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Permit procedures for industrial installations and infrastructure projects in Poland: assessing integration and speeding up

A. Baseline information

I. Development control - general features

In Poland generally a multiple-permit system is applied for development control.

For new developments generally it includes two stages:

-planning permission (a decision on the conditions for land development and use - *decyzja o warunkach zabudowy i zagospodarowania terenu*) - is required unless there is a local land use plan (plan miejscowy) which covers the site of the planned development (only about 25% of the country is covered by such detailed local land-use plans)

- construction permit (*pozwolenie na budowę*) - for some types of construction and construction works it takes a form of notification (*zgłoszenie*) which is a form of tacit agreement

For all projects subject to EIA scheme under the EIA Directive there is an additional requirement to obtain a "decision on environmental conditions" ("*decyzja o środowiskowych uwarunkowaniach*" - often called "environmental decision" or "EIA decision") before obtaining the above decisions. It is considered to serve as "reasoned conclusions" in the meaning of EIA Directive (as amended in 2014).
The EIA decision is required as a basis for any of subsequent decisions authorising the project, such as planning permission, construction permit, as well as concession for extraction of mineral resources, permit for waste management operations etc. (a developer, while applying for any of the subsequent decisions for a project under EIA scheme, has to submit the EIA decision).
Both the EIA decision and the 'subsequent decision' constitute jointly the 'development consent' necessary to start development of the project.

2. Industrial installations

1) Form and scope of permit

For industrial installations, apart from the above generally applicable procedures, there is also an additional requirement to obtain an "emission permit" (*pozwolenie emisyjne*) which may have a form of:
- 'integrated permit' (*pozwolenie zintegrowane*) under the IPPC/IED Directive, or
- 'sectoral permit' (*pozwolenie sektorowe*).

All the above permits are taken by various authorities, depending on the types of industrial installations and their location. Bearing this in mind there has never been a serious attempt to combine them all (see below Part B).

1) Procedures (on the example of waste disposal installations under point 10 of annex I to EIA Directive)

The respective authorisation procedure for a new installation of such a type would include 4 main decision-making stages:

- environmental (EIA) decision - main instrument to transpose EIA directive
- planning permission (if no local plan exists)
- construction permit
- integrated (emission) permit - - main instrument to transpose IED/IPPC directive

Stage 1 - environmental (EIA) decision

- issued pursuant to the Act of 2008 on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments (*Ustawa z dnia 3 października 2008 r. o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko* - often called as *ustawa oos*)
- in case of this installation - the EIA decision would be issued by local (*gmina*) authorities (the head of the local administration or the mayor of a town/city)
- environmental (not all - see below) and health authorities must be consulted
- as this is Annex I project - requires applying special so called “public participation procedure” which is regulated in the 2008 Act in accordance with EIA Directive and Aarhus Convention. The “public participation procedure” is based on “every person’ principle and includes several procedural steps, in particular: it requires using of several mandatory methods of notifying the public, special arrangements to have access to all relevant documentation and possibility to submit comments on the application and the respective EIA report in both written form (including by email without having to have electronic signature) or at the hearing (if applicable). The time-frame for submitting written comments is currently 21 days, since 2017 will be 30 days (transposition of 2014 amendment to EIA Directive). No specific time-frames for other stages of the procedure as required under article 6.4 of the Aarhus Convention.

- no requirement to have legal title to the site

- the decision sets the environmental conditions for construction, design etc. of the planned installation

- in case of significant impact on Natura 2000 - appropriate assessment and respective procedures under article 6 paras 3 and 4 of Habitat Directive are included into the general EIA procedure

- must be obtained by the developer before applying for any other "subsequent decisions" and is binding upon them (se above)

- may be appealed by parties to the procedure (see below) and environmental NGOs

Stage 2 - planning permission (required if no local plan exists)

