



Le juge administratif et le droit communautaire de l'environnement

National administrative courts And Community Environmental law

Pologne - Poland

**Réponse au
questionnaire
Answer to
The questionnaire**

The Supreme Administrative Court of Poland

SEMINAR FOR COUNCILS OF STATE AND SUPREME ADMINISTRATIVE JURISDICTIONS

28th JANUARY 2008, BRUSSELS

Questionnaire

I Public access to information on environment

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?

The Aarhus Convention i.e. the Convention on access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters as signed on June 25, 1998 in Aarhus has had a tremendous impact upon both the solutions introduced into the EU legislation as well as into the laws of the Member States. In case of the access to information on the condition of environment the said solutions have been incorporated into the Directive of the European Parliament and the Council of January 28, 2003 (2003/4/EC) on public access to environmental information and repealing Council Directive 90/313/EEC (O.J. EU L of February 14, 2003) and the Regulation (EC) no. 1367/2006 of the European Parliament and the Council of September 6, 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 Environmental Matters to Community Institutions and bodies (O.J. EU L 264 of September 25, 2006., p. 0013 – 0019). In implementation of the assumptions underscored in the provisions of the Community laws and those regarding international broad public Access to environmental processes, Poland, in the art. 74, item 3 of its Constitution guaranteed the public with the right to access information on the condition and protection of the environment while the Act of April 27, 2001 – The Environment Protection Law (O.J. of 2006 no. 129, item 902 as later amended) introduced, into the Environment Protection Law framework, a principle of public access to information on the condition of the environment

and public participation in the administrative decision-making proceedings in the area of environment protection.

Access to information

In accordance with provisions of the Environment Protection Law a public administration body has the duty to provide information on environment and protection thereof to any member of the public. Information is provided in response to the written application unless the information is easy to find and can be provided verbally. Publicly available lists are maintained electronically. The body having the obligation to maintain a list is obliged to make such information available in the Public Information Bulletin in pursuance of the Act of September 6, 2001 on access to public information (O.J. no. 112, item 1198., as later amended).

The body of administration shall not reveal information in cases, when:

- 1) disclosure of information could infringe provisions of regulation on protection of individual information obtained in the course of statistical surveys conducted by public statistics, as referred to in the Act of June 29, 1995 on public statistics (Dz. U. no. 88, item 439, as later amended) or provisions of the Act of August 29, 1997 on protection of private personal information (Dz. U. of 2002 no. 101, item 926 as later amended),
- 2) information requested applies to, as follows:
 - a) cases undergoing court, disciplinary or criminal proceedings, if disclosure thereof could distort the said proceedings,
 - b) cases that are subject to copyright or patent rights, in case disclosure could breach such rights,
 - c) documents or data provided by a third party if such party had no duty to deliver such information and requested that the information delivered would not be disclosed,
 - d) project implemented in closed areas where public participation proceedings do not apply,
 - e) documents or data that, when disclosed, could cause a threat to environment.

Furthermore, in case the information on the environment and its protection relates to emissions, the administration body cannot refuse to disclose such information even if an entity that provided information in the first place requested non-disclosure due to the fact that

such information contains data of commercial value. In other words, emission related information cannot be treated as information of commercial value and, thereby, be excluded from obligation to disclose (art. 20, item 3 of the Act – The Environment Protection Law).

The body of administration shall disclose information without unnecessary delay but not later than within the period of one month from the date of receipt of relevant application; the time can be extended to two months in view of the complexity of a case.

Public participation in the process of decision making in cases relevant to environment protection

Pursuant to art. 10 of the Act – the Environment Protection Law any member of the public can participate in proceedings, as provided for by the said law. i.e. in the decision-making process on environment protection issues i.e. in proceedings on individual cases resolved by the bodies of public administration by way of administrative decision. The public participation in administrative decision-making cases may involve “presentation of comments and requests” or “participation of environmental organization as parties to proceedings”. “Anybody” has the right to “present comments and requests” under proceedings conducted with public participation but this right is limited to presentation by “the society” of the position on the case that the relevant body authorized to issue a decision is obliged to use. Information on the way to use such comments or requests made under public participation should be incorporated in the rationale for the decision (art. 107, § 1 – 3 of the Code of Proceedings in Administration). The right to participate in proceedings involving the right to present “comments and requests” does not include appeal against decision issued, irrespective of how the body used such comments and requests i.e. took them into account or not. This popular form of public participation is granted to everybody, including environmental organizations irrespective of their location.

