HUNGARIAN STATE PRACTICE

The Ups and Downs of Hungarian Administrative Law's Europeanization in the Field of Environmental Protection

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Abstract

The article gives an overview of the influence of European law on Hungarian administrative law in the field of environmental protection. It briefly discusses new institutions that were introduced with the implementation of the acquis communautaire and the Aarhus Convention. There were quite a few developments in general administrative law dealt with in the article that can even be labelled as spill over or gold-plating effects in connection with public participation. The analysis shows that following a good start in Hungary both case law and legislation became somewhat less favorable to public participation in matters relating to the environment. After procedural backlogs, the abolishment of independent environmental administrative authorities in 2015 on territorial and in 2016 on national level hindered environmental protection. Nevertheless, the CJEU's case law also had an important influence on the codification of some Hungarian administrative court procedure rules, such as the loosening of the causality link requirement in the ambit of procedural errors or the creation of rules for mass procedures. Some signs give reason for hope in a gradual change of legal culture, such as the activity of the deputy ombudsman for the protection of the interests of future generations, the resilience of environmental NGOs as well as the rise of environmental law as a core subject in graduate legal studies.

Keywords: Aarhus Convention, access to environmental information, access to justice in environmental cases, public participation in matters relating to the environment, EIA.

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1. Hungary's Basic Attitude towards Union Law in the Field of Environmental Protection

The Environmental Protection Code (EPC) of 1995 opened a new chapter in environmental protection law in Hungary.[1] This act laid down for the first time and in an integrated manner the general rules of environmental protection. In 1976 thus, a comprehensive set of rules on the protection of the environment had been created comprising many important principles, yet this was rarely directly applicable.[2] The regulation that prevailed for a long time was characterized by government and ministerial decrees, unrelated to other areas of legal regulation. The depth of the regulation was quite variable and mostly low. Instead of prevention, the focus was on repression. After the fall of communism in 1990, the situation did not change immediately; environmental protection was seen more as an obstacle to the development of the new economic order. Although there were individual areas where important progress was made, a new era dawned with the EPC. At the time, the influence of European law was already noticeable in the anteroom of the forthcoming European integration.

The preamble of the EPC radiated this European influence across national constitutional law, taking the shape of constitutional principles.[3] The influence of European law was also tangible in some special fields, such as water management and nature protection. The harmonization of Hungarian legislative provisions applicable in the field of environmental protection was among the preconditions for accession to the EC. Hungary transposed the *acquis communautaire* through a series of implementing government Decrees, in addition to amending the EPC and specific laws governing the protection of individual elements of the environment. The promulgation of the Aarhus Convention also formed part of this harmonization endeavor.[4]

The new Fundamental Law of 2011 refers to environmental protection in various aspects.[5] Compared to the previous constitution, these fundamental rights have been reformulated as state goals and duties. However, if we analyze the jurisprudence of the Constitutional Court, the fundamental rights were

1 The EPC was promulgated as Act LIII of 1995 on 22 June 1995 and came into force 180 days later on 19 December 1995.

2 Act II of 1976.

3 Article P) of the Hungarian Fundamental Law, as well as Articles XXI and XX. *See e.g.* Katalin Sulyok, 'Az egészséges környezethez való jog' and 'Az egészséghez való jog', *in* Lóránt Csink (ed.), *Alapjogi kommentár az alkotmánybírósági gyakorlat alapján,* Novissima, Budapest, 2021, pp. 259-269, and 251-258, as well as Katalin Sulyok, 'The Public Trust Doctrine, the Non-Derogation Principle and the Protection of Future Generations', *Hungarian Yearbook of International Law and European Law*, Vol. 9, Issue 1, 2021, p. 360. *See also* Marcel Szabó, 'The Precautionary Principle in the Fundamental Law of Hungary: Judicial Activism or an Inherent Fundamental Principle? An Evaluation of Constitutional Court Decision No. 13/2018. (IX. 4.) AB on the Protection of Groundwater', *Hungarian Yearbook of International Law and European Law,* Vol. 7, Issue 1, 2019, pp. 67-83.

4 Act LXXXI of 2001.

5 Gyula Bándi, 'Környezetvédelmi igazgatás', *in* András Lapsánszky (ed.), *Közigazgatási jog. Fejezetek szakigazgatásaink köréből,* Vol. II., Complex, Budapest, 2013, pp. 373-374.

already interpreted in this sense before the Hungarian Fundamental Law came into force.[6]

