

**PUBLIC PARTICIPATION IN
ADMINISTRATIVE PROCEDURES:
POSSIBILITIES AND RECENT
DEVELOPMENTS IN HUNGARY**

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ABSTRACT: *Administrative cases have reached a complexity which has not been seen before. Great efforts are demanded to strike an appropriate balance between the rights and interests of those directly affected by the administrative decisions and the protection of the interests of the community. There are multiple aspects that have to be taken into account when deciding administrative cases. The use of uncertain notions and the margin of appreciation of the administration are growing. This leads to the proceduralization of administrative law, as procedural rules can only guarantee the optimal decision in such situations. This development leads to enforceable procedural rights safeguarded by courts. The paper focuses on the development of one of these rights: public participation. After presenting its sources on European and international level, it shows what effects these had on the Hungarian legal setting. The interactions of the legislator and the courts are then analysed and set into the context of ECJ's recent case-law. The analysis of court decisions shows that the judiciary is able to defend public participation even against the legislation. The role of the ECJ as ultimate safeguard is obvious in this scenario. Its case law does not only have impact on concrete cases but can even alter traditional national legal settings.*

KEY WORDS: *access to justice, administrative procedure, judicial review, public participation, right to good administration, standing (in administrative litigation)*

JEL CLASSIFICATION: *K40, K32*

1. INTRODUCTION

The judicial review of administrative action is a field of continuously growing importance. In the last decade, almost every CEE country has provided for administrative tribunals or even a distinct branch of judiciary for administrative matters. The competence of the administrative courts is getting broader and broader, they review administrative acts that have been immune to judicial review ever since. Meanwhile, administrative cases have reached an unprecedented complexity. The possibility of conditional programming

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of administrative action is less and less possible. There is a growing number of aspects that have to be taken into account when deciding administrative cases. The use of uncertain notions and the margin of appreciation of the administration are growing. On the other hand, the co-existence of various legal orders (national law and European law, international law) likewise leads to similar problems. The guidelines given for national legislation also leave a broad margin of appreciation to the Member States.

It is in this situation that the judiciary has to take a stand on the legality of administrative acts. This leads to the proceduralization of administrative law: the norms regulating the decision process have come to an unprecedented importance. The breach of procedural rules, which formerly was of rather marginal importance, has become the center of judicial review and reflects on the material legality of the decision, which leads to the higher appreciation of procedural norms. These procedural norms again have mostly to do with the interactions between the administration and the persons or groups affected through the decision. Such requirements, which were previously formulated as ethical requirements in view of the administrators are transformed into procedural rights of the administered person (party) or procedural obligations of the administrative organs and thus become enforceable. One such stage in present developments is the leveling of administrative norms through setting standards of good administration through the Decisions of the Court of the European Union or international instruments like the Code on Good Administration. The codification of the right to good administration in Art. 41. of the Charter on Fundamental Rights of the European Union – which was followed by the inclusion of this right into the new Hungarian constitution – is another stage which brings new aspects to this process in which the judiciary takes a leading role. The administrative procedures affecting a large number of persons are good examples for this proceduralization where the participation of the interested public and the right use of its procedural guarantees have a growing importance. This again leads to new problems in connection with access to justice, as may be seen in environmental litigation. The paper will finally show how this proceduralization affects – or rather hollows out - the administrative autonomy of both national states and administrative authorities.

2. THE CORRELATION BETWEEN GOOD GOVERNANCE, PROCEDURAL RULES AND JUDICIAL PROTECTION

The concept of rule of law, the growing importance of human rights resulted in an ever-growing administrative procedural legislation throughout Europe (Sommermann, 2002, 139). The ECtHR and the ECJ have also developed several principles, which all fell under the term of good administration. This resulted in the introduction of the right to good administration into the Charter of Fundamental Rights of the European Union. There were also two other streams of development that amended and varied this evolution: the concept of New Public Management and that of Good Governance. Perhaps one of the best examples of the synthesis in the field of procedural law is the Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration of the European Council. The adoption of this recommendation was partly due to the

introduction of the right to good administration into the Charter¹, and partly to the problems around its ratification. The Appendix to the Recommendation, the Code on Good Administration, is a model code recommended for adoption to member states, if their national rules do meet these standards. This code practically elaborates the elements of the right to good administration enshrined in Art. 41. of the Charter and is mainly based on the jurisdiction of the ECJ and the ECtHR (Hoffman, Rowe and Türk, 2011, 192).

