

Estonia

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union

Colloquium 2006

Answers to the Questionnaire

1) Administrative consent procedure:

In Estonia the administrative consent procedure is normally as a part of administrative procedure regulated in the Administrative Procedure Act, passed on 6 June 2001, in force since 1 January 2002. However, the implementing provisions of the Administrative Procedure Act foresee that this Act applies to administrative procedure regulated by a specific Act if so prescribed by the specific Act. Thus the specific acts can also regulate certain administrative procedures and in these cases the Administrative Procedure Act only applies if so prescribed by the specific law.

The conditions for the administrative consent procedure applying to project planning can be found in the Planning Act passed on 13 November 2002, entered into force 1 January 2003.

Thus in the **cases of planning procedure the Planning Act and subsidiarily the Administrative Procedure Act must be considered**, furthermore the relevant **norms of the European Union and the Estonian laws implementing them, such as Environmental Impact Assessment and Environmental Management System Act**, passed 22 February 2005, entered into force 3 April 2005, must be taken into account.

According to the Planning Act a plan prepared in the process of planning is a document, which consists of a text and maps. The types of plan are as follows:

1. National spatial plan: defines the prospective development of the territory of the state and the settlement systems located therein in a generalised and strategic manner;
2. County plan: defines the prospective development of the territory of a county in a generalised manner and determines the conditions for the development of settlement systems and the location of the principal infrastructure facilities;
3. Comprehensive plan: determines the general directions in and conditions for the development of the territory of a rural municipality or city, and sets out the bases for the preparation of detailed plans for areas where detailed planning is mandatory and for the establishment of land use provisions and building provisions for areas where detailed planning is not mandatory;
4. Detailed plan: establishes land use provisions and building provisions for cities and towns and for other areas and in other cases where detailed planning is mandatory.

In the case presented for Colloquium 2006 - the project of a planning a new motorway if it runs through territories of several municipalities can fall within the county plan, comprehensive plan and/or detailed plan which all can according to the Planning Act have as an objective to determine and define the location of roads, railway lines, waterways, utility network routes, airports, ports, sites for the final disposal of waste and other technical infrastructure. In all this cases an environmental impact assessment is necessary.

The plan is prepared and adopted during the following procedural steps:

1. **Initiation** (anyone may make a proposal for initiation of the preparation of a plan: the government, a county governor, a local government) **and administration of preparation of plan;**

2. Notification of intention to plan (at least once a year in the relevant newspaper);
3. Notification of already initiated plans (within one month after the decision to initiate planning is made, notification is made in the relevant newspaper);

4. Preparation of plans and public involvement:

- Preparation by specialists with higher education in an appropriate field (involvement of technical experts);
- The ministry, county governor or local government administering preparation of a plan is required to ensure the preservation of information and materials collected in the course of preparation of the plan and that interested persons have access to such information and materials;
- There is also a possibility to use temporary building ban during preparation of plan;
- Involvement of public in the preparation of the plan (see answer to the question number 2)

5. Approval of plans by other relevant authorities. The authorities are as follows:

- The county governors of counties neighbouring on the planning area and from the local governments of the planning area;
- The county environmental services; the relevant state authority or manager of a protected area if the planning area includes an area or object placed under state protection or if the plan serves as a proposal to place that object under protection.

A plan is deemed to have been approved regardless of any proposals or objections submitted concerning the plan unless, upon seeking approval, reference is made to contradiction with a law, legislation established on the basis of a law or an adopted plan.

If the agency authorised to approve a plan has not approved the plan within one month as of the date on which the plan is sent thereto, the compiler of the plan shall assume that the agency has no proposals or objections concerning the plan.

6. Acceptance and public display of plans (the plan will be accepted by local authorities by a decision, for public display see in detail answer to question number 2);

7. Procedure for presentation of proposals and objections (see answer to question number 2);

8. Supervision of preparation of plan by the relevant authorities (the Ministry of Internal Affairs, county governor);

9. Final adoption of plans by the competent authorities (by county or local government, in case of a county plan after approval by the Minister of Regional Affairs);

10. Notification of adoption of plans (notice in the relevant newspaper; for the persons involved by way of registered letter within one week as of the adoption of the plan, notice shall be given also to the persons whose written proposals and objections made in the course of the public display of the plan were not taken into consideration, to the owners of immovable whose current land use or building rights are restricted on the basis of the adopted plan and to the owners of immovable concerning whose registered immovable a temporary building ban has been established in the course of preparing the plan).

