STANOVISKO K POSOUZENÍ VLIVŮ PROVEDENÍ ZÁMĚRU NA ŽIVOTNÍ PROSTŘEDÍ VE SVĚTLE JUDIKATURY NEJVYŠŠÍHO SPRÁVNÍHO SOUDU ČESKÉ REPUBLIKY A EVROPSKÉHO SOUDNÍHO DVORA, ZEJMÉNA PAK JÍM JUDIKOVANÉ ZÁSADY EFEKTIVITY A EKVIVALENCE

AN OPINION ON ENVIRONMENTAL IMPACT ASSESSMENT IN THE LIGHT OF THE PRACTICES OF THE CZECH SUPREME ADMINISTRATIVE COURT AND THE EUROPEAN COURT OF JUSTICE, ESPECIALLY IN THE LIGHT OF PRINCIPLES OF EQUIVALENCE AND EFFECTIVENESS

ONDŘEJ KÁBELA
Právnická fakulta, Masarykova univerzita

Abstrakt

Životní prostředí a jeho ochrana získává v rámci spolupráce členských států Evropského společenství na důležitosti, přičemž bezprostřední význam je přikládán zejména prevenci. S touto snahou souvisí mimo jiné přijetí směrnice č. 85/337/EHS. Autor článku si klade za cíl zkonfrontovat stávající českou právní úpravu stanoviska k posouzení vlivů provedení záměru na životní prostředí s požadavky kladenými výše uvedenou směrnicí ve světle judikatury Nejvyššího správního soudu České republiky a Evropského soudního dvora, zejména pak jím judikované zásady efektivity a ekvivalence.

Klíčová slova

Životní prostředí, směrnice 85/337/EHS, Nejvyšší správní soud, princip ekvivalence, efektivity a loajality, stanovisko pro posouzení vlivů provedení záměru na životní prostředí, Evropský soudní dvůr

Abstract

The environment and its protection gain within the cooperation of the Member States of the European Communities on its relevance. The significance is attached to the prevention. This tendency is clearly illustrated by adopting the Directive 85/337/EEC. The aim of this author's paper is to confront the current Czech legal regulation of an opinion on the environmental impact assessment with the requirements posed by the above mentioned directive in the light

of the practices of the Czech Supreme Administrative Court and the European Court of Justice, especially in the light of principles of equivalence and effectiveness.

Key words

Environment, Directive 85/337/EEC, Supreme Administrative Court, principle of equivalence, effectiveness and loyalty, opinion on the environmental impact assessment, European Court of Justice

Introduction

The objectives of the European Communities (EC) have changed during an ongoing integration process of the democratic European states. Their originally economical scope has been extended by an implementation of new areas of the EC Member States common interest. One of these fields, to which even more importance has been attached to, was the environment. This is on the one hand closely connected with living and health conditions of the Member States inhabitants and on the other hand with natural resources, i.e. with essential elements for establishing a common market (as one of the EC goals).

Since the former Treaties establishing the European Communities did not grant the Council of Ministers any express competences to act in this area by adopting any legally binding documents, a series of legally unbinding five-year action programmes of the EC on the environment came into the world commencing with the year 1973.[1] However, the gap, reflecting the lack of interest in the environmental matters when establishing the EC, was not remedied until the Single European Act (SEA)[2] came into force in 1987 due to which the environmental matters were incorporated within the scope of the Treaty establishing the European Economic Community (EEC Treaty). Since that time, the environmental protection requirements must be integrated into the definition and implementation of the EC policies. The importance of the environmental area was further stressed after the Treaty of Amsterdam amending the EC Treaties came into force in the year 1999, since *"a high level of protection and improvement of the quality of the environment"* has been incorporated among the EC

[1] Former rather informative character of the environmental action programmes changed and they became an important tool for safeguarding the environment and natural resources. Until now, almost 6th environmental action programme has been adopted. See also http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002D1600:EN:NOT (last visited May 10, 2008).