2. New Institutions for the Implementation of European Law

2.1. Access to Environmental Information

Administrative bodies were faced with some new legal institutions. One of these was access to environmental information, which is based on three pillars. *(i)* Firstly, Article VI(3) of the Fundamental Law of Hungary states that everyone has a right to know and disseminate data of public interest. The enforcement of this right is controlled by an independent authority and shaped by the Law on Informational Self-Determination and Freedom of Information.[7] The latter regulates the scope of data of public interest and applications for access to data. *(ii)* The second pillar is made up of the provisions of the EPC. The introductory provisions enshrine the principle that everyone has a right to know environmental information. Environmental information is qualified as data of public interest in the EPC, establishing the link to the Data Protection Act.[8] In order to implement the Information Directive, the EPC prescribes on the one hand the comprehensive provision of environmental information to the public through a public information platform accessible *via* the Internet. This platform and the data stored there can be accessed and viewed by anyone without restriction and free of charge. The public platform must publish the environmental information specified in a law or government Decree that belongs to the information system or is derived from this data. The Information Directive was further implemented by amending the EPC rules on environmental information at the end of 2005. Obligations to provide environmental information are imposed not only on public authorities and other public bodies, but also on persons under private law who perform public functions. The EPC also stipulates that any person using the environment must, upon request, provide anyone with information on the environmental pollution or environmental stress they had caused, as well as the data associated with the related environmental hazard. Should this duty to provide information be infringed, action may be taken by the competent supervisory body. Another duty related to data of public interest is the obligation to make public permits and other official decisions affecting the environment. Furthermore, a database was set up in which NGOs active in environmental protection can register. Here, relevant decisions are made known directly and automatically to the registered NGOs. *(iii)* The third pillar is Government Decree 311/2005. (XII. 25.) on Access to Environmental

6 For example, the Constitutional Court stated that "the right to the environment is a fundamental right, but not a subjective right", and that "the subject of the right to the environment in fact is humanity and nature". The Constitutional Court also stated that the constitutional rules ensure the guarantees of the exercise of state functions in the field of environmental protection.

7 Act CXII of 2012.

8 Act CXII of 2011 on Informational Self-Determination and Freedom of Information.

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Information.[9] This contains detailed rules on the implementation of the provisions of the EPC.

Interestingly, already six months before the amendments to the ECP at the end of 2005, the Code of Civil Procedure (CPR) was amended in line with the Aarhus Convention, granting standing in administrative court procedures to persons who requested environmental information under international treaties and did not receive it. Additionally, this amendment to the CPR also created a possibility to sue for disclosure of information without party capacity under the CRP. This rule was repealed in 2009, meanwhile, the obligation to publish all substantive decisions of the environmental authorities was formulated in the EPC.[10]

The Data Protection Act grants access not to administrative, but to civil courts in the event of a denial of data of public interest, which must decide as promptly as possible in special proceedings. Case law interprets exceptions to the obligation to disclose restrictively.[11] There was also an important organizational change. Relying on the Tromsø Convention,[12] in 2012 the Data Protection Act replaced the Data Protection Supervisor with the Hungarian National Authority for Data Protection and Freedom of Information.[13] According to the former act, the erstwhile supervisor was a special commissioner to whom the rules on the ombudsman applied, whereas the data protection authority was set up as an autonomous administrative agency. The institution of ombudsman was also amended to a significant degree: whereas in the previous act on the Parliamentary Commissioner for Civil Rights[14] there were three special ombudsmen (special commissioners) with the independent competence to request norm control procedures and to conduct investigations, under the new act adopted in 2012[15] there are now two deputy ombudsmen with no independent competence to request norm-control from the Constitutional Court or the Supreme Court.

Similarly to the deputy ombudsman of future generations in judicial disputes concerning the environment, the data protection authority may, in addition to its administrative competences join the plaintiff in court actions for the disclosure of data.

9 Government Decree No. 152/1995. (XII. 12).
10 Section 67(5) and Section 71(3).
11 *E.g.* Decision No. 2.Pf.20.169/2009/3 of the Metropolitan Regional Court, which declared the denial of data on the grounds of them being business secrets to be unlawful.
12 Council of Europe Convention on Access to Official Documents of 18 June 2009.
13 There were even infringement procedures against Hungary launched by the European Commission ending with the finding of infringement: Judgment of 8 April 2014, *Case C-288/12, European Commission v Hungary*, ECLI:EU:C:2014:237.
14 Act LIX of 1993.
15 Act CXI of 2011.

2.2. The Environmental Impact Assessment

Environmental impact assessment (EIA) was first regulated in an overarching manner in 1993.[16] The most important rules were enshrined in the EPC two years later, while other rules were laid down in the Government Decree implementing the EIA.[17] After an intermediate stage[18] a new Government Decree was issued,[19] regulating not only the EIA but also the Integrated Environmental Permit.[20] This regulation is still in force today, the procedures are handled according to the general rules of administrative procedure with additional rules contained in this regulation. The integrated procedure only exists since September 2011, that is a novelty of procedural law with its only counterpart in the field in construction law.[21]