- issued pursuant to the Act of 27 March 2003 on Spatial Planning and Development (ustawy z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym
- to be issued by local (*gmina*) authorities (the head of the local administration or the mayor of a town/city)
- in certain circumstances some specialised environmental authorities will be consulted
- no requirement to have legal title to the site
- no requirement to apply "public participation procedure" but there are limited possibilities for public participation and right to appeal (only parties to the procedure (see below) and some NGOs
- in case of significant impact on Natura 2000 (not examined in EIA decision) - a special "habitat assessment" procedure is applied to implement appropriate assessment and respective procedures under article 6 paras 3 and 4 of Habitat (formally possible but never done in practice because planning permission is done almost immediately after the EIA decision)

Stage 3 - construction permit

- issued pursuant to the Building Law Act (BLA) of 7 July 1994 (ustawy z 1994 r.– Prawo budowlane)

- to be issued by district authorities (construction department in poviat office) or the mayor of a town/city

- requirement to have legal title to the site

- public participation and right to appeal

    - as a rule are very limited (see below) and no requirement to apply "public participation procedure"

    - only in rare cases where so called "repeated EIA" is required[1] both public participation and rights to appeal are the same as in case of EIA decision ("public participation procedure")

[1]requirement for "repeated EIA" was established in 2008 following the judgments in Crystal Palace/White City – C-508/03; Barker – C-290/03

- in case of significant impact on Natura 2000 (not examined in EIA decision)- "repeated EIA" is required in which appropriate assessment and respective procedures under article 6 paras 3 and 4 of Habitat Directive are included into the general EIA procedure

Stage 4 - integrated (emission) permit

- issued pursuant to the Environmental Protection Law Act of 27 April 2001 (ustawy z *z dnia 27 kwietnia 2001 r. - Prawo ochrony środowiska)*
- in case of this installation to be issued by regional authorities (evironmental department in voivodship marshall office)
- requirement to have legal title to the site
- "public participation procedure" (as described above) applies
- right to appeal is limited only to environmental NGOs (see below)
- in case of significant impact on Natura 2000 (not examined in EIA decision) - a special "habitat assessment" procedure is applied to implement appropriate assessment and respective procedures under article 6 paras 3 and 4 of Habitat

Under Polish law, access to review procedures regarding administrative decisions is granted to 'parties to the [administrative] proceedings.

According to the general rule as provided for by Art. 28 of the Administrative Procedure Code (APC), a party is a person whose 'legal interest' is affected by the proceedings (regarding interpretation of the 'legal interest' - see section below).

In cases regarding EIA decisions, the circle of parties is to be established on the basis of general rules as provided by Art. 28 of APC and the notion of legal interest is interpreted by administrative authorities and courts quite broadly - it is acknowledged that owners of the properties which may be affected by the project have a status of a party.

However, in proceedings regarding certain 'subsequent decisions' the circle of parties in significantly limited by specific provisions regulating issuing of such decisions.
This is the case of the construction permits issued on the basis of Building Law Act (BLA).
According to BLA, parties to the proceedings regarding a construction permit are only the applicant and owners or administrators of properties situated in the area affected by the building structure, while "the affected area" is defined restrictively as an area indicated by special provisions providing for limitations in the use of the area (Article 28.2 and Article 3 item 20 of BLA). Such provision limits significantly the circle of parties, as such "special provisions providing for limitations in the use of the area" are rather rare.
The circle of parties to construction permits proceedings is established according to the general rules (i.e. on the basis of Art. 28 of APC) only when within these proceedings the "repeated EIA" (ponowna ocena oddziaływania na środowsko) is carried out.

In case a person is regarded as having no legal interest at the stage of administrative proceedings he/she will also be regarded as having no legal interest at the stage of judicial proceedings.
Such limitations of the circle of parties means that members of the public concerned have limited possibilities to challenge the 'development consent' for projects subject to EIA.

In other words, in the EIA procedure (all potential mistakes of that procedure) can be verified within reviewing the EIA decision. The problem raised here consist in the fact that - while the conditions established by the EIA decision shall be binding for the final 'development consent' (e.g. construction permit) - the possibilities to challenge that final 'development consent', including verification whether the conditions of the EIA decision were observed, is very limited.
Extremely limited is also possibility to challenge integrated permit. According to Article 185.1 of EPLA, the circle of 'parties' to the proceedings for integrated permits is limited to the operator only (and certain neighbours in exceptional cases).
This means that normally neighbours of an installation will be deprived the access to justice, although according to the Directive they shall be regarded as 'members of the public concerned'.
Such limitation applies also for other environmental permits for emissions, so-called 'sectoral permits' required by Polish law, such as permit for emission into air, permit for emission into water.