The first recommendations formulated here reflect the impact of New Public Management:

„...the governments of member states:

– promote good administration through the organisation and functioning of public authorities ensuring efficiency, effectiveness and value for money. These principles require that member states:

- ensure that objectives are set and performance indicators are devised in order to monitor and measure, on a regular basis, the achievement of these objectives by the administration and its public officials;

- compel public authorities to regularly check, within the remit of the law, whether their services are provided at an appropriate cost and whether they shall be replaced or withdrawn;

- compel the administration to seek the best means to obtain the best results;

- conduct appropriate internal and external monitoring of the administration and the action of its public officials;

– promote the right to good administration in the interests of all, by adopting, as appropriate, the standards set out in the model code appended to this recommendation, assuring their effective implementation by the officials of member states ... ”

Setting objectives, performance indicators, monitoring etc. are keywords of the NPM, which necessitate primarily organisational and budgetary changes. The Good Governance stream can be regarded as the counterpart of this inward-looking modernization, which concentrates on the relationships between the administration and other stakeholders. (Plumptre and Graham, 1999, 3) In the considerations of the recommendation the impact of good governance cannot be missed: *„good administration is an aspect of good governance“*, it states. It is not just concerned with legal arrangements, but it depends on

¹ „1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

– the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

– the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

– the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language. ”

the quality of organisation and management; „it must meet the requirements of effectiveness, efficiency and relevance to the needs of society; ... it must maintain, uphold and safeguard public property and other public interests; ... it must comply with budgetary requirements; and ... preclude all forms of corruption”.

These requirements correlate heavily with the building up of social capital and trust. It is also declared that „good administration in many situations involves striking an appropriate balance between the rights and interests of those directly affected by state action on the one hand, and the protection of the interests of the community at large, in particular those of the weak or vulnerable, on the other hand“. All these requirements can be derived from the fundamental principles of the rule of law, but it is important that they are formulated concretely, as does the Code on Good Administration. Its principles are those of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy and transparency.

The judiciary has a very important role in relation to these requirements. Not only do these requirements emanate from the judiciary, but they are also guaranteed and further developed by it. In the system of checks and balances, these are the most important outward controls of administrative actions. The requirements set out in the Charter, in the Recommendation and in national legislations are realised not only by the administrations and the officials working in them, but also by the courts if administrations do not comply. Further, the judiciary also elaborates the real meaning of these requirements when providing legal protection to the stakeholders against the administration. In the inter-organisational network which is set up by governance (Rhodes, 2000, 355), the rules of the game are thus partly ensured by the judiciary. The Recommendation itself bears that in mind, when it deems it necessary that „cases of maladministration, whether as a result of official inaction, delays in taking action or taking action in breach of official obligations, must be subject to sanctions through appropriate procedures, which may include judicial procedures.“ An ever-wider perspective is given by the consideration, that „procedures intended to protect the interests of individuals in their relations with the state should in certain circumstances protect the interests of others or the wider community“. Article 15 of the Code on good administration expressly reflects latter requirement:

„Right of private persons to be involved in certain non-regulatory decisions

1. If a public authority proposes to take a non-regulatory decision that may affect an indeterminate number of people, it shall set out procedures allowing for their participation in the decision-making process, such as written observations, hearings, representation in an advisory body of the competent authority, consultations and public enquiries.

2. Those concerned in these procedures shall be clearly informed of the proposals in question and given the opportunity to express their views fully. The proceedings shall take place within a reasonable time.”

Public participation, formulated in this article is an exquisite field to show how important the role of the judiciary can be in safeguarding that administration and legislation meet the requirements of good administration. Certainly, we could have chosen any element of the right to good administration, but this aspect has become one of the

most rapidly evolving element of good administration in our time.² Let us examine what the tendencies presented above have reached in this field so far and what effects the interactions of the stakeholders affected produce in relation to the possibilities of public participation.

3. PARALLELS IN THE EVOLUTION OF PUBLIC PARTICIPATION ON INTERNATIONAL, EUROPEAN AND NATIONAL LEVEL

Public participation in European and international level

The question of the participation of the interested public was originally raised in two relations in the 1980's. On national level the immense projects realised in the fields of infrastructure (airports, speedways) and industrial plants (chemical plants, power plants etc.) could evoke the interest and protest of masses. This certainly was fuelled by the emergence of the NGOs. On a local level, similar tendencies arose in connection to urban planning.

One of the first legal appearances of public participation on European level was Recommendation CM (87)16 on the procedures affecting a large number of persons. This recommendation applies to the protection of the rights, liberties and interests of persons in relation to administrative acts of non-normative nature which concern a large number of persons. The Recommendation set up three categories of persons concerned. In the first category are persons to whom the administrative act is addressed, in the second persons whose individual rights, liberties or interests are liable to be affected by the administrative act even though it is not addressed to them. Persons who, according to national law, have the right to claim a specific collective interest that is liable to be affected by the administrative act form the third category.

