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Le juge administratif et le droit communautaire de l'environnement

National administrative courts And Community Environmental law

Tchéquie-Czech Republic

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?

Yes, there have been extensive disputes in particular on the scope of the Aarhus Convention. Although this litigation has been primarily focused on the Aarhus Convention, it has touched also upon Directive 2003/4/EC and Council Directive 85/337/EEC. The environmental disputes in the Czech Republic can be roughly divided into two groups. First group of cases relates to the questions *at which national procedures* do the Aarhus Convention and the abovementioned directives apply (i.e. question which national procedures are justiciable). Second group of cases focuses on question *at what stage* of the relevant national procedures do the Aarhus Convention and the directives apply (e.g. at what stage it is possible to challenge the opinion on environmental impact assessment). The former issue will be addressed here, whereas the latter will be answered under letter B).

The set of disputes on the applicability of the Aarhus Convention and the EC Directives focused on the justiciability of town and country planning documentation. The core question that divided even the Supreme Administrative Court (hereinafter only "SAC") itself was whether town and country planning documentation falls within the ambit of the term "measure of a general nature" (*opatření obecné povahy*). If yes, the administrative courts are entitled to judicial review of these acts. If not, the country plans are non-justiciable.

Initially, the SAC held that an adoption or change of town and country planning documentation is a "measure of a general nature" and therefore the SAC can review this documentation pursuant to § 101a of Act. No 150/2002 Coll., the Code of Administrative Justice (hereinafter only "CAJ").[1] Subsequently, another chamber of the SAC confirmed this ruling and added that the country plan can be challenged already at the stage of its adoption (by the municipal authority) and not only after its promulgation in the form of generally binding ordinance[2] (see also below as to the discretion of the administrative judge). However, in March 2007 the Extended

[1] Judgment of the SAC of July 18, 2006, No. 1 Ao 1/2006.

Chamber of the SAC overruled the previous two cases and opted for a more formalistic reasoning.[3] In a nutshell, it opined that the structure plans are not "measures of a general nature" since "measures of a general nature" are only those measures that are explicitly designated as "measures of a general nature" in the special laws. In other words, it is the formal designation and not material elements what is constitutive for a "measure of a general nature". As a result, country plans have been excluded from judicial review.[4]

In all three cases, the Aarhus Convention and the Directive 2003/4/EC played a crucial role. In the first decision,[5] the SAC found a basis for judicial review of "measures of a general nature" in Art. 9 of the Aarhus Convention interpreted in conjunction with Arts. 6 and 7 of the Aarhus Convention. It also relied heavily on the Decision 2005/370/EC[6] and Directive 2003/4/EC. It considered the Aarhus convention to have at least indirect effect[7] and found this effect sufficient to omit a question of a possible direct effect and of supremacy of the Convention. The SAC thus concluded that "obligation to interpret the national law so that it allows judicial review of town and country plan or its change flows also from the community law and membership of the Czech Republic in the European Union".

However, as mentioned earlier, the Extended Chamber did not share the view of the three-member chambers.[8] It held that the country plan is a "plan" within the meaning of Art. 7 of the Aarhus Convention and not the "decision on whether to permit proposed activities" within the meaning of Art. 6, and therefore Art. 9 (2) of the Aarhus Convention is inapplicable. In support to this conclusion, the SAC

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[2] Judgment of the SAC of November 30, 2006, No. 2 Ao 2/2006.
[3] Judgment of the Extended Chamber of the SAC of March 13, 2007, No. 3 Ao 1/2007 (extract available at JURIFAST).
[4] This judgment was based on the state of the law prior to the new Town and Country Planning Act No. 183/2006 Coll., which explicitly designates country plans as "measures of a general nature" and thus allows judicial review of these plans (see below).
[5] Judgment of the SAC of July 18, 2006, No. 1 Ao 1/2006.
[6] Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.
[7] Quoting C-53/96, Hermès [1998] ECR I-3603, § 35; and Joint Cases C-300/98 a C-392/98, Parfums Christian Dior SA [2000] ECR I-11307, § 47-48.

observed that while the Directive 2003/35/EC amended the Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, the Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment was left untouched. Yet another support was found in Art. 10 of the Regulation EC No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environment in conjunction with Art. 2 (e) and (g) of the same regulation. Art. 9 (2) of the Aarhus Convention was found a national opt-in provision and thus it is triggered only if the national legislation explicitly stipulates the obligation included therein (e.g. new Town and Country Planning Act No. 183/2006 Coll., effective of January 1, 2007, explicitly designates country plans as "measures of a general nature" and thus allows judicial review of these plans). The Extended Chamber concluded that the obligation to allow judicial review of country plans does stem neither from the Aarhus Convention nor from the EC law.

