PUBLIC PARTICIPATION IN THE LIGHT OF ESPOO AND AARHUS CONVENTIONS: THE PRACTICE OF LITHUANIAN COURTS

29-09-2015, VILNIUS

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"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

(Aarhus Convention, Art. 1)

Law on Environmental Protection, Art. 10

- *"Foreign citizens and stateless persons must abide by the duties of the citizens of the Republic of Lithuania as established by this Law and shall hold all the rights of the citizens of the Republic of Lithuania as stipulated by this Law, unless other laws of the Republic of Lithuania provide otherwise."*

Public participation in the environmental impact assessment (EIA) of the proposed economic activity:

- **Aarhus Convention, Art. 6 para. 2:**

“The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner […]”.

- **Procedure description *Information and Public Participation in the Process of the EIA of the Proposed Economic Activity*:**

Procedure of providing information to the public and participating in the process of the EIA consists of:

1. Providing information on the EIA:

1.1. Information of the public of the adopted screening decision;

1.2. Information of the public of the developed EIA programme;

2. Public hearing regarding EIA report;

3. Information of the public of the EIA decision adopted.

Aarhus Convention, Art. 2 para. 5: *"The public concerned" means* ***(1) the public (2) affected or likely to be affected by, or having an interest in****, the* ***(3) environmental decision-making****; for the purposes of this definition,* ***non-governmental organizations (i) promoting environmental protection*** *and* ***(ii) meeting any requirements under national law*** *shall be deemed to have an interest."*

Law on Environmental Impact Assessment of the Proposed Economic Activity, Art. 1, para. 10:

"Public concerned *shall mean the* ***(1) public (2) affected or likely to be affected by, or having an interest in, (3) the proposed economic activity.*** *According to this definition,* ***the associations*** *and other public legal persons (with the exception of the legal persons established by the State or a municipality or institutions thereof)* ***(ii) established in accordance with the procedure laid down by legal acts*** *and* ***(i) promoting environmental protection*** *shall in any case be held the public concerned."*

Supreme Administrative Court of Lithuania (SAC) (Summary of the practice, 2012):

- *International agreements are an essential part of the Lithuanian administrative law applied in the specific case categories. The 1951 Convention relating to the Status of Refugees, **Convention on the Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) [...]** are among the most frequently applied international agreements.*

- The Convention is mostly applied in disputes regarding spatial planning, constructions, the EIA.

ACCESS TO JUSTICE

Aarhus Convention Art. 9 para. 2: *Each Party shall […] 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 […].*

Subjects of the right of access to justice:

*** Natural person**

*** Legal person**

****NGO**

LEGAL STANDING OF NGO's (1). CONDITIONS

1) **Established in accordance with** the procedure laid down in **national legislation**;
2) Shall be "**Public concerned**" – SAC gives a detailed explanation of the concept "public concerned", relies on the Aarhus Convention Implementation Guide;
3) Shall challenge an act or omission only if **such right is enshrined in national legislation**, for e.g., in the environmental area acts and omission could be challenged by environmental NGO.

LEGAL STANDING OF NGO's (2). CASE LAW

- The Applicant (Pagiriai Village Community Center) challenged the EIA decision, adopted by the competent authority (Kaunas REPD), to permit the activity of anhydrite mine (shaft type). Applicant explained that it represents rights and interest of the members of Association. The Community Center is established according to the Law of Associations. Moreover, the defense of public interest was pointed as the second ground of access to justice.
- **The court of first instance** noted that Pagiriai Village Community Center can not represent the members of the Community, its procedural status is "the Applicant", not "the Representative". However, as the Applicant noticed correctly, Pagiriai Village Community Center can exercise its right to defend public interest but only in the scope of environmental issues.

The SAC:

- With respect to the national legislation and to the nature of the challenged acts, the Applicant is the "public" as it is enshrined in the EIA Law. It should be noted, that during the implementation of EIA process the interests of the association and of its members may coincide. Therefore, by challenging the EIA decision Association defends not only its own interests but also the interests of its members.
- Moreover, the Applicant rightly notes that the right of access to justice, the right to defend public interest, is guaranteed by the Aarhus Convention. However, it should be stressed that Art. 9 (2) of the Aarhus Convention <u>is applied directly</u> only in respect of those decisions, acts, and omission, which fall within the scope of Art. 6 of the Convention.
- The Court concluded that the Court of first instance applied incorrectly procedural and substantive national legal norms while evaluating the Applicant's right of access to justice.

