

Danish national report on questionnaire for the 20th colloquium of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union

1. Administrative consent procedure

2. Public involvement

The establishment of a new motorway is a government responsibility; cf. the Danish law on Public Roads (lbkg. 671/1999). The decision to establish a new motorway requires two acts being passed by Parliament (Folketinget). Thus there is no administrative consent procedure or judicial process directly applying to the project planning.

The initiative to pass such acts rests with the Minister of Transportation. The Minister/Ministry is assisted by the Road Directorate, which is a subdivision of the Ministry. During its preparatory work the Road Directorate will involve regional administrative districts and the municipalities. On the basis of this preparatory work, the Ministry submits a proposal for a planning law (projekteringslov) to the Parliament. If this act is passed, the Road Directorate initiates an environmental impact assessment (EIA), during which two public hearings are held. On the basis of this, the Ministry may decide to submit a bill to Parliament outlining the general layout of the motorway (anlmslov). In order for a bill to be adopted it undergoes political discussion in Parliament, including three readings.

The passing of the "anlaegslov" means that the formal decision has been taken for the road to be built. If alternative outlays have been discussed, this act will determine which of the outlays will be followed. The detailed, exact outlay has yet to be decided within the framework of this act through an administrative process. This is the competence of the Expropriation Commission, which has the power to decide what property must be expropriated from the landowners in order to build the road.

The Expropriation Commission which is an independent administrative body examines the project and establishes the final detailed layout of the road after a public hearing. When

title to the property needed for the construction of the road has passed to the government, the construction work may begin.

The Expropriation Commission starts its work by conducting a general meeting to which the public is invited by way of a public announcement. The Expropriation Commission conducts meetings with each landowner who is expected to cede land to the government in order for the project to be carried out. Each landowner has the right to argue his case before the Commission. Each landowner also has the right to submit written arguments to the Commission outlining his case. The final decision by the Expropriation Commission is taken when this detailed hearing process has taken place.

The decision of the Expropriation Commission is subject to judicial review. Judicial review of the Commission's decisions must be initiated within 6 months of the Commission's decision.

3. Judicial process

In Denmark there exist no administrative courts. The competence to undertake judicial review is resting with the ordinary courts. The ordinary rules of civil procedure apply to this process.

The basis of the jurisprudence on judicial review is evolved from section 63 of the Danish Constitution. This involves a basic distinction between questions of law which are subject to review and questions of administrative discretion which in principle fall outside the scope of the judicial review. However, in modern Danish administrative law the courts may also decide to undertake a judicial review of acts involving administrative discretion. The intensity of the review depends on several factors. If the question is whether the administration has had the necessary authority to make a decision, this will be tried thoroughly. If it is a question of pure interpretation, where the specific content of a statutory provision must be determined, the administration's general understanding of the rule will be tried completely. If, on the other hand, a statutory provision has been phrased imprecisely, and there is room for a certain amount of supplementation from the administration, the courts will normally be more cautious. Furthermore, the courts are extremely reluctant to involve themselves in questions of a political nature.

Typically the citizen calling for judicial review will ask the court for a declaratory ruling against the Ministry to the effect that the Ministry is not entitled to carry out the project authorised by the "anlxgslov".

So far no judicial review has been successful for the citizens, and thus it is unknown what judgement would be rendered against the Ministry. However, in principle it is possible for the court to render a declaratory judgement against the Ministry as claimed by the citizens. The practical result of such decision depends very much on the timing. If the action is brought at an early stage, it will be unlawful for the Ministry to proceed with the project. In reality we expect that in such a case the Ministry will, at least temporarily, stop the project. If on the other hand litigation is brought at a later stage when the project is finished, the practical consequences of the judgement will depend very much on the situation.

An interlocutory injunction is not an available remedy as such an action cannot be brought against government when the government is exercising public administrative power. However, this remedy *will* be available in order to protect rights based on EU legislation.

4. Standing

Danish law does not acknowledge the *actio popularis*. In order to bring an action before the court a plaintiff must have a material and individual interest in the matter. According to recent jurisprudence an interest group with certain permanent structure and a defined object relevant for the action may have standing to bring such an action. This especially applies if the interest group can be said to defend an essential public and/or common interest. On the base of this, all the listed plaintiffs may very well have a standing before the courts.

