Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union européenne a.i.s.b.l.

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.

Le juge administratif
et
le droit communautaire
de l'environnement

National administrative courts
And
Community
Environmental law

Estonie-Estonia

Réponse au questionnaire
Answer to The questionnaire

SEMINAR FOR COUNCILS OF STATE AND SUPREME ADMINISTRATIVE JURISDICTIONS

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QUESTIONNAIRE

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?

No disputes concerning the application of the referred directives have reached the Supreme Court so far. Nevertheless, the Administrative Law Chamber of the Supreme Court has adjudicated problems which have emerged upon the application of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). The majority of these disputes have been related to the right of access to justice, proceeding from Article 9.

In its judgment of 7 May 2003 in administrative matter no 3-3-1-31-03 the Administrative Law Chamber of the Supreme Court gave an explanation about what an appropriate procedure for informing the public, referred to in Article 6(9) of the Aarhus Convention should be like. The Chamber argued that an administrative authority must inform the public of its important decisions, including especially the environmental decisions, on its own initiative and in a manner more intense than prescribed by law, if it can be foreseen that the channels prescribed by the law may not be sufficient to bring the information to the concerned public, and if the additional notification does not require unreasonable expenses. Otherwise the effective realisation of the right to appeal would not be guaranteed.

In its judgment of 28 February 2007 in administrative matter no 3-3-1-86-06 the Administrative Law Chamber examined whether a local government body was entitled to have recourse to a court under Article 9(2) of the Aarhus Convention. The local government body which had filed an application with an administrative court was of the opinion that it could be regarded as a representative of the public concerned for the purposes of the Convention. The Chamber did not agree and found that a local government body is a public authority for the purposes of Article 2(2) of the Convention even in a situation where the competence to decide on a disputed issue is vested with an administrative authority at national level (a ministry).

In the judgment of 28 November 2006 in administrative matter no 3-3-1-43-06 the Administrative Law Chamber analysed the possibilities of an informal association of persons (civil law partnership) to have recourse to the courts under Article 9 of the Aarhus Convention. Under Estonian legislation a civil law partnership is not a legal person; this is a group of persons who have entered into a contract of partnership to achieve a common objective. Before the adjudication of the referred matter there was no experience of the civil law partnerships' participation in judicial proceedings in the legal practice. The Administrative Chamber held that for the guarantee of effective environmental protection a civil law partnership, in a capacity of a representative of the concerned public, may have the right of recourse to the courts under the Convention. The Chamber specified, though, that an informal association may be regarded as a representative of the concerned public having the right of recourse to administrative courts only if the positions or opinions of the association and the substantial part of the inhabitants who qualify as the public concerned overlap and if the public in one form or another accepts such a representative and its activities. An informal association filing an appeal with a court must demonstrate that it meets the referred conditions. The court may presume that there is the required public acceptance if the association has previously enjoyed public acceptance of its activities in the specific sphere.

In the judgment of 17 November 2005 in administrative matter no 3-3-1-54-05 the Chamber analysed whether a decision on the distribution of state budget funds taken by legal person acting under state supervision could be regarded as a relevant document under Article 7 and whether it could be contested in a court under Article 9 of the Convention. The Chamber held that as the national law does not permit to contest such decisions in court, the general right of appeal can not be induced from the referred provisions of the Convention, either.

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 has 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?

Pursuant to the Administrative Procedure Act repeal of an administrative act cannot be demanded solely for the reason that procedural requirements are violated upon issue of the administrative act, if this violation could not affect the resolution of the matter. As a rule, the fact whether the violation of procedural requirements affected or did not affect the resolution of the matter can be decided after the decision on the resolution is taken. That is why, as a general rule, the acts performed in the course of issuing an administrative act can be contested after the adoption of a final administrative act. Pursuant to the Supreme Court practice a procedural act can be contested, by way of exception, earlier on, that is if the error of procedure is of such a substantial nature that the material impact thereof on the final resolution is presumable already during the proceeding of the matter (judgment of the Administrative Law Chamber of the Supreme Court of 18 February 2002 in administrative matter no 3-3-1-8-02).