All the above limitations of access to justice seems to be not in line with the article 9.2 of the Aarhus Convention. In case of the integrated permit lack of any possibility to challenge the permit by owners is clearly not in line with the Aarhus Convention and with the IED/IPPC Directive.

3.Infrastructural projects (on the example of motorway under point 7 (b) of annex I to EIA Directive)

1) SEA

Strategic Environmental Assessment (SEA) under the SEA Directive applies to various strategic documents envisaging construction of motorways: Transport Policy, Strategy for Transport Development, Program for the Construction of National Roads 2014-2013, as well as to respective regional land use plans.
The location of the motorways established under the above strategic documents have been examined in the SEA for respective documents and become legally binding upon local land use plans.

The concrete pieces of motorways are subject to permitting and respective EIA procedures. There are no serious attempts to merge EIA and SEA procedures.

2) Permitting procedures

Permitting procedures for various kinds of infrastructure projects (roads, railways, airports ets) are increasingly subject to specific requirements deviating slightly from the general requirements described above under point 1.

For all of them the first stage of the procedure remains the same - it is EIA decision. The deviations from the general scheme apply mainly to stage 2 and 3 where specific laws provide some special rules different from the general rules in the Spatial Planning and Development Act and in the Building Law Act.

For motorways such specific rules are provided in the Act of 10 April 2003 on the Special Principles of the Preparation and Implementation of Investment Projects in the Scope of Public Roads. Under this Law stages 2 and 3 of the development consent are merged into one stage: it is called "a decision on the permit for the implementation of a road investment project".

Thus the procedure for a construction of a motorway in Poland is as follows:

- stage 1: environmental (EIA) decision
- stage 2: decision on the permit for the implementation of a road investment project

For stage 1 the procedure regarding EIA decision for a piece of motorway is exactly the same as described in case of waste disposal installation, with the only one difference - the decision is issued by the regional environmental director. All the requirements regarding public participation and access to justice apply.

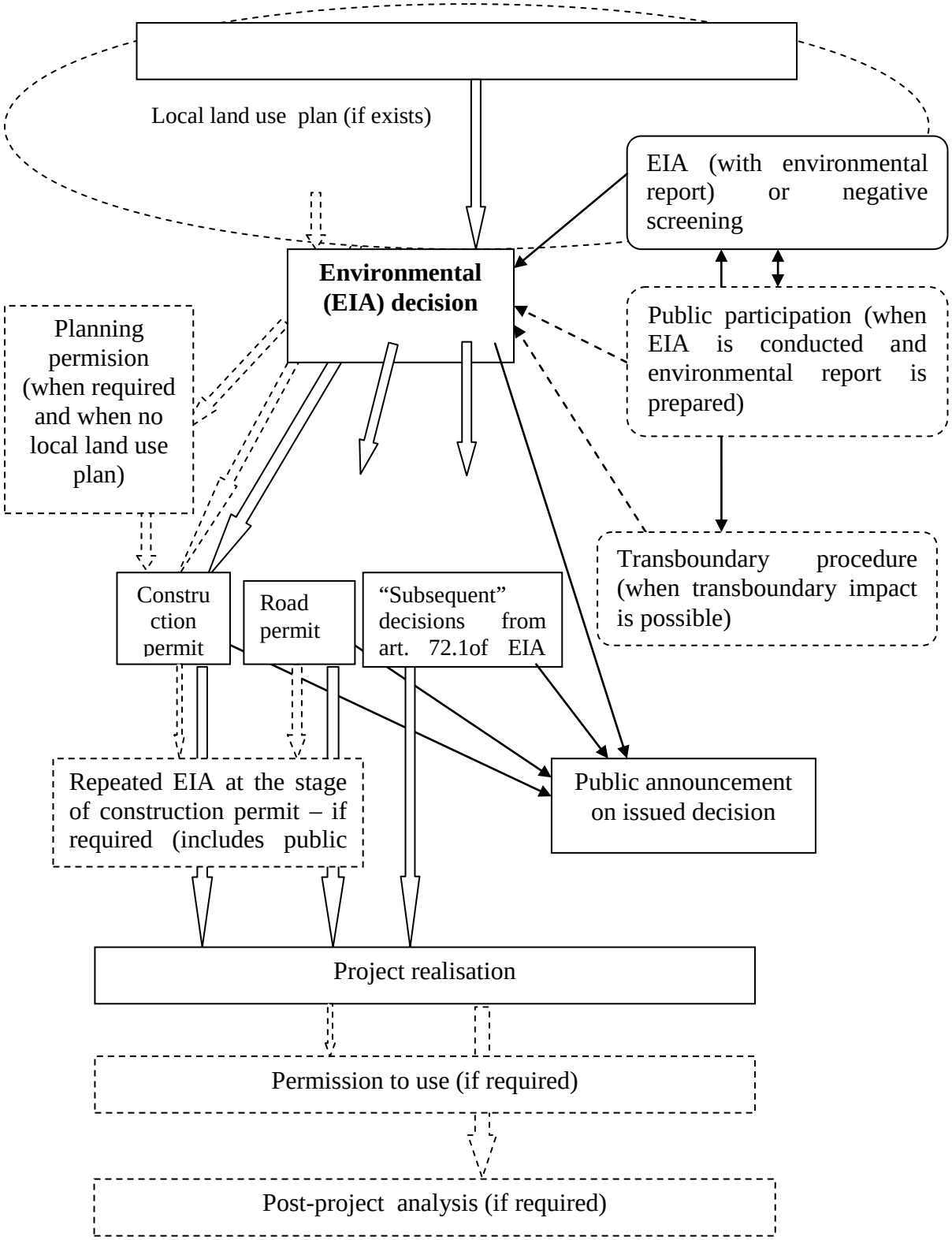
Stage 2 the decision on the permit for the implementation of a road investment project