The Recommendations have no binding force, as their name shows, but certainly play some role in designing national policies.

A next important step in public participation was the Convention on access to information, public participation in decision-making and access to justice in environmental matters done at Aarhus, Denmark, on 25 June 1998 (Aarhus Convention) that formulated the concept of public participation not generally, but on the most involved field of environmental issues.³ Article 2 gives the definition of the public concerned: „*the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest*”. From the three pillars, the public participation in decision-making and the access to justice are the most relevant for our issue. Article 6 sets up the types of administrative procedures where public participation has to be ensured. Access to justice is enshrined in Article 9:

²e.g. for an overall assessment of the increasing role of GC and ECJ in the field of competition policy, see Lehmkuhl, 2009, 154.

³ As most projects have environmental aspects, they can mainly be regarded as environmental cases.

„2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.”

As the parallel efforts of the European Union towards member states in strengthening environmental aspects in policymaking⁴ did not have the effects of unification expected, the European Union decided to sign the Convention as a contracting party (Obradovic, 2007, 53). Thus the Convention became a mixed convention and this way, legislation was made possible: the amendment of Directive 85/337/EEC and Directive 96/61/EC of the Council by 2003/35/EC directive and Directive 2003/4/EC on the access to information in environmental cases meant to accelerate this process. Special procedures were created to ensure public participation in environmental matters, which had to be implemented by member states. Another important aspect is that by these changes the ECJ has become the competence to adjudicate cases in connection with the Aarhus Convention. By these conditions, the Convention is now able to have greater impact on administrative procedures and litigation in several member states (Eliantonio, Backes, van Rhee, Spronken and Berlee, 2013, 82).

Participation in administrative procedures on national level

On the basis of Article 6 of the ECHR, the Committee of Ministers accepted several instruments explaining some aspects of fair trial in administrative procedures, as the ECtHR took a stand on the Article being applied also to certain administrative procedures (eg. Ringeisen-case). The first step was the Resolution (77) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities⁵. According to the Statute of the Council of Europe, it falls into its competence to protect rights and freedoms through procedural rights also in administrative procedures. The rights formulated in this Resolution were the right to be heard, the right to access information, the possibility of assistance and representation, the statement of reasons and the indication of remedies. These are all requirements of good and efficient administration, and can be seen as general barriers of administrative action⁶. In 1980 a Recommendation was accepted on discretionary powers. The requirements of the Resolution and the Recommendation were elaborated partly on the basis of the decisions of the ECtHR.

The Hungarian Code on the General Rules of Administrative Procedure from 1957 (Áe.) was in line with the requirements formulated in these instruments. This may be striking, but it is due to the fact that the Code was based on drafts formulated in the 1930s with respect to the model of the judicial procedure. The draft of biggest impact (Valló,

⁴ The European Governance White Paper COM (2001) set up general requirements which differed from the requirements set down in special acts (e.g. for GMOs, for strategic impact assessment or for water issues) which gave wide margins of appreciation to member states on whether and how to institutionalise public consultation.

⁵ September 28th 1977

⁶ Explanatory Memorandum to Res (77) 31

1937) took the institutions of the civil and the penal court procedure as models and formulated almost the same criteria as laid down in the aforementioned instruments of the Council of Europe. So the *Áe.*, which was mainly based on this draft was a party-centred Code which guaranteed the participation-rights of the citizens in administrative procedures much more than did the administrative procedural laws of other socialist countries. The problems came with the notion of public participation stemming from European documents.

The *Áe.* formulated the notion of the party very broadly in a substantive way: “Party is the natural or legal person or any other organisation without legal personality whose rights or legal interests are affected by the case.” The standing of the party was also granted in Art. 3 (4) to “organisations whose tasks are affected by the case on condition that they do not take part in the procedure as (special) authority”.

For a long time it seemed that these two rules will be able to handle most of the problems in the procedures affecting a large number of persons. In fact, this broad definition gave the possibility to administrative authorities and courts to interpret its notions quite freely. In the autumn of 2004, the new Act on the General Rules of Administrative Procedure (further *Ket.*) was promulgated. Here, a set of rules were created as special standing rules for the persons concerned by the second category of the Recommendation.