[2] The Czech version of the SEA is available at http://www.euroskop.cz/admin/gallery/30/cfbf4da11eb727c76c0609d834222e01.pdf (last visited May 10, 2008).

objectives.[3] The environment protection itself shall be based on prevention.[4] As already mentioned in the first environmental action programme, the best environmental policy consists not in the subsequent counteracting of the undesirable effects of eventual pollution, but in the contrary in preventing[5] its creation of nuisances at source. For that purpose the Council adopted the Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment on 27 June 1985[6] (EIA Directive).

EIA Directive and the Czech legal order

The overall purpose of the EIA Directive is to prevent any undesirable effects on the environment caused by the public and private projects. For that purpose the EIA Directive requires that *"Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects."* The projects covered by the EIA Directive are then identified in its annexes according to their effect they might have. The core of the EIA Directive[7] constitutes the opinion on the environmental impact assessment (Opinion) issued by the respective Member States authorities. No project which falls within the scope of the EIA Directive should be realized without prior consent reflecting the above mentioned Opinion.

In order to comply with Community law obligations regarding the environmental impact assessment, the Czech Republic adopted the Act No. 100/2001 Coll. on Environmental Impact Assessment (EIA Act). The legal regulation of the Opinion is contained in Art. 10 of the EIA Act. Pursuant to this article, the Opinion is an obligatory part of an administrative procedure which relates to projects that might have adverse impact on the environment. The Opinion constitutes a qualified basis for issuing a final decision in each single case and

[3] Art. 2 of the consolidated EEC Treaty.
[4] Art. 174 sec. 2 of the consolidated EEC Treaty.
[5] To the principle of prevention in Community law see de Sadeleer, N.: *Environmental Principles – From Political Slogans to Legal Rules*, New York: OXFORD University Press, 2005, ISBN 0-19-928092-4, p. 68-69.
[6] Since its adoption, the EIA Directive was amended twice - the Directive 97/11/EC of March 3, 1997 specified the impact assessment procedure terms whereas the main objective of the Directive 2003/35/EC of May 26, 2003 was to contribute to the implementation of the obligations arising under the Aarhus Convention. For more information see http://www.unece.org/env/pp (last visited May 10, 2008) or Stec, S., Casey-Lefkowitz: *The Aarhus Convention: An Implementation Guide*, Geneva: United Nations Publications, 2000, ISBN 92-1-116745-0. Available at http://www.unece.org/env/pp/acig.pdf (last visited May 10, 2008).
[7] *Guidance on EIA – EIS Review (June 2001)*, Luxembourg: Office for Official Publications of the European Communities, 2001, ISBN 92-894-1336-0. Available at http://www.mfcr.cz/cps/rde/xbcr/mfcr/EC_ENVIRO_EIA_EISreview.pdf (last visited May 10, 2008).

therefore no administrative decision may be issued without being provided with such Opinion. In respect to the crucial importance of the Opinion for the EIA procedure itself it should be expected that the Opinion will be of a decisive nature for the consideration whether the final consent of a administrative authority to the project's realization will be granted or not. In reality, however, the administrative authorities may pursuant to the EIA Act reject the requirements stipulated in this Opinion. The Opinion itself therefore does not constitute a legally binding document since the authority may adopt only a certain part thereof into the final decision or may not to take it in its consideration at all. In such cases the authority has to give reasons why it has been proceeded in this way. This subsequent clarification does not change anything on the fact that the process set up by the EIA Act could lead to an erosion of the main purpose of the EIA Act itself, i.e. to adopt the final decision regarding the environmental projects upon an objective and qualified document,[8] or even to a breach of the prevention principle under Community law. The non binding character of the Opinion is, however, not the only problematic part of the Czech legal order dealing with EIA procedure. Other controversial issue is the judicial review of the Opinion.

Czech Supreme Administrative Court and the Opinion

As consequence of a signature of Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) by the EC on 25 June 1998 and its expected approval,[9] the Directive 2003/35/EC amending the EIA Directive was adopted on 26 May 2003. In correspondence with a new amended Art. 10a of the EIA Directive *"Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned […] have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive."* The right to access to a review court hearing is not restricted only to individuals, but shall apply also towards any non-governmental organizations promoting environmental protection.