(23 February 2012 SAC ruling, Case No. A492-1231/2012)

LEGAL STANDING OF NGO's (3). CASE LAW

The Applicants - B. B., A. B., A. A., Association "Gintarinė tiesa", Association „Community Center of Atkopčio village Center of Klaipėda Region" – challenged the EIA decision permitting the construction of 330 kV Klaipėda-Telšiai overhead power line.

The defendant challenged the right of Association "Gintarinė tiesa", Association „Community Center of Atkopčio village Center of Klaipėda Region" to access justice. It was stated that these subjects do not have a "sufficient interest" to take part in the proceedings. The Applicants did not provide any evidence to support their activities in the field of environment.

The court of first instance supported the position of the defendant and concluded that Associations did not prove the existence of the elements, listed in Art. 9 para. 2 of the Aarhus Convention.

The SAC: disagreed with the court of first instance regarding this issue. Noted that all elements necessary to prove the legal standing of these Association were present in the case.

(14 March 2011 SAC ruling, Case No. A^{822}-681/2011)

Element of “**Public concerned**” (1)

The Applicant (X Community Center) challenged acts of the competent authority (Environmental Protection Agency) which were addressed to the prepared of the EIA documents (a request to supplement the EIA report and to repeat the public hearing) and the decisions taken during the public hearing.

The court of first instance refused to accepted the complaint, because the dispute falls outside the competence of administrative courts. The court noted that Applicant complains about the intermediate documents, acts of the EIA procedure which do not have any legal binding effect on the Applicant.

Element of **“Public concerned”** (2)

The SAC: highlighted that public authorities adopt different types of decisions and, as the Court has already ruled before, a person can only challenge an administrative act, which is adopted in the public administration sphere and which affects rights and interests of that person. The SAC added, that public authority can take various acts (procedural decisions, ect.) during the procedure (EIA) which are not “final decisions”. For this reason, in most cases, such decisions do not raise any legal consequences. However, the Applicant right to seek for the review of intermediate acts of the procedure is not constrained. This could be done during the challenge of the final decision of the procedure.

(28 May 2014 SAC ruling, Case No. AS552-454/2014)

Public participation in the EIA. Case law

Aarhus Convention Art. 6 para. 2

Public concerned shall be informed in adequate, timely and effective manner

330 kV Klaipėda-Telšiai overhead power line case

(14 March 2011 SAC ruling, Case No. A^{822}-681/2011)

The Applicants - B. B., A. B., A. A., Association "Gintarinė tiesa", Association „Community Center of Atkopčio village Center of Klaipėda Region" – challenged the EIA decision permitting the construction of 330 kV Klaipėda-Telšiai overhead power line.

The Applicants argue that there was:

1. A lack of public information:

1.1. The owners of the neighboring land plots had to get written information about the planned economic activity personally;

1.2. The exact route of the power line had to be determined during the preparation of the EIA programme and announced to the public.

2. Insufficient public participation:

2.1. The public was not informed about the possibilities to comment on the protocol of the public hearing;

2.2. Maps and drawings of the planned economic activity were available only in the electronic form (were uploaded on the website).

2.3. The competent authority did not provide written answers to the comments received from the public.

The court of first instance: rejected the complaint. It was concluded that the procedures of public information and public participation were not breached. Court named various newspapers where information about prepared EIA programme, spatial planning documents, the terms for public to provide comments, the time and venue of public hearings was provided. It was noted that the defendant explained in writing for the public concerned that individual informing is not efficient in this case as it is more than couple of hundreds land plots owners. The competent authority chose the alternative way to provide information – public meeting to discuss the EIA report. The court concluded that public had all possibilities to participate in the EIA process and was informed according to the requirements set in national legislation.

The SAC: rejected the appeal. The court reaffirmed that the court of first instance analysed in details all procedures of public information and participation in the EIA process. The Applicants did not provide any arguments supporting their statements that possible breaches of the EIA procedure had negative effect on their rights and interest or on the environment. The sole statements that people do not agree that part of the power line would cross their land plots is not sufficient.

