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Environmental Exploitation Plan as Administrative Form of Action

1. Subject

In addition to legislation of general application and individual decisions of the state as well as self-regulation of exploiters of the environment, strategic instruments of executive power, such as management plans, action plans, programmes, etc., are increasingly implemented in environmental law. The objective of this analysis is to explain, in the course of preparing the draft Environmental Code¹, the possibilities of using the environmental law plans in the Estonian legal order. There is a particular need to examine whether and under what conditions the rights of an individual can be restricted on the basis of such plans. More specifically, the working group of the Ministry of Justice raised the following question: 'Can the plans used in environmental law (including, but not restricted to the water management plan in the Water Act, waste management plan in the Waste Act, plans in the area of ambient air) according to the Constitution contain (*inter alia*) regulation that

- 1) impose immediately on people obligations (e.g., the duty of the owner of a dwelling to direct waste water into the public sewerage system or local container, the duty to use only central heating or gas heating, the prohibition to drive vehicles older than ten years in the city centre) and/or
- 2) serve as the basis for providing the conditions of an environmental permit or other administrative act or for refusal to issue a permit (e.g., the detailed plan is not adopted or the building permit is not issued if the heating solution is in conflict with the air protection plan or other plan)?'

Answering these questions firstly presumes that the nature of these plans be defined from the point of view of the general part of administrative law, more precisely the study of the administrative forms of action. Thereafter, it is possible to explain on that basis what general requirements of constitutional and administrative law must be taken into account when adopting these plans and what kind of legal effects they have. It must be emphasised that here it is possible to address only environmental law plans as a type of administrative action. Each plan relating to the special part of environmental law or even each particular provision of a plan may have a specific nature, which may justify a different approach than the one presented here.²

¹ For this, see H. Veinla, E. Saunanen. Keskkonnaseadustiku üldosa seaduse eelnõu põhialused (Fundamentals of the General Part of the Environmental Code Act). – *Juridica* 2008/9, p. 598 (in Estonian); H. Veinla. Keskkonnanõiguse kodifitseerimisest Eestis: põhjused, eesmärgid ja valikud (Codification of environmental law in Estonia: reasons, goals and choices). – *Juridica* 2007/7, p. 495 (in Estonian). Completed documents: <http://www.just.ee/41314> (in Estonian).

² For this in relation to the implementation of the European Union law, see K. Faßbender. Gemeinschaftsrechtliche Anforderungen an die normative Umsetzung der neuen EG-Wasserrahmenrichtlinie. – *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 2001, p. 247.

2. Overview of situation

2.1. Notion of environmental plans and their delimitation

Applicable Estonian law recognises, for example, the following environmental law plans that can be adopted by administrative bodies:

- air pollution action plan (plan of action for reducing emission levels of pollutants released into the ambient air in the area—AAPA^{*3} § 50);
- plan of action for reduction of ambient noise (AAPA § 132 (1));
- water management plan (WA^{*4} § 38 (1)), including an action plan for keeping the water status as pure as possible (water status action plan – WA § 38 (8) 4));
- waste management plan (WasteA^{*5} § 39 (1));
- a management plan for organising the protection of limited-conservation areas or protected areas (NCA^{*6} § 25 (1));
- an action plan for conservation and management of species (NCA § 49).

Introduction of the term ‘environmental exploitation plan’ could be considered as a general term that would encompass all the administrative law plans coordinating the use of the environmental resources provided for in the special part of environmental law. Such plans should include, in broad terms, the description of the present status of the environment, development scenarios, objectives for maintaining or improving the status of the environment and a list of measures that agencies or individuals must take to achieve the objectives.

The plans examined here should, ideally, be more specific and binding than the strategic and political plans outlining the environmental policy activities of the state, including the development plans^{*7} set out in § 12 of the SDA.^{*8} The latter are not, in principle, directly applicable, but rather prescribe the adoption of legislation of general application in the future; however, because of special provisions, a document of this type can partially serve as the basis for limiting the rights of an individual (e.g., Land Improvement Act^{*9} § 34 (1) 17)). Similarly, this paper will not tackle the environmental policy plans and programmes adopted by the European Union bodies.^{*10} In addition to the plans adopted by agencies, environmental law also recognises action plans prepared either voluntarily or on an obligatory basis by the person exploiting an environmental resource (forest management plan—FA^{*11} § 11 (4³), plan of action of possessor of source of pollution—AAPA § 51). These may require the approval of a competent body (AAPA § 51 (3)); yet do not qualify as an administrative act but (nationally governed) self-regulation of the operator or developer. The latter also plays an important part in the environmental management system of the European Union.

2.2. Objective

The objective of environmental exploitation plans is the systematisation and documentation of environmental information in a specific region and field of the environment, development of specific goals and, above all, harmonisation of activities that have an environmental impact. The environmental law of the European Union does not govern the limits of the activities of individual polluters, but rather requires that an appropriate status be achieved or maintained in environmental activities. To that end, numerical limit values have been established in several fields of the environment (e.g., ambient air protection). However, they have not entered

³ Välisõhu kaitse seadus (Ambient Air Protection Act). – RT I 2004, 43, 298; 2009, 49, 331 (in Estonian).

⁴ Veeseadus (Water Act). – RT I 1994, 40, 655; 2009, 49, 331 (in Estonian).

⁵ Jäätmeseadus (Waste Act). – RT I 2004, 9, 52; 2009, 62, 405 (in Estonian).

⁶ Looduskaitse seadus (Nature Conservation Act). – RT I 2004, 38, 258; 2009, 53, 359 (in Estonian).

⁷ For these, see SCALCd 3-3-1-81-03. See also the ‘National Strategy of Sustainable Development of Estonia’, approved by the *Riigikogu* on 14 September 2005, ‘Environmental Strategy until 2030’, approved on 14 February 2005, ‘Environmental action plan of Estonia for 2007–2013’, approved by the Government of the Republic order No. 166 on 22 February 2007, national radiation safety development plan (Radiation Act (RT I 2004, 26, 173; 2009, 48, 322) § 7 (1)), national oil shale use development plan (Land Improvement Act § 34 (1) 17)), forestry development plan (Forest Act § 7) (all in Estonian).

⁸ Säätstva arengu seadus (Sustainable Development Act). – RT I 1995, 31, 384; 2009, 12, 73 (in Estonian).

⁹ Maaparandusseadus (Land Improvement Act). – RT I 2003, 15, 84; 2009, 57, 381 (in Estonian).

¹⁰ For these, see H. Veinla. *Keskonnaõigus* (Environmental Law). Tallinn: Juura 2005, p. 172 *ff.* (in Estonian). The provisions of the secondary law of the European Union, however, are important, requiring the administrative agencies of the member states to adopt action plans and programmes for the protection of the environment (see point 2 below). This paper does not address spatial planning, even though the environmental aspects must undoubtedly be taken into consideration in relation to them.