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?

As mentioned earlier, the environmental adjudication in the Czech Republic has been predominantly focused on procedural issues and therefore the national case law did not clarify the *substantive* concepts contained in the relevant directives.

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?

[8] Judgment of the Extended Chamber of the SAC of March 13, 2007, No. 3 Ao 1/2007.

No, the establishment of the party to be consulted, as provided for under Directive 85/337 and referred to as the "public concerned", has never been the subject of litigation. Most of the environmental adjudication in the Czech Republic is initiated by few NGOs specialized in environmental law and their status has never been disputed.

However, in Judgment of June 19, 2007, No. 5 As 19/2006, the SAC was faced with another issue. It had to decide on the compatibility of conditions prescribed by the national law for access of the NGOs to the administrative proceedings related to the protection of environment. The SAC held that the NGOs have access to the administrative courts (to contest decisions of administrative authorities with environmental aspects), but only if they previously fulfilled all the conditions laid down by national law, i.e. to notify the relevant administrative authorities about their participation in the administrative proceedings and to exhaust all available remedies. Unless these conditions are satisfied, NGOs cannot contest the decisions of administrative authorities before the Czech courts. As to the community law aspects, the SAC held that the abovementioned conclusion is consistent with both Art. 9 (2)-(3) of the Aarhus Convention and Art. 10a of Directive 85/337/EEC, since both of these international instruments require fulfilment of conditions stipulated in national law as a prerequisite for the access to the courts in environmental matters.

Similarly, in Judgment of March 29, 2007, No. 2 As 12/2006, the SAC had to decide whether the NGOs may contest the grant of permit pursuant to the Act No. 18/1997 on the Peace Use of Atomic Energy and Radiation Caused by Ionization (hereinafter only “Act on Atomic Energy”). Under the Act on Atomic Energy, the only party to the permit procedure is the applicant for this permit. The SAC held that this national law which excludes the public from the permit procedure under Act on Atomic Energy is compatible with the international obligations of the Czech Republic, and in particular with the Aarhus Convention. Firstly, the SAC opined that Art. 6 of the Aarhus Convention is applicable to the atomic facilities. However, Art. 6 of the

Aarhus Convention is not self-executed provision, and therefore it requires explicit incorporation to the national law.[9] Hence, the NGOs do not have standing in this procedure. Secondly, the SAC found the national law compatible with Art. 6 of the Aarhus Convention since even if this article would be self-executed, it does not require the access of the public to the decision-making at every separate stage of administrative proceeding. Put differently, if the access of the public is effectively secured at least at the stage of environmental impact assessment of the atomic facility (which is the case pursuant to Act on Atomic Energy), Art. 6 is satisfied.

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?

Since the establishment of the party to be consulted, as provided for under Directive 85/337 and referred to as the "public concerned", has not been the subject of litigation, it is not possible to answer this question. However, it must be reminded that the Czech Republic joined the EU only in May 2004, and therefore there was a relatively short period before the expiry of implementation period for Directive 2003/35/EC (and after the Czech Republic became bound by community law). As a result of this fact, the “pre-Directive 2003/35/EC” period was too short to assess the positive effects of additional clarifications provided by Directive 2003/35/EC.

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

[9] Quoting Economic Commission for Europe: *The Aarhus Convention: An Implementation Guide*, p. 87, available at

administration in this regard? And what sanctions are issued when the judge observes that one of the obligations not been met?

Pursuant to the CAJ, the courts may solely annul the decision of the administrative authorities *or* affirm it and reject the action. Therefore, generally the only sanction when one of the obligations has not been met is the annulment of the administrative decision. The judge thus has no discretionary power.

The first (and so far last) sign of discretionary powers of an administrative judge has appeared in Judgment of the SAC No. 2 Ao 2/2006. This case dealt with the question of access of the public to the town and country planning proceeding. The SAC held that not every complainant who claims that her rights are impinged upon has standing to contest the "measure of a general nature". The complainant must prove that the impingement upon her rights are *likely*. Therefore, it is not enough to claim procedural deficiencies; the complainant must claim also the interference with her substantive rights. In sum, if the substantive rights of the complainant could not be interfered with or this interference is unlikely, the complainant does not have standing. However, it must be stressed that this judgment was overruled by the Judgment of Extended Chamber of the SAC of March 13, 2007 No. 3 Ao 1/2007, which found the review of the town and country planning documentation non-justiciable (see above), and thus the reach of Judgment of the SAC No. 2 Ao 2/2006 has become limited.

