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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

Lithuanie-Lithuania

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 think 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:

In the case law of the Supreme Administrative Court of Lithuania there were no disputes about the respective application scope of mentioned texts and the Community directives.

Moreover, the Supreme Administrative Court of Lithuania has not dealt with the clarification of the concepts contained in mentioned texts considering the case law of the Court of Justice of the European Communities yet.

There is no case law of the Supreme Administrative Court of Lithuania where according to the Law on Environmental Impact Assessment of Planned Activities (this Law implements the Directive 85/337) the concrete matter was raised over « the public concerned » participating in the procedures of environmental impact assessment.

The Supreme Administrative Court of Lithuania has decided on the matters concerning a right of Non-Governmental Organizations (hereafter – an NGO) as

provided for under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereafter – the Aarhus Convention) to apply to administrative courts defending the public interest.

For instance, in the ruling of the 23rd of January 2004 the judges' panel of the Supreme Administrative Court of Lithuania stated that an NGO has a right to apply to administrative court defending the public interest only in the cases directly indicated by the law. In this administrative case the provisions were analyzed by Aarhus Convention. The judges' panel of the Supreme Administrative Court of Lithuania determined the extent of a right of the NGOs, which meet the criteria laid down in the national law and promote environmental protection, to apply to administrative court. The Supreme Administrative Court of Lithuania stated that the NGO « Žvėrynas Community » is acknowledged as an organization promoting environmental protection under the Aarhus Convention. The Supreme Administrative Court of Lithuania analysed the statute of this NGO and assessed its activities as a factual movement defending the environmental interests. The judges' panel of the Supreme Administrative Court of Lithuania equally stated that this type of activity does not contravene the statute of the NGO (the ruling by the Supreme Administrative Court of Lithuania of the 23rd of January 2004 in the administrative case No. A^3-11/2004).

In the ruling by the Supreme Administrative Court of Lithuania of the 26th June 2004 an issue concerning a right of an association to apply to court defending the public interest was discussed. However, in this administrative case the judges' panel did not analyse the criteria according to which an association could be acknowledged as an NGO, which promotes environmental protection and has a right to apply to administrative courts defending the public interest. The Supreme Administrative Court of Lithuania decided that the association did not prove that infringement of requirements for environmental protection has occurred. It was stated that the NGO challenged the administrative act over the territorial planning documents and the solutions of these documents of territorial planning, which,

according to the NGO, were contradicting the laws of higher legal power and violating the procedures of territorial planning. But the NGO did not name the concrete requirements for components of the public interest infringed in this way. This act was not challenged because of the infringement of environmental protection requirements. That means that in this case the NGO did not have a right to defend the public interest (the ruling by the Supreme Administrative Court of Lithuania of the 26th June 2004 in the administrative case No. A^{7}-720/2004).

Vilnius Regional Administrative Court, as a court of first instance, has issued the ruling over a right of a concerned NGO to apply to court in the sphere of environmental protection, which was left unaltered by the Supreme Administrative Court of Lithuania. Vilnius Regional Administrative Court with the reference to the Aarhus Convention concluded that natural persons and NGOs, which meet the criteria laid down in the national law and promote environmental protection, have a right to defend the public interest applying to administrative court in the scope related to the air, atmosphere, water, soil, land, landscape, natural objects and biological multiplicity. Making a reference to the fact that « Kazokiškės Community » challenged the administrative act directly related to above mentioned natural elements, Vilnius Regional Administrative Court acknowledged a right to defend the public interest in the scope of environmental protection for the « Kazokiškės Community » (the ruling by the Supreme Administrative Court of Lithuania of the 5th of September 2006 in the administrative case No. A^{15}-1253/2006).

The extent of a right of an NGO to apply to court and the application of the Aarhus Convention was adjudicated once again in another administrative case examined by the Supreme Administrative Court of Lithuania. In the ruling of the 24th of October 2006 the judges' panel of the Supreme Administrative Court of Lithuania stated that under the Aarhus Convention NGOs, which meet the criteria laid down in the national law and promote environmental protection, have a right to

apply to administrative court defending the public interest in the sphere of environmental protection only when it is likely to have a huge impact on environment. The Annex I of the Aarhus Convention gives a list of activity types, which could have a huge impact on environment. According to the Supreme Administrative Court of Lithuania, only over these activities the NGO has a right to apply to court defending the public interest in the scope of environmental protection. This list does not include a building of dwelling-houses activity. Considering this fact a right for NGOs to apply to court defending the public interest was not acknowledged (the ruling by the Supreme Administrative Court of Lithuania of the 24th of October 2006 in the administrative case No. A^{10}-1253/2006).