¹¹ Metsaseadus (Forest Act). – RT I 2006, 30, 232; 2009, 62, 405 (in Estonian).

into force just like that. In the second half of the 1980s, the European Union began to attribute importance to developing strategies in member states in order to achieve the environmental situation prescribed by directives. In order to do that, following the example of the Anglo-American and Scandinavian legal orders, directives impose on states the obligation to adopt various rather specific action plans and programmes.^{*12} It is thus not surprising that many provisions regarding environmental exploitation action plans in Estonian law introduce the provisions set out in the environmental directives of the European Union.^{*13} Although water management plans were prescribed by § 38 of the initial version of the Water Act already back in 1994, i.e., long before Estonia's accession to the European Union, the regulation of planning the protection of water has changed considerably in the meantime because of European law. Yet, the present situation regarding the transposition of environmental directives concerning plans in Estonia cannot, by far, be considered satisfactory.^{*14} Let it be emphasised here that the fact that the plans originate from European Union law must be borne in mind when assessing the constitutionality of the plans. If the adoption of a plan that has certain content and legal features is required according to European Union law, the implementation of the plan cannot be questioned according to the Constitution of Estonia. The Constitution can be decisive only if the plan is not governed by European Union law or a plan prescribed by European Union law is implemented in areas or in the cases to which European Union law does not extend or, upon the adoption of the plan, the member state has been afforded playing room, within the limits of which the Constitution of Estonia can be taken into account.^{*15}

The preparation of plans has been imposed as mandatory in European Union law, not out of bureaucratic enthusiasm. Even though adherence to pollution thresholds is vital for the protection of the population's health, the actual situation in large cities, along major roads, and in industrial areas, frequently fails to comply.^{*16} This is also true for Estonia, in the area around Liivalaia Street in Tallinn, where compliance with the maximum permitted number of instances—35 days per year—of exceeding the emission limit value for fine particulate matter of less than 10 µm (PM₁₀) has not been achieved over the past few years.^{*17} It has been concluded that it is not possible to efficiently comply with the provisions by regulating individual sources of pollution in an isolated manner. For example, by limiting traffic along one street to reduce the dust and noise pollution, we would most likely increase pollution on other potential routes.^{*18} The administrative activities coordinated by plans may also be necessary to maintain, in the long run, the present good or satisfactory status of the environment and avoid environmental disturbances (prevention).^{*19}

It is not expected in the implementing of environmental exploitation plans that the desirable level of protection of the environment shall be solely achieved by the adoption of the plan or voluntary adherence to it by all relevant parties. The core of the environmental exploitation plans is to outline further administrative measures (spatial planning, permits and their secondary conditions, precepts for operators, traffic limitations, etc.—Minister of the Environment regulation No. 123 of 22 September 2004 § 4 (1) 11), AAPA § 132 (2), WA § 38 (8) 4) and 5), WasteA § 39 (2) and (3) 5)).^{*20} They generally do not have to contain directly applicable limits and precepts for individuals. The role of a plan in first mapping the status of the environment along with strategic problems is not insignificant.^{*21} However, plans cannot be limited to that function. Further adminis-

¹² K. Faßbender. Grundfragen und Herausforderungen des europäischen Umweltplanungsrechts. – NVwZ 2005, p. 1132.

¹³ E.g., Articles 28–33 of the Waste Directive (2008/98/EC); Articles 23 and 24 of the Framework Directive on Ambient Air (2008/50/EC); Article 8 of the Directive relating to the assessment and management of environmental noise (2002/49/EC); Articles 11 and 13 and Part VII of the Framework directive on water policy (2000/60/EC).

¹⁴ See, e.g., Commission Communication (18.09.2008) regarding infringement proceedings No. 2007/2236; Minutes No. 97 of the session of 9 February 2009 of the Environmental Committee of the *Riigikogu*. Available at http://www.riigikogu.ee/?op=emsplain&content_type=text/html&page=pub_ooc_file&file_id=536632&u=20090928143219&mnspl=09.02.2009&fd=11.02.2009&komisjon=KKK.

¹⁵ See SCALCr 3-3-1-85-07, paragraphs 38–39; SCCRCr 3-4-1-5-08, paragraphs 30–31 and 33.

¹⁶ C. F. Fonk. Das subjektiv-öffentliche Recht auf ordnungsgemäße Luftreinhalteplanung. – NVwZ 2009, p. 69.

¹⁷ OÜ Eesti Keskkonnauuringute Keskus. Tallinna linnastu välisõhu kvaliteedi parandamise tegevuskava (Action Plan for Improving Ambient Air Quality in Tallinn Conurbation), 2009 (not adopted), p. 104 (in Estonian). See also A. Alvela. Õhuseire käib pidevalt, kuid info seisab (Air Pollution is Continually Monitored but Information is Stuck). – aripaev.ee, 26.11.2009 (in Estonian).

¹⁸ P. Cancik. Aktionspläne zur Lärminderung – effektives Instrument oder „Aktionismus“? – Zeitschrift für Umweltrecht (ZUR) 2007, p. 174; a more general approach in W. Köck. – Grundlagen des Verwaltungsrechts. W. Hoffmann-Riem, E. Schmidt-Abmann, A. Voßkuhle (Hrsg.). München 2008, § 37, margin No. 4, 10.

¹⁹ R. Sparwasser, R. Engel, A. Voßkuhle. Umweltrecht. Heidelberg 2003, § 10, margin No. 434; cf. K. Faßbender (Note 12), p. 1132. See also H. D. Jarass. Saksa immissioonikaitseõiguse põhistruktuurid (Basic Structures of German Immission Protection law). – Juridica 2007/7, p. 471 (in Estonian).

²⁰ The plans should not be seen as a wonder cure in achieving this objective either. Directing administrative rulings by such plans is very complicated and resource intensive. See W. Köck (Note 18), margin No. 3. P. Cancik notes that the efficiency of plans as environmental law documents considerably depends on how specific obligations are imposed by plans and to what extent citizens and environmental associations can be involved in implementing them. See P. Cancik (Note 18), p. 175 ff.

²¹ In some areas, the description of the situation must be submitted together with an action plan (e.g., air pollution action plan—Minister of the Environment order No. 123 of 22 December 2004 § 4; water management plan—WA § 38 (8); waste management plan—WasteA § 39 (3)), in other cases, it must be adopted as a separate document that serves as the basis for an action plan (strategic ambient noise map—AAPA §§ 131 and 132).

trative measures must be specified in the plan with sufficient detail, in order to ensure the achievement of the objectives of the plan. The European Court of Justice has explained that the programmes specified in Article 7 of directive 76/464/EEC (on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community) are ‘specific programmes’ that ‘must embody a comprehensive and coherent approach, covering the entire national territory of each member state and providing practical and coordinated arrangements for the reduction of pollution’^{*22}. There is reason to take such positions seriously in preparing all plans related to the environment. A plan cannot contain only recommendations of a general nature to consider one or another measure to improve the situation at an unspecified point of time in the future.^{*23} The description of the measures must indicate who must act, what they must do and under what type of situation. Agencies can retain further right of discretion only regarding whether in that particular case the implementation of the plan is proportional to the colliding legal rights. The Court of Justice has also emphasised that the measures prescribed in the plan must be suitable for achieving the required status of the environment.^{*24} It is not possible to assess compliance with that requirement without a sufficient degree of specification.

