

INTERIM MEASURES IN ADMINISTRATIVE PROCEEDINGS: SPECIFICS OF ENVIRONMENTAL CASES

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Abstract. *Interim measures are procedural means that allow persons or States to have their rights preserved when a case is pending. Application of these measures especially in environmental cases is very important. In many of these cases (e.g. cases dealing with territorial planning, IPPC permits, environmental impact assessment, etc.) the claims deal*

with the protection of environment or its components (water, air, soil, etc.) as well as with the protection of public interest. Legal regulation of application of interim measures provided by Lithuanian Law on Administrative Proceedings is not optimal. That is why the first part of the article is dedicated to the analysis of the possibilities and problems of application of interim measures in the administrative proceedings in Lithuania, paying special attention to environmental cases. The second part of the article reflects the findings of a workshop of the Association of European Administrative Judges on „Interim relief in environmental matters” held in Vilnius on 22 September 2011. It briefly describes various national rules on interim relief procedures, especially in the German and the French legislation, with an assessment from the German point of view. This part of the article focuses on provisional legal protection where a permit is challenged by a third party whose rights are allegedly afflicted. In such a constellation the rights of the plaintiff compete with the rights of the operator.

The article concludes that, when deciding on the necessity of interim measures, it is vital to ensure the balance of interests: both by ensuring effective access to justice and by protecting the respondent and the third party (in environmental cases - usually the operator) from the violation of their rights and the damage caused by the abuse of the right to request interim measures. In such cases short time limits for procedural steps both of the parties and the court are not advisable and a prima facie prognosis on the outcome in the main proceedings meets the interests of the parties.

Keywords: *interim measures, interim relief, administrative proceedings, environmental protection, environmental cases, access to justice, administrative court procedure.*

Introduction

This article was inspired by the workshop of the Association of European Administrative Judges (AEAJ) which was dedicated to “Interim Relief in Environmental Matters”¹. The participants of the workshop (mainly administrative judges and academics) came from the following countries: Austria, Estonia, Finland, France, Germany, Italy, Lithuania, Slovenia, Sweden and United Kingdom. During the discussions in the workshop it has become clear that interim measures play a very important role in administrative proceedings. Especially this is true about environmental cases, where the interests of the parties to the case and the final decision of the court affect public interests and interests of third parties. On the one hand, interim measures could be called a “guardian” of access to justice, ensuring efficient execution of the final decision of the court. On the other hand, when the right to request interim measures is abused, the application of these measures might cause damage and financial losses.

1 This workshop was held in Vilnius on 22 September 2012 back to back with a next day international conference on “Administrative Courts in the European Administrative System”, organised by Vilnius University, Faculty of Law and the Supreme Administrative Court of Lithuania in co-operation with the Division of Administrative Courts of the Lithuanian Association of Judges and AEAJ. The results of the workshop were published on the AEAJ website (see www.aeaj.org).

That is why to seek the balance of interest and apply the principles of fairness and proportionality is one of the main duties of the court when deciding on application of interim measures.

The subject has received certain academic attention in foreign countries: some aspects of this question were analysed in the works of S. Fiorletta-Leroy, M. Hedemann-Robinson, Y. Haeck, C. Burbano Herrera, L. Zwaak, etc. Yet in Lithuania, despite the importance of the topic, it is an understudied phenomenon (especially when we speak about administrative proceedings, where environmental issues are involved) and a comprehensive analysis of it has not been offered.

Using systematic, logical, comparative approach this article aims at presenting a comprehensive analysis of the Lithuanian national framework and practice in other European countries regarding possibilities of application of interim measures in administrative proceedings, particularly in environmental cases. Systematic and logical methods are used for the analysis of legal acts and court practice (both in Lithuania and other European countries) in order to reveal their content and substance, and to draw some concluding remarks. The method of comparative analysis is used when analysing national rules on interim relief, trying to identify some similarities and differences between national systems of different countries. Therefore, the major objectives of the analysis are: 1. to reveal the main problems arising when applying interim measures in administrative proceedings in Lithuania; 2. to show the specifics of environmental cases in this context; 3. to compare national rules on interim relief of various European countries and find their main similarities and differences.

1. The Concept of Interim Measures

Interim measures are procedural means that allow persons or States to have their rights preserved when a case is pending². Generally speaking, interim measures can be characterised by several main features. Firstly, they are intended to be temporary by nature and are not supposed to represent a final resolution of the dispute at stake. Secondly, they are applied in cases where there is a real danger of irreparable harm to be suffered if interim measures are not taken³. Thirdly, they aim at safeguarding a legal situation and ensuring the enforcement of the final decision in the main proceedings. One can talk about interim measures in the national context, i. e. the application of them in administrative and/or civil proceedings according to the national legislation. This is the most common application of interim measures. On the other hand, these measures can be considered in the context of enforcement of the provisions of EU law. The Treaty on the Functioning of the European Union⁴ (TFEU) makes specific provision for

2 Fiorletta-Leroy, S. Can the Human Rights Bodies be Used to Produce Interim Measures to Protect Environment-Related Human Rights? *RECIEL*. 2006, 15(1): 69.

3 Kaminskienė, N. Application of Interim Measures in International Arbitration: the Lithuanian Approach. *Jurisprudencija*. 2010, 1(119): 246.

4 Consolidated version of the Treaty on the Functioning of the European Union. [2010] OJ, C 83/47.

the possibility of interim relief being applied for in conjunction with proceedings taken before the Court of Justice of the European Union. Article 278 TFEU states that actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended. Article 279 TFEU states that the Court of Justice of the European Union may in any case before it prescribe any necessary interim measures. Both norms enable the Commission to apply to the Court for interim orders to direct defendant Member States to suspend the application of national legislative or administrative measures, as well as to direct a defendant to take appropriate measures to ensure that current or imminent activity challenged by the Commission as being contrary to EU law is prevented from being allowed to continue or occur⁵. The above-mentioned TFEU provisions appear to confirm that applications for interim measures may only be filed at the stage where cases are filed before the Court of Justice. Consequently, proceedings for interim measures are ancillary to and contingent upon the pursuit of other legal proceedings undertaken at EU level; they have no independent or autonomous status⁶. Interim measures might also be considered in the international context, especially when speaking about the protection of human rights. For example, the Statute of the International Court of Justice⁷, namely Article 41, allows the Court indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. Another example is the Rules of the European Court of Human Rights⁸ ('Rules of Court'). Rule 39 states that the Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated. The case law of the European Court of Human Rights shows that interim measures have been indicated only in limited spheres. They are issued, when three cumulative conditions are met: (1) the situation must be imminent and exceptional and there must no longer be any suspensive domestic remedy available against the disputed act; (2) there must be high degree of probability that the disputed act will contravene the European Convention on Human Rights and (3) there must be a risk of irreparable

5 Hedemann-Robinson, M. Enforcement of EU Environmental Law and the Role of Interim Relief Measures. *European Energy and Environmental Law Review*. 2010, 19(5): 208.

6 *Ibid.*

7 The Statute of the International Court of Justice. Annex of the Charter of the United Nations [interactive]. San Francisco, 1945 [accessed on 20-09-2012]. <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>>.

8 Rules of the European Court of Human Rights [interactive]. Strasbourg, 2012 [accessed on 20-09-2012]. <<http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Other+texts/Rules+of+Court/>>.

damage⁹. While there is no specific provision in the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention. The vast majority of cases in which interim measures have been indicated concern deportation and extradition proceedings. In most cases, measures are indicated to the respondent Government, although there is nothing to stop the Court from indicating measures to applicants. Cases of States failing to comply with indicated measures remain very rare¹⁰. Of course, other examples of possibilities of application of interim measures might be indicated, but due to limited scope of this article, they will be left for future scientific research of the authors of this article.