The second form of public participation involves its participation in proceedings, as parties thereto. This opportunity is granted only to certain environmental organizations subject to compliance with terms and conditions provided for in the Act. Only those organizations can participate as parties to proceedings who will, justifying the case by specifying their area of operation, disclose their intent to participate and, in addition, present their comments and requests under such proceedings. This has to be completed within the

period of 21 days from the date specified in the announcement on commencement of the proceedings. The above conditions have to be complied with jointly.

An environmental organisation, participating as a party to the proceedings shall enjoy all the rights belonging to the party to the process. It may submit motions, participate in hearing of evidence, and submit an appeal against the decision issued. Furthermore, such party has the right to submit protest to the court of administration (art. 50 § 1 of the Act of August 30, 2002 – the Law on proceedings before the administration courts, Dz. U. of 2002 no. 153, item 1270 as later amended) stipulating that such claims to the court of administration may be submitted by environmental organization with respect to cases residing within the area of its statutory activities, in cases relating to legal interests of any third parties, in case it has participated in the administrative proceedings.

To date, no problems regarding application of the law in the above mentioned areas have been disclosed in the jurisdiction of the administrative courts. Both the Convention as well as the Community Laws are taken into account by administrative courts when monitoring application, by the bodies of public administration, of the environmental provisions. It is necessary to note that the Aarhus Convention appears, in the jurisdiction of the administrative courts, in majority of cases, in the context of exempting NGOs from payment of court charges with respect to cases covered by the Convention.

II Pollution

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?

Responsibility in environment protection

In the Act of April, 2001. – the Environment Protection Law (Dz. U. of 2006 No. 129, item 902 as later amended) the legislator, in Title IV „Responsibility in Environment

Protection” provided for three separate types of liabilities with respect to negative impacts upon the environment: civil liability, criminal, and administrative liability. Each separate liability type performs a different role and is subject to different methods, procedures and legal instruments. These liabilities are not mutually exclusive but, on the contrary, they are complementary. Should the entity generate negative impact on the environment thereby generating damage the civil liability is triggered. In case the act has features of a criminal offence (misdemeanour) in addition case falls under criminal liability. The third type of liability is administrative liability, based upon administrative law with no requirement for a connection with civil law or an act being a criminal offence or misdemeanour.

According to art. 7 of the Act of April 27, 2001. – the Environment Protection Law; who causes pollution of the environment shall bear the costs of removal of effects of such pollution while who can potentially cause pollution of the environment shall bear costs of preventing such pollution from occurring. Art. 7, item 1 and 2 of the said Act provides for the principle defined as “pollutant pays”. The legislator in art. 7, item 1 imposed the duty to bear costs of pollution upon every entity causing such pollution without any differences or variations. Hence, in general, the duty rests upon both individuals and organizational units. Practical implementation of the “pollutant pays” principle is supported by economic instruments such as charges for the use of environment or monetary fines charged for introduction of polluting substances in breach of conditions defined in the environmental permit.

Principles regulating responsibility for preventing damages to the environment and issues related to removal of environmental damages are regulated by the Act of April 13, 2007 on preventing environmental damages and removal thereof (Dz. U. no. 75, item 493). According to the said Act the remedial actions are defined as any and all actions, including of organizational nature or temporary activities, undertake with the aim to remedy or replace, in an equivalent manner, of nature elements or their functions that have been damaged including, in particular, contamination of soil and water, reclamation of natural landscape, afforestation, planting trees or planting groups of plants, re-introduction of damaged species with the aim to remove a threat to human health and to reinstate natural balance and landscape values in a given area.

Provisions of the said Act are applied directly to situations of threat of environmental damage or directly to environmental damage itself:

- 1) caused by operations of an entity using the environment and generating a risk of damaging the environment;
- 2) caused by other activities than the one referred to in point 1 above, undertaken by the entity using the environment in case it applies to protected species or protected natural habitats and were caused due to the fault of the entity using the environment.