- decision is issued by the regional governor (voivoda).
- provisions of the Spatial Planning and Development Act do not apply
- provisions of the Building Law Act apply with some modifications
- deadline for issuing the decision is set for 90 days
- there are special rules and deadlines for appeal procedures (administrative court must issue the verdict within 2 month)
- public participation and right to appeal:
    - as a rule: no requirement to apply "public participation procedure" but there are limited possibilities for public participation and right to appeal for parties to the procedure and some NGOs (similar as in case of planning permission).
    - only in rare cases where so called "repeated EIA" is required, both public participation and rights to appeal are the same as in case of EIA decision ("public participation procedure")

- in case of significant impact on Natura 2000 (not examined in EIA decision)- "repeated EIA" is required in which appropriate assessment and respective procedures under article 6 paras 3 and 4 of Habitat Directive are included into the general EIA procedure

. The process of obtaining administrative decisions required for the legal development of a project

The process of obtaining administrative decisions necessary to develop a project covered by the EIA Directive [2].



[2] See: Bar M., Jendroska J., Decyzja o środowiskowych uwarunkowaniach i inne wymagania prawne ochrony środowiska w procesie inwestycyjnym. Praktyczny poradnik prawny, Wroclaw 2009, p. 48.

B. Describing and evaluating integration and speed up legislation

Integration
As mentioned above there has never been a serious attempt to integrate all the above development control procedures. In fact introduction of an additional stage in the procedure in form of a separate environmental (EIA) decision may be considered as a step in a different direction.

The environmental (EIA) decision was introduced in Poland in 2005 because the hitherto existing legal framework for EIA has been heavily criticized by the European Commission (EC) for its shortcomings in the transposition of EIA and Habitats Directives.
Traditionally, EIA in Poland has been integrated into the various decision-making procedures which authorize particular categories of projects, as follows (Article 46.4 of EPLA):

- planning permision/location decisions
- construction permits
- mining concessions
- water permits:
  - for constructing water facilities
  - for underground abstraction
  - for agricultural use of wastewater
- consents for works related to water regulation and flood protection
- decisions on restructurization of rural land holdings
- consents for changing forests into arable land.

In addition, under the Road Act, EIA was also related to road location decisions and road construction permit procedures.