2. Legal Possibilities of Application of Interim Measures in Administrative Proceedings: Case of Lithuania

According to Article 71 of the Lithuanian Law on Administrative Proceedings (LAP)¹¹, the court or the judge may, upon a motivated petition of the participants in the proceedings or upon his/its own initiative, take measures with a view to securing a claim. The claim may be secured at any stage of the proceedings if failure to take provisional measures to secure a claim may:

- (a) impede the enforcement of the court decision; or
- (b) render the decision unenforceable.

The request for interim measures (in the Lithuanian administrative process they are called “measures securing the claim“) must be filed prior to the commencement of the hearing of the case on the merits. The applicant also has the right to repeated requests if new circumstances appear. However, in such cases the applicant must define the new circumstances and provide evidence, explaining why, according to Article 71 of LAP, it is necessary to apply/reapply the interim measure, replace one measure with another one, or why the application of interim measures is no longer needed¹².

9 Haeck, Y.; Burbano Herrera, C.; Zwaak, L. Non Compliance with a Provisional Measure Automatically Leads to a Violation of the Rights of Individual Application ...or doesn't it? *European Constitutional Law Review*. 2008, 4: 43.

10 *Mamatkulov and Askarov v. Turkey* [GC], no. 46827/99 and 46951/99, § 121, ECHR 2005-I. (at paras.104, 105.)

11 Lietuvos Respublikos administracinių bylų teisenos įstatymas [Law of the Republic of Lithuania on Administrative Proceedings]. *Official Gazette*. 1999, No. 13-308; 2000, No. 85-2566.

12 Lietuvos vyriausiojo administracinio teismo 2008 m. vasario 13 d. nutartis administracinėje byloje *Klaipėdos apygardos vyriausiasis prokuroras v. Neringos savivaldybės taryba, Neringos savivaldybės administracija* (bylos Nr. AS143-133/2008). [The Supreme Administrative Court of Lithuania, 13 February 2008, decision in the administrative case *Chief Prosecutor of Klaipėda Region v. Neringa Municipality Council, Neringa Municipality Administration* (Case No. AS143-133/2008)].

The request for interim measures must be properly reasoned and based on evidence (it cannot be abstract). In his request, the applicant must indicate the specific measures that are required (e.g. what specific actions should the respondent be restrained from, etc.) and submit the evidence proving that the failure to apply interim measures would impede the enforcement of the court decision in the main proceedings or render this decision unenforceable¹³. The requirement for interim measures is possible only against the respondent, e. g. it is not possible to require that the third party would be restrained from certain actions¹⁴. The required interim measures must be associated with the requirements in the main proceedings¹⁵. Request for interim measures will not be satisfied, if it is associated with the preventive defence of the applicant's rights (protection of the applicant from future violations of his or her rights) and if it is not aimed at ensuring the enforcement of a final decision in the main proceedings¹⁶.

According to LAP, a complaint/petition may be filed with the administrative court within one month from the day of publication of the contested act or the day of delivery of the individual act to the party concerned or the notification of the party concerned of the act (or omission) or within two months from the day of expiry of the time limit set by the law or any other legal act for complying with the demand. And only if it is recognised that the time limit for filing a complaint/petition has not been observed for a good reason and there are no circumstances for the complaint/petition to be declared unacceptable (specified in LAP), at the claimant's request the administrative court may grant restoration of the *status quo ante*. The petition for securing a claim might be accepted only if the main complaint is accepted. In Lithuanian administrative proceedings, there is no possibility of asking for interim measures, without challenging the administrative act or omission.

According to Article 71 of LAP, provisional measures may be as follows:

- (1) granting an injunction restraining the respondent from certain actions;
- (2) stay of execution under the writ of execution;
- (3) suspension of validity of a contested act.

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- 13 Lietuvos vyriausiojo administracinio teismo 2008 m. balandžio 15 d. nutartis administracinėje byloje *O. B. v. Kauno apskrities viršininko administracija* (bylos Nr. AS²⁶¹-262/2008). [The Supreme Administrative Court of Lithuania, 15 April 2008, decision in the administrative case *O. B. v. Kaunas County Governor's Administration* (Case No. AS²⁶¹-262/2008)].
 - 14 Lietuvos vyriausiojo administracinio teismo 2008 m. vasario 26 d. nutartis administracinėje byloje *O. J. M. ir L. V. M. v. Vilniaus apskrities viršininko administracija* (bylos Nr. AS⁵⁰²-159/2008). [The Supreme Administrative Court of Lithuania, 26 February 2008, decision in the administrative case *O. J. M. & L. V. M. v. Vilnius County Governor's Administration* (Case No. AS⁵⁰²-159/2008)].
 - 15 Lietuvos vyriausiojo administracinio teismo 2008 m. vasario 13 d. nutartis administracinėje byloje *Klaipėdos apygardos vyriausiasis prokuroras v. Neringos savivaldybės taryba, Neringos savivaldybės administracija* (bylos Nr. AS143-133/2008). [The Supreme Administrative Court of Lithuania, 13 February 2008, decision in the administrative case *Chief Prosecutor of Klaipėda Region v. Neringa Municipality Council, Neringa Municipality Administration* (Case No. AS143-133/2008)].
 - 16 Lietuvos vyriausiojo administracinio teismo 2005 m. rugsėjo 15 d. nutartis administracinėje byloje *AB „Mažeikių nafta“ v. Konkurencijos taryba* (bylos Nr. AS²-388/2005). [The Supreme Administrative Court of Lithuania, 15 September 2005, decision in the administrative case *SC „Mažeikių nafta“ v. Competition Council* (Case No. AS²-388/2005)].

The judge or the court shall hear the petition for securing the claim within one day from the receipt thereof, without notifying the respondent and other participants in the proceedings. If such a petition is filed together with the complaint/petition, it shall be heard within one day from the acceptance of the complaint/petition. The court or the judge shall make an order on securing the claim and state the procedure and the manner of execution thereof. A separate appeal may be filed against the court order on the issues regarding the securing of claims. Filing of a separate appeal against the order to secure the claim shall not stall the execution of the order or suspend the hearing of the case. The court order to secure the claim shall be executed without delay. The order to replace a measure securing a claim or to cancel the measure aimed at securing a claim shall be executed upon the expiry of the time limit for filing a complaint against such orders and, where the complaint has been filed, upon making an order to reject the complaint. The orders concerning interim measures shall be executed in accordance with the procedure established for the execution of court decisions.