2) Public involvement:

a) Yes, there is public involvement and hearing of affected parties during the consent procedure in form of public display of the plan and public discussion. All materials related to the plan are available for the public. The Administrative Law Chamber of the Supreme Court has in its decisions stressed the importance of publicity of the planning procedure (see for example the judgment of 18 February 2002 in the case number 3-3-1-8-02);

b) There is one possibility to involve public during the preparation of a plan. Owners of immovable located in and residents of the planning area and other interested persons shall be involved in the preparation of comprehensive and detailed plans. The local government shall

organise public discussions to present the initial planning outline, the draft plans and the potential impact of the implementation of a comprehensive plan. The need to organise public discussions to publicise the initial detailed planning outline and the draft plans are to be determined by the local government. At least one public discussion shall be organised if the detailed plan is prepared for example for an area under heritage conservation or nature conservation.

Another stage where the public is involved is **after the plan has been accepted by the relevant authorities, but prior to the final adoption**. At that time the plans shall be **displayed to the public** in county centre or in the rural municipality or city centre, the larger settlements of the rural municipality or the settlement for which the plan is being prepared.

If the plan results in a need to expropriate immovable or in changes to the existing land use or building rights on the plots against the will of the owner, these persons shall, by way of registered letter and at least two weeks before displaying the plan to the public, be informed of the time and place of the public display of the plan and of the public discussion regarding the plan. The local government or county governor administering preparation of a plan shall, at least one week before displaying the plan to the public, publish a notice in the relevant newspaper setting out the time and place of the public display of the plan. The plan will be on public display in at least one public building or place open to the public (shop, library, school, bus stop or other such place) in the relevant villages of the rural municipality or in the urban regions of the city. The duration of a public display is two weeks for a detailed plan; four weeks for a comprehensive plan and for a county plan.

During the time the plan is on public display, all interested persons shall have access to all material and information related to the plan. During the time the plan is on display to the public everyone has the right to present proposals and objections concerning the plan

The local government or county governor administering preparation of a plan informs persons who have sent proposals and objections by post or electronic mail during the time the plan is on display to the public of the opinion of the local government or county governor on such proposals and objections and specifies the time and place of the public discussion within two weeks after the end of the public display of the plan.

A public discussion regarding a comprehensive or a county plan and, in case there are objections also regarding the detailed plan, are organized within one month after the end of the public display.

c) In principle not: every person who finds that a decision to adopt a plan is in conflict with a law or other legislation or that his or her rights have been violated or freedoms restricted by the decision has the right to contest the decision in court within one month as of the day on which he or she became or should have become aware of the adoption of the plan.

3) Judicial process:

Contest procedure

Every person who finds that an adopted detailed plan or comprehensive plan is in conflict with law or other legislation or the decision to adopt the plan is in conflict with law has the right to make a proposal to the authority which adopted the comprehensive plan or detailed plan to bring the adopted plan or the decision to adopt the plan into compliance with the law or other legislation. The county governor or local government who adopted the plan makes a decision concerning the proposal and, if the proposal is found to be justified, brings the plan or the decision to adopt the plan into compliance with law, by way of registered letter, informs the person who made the proposal of the decision and of the reasons for accepting or rejecting the proposal within one month after the date on which the proposal is received.

However this objection proceeding is not obligatory, a person can turn also directly to the court. The competent courts to review the planning decisions in Estonia are **the administrative courts**. There is a three level court system, there are two **administrative courts in first instance** (Tallinn and Tartu, but also some court houses in other parts of Estonia which are administered by these two courts administration), on the second instance there are two **district courts in which administrative matters are reviewed** (also in Tallinn and Tartu) and on the third level there is the highest court - **the Administrative Law Chamber of the Supreme Court**.

The time limit for the action is one month as of the day on which the applicant became or should have become aware of the adoption of the plan.

After acceptance of an administrative matter, **pre-trial proceedings are conducted** in which the court prepares the matter so that it can be adjudicated without interruptions in one court session. In the Supreme Court there exists a system of **leave to appeal**, the appeal is accepted if it contests the correctness of application of a provision of substantive law or requests annulment of a court decision due to material violation of a provision of court procedure which has or may have resulted in an incorrect court decision and/or if a judgment of the Supreme Court is essential for the uniform application of the law.

