Answers to the Avosetta questionnaire on weighting of risks - benefits and alternatives solutions

ESTONIA

Hannes Veinla (Tartu University)

General remark:

As Estonian relevant legislation and especially administrative and court practice concerning weighting of risks – benefits and alternatives is extremely undeveloped and vague I am not able to give meaningful answers to most of the questions in the questionnaire. However I am still trying to discuss some of the relevant aspects

I. Estonian legislation on weighing of risks and benefits of alternatives

1. EIA legislation

According to Estonian law objective of environmental impact assessment and strategic environmental assessment is to make, on the basis of the results of environmental impact assessment of proposed activities, a proposal regarding the choice of the most **suitable solution for the proposed activities**, which makes it possible to prevent or reduce damage to the state of the environment and to promote sustainable development and to allow the results of environmental impact assessment to be taken into account in proceedings for issue of a development consent. Environmental impact is assessed upon application for or application for amendment of a development consent (permit). Accordingly there are two different stages of the procedure – EIA stage and the stage of issuance of a permit.

Weighting and balancing of non- environmental aspects is taking place at the second stage (issuance of the permit). In many cases permit agency is different from the environmental agency. For example building permit is issued by local government. Permit agency enjoys considerable room of discretion and may easily overestimate social and economic considerations and underestimate environmental ones. Upon making a decision to issue or refuse issue of a permit, the permit agency may refuse to take account of the results of environmental impact assessment and the environmental requirements appended to the EIA report, in this case the permit agency should set out a reasoned justification. Consequently in the context of permitting procedure non-environmental considerations can easily prevail. At the same time Estonian legislation does not specify what kind of social and economic interests could be taken into account – jobs, general economic development, infrastructure, energy, regional development issues. There is no solid case law, which could clarify the issue of balancing different interests.

It is also important to mention that EIA procedure and permitting procedures are open procedures. All persons (without stating their interest or violation of rights) have the right, within a designated term, to submit to the administrative authority conducting the proceedings proposals and objections concerning the draft of the legal act (in this case EIA report or permit) or application for issue thereof. This widens the scope of balancing of interests considerably.

2. Land use planning

According to article 1 of the Planning Act (Scope of application and purpose of Act):

"… spatial planning (hereinafter planning) is democratic and functional long-term planning for spatial development which co-ordinates and integrates the development plans of various fields and which, in a balanced manner, takes into account the long-term directions in and needs for the development of the economic, social, cultural and natural environment."

According to the legislation and case law fair and equitable balancing of different values and interests in the planning procedure is a key condition for validity of the planning decision. Planning authority has wide discretionary power. One may say even too wide and undefined. The planning Act only very generally stipulates, that needs for the long term development of economic, social, cultural and environmental sectors should be balanced. There are only some general conditions and criteria which always should be followed.

The right of discretion shall be exercised in accordance

- with the limits of authorisation,
- the purpose of discretion,
- the general principles of law (especially principle of proportionality),
- taking into account all relevant facts and
- considering all legitimate interests.

Within the framework of discretion the court can not replace the administrative decision, the court has to acknowledge the administrative body as far as it's decision depends on discretion and does not exceed the latitude of discretion, the framework.

It should also be noted that planning law is in Estonia is the only branch of law where "actio popularis" is permissive. According to Estonian law every person who finds that a decision to adopt a plan is in conflict with an Act or other legislation **or** that his or her rights have been violated or freedoms restricted by the decision has the right to contest the decision in court within one month as of the day on which he or she became or should have become aware of the adoption of the plan. So each person can contest the plan on the basis of debatable balancing of different interests.

3. Nature protection law

One of the basic principles of nature protection law seems to be the requirement that - nature conservation shall be based on the principles of balanced and sustainable development and in **each individual case, alternative solutions shall be considered** which, from the

position of nature conservation, are potentially more effective. This principle is addressed to administrative authorities and does not directly oblige private entities. However, the actual situation is that this potentially far-reaching principle seems to be completely forgotten. I do not know that it would be implemented at all, let alone the accurate interpretation of it by the administrative bodies or courts. However, this is a typical situation where the case law on principal issues of environmental law is very limited(or even nonexistent) and superficial. It also follows from this that judges knowledge of the environmental law issues is very slight indeed.

Another example of balancing of interests and search of alternatives from nature protection law concerns the transposition of art 6(4) of Habitats directive into Estonian law. Estonian law is here also limited to mere literal transposition of provisions of the directive. Estonian law does not interpret these obligations in more detail. Case law is completely nonexistent as well.

4. Water Law

Estonian Water Act contains the following provisions which provide for the balancing of interests:

- If the supply of water being used is not sufficient, the demands of residents and health care, social welfare, educational and child care institutions and food industry for drinking water shall be guaranteed first and foremost.
- A permit for the special use of water can be amended, if: the legislation which constituted the basis for the requirements set by water permit have been amended, and the public interest that the permit be amended outweighs the person's certainty that the permit remains in valid in its current form

Unfortunately, however, I have no information on whether and how these requirements have been implemented in practice, but I suspect that not..

5. Draft of the General Part of Environmental Code

The draft in many cases gives the administration discretionary power, which includes balancing of interests and search of alternatives. For example the draft prescribes everybody's right to environment adequate to his or her health and wellbeing. At the same time the draft stipulates in this case also balancing of interests.
In assessing compliance of the environment with the health and wellbeing needs rights and interests of other persons, public interests and land use plans should be taken into account. The draft provide that only reasonable measures can be taken to ensure the compliance of the state of the environment with the health and wellbeing needs.

However these very significant formulations are only preliminary, and have not been approved by the lawmaker.

II. Estonian case law

The only somehow relevant case is so called "Jamejala Park case" of Estonian Supreme Court

A historic and well preserved park is situated in a small village – Jamejala – in central Estonia. In soviet time a home for aged people was erected in the park. In the end of 90-s the Ministry of Justice launched a project to erect on the basis of existing building a new central hospital of prisons. The planned new facility would have needed more space and as a consequence a significant part of the park would have had to be destroyed. Under Estonian planning law all such projects should be based on land use plan. The plan was initiated and subsequently adopted by local government. Adoption of the land use plan is under Estonian law a discretionary decision that should entail weighting of different interest and values. The decision of the local government was based on two arguments. The first argument was

brought out by the Ministry of Justice – building of a new facility in the park on the basis of existing buildings would have ended up in fewer costs. Local government emphasised the opportunity for new jobs for local people who suffered from high rate of unemployment. Local government totally ignored environmental values of the park when deciding on the plan, which was brought out by local people, who decided to protect the park. A group of local inhabitants filed a complaint in administrative court and contested the adoption of the planning, applied for annulment of the administrative act. The court of first instance and district court dismissed the complaint, but the Supreme Court took a different position. The Supreme Court annulled the plan, the reasoning of the court was based on concept of discretion. Under Estonian administrative law the right of discretion is an authorisation granted to an administrative authority by law to consider making a resolution or choose between different resolutions. The right of discretion shall be exercised in accordance with the limits of authorisation, the purpose of discretion and the general principles of justice, taking into account all relevant facts and considering all legitimate interests. The Supreme Court pointed out that the planning act adopted by the local government was not based on all relevant facts and consideration of all legitimate interests. According to Supreme Court's estimation local government totally forgot about environmental considerations and this should be considered as manifest error of discretion that should end up in illegality of planning decision.