Public participation in the EIA. Case law

Aarhus Convention Art. 6 para. 6(e)

Information provided to the public concerned should include *an outline of the main alternatives studied*

Anhydrite mine case (23 February 2012 SAC ruling, Case No. A[492]-1231/2012; (23 October 2013 SAC ruling, Case No. A[525]-1745/2013)

The Applicant (Pagiriai Village Community Center) challenged the EIA decision, adopted by the competent authority (Kaunas REPD), to permit the activity of anhydrite mine (shaft type).

Among other arguments, Applicant stated that this activity is planned to be implemented very near the living area, no other location alternatives were evaluated.

The court of first instance rejected the complaint. Applicant's arguments (relating to environmental issues) were summarized and Court concluded that none of the arguments are motivated, the Applicant did not provide any evidence to support its propositions.

The SAC: it is clear from the complaint that Applicant questions the legality of the Decision, because of: the lack of evaluation of possible alternatives; only three sources of air pollution – auto repair, garage, accumulator room - were taken into consideration (the Applicant named many others); the alternatives of anhydrite transportation by rail or road transport were not evaluated an so on. The court of first instance did not analyse these circumstances.

The case was return to the court of first instance to repeat the analysis.

(23 February 2012 SAC ruling, Case No. A^{492}-1231/2012)

The court of first instance rejected the complaint repeatedly. Applicants' claims regarding the lack of alternatives' evaluation are ungrounded. Court stated, that Decision included all necessary elements, listed in the national legislation. Moreover, the Applicant did not challenged any acts of the participants of the EIA procedure (agreed with all the conclusions provided by the participants of the EIA).

The SAC: left the ruling of the court of first instance unchanged. The court noted that the scope of the EIA procedure was defined in the EIA programme. The information regarding location, transportation alternatives was provided in the programme. Moreover, the need to analyse technology, water supply, wastewater treatment alternatives was expressed in the programme. All possible alternatives were analysed in the EIA report. (23 October 2013 SAC ruling, Case No. A^{525}-1745/2013)

Wind farm parks case (27 January 2014 SAC ruling, Case No. A[492] -1890/2013)

The Applicant – Association Village Community "Lumpėnų strazdas" – challenged the EIA decision, adopted by the competent authority (Klaipėda REPD), to permit the installation and exploitation of wind farm parks in elderships of Pagėgiai and Lumpėnai of the Pagėgiai municipality. The Applicant argued the lack of examination of possible alternatives.

The court of first instance rejected the complaint. Firstly, the court commented upon Applicants' *locus standi* and confirmed Applicants' right to access justice according to the Aarhus Convention. Secondly, the court reminded that four technological alternatives were analysed in the EIA report: different total capacity of wind farm parks', different location of smaller and bigger capacity wind farms.

The SAC: rejected the appeal. The court confirmed that from written documents provided into this case it is obvious that alternatives were analysed. The evaluation of different technological alternatives and zero alternative are described in the EIA report. National legislation does not specify the exact number of alternatives that should ne analysed in certain case. Depending on the planned economic activity there should be evaluated several alternatives: location, time, technological, means of mitigating negative effect and so on.

The court also commented on Applicant's arguments that a due account of public comments was not taken in the decision. It was noted, that EIA procedures were carried out according to the requirements enshrined in national legislation. The public used its right to participate in the process – provided its written comments and opposition to the proposed economic activity. Moreover, the representatives of the public attended the public hearing, expressed their concerns. All other participants of the EIA process gave their consent to implement planned activity. Public comments were evaluated, reasoned evaluation of public comments were sent to the competent authority. The court could not agree with the Applicant that public participation right was restricted during the EIA process solely because the prepared of the EIA documents and the competent authority did not accept the arguments provided by the public.

