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"Effective" Air Quality Plan and Constitutional Guarantees of Ecological Security

Keywords: air quality plan, ecological security, constitutional guarantees, right to protect human health, access to justice, EU Member State obligations
Słowa kluczowe: Program ochrony powietrza, bezpieczeństwo ekologiczne, gwarancje konstytucyjne, prawo do ochrony zdrowia, dostęp do sprawiedliwości, obowiązki państwa członkowskiego UE

Abstract

Ecological security is a state in which air quality compliant with the standards of air protection is ensured for members of society. An air quality plan is a legal instrument serving the restoration of air quality to the level required by law as soon as possible in case of the emergence and the persistence of exceedances of such standards. Members of society fearing the influence of bad quality air on their health have the right to demand judicial control of the effectiveness of such a plan. The possibility of demanding the restoration of ecological security in such a way results from the guarantees given them at the constitutional and EU level. National courts in Poland, which is an EU Member State, are obliged to respect those guarantees.

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Streszczenie

„Skuteczny" program ochrony powietrza a konstytucyjne gwarancje bezpieczeństwa ekologicznego

Bezpieczeństwo ekologiczne to stan, w którym członkowie społeczeństwa mają zapewnioną jakość powietrza zgodną ze standardami ochrony powietrza. Program ochrony powietrza to instrument prawny służący przywracaniu jakości powietrza do poziomu wymaganego prawem tak szybko jak to możliwe, w razie zaistnienia i utrzymywania się przekroczeń takich standardów. Członkowie społeczeństwa, obawiający się o wpływ niewłaściwej jakości powietrza na swoje zdrowie, mają prawo żądać sądowej kontroli efektywności tego planu. Możliwość żądania przywrócenia w taki sposób bezpieczeństwa ekologicznego wynika z gwarancji przyznanych im na poziomie konstytucyjnym i unijnym. Sądy krajowe w Polsce, będącej państwem członkowski UE, są zobowiązane do respektowania tych gwarancji.

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I. Introduction

This article aims to present the relations between constitutional obligations of public authorities to ensure ecological security[2] for members of society and an instrument of environmental law, i.e., an air quality plan (AQP). A suitable background to present current challenges in this scope is legal disputes conducted in Poland in recent years as part of "the battle with smog". The disputes oriented on the battle for good air quality were indeed disputes between individuals[3] and the Polish state in order to reinstate as soon as possible constitutional guarantees resulting from the obligation, included in Art. 5 in reference with Art. 74 sec. 1 of

[2] "Right to ecological security" is defined as "access to environment which enables undisturbed realization of basic human vital functions". M. Górski, *Komentarz do Art.74 ust. 1 Konstytucji,* [in:] *Konstytucja RP. Tom I. Komentarz do art. 1–86,* eds. M. Safjan, L. Bosek, Warsaw 2016, para. 3–5.

[3] Members of society acting individually and ecological organizations.

the Constitution of April 2, 1997[4], to ensure ecological security to present and future generations[5]. In this case, ecological security means the state in which air quality standards (AQS)[6] are met on the territory of Poland, and due to that, the health of society is protected from the risk, which is, e.g., smog.

Such disputes arose in Poland about the Directive 2008/50/EC of the European Parliament and the Council of May 21, 2008 on ambient air quality and cleaner air for Europe[7]. The disputes were conducted in the scope of administrative law (within AQP) and civil law (protection of personal rights). The efforts of members of society, whose aim was to lead to a judicial audit of AQP effectiveness about the disputes regarding the "battle with smog", should be examined in a legal context on several different levels. On the first level, the aspect of constitutional guarantees of ecological security and the question of an EU Member State's obligations resulting from Directive 2008/50 should be considered. Additionally, the issue should also be analyzed regarding two horizontal measures of environmental law: 1) the right to a clean environment and 2) access to justice in environmental matters[8].

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[4] Dz.U.No. 78, item 483 with amendments.