Practically, this was a two-steps-forward-one-back development. The cause is not the Recommendation itself, but rather the mode of adoption. The *Ket.* formulated a widened standing in procedures for the persons concerned of the second category: everyone who had a registered property right in the area affected by the future functioning of the plant to be permitted had to be granted the position and the rights of the party. Nevertheless, as the notions of the “area affected” and “plant” were so vague that the general rules of administrative procedure were practically hollowed out, the issues of concern were decided finally by the ministries responsible for the fields of action. These lacked the perspective of the importance of public participation and regarded the new institutions of the *Ket.* only as a burden, which hinders them in prompt decision-making – so the institutions were not applied.

The persons concerned of the third category had a similar fate. The rule of the standing of affected organisations was also modified. Art. 3 (4) of the *Áe.* originally aimed not at guaranteeing the participation of the public, but was due to the philosophy of the unity of power and the possibility of the control through the party. As times changed, after 1988 the civil organisations started to make use of it. Local governments also used it for getting their interests to the courtroom. Nevertheless, the notion „organisation” was too vague: did this mean only public authorities or also NGOs? This led to an inconsistent case law of the administrative authorities: some granted the standing as party to all organisations, both civil and administrative, while others interpreted this notion not so broadly and only allowed the participation of administrative authorities. For a long time, the judiciary failed to set precise guidelines, and so the practice of the authorities showed great uncertainty. Finally, this clause was diversified by the *Ket.* according to the Recommendation, but again: the NGOs could get a standing only by special legislation. This was due to the fact that the Hungarian Act on Environmental Protection – with view to the Aarhus Convention – in the 90’s introduced the possibility of participation of civil organizations

as parties in environmental administrative issues. This was a parallel, but indeed superfluous regulation, as the standing was already given by Art. 3 (4) Áe. Unfortunately this influenced the codification of the Ket.: it didn't retain the rule on the general standing as party of the NGOs in cases where their aims are affected, but gives permission to the special (sectorial) legislation to grant the standing of the party. Thus, we see that for the third category of interested public the developments at national level in connection with the Aarhus Convention led to the narrowing of the possibility of public participation. The sectorial legislator in general is reluctant to this form of public participation. It is obvious that today the sectorial legislator only grants standing to NGOs where it has an external obligation for it. Therefore, NGOs have standing in environmental administrative issues, in some issues of consumer protection and in relation to anti-smoking regulation (e.g. advertising and promoting of tobacco).

4. THE COURTS AS THE DEFENDERS OF PUBLIC PARTICIPATION

The wrestling of the Courts and the legislator on public participation

In the beginning of 2004, some months before the promulgation of the Ket. – probably also to conserve the situation⁷ – the Highest Court (“Curia”) issued two general decisions for the uniformity of the case law⁸: one on the standing of local governments as affected organisation not taking part as authority in the procedure (2/2004. KJE) and one on the standing of NGOs in cases of environmental law. The latter is of greater interest for us now, as it partly was based on the Aarhus Convention. The question underlying this decision No. 1/2004 of the Highest Court was whether the NGOs had a standing only in cases where the environmental authority was the authority leading the administrative procedure, or also in cases where the environmental authority was only taking part as a “special authority”, deciding only on certain environmental aspects of the case. This was an important question as the legislator tried to construct almost all procedures in a way that the authority for environmental protection would only be a special authority, not the authority deciding. The above-mentioned problems of the notion of organization did not come up here as the Act for Environmental Protection precisely mentioned associations as parties.

The Highest Court correctly took the Convention into consideration and came to the right conclusion, namely that the NGOs have a standing in all cases where the authority of environmental protection takes part as authority, regardless of its position in the procedure (deciding or only special authority). This strengthened the position of the NGOs to some extent.

The legislator was very creative: to avoid the possibility of public participation, it changed the regulation in some cases: the environmental authority should not have a status of special authority anymore in the cases concerning highway-infrastructure, but

⁷ The Ket.'s original draft version was accessible at that time already at the web-site of the Parliament (with No. T-10527.). The decision 1/2004. KJE-t was brought on 20th January 2004, while Nr. 2/2004. KJE on 30th September.

⁸ On the problematic nature of these decisions see in German: Rozsnyai, 2011.

should only give an expert's opinion.⁹ As this opinion would have had binding force, practically the same rules would apply as if it would give permission as special authority, with the single but important difference that in this construction NGOs had no standing as party. The Constitutional Court relatively promptly annulled this regulation¹⁰ because the Court deemed it contrary to the Act on Environmental Protection and the government decree on the administrative procedures on permits of the authority for environmental protection. The Constitutional Court declared that the procedural position of the authority cannot be altered freely by the legislator because of these higher ranking rules.

