**EUFJE Conference 2019**

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**The role of science in environmental adjudication**

**Questionnaire**

**Estonia**

**Questions**

**1) Mandate of the court to review techno-scientific matters**

**a) In what forms do judges gather scientific advice (e.g. party-appointed experts, court-appointed experts, in-house experts, expert judges (legal adjudicators having a formal training in a certain scientific field), and/or expert assessor (scientific experts sitting with judges during the deliberation without the right to vote)? What is the task of these actors?**

Court can use the opinions of party-appointed experts and court-appointed experts. Court assesses expert assessments and opinions amongst other evidences. Court does not regard any evidentiary item as possessing pre-determined strength in the matter. However, the opinions of party-appointed experts are in practice considered merely as any other documentary evidence, *i.e*. having less evidentiary strength than the opinions of court-appointed experts, whose impartiality is guaranteed by procedural rules.

**b) What forms of scientific references are acceptable as bases for making persuasive scientific findings (E.g. expert evidence, standards issued by competent international or national organizations, regulatory trends of other states, etc.)?**

Court can consider as evidence any information that appears in a format that the law requires in legal proceedings. That includes testimony of witness, hearing under oath of participants in proceedings, documentary and physical evidence, inspection of an area or the scene of an event by court, expert assessment and the opinion of person with specific expertise. Where the parties have not presented evidence required for a just resolution of the matter or where they have presented insufficient evidence, administrative court can take evidence itself.

**c) Can a higher court (e.g. appeal court, supreme court) in your jurisdiction investigate scientific questions, and/or review the scientific findings of lower courts? If so, to what extent?**

Circuit court (the court of second instant) can review the assessment of evidence by the court of first instance. The parties of a proceeding can also submit new evidence if it was not possible to submit the evidence in the court of first instance.

The Supreme Court is bound by the facts as ascertained by the circuit court, except in the case that ascertainment of a fact is contested in the appeal in cassation and, in relation to that ascertainment, the rules of procedure were significantly infringed.

**d) How would you handle evidence derived from geospatial (GIS) technologies (such as satellite images, aerial photography, drones, etc.) (see for instance the use of geospatial intelligence in the Bialowieza case, C-441/17 R)? In what type of cases and in what ways do you utilize them? How can they promote compliance monitoring and a more effective enforcement?**

Court would consider evidence derived from geospatial technologies as documentary evidence. A lot of information derived from geospatial technologies is freely available at the Geoportal of Estonian Land Board (see https://geoportaal.maaamet.ee/eng/). It is not unusual for a judge to search for information on this site by its own volition to get a better understanding of the facts of a case.

In addition to the actual and historical land use, the Geoportal also displays historical maps. The portal has mostly been used in cases concerning spatial planning (also construction), nature conservation and land reform. In cases concerning nature conservation, court has verified from the portal if the disputed area is designated as a conservation area or not. Court has also checked if the alleged neighbours actually shared a border with the disputed area or not and whether there existed a forest in the disputed area. However, the examples where the Geoportal is mentioned in court decisions are quite rare (19 cases total in 2008-2019). Often it is the Estonian Land Board itself that, as a party to the proceedings, refers to the portal.

Besides, of the use of geoportal, the participants of the proceedings can provide orto or aero photos to the court on their own (as a part of expertise). Ortophotos can also be a part of evidence, collected already during the administrative proceedings, if they help to establish the facts relevant to the matter. Orto photos often contain already in a planning documents.

**2) When do you gather expert advice?**

**a) How do you distinguish between technical/scientific questions and legal questions in fact-intensive disputes, where science and law are closely interlinked in the underlying legal rules and concepts?**

There are no general guidelines, neither in law nor in the case law of the Supreme Court, for this kind of distinction, so court must decide it on case-by-case bases. Sometimes the scientific and legal questions are indistinguishable. For example the question whether a strategic environmental assessment has been carried out with due thoroughness can be seen as both scientific and legal.

There are examples of case law where a court has intervened quite boldly in the assessment of scientific questions, making no distinction between scientific and legal questions, but there are also examples where a court has distanced itself more from complex scientific questions and limited its role only to the assessment of purely legal questions.

**b) Are there any types of cases and/or questions where gathering scientific evidence is mandatory under domestic law?**

Mandatory scientific evidence (e.g EIA, SEA) is already gathered during administrative proceedings. There are no types of court cases where gathering scientific evidence is mandatory.

**c) To what extent are judges allowed to investigate the scientific dimensions of cases ex officio?**

Administrative court has the obligation to make sure, of its own motion, that facts material for deciding the matter are ascertained, where necessary by gathering evidence itself, or by imposing the obligation of presenting evidence on participants in proceedings. Consequently, where evidence required for a just resolution of the matter has not been presented or where insufficient evidence has been presented, court can take evidence itself.