[5] P. Korzeniowski, *Bezpieczeństwo ekologiczne jako dobro prawnie chronione*, [in:] *Dobra chronione w prawie administracyjnym*, ed. Z. Duniewska, Łódź 2014, pp. 149–168; K. Karpus, *Bezpieczeństwo ekologiczne w Konstytucji RP*, [in:] *Kategoria bezpieczeństwa w regulacjach konstytucyjnych i praktyce ustrojowej państw Grupy Wyszehradzkiej*, eds. A. Bień-Kacała et al., Toruń 2016, pp. 119–130.

[6] The basis to define AQS is Art. 86 of the Act of April 27, 2001 on Environmental Protection Law (Dz.U. 2020, item 1219 with amendments; further referred to as EPL); currently binding in this scope is the regulation of the Minister of Environment of August 24, 2012 on levels of some substances in the air (Dz.U. 2021, item 845).

[7] OJ L 152, 11.6.2008, p. 1–44; cited as: Directive 2008/50; M. Baran, *Dyrektywa 2008/50/WE w sprawie jakości powietrza i czystszego powietrza dla Europy oraz jej implementacja w prawie polskim*, "Europejski Przegląd Sądowy" 2017, No. 7, pp. 15–27.

[8] As defined in Art. 9 of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on June 25, 1998 (Dz.U. 2003, No.78 item 706); I. Przybojewska, *Trzeci filar konwencji z Aarhus oraz rola Komitetu ds. Przestrzegania Konwencji z Aarhus*, "Europejski Przegląd Sądowy" 2020, No. 10, pp. 22–29.

II. Air Quality Plan and Obligations of the EU Member State

An air quality plan is a legal instrument serving public authorities to react in the event of exceedances of AQS and to lead to compliance with them – Art. 84 sec. 1 in reference to Art. 91 of EPL. The plan is a resolution of voivodship sejmik, being an act of local law. The Polish legislator pursuing policy ensuring the ecological security in the air quality area is obliged to simultaneously consider the objectives of this protection defined in Art. 5 and Art. 74 sec. 1 of the Constitution and the obligations resulting inter alia from EU environmental law. The assessment of national legal measures adopted in this scope has then both constitutional and EU dimensions. In the second case, the audit is also conducted by national courts within the system of EU legal protection[9].

The obligation to ensure that AQP will be established for a given zone in the case of exceedances of AQS results from the first paragraph of Art. 23 sec. 1 of the Directive 2008/50. Furthermore, as it is stated in the second subparagraph of Art. 23 sec. 1 "in the event of exceedances of those limit values [AQS] (…) the air quality plans shall set out appropriate measures so that the exceedance period can be kept as short as possible(…)". Regarding Art. 23 sec. 1, there is no doubt that a given member state is obliged to adopt an adequately effective AQP. In the case of the infringement of AQS in a given zone in reference to substances and particulates observed within air quality monitoring – a basic environmental aim of AQP is to ensure that the "exceedance period is as short as possible".

Such understood effectiveness of AQP, required by Directive 2008/50, had already been subject to the interpretation of the CJEU[10]. For instance, the CJEU presented its view in Case C-404/13[11], stating that: "where it is apparent that conformity with [AQS] established in (…) Directive 2008/50 cannot be achieved in a given zone or agglomeration of a Member State (…) the fact that an air quality plan which complies with the second subparagraph

[9] A. Sołtys, *Cechy i charakter prawa unijnego oraz problem jego konstytucjonalizacji*, [in:] *Podstawy i źródła prawa Unii Europejskiej*, ed. S. Biernat, Warsaw 2020, pp. 222–227.

[10] It occurred not infrequently concurrently with the assessment of fulfilling the obligation of a member state included in Art. 13 ("Limit values and alert thresholds for the protection of human health") of Directive 2008/50.

[11] Judgment of the CJEU of November 19, 2014 in Case C-404/13, ECLI:EU:C:2014:2382; para. 49, 57–58.

of Art. 23 sec. 1 of the Directive has been drawn up does not, in itself, permit the view to be taken that a Member State has nevertheless met its obligations under Art.13 of the Directive. (…)As regards the content of the plan, it follows from the second subparagraph of Art. 23 sec. 1 of Directive 2008/50 that, while the Member States have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible".