3. Legal nature

Within the spectrum of administrative forms of action, the environmental law plans serve as administrative law plans (sectoral plans).^{*25} However, plans are not the main legal type of administrative rulings, but a comprehensive notion that includes instruments of a very different nature. It must be specified separately for each plan how it should be legally classified.^{*26} Since the plans are not phenomena preordained by nature or God, but constructs created by humans in legislative acts, their classification is, above all, a question of interpretation and pragmatic judgment, which must be addressed, considering the objectives of the plans and constitutional principles of administrative law.^{*27} Spatial planning and budgets are most likely the best-known plans. Comprehensive and detailed plans are, by nature, the closest to administrative legislation (general orders)^{*28} and are regarded as such in Estonian practice.^{*29} National spatial plans and county plans are very general documents that rather guide agencies in their further decisions, including in adopting lower-level plans, hence remaining as mostly internal acts. Budgets serve as internal administrative acts, imposing obligations only on agencies of the public authority.

It would be easy but uninformative to comment that environmental exploitation plans are *sui generis* administrative activity. Rather than classifying plans as certain types, it is more important to consider how to apply essential distinctive criteria to them in administrative law and administrative court proceeding.

- Do environmental exploitation plans have a regulatory effect, i.e., are they legislative acts?
- If yes, is the regulation of the plan abstract or specific, i.e., is it legislation of general or specific application?
- If the answer to the first question is in the affirmative, is the regulatory effect external, i.e., do the plans impose obligations on or grant rights to persons outside administration?

Answers to these questions shape the procedural and formal requirements to adopting the plans, implementation of the principles of reservations to acts and exercise of the right of discretion as well as possibilities for protection by the court.^{*30} The above particularly determines whether an individual can demand:

- revocation of a plan;
- adoption of a plan;
- inclusion of a particular measure in the plan;
- implementation of a measure prescribed in the plan;

²² Case C-207/97, *Commission v. Belgium*, paragraph 39 ff.; Case C-232/95, *Commission v. Greece*, paragraph 32 ff. See about waste disposal plans Case C-387/97, *Commission v. Greece*, paragraph 75 ff.; Case C-298/97, *Commission v. Spain*, paragraph 16.

²³ Unfortunately, this is all that has been stated, e.g., in the draft ambient air action plan of Tallinn (Note 17), pp.113–116. This plan does not obviously conform to the court practice referred to above.

²⁴ In the case of the ambient air pollution action plan Case C-237/07, *Janecek*, paragraph 47.

²⁵ See, e.g., H. Maurer. *Haldusõigus. Üldosa* (Administrative law. General Part). Tallinn: Juura 2004, § 16, margin No. 6 (in Estonian); W. Köck (Note 18), margin No. 40.

²⁶ H. Maurer (Note 25), § 16, margin No. 13, 18.

²⁷ See W. Köck (Note 18), margin No. 18.

²⁸ A. Aedmaa *et al.* *Haldusmenetluse käsiraamat* (Handbook of Administrative Proceeding). Tartu: Tartu Ülikooli Kirjastus 2004, p. 265 (in Estonian).

²⁹ E.g., SCALCd 3-3-1-54-03, paragraph 34.

³⁰ W. Köck (Note 18), paragraph 33 ff.

- implementation of a measure not set out in the plan^{*31};
- compensation for damage, if the plan has not been adopted or implemented as required;
- upon amending the plan, adherence to restrictions set out in §§ 64–70^{*32} of APA.^{*33}

3.1. Regulatory nature

There are both regulatory and only informative (indicative) plans in administrative law.^{*34} Declarations, positions, development plans, strategies, etc. are not binding; they only outline the situation and forecasts and do not appear to have a legal effect on the activities of agencies and individuals.^{*35} The environmental exploitation plans are not limited to this.^{*36} The sole obligation to take the plan into account, as an expression of public interest in making further discretionary decisions, does not indeed turn a plan into a legislative act.^{*37} Yet, it is seriously doubtful whether the obligation to take them into account suffices for the effective implementation of the plans. As explained above, the objective of the plans to serve effectively in coordinating individual environmental decisions requires that they be binding at least to some degree. This particularly concerns measures addressed in the plans, the implementation of which is necessary for the actual enforcement of the European Union law, *inter alia*, maximum permitted levels of pollution.

There is much debate in German specialised literature, for example, about the legal nature of the programmes of measures and water management plans to be adopted under Articles 11 and 13 of the water framework directive (2000/60/EC). It is clear that a water management plan is more general, containing particular information about the status of a river basin, environmental objectives set under Article 4 of the framework directive and summaries of further measures, including a summary of the programme of measures (Annex VII to the directive). A programme of measures is more specific, prescribing more precise measures for achieving the environmental objectives (permit reservations, prohibitions, limits of pollution, etc.—Article 11 (3) and (4) of the directive, precluding, for example, granting of permits for activities that are not in compliance with the programme of measures.^{*38} It has been construed to imply that at least a programme of measures must be adopted as a legal act (regulation)^{*39}, whereas the management plan remains only informative (being as an instrument of transparency primarily aimed at the European Commission).^{*40} The other authors are of the opinion that also some parts of the management plan, for example, the standards imposed on emissions as environmental objectives^{*41}, or the water management plan in its entirety, are binding.^{*42} The management plan at least has a framework setting significance, as specified in Article 3 (2) a) of the directive on the assessment of the effects on the environment (2001/42/EC).^{*43} However, there are people who claim that a programme of measures is not a legislative act either^{*44}, relying, *inter alia*, on the second sentence of Article 11 (1) of the framework directive, according to which a programme of measures may make reference to legislation.^{*45}

The jurisprudence of the European Court of Justice distinguishes between transposition and implementation acts upon the enforcement of directives.^{*46} Based on the principle of legal certainty, provisions can be transposed only by indisputably binding, genuine and overtly obligatory provisions, which means legislation of general application (act or regulation) in the Estonian context, not by specific administrative acts, internal

³¹ See P. Cancik (Note 18), p. 171.

³² See H. Maurer (Note 25), § 16, margin No. 28–35.

³³ Haldusmenetluse seadus (Administrative Procedure Act). – RT I 2001, 58, 354; 2009, 27, 164 (in Estonian).

³⁴ See original terms H. Maurer. Allgemeines Verwaltungsrecht. München 2002, § 16, margin No. 15 *ff.*, 19 *ff.*

³⁵ A. Aedmaa *et al* (Note 28), p. 262; H. Maurer (Note 25), § 16, margin No. 25; SCALCd 3-3-1-81-03, paragraph 19.

³⁶ The noise map is an exception (AAPA § 131).