Though there is no *expressis verbis* obligation in LAP, according to the practice of the Supreme Administrative Court of Lithuania, the court, while deciding on the interim measures, must initially take into account the nature of the claim (that is requested to be secured), the indicated factual basis for the claim, the rights granted by the contested act, and actual realisation of these rights. Only then the court can decide whether the requirement for interim measures under the circumstances of the application would be adequate to the purpose and whether the principle of proportionality and the balance of interests of the parties and the public interest wouldn't be violated¹⁷. When considering the requirement for interim measures, the court needs to answer the question whether an interim measure would actually help restore the previous legal position, if the main claim would be satisfied. Having regard to the principle of proportionality, courts must consider the potential harm ratio: i.e. any damage which could occur after application of the interim measures, if the main claim is not satisfied at the end, and the damage that would occur if the interim measures are not applied, but the main claim is satisfied subsequently¹⁸. The rights of the respondent should not be restricted more than it is necessary for securing the enforcement of the final court's decision¹⁹. If there is a risk

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- 17 E. g. Lietuvos vyriausiojo administracinio teismo 2006 m. kovo 9 d. nutartis administracinėje byloje *Lietuvos Respublikos Generalinio prokuroras v. Klaipėdos miesto savivaldybės administracija* (bylos Nr. AS15-183/2006) [The Supreme Administrative Court of Lithuania, 9 March 2006, decision in the administrative case *The Prosecutor General Of The Republic Of Lithuania v. Klaipėda City Municipality Administration* (Case No. AS15-183/2006)]; Lietuvos vyriausiojo administracinio teismo 2008 m. kovo 28 d. nutartis administracinėje byloje *951-osios daugiabučio namo savininkų bendrija v. Vilniaus miesto savivaldybės administracija* (bylos Nr. AS⁶²-217/2008) [The Supreme Administrative Court of Lithuania, 28 March 2008, decision in the administrative case *951 apartment owners' association v. Vilnius City Municipality Administration* (Case No. AS⁶²-217/2008)].
- 18 Lietuvos Vyriausiojo Administracinio Teismo 2008 m. balandžio 10 d. nutartis administracinėje byloje *individuali įmonė D. V. v. Kauno miesto savivaldybės taryba* (bylos Nr. AS⁴⁴⁴-244/2008) [The Supreme Administrative Court of Lithuania, 29 February 2008, decision in the administrative case *individual enterprise D. V. v. Kaunas City Municipality Council* (Case No. AS⁴⁴⁴-244/2008)].
- 19 Lietuvos vyriausiojo administracinio teismo 2009 m. sausio 30 d. nutartis administracinėje byloje *D. Š. v. Utenos apskrities viršinininko administracija* (bylos Nr. AS¹⁴⁶-125/2009) [The Supreme Administrative

that non-application of interim measures could lead to additional disputes (e.g. if the validity of the approved detailed plan is not suspended, the granting of a building permit or other documents could lead to further disputes, where such documents would be challenged), the *status quo* should be maintained until the dispute is solved, i.e. the interim measures should be applied²⁰.

2.1. Peculiarities of Application of Interim Measures in Environmental Cases

Though general requirements and principles concerning application of interim measures are valid for environmental cases, they have their specifics. Most of the environmental cases where interim measures were applied (or at least the application of interim measures was requested) dealt with territorial planning and construction.

Territorial planning means the established procedure for setting the overall spatial concept of territorial development, land-use priorities, for establishing environmental, cultural heritage protection and other conditions, for developing land, forest and water areas, residential areas, developing the system of production and infrastructure, regulating the employment of the population, establishing the rights of legal and natural persons to undertake activities in the territory. In this process, the interests of different social groups are affected²¹. That is why, when applying interim measures the principles of proportionality and precaution must be invoked, the court must seek for the balance of interests of different parties, e. g. the suspension of the procedure for approving a general plan of a particular territory could lead to the breach of the above-mentioned principles²².

While deciding on interim measures, the court has to evaluate the reality of further actions in case interim measures are not applied. For example, if the main proceedings

Court of Lithuania, 30 January 2009, decision in the administrative case D. Š. v. Utena County Governor's Administration (Case No. AS¹⁴⁶-125/2009)]

- 20 Lietuvos vyriausiojo administracinio teismo 2007 m. gegužės 31 d. nutartis administracinėje byloje *V. P. v. Vilniaus apskrities viršininko administracija, Vilniaus miesto savivaldybė* (bylos Nr. AS⁶-258/2007) [The Supreme Administrative Court of Lithuania, 31 May 2007, decision in the administrative case *V. P. v. Vilnius County Governor's Administration, Vilnius City Municipality* (Case No. AS⁶-258/2007)]; Lietuvos vyriausiojo administracinio teismo 2006 m. birželio 8 d. nutartis administracinėje byloje *J. P., visuomeninė organizacija „Lietuvos žaliųjų judėjimas“, O. A., P. G., L. A. L. ir G. V. V. Pakruojo rajono savivaldybė* (bylos Nr. AS¹⁵-336/2006) [The Supreme Administrative Court of Lithuania, 8 June 2006, decision in the administrative case *J. P., NGO „Lietuvos žaliųjų judėjimas“, O. A., P. G., L. A. L. ir G. V. V. Pakruojis District Municipality* (Case No. AS¹⁵-336/2006)].
- 21 Lietuvos Respublikos teritorijų planavimo įstatymas [Law of the Republic of Lithuania on Territorial Planning]. *Official Gazette*. 1995, No. 107-2391; 2004, No. 21-617.
- 22 Lietuvos vyriausiojo administracinio teismo 2005 m. rugsėjo 9 d. nutartis administracinėje byloje *J. S. v. Birštono savivaldybė* (bylos Nr. AS¹-295/2005) [The Supreme Administrative Court of Lithuania, 9 September 2005, decision in the administrative case *J. S. v. Birštonas Municipality* (Case No. AS¹-295/2005)]; Lietuvos vyriausiojo administracinio teismo 2008 m. vasario 5 d. nutartis administracinėje byloje *UAB sveikatos centras „Energetikas“ v. Palangos miesto savivaldybės administracija ir Klaipėdos apskrities viršininko administracija* (bylos Nr. AS³⁹-132/2008) [The Supreme Administrative Court of Lithuania, 5 February 2008, decision in the administrative case *JSC health centre Energetikas v. Palanga City Municipality Administration and Klaipėda County Governor's Administration* (Case No. AS³⁹-132/2008)].

concern the approved detailed plan and the requested interim measure consists of the suspension of validity of this plan, in order to apply this measure, the court first needs to evaluate, whether the person is actually determined to build the objects shown on the plan. If the answer is “yes”, if there is a threat that the construction works will be started or even finished before the final court’s decision concerning the challenged detailed plan is adopted, and if the court thinks that it will impede the enforcement of the court decision or will render the decision unenforceable and the irreversible damage would be caused to the environment (e.g. by changing the landscape, etc.), the interests of other person or public interest would be violated, and the elimination of consequences of the construction works will require complex technological processes and considerable recourses, then, of course, interim measures should be applied²³. In these cases, the principle of proportionality would not be violated. It should be mentioned that the procedure of territorial planning itself could not form the basis for such a decision, the plan must be already approved and challenged, and only then the question of interim measures can arise²⁴. On the other hand, it should be noted that if the construction works are already finished or nearly finished, also if the construction works have not been started yet, the application of interim measures would not be reasonable. But in the latter case the court should inform the parties about the possibility of requesting