The Polish state's assurance of ecological security within air quality means that it must develop AQP, which is adequately effective. Within this plan, the EU law – Art. 23 sec. 1 of the Directive 2008/50 and the Polish Constitution – Art. 5 and Art. 74 sec. 1 are coherent. The indicated article of the Directive only complements the constitutional obligation within air quality, defining the necessary pace of the restoration of the security of public health.

III. Air Quality, "Right to Protect Human Health via EU Environmental Legislation" and the Case C-237/07 (the Janacek Case)[12]

In the doctrine of law, a view is presented that an individual has the right to a clean environment as a substantive right[13]. However, it must be admitted that the recognition of this right is still a complex legal issue. Thus, it is still a challenge for the national law of the EU member state, EU law, and international human rights law[14]. For instance, in the context of the EU law, it is indicated that "EU environmental law does not establish a general right to a healthy and intact environment for every individual. However, a natural or legal person may have obtained the right to use the environment for a specific economic or non-profit activity. (…) This may give rise to the need to challenge any decision, act or omission which impacts that specifically allo-

[12] Judgment of the CJEU of July 25, 2008 in Case C-237/07, ECLI:EU:C:2008:447.

[13] B. Rakoczy, [in:] *Prawo ochrony środowiska. Komentarz*, eds. Z. Bukowski et al., Warsaw 2013, pp. 15–19.

[14] The judgment of July 8, 2003 of the ECHR in the case of *Hatton and Others v. the United Kingdom* (No. 36022/97), para. 96: "There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8"; A. Boyle, *Human Rights and the Environment: Where Next?*, "European Journal of International Law" 2012, No. 3, pp. 613–642.

cated right to use the environment"[15]. Therefore, it should be pointed that the access to justice within "environmental" substantive rights of an individual is currently limited in reference to EU law and the CJEU case-law to two rights: 1) a property right covered by the objectives of EU environmental legislation, and 2) the right to protect human health via EU environmental legislation[16].

In the context of constitutional guarantees and the right to a clean environment, the Constitutional Tribunal holds a similar position as the CJEU. In the context of this right, the Tribunal acknowledged that "a combined view on mentioned *provisions*[17] allows to recognize that »healthy« environment is a constitutional value, whose realization should be compliant with the interpretation of the Constitution. On the other hand, the Constitution does not constitute or guarantee subjective right to »life in healthy environment«"[18].

Given the interpreting problem regarding the right to a clean environment, legal assessments within the disputes aimed to restore environmental security within air quality in Poland should be conducted under the "right to protect human health via EU environmental legislation". In this aspect, the position presented by the CJEU in the Janacek case is particularly important. According to it: "whenever the failure to observe the measures [like AQS] required by the directives which relate to air quality and drinking water, and which are designed to protect public health, could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives"[19].

In this precedent case, the CJEU confirmed that the "right to protect human health" should be understood so that human health is subject to protection under EU environmental law, including directives within air quality (currently it is Directive 2008/50). The CJEU confirmed this position in the following years[20]. The essential summary of this trend in the CJEU case-law

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[15] Commission Notice on access to justice in environmental matters (C/2017/2616), OJ C 275, 18.8.2017, pp. 1–39; para. 55.

[16] Commission Notice C/2017/2616, para. 101.

[17] Art. 68 sec. 4, Art. 74, Art. 86, Art. 31 sec. 3 of the Constitution.

[18] Judgment of the Constitutional Tribunal of May 13, 2009, case No. Kp 2/09, OTK ZU 5A/2009/66.

[19] Case C-237/07, para. 38–40.

[20] The judgment of the CJEU of May 26, 2011 in Joined Cases C-165/09 to C-167/09, ECLI:EU:C:2009:393, para. 94.

within the effective control of AQP by members of society may be found in the Commission Notice C/2017/2616[21]. It was indicated in it that the "general basis for legal standing to challenge decisions, acts and omissions of Member States in the fields covered by EU environmental law is laid down in national law, but has to be interpreted consistently with the requirements set out in Art. 9 sec. 3 of the Aarhus Convention and Art. 19 sec. 1 TEU[22] and 47 of the Charter of Fundamental Rights"[23]. It means a major limitation for procedural autonomy of the EU Member States. Nearly a decade after the Janacek case, the CJEU in Case C-664/15[24] one more time upheld the position on the subject of access to justice within the "right to protect human health". Thus, it indicated that Art. 9 sec. 3 of the AC read in conjunction with Art. 47 of the EU CFR "imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law"[25].