As the constitutional court did not annul the ministerial decree retroactively, later that year the administrative court of first instance had to decide whether to grant standing to an NGO in a case concerning the track planning of a section of the highway around Budapest¹¹. At that time, there was no general interdiction of application of annulled unconstitutional norms in ongoing procedures, so the annulled decree should have been applied to the case and thus the standing of the NGO denied.¹² The NGO invoked the Directive 2003/4/EC on the access to information in environmental cases and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. These Directives should have been implemented until February and June 2005 respectively, which were dates after the issuing of the administrative decision in question. The court stated that the result pursued by the directives is to implement the Aarhus Convention into Community Law and to harmonise the national laws of the member states.¹³ After analysing the Directives, the court concluded that since the deadline for implementation has unsuccessfully passed, due to the requirement of national law to be interpreted in conformity with the aims of community law, the national court has to, within the limits of its jurisdiction, ensure the full effectiveness of the law of the European Union. Thus, according to Art. 2. para 3 of the Directive the right to access to justice of the NGO can only be safeguarded if the court granted its standing by setting aside national law, mostly on the basis of Art. 4. para 4 of the Directive 35/2003 EC¹⁴. The court admitted that national legislation would be required

⁹ Decree No. 99/2004. (VII. 24.) GKM on the modification of Decree No. 15/2000. (XI. 16.) KöViM on the building of roads

¹⁰ Decision of the Constitutional Court No. 13/2006. (V.5.) AB.

¹¹ Budapest County Court, case No. 24.K.30.647/2006.

¹² According to decision No. 68/1995. (XII. 7.) AB of the Constitutional Court. Later, the CC revised its case law with Decision No. 35/2011. (V. 6.) AB.

¹³ „Article 1 The objective of this Directive is to contribute to the implementation of the obligations arising under the Aarhus Convention, in particular by: (a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment; (b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.“

Article 2 „3. Member States shall identify the public entitled to participate for the purposes of paragraph 2, including relevant non-governmental organisations meeting any requirements imposed under national law, such as those promoting environmental protection.“

¹⁴ the following Article shall be inserted:

"Article 15a

Access to justice

for the precision of this Article, but it deemed it necessary in view of the standing of the NGO to interpret national law in accordance with the directives.¹⁵ The court also referred to the decision 1/2004. KJE of the Highest Court.

There have also been other court decisions, which connected the standing directly to the Aarhus Convention, which formed part of the Hungarian law system since 2001. These were all cases that raised extraordinary interest in the public, like a NATO radar-locator near a NATURA 2000 area¹⁶ or a huge Hotel in the Buda Hillside which heavily affected the landscape forming part of the world heritage¹⁷. In these judgments, courts interpreted the notion of environmental matter broadly. Courts were thus sensitive to the questions the Convention raised and to foster public participation in this period. The legislator again replied with alterations of the legal framework.

Altering the legal framework by the legislator

In 2008, a great amendment of the Ket. also affected the regulations of the standing as party and the possibilities of judicial review. As already mentioned, the regulation for the persons affected by the second category was very problematic. The rules for the second category of interested persons for plants with an affected area were put out of force and the sectorial legislator was allowed to grant standing in such cases. In this regard it is somewhat good to see that several decrees on special planting procedures apply these possibilities.¹⁸

In addition, the legislator decided to amend the provisions of the Ket. on the participation of NGOs as parties and introduced a new 3-step regulation. According to this, all NGOs have the right to give statements in every administrative case. The second step is that the sectorial legislator can vest NGOs with certain rights of the party. The third step is the original text of the Ket.: the sectorial legislator can grant the legal status of party to NGOs (now called civil organisations). This change can be interpreted in different ways: as a measure to foster the public participation in the light of the unwillingness of the sectorial legislators to grant the standing of the party or as the weakening of public participation. The latter is more likely, if we take into consideration the subsequent paragraph allowing the restriction of some of the rights of the parties for certain cases.

Since 2008, even judicial review can be restricted through the sectorial legislators. So if someone with the rights of the party does not take part in the procedure of first instance,

Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively, (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition; have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

... the interest of any non-governmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

¹⁵ This was the only way the court could ensure public participation, as the collision with community law is not a question of constitutionality (Sonnevend 2007, 968)

¹⁶ Tubes-Case, Highest Court Decision No. Kfv.IV.37.629/2009/70.

¹⁷ Hotel Rózsadomb Case, Budapest County Court Decision No. 1. K. 33389/2005/28.