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- 23 Lietuvos vyriausiojo administracinio teismo 2007 m. gegužės 31 d. nutartis administracinėje byloje *V. P. v. Vilniaus apskrities viršininko administracija, Vilniaus miesto savivaldybė* (bylos Nr. AS⁶-258/2007) [The Supreme Administrative Court of Lithuania, 31 May 2007, decision in the administrative case *V. P. v. Vilnius County Governor’s Administration, Vilnius City Municipality* (Case No. AS⁶-258/2007)]; Lietuvos vyriausiojo administracinio teismo 2008 m. kovo 28 d. nutartis administracinėje byloje *951-osios daugiabučio namo savininkų bendrija v. Vilniaus miesto savivaldybės administracija* (bylos Nr. AS⁶²-217/2008) [The Supreme Administrative Court of Lithuania, 28 March 2008, decision in the administrative case *951 apartment owners’ association v. Vilnius City Municipality Administration* (Case No. AS⁶²-217/2008)]; Lietuvos vyriausiojo administracinio teismo 2004 m. liepos 29 d. nutartis administracinėje byloje *Valakupių bendruomenės asociacija v. Vilniaus miesto savivaldybės taryba, Vilniaus miesto savivaldybės administracija* (bylos Nr. AS¹-375/2004) [The Supreme Administrative Court of Lithuania, 29 July 2004, decision in the administrative case *Valakupiai community association v. Vilnius City Municipality Council, Vilnius City Municipality Administration* (Case No. AS¹-375/2004)].
- 24 Lietuvos vyriausiojo administracinio teismo 2006 m. kovo 30 d. nutartis administracinėje byloje *G. V., J. P., O. A., P. G. ir visuomeninė organizacija „Lietuvos žaliųjų judėjimas“ v. Šiaulių regiono aplinkos apsaugos departamentas* (bylos Nr. AS¹¹-133/2006) [The Supreme Administrative Court of Lithuania, 30 March 2006, decision in the administrative case *G. V., J. P., O. A., P. G. ir NGO „Lietuvos žaliųjų judėjimas“ v. Šiauliai Regional Environmental Protection Department* (Case No. AS¹¹-133/2006)]; Lietuvos vyriausiojo administracinio teismo 2008 m. gegužės 20 d. nutartis administracinėje byloje *Lietuvos žaliųjų judėjimas v. Valstybinei teritorijų planavimo ir statybos inspekcija prie Aplinkos ministerijos, Alytaus apskrities viršininko administracija, Alytaus miesto savivaldybė* (bylos Nr. AS¹⁴³-322/2008) [The Supreme Administrative Court of Lithuania, 20 May 2008, decision in the administrative case *NGO “Lietuvos žaliųjų judėjimas” v. State Territorial Planning and Construction Inspectorate under the Ministry of Environment, Alytus County Governor’s Administration, Alytus City Municipality* (Case No. AS¹⁴³-322/2008)]; Lietuvos vyriausiojo administracinio teismo 2008 m. balandžio 17 d. nutartis administracinėje byloje *B.B., J.A., V.K., J.R. ir Č.T. v. Vilniaus rajono savivaldybė* (bylos Nr. AS⁴³⁸-256/2008) [The Supreme Administrative Court of Lithuania, 17 April 2008, decision in the administrative case *B.B., J.A., V.K., J.R. ir Č.T. v. Vilnius District Municipality* (Case No. AS⁴³⁸-256/2008)].

interim measures at any later stage in the process, if the situation changes and/ or the parties can supply additional evidence²⁵.

The status of the territory where the construction works are planned must also be taken into account. For example, if the territory is important for the society as a whole, because of its social, cultural, environmental or other value, its protection becomes a public interest. In this case, the application of interim measures would be reasonable and would not breach the proportionality principle, even if the construction works have not been started yet. In this case, the material interests and possible pecuniary losses of the person interested in construction should not be considered as overriding²⁶. In a similar case the Supreme Administrative Court of Lithuania also stressed the importance of public participation in territorial planning, and as one of the elements important to proper realisation of this right, the court mentioned ensuring of efficient execution of the court's final decision, which would not be the case if interim measures were not applied²⁷.

When dealing with environmental cases, one has to keep in mind that the court might change certain conditions of the permit, e.g. it can change the allowed height of the building, distances between objects, etc. These changes would automatically result in the need to restore the situation that existed before the beginning of construction works, i. e. to demolish all that was built, to restore natural environment, etc. In this case, the application of interim measures would be justifiable²⁸. And contrary to this, if

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- 25 Lietuvos vyriausiojo administracinio teismo 2007 m. sausio 4 d. nutartis administracinėje byloje *V. J. v. Kauno miesto savivaldybės administracija* (bylos Nr. AS⁷-5/2007) [The Supreme Administrative Court of Lithuania, 4 January 2007, decision in the administrative case *V. J. v. Kaunas City Municipality Administration* (Case No. AS⁷-5/2007)]; Lietuvos vyriausiojo administracinio teismo 2009 m. vasario 21 d. nutartis administracinėje byloje *UAB „Hidroenergija“ v. Šilutės rajono savivaldybės administracija* (bylos Nr. AS⁴³⁸-170/2009) [The Supreme Administrative Court of Lithuania, 21 February 2009, decision in the administrative case *JSC Hidroenergija v. Šilutė District Municipality Administration* (Case No. AS⁴³⁸-170/2009)].
- 26 Lietuvos vyriausiojo administracinio teismo 2007 m. kovo 15 d. nutartis administracinėje byloje *T. B., V. D., J. M. ir G. U. v. Vilniaus apskrities viršininko administracija* (bylos Nr. AS²-185/2007) [The Supreme Administrative Court of Lithuania, 15 March 2007, decision in the administrative case *T. B., V. D., J. M. ir G. U. v. Vilnius County Governor's Administration* (Case No. AS²-185/2007)]; Lietuvos vyriausiojo administracinio teismo 2007 m. lapkričio 9 d. nutartis administracinėje byloje *Lietuvos Respublikos generalinis prokuroras v. Trakų rajono savivaldybės administracija, Vilniaus apskrities viršininko administracija* (bylos Nr. AS²-603/2007) [The Supreme Administrative Court of Lithuania, 9 November 2007, decision in the administrative case *The Prosecutor General Of The Republic Of Lithuania v. Trakai District Municipality Administration, Vilnius County Governor's Administration* (Case No. AS²-603/2007)]; Lietuvos vyriausiojo administracinio teismo 2008 m. sausio 23 d. nutartis administracinėje byloje *702-oios gyvenamųjų namų statybos bendrija ir visuomeninė organizacija „Miško ir kraštovaizdžio apsauga“ v. Vilniaus miesto savivaldybės administracija* (bylos Nr. AS³⁹-112/2008) [The Supreme Administrative Court of Lithuania, 23 January 2008, decision in the administrative case *702nd housing community and public organisation „Forest and landscape protection“ v. Vilnius City Municipality Administration* (Case No. AS³⁹-112/2008)].
- 27 Lietuvos vyriausiojo administracinio teismo 2007 m. kovo 15 d. nutartis administracinėje byloje *T. B., V. D., J. M. ir G. U. v. Vilniaus apskrities viršininko administracija* (bylos Nr. AS²-185/2007) [The Supreme Administrative Court of Lithuania, 15 March 2007, decision in the administrative case *T. B., V. D., J. M. & G. U. v. Vilnius County Governor's Administration* (Case No. AS²-185/2007)].
- 28 Lietuvos vyriausiojo administracinio teismo 2005 m. spalio 6 d. nutartis administracinėje byloje *A. M.,*

there are no grounds allowing the presumption of such a need, the court might decide not to apply interim measures²⁹.

2.2. Problems of Legal Regulation Concerning Application of Interim Measures in Administrative Proceedings

Application of interim measures especially in environmental cases is very important. In many of these cases (e.g. cases dealing with territorial planning, IPPC (Integrated Pollution Prevention and Control) permits, environmental impact assessment, etc.) the claims deal with the protection of environment or its components (water, air, soil, etc.) as well as with the protection of public interest. Legal regulation of application of interim measures provided by LAP is not optimal. Here are several reasons for such a conclusion.