It is worth mentioning that even after modification and replenishment of the term « the public concerned » it remains unclear what kind of organizations could be acknowledged as « having an interest in », especially when the Member State has not established any requirements for acknowledgement of an NGO as « having an interest in ». The criteria, which could help to identify an NGO as an organization « promoting environmental protection », remain unclear too. How can the society be assessed as « likely to be affected »?

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:

Meanwhile there is no case law of the Supreme Administrative Court of Lithuania concerning in the concrete the issues on breach of the procedures of public announcement according to the Law on Environmental Impact Assessment of Planned Activities. However, considering case law of the Supreme Administrative Court of Lithuania, usually the substantial breach of the procedures of public administration is demanded when estimating the legal regulation of the procedures of public administration. For example, in one administrative case the question about the detailed planning documents of park of wind power-stations confirmation originated with the Supreme Administrative Court of Lithuania, which stated that it is necessary to identify whether infringements made are substantial and could they be treated as a basis to acknowledge the decision as illegal (the ruling by the Supreme Administrative Court of Lithuania of the 20th of June 2003 in the administrative case No. A^4-506/2003).

It should be noted that according to the Law on Environmental Impact Assessment of Planned Activities the NGO « Kazokiškės Community » applied to the Supreme Administrative Court of Lithuania over the breach on the procedures of public announcement, but the administrative case was not decided because of the missed terms to apply to the court. NGO « Kazokiškės Community » requested to quash the decision of 12th of June 2002 of the Ministry of Environment of the Republic of Lithuania «Over the opportunities to set Vilnius district communal waste dump with a view to the environmental impact aspects » At the same time the mentioned NGO presented a petition to renew the terms to apply to court. It emphasized that the Law on Environmental Impact Assessment of Planned Activities (Article 10 Paragraph 1) provides for that the responsible institution (in

this case the Ministry of Environment of the Republic of Lithuania) and contractor following the determinate order have to inform the public about the reasoned decision of the Ministry of Environment of the Republic of Lithuania and enable the public to become acquainted with it. The Supreme Administrative Court of Lithuania stated that under the Order on the Public Announcement and Participation in the Process of Environmental Impact Assessment of Planned Activities (to be precise, Chapter IV) affirmed on 10th of July 2000 by the Minister of Environment with the order No. 277, which elaborates the requirements of the Law on Environmental Impact Assessment of Planned Activities, the public is considered to be informed over the adopted decision since the information is promulgated in the indicated mass communications, not since the report about the adopted decision is delivered. The NGO has applied to the court after 2 years from the respective decision promulgation in the Lithuanian Official Journal « Valstybės žinios » annex « Informaciniai pranešimai ». In respect of that the Supreme Administrative Court of Lithuania concluded that the NGO missed the terms to apply to court (the ruling by the Supreme Administrative Court of Lithuania of 18th of November 2004 in the administrative case No. AS^{5}-508/2004).

There is no case law of the Supreme Administrative Court of Lithuania over the making the entire or part of such procedure compliant.

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.

Answer:

For example, the NGO « Kazokiškės Community » appealed to the Supreme Administrative Court of Lithuania challenging the legality of the integrated pollution

prevention and control licence allowing the exploitation of the Kazokiškės dump issued by the Vilnius Region Environmental Protection Department of 5th of September 2006. The appellant based its petition on two main arguments: firstly, the requirements for ensuring the procedures of appropriate public announcement and public participation in a procedure of a licence issuance were breached; secondly, the content of the issued licence does not correspond with the requirements of legal acts. Vilnius Regional Administrative Court, as a court of first instance, annulled the licence on the first ground. However, Vilnius Regional Administrative Court in the administrative proceeding did not examine the second ground. The judges' panel of the Supreme Administrative Court of Lithuania stated that the Paragraph 11.11 of the Rules on Integrated Pollution Prevention and Issuance, Renewal and Cancellation of the Control Licences, affirmed by the Minister of Environment with the order No. 80 (valid since 1st of January 2004) on 27th of February 2002, provides for the principal requirement for issuance of such kind of licences : it is necessary to ensure the public announcement and the public « having an interest in » participation in the procedure of such licence issuance and renewal.