¹⁸ E.g. the decrees on the permits of railways [Government Decree No. 289/2012. (X. 11.)], on airports [Government Decree No. 159/2010. (V. 6.)] and the Act on Road Traffic No. I. of 1988.

he is not entitled to access to justice, if he got notice of the beginning of the procedure.¹⁹ Since January 2013, further restrictions apply: taking part in the first-instance procedure can be equated only with the exercise of the right of giving declarations or applications with further specified substantive qualities.²⁰ The sectorial legislator can even state that at least six months after the decision gaining legal binding force, further parties cannot take part in the procedure and have no possibility to redress, even if they have not been notified of the procedure. Another restriction is that rules can be made for the substance of the application for pre-trial review, which leads to the loss of the function of the defence of the legal order by the appellate authority. The sectorial legislator has naturally already made use of these possibilities in the area most affected by appeals and judicial review: that of building permits.²¹

We do not yet know whether the Constitutional Court agrees with such a restriction of the right to legal remedy. However, we can see an interesting line of development, if we investigate on the case law of the Highest Court in connection with public participation from the perspective of the case law of ECJ in similar cases.

5. RECENT DEVELOPMENTS SET INTO THE CONTEXT OF THE CASE-LAW OF THE ECJ

The Slovakian brown bear ...

The further development in Hungary of the third pillar of the Aarhus Convention, the access to justice is somewhat interesting in the light of the recent case law of the ECJ, as there are some parallels. The first case to mention is the Case of the Slovakian Bear²², where some important issues of the Aarhus Convention as a mixed Convention were raised. The Hungarian Highest Court had to give a new ruling for the uniformity of case law on the standing of the NGOs at almost the same time as the judicial review of this Slovakian case started before the ECJ. The questions raised by the president of the Administrative Section of the Highest Court were formulated on the grounds of the decision No. 1/2004. KJE and were mainly connected to public participation. The most important of them was in what kind of administrative cases do NGOs have a standing as party? In addition, when can they intercede in processes for the review of administrative acts? In the judicature, there were contrary decisions that were all based on that decision. As we have seen already, there were judges who interpreted the notion of environmental administrative matter broadly, others not. Some judges refused to grant the standing of NGOs in cases related to hunting issues, some granted it in cases related to forestry (these cases do not fall into the competence of the environmental protection authority). Finally, the Highest Court reaffirmed his decision from 2004 with the specification, that it is not enough that the authority for the protection of the environment, nature and water issues takes part as authority or special authority in the case. It must be a case in connection with the Act on Environmental Protection, which grants the standing of the NGOs. In all other

¹⁹Ket. 15. § (6) bek.

²⁰ Government Decree No. 312/2012. (XI. 8.)

²¹ Construction Act Art. 53/A. (11) and (12)

²² C-240/09 Judgment of the Court (Grand Chamber) of 8 March 2011, Case Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky

cases of the participation of this authority (e.g. water issues) and in cases connected with environmental elements falling into the competence of other authorities (e.g. forestry), the NGOs can only have standing, if the sectorial legislator explicitly rules so. This decision unfortunately lacks the consideration of the Convention, which could have led to another outcome. As the Convention forms part of the Hungarian legal system, the interpretation in accordance with international law – at least according to the case law of the Constitutional Court – would have been the constitutional duty of the Court when ruling on the notion of environmental case.²³

Another possible and better way for the Highest Court would have been to submit the question for a preliminary ruling to the ECJ similarly as did the Slovakian highest court, as the case has multiple connections to European Law. This deed of the Slovakian Court showed more openness to public participation and the will to widen the notion of environmental matters in national law. This is reflected in the ruling of the ECJ, which stated:

*„ Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law”.*²⁴

This case had also another relevance in view of the competence of the ECJ in interpreting the Convention (Jans, 2011, 93), which we cannot deal with here, but it also stresses how dedicated the ECJ is to foster public participation and how it tries to instruct national courts.

Thus we encounter here a restricting judicature in harmony with the aims of the legislator analysed above. We can deem this as the emptying of the initial interpretation connected with judicial activism that was favourable to civil organisations and was fostering public participation, thus good governance. Unfortunately, these signs seem to be not unique in the region (Szegedi, 2014).

... and Paul Abraham v. Régionwallonne cases

The Environmental Impact Assessment is an instrument that has originated major changes in the procedural regulations of member states. The questions treated above also stem partly from the obligations of environmental impact assessment. Here we see very clearly what a strong promoter of public participation the ECJ is. As the environmental impact assessment involves stronger public participation, the interested stakeholders (investors and also the legislator himself) try to find ways to avoid this obligation in connection with bigger projects. One such strategy is the division of projects into smaller stand-alone projects that do not fall under the scope of the environmental impact

²³ Constitutional Court Decision No. 53/1993. (X. 13.) AB, ABH 1993, 323, 327.