As referred above, Art. 71(3) of LAP states that the judge or the court shall hear the petition for securing a claim within one day from the receipt thereof, without notifying the respondent and other participants in the proceedings. If such a petition is filed together with the complaint/petition, it shall be heard within one day from the acceptance of the complaint/petition. The one day period and the fact that the court decides on this question without notifying the respondent and other participants could be criticised. First of all, the one-day period is clearly too short in order to thoroughly evaluate the necessity of the interim measures. As it is clear from the practice of administrative courts in Lithuania and as it has already been mentioned, the court has to take into consideration the principle of proportionality, seek for ensuring the balance of different interests, evaluate the ratio of possible damage, the risks of applying and non-applying interim measures, the stage of construction works, possible impact on the environment, interests of different persons and the society as a whole, possible material losses, the probability of further (new) disputes, the status of the territory, etc. In order to evaluate all of these aspects, the judge needs to have certain preparedness, the possibility of questioning the parties or experts and to obtain their explanations and arguments.

According to existing legal regulation, the judge or the court shall hear the petition for securing the claim without notifying the respondent and other participants in the proceedings. Therefore, the respondent might not even know that the question of interim measures was raised. That is why it might even be considered whether respondent's right to a fair trial and legal protection is not violated by such regulation. Furthermore,

*E. M., J. K., V. L., A. A. ir E. Ž. V. Klaipėdos miesto savivaldybės administracija, UAB „Prekybos namai Vidar“ (bylos Nr. AS⁷-419/2005) [The Supreme Administrative Court of Lithuania, 6 October 2005, decision in the administrative case *A. M., E. M., J. K., V. L., A. A. & E. Ž. v. Klaipėda City Municipality Administration, JSC Prekybos Namai Vidar* (Case No. AS⁷-419/2005)].*

29 Lietuvos vyriausiojo administracinio teismo 2005 m. rugpjūčio 25 d. nutartis administracinėje byloje *L. K., L. M., V. R., J. V., J. A., M. K., R. T., O. R. Š. v. Vilniaus miesto savivaldybės administracija* (bylos Nr. AS⁵-375/2005) [The Supreme Administrative Court of Lithuania, 25 August 2005, decision in the administrative case *L. K., L. M., V. R., J. V., J. A., M. K., R. T., O. R. Š. v. Vilnius City Municipality Administration* (Case No. AS⁵-375/2005)].

it should be noted that when dealing with environmental cases, the interim measure applied most often is the suspension of validity of a contested act (e.g. approved detailed plan, construction permit, etc.). The application of such measures affects the interests of third parties. It might even be said that third parties might be affected much more than the institution that issued the contested act. This is especially true in cases where the act was challenged by the public concerned and the third party is the person who is interested in (or has already started) the construction, or the owner of the territory that was planned, etc. In these cases, the third party will bear financial and other material losses. Thus, the fact that they are not notified when the court or the judge decides on the application of interim measures is simply unfair.

Another problem is that in LAP there are no provisions concerning liability of claimants for damages if they are successful in their applications for interim measures, but finally lose in the main proceedings. According to the court practice, the rules of the Lithuanian Code of Civil Procedure³⁰ (which *inter alia* regulates the question of liability in cases of application of interim measures) in administrative process might be applied only when such possibility is *expressis verbis* stated in LAP. However, that is not the case when we speak about interim measures in administrative process. Nevertheless, this does not exclude civil liability of the applicant, on whose request the interim measures were applied, in cases where the abuse of the right to request interim measures is identified. While deciding on civil liability, the court must, taking into account the specific circumstances of the case, determine whether the requirement of interim measures was necessary and proportionate i.e. whether the person was able to properly assess his or her share of risk. A person's inability to properly weigh these circumstances might be considered by the court as evidence of fault, and the damage caused by the request for interim measures might be considered as unlawful (i.e. as caused by abusing one's right to request interim measures). However, it should be noted that it would not be considered unlawful, where the application of interim measures is necessary and reasonable for ensuring efficient implementation of access to justice and when the requested interim measures are proportionate to the aim of protection of person's rights. Deciding on the question of civil liability in such cases, the court must also evaluate whether the application of civil liability does not create the impression that a relatively simple possibility (e.g. by the mere statement of rejection of the claim) to recover property damage can be seen as a restriction of the access to justice. On the other hand, a person requesting interim measures should evaluate prior to filing a request whether the restriction of other person's rights is really necessary for the protection of his or her rights, if no other measures are capable of achieving the same objective without causing the damage. A person should also keep in mind that if the constraints are too stringent, compared with a purpose, it can be concluded that the person is abusing the right to request interim measures³¹. The claim concerning the question of liability

30 C Lietuvos Respublikos civilinio proceso kodeksas [Code of Civil Procedure of the Republic of Lithuania]. *Official Gazette*. 2002, No. 36-1340.

31 Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2009 m. sausio 6 d. nutartis civilinėje byloje *UAB „Lit-Invest“ v. UAB „Paribys“* (bylos Nr. 3K-3-58/2009). [The Supreme Court of Lithuania, Civil Division, 6 January 2009, decision in civil case *JSC Lit-Invest v. JSC Paribys* (Case No. 3K-3-58/2009)].

against a public authority would be investigated by an administrative court. The claim against a private person would be investigated by the court of general competence in civil proceedings. However, this means that a person who suffered damage or losses because of wrongful application of interim measures might seek liability only by filing another claim, and it will take long before the final decision concerning civil liability (including compensation of damage) is adopted. This means that additional time, financial means as well as human resources will be necessary to restore the balance of interests and protect the violated rights. This problem would be solved if the regulation provided by LAP is improved, e.g. by inserting legal regulation of liability into LAP, or by allowing the application of the Lithuanian Code of Civil Procedure (at least to some extent) when applying interim measures in administrative process. On the other hand, it should be noted that improving the regulation of the procedure of application of interim measures might also solve the problem, i.e. if the time limit for the decision is extended, if all the interested parties are involved in the decision-making process concerning the application of interim measures, the question of liability might not arise at all.

In conclusion it should be noted that the entire legal regulation of interim measures in the administrative proceedings (i.e. not only regulation of liability) should be improved. When deciding on the application of interim measures, administrative courts should thoroughly evaluate all the circumstances, including the possibility of abuse of the right to request interim measures, as described above. As referred above, liability is possible only when the fact of abuse of the right to request interim measures is identified. This aspect should be examined at the first stage (i.e. when deciding on the necessity of interim measures) and not postponed for a separate claim for the compensation of damage caused by application of interim measures. In order to do this, it is necessary to settle the procedural rules and reasonable timeframes for decision-making on interim measures.

3. Application of Interim Measures in Administrative Process: Practice in other European Countries

The comparative analysis presented in this section of the article is based on the answers of the participants to the questionnaire prepared for the workshop referred to in the introduction of this article. The following remarks assess, from the German point of view, mainly different national solutions, especially in French law.

A classical field of provisional legal protection is the decision on granting or refusing suspensive effect when an administrative act is contested. The considerations in this part of the article will focus on the suspensive effect of a remedy against an administrative act which is likely to afflict a third party, either an individual or a non-governmental organisation (NGO). In such a situation the interest of the plaintiff competes not only with the public interest, but also with the rights of the operator who obtains the challenged permit.

Regarding the matter of an interim relief request two different constellations can be found depending on the general legal provisions on suspensive effect of remedies. In some countries (e.g. Austria, Bulgaria, Germany³², Finland, Sweden) the action of the afflicted third party has suspensive effect by virtue of the law. In such a country the operator may apply for an order of immediate execution which means the right to start the project before the permit is final (incontestable). Such an order may be conferred to the administrative authority and the court (Germany) or to the court only. In both cases the plaintiff may in turn appeal against the order. In other countries it was up to the appellant to request an order of suspensive effect from the court. In Germany many legal exceptions from the principle of automatic suspensive effect of an action are provided³³. Under the German law, a public authority may also order the suspension and thus stop the project temporarily. The operator may in turn appeal against such an order. With regard to the outcome of the judicial review a substantial difference between the two designed systems does not seem to be justified. But in Germany some are of the opinion that the interest in immediate execution has certain preference in the waging of interests in case suspensive effect is excluded by virtue of a special law³⁴. But that seems to be an uncommon opinion.

