

Dear Committee!

The Polish party maintains its view on compliance of the regulations with the scope of the Water Law, expressed in writing in the correspondence in the case C-146. In making use of the option provided for by the hearing, I would like to draw the Committee's attention to the following issues.

I. Parties to the proceeding

As a preliminary remark, it is worth to emphasize that identifying the parties to the proceeding on granting the water permits constitutes one of the conditions for correctness of an administrative proceeding. Not awarding the status of a party against the provisions of the proceeding law carries far-reaching legal consequences, including the need for repeating the administrative proceeding, even the one that ended with the decision, which has already embedded in the legal system.

Pursuant to Article 401(1) of the Water Law currently in force, the party to the proceeding in the cases pertaining to water permits is the applicant and the entities affected by the intended use of water or entities in the range of impact of the water devices planned to be used.

II. Judgment of the Supreme Administrative Court

Judgments of the Supreme Administrative Court (SAC) are binding in a specific case for all lower courts and additionally constitute a significant component of legal interpretation considered by the courts of lower instances, which usually refer to the SAC judgments. The SAC position refers to the constitutional hierarchy of the sources of law, according to which the international agreements ratified upon prior consent expressed by means of an act (including the EU legislation, which is the special case) prevail in the Polish legal system over the laws. However, taking into account the practice of the voivodeship regional courts to refer into the SAC case-law, any and all doubts of the Communicant on absence of consistent judging in the administrative courts should be deemed purely theoretical.

The Polish party pointed also out at the amendments introduced by the Act of 30 March 2021 amending the Act on access to information on the environment and environmental protection, public participation in environmental protection and on environmental impact assessments and certain other acts (Journal of Laws item 784), which introduced Article 402(2) to the Water Law. In the existing legal status, this Article ensures the relevant access to justice to the members of the public in the process of issuing the water permit.

III. Public participation and access to justice

As a matter of principle, the process of issuing the development consent in Poland consists in at least two tiers (tier 1: decision on environmental conditions, tier 2: this decision underlies the development consent).

Public participation is provided for at the tier, at which all variants are still possible, i.e. at the stage of issuing the decision on environmental conditions. The follow-up decision must comply with the decision on environmental conditions. This is at the same time the stage, at which the concept of the project must be specified enough to ensure that the environmental

impact assessment is reliable. The subsequent decisions issued for the specific investment project must take the content of the decision on environmental conditions into account. In the case of a change of the concept in the scope assessed in the decision on environmental conditions, the environmental impact assessment must be repeated. This forces the investor to return to the proceeding on issuing another decision on environmental conditions.

The correspondence of the State Party provides the regulations – Article 86 or recently added Article 86c and Article 86g of the Act of 3 October 2008 on access to information on the environment and environmental protection, public participation in environmental protection and on environmental impact assessments i.e. the EIA Act, in detail.

An environmental organisation, similarly as the party to the proceeding on issuing the decision on environmental conditions, has the right to appeal to the administrative court against non-compliance of the follow-up decision (development consent) with the decision on environmental conditions.

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Let's translate these rules onto the aspects of issuing the water permits.

As a matter of principle, the environmental issues in the procedure of issuing the water permit constituting the project likely to have significant effects on the environment are decided at the stage of decision on environmental conditions for such project. This tier involves also public participation, including of non-governmental organisations. In the opinion of the Polish authorities, this cannot be deemed a restriction of rights of these organisations and is only the result of permissible (por. Article 2(2) of the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment – hereinafter: “EIA directive”) division of the process of issuing the permit in this case into two tiers – i.e. issuing the decision on environmental conditions, followed by issuing the development consent (in the meaning of Article 1(2)(c) of the EIA directive). The Aarhus Convention does not impose the manner, in which the investment process at the national level is to be organised i.e. whether it should be single-, or multi-tiered.

It should be noted that the essence of the decision on environmental conditions is determination of the environmental conditions of project implementation (por. Article 71(1) of the EIA Act). On the other hand, all regulations of the Aarhus Convention result from the need to establish the appropriate measures ensuring adequate environmental protection, including by ensuring public participation in issuing the decisions for the project likely to have significant effects on the environment (Annex I to the Aarhus Convention).

Thus, having regard to the fact that providing public participation in the process of issuing the water permit only at the stage of proceeding pertaining to the decision on environmental condition and to the fact that at the following stage of decision-making process – i.e. issuing the water permit – the environmental aspects have been already determined and remained unchanged, such structure of the decision-making procedure does not contradict with Article 6(1)(a) of the Aarhus Convention referred to in our letter.

The established scope of appeal results from the two-tiered process of issuing the water permit referred to above, in which in the first place and with public participation, including of the environmental organisations, the environmental conditions of the project binding the competent authority to issue the follow-up decision – water permit - are determined.

Thus, there is no substantive justification, both on the basis of the Aarhus Convention and EIA directive, to grant the organisations with the procedural rights in the scope going beyond the environmental protection aspects in the proceeding on issuing the water permit.

Thank you for your attention.