

ERA Workshop on Access to Justice in Environmental Matters, Budapest 2024

Case study on judicial review and effective remedies – focus on EIA / 05.12.2024

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Facts: *Environmental assessment for tiny land-use plan?*

Scenario 1

In Freetown, a popular city in Euroland, housing demand particularly of young families has been growing significantly during the last years. The City Council wanted to meet the need before long and initiated an accelerated planning procedure for an area dedicated to residential buildings. The plan covered an undesignated outlying space of 9.500 square meters next to an existing residential area. Objections of an environmental NGO (eNGO, recognized according to national law requirements) against the speedy procedure and omission of an environmental assessment were dismissed with regard to a provision recently inserted into the National Building Code (NBC); it reads as follows:

Zoning plans for housing projects in outlying areas up to 10.000 square meters which are directly neighboring existing residential areas may be developed in an accelerated procedure. To that end the regular environmental assessment and report are dispensable.

After the zoning plan was adopted by the City Council the eNGO filed an action against the plan before the competent Administrative Court of first instance, claiming a declaration of ineffectiveness of the zoning plan. It invokes unlawfulness of the speedy procedure without proper environmental assessment according to European environmental law, namely Art. 3 Paragraphs 3 to 5 Directive 2001/42/EC (Strategic Environmental Assessment Directive = SEA Directive; text see Annex below).

The City as defendant points out that the planning procedure strictly observed the legal requirements of the NBC. By inserting the new provision on accelerated procedure, the legislator of the NBC exercised its respective discretion granted in the Directive for local plans of minor significance for the environment. Granting this discretion respected the procedural autonomy of EU member states. Moreover, the NBC as a parliamentary law could not simply be set aside by the Administrative Court, even if there were a conflict with the Directive.

Questions:

1. Admissibility of the action in your domestic law?
2. Legal standing of the eNGO?
3. Does the zoning plan comply with EU law, particularly Art. 3 SEA-Directive?
4. Does the new NBC provision as such comply with the Directive?
5. Assuming no-compliance of the plan: Which decision can the Administrative Court take?

Scenario 2

The zoning plan was not directly challenged after adoption. However, building permits issued according to the plan by the competent administrative authority were challenged:

Farmer F who runs an isolated farm including pig breeding not far away from the plan area files an action before the Administrative Court for repealing the permits. He argues the approaching residential homes will provoke further restrictions for his farm activities, particularly the pig breeding because of its obvious odour emissions. Such consequences were not considered by the City Council.

Questions:

1. Legal standing of F?
2. Assuming no-compliance of the plan with the SEA-Directive:
 - 2.1 May/Must the Court consider it, although not brought forward by F, ex officio?
 - 2.2 Assuming so: May/Must the Court examine the validity/effectiveness of the plan incidentally as a precondition for the lawfulness of the permits?
 - 2.3 May the Court apply the non-compliance with the Directive **against** the holders of the building permits as private beneficiaries of the plan?

The answers shall primarily be based on EU law, additionally on relevant national law.

Annex: Excerpt SEA Directive 2001/42/EC

Article 1

Objectives

The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.

Article 3

Scope

1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.
2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,
 - (a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or
 - (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

Solution hints:

In July 2023, the government of EUROLAND (EU member state), where many attractive winter sports areas are located, announces generous financial and administrative support for winter sports operations; the industry shall be helped to at least partially compensate for the losses caused by the Corona pandemic.

The operators of ski lifts in many ski resorts acclaim the announcement and want to take advantage of an extended skiing season from mid-November until the end of May; so does an operator (O) of a large-scale lift system in the regional district of SNOWY which is crossed by a mountain river. With regard to the warm weather periods in recent years, however, too little natural snow is expected. To improve snow conditions, O wants to take water from the river and use it for snow-making systems. O therefore applied for a respective permit from the responsible water authority. The regional press reports on the project illustrating the scenery by a photo:



This leads to critical discussions in the public and to various submissions to the water authority, initially with the aim of participating in the procedure, but finally of preventing the project:

- An environmental NGO sees water quality at risk because the chemical additives used in artificial snow production could end up in the river as a result of snowmelt.
- Prof. Persistent (P), a renowned water protection expert residing in the university town 50 km away, considers an impairment of the aquatic ecosystem likely.
- A farmer growing crops and corn (C) is concerned that his neighbouring fields would no longer retain enough moisture.
- Mr. Fisher (F), who runs a trout farm downstream as well as a small hydroelectric power plant with the right to divert water depending on the water level, fears interference with his lawful water uses.
- A local administrative union (AU, a public corporation) formed by several municipalities in the district, which supplies the villages with water from deep wells near the river, considers a reduction in the quantity and quality of the well water to be obvious.

The water authority grants the permit applied for by O, giving the following reasons: With regard to EU law the project does not fall under the EIA Directive and also not under the Habitats Directive, but only under the Water Framework Directive (WFD). Procedurally, even if the Aarhus Convention (AC) is taken into account, there was no reason for public participation. The objections raised on the merits were in part already too unsubstantiated, and in any case all unfounded. The project also served the sustainable development of the region; therefore, even an alleged deterioration of the river water would be justified according to Art. 4 Para 7 WFD.

After unsuccessful objection proceedings, all objectors file an action with the Administrative Court and apply for the permit to be revoked. They claim their standing to bring an action is in any case to be derived from the AC in connection with their legal positions asserted. They regard the administrative authorisation

already unlawful due to procedurally incorrect omission of proper public participation. Furthermore, they invoke violation of the provisions of the WFD, in particular Art. 4 WFD, and their substantive rights.

Questions:

1. Was public participation required by AC and/or EU law? Consequences for A2J rules under AC?
2. Which procedural standard of review applies in general for standing to sue?
Which claimants have standing on the basis of the AC in connection with the WFD or other rights?
 - 2.1 NGO
 - Privileged status as an environmental NGO?
 - only NGOs already recognised at the time of filing the lawsuit?
 - Possible violation of environmental law, particularly Art. 4 WFD?
 - 2.2 Professor P
 - Sufficiently affected? In which legal interests?
 - 2.3 Farmer C
 - Only factual or also legal impairment?
 - Relationship of the administrative authorisation to private rights?
 - 2.4 Fisher F
 - Impairment of a protected legal position?
 - 2.5 Administrative Union AU
 - Subjective right of a public corporation?
 - Concern?
3. Additional question: Could the plaintiffs be precluded in the court proceedings with objections that were not raised or not substantiated in the administrative proceedings? Would corresponding national procedural rules be compatible with AC and EU law?

The answers shall primarily be based on EU law, additionally on relevant national law. Proper transposition (1:1) of the WFD into national law is to be assumed.

Excerpt Aarhus Convention

Article 6

PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions;

...

Article 9

ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest
or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

...

Excerpt WFD

Article 4

Environmental objectives

1. In making operational the programmes of measures specified in the river basin management plans:

(a) for surface waters

(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;

(ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

...

(b) for groundwater

(i) Member States shall implement the measures necessary to prevent or limit the input of pollutants into groundwater and to prevent the deterioration of the status of all bodies of groundwater, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

(ii) Member States shall protect, enhance and restore all bodies of groundwater, ensure a balance between abstraction and recharge of groundwater, with the aim of achieving good groundwater status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

...

7. Member States will not be in breach of this Directive when:

- failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or
- failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities

and all the following conditions are met:

- (a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;
- (b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;
- (c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and
- (d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.