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?

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http://www.unece.org/env/pp/acig.pdf, in support of this conclusion.

The second set of disputes relates to the judicial review of opinions on environmental impact assessment. The core question is whether it is possible to review opinions on environmental impact assessment separately or only incidentally in connection with the decisions based upon these opinions. The SAC held in Judgment of June 14, 2006, No. 2 As 59/2005, that the opinion on environmental impact assessment in itself cannot interfere with the rights of individuals, and therefore it cannot be contested separately (i.e. in itself it is excluded from judicial review). Furthermore, the administrative authorities are not bound by these opinions and may deviate from them. In such circumstances, it would make no sense to review an opinion on environmental impact assessment separately if it is not eventually used by administrative authorities[10] as a basis for administrative decision (that alone is capable to interfere with rights of individuals). Therefore, opinion on environmental impact assessment can be reviewed only in proceedings related to the decision which was based upon this opinion and not separately (i.e. not before the relevant administrative decision is taken).

In Judgment of June 14, 2007, No. 1 As 39/2006,[11] the SAC had to reconsider its reasoning since the complainants invoked the Aarhus Convention and Directive 85/337/EEC in support of separate review of opinions on environmental impact assessment. The SAC affirmed the decision from 2006 and held that opinion on environmental impact assessment is not separately contestable; it may be reviewed only incidentally in connection with the administrative decision concluding the process. According to the SAC, the obligation to review opinions on environmental impact assessment separately does flow neither from the Aarhus Convention nor Directive 85/337/EEC. Both instruments thus do not preclude review of environmental impact assessment only in connection to the final administrative

[10] The opinion on environmental impact assessment is an obligatory part of the administrative procedure which relates to projects that might have adverse impact on the environment, but pursuant to Art. 10 § 4 of Act No. 100/2001 Coll., on Environmental Impact Assessment, the administrative authorities may under specific circumstances reject the requirements stipulated in the opinion on environmental impact assessment.

[11] Extract available at JURIFAST.

decision. However, the SAC added one important qualification. The motions to the administrative courts challenging these administrative decisions must be granted suspensive effect in order to meet the requirements of Art. 9 (4) of the Aarhus Convention - to be effective, fair and timely (and to prevent the situations where the courts decide on environmental impact assessment only at the time when the construction is already finished). Therefore, if the courts do not grant suspensive effect to these motions, this would amount to a violation of Art. 9 (4) of the Aarhus Convention.

Finally, in Judgment of August 29, 2007, No. 1 As 13/2007, the SAC rejected the complainant's proposal to submit preliminary question to the ECJ whether Art. 10a of Directive 85/337/EEC and Art. 9 (2)-(4) of the Aarhus Convention require separate review of the opinion on environmental impact assessment directly and immediately without waiting for the final administrative decision (which is based upon the environmental impact assessment). The SAC affirmed the reasoning in Judgment of June 14, 2007, No. 1 As 39/2006, that Art. 9 of the Aarhus Convention does not require review of every decision under Art. 6 in a separate procedure. According to the SAC, Art. 9 sets only the aim and leaves broad discretion up to the Member States which means they choose for achieving this aim. Art. 9 thus requires review of environmental impact assessment only in the phase when the individual rights might be interfered with (i.e. only when the final administrative decision is taken). The SAC also referred to the relevant part of Art. 10a of Directive 85/337/EEC that explicitly stipulates that: "*Member States shall determine at what stage the decisions, acts or omissions may be challenged*". This provision does not allow different interpretation than the one adopted by the SAC in its previous judgments and, thus, under the doctrine of *acte claire* the SAC is not obliged to refer the preliminary question to the ECJ.[12] The SAC buttressed its conclusion by two subsidiary factors. First, it looked at the different language versions of Art. 10a of Directive 85/337/EEC and concluded they do not depart from the Czech language

[12] Quoting C-283/81 *Srl. CILFIT and Lanificio di Tabardo SpA v. Ministero della Sanità*, Recueil p. 3415, §§ 16-20; and C-495/03 *Intermodal Transports BV v. Staatssecretaris van Financiën*, Recueil I-8151.

version. Second, it referred to the laws in other Member States that similarly to the Czech Republic do not allow separate contestability of the environmental impact assessment.[13]