²⁴C-240/09 [51]

assessment directive²⁵ and the implementing regulations. The ECJ took position against this avoidance strategy in the Case of Paul Abraham and Others v Régionwallonne²⁶. In the initial case, one of the central questions was whether the work will concern the runway or not, because according to this should be assessed whether the work to be undertaken at the airport is falling within the scope of Directive 85/337 or not. The court has found that

*"installations or equipment of an airport must be considered to be works relating to the airport as such. For the application of point 12 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, that means that works to modify an airport with a runway length of 2 100 metres or more thus comprise not only works to extend the runway, but all works relating to the buildings, installations or equipment of that airport where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic."*²⁷

This statement was quoted by the Hungarian Highest Court in a similar case at the end of 2012. It was about the legality of the building permit of the Mail-Exchange Facility of the Budapest Airport.²⁸ This building was part of a large project for the reconstruction of the Budapest Airport, also featured in the media. The first instance court even mentioned that this project will obviously have a significant impact, but then found that it can only revise the building permit of the Facility and cannot take into consideration the other elements of the project, as they have been or will be objects of other building procedures and permits. Similarly as in the Paul Abraham case, the court linked the obligation for EIA with the fact that the works modify the runway or not. The above-quoted statement of the ECJ was even quoted verbatim, but the Highest Court drew no consequence from it: it dismissed the revision. This resulted necessarily from the national legislation on EIA and the above-mentioned Decision No 4/2010 of the Highest Court, which makes it impossible that the courts decide on the legality of the decision in a broader context. The case law cited by the ECJ would of course have been able to justify a different decision, as well as the decision in the case of the Salzburg airport²⁹. Here, the ECJ pointed out that the criteria and thresholds of Directive 85/337 are designed to facilitate the examination of the actual characteristics of a project modifying or extending a project already authorised, in order to determine whether a project is subject to EIA or not, so its purpose cannot be to exempt certain types of projects in advance from that obligation³⁰. Thus, a Member State which establishes criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an impact assessment

²⁵Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35

²⁶C-2/07, Judgement of the Court (Second Chamber) from 28 February 2008, Case of Paul Abraham and Others v Régionwallonne

²⁷C-2/07 [36]

²⁸Decision Kfv. 37.221/2012/6. of the Hungarian Highest Court

²⁹C-244/12 Salzburger Flughafen GmbH v Umweltsenat. Judgement of the Court (Second Chamber) from 21 March 2013

³⁰C-244/12[30]

exceeds the limits of its discretion under the directive, so the quantitative threshold given in the Austrian regulation was incompatible with the general obligation laid down in the directive for the purposes of correct identification of projects likely to have significant effects on the environment. The mere mechanic implementation of the thresholds of the environmental impact assessment Directive is not sufficient for the identification of the effects, so other circumstances of the case – like in Salzburg the dense population of the affected area – have to be given due regard.

From these two cited cases it is already evident that a different answer could have been given by paying greater attention to the law of the European Union. It definitely underlines how important a role courts can play and can ensure the prevailing of the principles of good governance even *vis-à-vis* reluctant national authorities and investors.

Luckily, since then the Hungarian legislator has altered the implementing decree, which now states that cumulative effects have to be considered when deciding on the necessity of environmental impact assessment.³¹ The Construction Act had been modified in several aspects, which also foster public participation through the integration of administrative procedures³² or the already mentioned regulations of the standing of party in administrative procedures.³³ Given that at the designation and publication of the decision of the Highest Court as a leading decision the ratio decidendi was the quote taken from Paul Abraham decision, this judgment has since *volens-nolens* influenced the case law³⁴ in a positive way through this ratio decidendi.

6. PERSPECTIVES

Public participation is a hard-to-deal-with issue in all member states. It renders necessary the rethinking of procedural and processual questions. In this process, quite many hindrances arise from the collision of different legal cultures. Traditional procedural rules, but also the reactions of the legislature or the judiciary to new challenges brought by this institution can be such hindrances (Kovács and Varjú, 2014, 215 for Hungary or Szegedi, 2014 for CEE countries), as we have seen in the foregoing chapters. We see that ECJ acts as a motor of public participation and even member states' administrative autonomy is no taboo, if it deems national rules inadequate.³⁵

We can find also other examples of fostering public participation, again through the decisions of ECJ. The German courts seem to be more open to these tendencies and there are repeatedly German courts which seize the ECJ with requests for preliminary rulings. The Trianel-case³⁶ can be placed in a line of development (Eliantonio, 2012, 773), which

³¹ EIA-decree of the Hungarian Government Art. 1 (3) f), Art. 2 (2) e) and 5th Appendix h)

³² Hungarian Construction Act Art. 30/B. Unfortunately, this integrated procedure is not an obligation, but only a possibility.

³³ see e.g. the decrees listed above (footnote 18).

³⁴ Decision of the Highest Court (18. September 2013) No. Kfv. III. 37.385/2012/7.

³⁵ C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening (15 October 2009); C-378/09 Commission v. Czech Republic (10 June 2010) and also case C-244/12 Salzburg Flughafen GmbH v. Umweltsenat

³⁶ C-115/09 Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen (intervening), Judgement of the Court (Fourth Chamber) of 12 May 2011

questions traditional characteristics of German administrative procedure, like the rules of standing only in connection with public substantive rights, or the secondary role of procedural rules (and the wide possibilities to leave its breaches out of consideration). Even the rethinking of the whole system of administrative processes can be the long-term consequence of these ECJ-decisions (Schink, 2012 and Berkemann, 2011).

These problems all reflect the quest for the ensuring all functions of procedural rules. They have to guarantee not only the legality of the decisions, but also its legitimacy, which flows from other aspects of the decision itself and the procedure of its adoption – all aspects addressed by the code on good administration and generally by the concept of good governance. These functions formulate requirements somewhat contrary to each other, thus the construction of the system is a long trial-and error procedure. This is also expressed in the Recommendation CM/Rec(2007)7 on good administration: “*due regard should be had to the requirements of sound, efficient administration as well as to major public interests and the interests of third parties, in particular with respect to the protection of personal data and of industrial or commercial secrecy.*”

The *GemeindeAltrip* decision of the ECJ³⁷ probably opens a new chapter in the history of procedural rules. It tries to end the concept of the servile role of procedural rules. This concept finds its most important consequence in the thesis that breaches of procedural rules are acceptable and do not affect the legality of the decisions as long as they do not touch the substance of the case. This concept is contrary to the aim of procedural rules that builds on the supposition, that if procedural rules are observed, the decision is likely to be in accordance with law. The ECJ in the *GemeindeAltrip* accepted this concept to some extent, but also narrowed its field of application by the third answer:

“Subparagraph (b) of Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not precluding national courts from refusing to recognise impairment of a right within the meaning of that article if it is established that it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant. None the less, that will be the case only if the court of law or body hearing the action does not in any way make the burden of proof fall on the applicant and makes its ruling, where appropriate, on the basis of the evidence provided by the developer or the competent authorities and, more generally, on the basis of all the documents submitted to it, taking into account, inter alia, the seriousness of the defect invoked and ascertaining, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that public to have access to information and to be empowered to participate in decision-making, in accordance with the objectives of Directive 85/337.”³⁸

Hopefully this decision will bring a higher appreciation to procedural rules. The Hungarian legislator sanctified the same concept elaborated by the judiciary, thus the

³⁷C-72/12 *GemeindeAltrip and Others v Land Rheinland-Pfalz*. Judgment of the Court (Second Chamber) of 7 November 2013

³⁸C-72/12 [57]

Hungarian Code on Civil Procedure states that the court annuls the illegal decision of the administration with the exception of procedural defects that didn't touch the substance of the case. Again, the development of the case law will be highly dependent on the openness to the judiciary to questions of good governance or at least to European law. The importance of procedural rules will certainly also be stressed out by the work which begun according to the initiative of the European Parliament, which requested the Commission to submit, on the basis of Article 298 of the Treaty on the Functioning of the European Union, a proposal for a regulation on a European Law of Administrative Procedure.³⁹

Luckily, this trial-and-error procedure takes place in a multi-level legal system, which has several checks and balances. The judiciary constitutes such a check, and if on one level the check does not work, there is (are) still another level(s) where further checks can influence developments. The case study presented in this paper aimed at highlighting these tendencies setting the judiciary in the spotlight. We could see what difference it makes if the judiciary is open to promoting good governance and its requirements formulated by international or European law and if the courts lack this openness which leads to narrowing the possibilities for public participation.

Finally, we cannot deny that legal and social culture also has an immense impact on this process. It is a long way from the concept of the legislator having a monopole on defining public interest to the concept of good governance that builds on the interactions of the stakeholders. The judiciary can act as an accelerator in this process.

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³⁹European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)) at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0004+0+DOC+XML+V0//EN> (accessed 31 March 2014)

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