**3) Rules of expert appointment**

**a) What are the selection criteria of experts in your jurisdiction (e.g. having requisite training, being impartial, independent from the party, being enrolled on government-issued lists, etc.)?**

Court-appointed expert is either a forensic expert or another qualified person employed by a state forensic institution, an officially certified expert or another person with specific expertise. The court may appoint a person as an expert if the person has the knowledge and experience necessary to provide an opinion. Expert has to be impartial.

**b) Whether and on what basis can a party challenge the appointment of a party appointed/ court-appointed/in-house expert?**

The parties may submit a petition of challenge upon the existence of circumstances that give reasons to doubt the impartiality of the court-appointed expert. The list of this kind of circumstances is an open one, identical to the circumstances when a judge must remove himself or herself from the proceedings. The list includes the cases in which the expert is close to a participant of the proceedings.

**c) To what extent and in what ways do judges in your jurisdiction exercise control over the scientific fact-finding process (e.g. by defining precisely the scope of factual controversy needed to be addressed by experts)?**

Court determines the questions for which it requests an expert opinion. A participant in proceedings has the right to pose questions to an expert, but only through the court. If necessary, the court hears the opinion of an expert concerning the expert assessment before posing questions to him or her.

**4) Evidentiary issues: standard and burden of proof**

**a) What is the applicable standard of proof for environmental cases in administrative, civil and criminal law (e.g. preponderance of the evidence, beyond reasonable doubt, etc.)? Is it set in domestic law, or are judges free to adjust the standard as they deem fit?**

There are no special rules considering environmental cases. In civil and administrative cases, the court is free to decide, acting in all conscience, whether or not an assertion made by a participant in proceedings has been proved. That is also the case in criminal proceeding, with the addition of the rule that any suspicion of guilt regarding a suspect or accused, which has not been eliminated in a criminal proceeding, shall be interpreted to the benefit of the suspect or accused. In civil cases, the court also has to consider any agreements between the parties concerning the provision of evidence.

**b) What are the rules of allocating the burden of proof in science-intensive cases (maybe give one or two examples to indicate what is meant by science intensive cases)?**

Generally, a participant in proceedings must prove the factual assertions on which his or her submissions are founded. In administrative court, where most environmental disputes are solved, the court has the obligation to make sure that facts material for deciding the matter are ascertained. Where the parties have not presented evidence required for a just resolution of the matter or where they have presented insufficient evidence, the court proposes that they present the requisite evidentiary items, or takes evidence itself. According to the case law of Estonian Supreme Court, a court must support the weaker party to ensure a better balance between the parties. The weaker party has fulfilled his obligation arising from the burden of proof, if he has substantiated why he cannot present the required evidence and shown where the evidence could be found (case no 3-3-1-80-05). There are no specific guidelines for allocating the burden of proof in environmental matters.

Example: An environmental NGO brought to administrative court a case against a decision of an administrative body to reduce the sanitary protection zone around the lake Ülemiste that is used as a source for drinking water of Estonian capital Tallinn. The aim of the decision was to enable issuing a building permit. The court of first instance was on the opinion that the NGO should have brought scientific evidence that the decision has a harmful effect to the quality of water. The court reasoned

that an environmental NGO should have the required environmental expertise. The NGO argued that this demand impedes its right to access to justice granted by the Aarhus convention (decision from 15th of February 2006 in the case no 3-17-1613).

Though the Estonian Supreme Court did not give this case a leave to appeal, the argument of the NGO may be considered well founded and the burden of proof attributed to the administrative body as well, assumed that the NGO has managed to give rise to reasonable doubt as to the legality of the decision.

**5) Rules of evaluating expert evidence: standard (intensity) of review**

**a) How do you choose between two competing or conflicting pieces of expert evidence?**

It is for the judge to decide, which expert evidence he or she deems more convincing. Court also has the right to order a reassessment if an expert opinion is ambiguous, contradictory or insufficient and cannot be corrected by additional questions. A reassessment is assigned to the same expert or another expert.

**b) Could you review the scientific assessments and justifications made by a competent domestic authority (by conducting a de novo review of the evidence)? Or is your judicial review deferential towards the scientific claims of domestic authorities?**

Estonian courts sometimes do tend to be deferential towards the scientific claims of domestic authority. However, if a claimant manages to show that there are significant shortcomings in an assessment made by a competent authority, the court can and should gather additional scientific evidence or grant the action obliging the authority to make a new decision.

**c) What is the applicable standard of review to scrutinize the scientific assessments of domestic authorities (e.g. scrutinizing 'manifest errors', or the reasonableness/consistency/coherence of their scientific conclusions, or interrogating the scientific validity and factual correctness of the evidence, or reviewing the procedural aspects of science-based decision-making process at hand)?**

Estonian Supreme Court has stressed the importance of following procedural rules in environmental cases (decision from 28th of February 2007 in the case no 3-3-1-86-06). The court reasoned that due to precautionary principle and the wide margin of discretion that administrative bodies usually enjoy in environmental matters, as well as many conflicting interests at question, the lawfulness of the final decision can only be presumed in the case where just and correct administrative procedure has been followed.