Provisions of the Act also apply to direct threat of damage to the environment or actual damage to environment caused by dispersed emission generated from many sources when it is possible to establish *causal nexus* between the direct threat of damage to environment or actual damage and operation of an entity using the environment. The entity using the environment is defined as an entity using the environment as understood by provisions of art. 3 point 20 of the Environment Protection Law, that conducts operations generating a risk of an environmental damage or any other operations referred to in art. 2, item 1, point 2 causing direct threat of damaging the environment or an actual environmental damage. Art. 3, point 20 of the Environment Protection Law provides for the definition of an entity using the environment, as follows:

- a) an enterprise as referred to in art. 4 of the Act of July 2, 2004. on freedom of business operations (Dz. U. no. 173, item 1807, as amended), as well as persons carrying out production activities in agriculture, in the area of cultivation of crops, breeding of animals, horticulture, vegetable raising, forestry and inland fishery as well as persons performing individual medical practices or individual specialist practice,
- b) organisational unit which is not an enterprise, in the understanding of an Act of July 2, 2004 on freedom of business operations,
- c) an individual, who is not an entity referred to in letter a, and using the environment in the scope requiring obtaining of the environmental permit.

Provisions of art. 11 of the Act of April 13, 2007. on preventing environmental damages stipulates that, in case the direct threat of damage to the environment failed to be removed in spite of preventive actions undertaken, or such environmental damage occurred, the entity using the environment has the duty to immediately notify the fact to the environment protection body and to the Voivodship environment protection inspector. However, according to art. 12, the direct threat of damage to the environment or actual environmental damage were caused by more than one entity using the environment the liability of such entities regarding undertaking of preventive and remedial actions is joint and several.

Furthermore, in case the direct threat of damage to environment or actual damage were caused with approval and knowledge of an entity having a title to land surface, such entity also has the duty to undertake preventive and remedial activities jointly and severally with the entity using the environment who caused such damage or threat. The entity using the environment shall agree upon performance of remedial actions with the environment protection body and such agreement on terms and conditions of carrying out remedial actions shall take a form of decision.

However, in case the entity using the environment fail to undertake preventive and remedial action the environment protection body, by way of decision, shall impose the duty to carry out such actions upon such entity.

In situations when:

- 1) the entity using the environment cannot be identified or execution proceedings cannot be commenced against such entity or in case the execution proceedings turned out to be ineffective;
 - 2) in view of a threat to human life or Health and potential irreversible damage to the environment it is necessary to undertake immediate actions,
- the environment protection body shall undertake preventive or remedial actions. In such circumstances the environment protection body shall require the entity using the environment to reimburse costs incurred by self in connection with carrying out the said preventive or remedial actions.

Provisions of the said Act provide for a penalty of a fine to be imposed upon entities who, while having a duty fail to undertake preventive or remedial actions and upon entities who, while having a duty to agree the conditions of performance of remedial actions with the environment protection body fail to comply with such duty or carry out such actions in contravention of the agreed terms and conditions.

Issues regarding principles of protection of arable and forestry land as well as reclamation and improvement of usable value of land are provided for under the Act of February 3, 1995 on protection of arable and forestry land (Dz. U. of 2004. no. 121, item 1266 as later amended), while the provisions of the Act of April 13, 2007 on preventing environmental damages and removing thereof apply, respectively, to the issue of reclamation of such land.

According to art. 20 of the Act of February 3, 1995 on protection of arable and forestry land, a person causing a loss or reduction of usable value of land has the duty to reclaim such land at its own cost.

However, reclamation of land for agricultural activity purposes and located within the agricultural production area, when devastated or degraded by unidentified persons, in effect of natural disasters or tectonic movements of the earth is performed by a relevant body, using the resources provided by the Arable Land Protection Fund, while reclamation of forest lands and land designated for afforestation – with the use of the State Budget resources in keeping with principles established under regulations pertaining to forests.

In addition, reclamation, for purposes other than the above mentioned, of other land devastated or degraded by unidentified persons, in effect of natural disasters or tectonic movements of the earth is performed by a relevant body using the State Budget resources or resources provided by parties interested in conducting business activities in the area of reclaimed land.

In the situation of industrial operations creating the duty to reclaim land being conducted by several persons the duty is imposed upon each person involved, respectively to the scope of operations causing the need to reclaim land.

Land reclamation is conducted when a given piece of land becomes redundant completely, partially or for a period of time required for conducting industrial operations and ends within the period of 5 years from discontinuation of such operations. In case the reclamation of devastated land is not completed within the said period, an annual charge applies increased by 200%, as assessed from the day on which such reclamation of land should have been completed.

However, in case of not performing the duty to reclaim the degraded land, the duty is imposed, by way of decision, to pay to the account of the Arable Land Protection Fund or the Forestry Fund, by a person causing reduction of the usable value of such land, of the charge equal to annual charge pro rata to the level of reduction of such usable value of the land.