In its judgment of 28 February 2007 in administrative matter no 3-3-1-86-06 the Supreme Court specified the permissibility of contesting procedural acts in environmental matters. The Chamber held that for the appropriate resolution of matters of significant environmental impact the conducted administrative procedure in itself is of decisive importance. Due to the fact that administrative authorities have wide discretion upon deciding environmental matters the lawfulness and consideration of different interests can be guaranteed only by lawful, efficient and fair proceeding prior to the adoption of relevant administrative act. In most environmental matters it can not be decided conclusively that irrespective of the drawbacks in the conduct of administrative proceedings the administrative acts issued as a result are essentially lawful. That is why a person with the right to appeal must have wider legal possibilities to contest the acts performed within such proceedings, separately from the final administrative acts.

On the basis of the foregoing the Supreme Court has emphasised the special importance of performing procedural acts in a correct manner when deciding on environmental matters. Thus, the failure to inform the public or the restriction of the public’s possibility to participate would most probably result in the invalidation of the final decision by a court. If a procedural act or a failure to perform a procedural act prior to adoption of an administrative act is contested, the courts can declare a procedural act unlawful or require that a procedural act be performed.

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?

In the most general terms the duty of every person to preserve the human and natural environment and to compensate for damage caused to the environment by him or her arises from § 53 of the Constitution. It has to be pointed out, by way of introduction, that an Act which will regulate the issues of environmental liability in a systemic and integrated manner (the Environmental Liability Act) was passed only on 14 November 2007. As a rule, after the President of the Republic has promulgated an Act, it will enter into force, pursuant to general procedure, on the tenth day after publication in the Riigi Teataja [the State Gazette]. Pursuant to a special provision concerning the entering into force of the Environmental Liability Act, as far as the Act concerns the International Convention on Civil Liability for Bunker Oil Pollution Damage, it will enter into force on the date of international entry into force of the referred Convention. The purpose of this Act is to regulate, in a complex manner, the prevention of and compensation for the environmental damage, allowing at the same time for more effective implementation of the polluter pays principle. The Environmental Liability Act (like the environmental liability directive) mainly deals with the compensation for the damage caused to environment, and is thus mainly aimed at the protection of public interests. At present the provisions regulating environmental liability are included in different legal acts (the Waste Act, the Water Act, the Nature Conversation Act, the Earth's Crust Act, the Fishing Act, the Hunting Act, the Forest Act).

Due to the lack of special regulation in legal norms regulating environmental issues, the claims against the polluters who have caused damage are adjudicated on the basis of the tort provisions of the Law of Obligations Act.

In the context of this questionnaire the regulation of the Integrated Pollution Prevention and Control Act, presently in force in Estonia, by which the Council Directive 96/61/EC concerning integrated pollution prevention and control was transposed to Estonian legal order, is of special importance. § 35 of this Act establishes that if pollution has been emitted by an installation for the use of which a permit has been granted or for the operation of which a permit is required pursuant to this Act or legislation established on the basis thereof, the operator shall, within the limits of its technical or economic possibilities, immediately liquidate the pollution (regardless of whether or not pollution was intentional or was caused by negligence). If an operator fails to perform its duty to liquidate pollution, the Environmental Inspectorate (state body exercising environmental supervision) shall organise the liquidation pursuant to the procedure provided for in the Substitutive Enforcement and Penalty Payment Act.

The control and monitoring authority of public powers for termination or prevention of possible pollution after an operator has terminated its activities is guaranteed by § 26(2) of the Integrated Pollution Prevention and Control Act, which establishes that if a permit has been revoked, the issuer of permits may impose conditions for the aftercare of the installation or its site to the operator in order to prevent any hazards to the environment, human health or property after the termination of the operator's operation.

As for the liability of the public authority which has exercised insufficient control or supervision, the valid regulation of the Code of Administrative Court Procedure provides for the following possibilities to contest the acts, activities or failure to act of public authorities. Pursuant to § 6(2) and (3) it is possible, in an administrative court, to apply for

1) annulment of an administrative act or a part thereof;
2) execution of a suspended administrative act, for issue of an unissued administrative act, or for a suspended or untaken measure to be taken;
3) establishment of the unlawfulness of an administrative act or measure;
4) compensation for damage caused in public law relationships;
5) the establishment of the existence or absence of a public law relationship.