The Paragraph 70 of the Rules obliges the regional environmental protection division to inform the public about the application to issue or renew the licence within the time limit of 10 days in all possible types of mass media. The regional environmental protection division must publicize this kind of information over the target issuance or renewal of licence : the object (installation) of economic activity, its occurrence, the kind of economic activity, the economic operator, where and when it is possible to become acquainted with the information provided for under the Paragraphs 16, 17, 20 and 22 of the Rules, the entitlement of the institution, which participates in the decision-making over licence issuance or renewal procedure, to whom and by when reasoned propositions over the licence issuance or renewal should be laid. According to the Paragraph 71 of the Rules the public « having an interest in » has a right to lay reasoned propositions and remarks within

the time limit of 14 days since the day of the announcement made as provided for under the Paragraph 70 of the Rules.

In this administrative case the respondent announced about the application to issue or renew a licence at the time of lack of some required data for licence issuance.

The judges' panel of the Supreme Administrative Court of Lithuania stated that in this case the public « having an interest in » within the time limit of 14 days since the announcement in the mass media was made had not the substantive opportunity to become acquainted with the relevant information, because of the fact that the respondent did not receive all the information provided for under the Paragraphs 16, 17, 20 and 22 of the Rules. This *ipso facto* means that the respondent in the procedure of challenged licence issuance did not fulfil the requirement for guaranteeing the appropriate public announcement and participation in decision-making procedure (the ruling by the Supreme Administrative Court of Lithuania of the 1st of October 2007 in the administrative case No. A^{14}-947/2007).

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?

Answer:

According to the principle « polluter pays » the expenditure on waste management should be paid by a holder of waste and (or) a producer or importer of material and products, *inter alia* – packaging, using which causes the waste formation (the Article 32 of the Law on Waste Management). The main legal acts in this sphere are the Law on Waste Management and the Rules on Integrated Pollution Prevention and Control Licences Issuance, Renewal and Cancellation. Other legal acts relevant to waste management are the Law on Environmental Protection, the Law on Water, the Law on Environmental Air Protection and the Law on the Tax for Pollution of Environment.

A company, which uses or disposes the waste, has a duty to discontinue such activity in the way that the negative impact on environment and human health both during the discontinuing the activity and after the discontinuation of it would not

originate. If such company departs from this duty, according to the Law on Waste Management (Articles 11 and 35), it faces the liability directly indicated by the law. The Ministry of Environment is responsible for the environmental impact assessment and the lodgement of claims for compensation of damages.

The Law on Environmental Protection provides that natural resources users and individuals carrying economic activities (hereafter – economic operators) have a duty to take urgent measures to avoid the damage for environment, human health and lives, possessions and interests of other persons. When the damage is made, a liable person has a duty to restore the previous condition of environment, if it is possible – to absolute *status quo*, and to compensate the loss (Article 32).

In cases of a natural or legal person's carried activities, which cause the mass exhaustion of flora and fauna through polluting water, environmental air, earth or other environmental components, or when a natural or legal person pollutes water, environmental air and this directly endangers human health or lives, an officer of the State Control of Environmental Protection Department has a duty to stop immediately the activity harmful for environment (there is no time term for preparation to stop the activity harmful for environment) (the Article 27 of the Law on State Control of Environmental Protection).

The Law on Environmental Protection determines not only a duty to compensate the loss and restore the condition of an environmental object – in cases of substantial imminence for environmental harm it additionally obliges natural resources users and economic operators to take all the preventive measures, i. e. threat remissive, threat avoidable or eliminating the threat at all. Also this Law provides for the obligation of the state or municipality institutions to compensate the expenditure of preventive and (or) environment restoring measures execution, when it is not possible to identify the person, who harmed the environment (the Article $32^{(2)}$ of the Law on Environmental Protection).

If an economic operator does not execute the indispensable preventive and (or) environment restoring measures, according to their competence municipality and/or state authorized institutions themselves or in assistance with the third interested persons execute this kind of measures. In such situation an economic operator, who is responsible for environmental harm or threat of it, must compensate all the expenditure for execution of preventive and/or environment restoring measures. An economic operator is not obliged in this way only in cases when the environmental harm or threat of it occurred because of the *force majeure* and in cases when he or she proves that the environmental harm or threat of it occurred because of the action or inaction of the third person despite the execution of all security measures.

According to the Law on Environmental Protection, all persons, who infringed the requirements for environmental protection, are liable under the laws of the Republic of Lithuania. Civil liability irrespective of guilt is applied to economic operators for any environmental harm or threat, occurred because of the economic activity they carry, excluding the cases when environmental harm is assessed insignificant, i. e. the environmental harm is small and the expenditure of its exaction is bigger than the sum to be exacted (Article 33). Under the Law on Environmental Protection the claim concerning compensation of environmental harm and other loss, including the execution of preventive and (or) environment restoring measures, may be lodged in a time term of 5 years.

Persons, whose health, possessions or interests are harmed, have a right to claim the compensation for damages (the Article 33 of the Law on Environmental Protection).

The Paragraph 86 of the Rules on Integrated Pollution Prevention and Control Licences Issuance, Renewal and Cancellation provides an operator’s obligation to

compensate the loss in cases regarding the breach of these Rules when environment, persons or possessions are harmed when it is directly indicated by the law.

In Lithuania legal acts in the sphere of environmental protection do not separately regulate the liability for « historical pollution » (when the activity, which caused the pollution, is discontinued or the legal person carrying such activity was liquidated). Legal acts only state that in cases when it is impossible to identify a holder of waste or who does not even exist, the waste management is arranged by the municipal institution (the Article 25 of the Law on Waste Management).

The Law on State Control of Environmental Protection sets that in cases when the harmful environment activity is carried by a legal person, who holds a licence for using the natural resources, this activity may be suspended by abolishing such licence (Article 30). If the officers of the State Control of Environmental Protection Department do not undertake appropriate actions warranting the following of requirements set by laws regulating environmental protection and other legal acts or act *ultra vires*, they gain the legal liability directly indicated by the law (the Article 55 of the Law on State Control of Environmental Protection). The Paragraph 3 of the Regulations on State Control of Environmental Protection also provides for an opportunity to appeal against the inaction of State Control of Environmental Protection Department. So far there is no case law of the Supreme Administrative Court of Lithuania on this issue though.

The administrative liability over the carriage of economic or other activity, exploitation of objects without a natural resources using licence when it is directly indicated by the law or other legal acts or breaching the requirements and normatives of environmental protection is provided by the Code of Administrative Offences (Article 51^2 Paragraph 2). Mentioned legal norm is directing to other legal acts such as the Law on Environmental Protection or the Rules on Integrated Pollution Prevention and Control Licences Issuance, Renewal and Cancellation.

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)?

Answer:

In the regulation of disputes concerning waste management legal acts do not provide for any special powers to courts, there is no case law over this issue either. Therefore while solving such kind of disputes and holding a judgement, a court should apply common principles of administrative procedure and the provisions of the Law on Administrative Proceedings. Verifying legal acts over waste management issued by the subjects of the public administration a court has to take into consideration the fact that this segment of the social relations is peculiar and requires knowledge of specific technical and economical information. A court examining such kind of social conflicts not always has the disposition of that sort of information. For this reason a court exercising judicial control over the complicated technical and economical assessments made by the subject of the public administration within the margin of its discretionary powers should not decide by itself. It should simply verify the possibility of the overstepping the margin of such

institution discretionary powers. For instance, whether the respondent has followed the provisions of the Rules on Integrated Pollution Prevention and Control Licences Issuance, Renewal and Cancellation, whether the facts on which the decision was grounded are materially certain, whether the institution did not misuse the competence or has followed the inadmissible motivation, whether the institution invoked the criteria of legal significance and did not the contrariwise, whether the act issued by the institution or the action or inactivity of the institution did not contradict the aims and goals of the establishment and the competence of the respondent, whether the institution did not make an obvious error of assessment.

Thus considering the technical particularity of a solving dispute a court should not replace the administrative institution or decide instead of it, but taking a decision in the administrative proceeding must evaluate, whether the administrative jurisdiction did not overstep the margin of its discretionary powers, and/or direct the institution to take into consideration the guidelines of a court when remaking the decision anew. For example, the Paragraph 87 of the Rules on Integrated Pollution Prevention and Control Licences Issuance, Renewal and Cancellation provides that in the cases directly indicated by the law a right of an operator or « the public concerned » to apply to court over the State Control of Environmental Protection Department actions or inactivity respecting the issuance, renewal, correction or cancellation of an integrated pollution prevention and control licence. In case law of the Supreme Administrative Court of Lithuania there was an administrative case over the partial cancellation of an integrated pollution prevention and control licence, in which the judges' panel stated that the partial cancellation of such licence is approached as a duty for Vilnius District Environmental Protection Department appropriately and following the legal requirements to repeat an administrative procedure and take a lawful administrative decision (the ruling by the Supreme Administrative Court of Lithuania of the 5th of September 2006 in the administrative case No. A^{15}-1253/2006).

When it is necessary to solve the matters requiring special, scientific, technical knowledge, a court may appoint an expert or invite a specialist (the

Articles 61 and 62 of the Law on Administrative Proceedings). Hence a court ruling on legal disputes concerning the sphere of waste management, as evidence may invoke an expert's conclusion and/or a specialist's explanations. Lithuanian administrative procedure law does not provide for any law provisions over the specific procedural averment dedicated namely to such kind of cases.

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.

Answer :

For instance, on the 4th of September 2004 the closed joint stock company (hereafter – CJSC) « Agrochema » purchased a repository, whereat pesticidal waste were buried. In the time-period from November 2004 to December 2005 CJSC « Agrochema » cleaned up the waste and performed the environmental restoration activity. According to the Article 4 Paragraph 1 of the Law on Waste Management, an obligation to manage waste is directly related to the person, who is a waste holder. The Article 2 Point 11 of this Law provides for the term « waste holder » : it is a waste producer or a person, who has waste. The judges' panel of the Supreme Administrative Court of Lithuania cited the Dictionary of Contemporary Lithuanian Language, in which the term « holder » is defined as « possessor, tenurer ». The judges' panel stated that tenure and possession of an object are the institutes of civil law, therefore solving whether a person is a waste holder, it is necessary to follow the common rules of civil rights origin too. It also concluded that the written evidences gathered in this administrative case approve that the pesticidal waste were transported into the repository and hidden there illegally before the petitioner purchased the building. The conditions of the Agreement on Purchase and Sales of the 3rd of September 2004 do not express the petitioner's volition in any way to

purchase the repository with the pesticidal waste hidden in it. Similarly the Supreme Administrative Court of Lithuania did not identify any other factors, which with reference to the provisions of civil law could be assessed as the ground for the petitioner's right of tenure or possession towards the pesticidal waste originating. The pesticidal waste hidden in the purchased building could not be considered as a appurtenance of the building because they do not have any constant functional connection to the leading object.

In respect of indicated factors, the judges' panel of the Supreme Administrative Court of Lithuania approved the implication of Vilnius Regional Administrative Court that the petitioner, buying a building of the repository, did not become a pesticidal waste hidden in it holder, therefore an obligation to clean them up on its account did not emerge. Herewith the previous implication is obvious that the Šiauliai Region Environmental Protection Department officers' given obligatory instructions to the petitioner to clean the pesticidal waste up on its account are unlawful.

The judges' panel of the Supreme Administrative Court of Lithuania also stated that the contract of delegation arranged between the petitioner and the Ministry of Environment on 2nd of May 2005 can not be qualified as an obligation to clean the pesticidal waste up on its account, because of the fact that this contract was arranged over the concrete tasks of pesticidal waste management as a result of the execution the unlawful environmental protection department officers' obligatory instructions. The content of the contract on delegation do not provide for any conditions whereof would be possible to decide that the petitioner acknowledged itself as a pesticidal waste holder and hereby shouldered the obligation on its account to manage this pesticidal waste (the ruling by the Supreme Administrative Court of Lithuania of the 12th of October 2007 in the administrative case No. A^{14}-854-2007).