IV. *Locus Standi* Requirements and the Order of the Supreme Administrative Court of January 23, 2018, Case No. II OSK 3218/17[26]

According to Directive 2008/50 and the CJEU case-law, the "right to protect human health via EU environmental legislation" is owed to members of society of each EU Member State[27]. The constitutional guarantees of the Polish legal system are coherent in this scope with the objectives of EU law as far as ecological security (the restoration of air quality to the level indicated by AQS)

[21] Commission Notice C/2017/2616, point 2.5.1.

[22] According to Art. 19 sec. 1 of the Treaty on European Union (Dz.U. 2004, No. 90, item 864/30): "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

[23] Art. 47 of the EU CFR (*OJ C 326, 26.10.2012, pp. 391–407*) regulates the right to an effective remedy and to a fair trial.

[24] Judgment of the CJEU of December 20, 2017 in Case C-664/15, ECLI:EU:C:2017:987.

[25] Case C-664/15, para. 45, 56–58.

[26] CBOSA, https://orzeczenia.nsa.gov.pl (20.07.2021).

[27] Additionally, ecological organizations in the light of the EU law and the CJEU case-law have the second legal basis – the "right to protect the environment via the requirements of EU environmental legislation" – see: Commission Notice C/2017/2616, para. 101.

is concerned. Thus, on both levels – constitutional and EU – guarantees for an individual, fearing for his health and demanding the adoption of AQP, have been established[28]. They also encompass the access to justice to execute a judicial audit of fulfilling the criterion of "effectiveness" of a given AQP. The resulting from the CJEU case-law legal model locus standi of members of society in national proceedings has been unambiguously strengthened after the ruling in Case C-664/15. Thus, when the national proceedings law is not coherent with the guarantees within the access to justice, then the national court should retreat from applying a national law not coherent with those guarantees and give those entities legal standing in the proceeding regarding the effectiveness of AQP within EU law guarantees, i.e., such court should conduct according to Art. 19 sec. 1 TUE.

Access to justice in the context of the effectiveness of AQP and the health protection of members of society should be analyzed on the ground of Art. 90 sec. 1 of the Act of June 5, 1998 on voivodship self-government[29]. On this basis, everyone whose legal interest or right has been violated by AQP can appeal to an administrative court against the provision of this plan. Regarding this legal construction, the Constitutional Tribunal indicated that legal standing, in this case, cannot be equated with *actio popularis*. According to the Tribunal, the notion of "legal interest" should be understood narrowly. The resolution of a local government unit (such as AQP) may be appealed when it is not compliant with the law, or it violates specifically understood interests or rights of a given individual or a group of individuals, or finally another entity, who is an inhabitant of a given local government unit or is legally bound to this unit in some other way[30].

The judicature of administrative courts consequently considers such a narrow interpretation of legal standing[31] presented by the Constitutional Tribunal. The problems with fulfilling *locus standi* requirements of the study of the

[28] A. Gintowt, *Problematyka prawa podmiotowego na tle Konstytucji RP,* [in:] *Z zagadnień teorii i filozofii prawa. Konstytucja*, ed. A. Bator, Wrocław 1999, p. 189.

[29] Dz.U. 2020, item 1668.

[30] Judgment of the Constitutional Tribunal of September 16, 2008, case No. SK 76/06, OTK-A 2008/7/121.