[8] Motzke, R.: *Životní prostředí ve správním soudnictví – postřehy ze setkání soudců a právníků neziskového sektoru*, In: VIA IURIS. Tábor: PILA, 2008. Available at http://www.viaiuris.cz/index.php?p=msg&id=199 (last visited May 10, 2008).

[9] EC approved the Aarhus Convention on 17 February 2005. The Aarhus Convention became thereby a part of Community law, whereas it is binding also towards the EC authorities. A list of contractual parties to the Aarhus Convention is available at http://www.unece.org/env/pp/ctreaty_files/ctreaty_2007_03_27.htm (last visited May 10, 2008).

The Supreme Administrative Court (SAC) has, as far as the Opinion was concerned, dealt with the issue, whether the Opinion shall be reviewed separately or only in connection with the final decisions of the respective authority based upon this Opinion. The SAC repeatedly confirmed by its judgments[10] that the Opinion is not a decision[11] pursuant to the Art. 65 sec. 1 of Act No. 150/202 Coll., the Code of Administrative Justice (CAJ) since it itself does not interfere with the rights of individuals and therefore it cannot be reviewed separately,[12] but only in proceedings related to the decision upon the Opinion. The SAC argumentation was based on the thoughts that neither EIA Directive nor Aarhus Convention requires reviewing Opinions separately and furthermore, since the administrative authorities are not bound by the Opinion, it would be useless to review an Opinion separately if it is not eventually used by administrative authorities. This SAC argument, however, is at least disputable, since on the other hand the SAC, when deciding about the contestability of the Opinion, referred to Art. 75 sec. 2 of the CAJ upon which *"[i]f the binding grounds for the decision under review were another act of the administrative authority, the court likewise reviews its lawfulness together with the complaint unless the court itself is bound by it and unless this law enables the complainant to contest such an act by means of an independent administrative justice complaint."* This would mean that the Opinion shall be of a binding nature, what, however, the SAC rejected at the same time. The unbinding character is obvious also from the wording of the Art. 10 sec. 3 of the EIA Act itself. The opinion constitutes only a special basis for the authority final decision. As regards the final decisions themselves, the SAC qualified in its judgment of June 14, 2007, No. 1 As 39/2006 - 55 some important conditions which the lower courts must take into account when the final administrative decision upon the Opinion is at issue – the administrative action must be granted a suspensive effect in order to secure fair, equitable and timely procedure as required by the EIA Directive as well as the Aarhus Convention.

Preliminary question

[10] Judgment of June 14, 2006, No. 2 As 59/2005-136, judgment of June 14, 2007, No. 1 As 39/2006-55. Available at http://www.nssoud.cz/ (last visited May 10, 2008).
[11] The legal nature of a decision was dealt also with the Czech Constitutional Court finding of May 25, 1999, No. IV. ÚS 158/99 und Constitutional Court decision of November 11, 2006, No. I. ÚS 637/06. Available at http://www.concourt.cz/ (last visited May 10, 2008).
[12] This fact leads to an exclusion of the Opinion itself from a judicial review.