Since for many categories of projects more than one of these authorization procedures was required, in practice EIA had to be carried out at least twice for most projects. This was considered to be an excessive burden beyond the requirements of the EIA Directive. On the other hand, the EC has questioned which of several decisions should be treated as 'principal decisions' and which as 'implementing decisions' in the sense given in the judgement in Case C-201/02 *Delena Wells*,[3] followed by the question whether the EIA procedure connected with the decision to be treated as the 'principal' decision really complied with the requirements set by the EIA Directive.

[3] *R (Delena Wells) v The Secretary of State for Transport, Local Government and the Regions* [2004] 1 CMLR 31. See J Lowther, ELM 16 [2004] 1 31, where: '...the court then considered the question of the point at which an EIA must be undertaken. It stated clearly the directive's requirement, at Article 2(1), that the EIA must come before the grant of consent. The preamble to the directive requires the competent authority to take account of environmental effects at the earliest possible stage. In a circumstance where there may be several stages, for example where there is a principal decision and an implementing decision limited by the parameters of the former, the environmental effects should be identified and assessed at the time of the procedure relating to the principal decision, unless the effects can only be identified later in the process. Thus, the ECJ required an EIA of the effects of the reactivation of the mining consents, reiterating the point that an EIA should, in principle, be carried out as soon as possible'.

The above legal scheme, mainly due to some deregulatory changes in the general legal framework concerning development controls introduced in 2003 and 2004, raised a number of doubts concerning its compliance with the relevant *acquis*. The doubts were related to the following issues: requirement for development consent, transposition of annexes, approach to screening, and impact on Natura 2000 sites. Also of some concern were details concerning public participation and conformity of the special EIA procedure for roads. The Road Act exempted roads from the general EIA procedure and replaced it with a simplified procedure which was generally in compliance with the EIA Directive, except for the scoping requirement whereby an authorizing body must specify the scope of the EIA report required: in the case of roads there was no scoping at all.

The EIA Directive requires in Article 2.1 that Member States shall ensure that projects likely to have significant effects on the environment are not only made subject to EIA but also 'made subject to a requirement for development consent'. As far as the requirement for development consent is concerned, the main issue in Poland was the fact that certain projects which required screening under the EIA Directive (for example modernisation of roads) were no longer under an obligation to obtain a planning permision and construction permit as long as authorities were notified. The notification, however, is a form of "tacit agreement" and as such could not be treated as a 'development consent' in the meaning of the EIA Directive, and did not trigger EIA procedure, nor meet the requirements allowing proper screening under the EIA scheme.

Another issue at stake was related to the fact that a location decision, considered to be the 'principal decision' in the sense given in the *Delena Wells* case, was – after the changes in the land use planning introduced in 2003 – no longer required in areas where there was a valid local land use plan in force.

While EIA reports were also required to examine the impact of projects on Natura 2000 sites, there was no sufficient legal link between EIA procedure and the special procedure for approving projects under Article 6.4 of the Habitats Directive. Moreover, a 'habitat assessment' was limited only to projects subjected to EIA under the EIA Directive and thus did not cover other projects. Such limitations seemed to be not in line with the Habitats Directive as interpreted in Case C-143/02 *Commission v Italy*[4].

The 2005 EPLA Amendment introduced a brand new procedure (the EIA decision) established solely for the purposes of providing EIA. Instead of integrating EIA into the various development consent procedures listed at that time in Article 46.4 of EPLA, the special EIA decision was to be obtained before an application for any of the development consent listed in Article 46.4 of EPLA was made. Thus, the new decision did not replace the existing ones but merely supplemented them. Moreover, the 2005 EPLA Amendment abolished a special EIA procedure for roads and provided a set of EIA rules applicable in all cases - also for roads. The EIA decision was required early in the decision-making process for any project which may have significant impact on the environment irrespective of whether such a project was to be implemented in an area where a local land use plan existed or not.

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[4] *Commission of the European Communities v Italian Republic*, judgment 20 March 2003, OJ C112, 10/05/2003 *where* the ECJ ruled that Italian legislation for transposing the Habitat Directive did not conform with this Directive, as its transposition measure "excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance.