III Judge control techniques¹

The limits of jurisdiction of administrative courts and relative concept of judicial activities performed by these courts are based upon provisions of art. 184 of the Constitution of the Republic of Poland. According to these provisions the administrative courts perform control, within the scope determined under the relevant legislation, over the activities carried out by public administration. The above principle is followed by the provisions of art. 1 § 1 of the Act of July 25, 2002 – The Law on the System of Administrative Courts (Dz. U. no. 153, item 1269 as later amended). According to the said provisions the administrative courts perform jurisdiction by way of controlling activities of public administration and resolution of competence disputes between bodies of sub-national government, sub-national appellate colleges and between the said bodies of government administration.

Decisions issued by an administrative court, in case of admitting a claim, decide upon annulment or declaration of invalidity of the act under claim or impose a duty upon the body of public administration to perform certain actions in the course of further proceedings on a case. In case of an audit of public administration body's operations, as performed by the administrative courts, a case related to the operation of a specific body of public administration, remains the case to be processed by the said body. The task of the administrative court involves, therefore, performance of an audit (assessment) of such operation. The court, due to submittal of a complaint or in case of action undertaken (or lack of action) by the body of public administration, does not accept the case for final resolution but its duty is to audit (assess) activities undertaken by the body of administration. Hence, the administrative court, in principle, may not stand in for the body of public administration and issue a final decision in a case. Taking over by the administrative courts of duties of bodies of public administration regarding final resolution of a case would be considered to be unconstitutional in terms of the courts going beyond the borderlines of oversight of activities of public administration bodies.

The focus of the court control is to assess consistence, or lack of it, of an administrative act complained against with the legal standard. To achieve this, the administrative court provides interpretation of legal regulations that constitute the legal basis for the decision complained against. Subsequently, the court assesses correctness of application of

¹ Response common to parts I and II.

appropriately interpreted regulation to the determined actual situation of the case. By verifying legality of a decision subject to a complaint in the latter aspect, the court will have to refer to actual evidence, as delivered in the course of administrative proceedings. In this sense, the court takes up an issue of actual evidence of the case and verifies correctness thereof.

The court may admit documentary evidence if, in view of the court, it is necessary to clarify any material doubts and it will not cause unnecessary delay of the proceedings. However, the above solution can be used only as a complementary evidence, limited to documentary evidence capacity both with respect to official and private documents. Conducting this evidence proceedings using other evidence is inadmissible.

In case of administrative approval the examination of a case by the administrative court looks into material and legal premises justifying the use, by the body of administration, of its rights, observance of external limits of the Act i.e. the issue related to approval powers and, in addition, the need to observe legal directives of choice that influence approval, although they cannot eliminate thereof.

The administrative courts do not evaluate a choice of one of the two or more options of the body of administration to act, as it could entail a decision making, instead of controlling function. The duty of the court is to examine the thinking process of a relevant body as reflected in rationale of the administrative act. Correctness of the rationale of a discretionary decision will, consequently, determine whether the choice of solution remains in line with effective law.

In case of failure to execute the judgment regarding the compliant against inaction and in case of inaction of a body following the jurisdiction annulling or rendering the act or action invalid a party, following prior notice to the relevant body to perform the verdict or resolve the case, has the right to submit relevant complain requiring imposition of a fine upon such body of administration. The above powers of the court have been designed to enforce performance of court decisions upon a body of public administration. These are the powers disciplining bodies of public administration and enforcing actions.

A person who incurred a damage due to failure to execute the court decision has the right to submit claim to a common court regarding payment of compensation, as provided for in the Civil Code. Compensation is paid by the body that failed to execute the decision of the administrative court. In case the body of administration, within the period of three months

from the date of submission of request for compensation, fails to pay such compensation, the eligible entity has the right to submit claim to the common court.

In case, in the course of consideration of a case involving material infringement of the law or circumstances having impact upon creation thereof, the bench of the administrative court may, by way of decision, inform relevant bodies or their superior bodies on such deficiencies. The body receiving such decision has to consider thereof and notify the court regarding position adopted within the period of thirty days. The above powers of administrative courts have been designed to inform public administration bodies on deficiencies in their operation which, according to the court's belief, constitute the underlying basis for submission of complaints against such operations (signalling powers).

Warsaw, January 2008