Public participation in the EIA. Case law

Aarhus Convention

Art. 6 para. 8: *it shall be ensured that in the decision due account is taken of the outcome of the public participation;*

Art. 6 para. 9: *the text of the decision along with the reasons and considerations on which the decision is based shall be made accessible to the public*

Distribution warehouses and logistics case (2 June 2011 SAC ruling, Case No. A[492]-2371/2011)

Applicant challenged screening decision adopted by the competent authority (Vilnius REPD) which confirmed that the **proposed economic activity** – complex of distribution warehouses and logistics – **is subject to the EIA.**

Applicant argued that this unfavorable decision has no objective grounding, decision was not motivated and was based only on the request received from the local community (Association of Salininkai community).

The court of first instance: rejected the complaint.

The SAC: rejected the appeal. The court did not support arguments of the Applicant that interests of Salininkai community should not be taken into consideration while evaluating the need of EIA for planned economic activity. Despite the fact that members of the community live in the gardeners communities, the factual situation shows that most of them live here on the permanent basis. The possible negative effect on these peoples' health and the environment should be evaluated (Vilnius city municipality, as the participant of the procedure, also informed about possible negative effect on human health and environment of this economic activity).

Waste treatment plant case (2 June 2014 SAC ruling, Case No. A822-1472/2014)

The Applicant – Association "Lazdijai Community" challenged the screening decision adopted by the competent authority (Vilnius REPD) which confirmed that the **proposed economic activity** – construction and operation of the mechanical biological treatment plant of municipal waste – **is not a subject to the EIA.**

Applicant argued that this decision has no objective grounding, decision is not motivated. The Government did not ensure effective public participation. The public is convinced that this place will become a waste dump for radioactive and other dangerous waste. The public has no information about the mechanism to be used in this activity and the effect on the environment of this planned economic activity.

The court of first instance rejected the complaint. The court commented upon the factual situation and noted that Vilnius Public Heath Center opposed to the prepared screening decision; Confederation of Lithuania's United Democratic Movement, Environmental Committee of Vilnius region inhabitants' Communities, the representative of Trakų Vokė required to reconsider prepared screening decision. The competent authority informed the public about the public hearing (to reconsider screening decision) to be held in the premises of competent authority. The preparer of the documentation provided written evaluation of public comments and proposals received from other participants to the competent authority. Vilnius Public Heath Center agreed with the prepared screening decision (after certain amendments). <u>The court highlighted that the Applicant did not participated in public hearing, did not provide any written comments – in general – did not exercise its right to public participation</u> although Applicant had all possibilities to do so.

The SAC: satisfied the appeal partially. The SAC supported arguments of the court of first instance that the public had all possibilities to participate in the screening process. Information to the public was provided according to the requirements of the national legislation. The public did not use its right to get additional information, to participate in the screening process. Taken this into consideration, there are no grounds to conclude that Art. 6 para 8 of Aarhus Convention was breached. However, the fact that public did not use its right to participate in the process did not mean the restriction of its right to access justice – to challenge screening decision. The court concluded that, indeed, the screening decision was not motivated. The decision was annulled.

Peat deposit case (17 July 2014 SAC ruling, Case No. A556-1424/2014)

Applicants (Lithuanian Ornitological Society, Paluknis Community "Diemedis", AC "Merkys") **challenged screening decision** adopted by the competent authority (Vilnius REPD) which confirmed that the **proposed economic activity –** the use of peat deposit **– is not a subject to the EIA.**

Applicants argued that screening decision is not reasoned; the attention was payed to the fact, that the area of the planned economic activity is valuable from the ornothological side (protected, endangered bird species, amphibians, plants).

The court of first instance: rejected the complaint.

The SAC: satisfied the appeal partially. Court indicated that screening decision consists of detailed description of the planned economic activity. However, the reasoning regarding the effect of the activity on the fauna and flora is absent from the decisions, the full scale of the activity and the effect on the environment was not evaluated.

The court highlighted that according to the national legislation, the competent authority has to take a reasoned screening decision. The competent authority does not have an unlimited discretion to decide if the planned economic activity is a subject of the EIA. According to the facts of this case, the administration of Trakai region municipality, the eldership of Paluknis, Lithuanian Ornitological Society raised their doubts (*in writing*) regarding the implementation of this planned economic activity. The public concerned and the local government did not support the activity because of its negative effect on humans and the environment. The court noted that it is not enough to mention in the decision that comments from the public were received.

The screening decision was annulled.

THANK YOU FOR YOUR ATTENTION!

"Every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations."