

## **EUFJE Conference 2019 Helsinki**

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### **The role of science in environmental adjudication Questionnaire**

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 assessors (scientific experts sitting with judges during the deliberation without the right to vote)? What is the task of these actors?

Polish legal system regarding administrative adjudication differs considerably from common adjudication (penal and civil courts). Administrative courts do not gather evidence, only evaluate whether evidence gathered by administrative authorities was collected and assessed correctly. Administrative authorities in charge of environmental protection by gathering scientific evidence use in-house experts and administration-appointed experts. It may happen that in order to challenge the opinion of in-house experts and administration-appointed experts, parties present the expertise of party-appointed experts. Administrative organs are obliged to assess them, present in their decision their attitude and justification (when the opinion of the party-appointed experts is not considered) why the opinion of the party-appointed experts was not considered correct. The opinion presented by the party may be the reason of creating a new opinion by administrative organ.

The administrative courts do not use court-appointed experts, in-house experts, expert judges and expert assessors. Sometimes when the party presents an opinion prepared by party-appointed experts and this opinion differs from the decision of administrative authorities, administrative court can set aside the decision and submit the case for re-evaluation.

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.)?

Acceptable are expert evidence, standards issued by competent international and national organizations.

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?

In Poland decisions of administrative authorities are assessed by voivodeship administrative courts. These are the administrative courts of first instance. The sentences of regional administrative courts are evaluated by the Supreme Administrative Court. The extent of evaluation depends on cassation complaint on the one hand, on the other hand we should remember that Polish administrative courts, including the Supreme Administrative Court, assess only the legality of administrative authorities' decision. However, administrative courts based on the whole evidence assess whether this decision is correct or not, and assess whether scientific findings are correct too.

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 2 type of cases and in what ways do you utilize them? How can they promote compliance monitoring and a more effective enforcement

In this case I would be entitled to examine this evidence and assess it on my own. If I assess that this evidence shows that the administrative decision is wrong, I would have the right to set aside the decision and order the authorities to re-evaluate the case correctly. I would be entitled to indicate to the authorities the correct way of proceedings.

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?

It is very difficult but, according to the rule, Polish courts are entitled to interpret the law. Experts cannot do it. Experts should express their opinion only in the case of scientific questions. Everything included in the rule of law belongs to the tasks of the court. The rest may be assessed by experts. The experts' opinion is evaluated by administrative authorities,

then by voivodeship administrative court and the next the Supreme Administrative Court, if it is presented in cassation appeal.

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

Always is needed gathering scientific evidence in proceedings regarding a water – legal permit and a decision on the environmental conditions for implementing the project.

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

The Polish administrative court only assesses whether administrative authorities correctly evaluated scientific evidence. They assess whether administrative authorities evaluated everything in detail and whether it is logical.

### 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.)?

The administrative courts, due to the fact that they do not gather evidence, do not have their own experts. It results from art. 106 § 3 act of 30th August 2002 Law on proceedings before administrative courts, the court may, on its own motion or at the request of the parties, request additional documentary proof, if this is necessary to resolve substantial doubts and will not extend excessively the proceedings on the case. The administrative organs can use experts enrolled on government – issued lists. The experts are enrolled on this list by common courts and they must fulfill high requirements regarding their knowledge.

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

If in the case is required special knowledge, the administrative authorities can appoint an expert and order him to prepare an opinion. This expert may be excluded based on art. 24 administrative proceedings code. This reason does not concern his knowledge but touch upon, for example, other circumstances e.g. the case involving his relatives.

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)?

In my jurisdiction, judges exercise control in this way that when setting aside the decision or order the authority in whole or in part to conduct proceedings according to the correct rule and show to the authority this correct way.

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?

In Polish legal system does not exist preponderance of the evidence. It concerns administrative, civil and criminal law. According to the rule, in Polish criminal law beyond reasonable doubt must be settled in favour of the accused. In civil law judge assesses, based on whole evidence, whether these circumstances are proven.

In Polish administrative law, evidence can be everything what contributes to the solution of the case and is not against the law. Specially evidence can be documents, testimony, experts opinions and visual inspections. The authority must assess all evidence taking into consideration mutual connections among them. The administrative court must assess whether this decision is correct and based on true claims. Judges may adjust the standard as they deem fit.

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 scienceintensive cases)?

A typical example is the decision on the environmental conditions for implementing the projects. In this proceedings must be prepared a report by experts.

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

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

In this case I must assess very thoroughly conflicting pieces of expert evidence and analyse existing conflicts among them. My job concerns evaluation of administrative decision and its content. I evaluate whether authority thoroughly justified and described every

important circumstances, especially scientific evidence. When I have doubts, I can set aside the decision and order the authority to consider everything once again and show where the problem exists.

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?

Polish judiciary system is based on cassation system. It means that courts only assess decisions of administrative authorities. Administrative authorities gather evidence in full. When court claims that evidentiary proceeding was conducted incorrectly, the court sets aside the decision. The basis of setting aside such a decision is made by the court's assessment of defectiveness of scientific evidence. The court is entitled to order the authority to conduct de novo evidentiary proceeding including scientific evidence.

In the case when court proceeding is conducted by civil court, this court is obliged to conduct it on its own. This administrative court can order experts to make a new opinion. The civil court is obliged to conduct evidentiary proceeding on its own.

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)?

The most important is the content of decision of administrative authority. It is the basis for evaluation by administrative court. The administrative court compares the decision with scientific evidence and assesses whether administrative authorities have applied correct assessment of this evidence.

To do this, administrative courts may, on its own motion request additional documentary proof according to art. 106 § 3 law on proceedings before administrative court.

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?

The difficulties of scientific fact – finding are the biggest challenge in environmental adjudication compared to other difficulties. It is more difficult because Polish judiciary

system is cassation system. We only assess proceedings conducted by administrative authorities. Judges do not use expert's help. Judges must on their own assess scientific evidence and make a decision only based on proofs gathered by administrative authorities. When administrative court decides that this evidence is insufficient, it can set aside the decision and order administrative authority to conduct evidentiary proceeding correctly.

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?

In my opinion in some types of cases helpful would be creating a possibility of using expert's help. It would give judges the greater possibility to control gathered evidence by administrative authorities.

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?

In my opinion the limits of curial supervision of fact – intensive cases are appropriate for providing effective judicial protection and promoting uniform application of EU law is sufficient. It depends only on the appropriate usage of available domestic legal resources.

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 believe that it is necessary to improve the scientific engagement of judges. The most important is to improve the scientific competence of judges through training and capacity building.

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? Choose one of the following cases, according to your field of expertise: 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.

The question of law is protection of Natura 2000 – site especially wetlands and therefore in what way artificial groundwater production plant might impact this site. The most important is opinion of experts who deal with assessment of groundwater level. These experts must evaluate whether this groundwater level has changed and if yes, then in what way, and assess whether this influences the wetland and in what way. A particular role is played in this evaluation by the precautionary principle and scientific uncertainty. Because it is necessary to assess not only factual influence of this project but the possibility of influence of this plant on Natura 2000 – site.