³⁷ The right of discretion in making individual decisions can be affected even by a draft action plan, judgment of the Federal Administrative Court of Germany (BVerwG) of 23 November 2005. – NVwZ 2006, p. 331 *ff.*

³⁸ G.-M. Knopp. – F. Sieder *et al.* Wasserhaushaltsgesetz. Abfallwirtschaftsgesetz (as of 1 August 2008), WHG § 36, margin No. 5a.

³⁹ R. Sparwasser *et al* (Note 19), § 8, margin No. 228; M. Kotulla. Das Wasserhaushaltsgesetz und dessen 7. Änderungsgesetz. – NVwZ 2002, p. 1415; W. Seidel, J. Rechenberg partly take the same position. Rechtliche Aspekte des integrativen Gewässermanagements in Deutschland. – ZUR 2004, p. 219.

⁴⁰ K. Faßbender (Note 2), p. 248; M. Kotulla (Note 31), p. 1417; G.-M. Knopp (Note 38), § 36, margin No. 5, § 36b, margin No. 3 and 5.

⁴¹ R. Sparwasser *et al* (Note 19), § 8, margin No. 227.

⁴² M. Reinhardt. Wasserrechtliche Richtlinienstransformation zwischen Gewässerschutzrichtlinie und Wasserrahmenrichtlinie. – Deutsches Verwaltungsblatt (DVBl) 2001, p. 145 (clause II.2.b).

⁴³ G.-M. Knopp (Note 38), § 36b, margin No. 5.

⁴⁴ K. Faßbender (Note 2), p. 247; G.-M. Knopp (Note 38), § 36, margin No. 11; *cf.* K. Faßbender (Note 12), p. 1130, making a reservation to the minimum requirements set out in Article 11 (3) of the framework directive, which ‘clearly create rights and obligations for an individual’.

⁴⁵ I cannot see the reasoning as relevant. The fact that a document refers to legislation or prescribes its issue does not mean that a document could not be a legislative act itself.

⁴⁶ Particularly Case C-159/99, *Commission v. Italy*, paragraph 32.

acts or actual acts. It can be said with relative certainty that the adoption of environmental exploitation plans does not serve as the transposition of the provisions of the directives but their administrative implementation. Yet the ‘obligatory, indisputable and binding nature’ of a measure can be necessary for the effective implementation of a directive in individual cases.^{*47} In order to avoid an extensive amendment of the plan in its implementation stage, in other words, to prevent the loss of its role as a consistent^{*48} coordinator of the activities of environmental agencies, the legal regulation of the plans must ensure that any derogation from them could be considered only under exceptional circumstances. In my opinion, this would mean that the plan has at least some legal effect with regard to environmental agencies. The plan must considerably limit the further right of discretion of agencies, not remain limited to the expression of public interest. Consequently, all environmental exploitation plans that, according to European Union or national law, must include a consistent and coordinated programme of action of agencies in making decisions that affect the rights of an individual, should be considered as legislative acts.

A distinction must certainly be made between different parts of the plan when evaluating its regulatory nature. It would be wrong to consider as binding the description of the present status of the environment or even future forecasts contained in the plan. Binding identification of matters of fact by an administrative act is, in principle, possible, but administrative law regards this as an exception (APA § 60 (1), third sentence).^{*49} A specific legal basis or justified need is required for adopting such an administrative act. Such a need is absent in the case of environmental exploitation plans. The surveys preceding the plans are extensive and complicated, which is why mistakes can inevitably be made in describing and forecasting data. It should be presumed that the data provided in the plan are correct and they should be taken into account when implementing the plan; yet the possibility to refute the data contained in the plan, by other evidence, if necessary, should be retained. It is not necessary to ensure legal certainty related to the actual status described in the plan to the same extent as related to the measures prescribed by the plan. Also, besides measures provided by law, which limit the rights of individuals and are as a rule mandatory, the parts concerning the implementation of the plans can contain ‘soft instruments’, such as provision of information, calls for action, monitoring, pilot projects, etc.^{*50}, the implementation of which can remain advisory or obligatory only within administration.

3.2. Degree of specificity

When distinguishing between legislation of general and specific application, instead of the number of people at whom the act is aimed it is decisive whether the act governs a specific case (specific cases) or an abstract number of cases.^{*51} This is often hard to distinguish, especially in the case of plans. Plans, including environmental plans, are located between regulations of general application and specific decisions on the scale of legislation.^{*52} On the one hand, a plan prescribes guidelines for the application of a large and mostly unspecified number of further measures. On the other hand, the regulation can usually be delimited to the creation of a certain legal situation in a certain area. A plan can be regarded as a set of a number of individual, mutually coordinated decisions. A plan regulates a specific status of affairs, it is much more closely related to the particular situation to be regulated than legislation of general application.^{*53}

Estonian legal practice has increasingly considered such borderline acts that establish rules in a certain territory, in a particular agency or in a delimited issue comparable with specific acts.^{*54} If the effect is aimed outside administration^{*55}, the act is a general order (APA § 51 (2)).^{*56} By their degree of specificity, the environmental

⁴⁷ K. Faßbender (Note 12), p. 1130; Case C-415/01, *Commission v. Belgium*, paragraph 21 ff. The obligation to adopt a waste management plan prescribed in Article 7 (1) of directive 75/442/EEC is not only a legal obligation according to the Court of Justice but an obligation to achieve an actual result. See Case C-292/99, *Commission v. France*, paragraph 39.

⁴⁸ Let us recall the positions of the European Court of Justice referred to above (Note 22).

⁴⁹ More precisely, I. Pilving. *Haldusakti siduvus (Binding Nature of Administrative Act)*. Tartu: Tartu Ülikooli Kirjastus 2006, pp. 127–132, 136–138 (in Estonian).

⁵⁰ As exemplified by programme of measures in the area of water policy W. Seidel, J. Rechenberg (Note 39), p. 219.

⁵¹ A. Aedmaa *et al* (Note 28), p. 263.

⁵² G.-M. Knopp (Note 38), § 36, margin No. 5a; W. Köck (Note 19), margin No. 14.

⁵³ According to German authors, plans are rather closer to legislation of general application but, e.g., in the case of spatial planning, this does not yield satisfactory results in their opinion. Together with further references W. Köck (Note 19), margin No. 11 and 14.

⁵⁴ E.g., placing a special conservation area under protection: SCALCd 3-3-1-57-09, paragraphs 11–13; 3-3-1-27-09; protection rules of landscape protection area: SCALCr 3-3-1-13-04, paragraph 11, SCALC 3-3-1-31-03, paragraph 12; legislation concerning the internal rules of a prison: SCALCd 3-3-1-102-08, paragraph 15, SCALCd 3-3-1-20-08, paragraph 14, SCALCr 3-3-1-95-07, paragraph 11, SCALCd 3-3-1-54-07, paragraph 7; rules of admitting pupils to secondary schools: SCALCd 3-3-1-85-08, paragraph 21.

⁵⁵ See below, point 3.3.