In later cases of June 26, 2007, No. 4 As 70/2006-72 and of August 29, 2007, No. 1 As 13/2007-63, the SAC must face the proposals to submit preliminary question to the European Court of Justice (ECJ) whether the complainants are entitled pursuant to Art. 10a of the EIA Directive and Art. 9 sec. 2, 3 and 4 of the Aarhus Convention to claim a separate review of the Opinion directly and immediately, i.e. not only in connection with the final administrative decision. The SAC, however, in none of these cases found the reason for submitting the preliminary question to the ECJ and the proposals rejected as causeless. The SAC made reference to its constant judicial practice regarding the Opinion, whereas it considered that *"the interpretation of Art. 10a of the Directive 85/337/EEC as well as Art. 9 sec. 2, 3 and 4 of the Aarhus Convention is absolutely obvious and clear and therefore without any reasonable doubts."*[13] The SAC based its reasoning on the fact that the laws of some of other Member States also do not allow separate contestability of the Opinion.[14] Furthermore the SAC referred the relevant part of Art. 10a of the EIA Directive which explicitly stipulates that: "*Member States shall* determine *at what stage the decisions, acts or omissions may be challenged.*" As consequence thereof, the SAC, applying the Community law doctrine of *act clair*,[15] found itself for not being obliged to refer the preliminary question to the ECJ. However, the doctrine of *act clair* having its origin in French administrative law and being implemented into Community law by ECJ[16] is not always as clear as it seems to be. This is caused due to the fact that the national courts of the Member States may not interpret it in the same way what subsequently *"may lead to an incorrect application of Community law and, for the individual concerned, a denial of justice."*[17] Moreover, the praxis of the national courts of the Member States and especially those of the ECJ is rather flexible, i.e. the interpretation of that what the *act clair* is considered to be is changing in time.[18] The omission to refer a preliminary question to the ECJ pursuant to Art. 234 EC Treaty may therefore cause a misinterpretation of Community law by the SAC and subsequently its breach and possible

[13] SAC judgment of June 26, 2007, No. 4 As 70/2006-72, p. 5. Available at http://www.nssoud.cz/ (last visited May 10, 2008).
[14] Rubel, R.: *General Report: National road planning and European environmental legislation – A Case Study*., Leipzig: Druckerei Roland Koch, 2006, p. 28. Available at http://www.juradmin.eu/colloquia/2006/Generalbericht-englisch.pdf (last visited May 10, 2008).
[15] Bobek, M., Komárek, J., Passer, J., Gillis, M.: *Předběžná otázka v komunitárním právu,* Praha: LINDE PRAHA, a.s., 2005, ISBN 80-7201-513-3, p. 227-231.
[16] ECJ judgment of March 27, 1963 Da Costa en Schaake NV and Others (C 28-30/62) and ECJ judgment of October 6, 1982, CILFIT Srl. (C 283/81).
[17] Steiner, J., Woods, L., Twigg-Flesner, Ch.: *Textbook on EC Law,* 8th edition, New York: OXFORD University Press, 2003, ISBN 0-19-925874-0, p. 566.
[18] Bobek, M., Komárek, J.: Koho vážou rozhodnutí ESD o předběžných otázkách? Úvahy o úloze evropské judikatury v českém právním řádu, In: Právní rozhledy 19/2004 (pp. 697-706) and 20/2004 (pp. 752-757).

liability of the Czech Republic under infringement proceedings initiated[19] by the European Commission.[20]

Principles of equivalence and effectiveness

The principle of equivalence and effectiveness are closely connected with the principle of the procedural autonomy of the Member States and protection of the rights which individuals acquire under Community law. According to these principles, the principle of the procedural autonomy of the Member States will apply, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).[21] Both principles play therefore a key role by answering the question whether an acting of a Member State's authority, in particular the SAC, is in breach with Community law which is of a crucial importance in context of the ECJ judgments[22] focusing on the correct application of Community law by the national courts.

A leading judgment in this context is that in case Kühne & Heitz.[23] In this judgment the ECJ decided that even if *"Legal certainty is one of a number of general principles recognized by Community law"* and therefore "*Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final in that way"*[24] *"an administrative body [has] an obligation to review a final administrative decision, where an application for such review is made to it, in order to take*