3.1. Characteristics of the Interim Relief Procedure

In all national systems the interim relief procedure is an annex to the main proceedings. In some countries (Estonia, Sweden) interim measures are incorporated to the main proceedings. In these countries, interim measures may be initiated by the court *ex officio*. Other countries like Germany have quite a different system ruled by the “*ne ultra petita*” principle, which means that the courts may not go beyond what is requested in the action³⁵. In the latter countries, interim proceedings must be initiated by a party and are handled as a separate lawsuit concerning registration, files, costs and so on.

In some countries, like France³⁶, a time limit for provisional legal protection is generally provided. In Germany such a rule exists only in some special fields of law³⁷. These exceptions respond to new challenges, such as public interest in a short term

32 Verwaltungsggerichtsordnung (The German Code of Administrative Court Procedure in the version of the promulgation of 19 March 1991 (Federal Law Gazette I page 686), most recently amended by Article 9 of the Act of 22 December 2010 (Federal Law Gazette I page 2248)) [interactive]. Section 80(1). [accessed on 20-09-2012]. <<http://www.gesetze-im-internet.de/vwgo/index.html>>.

33 Following a former judge of the Federal Constitutional Court (Steiner, U. Zum Stand des Verwaltungsrechtsschutzes in Deutschland, *Bayerische Verwaltungsblätter*. 2012, 5: 129) suspensive effect was the ‘great loser’ in the course of acceleration legislation.

34 Kopp, F.; Schenke, W. R. *Verwaltungsgerichtsordnung*. 17. Auflage. München: Verlag C.H.Beck, 2011. Section 80 para 152.

35 The German Code of Administrative Court Procedure, Section 88.

36 Code de justice administrative (CJA) (Code of Administrative Proceedings of France) [interactive]. Article R 421-1. [accessed on 20-09-2012]. <<http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070933>>.

37 E.g. Kopp, F.; Schenke, W.R., *supra* note 34, Section 80 para 141.

realisation of infrastructure projects or a timely decision on the residence of asylum seekers. On the one hand, time limits favour legal certainty. On the other hand, time limits exclude a flexible reaction to a new situation. It may happen that an operator hesitates at the beginning, although an action has no suspensive effect and decides after all to start the works for the project before the court has decided in the main proceeding. Why should the plaintiff initiate interim measures at once in case of “waiting for agreement” with the operator?

The rules and principles governing conduct of interim relief procedures vary in the EU Member States. Under the “French system”, which was adopted by the EU legislation³⁸ the order of an interim measure falls within the competence of the President of the Court³⁹ who may delegate it to a single judge which is the rule in practice. In Germany, in principle the same rules of competence apply like in the main proceedings with one legal exception: in asylum matters a single judge decides exclusively on interim relief⁴⁰. Under the French law⁴¹ the interim relief judge (*juge de référé*) may not be concerned with the main proceedings. The background of this rule is the suspicion of bias if the same judge decides later in the main proceedings, taking into consideration the human tendency to defend a decision once it is made. In other countries, for example in Germany such a worry does not exist. Both systems have pros and cons. The advantage of the latter is the possibility of getting a provisional opinion of the court. But this of course requires a *prima facie* analysis on the merits. Before the German courts the parties usually are grateful for early legal hints in the course of the proceedings.

In all legal systems, the interim relief procedure has a provisional character. Even if the proceedings are governed by *ex officio* investigation, it is up to the claimant to present facts and arguments in order to enable the court to give an overview within a short time. The German law does not explicitly provide special procedural rules, but it is common opinion that the court may restrain its review on a *prima facie* assessment of factual and legal questions. According to the settled case law, the investigation is usually limited to adducing the means of evidence⁴².

As to the role of oral hearings, crucial difference can be found between the German and the French system. In the French administrative jurisdiction oral hearing in the main proceedings is more or less a formality, because the submission of new factual or legal arguments is no longer possible. However, in provisional legal protection oral hearing plays a crucial role⁴³ in France and here the above-mentioned restriction does

38 Protocol No 3. on the Statute of the Court of Justice of the European Union. Article 39. [2010] OJ 83/210, Article 39.

39 CJA, Article L 511-2.

40 Asylverfahrensgesetz (Asylum Procedure Act) [interactive]. Section 74(4) sentence 1. [accessed on 20-09-2012]. <http://www.gesetze-im-internet.de/bundesrecht/asylvfg_1992/gesamt.pdf>.

41 CJA, Article L 511-1.

42 Kopp, F.; Schenke, W. R., *supra* note 34, Section 80 para 125.

43 CJA, Articles R 522-6, R 522-7, R 522-86.

not apply. In Germany, however, the procedure is mostly written, although an oral hearing is possible.

French law explicitly provides for a procedure that must be as quick as possible⁴⁴, whereas the German law is silent on this point. The background of this difference reveals two different models of interim legal protection. One model intends an immediate ruling within the shortest time frames possible, the other model enables a type of shortened procedure which may substitute the main proceedings in many cases similar to a “simplified procedure” as provided by the Polish law⁴⁵. In Bavaria, the average duration of proceedings on provisional legal protection in 2011 in the first instance was 2.4 months altogether and in the second instance – 3.3 months⁴⁶. Of course, the German model does not exclude immediate decisions, even within several hours, if necessary to avoid completed facts, like in demonstration or expulsion cases.

Time limits for the court’s decision are a characteristic of the “high-speed procedure” model. As referred above, in Lithuania the decision must be rendered within one day after the receipt of the request for interim measures, irrespective of the complexity of the case and without the possibility of prolongation. From the German point of view, this rule has a civilian law touch and it is doubtful whether it complies with the character of administrative law disputes, especially in more complicated cases. A precondition seems to be an early decision in the main proceedings, which is for instance required by the French law when suspension has been granted⁴⁷. In Germany, a time limit is stipulated in asylum matters only. In cases where an asylum application is to be disregarded or manifestly unfounded, the court’s decision on the request for suspensive effect is to be taken within one week⁴⁸. The French judge must decide within 48 hours, where the infringement of a fundamental freedom is at stake (*référé liberté*)⁴⁹.

3.2. Legal Criteria for the Court’s Decision

The first thing for the court to evaluate, when deciding on interim measures, is the question of admissibility. In most countries the same rules for admissibility are applicable as in the main proceedings. But in the northern European countries (Sweden, Finland) an exception is made for legal standing. In Finland it is possible, although not common for the court to decide on interim rulings before the standing is definitively resolved. In Sweden, the courts find a pragmatic way when a permit is challenged by different plaintiffs and when in some cases the standing is clear, and in others it is not.

44 CJA, Articles L 511-1, L 522-1, R 522-4, R 522-6.

45 Skoczylas, A.; Swora, M. Administrative Judiciary in Poland in Research for Fairness and Efficiency – An Overview. *Transylvanian Review of Administrative Sciences* [interactive]. 2007, 19 E: 124 [accessed on 20-09-2012]. <<http://www.rtsa.ro/en/files/TRAS-19E-2007-11Skoczylas-Swora.pdf>>.