⁵⁶ Regardless of somewhat misleading terminology, it is legislation of specific application. See A. Aedmaa *et al* (Note 28), p. 263 ff.

plans as they should be adopted^{*57} are not inferior to spatial comprehensive and detailed plans.^{*58} As referred to above^{*59}, the latter are regarded as general orders.

The classification of environmental exploitation plans as legislation of specific application is supported by pragmatic considerations in organising legal protection. If we regard plans as legislation of general application, their immediate judicial supervision would, in principle, be practicable now only in the constitutional review procedure. However, an individual lacks the right to initiate a procedure, regulated by law. With regard to further discussion below, it must be mentioned that the need for immediate judicial supervision of environmental exploitation plans derives at least from European Union law.^{*60} Proceeding from efficient implementation, we should prefer a solution in the case of which a plan that has been adopted and has not been directly disputed acquires certain conclusive force during a particular period of time. This is possible only in the case of administrative acts. Since an individual cannot dispute a provision of general application, he or she can demand that it be not applied in disputes regarding measures based on the plan (Constitution § 152 (1)).

3.3. External effect

If a plan includes limitations directly applicable to the activities of an individual or obligations to be imposed on individuals, the plan certainly has an external effect and it would qualify as an administrative act according to APA § 51. If there are no such precepts aimed at individuals and the sole purpose of the plan is to coordinate further administrative rulings, the evolvment of external effect depends, among other things, on the extent of discretion conferred on the person implementing the plan. If all important choices have already been made in the plan, its implementation by further administrative acts is only formal, as a result of which the plan would have an external effect on operators and developers, but also on third parties. If, however, the agency retains, in principle, the possibility to derogate from the plan in individual cases, the act could be both an internal act and a general order. The legislator could opt for one or another form of activity as regards particular plans.

Such an approach would conform to the principle of internal administrative law in Estonia. If regarded from the point of view of the European Union, the effect of environmental exploitation plans on an individual is more extensive. In its decision of 25 July 2008, the European Court of Justice explained that an individual can require the competent national authorities to draw up an action plan in the case—referred to in Article 7 (3) of directive 96/62—where there is a risk that the limit values or alert thresholds may be exceeded.^{*61} The directive imposes on the member states sufficiently clear obligations with no reservations in that part. This is enough according to the general principles of European Union law in order to create a judicially protected position for a person concerned. In this case, the Court of Justice did not accept the position of the Federal Administrative Court of Germany that had applied for a preliminary ruling that there was no right of appeal to require the adoption of the action plan because the applicant could require direct application of measures that the action plan should describe in his opinion. The application of other measures does not create a reservation to the obligation to adopt an action plan. The judgment referred to relates all environmental exploitation plans significantly to persons concerned. Further to that, it must be kept in mind that open proceedings must be carried out in the case of plans.^{*62} It should be considered highly likely in that light that in a relevant case, the Court of Justice would assume a position that a person concerned must have an opportunity to demand the application of the measures prescribed by the environmental exploitation plan in the court of the member state.^{*63} In such a case, the plan would directly grant rights to persons external to administration.

Environmental protection agencies do not act in an isolated manner when implementing the plans but are in legal relationships at least with operators to whom further measures should be addressed, while often also with third parties concerned. If we regard plans as internal acts, their binding nature would in fact become non-existent in all legal relationships involving individuals.^{*64} If private individuals are not related to the plan, they could demand that the agency implementing the plan make a new and comprehensive discretionary decision. Taking this into account, a plan with an effect on internal administration could not be used for the sufficient planning of individual decisions. To justify the classification of various plans, including environmental plans,

⁵⁷ See above, point 2.2.

⁵⁸ A comparison with the rules of protection of protected areas is also appropriate. E.g., R. Sparwasser, R. Engel and A. Voßkuhle bring both environmental exploitation plans and rules of protection under the umbrella notion of environmental law plans. See R. Sparwasser *et al* (Note 19), § 2, margin No. 100.

⁵⁹ Notes 28 and 29.

⁶⁰ See in greater detail below (3.3) about the external effect on citizens.

⁶¹ Case C-237/07, *Janecek*.

⁶² R. Sparwasser *et al* (Note 19), § 8, margin No. 237.

⁶³ For such a position with further references, see P. Cancik (Note 18), pp. 171, 174.

⁶⁴ See P. Cancik (Note 18), p. 175, Note 75.

as internal acts, reference has been made to the indirect effect on private individuals.^{*65} This is not a convincing argument. In addition, a legislative act that does not limit rights directly but prescribes the enforcement of encumbering administrative acts for its implementation (e.g., a precept for the operator to terminate its activities) has an external effect on the rights of an individual. The environmental exploitation plan will limit the rights of an individual upon the implementation of the plan as well, and it need not be possible to efficiently dispute the implementation any more.^{*66} The right of discretion, especially if limited because of the plan, does not preclude regulatory nature.

Since it would be anyway impractical in internal law to distinguish between internal and external acts based on the degree of discretion, while environmental exploitation plans have legal effect on private individuals according to European Union law, environmental exploitation plans (particularly action plan for the protection of ambient air, noise action plan, water status action plan and waste management plan) must typically be considered as administrative acts (general orders) as defined in APA § 51. The more specific legal effect of particular plans and their parts depends on their content, among other things, whether and in what manner the plan prescribes limitations on the rights of an individual. In order to avoid disputes, it would be advisable to set out in the special part of the Environmental Code what plans are general orders.

4. Plan as basis for limiting rights

4.1. Direct precepts

The objective of environmental exploitation plans is not to impose new obligations or prohibitions on private individuals. Considering that a plan is an administrative act, it is not, however, legally impossible, if an underlying provision prescribed by law for issuing such a precept is contained in the plan (Constitution § 3 (1), first sentence, APA § 54), the agency adopting the plan is competent to issue the precept and other requirements imposed on administrative acts are adhered to. The mere obligation of an agency to adopt an environmental plan does not entail that the agency could include arbitrary precepts in the plan, for example, regulations regarding the age of motor vehicles. However, a local government can regulate, for example, in a noise reduction action plan, the use of all-terrain vehicles on its territory (TA^{*67} § 70 (6), AAPA § 134 (1) 4)).

4.2. Coordination of further acts

As emphasised repeatedly above, the main objective of environmental protection action plans is the coordination of further measures of executive power in performing the environmental protection duties of the state and other administrators. It has not been meant that new acts would be created when adopting the plans in Estonian and European Union law.^{*68} A plan as an administrative act itself cannot replace a legal basis, if it is required for the implementation of further measures because of the infringement of the rights of an individual.^{*69} The provision imposing the obligation to adopt a plan (e.g., AAPA § 50 (1)) is not a general clause for the implementation of all appropriate and necessary measures either. The measures that arise from law anyway (plans, permits, precepts, taxation, etc.), and for the application of which the prerequisites in substantive law provided in the underlying provision have already been met in the particular case can and must be implemented. The person adopting and implementing the plan can retain a relatively high degree of independence in deciding what limitations to apply and the extent of the limitations but the measures from which the person adopting and implementing the plan can choose must derive from law.^{*70} The underlying provision for implementing the measure can but need not be contained in the same legislative act that governs the adoption of the plan.

