers?

Directive 96/61, for example, makes provision for the satisfactory rehabilitation of an operating site once operating activities have been completed. Problems can arise when the relevant public authority intends to exercise its supervision and control powers to end pollution that emerges after operating activities have ended. For example, can these powers be exercised immediately? Against which party: the former operator, the current owner? Can the responsibility of the relevant authority be applied due to a shortcoming in the exercise of its prerogatives?

ANSWERS:

A landfill operator is under Act No. 223/2001 Coll. obliged to prepare and have approved project document for closure, reclamation and monitoring of the landfill after its closing and to close, reclaim and monitor the landfill in compliance with that document. This project document must be prepared by the applicant prior granting a permit to operate a landfill.

Landfill operator is anyone to whom is granted the state authorization to waste disposal including care for the place of disposal. It is irrespective whether landfill operator is land owner, land holder or only possessor.

Furthermore a landfill operator is obliged to retain monitoring records during the landfill operation and in the after-care stage, and annually report the monitoring outcomes to the competent district authority by 31 January of the following year.

During a landfill operation, the landfill operator is also obliged to create a special financial reserve to be used for the closure, reclamation and monitoring of the landfill in the after-care phase.³⁶⁾ Anyone operating more than one landfill shall create the special financial reserve for every landfill separately.

The special financial reserve must be created annually by debiting the expenditures (costs)³⁶⁾ in the amount of a fixed share in total costs for the closure, reclamation and monitoring of the landfill in the after-care phase. Various factors (e.g. quantity of waste deposited per year in tonnes or spare capacity of the landfill) are used for determination of the annual amount of special financial reserve.

The funds forming a special purpose financial reserve shall be kept in a special account³⁷⁾ of the landfill operator. Before transferring the first instalment of the special purpose financial reserve, the landfill operator shall be obliged to provide for the opening of a special account to which the funds of the special purpose financial reserve would be transferred, and at the same time assure earmarking of the special purpose financial reserve funds for to the above mentioned purpose and it is very important that the funds may not be affected by the execution of a decision or by distraint under special regulations⁴⁴⁾.

The funds of the special financial reserve may be used only after issuance of state authority's consent. The funds may be drawn to the amount laid down in a written acknowledgement, by which the competent state administration body in waste management confirms authorised drawing of those funds in advance.

If a landfill operator decide to terminate its business without a legal successor before the completion of the closure, reclamation or monitoring of the landfill in the after-care phase, all rights and obligations related to the closure, reclamation and monitoring of the landfill shall pass to the municipality, in which the major part of the landfill is situated as of the day preceding the start of liquidation or the day of the trade licence cancellation;³⁸⁾ as at the day of transfer of rights and obligations, that municipality will also be given the right to dispose with the funds of the created special financial reserve.

³⁶⁾ § 24 of Act No. 366/1999 Coll. on Income Taxes

§ 9 of Act No. 368/1999 Coll. on Reserves and Provisions to Establish the Income Tax Base

³⁷⁾ For instance, §§ 708 through 719 of the Commercial Code

⁴⁴⁾ For instance, § 251 of the Civil Procedure Code, the Act of the National Council of the Slovak Republic No. 233/1995 on Court-Appointed Executors and Executory Activities (the Execution Order) and on amendment of other acts, as amended, Act of the Slovak National Council No. 511/1992 Coll. on Administration of Taxes and Charges and on Modifications in the System of Territorial Fiscal Bodies, as amended

³⁸⁾ For instance, §§ 70 through 75 of the Commercial Code, §§ 15a through 15e of Act No. 111/1990 Coll. on State-Owned Enterprise, as amended, §§ 57 to 59 of Act No. 455/1991 Coll., as amended by Act of the National Council of the Slovak Republic No. 132/1994 Coll.

Where a decree of bankruptcy was issued for a landfill operator, a motion to decree bankruptcy was refused for lack of assets or where settlement³⁹⁾ was allowed to a landfill operator before the completion of closure, reclamation or monitoring of the landfill in the after-care phase, all rights and obligations related to the closure, reclamation and monitoring of the landfill pass to the municipality, in which the major part of the landfill is situated as at the day preceding the day of effectiveness of the bankruptcy decree, decision to refuse bankruptcy for lack of assets or decision of permit settlement.