46 Bayerisches Landesamt für Statistik und Datenverarbeitung, Tätigkeit der Verwaltungsgerichte in Bayern 2011 [interactive]. Pages 40,56 [accessed on 20-09-2012]. <<https://www.statistik.bayern.de/veroeffentlichungen/download/B6300C%20201100/B6300C%20201100.pdf>>

47 CJA, Article L 521-1.

48 Asylum Procedure Act, Section 36(2).

49 CJA, Article L 521-2.

Then the court needs not conduct a thorough examination of the standing in unclear cases.

The common standard seems to be the discretion of the court which has to weigh the competing interests. The court checks whether there is a threat of creating irreversible facts, which would make final success in the main proceedings meaningless. When a permit for a major project is challenged, the strict observation of this principle should normally lead to suspension. In some countries (e.g. Austria, Bulgaria, Finland) the probable outcome of the action in the main proceedings is of no relevance. In case of a “high speed procedure”, such a prognosis is probably not possible due to the lack of time. The French judge may order suspension if justified by urgency and a serious doubt about the legality of the administrative decision arises.⁵⁰ A similar rule applies in Italy. The Italian court can grant interim relief only in case of serious and irreparable damage (*periculum in mora*) and if it is foreseen that the final judgement will be in favour of the claimant (*fumus boni iuris*). The German Code of Administrative Court Procedure sets no guidelines for the court’s decision⁵¹. According to the settled case law of the German courts⁵², firstly, the consequences are to be assessed in case suspension is granted or not. Secondly, a prognosis on the outcome in the main proceedings is to be undertaken. In practice, the latter criterion usually prevails. The Court of Justice of the European Union (CJEU)⁵³ carries out a *prima facie* analysis on the facts and the law as well. But this case-law applies to the proceedings on the European level only and has no binding effect on the proceedings at national level. Under the German doctrine, the court is all the more obliged to conduct an in-depth examination on the merits, since the ruling more or less substitutes the decision in the main proceedings. In such a situation, the procedure lasts longer and becomes similar to shortened main proceedings and an opposite solution in the main proceedings, if continued, is quite rare.

There is a range of possible decisions apart from granting suspension or rejecting a request. In some countries (Bulgaria, Germany, Finland), the court may order the deposit of a security as a condition for immediate enforcement. In Bulgaria and Germany, such an order is adopted in extremely rare cases. In Finland, a security deposit is generally mandatory. It is required by the authority issuing a permit for enforcement, while the court is competent to review the authority’s order, including the security. The security is in favour of the public authority and not of the operator. Starting a project before the permit becomes final (incontestable) always entails risk for the operator. The security shall cover the costs of appropriate administrative measures if the permit is finally annulled. The German Code of Administrative Court Procedure⁵⁴ empowers the court to order the rescission of implementation. However, this provision has no significant meaning in a constellation where a permit is challenged by a third party. It is often sufficient to terminate the project. The re-establishment of the *status quo*

50 CJA, Article L 521-1.

51 Section 80 (5).

52 Kopp, F.; Schenke, W. R., *supra* note 34, Section 80 para 152.

53 See Case C-76/08R, *Commission of the European Communities v Republic of Malta* [2009] ECR I-8213.

54 Section 80 (5)

seems to make no sense where the plaintiff's failure to win the case is still possible in the main proceedings. For that reason, rescission is in practice limited to provisional measures that do not lead to completed facts to the detriment of the operator, such as the demolition of a partially erected building.

The German courts are empowered to make suspensive effect dependent on certain conditions. But in practice this rarely happens.

3.3. Liability for Damage Caused by Interim Measures

The liability of the plaintiff for the damage caused by delay if suspension has been granted but the appeal is rejected in the main proceedings poses a serious problem. The risk of liability may prevent a citizen from pursuing his/her rights and thus impair the right to an effective EU remedy as provided for in Article 47 of the Charter of Fundamental Rights of the EU⁵⁵ and Article 19 of the Treaty on European Union⁵⁶. If redress is possible in theory, in a follow-up lawsuit the suspension granted in previous proceedings may hardly be considered as an illegal act caused by the applicant who had challenged the permit. Thus, a claim for redress will in practice be unsuccessful, unless such a redress is explicitly provided by the law. Most legal systems do not provide for such a responsibility of the appellant. Due to the lack of such a provision it seems to be a common opinion in Germany⁵⁷ that the damage caused by suspension granted by the court cannot be claimed.

In the United Kingdom, the requirement that an applicant gives a cross-undertaking⁵⁸ in damages when seeking an interim injunction is an area of key concern at the moment. The rules of civil procedure (RCP) provide that where the court faces an application for interim relief, it is expected that there will be a cross-undertaking as to damages, unless the judge decides otherwise,⁵⁹ i.e. it is an active step of judicial discretion not to require a cross-undertaking. In the field of environmental law the issue has been raised by the European Commission, which argued that the UK had failed to fully transpose Directive 2003/35/EC⁶⁰ and to apply it correctly, partly due to the requirement for the applicants to provide a cross-undertaking on damages when seeking

55 Charter of Fundamental Rights of the EU. [2010] OJ, C 83/389.

56 Consolidated version of the Treaty on European Union. [2010] OJ, C 83/13.

57 See Kopp, F.; Schenke, W. R., *supra* note 34, Section 80, para 208. Schoch, F.; Schmidt-Abmann, E.; Pietzner, R. *Verwaltungsgerichtsordnung*. München: Verlag C.H.Beck: Stand: 06/2011. Article 80 Para 410.

58 A cross-undertaking in damages is an agreement by a claimant requesting an injunction to pay compensation to the party subject to the injunction (in the workshop cases, the developer) if the court subsequently decides that the injunction should not have been given and the party subject to the injunction suffers a quantifiable financial loss as a result of complying with that injunction.

59 Paragraph 5.1(1) of Practice Direction 25a – interim injunctions [interactive]. [accessed on 20-09-2012]. <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_part25a>.

60 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. [2003] OJ, L156/17.

interim relief. According to Article 9(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),⁶¹ remedies shall not be prohibitively expensive⁶². Following a recent complaint, the Aarhus Compliance Committee recommended in its findings of 24 September 2010⁶³ that the UK reviewed its system for allocating costs in environmental cases within the scope of the Convention and undertook practical and legislative measures to overcome the problems identified.

3.4. Influence of EU Law on the National Interim Relief Procedure

According to Article 19(1) of the Treaty on European Union, *Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*. Starting from the *Factortame*⁶⁴ case it is settled case-law that effectiveness of legal protection includes interim relief. Procedural rules on the EU level exist only in some fields of law. Noteworthy are the rules on legal standing of NGOs in environmental matters⁶⁵. The CJEU stressed in cases *Djurgården-Lilla Värtans Miljöskyddsförening*⁶⁶ and *Trianel*⁶⁷ the principle of wide access to justice. Apart from sporadic rules of EU legislation, the procedural autonomy of the Member States is recognised. In the absence of EU rules, it is for the domestic legal system of each Member State to lay

61 Convention on Access to Information, Public Participation in Decision - Making and Access to Justice in Environmental Matters (Aarhus Convention) [interactive]. [accessed on 20-09-2012]. <<http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>>.

The Convention was approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 ([2005] OJ, L124/1) and was adopted by all Member States (except Ireland).

62 A general overview is given by Darpö, J. *On costs in the environmental procedure*. 2011 [interactive]. [accessed on 20-09-2012]. <http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/Costs_JD_31012011.pdf>.