⁶⁵ H. Maurer (Note 25), § 16, margin No. 24.

⁶⁶ SCALCd 3-3-1-81-03, paragraph 26.

⁶⁷ Liiklusseadus (Traffic Act). – RT I 2001, 3, 6; 2009, 68, 463 (in Estonian).

⁶⁸ However, the plan can set out the informative measures not provided by law, which do not infringe the rights of the individual, e.g., information campaigns, informative agreements, etc.

⁶⁹ Everything that applies to the limitation of rights by a regulation, also applies to administrative acts. As exemplified by the limitation of the right of ownership SCebd 3-3-1-41-06. The second sentence of § 32 (2) of the Constitution or other fundamental provisions cannot be construed to mean that the right of ownership and other rights cannot be limited even by an administrative act based on law. Such an extreme position would preclude the adoption of the majority of administrative acts recognised in the present legal order (e.g. notices of assessment, detailed plans). See also H. Maurer (Note 25), § 16, margin No. 23. For the air pollution action plans see H. D. Jarass. Luftqualitätsrichtlinien der EU und die Novellierung des Immissionschutzrechts. – NVwZ 2003, p. 262 ff.

⁷⁰ See the catalogue set out in § 9 (2) of the Planning Act that limits the right of discretion upon the adoption of the detailed plan in the same way.

Any law would do. The Act need not provide directly what measures could be included in the plan because the plan does not serve as the independent basis of these measures.

Since, for example, the adoption of a detailed plan is a discretionary decision, i.e., a rural municipality or a town need not certainly adopt the detailed plan that the developer likes, the local government definitely has the possibility to refuse to adopt the detailed plan, referring to the action plan for the protection of ambient air (Planning Act^{*71} § 4 (2))^{*72}, if the reasons behind the refusal to adopt the plan are covered by the objective of the right of discretion and are proportional to a particular case. Environmental discretions are clearly covered by the objective of the planning discretion (Planning Act § 1 (3)). If the air pollution action plan adopted by a competent authority (Environmental Board) provides that in order to control air pollution, district heating or gas heating must be used in the area, this limits the right of discretion of the local government in adopting the detailed plan.^{*73} An owner of a registered immovable could theoretically apply for an exception to the provisions of the action plan because the right of discretion of the local government need not be completely reduced but in reality the owner should have very weighty and special arguments (e.g., considerably higher than usual costs for the connection to the district or gas heating network). The principle of equal treatment must be taken into account when making exceptions. Proceeding from that, all sources of pollution must be addressed both in adopting the plan and its implementation, in line with their individual contribution to pollution in general.^{*74} The legislator must answer the question what degree of discretion must be allowed for the person implementing the plan separately regarding each individual plan. It is possible that a differentiated approach must be taken to various measures upon the adoption of the plan—leaving rather limited room for manoeuvre if both the person adopting the plan and the person implementing the plan are state authorities, but leaving somewhat more choice if the plan is adopted by the state but implemented by a local government.^{*75}

From the point of view of the reservation to law required for limiting the rights of an individual (Constitution § 3 (1)), the limitation on the heating solution could be feasible within the framework of the applicable legislation. Here an additional problem arises in relation to the autonomy of the local government (Constitution § 154 (1)) upon spatial planning (LGOA^{*76} § 6 (1)) and regulating construction activities (BA^{*77} § 22 (1) and § 59 (2)).^{*78} It can also be construed to mean that the competence of the state in the protection of the environment already provided by law (Constitution § 65 (16)), including in adopting environmental exploitation plans in the area of ambient air, limits the autonomy of local governments in adopting the plans, as a result of which the plan itself no longer infringes the autonomy.^{*79} In order to avoid disputes, it would be obviously clearer and more secure to provide *expressis verbis* in the rules concerning environmental exploitation plans that local government has the obligation to generally observe or at least take into account the plans upon spatial planning, exercising construction supervision, etc.

The mandatory nature of the plan must not be understood in such a way that if it prescribes a measure not set out by law and limiting rights, the plan as an applicable administrative act should be implemented regardless thereof. It is true that the administrative act is applicable and is mandatory for execution regardless of its unlawfulness (APA § 60). However, an environmental exploitation plan is, as a rule, not used in making a final decision on whether any further measures are taken or not. As emphasised above, the objective of the plan is to coordinate further discretionary decisions, and this specification limits the object of regulation of the plan and through that also the binding nature, imposing on the agency the obligation to implement further measures with a reservation^{*80} that the measures are legally admissible as well as founded on a legal basis and proportional. In order to avoid confusion, it would be advisable to limit the effect of plans expressly for example in the general part of the Environmental Code.

It is also important to keep in mind that according to Estonian or European Union law, the environmental exploitation plans do not serve as a precondition for making individual decisions in a particular case in the relevant area. An operator cannot dispute a precept issued for it solely based on the argument that the precept has not been provided in the action plan of a relevant environmental area or that the plan has not been adopted at all.^{*81} In such a respect, environmental plans differ, for example, from the detailed plan, the adoption of which often serves as a precondition for issuing a building permit and starting construction works. Yet the

⁷¹ Planeerimisseadus. – RT I 2002, 99, 579; 2009, 39, 262 (in Estonian).

⁷² See for the refusal to adopt a plan SCALCd 3-3-1-56-08, paragraph 25.

⁷³ Similarly, SCALCd 3-3-1-15-08, paragraph 18.4.

⁷⁴ H. D. Jarass (Note 69), p. 262.

⁷⁵ E.g., in Germany, the air protection action plan is as a rule strictly binding but it must only be taken into account when adopting plans, R. Sparwasser *et al* (Note 19), § 10, margin No. 431; H. D. Jarass (Note 69), p. 262.

⁷⁶ Kohaliku omavalitsuse korralduse seadus (Local Government Organisation Act). – RT I 1993, 37, 558; 2009, 62, 405 (in Estonian).

⁷⁷ Ehitusseadus (Building Act). – RT I 2002, 47, 297; 2009, 63, 408 (in Estonian).

⁷⁸ Besides that, there are procedural questions, discussed below in point 5.1.

⁷⁹ See SCCRCd 3-4-1-4-07, paragraph 12; SCALCd 3-3-1-15-08, paragraph 18.4.

⁸⁰ For a more detailed discussion of the reservations to the binding nature of an administrative act, see I. Pilving (Note 49), pp. 133–135.

⁸¹ A. Willand, G. Buchholz. Feinstaub: Die ersten Gerichtsentscheidungen. – Neue Juristische Wochenschrift (NJW) 2005, p. 2644.

plan affects the right of discretion if the agency and the issue of a precept not provided in the plan can be a discretionary error because an agency that has special competence has found, that the measure is not necessary for the protection of the environment.