Other than that, neither law now case law has specified a standard of review to scrutinize the scientific assessments of domestic authorities.

**6) The role of science and technology in the courtroom – an overall assessment**

**a) To what extent do you consider the difficulties of scientific fact-finding to be a defining challenge in environmental adjudication compared to other difficulties?**

I consider it a significant challenge. Courts are often reluctant to order expertizes, with the aim of keeping the costs of the proceedings low for the parties of the proceedings. That means that judges usually try to manage the scientific fact-finding by themselves, with the help of evidences provided by the parties.

**b) Do you consider the domestic rules of expert involvement to be appropriate to secure judicial control/monopoly over deciding environmental disputes? Or do you think judges should exercise greater control over the scientific fact-finding process?**

There are no legal restriction to judicial control over scientific fact-finding process. However, to ensure the quality of court decisions in environmental cases, it would be useful if the courts could get timely and easily accessible scientific advice without additional costs to parties of the proceedings.

**c) Do you consider the limits of curial supervision of fact-intensive cases are appropriate for providing effective judicial protection and promoting uniform application of EU law?**

There are no procedural rules that would significantly limit curial supervision of environmental cases. However, the problems of effective judicial protection and uniform application of EU law may arise due to occasional low quality of scientific fact-finding in courts or the reluctance of courts to intervene in the margin of appreciation of administrative bodies with scientific expertise.

**d) Do you think it is necessary and if so, in what ways, to improve the scientific engagement of judges (E.g. would you improve the procedural rules of scientific fact-finding, enhance the scientific competence of the judges through training and capacity building, or develop new legal tests to review contradicting scientific evidence, etc.)?**

I consider it necessary. I would improve the scientific competence of judges or court personnel and provide a better access to basic scientific knowledge. At the moment, judges and court personnel often have to rely on the knowledge accessible on the internet.

**7) Case study**

**How would you delineate applicable questions of law and science in the following cases, what types of expert evidence would be gathered, and how would they be evaluated?**

*a) The case brought before you is about a proposed artificial groundwater production plant that might impact a nearby Natura 2000 -site, whose conservation values are contingent on groundwater levels, thus being of concern when authorizing artificial groundwater undertaking outside the protected area. The Natura 2000 site has e.g. the region's largest sinkhole that has wetland at the bottom of it, and is thus connected with the groundwater formations. It also has coniferous forests on glaciofluvial eskers, and the site is generally described as having calcareous fens and springfens (all listed as Natura 2000 habitats). Up until now the plant has gained the required approvals. The groundwater model used in the proposed undertaking's plans modeled the water currents in the ground. As typical of such models, it was more uncertain in the rims of the area than in its centre. Coincidentally, these rims of the area also included especially sensitive and small wetland formation. The administrative authority, in its statement of reasons, discussed the role of the precautionary principle and scientific uncertainty, noting that neither formed as such a reason to not allow the venture. They only obliged the administration to establish such permit conditions that they adequately curbed the harmful impact. However, an environmental NGO brings a claim against the permit arguing that the permit should not have been granted at all. They claim that since the scientific assessments presented before the administrative authority did not remove all justified scientific uncertainty on the undertaking's consequences, and since there are thus relevant risk of detrimental impact to the Natura 2000 –site, the plan should not be allowed to proceed.*

**I How would you delineate questions of law/science?**

<u>Questions of law:</u>

1) According to legislation and case law, in what case can an activity that may influence a Natura 2000 site be authorised? Are the habitat types priority habitats or not?

2) Is the sensitive wetland formation protected under domestic/ EU law? What is the protection regime and on what conditions is it allowed to cause a risk to the wetland formations?

3) According to precautionary principle, how should scientific uncertainty be managed in the current case? Is it sufficient that the potential harmful impact is curbed by permit conditions or is it necessary that the permit would not be granted?

Questions of science:

1) Has the administrative authority eliminated all reasonable scientific doubt as to the existence of adverse effects of the activity to the integrity of the Natura 2000 site?

2) Is the model of water currents adequate? Does it represent high-level scientific knowledge? Would it be possible to gather more knowledge considering the effects of the planned activity to the Natura 2000 sites and sensitive wetland formations?

3) How effective are the mitigation measures proposed for minimising the environmental risks caused by the activity?

**II What types of expert advice would be gathered? How would they be evaluated?**

The parties could present opinions of people with expert knowledge in the field (but these specialists do not have to comply with the rules that apply to court-appointed experts). The court, acting in all conscience, would assess these documents and other evidence gathered.

If the court deems it necessary (in practice this does not happen very often), it would appoint an independent expert to give his or her opinion in the pertinent scientific questions. The court would evaluate the expert opinion amongst other evidence. It does not possess a pre-determined evidentiary strength. The court has to assess the evidentiary items as a body of evidence and have regard to any interconnections between evidentiary items.