As of the day preceding the start of bankruptcy, the day of the trade licence cancellation or the effectiveness date of declaring bankruptcy, of a decision to refuse the motion for declaring bankruptcy for lack of assets or of a decision to permit settlement, the landfill operator must transfer the funds of the created special financial reserve to the account of the municipality to which the right to dispose those funds is passed.

B - Judge control techniques

What is the scope of the powers of a judge ruling on a dispute concerning the application of one or other of these regulations? Are there procedural regulations or rules of evidence before the judge or procedures for establishing specific facts connected with these matters, given, in particular, their specific technical nature?

When asked, for example, to rule on the decision taken by the relevant authority on the request for prior authorisation provided for under Directive 96/61, is the judge only permitted to annul the decision? Or may the judge also amend the decision or impose other measures?

What rules for the transfer and taking of evidence does the judge apply to settle the dispute? Can the judge request special investigation measures (e.g. expert opinions or amici curiae)?

ANSWERS:

A judge ruling on a dispute concerning waste cases performs administrative justice procedure.

Under Article 250i of the Slovak Code of Civil Procedure when examining the lawfulness of the decision, those facts are decisive for the court that existed at the time when the appealed against decision was issued. Only in the exceptional cases the court may render evidence, necessary for the review of the appealed against decision. The court therefore in case the

³⁹⁾ Act No. 328/1991 Coll. on Bankruptcy and Settlement, as amended

administrative body decided on the dispute or on any other legal matter following from the civil law, labour law, family and commercial relations in accordance with a special legal act or decided about imposing a sanction, the court, when reviewing this decision, is not bound by the facts ascertained by the administrative body. The court may proceed from facts ascertained by the administrative body, it can repeatedly render evidence already rendered by the administrative body, or it can carry out probation of evidence in accordance with the third part of Chapter Two (rules of evidence).

In principle, a Slovak court can issue three types of rulings.

1. In the first possible verdict, the Slovak court confirms the challenged decision of the administrative body with a judgement and rejects the action as unfounded.
2. In the second possible verdict, the Slovak court annuls the challenged decision of the administrative body with a judgement and returns the case to it for further proceedings.
3. In the last possible verdict, the Slovak court discontinues the proceedings on grounds of established procedural defects (lapsed time limit for filing an action, action filed by an unauthorised person, impossibility of judicial review, filing of action by a person who is not legally represented by a lawyer, the plaintiff failed to remedy defects of the action ordered by the court in time, failure to pay the court fee of SKK 2.000,-- /approx EURO 65/ and/or the action was filed with an incompetent court) with a resolution.

Furthermore the Slovak court has no possibility to issue a verdict of partial cancellation of the contested administrative decision and/or to impose additional requirements to the verdict concerning the waste management or others items of nature as indicated above. The cassation principle applied in the Slovak administrative justice prevents the application of this procedure.

In Slovak administrative justice as regards interlocutory injunctions the only possibility existing is postponing the enforcement of the contested administrative decisions because the court proceedings opened on the basis of the action reviews final decision and opening of the court review of the final decisions does not effect the non-enforceability of the decision (in our case the proposed waste activity). Other interlocutory injunctions are inadmissible in administrative justice.

Upon party's request, the presiding judge may rule postponement of administrative decisions enforcement if the immediate enforcement of the challenged decision could cause serious detriment. The party must always prove his/her statement that there is a threat of a serious detriment, or that this detriment has already occurred and continues. If the presiding judge does not satisfy the request, he/she shall inform the party concerned.

C - Open question

In addition to the two previous questions, has your court issued other decisions on waste law or polluting installations law that should be noted? If yes, please summarise these decisions in a few lines.

Today, they are still rare court decisions also due the fact that Slovakia is a new EU Member State. Therefore, it is not possible to answer this question. As already mentioned above, the Supreme Court of the Slovak Republic has so far issued a ruling that should give an exhaustive answer to the number of variants and their modifications in the process of environmental impact assessment, to the definition of the group of parties, public involvement and the manner in which to inform the public.