5. Procedure

5.1. Involvement

Proceeding from the assumption that an environmental exploitation plan as an administrative act infringes the rights of individuals (both operators and the third parties concerned), hearing them out in the procedure of adopting the plan emerges as an important topic. At least in the case in which the plans considerably affect the right of discretion of the agencies implementing the measures prescribed by the plans, it is not sufficient if the relevant persons are involved in the implementation stage of the plan because the decisions of principle have been made by that time already. Due to the broad territorial scope of application of the plans, they concern many people. Clause 6 of subsection § 40 (3) of the APA allows for foregoing the personal notification of all individuals concerned but on the level of the constitutional principles of administrative procedure, this unavoidably requires conducting open proceedings. Preparation of the plans away from the public would not be in compliance with ensuring extensive access characteristic of environmental law. Moreover, open proceedings are predominantly necessary in relation to strategic environmental assessment, as the plans are to be adopted by a governmental authority or a local government body as legislative acts (Environmental Impact Assessment and Environmental Management System Act^{*82} § 31) and framework documents (directive 2001/42/EC, Article 3 (2) p a)).^{*83} At the same time, open proceedings do not preclude the need for the personal involvement of persons who are particularly intensively concerned, such as the owners of large plants or persons living in a particularly sensitive area.^{*84}

When drafting the Environmental Code, it would be advisable to take into account the provisions of the APA concerning open proceedings, modifying them by special provisions if possible. An Act should be as comprehensive as possible. In order to avoid overregulation and legal vagueness, the procedure for adopting a plan should not be delegated to the government and ministers, especially if the plan is implemented by a local government. Anything of importance in the procedure should be contained in law and regulation of irrelevant matters should be avoided.^{*85}

In addition to individual persons, attention should be paid to the involvement of the agencies that should implement the measures provided in the plan in order to ensure efficient implementation of the plan and avoid disputes between the state and local governments.^{*86} This can take place based on APA § 11 (2). The involvement may also be required by the Constitution upon limitation of the autonomy and the right of discretion granted by law to local governments. Hence, it will be worthwhile to set out the involvement of agencies as mandatory in the draft Environmental Code.^{*87}

5.2. Supervision

To avoid a situation in which the plans adopted by local governments remain too general or formal, the state would need tools to call them to order. This particularly applies if the enforcement of the European Union directives comes under threat. The obligation of a rural municipality or town to ask a competent state authority for its non-binding opinion would be a relatively mild option to achieve this goal. Right now, such an obligation has been set out for example in WasteA § 55. According to this provision, asking for the opinion of the county governor and the Environmental Board suffices to adopt the plan. The adoption of the plan does not presume state authorities' approval of its content. Unfortunately, such a non-binding opinion can remain inefficient. It is true that it could be compensated for by inspection and, if necessary, by the right to file a protest with an administrative court pursuant to ESA^{*88} § 7 (1) and (4), since it is legislation of specific application that has been adopted when pursuing an environmental protection target. Within the framework of general

^{*82} Keskkonnamõju hindamise ja keskkonnanjuhtimissüsteemi seadus (Environmental Impact Assessment and Environmental Management System Act). – RT I 2005, 15, 87; 2009, 3, 15 (in Estonian).

^{*83} Note 43.

^{*84} SCALCd 3-3-1-12-08, paragraph 13; SCALCr 3-3-1-47-05, paragraph 13; SCALCr 3-3-1-31-03.

^{*85} The choice of form and the right of discretion of an agency in the procedure should be valued (APA § 5 (1)).

^{*86} P. Cancik (Note 18), p. 175.

^{*87} See SCCRCd 3-4-1-4-07, paragraph 25.

^{*88} Keskkonnajärelevalve seadus (Environmental Supervision Act). – RT I 2001, 56, 337; 2007, 19, 95 (in Estonian).

supervision of lawfulness, the county governor can also interfere (GRA^{*89} § 85 (4)). However, we definitely cannot appreciate a situation in which the Environmental Board must submit its opinion on the plans, but the supervision over them is exercised by the Environmental Inspectorate.^{*90}

It would be more worthwhile upon the preparation of the draft Environmental Code to consider the possibility of subduing the plan to be adopted first to supervision of its lawfulness in the form of a binding approval by the Environmental Board. The supervision structure prescribed by PA § 23 as a suitable model could be used in the draft Environmental Code. In the case of a waste management plan, this would again constitute an infringement of the autonomy of the local government, but if supervision is only limited to lawfulness and does not interfere with the purposefulness of the measures planned, the infringement has to be regarded as moderate and constitutional. To avoid going to extremes within the framework of the supervision and to protect the autonomy of the local governments, it is possible to give rural municipalities and towns the option to file a complaint with a administrative court if approval is not granted.^{*91}

6. Legal protection

It is easy to derive from the above, conclusions about the legal protection of both operators and the persons concerned in administrative courts, in relation with environmental exploitation plans. It should be reminded, as a general note, that environmental law uses the extended right of appeal that enables persons directly and actually concerned as well as environmental associations to contest administrative measures (Aarhus Convention^{*92}, Article 9). The environmental right of appeal is broader in scope than the general right to have recourse to an administrative court (CACP^{*93} § 7 (1)), yet it is not interchangeable with *actio popularis*.^{*94}

6.1. Right to claim adoption of plan

Even though action plans are not legally preconditions for implementing environmental protection measures, they in fact often serve as such.^{*95} An individual can theoretically request the implementation of a measure necessary for exercising his or her rights and interests independently of the environmental exploitation plan, but this is considerably more complicated in reality because of the high degree of discretion related to environmental measures. Since the need for a particular measure and the feasibility of its implementation depend on the coordination of the measure with many other measures, the administrative court would be, in most cases, unable to issue sufficiently clear precepts for agencies. As referred to above, it has become clear in relation to the plans deriving from European Union law through the *Janecek* case that the person concerned has the right to file a complaint with a court of the member state if the agencies of the member state have failed to meet their obligation to adopt an environmental exploitation plan.^{*96}

In the same judgement, the Court emphasises that the member states are not under the obligation to include in the action plan measures to ensure that the limit values and alert thresholds of pollution are not exceeded at all. The states are obliged to take measures capable of reducing to a minimum the risk of values/thresholds being exceeded and the duration of such an occurrence, taking into account all the material circumstances and opposing interests.^{*97} In other words, the agency of a member state, as a rule, has a high degree of discretion upon adopting the plan, in which the court cannot interfere based on a complaint filed by an individual. The request of an individual for including a particular measure in the action plan can consequently emerge only

⁸⁹ Vabariigi Valitsuse seadus (Government of the Republic Act). – RT I 1995, 94, 1628; 2009, 49, 331 (in Estonian).

⁹⁰ Proceeding from the duties set out in the statutes, the supervisory competence of the plans adopted by local governments should be vested in the Environmental Board. Cf. Minister of the Environment Regulation No. 5 of 19 January 2009, § 5 (1); Regulation No. 12 of 31 March 2008, § 6.