[19] See the case of Commission of the European Communities v. Italian Republic (C-129/00) initiated by the Commission due to the fact that a Member State's courts repeatedly decided a particular legal issue in conflict with Community law - ECJ judgment of December 9, 2003.
[20] The European Commission already addressed the Czech Republic a reasoned opinion as of June 27, 2007, No. 2006/2271, (2007)2927 concerning the implementation of the EIA Directive. Moreover, a Czech environmental organization Ekologický právní servis (Environmental Law Service) filed its own complaint to the European Commission against the Czech administrative authorities for breaking the EIA Directive. See http://www.eps.cz/ (last visited May 10, 2008). ON the other hand, the Czech Republic is not the only Member State which must face a reasoned opinion of the Commission for non-conformity of national measures with the EIA Directive. See Seventh Annual Survey an the implementation and enforcement of Community environmental law 2005, document is available at http://ec.europa.eu/environment/law/pdf/7th_en.pdf (last visited May 10, 2008)
[21] ECJ judgment of September 19, 2006, i-21 Germany GmbH (C-392/04), Arcor AG & Co. KG (C-422/04) v. Bundesrepublik Deutschland, para. 57.
[22] ECJ judgment of January 13, 2004, Kühne & Heitz v. Productschap voor Pluimvee en Eiren (C-453/00), ECJ judgment of September 19, 2006, i-21 Germany GmbH (C-392/04), Arcor AG & Co. KG (C-422/04) v. Bundesrepublik Deutschland, ECJ judgment of September 30, 2003, Gerhard Köbler v. Republik Österreich (C-224/01), ECJ judgment of March 16, 2006, Rosmarie Kapferer v. Schlank & Schick GmbH (C-234/04).
[23] ECJ judgment of January 13, 2004, Kühne & Heitz v. Productschap voor Pluimvee en Eiren (C-453/00).
[24] Ibid, para. 24.

account of the interpretation of the relevant provision given in the meantime by the Court where

- under national law, it has the power to reopen that decision;

- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;

- that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and

- the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court.“[25]

The ECJ therewith explicitly recognized the possibility of re-opening of a final administrative decision which, notwithstanding that it was subsequently confirmed by a national court having failed to refer the issue to the ECJ, is in breach with Community law, provided that all conditions established by the ECJ are fulfilled[26] and the procedural rules of the particular Member States allow this re-opening proceedings at the same time.[27]

Conclusion

As mentioned above, the Czech EIA procedure pursuant to the EIA Act does not fully comply with the EIA Directive, since the prevention principle is diminished. The SAC, however, in the cases where the EIA procedure, in particular the Opinion and subsequently the prevention principle itself, was in question, instead of referring the preliminary question to the ECJ, considered the cases as *actes claires*. However, as shows the ECJ practice, an interpretation of a particular case being held for an *act clair* is not unchangeable and may differ in time. The way how the SAC proceeded in respective situations may therefore be considered, with regard to the questionable legal nature of the Opinion as well as its contestability before the Czech

[25] Ibid., para. 28.

[26] Critically Bobek, M.: *Consequences of Incompatibility with EC Law for Final Administrative Decisions and Final Judgments of Administrative Courts in the Member States*, the Colloquium of the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union, p. 20. Document is available at http://www.juradmin.eu/colloquia/2008/Czech_Republic.pdf (last visited May 10, 2008).

[27] The application of the conditions established in the judgment Kühne & Heitz are restricted by the principle of procedural autonomy of the Member States, since *“Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so enable it to remedy an infringement of Community law by the decision at issue.”* See ECJ judgment of March 16, 2006, Rosmarie Kapferer v. Schlank & Schick GmbH (C-234/04), para. 21.

national courts, as omission to refer the preliminary question to the ECJ, i.e. as breach of Community law which may lead to a liability of the Czech Republic under the infringement proceedings. Moreover, provided that the incorrect acting of the SAC would by confirmed (e.g. by the ECJ within infringement proceedings), i.e. the SAC failed to refer a question or decided in breach of the EIA Directive (eventually Aarhus Convention) even without breaching its obligation to refer, the principles of loyalty together with the principles of equivalence and effectiveness might apply. This would mean in the context of the current EIA procedure a potential uncertainty for the participants since, even if the consent of an administrative authority was granted and it became valid and effective, its finality might be under certain conditions contested in respect of the "appellate theory"[28] of the ECJ. A subsequent liability of the Czech Republic for the caused damages would be indisputable.

[28] Komárek, J.: *Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order*, In: Common Market Law Review 42, The Netherlands: Kluwer Law International, 2005, p. 9-34.