Upon filing an action the requirements established by the Code of Administrative Court Procedure must be fulfilled, including that the person must have the right of appeal, established by law.

Pursuant to the State Liability Act a person whose rights are violated by the unlawful activities of a public authority in a public law relationship may claim compensation for damage caused to the person if damage could not be prevented and cannot be eliminated by the protection or restoration of rights in the manner provided for in this Act. Compensation for damage caused by a failure to act may be claimed only if an administrative act is not issued in due course or a measure is not taken in due course and the rights of a person are violated thereby.

Persons entitled to file a protest (an authority or an official entitled by law) may file a protest with an administrative court to apply for annulment of an administrative act or a portion thereof, for execution of a suspended administrative act, for issue of an unissued administrative act, or for a suspended or untaken measure to be taken.

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)?

Under § 26(1) of the Code of Administrative Court Procedure an administrative court, upon adjudication of the merits of an action or protest, has the right:

1) to annul an unlawful administrative act wholly or partially and, if possible, issue a precept for the reversal of the administrative act, indicating the method of reversal;
2) to issue a precept for execution of an unlawfully suspended administrative act, for the issue of an unissued administrative act or for an untaken measure to be taken;
3) to declare an administrative act or measure unlawful if the legitimate interest of the person who filed the action or protest in such finding is expressed in the action or protest;
4) to order the payment of compensation for damage caused in public law relationships;
5) to establish the existence or absence of a relationship in public law;
6) to dismiss the action or protest.

This authority of the courts also extends to the disputes concerning the issues under discussion in this questionnaire.

Pursuant to § 12'(2) of the Code of Administrative Court Procedure an administrative court may issue a ruling on the provisional protection of the rights of a person filing an action in all stages of proceedings at the reasoned request of the person filing the action or on its own initiative, if otherwise execution of a court judgment is impracticable or impossible. By a ruling on provisional legal protection, an administrative court may (§ 12'(3)):

1) suspend the validity or execution of a contested administrative act;
2) prohibit the issue of a contested administrative act or taking of a contested measure;

3) require an administrative authority to issue an administrative act being applied for or take a measure being applied for or terminate a continuing measure;
4) apply the measures for securing an action prescribed in the Code of Civil Procedure;
5) order the seizure of assets, including making a notation concerning a prohibition on disposal of property in property register, or make a notation about litigation.

Evidence in administrative court proceedings is all evidence which is admissible in civil proceedings. Pursuant to § 229(2) of the Code of Civil Procedure evidence may be, among other things, an expert opinion or an inspection. The latter may consist in the inspection of an area or the scene of an event (§ 290 of the Code of Civil Procedure).

Pursuant to § 14(3)3) and (4) of the Code of Administrative Court Procedure an administrative court may involve a representative of a state or local government agency – i.e. a representative of an agency that is not a party to the litigation – to provide an opinion with regard to a matter.

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.

In regard to waste the Supreme Court has adjudicated a dispute arising from the choice of location for a regional landfill (judgment of the Administrative Law Chamber of 9 March 2005 in administrative matter no 3-3-1-88-04).

The construction of the landfill is provided for in the National Waste Management Plan, approved by the Riigikogu [Estonian parliament]. The need to construct regional landfills arises from the obligation to bring the waste management into conformity with the requirements of Article 14(c) of the Council Directive 1999/31/EC on the landfill of waste (the landfill directive). The Supreme Court held that the construction of a regional landfill is an activity with significant environmental impact, and is related to important public and national interests. One phase of a landfill construction is the choice of its location. A landfill must be constructed in a location where its environmental risks and negative environmental impacts are as small as possible. This requires that reasonable alternatives be identified and weighed before the detailed plan is drawn up.

The Supreme Court is of the opinion that the suitable location should be identified pursuant to a determined legal procedure, which did not exist during the taking of the decision under discussion. Because of the lack of procedure for conducting public proceeding of choice of location of landfills, and due to the deficiencies in the conducted proceedings, the complainants had no legal possibilities to contest in a court, prior to adoption of detailed plan, the lawfulness of the choice of the location of the landfill.

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