⁹¹ Cf. Supervision of lawfulness in spatial planning R.-P. Löhr. – U. Battis, M. Krautzberger. R.-P. Löhr. Baugesetzbuch. München 2009, § 6, margin No. 1 ff. See also SCCRCd 3-4-1-9-09, paragraphs 32–33.

⁹² Convention on access to information, public participation in decision-making and access to justice in environmental matters. – RT II 2001, 18, 89.

⁹³ Halduskohtumenetluse seadustik (Code of Administrative Court Procedure). – RT I 1999, 31, 425; 2008, 59, 330 (in Estonian).

⁹⁴ SCALCd 3-3-1-86-06, paragraph 16; SCALCd 3-3-1-43-06, paragraph 24–29; SCALCd 3-3-1-81-03, paragraphs 23–24; K. Relve. Århusi konventsiooni artikli 9 lõige 3 – kas alus piiramatuks *actio popularis*'eks (Article 9 (3) of the Aarhus convention—a basis for unlimited *actio popularis*?) – Juridica 2009/1, p. 19 (in Estonian); K. Relve. Isikute ühendused keskkonnahuvi esindajana: kas iga ühenduse õigus või valitute privileeg? (Associations of persons as representatives of environmental interest: the right of any association or the privilege of the chosen?) – Juridica 2007/10, p. 727 (in Estonian).

⁹⁵ As exemplified by the noise reduction action plan P. Cancik (Note 18), p. 174.

⁹⁶ Case C-237/07, *Janecek*, paragraphs 34–42.

⁹⁷ *Ibid.*, paragraphs 44–45.

when the right of discretion is reduced to nothing, which would be a clear exception.^{*98} Such a situation would be created if the problem could indeed be solved by a single specific measure.

6.2. Claim for revoking the plan

The persons actually and directly concerned can contest environmental exploitation plans as environmental general orders in an administrative court (CACP § 4 (1)). This applies both to the possessors of sources of pollution whose activities will be limited upon the implementation of the plan and third parties who find that the plan fails to ensure the protection of the environment directly concerning them to a sufficient extent. It is necessary to also take into account the extensive right of discretion of the person adopting the plan in the latter case; hence, the claim will be satisfied only if the agency made a considerable discretionary mistake. If the autonomy of a local government is infringed, it may be admissible for the local government to contest a plan adopted by the state; the local government should start to implement the plan or the plan impedes the performance of other duties of the local government.^{*99}

As the plan is a general order, certain specifications regarding the term for filing a claim would apply to it. The person concerned could contest the plan right after its adoption if he or she so wishes but in the light of recent judicial practice, he or she can retain the possibility to contest the plan also after the expiry of the term of 30 days assigned for filing the claim. The Supreme Court is of the opinion that if “the provision of a general order has a direct effect on the rights of an individual, an action must be filed with an administrative court within 30 days of the notification of the order. If the provision addresses an unidentified number of cases, which does not affect the rights of the addressee of the Act at the time of its notification, the person can file a claim for the revocation of the order within 30 days after the emergence of the effect, for example after an act has been performed or an administrative act has been issued regarding him or her based on the general order”^{*100}. It was already indicated above that delays in contesting environmental exploitation plans would impede the efficient implementation of their objective. Similarly to comprehensive and detailed plans (PA § 26 (1)), the requirement of immediate contestation should be imposed on environmental exploitation plans as well. The term for filing an action should as a rule start from the notification of the plan but it is necessary to secure the rights of particularly concerned persons by way of more intensive notification than usual. Special cases when a person regardless of sufficient care could not contest the plan on time can be settled by the restoration of the term.

6.3. Other rights of claim

Besides legislation of general application, subjective rights can also derive from administrative acts, thus in principle also from environmental exploitation plans. Whether one or another plan actually imposes on the individual, alongside the objective obligation of the agency implementing the plan, the subjective right to demand the implementation of the plan on the one hand depends on the relation of the individual with the legal rights and on the other hand on the degree of specificity of the plan (the extent of the right of discretion assigned to the agency). If the obligation to take a measure has been imposed at least among other things in the interests of the health of the individual or for the protection of the environmental resource that the person used (e.g., measures to reduce air pollution at the individual’s place of residence), the requirement of the relation has been met. The right of discretion may mean that the agency is not obliged to implement the measure prescribed in the plan regardless of the plan. In such a case, the individual can only request the adherence to discretionary rules in making a decision concerning the individual.^{*101} Since the plan does not serve as the final decision on implementing the environmental protection measures referred to in the plan and does not fully preclude the implementation of the measures not specified in the plan, there would as a rule be no causal relationship between the damage caused to the person as a result of unsatisfactory status of the environment and the plan. The plan could not in such a case create a legitimate expectation that the measures included in the plan are implemented as a rule. In the absence of legitimate expectation, APA §§ 64–70 would not limit the amendment of the plans.

⁹⁸ P. Cancik (Note 18), p. 174.

⁹⁹ SCALCd 3-3-1-86-06, paragraph 16; SCCRC 3-4-1-9-04, paragraphs 26, 33.

¹⁰⁰ SCALCr 3-3-1-95-07, paragraph 14.

¹⁰¹ I.e., the court can revoke the discretionary decision that contains errors and oblige the agency to adjudicate the matter anew, not to implement a certain measure. For measures not specified in the plan, see point 4.2 above.

7. Conclusions

Environmental exploitation plans constitute, in addition to more general development plans of the state and local governments, a more clearly delimited category of administrative forms of action. As prescribed by European Union law, their content must be relatively specific as regards further measures. They cannot be considered as general guidelines of an informative nature as are strategic environmental policy plans and programmes. The main objective of environmental exploitation plans is to coordinate further environmental law decisions or decisions concerning the environment, such as spatial planning, permits and their secondary conditions, precepts, traffic and activity restrictions, etc.

Due to relatively specific content and the significance attributed by the European Union law, environmental exploitation plans (including air pollution action plan, noise reduction action plan, water management plan and waste management plan) are regarded as administrative acts (general orders) in Estonia. As such, the plans are mandatory both for the agencies implementing them and individuals to be concerned by the measures of implementing the plans. The above does not rid the agencies implementing the plan of their right of discretion but adherence to the plan should be a general rule. The body implementing the plan must ensure that individual measures are proportional to the public and private interests colliding with environmental considerations in a particular case. It would be advisable to provide in the General Part of the Environmental Code Act that plans shall be observed upon granting permits, issuing precepts and making other individual decisions unless there are good reasons for derogations.

Environmental exploitation plans need not contain immediate precepts for individuals; in the case of a provision delegating authority that derived from law, this is not in principle impossible either. A clear and specific legal basis must be set out in the plan for further measures infringing the rights. The mere obligation to adopt a plan cannot be used to derive an authorisation for including arbitrary measures in the plan. The plan itself cannot substitute for the legal basis required for environmental acts. Individuals and local government bodies directly and actually concerned can contest environmental exploitation plans in court and individuals can claim the adoption of the plan concerning them. The judicial supervision of the implementation of specific measures is limited because of the high degree of the right of discretion.