The SAC has also addressed the Reasoned Opinion of the Commission of June 27, 2007, No. 2006/2271, (2007)2927, where the Commission informed the Czech Republic that it has not fully implemented Art. 10a of Directive 85/337/EEC. The Commission claims that the Czech legislation may be under specific circumstances incompatible with the Directive. This situation may occur for example when the opinion on environmental impact assessment cannot be separately contestable *and* the public subsequently does not have standing to challenge the decision which is adopted on the basis of the opinion on environmental impact assessment. The SAC interpreted the position of the Commission as requiring both factors to exist *cumulatively* so that the Czech national law becomes incompatible with the Directive. This was not the case in Judgment of August 29, 2007, No. 1 As 13/2007, since the complainant had standing in both administrative and judicial proceedings related to the decision which was adopted on the basis of the environmental impact assessment (and therefore the public could incidentally challenge the opinion on environmental impact assessment). In sum, according to the SAC, even the Commission does not require separate contestability of opinions on environmental impact assessment. [14]

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.

[13] Quoring *Rubel, R., Silbermann, E. I.,* Road Planning in Europe – A Case Study. Druckerei Roland Koch: Leipzig, 2006, p. 28, available also at http://www.juradmin.eu/en/colloquiums/colloq_en_20.html (last visited November 15, 2007).

[14] According to the SAC, the European Commission thus implicitly 'blessed' the Czech law which does not allow separate contestability of opinions on environmental impact assessment.

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?

The SAC has not had any opportunity to decide on the abovementioned questions. These issues simply have not been raised before the SAC so far. More specifically, the SAC has not heard any case dealing with Directive 2006/12/EC of the European Parliament and the Council of 5 April 2006 on waste, and with regards to the Directive 96/61/EC of the Council of 24 September 1996 concerning integrated pollution prevention and control, it touched upon it only in one case[15] (as of November 2007). Apart from the SAC, there has been only one more case on integrated prevention at the lower courts, but this case was decided solely on the basis of national law without any reference to the EC Directives.[16]

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)?

The abovementioned questions have been to a large extent left untouched in Judgment of the SAC No. 5 As 49/2005 which is so far the only case related to waste and polluting installations directives that has reached the SAC. However,

[15] Judgment of the SAC of October 25, 2006, No. 5 As 49/2005 (see below).
[16] Judgment of the Municipal Court of Prague of May 30, 2006, No. 11 Ca 218/2005.

pursuant to the CAJ, the courts may solely annul the decision of the administrative authorities *or* affirm it and reject the action. Courts have not been conferred the power to amend the decision of administrative authorities or impose other measures. Furthermore, there are no special procedural regulations or rules of evidence before the judge or procedures for establishing specific facts.

As to the special investigation measures, if the judge (of the Regional Court[17]) founds the evidence before him insufficient, he can either request expert opinion or remand the case to the administrative authorities requiring them to supplement the evidence accordingly. In the Czech Republic, there is no tradition of *amici curiae* and this concept is not explicitly envisaged in the CAJ.

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.

Judgment of the SAC No. 5 As 49/2005 dealt primarily with the procedural issues, access of public to information, and with public participation in the permit procedure. The facts were as follows. On March 23, 2003, company LG Philips applied to regional authorities for integrated permit for adding organic film on TV screens. The NGO specialized in protection of environment entered the administrative procedure on June 26, 2003. On August 11, 2003 a specialized agency hired by the regional authority issued its expert opinion. This expert opinion was made public for comments on August 19, 2003 and the oral hearing was scheduled for August 27, 2003. This hearing took place and the integrated permit was issued on September 24, 2003. The NGO subsequently filed a motion to the Regional Court claiming that the time period for commenting was too short and

[17] The SAC operates on the cassational principle and therefore decides solely the questions of law and not questions of fact.

violated relevant provisions of Act No. 76/2002 Coll., on Integrated Pollution (a transposing norm of Directive 96/61/EC). The Regional Court interpreted relevant provisions solely on the basis of national law and quashed the integrated permit. The Ministry of Environment filed a cassational complaint to the SAC. The SAC affirmed the judgment of the Regional Court, but added the euroconform reasoning. More specifically, the SAC held that the ambiguous provisions of Act No. 76/2002 Coll., on Integrated Pollution, must be interpreted in line with the Directive 96/61/EC and thus they must be construed *inter alia* in a manner that allows effective participation of the public in the permit procedure. Therefore, if the regional authority scheduled the oral hearing before the expiry of the 30-day-period from the publication of expert opinion, it violated the right of the public to effectively participate in the permit procedure since the NGO did not have sufficient time to assess the expert opinion in such a complex and technical matter and thus could not be fully prepared for the oral hearing.