

**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

Faculty of Law, Masaryk University

FILIP KŘEPELKA

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Introduction

The objectives of the European Communities (EC) have changed during an ongoing integration process of the democratic European states. This development reflects the aim of the Member States as well as the European Communities to achieve / secure a sustainable development which is inter alia determined by the environmental protection. This was the main impetus, why the gap, reflecting the lack of interest in the environmental matters when establishing the European Communities, was remedied by the Single European Act in 1987 due to which the environmental matters were incorporated within the scope of the Treaty establishing the European Economic Community. Since that time, the environmental protection requirements must be integrated into the definition and implementation of the European Communities policies, whereas a fundamental of that protection constitutes a prevention principle. For that purpose, the European 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 (EIA Directive).

Opinion on the environmental impact assessment

The EIA Directive was transposed into the Czech legal order by Act No. 100/2001 Coll., on Environmental Impact Assessment (EIA Act). The purpose of the EIA Directive and subsequently the EIA Act is to prevent any undesirable effects on the environment caused by the public and private projects specified in the annexes to these documents. The core of the screening process set up upon both documents represents an opinion on the environmental impact assessment (Opinion). No project which falls within the scope of the EIA Directive / EIA Act should be realized without prior consent reflecting the above mentioned Opinion. Pursuant to the Czech regulation, however, an administrative authority granting the final consent may reject the requirements stipulated in this Opinion. The Opinion itself therefore does not constitute a legally binding document. This results in an erosion of the main purpose of the EIA Act, i.e. adopting the final decision regarding the environmental projects upon an objective and qualified document, and moreover in a breach of the prevention principle under Community law.

Praxis of the Czech Supreme Administrative Court

The legal nature of the Opinion has therefore become a subject to interpretation of the Czech Supreme Administrative Court (SAC). The SAC held that the Opinion is not a decision pursuant to the Act No. 150/202 Coll., the Code of Administrative Justice since it itself does not interfere with the rights of individuals and therefore it cannot be reviewed separately, but only in proceedings related to the decision upon the Opinion. On the other hand, however, the SAC following the EIA Directive qualified in its judgment of June 14, 2007, No. 1 As 39/2006 an important condition for proceedings which deal with the Opinion - the administrative action must be granted a suspensive effect in order to secure fair, equitable and timely procedure.

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, considered the interpretation of the above mentioned articles in both cases to be *act clair* and subsequently denied the motions.

Principles of equivalence and effectiveness

The answer on the question whether an acting of a Member State's authority, in particular the SAC, is in breach with the Community law is of a crucial importance in context on the one hand of the principles of equivalence and effectiveness which are closely connected with the procedural autonomy of the Member States and on the other hand of ECJ judgments focusing on the correct application of Community law by the national courts. This is due to a fact that the ECJ explicitly recognized in its judgment of January 13, 2004, *Kühne & Heitz v. Productschap voor Pluimvee en Eieren (C-453/00)* 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 and at the same time the procedural rules of the particular Member States allow this re-opening proceedings.

Conclusion

As mentioned above, the Czech EIA procedure pursuant to the EIA Act does not fully comply with the EIA Directive. The SAC, however, hold the conformity for unquestionable using the doctrine of *act clair*. 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 may therefore be considered 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 be confirmed (e.g. by the ECJ within infringement proceedings) the principles of loyalty together with the principles of equivalence and effectiveness might apply. This would mean that already valid and effective decisions regarding the EIA procedure might be under certain conditions contested in respect of the "appellate theory" of the ECJ. A subsequent liability of the Czech Republic for the caused damages would be indisputable.

Contact – email:

Ondrej.kabela@seznam.cz