The filing of an action or protest does not automatically prevent the execution or issue of an administrative act or taking of a measure against which the action or protest is filed unless otherwise provided by law. However, **an administrative court may undertake interlocutory injunctions - 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 suspend the validity or execution of a contested administrative act; prohibit the issue of a contested administrative act or taking of a contested measure; require an administrative authority to issue an administrative act being applied for or take a measure being applied for or terminate a continuing measure. The court may apply several measures in a ruling on provisional legal protection.

4) Standing

Yes, all the persons listed in the case for colloquium 2006 have standing before the Estonian administrative courts.

5) Scope of claims

The plaintiffs in the case study **are allowed to claim both**: infringements of their individual rights as well as infringements of public interests.

Normally in Estonian administrative court procedure only a person who finds that his or her rights have been violated or his or her freedoms have been restricted by an administrative act or measure has the right to file an action with an administrative court (see Article 7 of the Code of Administrative Court Procedure, passed 25 February 1999, in force 1 January 2000). However, the planning procedure and environmental impact assessment are exceptions to this rule. According to the Article 26 of the Planning Act which prevails here as a special regulation, every person who finds that a decision to adopt a plan is **in conflict with an Act or other legislation** or that **his or her rights have been violated or freedoms restricted** by the decision has the right to contest the decision. The Administrative Law Chamber of the Supreme Court has confirmed the right of everyone to turn to the court in case he or she finds

that the planning decision is in conflict with law (judgment of 9 June 2004 in the case number 3-3-1-28-04).

Furthermore, Estonia (as has the European Community) has ratified the Århus convention on access to information, public participation on decision-making and access to justice in environmental matters (Estonia ratified on 6 June 2001). The convention is directly applicable in Estonia. For a case of building a motorway the Article 3 in conjunction with Article 6 of the Estonian Environmental Impact Assessment and Environmental Management System Act apply, which foresee the assessment of environmental impact.

The Estonian environmental organizations (NGO-s) have been successfully using their right to contest planning decisions.

6) Scope of judicial review

The Estonian courts review the lawfulness of a planning decision in every procedural and substantive respect, both procedural as well as substantive law (legality of the decision) aspects and of course the possible infringements of national law with the Community law. However, the Administrative Law Chamber of the Supreme Court has stated in its decisions that the review is limited to the lawfulness of the decision, thus the only aspect which is out of the scope of the judicial review is the expedience, usefulness (*Zweckmässigkeit*) of the discretion of the authority (*no contrôle d'opportunité*), only the lawfulness (*Rechtmässigkeit, légalité*) of the discretion decision is reviewed (see for example judgment of 13 March 1998 in the case number 3-3-1-9-98). Nevertheless, if an agency, official or other person performing administrative functions is authorised to act on the basis of discretion, a court verifies whether the act was issued in adherence to the limits and purpose of discretion, the principles of proportionality and equal treatment and other generally recognised principles of law.

7) EU environmental law

a) The Estonian administrative courts respect the supremacy of application of Community law, thus the environmental impact assessment must be carried out due to the Community law. In Estonia there also applies the Environmental Impact Assessment and Environmental Management System Act which harmonizes various EU directives, such as: Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment; Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

b) According to Article 4 (5) of the Habitats Directive, a site shall be subject to the conservation measures of Article 6 (2), (3) and (4) as soon as it is placed on the list of sites of Community importance. The Habitats Directive does thus not explicitly oblige Member States to apply the conservation measures of Article 6 to the sites that have not yet been transmitted to the Commission.

On the other hand, all the Member States have the general obligation of co-operation arising from Article 10 of the Treaty Establishing the European Community - Member States shall abstain from any measure, which could jeopardise the attainment of the objectives of the Treaty. According to Article 2 of the Treaty, the high level of protection and improvement of the quality of the environment is amongst the main tasks of the Community.

Environmental impact of different projects to the natural habitats has often irreversible nature and may therefore damage the conservation objectives and ruin conclusively the integrity of the site. So, if permission is given to a project that adversely affects a potential special area of conservation the objective of high level of protection may be jeopardised. **The Member States should thus abstain from any activities that may adversely affect natural habitats, which are eligible for designation as a special area of conservation.**

The European Court of Justice (ECJ) has dealt with this problem in relation to the Birds Directive in the case C-355/90 *Commission of the European Communities v Kingdom of Spain* (the case of the *Santoña marshes*). The Court emphasises that objectives of protection could not be achieved if Member States had to comply with the obligations arising under the Directive only in cases where a special protection area had previously been established. This principle can also be applied to the sites protected by the Habitats Directive.

The obligation of the State to refrain from damaging the habitats is thus based on an objective criteria - all sites hosting habitat types or species protected by EU law, should be conserved. **This obligation does not depend on the formal criteria of whether or not a State has started the process of pre-selection and given the site a certain legal status.**

If the natural habitat affected by the project is eligible for a special area of conservation in the sense of „EU Habitats Directive”, but has not yet been transmitted to the European Commission (according to the directive it should have already happened within three years after the notification of the directive which was in 1992), this does not prevent the Estonian administrative court to consider the area as a natural habitat of Community importance in the sense of "EU Habitats Directive," especially in the case, where the date prescribed for the transmission has been exceeded. But even in the case, where the date has not been exceeded, one could conclude from the established case law of the ECJ that the state should refrain from any activities damaging the natural habitat. In case C-129/96 *Inter Environnement Wallonie* the ECJ stated that although the Member States are not obliged to adopt the measures of directives before the end of the period prescribed for their transposition, they must refrain from taking any measures liable seriously to compromise the result prescribed. The period before a habitat eligible for designation as a special area of conservation is transmitted to the Commission can be considered as a period for the transposition of the Habitats Directive.

c) The Estonian administrative court will regard the area as a natural habitat area even more so in the case, if Estonia has already by its own legal acts designated the area in question as natural habitat types of Community interest and transmitted it to the European Commission. Namely according to the Article 91 paragraph 6 of the Estonian Nature Conservation Act, passed 21 April 2004, entered into force 18 July 2004, the list of areas included in the Natura 2000 network to be submitted to the European Commission shall be approved by an order of the Government of the Republic. The areas included in the Natura 2000 network shall be designated in adherence to the requirements set out in paragraphs 1 and 2 of Article 4 of Council Directive 79/409/EEC on the conservation of wild birds and paragraph 1 of Article 4 of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. According to the Article 5 of the „EU-Habitats Directive” only in exceptional cases where the Commission finds that a national list fails to mention a site hosting a priority natural habitat type or priority species which, on the basis of relevant and reliable scientific information, it considers to be essential for the maintenance of that priority natural habitat type or for the survival of that priority species, a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each.

Therefore in the cases asked in above-mentioned situations (a + b + c), the project should not be carried out.

d) According to Article 7 of the Habitats Directive, the obligations arising under the Article 6 (2), (3) and (4) apply to the special protection areas for the conservation of bird species designed under the Birds Directive (79/409/EEC).

According to Article 6 (3) of the Habitats Directive, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned. The European Court of Justice has specified this provision in case C-127/02 *Waddenzee*. According to the ECJ, it is apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned. So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

Therefore, in case the adverse impact of a project to a special protection area for birds is identified, it should, as a rule, be disallowed.

In exceptional cases of imperative reasons of overriding public interest a project adversely affecting a special protection area must nevertheless be carried out. In that case the court must ascertain that the conditions listed in Article 6 (4) are fulfilled. The court should also weigh the public interest for carrying out the project against the public interest for conservation of the special protection area.

e) According to Article 5 (1) of the "Ambient Air Directive", Member States shall take the measures necessary to ensure that concentrations of PM10 in ambient air do not exceed the limit values. Limit value is a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and the environment (Art 2 (5)).

According to **Estonian Ambient Air Protection Act** the possessor of a source of pollution has the obligation to assess the possible pollutant emission of the source before applying for ambient air pollution permit. The pollution permit is denied in case the pollutant emission exceeds the validated limit values.

The aim of the limit values is to prevent air pollution and its harmful consequences beforehand. The limit value is one of the methods applying the leading principals of European Environmental law of prevention and precaution. Therefore the precautionary approach can be applied. Although the project is only likely to exceed the limit values, full scientific knowledge is not necessary for denying permit for such project.

The project likely to exceed the limit values should thus not be carried out.