Literature

I. Publications

[1] Bobek, M.: *Consequences of Incompatibility with EC Law for Final Administrative Decisions and Final Judgments of Administrative Courts in the Member States*, the Colloquium of the Association of the Councils of State and the Supreme Administrative Jurisdictions of the European Union, pp. 20.

[2] Bobek, M., Komárek, J.: Koho vážou rozhodnutí ESD o předběžných otázkách? Úvahy o úloze evropské judikatury v českém právním řádu, In: Právní rozhledy 19/2004 (pp. 697-706) and 20/2004 (pp. 752-757).

[3] Bobek, M., Komárek, J., Passer, J., Gillis, M.: *Předběžná otázka v komunitárním právu*, Praha: LINDE PRAHA, a.s., 2005, pp. 517, ISBN 80-7201-513-3.

[4] *Guidance on EIA – EIS Review (June 2001)*. Luxembourg: Office for Official Publications of the European Communities, 2001, pp. 29, ISBN 92-894-1336-0.

[5] Komárek, J.: *Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order*, In: Common Market Law Review 42, The Netherlands: Kluwer Law International, 2005, pp. 25.

[6] Motzke, R.: *Životní prostředí ve správním soudnictví – postřehy ze setkání soudců a právníků neziskového sektoru*, In: VIA IURIS. Tábor: PILA, 2008, pp. 2.

[7] Rubel, R.: *General Report: National road planning and European environmental legislation – A Case Study*. Leipzig: Druckerei Roland Koch, 2006, pp. 52.

[8] Stec, S., Casey-Lefkowitz: *The Aarhus Convention: An Implementation Guide*. Geneva: United Nations Publications, 2000, pp. 198, ISBN 92-1-116745-0.

[9] Sadeleer, N.: *Environmental Principles – From Political Slogans to Legal Rules*, New York: OXFORD University Press, 2005, pp. 433, ISBN 0-19-928092-4.

[10] Steiner, J., Woods, L., Twigg-Flesner, Ch.: *Textbook on EC Law*, 8th edition, New York: OXFORD University Press, 2003, pp. 690, ISBN 0-19-925874-0.

II. Judgments

<u>1. European Court of Justice:</u>

[1] Judgment of March 27, 1963, Da Costa en Schaake NV and Others (C 28-30/62).

[2] Judgment of October 6, 1982, Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health (C 283/81).

[3] Judgment of September 30, 2003, Gerhard Köbler v. Republik Österreich (C-224/01).

[4] Judgment of December 9, 2003, Commission of the European Communities v. Italian Republic (C-129/00).
[5] Judgment of January 13, 2004, Kühne & Heitz v. Productschap voor Pluimvee en Eiren (C-453/00).
[6] Judgment of March 16, 2006, Rosmarie Kapferer v. Schlank & Schick GmbH (C-234/04).
[7] Judgment of September 19, 2006, i-21 Germany GmbH (C-392/04), Arcor AG & Co. KG (C-422/04) v. Bundesrepublik Deutschland.

2. Supreme Administrative Court of the Czech Republic:

[1] Judgment of June 14, 2006, No. 2 As 59/2005-136.
[2] Judgment of June 14, 2007, No. 1 As 39/2006-55.
[3] Judgment of June 26, 2007, No. 4 As 70/2006-72.

3. Constitutional Court of the Czech Republic:

[1] Finding of May 25, 1999, No. IV. ÚS 158/99.
[2] Decision of November 11, 2006, No. I. ÚS 637/06.

III. Internet sources

[1] www.concourt.cz
[2] www.curia.eu
[3] www.ec.europa.eu/environment/law
[4] www.eps.cz
[5] www.eur-lex.europa.eu
[6] www.euroskop.cz
[7] www.juradmin.eu
[8] www.nssoud.cz
[9] www.mfcr.cz
[10] www.unece.org/env/pp

IV. Other sources

[1] Consolidated EEC Treaty
[2] Single European Act

Contact - email:

Ondrejkabela@seznam.cz