The above changes did not solve all the pre-existing problems with the transposition. Furthermore, the scheme introduced in 2005 envisaged EIA to be conducted only once during the multi-stage procedure which meanwhile - in the light of the the judgments in Crystal Palace/White City (-508/03 and Barker C-290/03 - appeared to be incorrect transposition of the EIA Directive.
This has ultimately led to the initiation of the infringement procedure by the European Commission (procedure N^{o} 2006/2281). For this reason Polish legislator decided to make an effort to rectify the situation by introducing a new EIA scheme to be included in the already mentioned Act of 2008 on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments. The new law was expected not only to provide full transposition and to remove ambiguities of the previous legal text and consequently facilitate the implementation of the EIA regulation but also to address constant criticism of this part of Polish environmental law, claimed to be an administrative burden and making the business development more difficult and unnecessarily lengthy. In this respect the changes introduced represent the overall drive to facilitate the investment process.

The new law repealed related provisions of Environmental Protection Law Act (EPLA) of 27 April 2001. From then on it is the legal basis for Polish EIA procedure and consequently, the main legislation for transposing the EIA Directive. In a way, it is a step back when compared to the idea that was behind the creation of EPLA: to have one *codex*-type piece of legislation, regulating the general matters common to this domain of law.
The major change in the EIA scheme introduced in 2008 is that the EIA procedure could again be conducted for certain projects twice. The EIA decision was not removed from the system, and is still carried out for projects early in the decision-making process when all options are open, before a number of "principal decisions" in the sense given in the judgement in Case C-201/02 *Delena Wells.* What has changed in the EIA scheme with the Act of 2008 is that in certain circumstances it can be repeated at the stage of "implementing decision" (commonly called as "subsequent decisions'- decyzje następcze) , this time, though, integrated into some other existing procedures as so called "repeated EIA".. One can perceive this as partial return to the old regulation, where similar provisions existed. Thus, the final legislative outcome seems to be a combination of the "old" system with the "after-2005" solutions. Furthermore, the 2008 Act created a special scheme for projects likely to have significant impact on Natura 2000 sites but not covered by the EIA scheme.

"Speed up" legislation

As far as efforts to "speed up" procedures are concerned there is a clear trend towards this direction. A number of special laws have been created to speed up investment process. They concern however only the infrastructural projects and not industrial installations. This legislation is either a project specific (like for example the Act on 24 April 2009 on the investments in the area of liquefied natural gas regasification terminal in Świnoujście) or - usually - is related to certain type of infrastructure projects (roads, railways, airports etc).
The above efforts to sped up the procedures have not affected as yet - thanks to very strong resistance from environmental authorities - the role of environmental (EIA) decision in the development control system.
The major argument to keep its role has been the need to comply with the environmental acquis, which in turn is a pre-condition for benefitting from EU funding. bearing in mind the role of EU funding in the economy of Poland - this argument has proven decisive as yet.

Most of the speed up efforts are focused on integrating planning permission and construction permit procedures, on facilitating compulsory expropriation procedures and on shortening time-frames, including time-frames for appeal.

Conclusions

The existing multiple permitting system for development control seems to be quite efficient in safeguarding environmental concerns with the development goals.
Having environmental (EIA) decision at the early stage allows developers to reduce the risk associated with undertaking projects likely to have significant impact on the environment or Natura 2000 sites. They learn about environmental conditions before investing into the purchase of land and architectural and technical design documentation. On the other hand, respective decisions of competent public authorities are less affected by economic concerns and more on environmental concerns. Important is also that at the early stage the public may participate and challenge the decisions regarding permitting the project.

C. Locus standi for a local government within the permitting procedure

The issue is not subject to any debate in Poland. Local authorities serve as competent authorities in most of development control permitting decisions. Besides, they adopt local land use plans which are binding. Thus they have decisive role in case of most development projects. Only in case of some infrastructural projects of national or regional importance they role is limited.
In case of such rare procedures in which local authorities do not serve as competent authority they have the role either as consulting authorities (with no special rights to challenge the decisions) or - in case they own property being affected by the project at stake - as party to the proceedings.