5. Scope of claims Both types of claims may be brought before the courts.

6. Scope of judicial review

There exist in Denmark very few court decisions illustrating the questions of the questionnaire. Thus the replies to the questions of the questionnaire are based on an assessment as to how the courts *would* act if such a case was brought before them.

As mentioned under questions 1 and 2, the decision to establish a new motorway in Denmark is a matter for Parliament. Thus the judicial review is restricted to the constitutionality of the act in question and/or whether the act in question is in accordance with Community law. In practice the question of Community law is more important. If a directive is directly applicable the courts will review whether the act is in accordance with the directive. If a directive is not directly applicable the courts will, however, consider the directive in its interpretation of the said act as the court will presume, that the national act is in accordance with Community law.

Administrative decisions involved in the execution of the project, i.e. the decisions of the Expropriation Commission, are subject to full judicial review. Thus the courts may review whether or not the Expropriation Commission has applied relevant criteria in its decision and/or whether the decision is in conformity with the goals of the act and/or general legal principles. However, the courts tend to show reticence in changing the Commission's discretionary decision, unless it is manifestly incorrect.

It should be noted that in their review the courts are restricted by the adversarial System. This means that the court rulings must be within the contentions/claims of the parties and can be based only on the facts/arguments presented by the parties before the courts.

7. EU environmental law

The directives have all been implemented in Denmark. Therefore, while passing an act establishing a new motorway the Parliament will be careful not to allow the project to interfere with special protected areas or to exceed the limit values on air pollution. However, if the Parliament has found it necessary to pass an act allowing a project to interfere with the said areas or limit values, the courts can review if the act is in accordance with the Council Directives presuming that the directives are directly applicable; cf. the answer to question 6.

In the case *Greenpeace Denmark vs. the Ministry of Transportation (552/1996)*, the Supreme Court held that the EIA Directive was not violated by an act authorizing a major bridge construction project. The Supreme Court however, did not directly address whether the directive was directly applicable, as this question that was not brought before the court.

The court's decision in the situations outlined in the questions will be based on a concrete assessment. Therefore, the following answers are made on general reflections and on the presumption, that the directives are directly applicable. If they are not directly applicable the plaintiffs will have no cause of action challenging the acts of Parliament. However, the court will include the directive in its interpretation of the act; cf. the answer to question 6.

- a. If an EIA has not (or not duly) been carried out in connection with the project in question, the court can rule that construction work in accordance with the passed act cannot be carried out.
- b. If the project adversely affects a natural habitat which is eligible for designation as a special area of conservation in the sense of the Habitats Directive, but which has not yet been transmitted to the Commission, the habitat is not yet under special protection, and there is no cause of action before the court.
- c. If the natural habitat has been transmitted to the Commission, but not yet placed on a Commission list, there is no cause of action before the court. If the area has been placed on a Commission list it will be protected by the Directive. In this case it will be unlawful to adopt the project in question.
- d. If the project adversely affects a bird sanctuary in the sense of the Birds Directive, it will be unlawful to adopt the project and the court may rule accordingly.
- e. If it is held that the project is likely to exceed the limit values of the Ambient Air Directive, the court might find the project unlawful given that exceeding the limit values will result in substantial deterioration of the air quality.

8. Consequences of procedural and substantive deficiencies of the planning decision

- a. The answer to the question is no.
- b. The ruling in that case will be a declaratory ruling.
- c. The courts do not impose additional requirements in order to repair minor deficiencies in a bill passed by the Parliament. Furthermore, the courts are disinclined to impose additional requirements in order to repair minor deficiencies in the decisions to carry the act into effect. In the latter case, the courts more likely will remit the project to the competent authorities, as they have the expertise and special knowledge that is required. By remitting the project it is also assured, that the procedure of public hearing and of public involvement is carried through with regards to the modifications.

d. If the plaintiffs have standing cf. the answer to question 4, they can all obtain a declaratory ruling that the Ministry is not entitled to carry out the project. If the plaintiffs are particularly affected by the project and can prove a consequent economic loss, they can obtain damages. The interest groups cannot obtain damages, as they cannot prove economic loss.

9. Remedy of deficiencies

During the judicial process before the court the Ministry or the Expropriation Commission, as the case may be, may decide at its own initiative to remedy procedural deficiencies, if any. This remedial process does not involve the court and will in principle be carried out independently of the litigation pending before the court. However, if deficiencies are remedied, the court will decide in favour of the Ministry or the Expropriation Commission.