63 Findings and recommendations of the Aarhus Convention Compliance Committee with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom [interactive] [accessed on 20-09-2012]. <http://www.unece.org/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf> Paragraph 133:

“A particular issue before the Committee are the costs associated with requests for injunctive relief. Under the law of E&W, courts may, and usually do, require claimants to give cross-undertakings in damages. As shown, for example, by the Sullivan Report, this may entail potential liabilities of several thousands, if not several hundreds of thousands of pounds. This leads to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with Article 9, paragraph 4.”

64 Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [2009] ECR I-2433.

65 Article 10 a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effect of certain public and private projects on the environment ([1985] OJ L/175), as amended by Directive 2003/35/EC, Article 15 a, Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control ([1996] OJ L/257), as amended by Directive 2003/35/EC.

66 Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* [2009] ECR I-9967.

67 Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*. [2011] OJ C204/6.

down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. But according to the well-established case law of the CJEU, the detailed procedural rules must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness)⁶⁸.

As a result, it must be stated that the influence of the EU law is limited. Of course, different national rules on interim relief procedures, depending on whether the EU law is concerned, should be avoided.

Conclusions

1. Interim measures are procedural measures, aimed at safeguarding a legal situation and ensuring the enforcement of the final decision in the main proceedings, temporary by nature and applied in cases where there is a real threat of irreparable harm to be suffered if interim measures are not taken. One can talk about interim measures in the national context, as well as in the context of enforcement of the provisions of EU law and international context, especially when speaking about the protection of human rights.

2. The term of one day, foreseen in LAP, is clearly too short in order to thoroughly evaluate the necessity for interim measures. As it is clear from the practice of administrative courts in Lithuania, the court has to take the principle of proportionality into consideration, seek to ensure balance of different interests, evaluate the ratio of possible damage, the risks of application and non-application of interim measures, the stage of construction works, possible impact on the environment, interests of different persons and the society as a whole, possible material losses, the probability of further (new) disputes, the status of the territory, etc. In order to evaluate all of these aspects, the judge needs to have certain preparedness, be able to question the parties or experts and obtain their explanations and arguments.

3. The fact that, according to LAP, the judge or the court shall hear the petition for securing the claim without notifying the respondent and other participants in the proceedings, may be criticised. The respondent might not even know that the question of interim measures was raised. That is why it might even be considered whether such regulation could violate the respondent's right to a fair trial and legal protection. Furthermore, it should be noted that application of interim measures affects the interests of third parties. This is especially true in environmental cases. In such cases, the third party will bear financial and other material losses. Therefore, the fact that they are not notified when the court or the judge decides on the application of interim measures is simply unfair.

68 Case C-240/09, *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] OJ C130/6.

4. According to existing legal regulation in Lithuania, a person who suffered damage or losses because of wrongful application of interim measures in the administrative proceedings might seek liability only by filing another claim, and it will take long until the final decision concerning civil liability (including compensation of damage) is adopted. This means that additional time, financial means as well as human resources will be necessary to restore the balance of interests and to protect the violated rights. This problem would be solved if the regulation provided by LAP is improved, e.g. by inserting legal regulation of liability into LAP, or by allowing the application of the Lithuanian Code of Civil Procedure (at least to some extent) when applying interim measures in administrative process. On the other hand, it should be noted that improving regulation of the procedure of application of interim measures might also solve the problem, i.e. if the term for deciding upon it is prolonged, if all the interested parties are involved in the decision-making process concerning the application of interim measures, the question of liability might not arise at all.

5. The national rules on interim relief vary in national law on administrative jurisdiction of the EU Member States. Two types of interim relief can be found. On the one hand, it is a “high speed procedure” with short time frames. On the other hand, it is a type of shortened main procedure without the pressure of precise time limits. In cases where a permit is challenged by a third party, the second model of provisional legal protection better meets the interest of the parties. Where the right of the plaintiff competes with the right of the operator, a *prima facie* assessment of the factual and legal situation is preferable in order to avoid a different solution in the main proceedings as far as possible.

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REIKALAVIMO UŽTIKRINIMO PRIEMONĖS ADMINISTRACINIAME PROCESĖ: SU APLINKOS APSAUGA SUSIJUSIŲ BYLŲ YPATUMAI

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Santrauka. Reikalavimo užtikrinimo priemonės (arba laikinosios apsaugos priemonės) yra procedūrinės priemonės, leidžiančios užtikrinti tinkamą asmenų ar valstybių teisių bei interesų apsaugą, dar neišnagrinėjus bylos iš esmės. Šių priemonių taikymas ypač reikšmingas bylose, susijusiose su aplinkos apsauga, nes daugelyje tokių bylų (pavyzdžiui, bylose, susijusiose su teritorijų planavimu, taršos integruotos prevencijos ir kontrolės leidimais, planuojamos ūkinės veiklos poveikio aplinkai vertinimu ir t. t.) paliečiami aplinkos ar atskirų jos komponentų (oro, vandens, dirvožemio, augalijos ir pan.) apsaugos klausimai, taip pat dažnai ginami viešieji interesai. Reikalavimo užtikrinimo priemonių taikymo teisinis reguliavimas, įtvirtintas šiuo metu galiojančioje Lietuvos Respublikos administracinių bylų teisenos įstatymo redakcijoje, nėra optimalus. Būtent dėl to pirmoji straipsnio dalis skiriama reikalavimo užtikrinimo priemonių taikymo Lietuvos administraciniame procese galimybių ir problemų analizei, didesnę dėmesį skiriant su aplinkos apsauga susijusioms byloms bei jų specifikai. Antroji straipsnio dalis skirta Europos administracinių teismų teisėjų asociacijos Aplinkos darbo grupės organizuoto teorinio-praktinio eminaro „Laikinosios apsaugos priemonės aplinkos apsaugos srityje“ (įvykusio 2011 m. rugsėjo 22 d. Vilniuje) rezultatams ir išvadoms atskleisti. Joje trumpai apžvelgiama nacionalinė įvairių valstybių praktika, taikant laikinasias apsaugos priemones, daugiausia dėmesio skiriant Vokietijos ir Prancūzijos teisiniam reguliavimui.

Straipsnyje atlikto tyrimo pagrindu galima daryti išvadą, kad, sprendžiant būtinumo taikyti laikinąsias apsaugos priemones klausimą, ypač svarbu yra užtikrinti teisingą interesų pusiausvyrą: tiek garantuojant efektyvų teisės kreiptis į teismus įgyvendinimą, tiek užtikrinant, kad nebūs pažeistos atsakovo ir trečiųjų asmenų teisės, kad laikinųjų apsaugos priemonių taikymas nesukels žalos, didesnės negu ta, kuri būtų, jei laikinosios apsaugos priemonės nebūtų taikomos, taip pat kad nebūs piktnaudžiuojama teise reikalauti taikyti šias priemones. Šiuo aspektu reikėtų akcentuoti, kad teisiniame reguliavime neturėtų būti nustatyti trumpi terminai teismo procesinių veiksmų atlikimui, priimant sprendimą dėl laikinųjų apsaugos priemonių taikymo. Be to, reikalinga koreguoti dabar galiojančią teisinį reguliavimą, kad teismui būtų įmanoma įvertinti preliminarius galimus pagrindinės bylos rezultatus bei nustatyti, ar nėra piktnaudžiuojama teise taikyti šias priemones.

Reikšminiai žodžiai: laikinosios apsaugos priemonės, reikalavimo užtikrinimo priemonės, administracinis procesas, administracinių bylų teisena, aplinkos apsauga, teisė kreiptis į teismus, bylos, susijusios su aplinkos apsauga.

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