8) Consequences of procedural and substantive deficiencies of the planning decision:

a) + b) Yes, in Estonian legal order there are stipulated some exceptional cases, listed (enumerative list), in which deficiencies of an administrative decision are so important that the administrative act is rendered completely void. **According to the Article 63 of the Estonian Administrative Procedure Act an annulled administrative act is void from inception.** These cases are the following, if an administrative act:

- Does not specify the administrative authority, which issued the administrative act;
- It does not specify the addressee of the administrative act;
- It has not been issued by a competent administrative authority;
- It requires commission of an offence;
- The rights and obligations are not specified therein, if obligations are contradictory or
- The administrative act cannot be complied with for other objective reasons.

In most cases however, the planning decisions are not void from inception, but rather must be annulled, either completely or partly. The Administrative Law Chamber of the Supreme Court has pointed out that in the planning procedure, which is characterized by quite a great proportion of discretion, the procedural norms and adhering to them play an important role. Therefore it is important that all aspects have been taken into account in decision making procedure and that the decisions have been founded, the motivation of the planning decision must convince the court (judgment of 10 October 2002, in the case number 3-3-1-42-02 and of 14 October 2003, in the case number 3-3-1-54-03). An administrative act, which is unlawful at the moment of issue, may be repealed in favour of a person both proactively and retroactively. A lawful administrative act may be repealed proactively in favour of a person, except if an administrative act with the same content has to be reissued or if repeal is contrary to law.

c) According to the Article 58 of 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 or the administrative act does not comply with the requirements for formal validity if the above-mentioned violations cannot affect the resolution of the matter (see also the case law of the Administrative Law Chamber of the Supreme Court, for instance judgment of 6 November 2001 in the case number 3-3-1-54-01 etc).

Upon adjudication of the merits of an action an administrative court has the right 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;
- 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;
- 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;
- To order the payment of compensation for damage caused in public law relationships;
- To establish the existence or absence of a relationship in public law; or
- To dismiss the action or protest.

The modification of the decision must be undertaken by the authority, which adopted the decision according to the guidelines of the court.

d) Based to the presented facts and legal situation, in the current case it is very hard to predict what would be the solution in all cases of the plaintiffs. The court will need to weigh the public interest in building the motorway and the interests of the relevant plaintiffs and protection of nature. If the significant procedural aspects are not followed: the environmental impact assessment not done or poorly done and/or the decision contradicts with the substantial law as well as the Community law, then it is most likely that the decision will be completely or partly repealed and the authority needs to make another decision taking into account the motives of the judgment.

9) Remedy of deficiencies

The answer to the question depends on many factors: how significant are the deficiencies, at what stage of the procedure they are to be remedied, does the violation of the rights continue, has the unlawful decision already caused damages, etc.

In principle it is possible that the procedural or substantive deficiencies of the disputed administrative act are to be remedied during the judicial process, but this does not mean that the act was lawful at the time it was adopted, thus this does not give the act a retroactive legality and if the complainant so wishes - the court can find that the act, although it has been mended, was unlawful at the time it was adopted and this could constitute

a basis for compensation of damages. Nonetheless, the act that finally will result if the deficiencies were eliminated during the judicial process will remain in force by the court.

In other words, neither the Planning Act nor the Administrative Procedure Act forbid that the procedural or substantive deficiencies of the disputed administrative act are to be remedied during the judicial process, sometimes it is in fact positive if the deficient decision will be improved. Therefore it is not excluded that a deficient public involvement will be repaired during the proceedings or that the planning decision will be amended based on the new proposals or completely repealed and a new decision adopted.

There is a possibility to modify the complain (action) due to these kind of events during the judicial procedure to a certain extent. An administrative court hears a matter to the extent requested in the action or protest, is however not bound by the wording of an action or protest. A person filing an action may amend a request set out in the action until the summations in an administrative court if the rest of the participants in proceedings consent to the amendments or if the court deems the amendments purposeful.

A person filing an action has also until the termination of the hearing of the matter in a court session the right to discontinue the action. An administrative court accepts a discontinuance if such discontinuance does not violate the rights or freedoms of other persons.

According to the Code of Administrative Court Procedure an administrative court terminates the proceedings if an administrative act against which an action is filed has been repealed, or an unissued administrative act has been issued, or a suspended administrative act has been executed or a measure taken, except if the person who filed the action or protest applies for the hearing of the matter.

However, it is not allowed to improve the motivations of the planning decision retroactively or to give the persons who were not consulted during the preparation of the planning decision an opportunity to be consulted during the judicial procedure or answer to the proposals of the public only at the judicial procedure. Once again, the reparation of the planning decision at the stage of the judicial proceedings does not give the decision a retroactive lawfulness.