[31] M. Jakubowski, A. Warso-Buchanan, *Programy ochrony powietrza – prawo do sądu (w świetle orzecznictwa Trybunału Sprawiedliwości oraz sądów krajowych)*, "Europejski Przegląd Sądowy" 2020, No. 10, pp. 45–51.

effectiveness of AQP in Poland are depicted by the position of the Supreme Administrative Court in case No. II OSK 3218/17. The complainants, in this case, addressed the SAC to interpret Art. 90 sec. 1 of the Act of 1998 within *locus standi* requirements taking into consideration the principle of *effet utile* in reference to Art. 23 of the Directive 2008/50. At the same time, the complainants cited adequate CJEU case-law, i.e., the obligation to ensure by an EU Member State that a given AQP is not only adopted but also "efficient". However, the SAC entirely rejected those arguments and refused to give legal standing to those entities. Moreover, the SAC acknowledged that the interpretation of Art. 90 sec. 1 of the Act of 1998 in the context of Art. 23 sec. 1 of the Directive made according to the principle of the *effet utile* of the EU law would be an "interpretation *contra legem* not to be reconciled with the principle of the rule of law and connected to it principle of equality before the law".

The problems with obtaining legal standing by individuals before the Polish administrative courts made it impossible to conduct an audit in this procedure, saying to what degree AQP adopted in Poland is "efficient" as understood by EU law. Thereby they impaired constitutional guarantees within ecological security owed to members of society fearing for the influence of long-term bad quality air on their health. An interesting side effect of this situation was the transfer of disputes with public authorities on ecological security from administrative law (environmental law) to civil law (the protection of personal rights in civil law – Art. 23 of the CC[32]). In 2018–2020, civil courts of the first instance gave disparate rulings on whether the right to a clean environment is one of the personal rights[33] according to Art. 23 of the CC[34]. Those discrepancies were cut by the Supreme Court, which in its resolution of 28 May 2021, case No. III CZP 27/20[35] unambiguously proclaimed that the right to a clean environment is not a personal right.

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[32] The Civil Code of April 23, 1964 (Dz.U. 2020, item 1740).

[33] The judgment of the District Court for Warsaw Śródmieście of February 17, 2020, case No. I C 3954/18, in which the Court acknowledging this right presented, i.a., the argument about constitutional guarantees of ecological security included in Art. 74 sec. 1 of the Constitution.

[34] I. Wereśniak-Masri, *Prawo do czystego środowiska i prawo do czystego powietrza jako dobra osobiste*, "Monitor Prawniczy" 2018, No. 17, pp. 937–945.

[35] http://www.sn.pl; "Monitor Prawniczy" 2021, No. 13, p. 671.

V. Conclusions

The standpoint of the Supreme Court on this substantive right is not a surprise. In this scope, the Supreme Court gave an opinion similar to those expressed earlier by the Constitutional Tribunal, the CJEU, or the ECHR. The main consequence of the resolution of the Supreme Court for citizens demanding the restoration of ecological security within air quality in Poland is the retransfer of the discussion on a proper realization of this constitutional obligation by public authorities to administrative law.

The main access path to justice within the audit of the effectiveness of AQP, as an instrument of environmental law, should be, above all, a judicial, administrative path. To make it happen, administrative courts have to finally see the effects resulting from the guarantees given to Polish society members by EU law within the "right to protect human health via EU environmental law" (the Janacek case et al.). The second issue, which must change, is the assessment of the legal character of AQP. For some incomprehensible reasons, the SAC in its order in case No. II OSK 3218/17 qualified such a plan as a general environmental policy plan, establishing only framework air quality goals. Whereas the plan has an entirely different character – it is undoubtedly an intervention plan[36], through which an EU Member State is to bring about as soon as possible to the situation when the air quality in a given area is "good", i.e., compliant with AQS. Ecological security, violated by existing and persisting exceeded levels of substances and particulates in air observed within air quality monitoring, should, according to Art. 5 and Art. 74 sec. 1 of the Constitution, be restored to society members by public authorities as soon as possible. It is incomprehensible that despite the complete coherence between guarantees in the Constitution and EU law, citizens still have limited access to justice within this scope.

[36] AQP is also defined as a "reparative program" – M. Pchałek, *Komentarz do art. 84*, [in:] *Prawo ochrony środowiska: komentarz*, eds. M. Górski et al., Warsaw 2019.

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