A special feature of the EIA Decree is that it transposes both the EIA Directive 2011/92/EU and the IPPC Directive 2010/75/EU into Hungarian law. Annex 1 is based on Annex I of the EIA Directive. Annex 2 of the EIA Decree adopts Annex I of the IPPC Directive. In Annex 3 we find the requirements of Annex II of the EIA Directive. This regulation has received much criticism from the European Commission because Hungary did not transpose the EIA Directive correctly into national law, especially when it comes to the rules on project screening. Certain exclusion thresholds and criteria were set out in such a way that not all relevant selection criteria of Annex III of the Directive were taken into account. This resulted in a restrictive application of the Directive. The issue was raised in a letter of formal notice sent to Hungary in May 2009, followed by another letter in January 2010. As a result, Hungary made some changes to its legislation to bring it in line with the provisions of the Directive. While the Commission welcomed these changes, it nevertheless found that there were still shortcomings in relation to the screening of some projects. Therefore, it issued a new reasoned letter in June 2012, following which[22] the regulation was amended again.

Striving to avoid the obligation of EIA is a general endeavor of investors throughout Europe. Perhaps the most well-known such strategy is the splitting

16 Government Decree No. 86/1993. (VI. 4.). Beforehand, there were initial rules, such as the Council of Ministers' Decree 46/1984. (XI. 6.) for major projects, but still without detailed rules and specifications. It was only the Directive on the Rules of EIA of the Minister for Environmental Protection (MI-13-45-1990) which had a normative content. In the early 1990s, sector-specific regulations were also issued, such as Government Decree No. 146/1992. (XI. 14.) in connection with projects in the energy sector.

17 Government Decree No. 152/1995. (XII. 12.).

18 The EIA and IPPC Directives were transposed together in Government Decree No. 20/2001. (II. 14.). This particularity was also retained in the new regulation in Government Decree No. 314/2005. (XII. 25.) after Hungary's accession to the EC.

19 Government Decree No. 314/2005. (XII. 25.).

20 *See* István Hoffman, 'Environmental assessment in Hungary', *in* Veronika Tomoszková (ed.), *Implementation and Enforcement of EU Environmental Law in the Visegrad Countries,* Olomouc, 2014, p. 207.

21 Only, if the project falls under the 3rd Annex of the EIA Government Decree and if it does not have a significant effect on the environment.

22 *See* at http://europa.eu/rapid/press-release_IP-12-656_en.htm. There were mainly problems with the special regulations on EIA.

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up of projects into smaller independent projects, to avoid falling within the scope of the EIA Regulation. This avoidance strategy was opposed by the CJEU in *Paul Abraham*.[23] While the Curia of Hungary (the Hungarian Supreme Court) quoted this decision *verbatim* in a similar Hungarian case at the end of 2012, this did not affect the merits of the case: the Supreme Court dismissed the appeal. This decision followed from the system of national regulation of the EIA and the Supreme Court's Uniformity Decision No. 4/2010,[24] an aspect that was also addressed in the amendment of the EIA Decree, which explicitly states that cumulative effects must be considered when deciding on the need for an environmental impact assessment. Several provisions of the Construction Code were also amended: the integration of building permit procedures[25] was intended to promote public participation. Nevertheless, since the cited decision of the Curia of Hungary was published as a fundamental decision, and its ratio decidendi was taken from the *Paul Abraham* case, this CJEU judgment has since influenced the case law in a positive way, namely through its *ratio decidendi* in connection with the amendment of the EIA Decree.[26]

Unfortunately, another avoidance strategy has been developed in Hungary since then, that of qualifying a project as a 'project of special national economic interest'. Special procedural rules apply to such projects in order to be realized promptly. This solution was partly due to the fact that these projects are usually co-financed by European funds, and the realization of the project must therefore be secured in a timely manner, and in this regard, the EIA and the associated public participation may significantly prolong these procedures. Since the introduction of this institution, the number of projects qualified by the government to be of such an interest, is growing dynamically year by year.

3. Administrative Procedure

3.1. The Beginnings

In general administrative procedural law, the right to public participation in administrative procedures have brought about important changes. The Hungarian Act on the General Rules of Administrative Procedure of 1957 (HuAPA1957), in its Section 3(4), granted the status of party to, among others, organizations whose functions were affected by the administrative matter, but did not participate in the proceedings as an authority or special authority (so-

23 Judgment of 28 February 2008, *Case C-2/07, Abraham and others*, ECLI:EU:C:2008:133.

24 Decision for the Uniform Interpretation of Law No. 4/2010 KJE of the Supreme Court (now Curia of Hungary). The cited case law of the CJEU could of course have justified a different decision, or at least a preliminary reference procedure, as is evident from the Judgment of 21 March 2013, *Case C-244/12, Salzburger Flughafen*, ECLI:EU:C:2013:203. *See* Krisztina F. Rozsnyai & László Szegedi, 'A Kúria ítélete a repülőtéri postai üzem építési engedélyének jogszerűségéről: A környezeti hatásvizsgálat-köteles jelleg és az önkormányzat kvázi-ügyféli jogállása a közigazgatási hatósági eljárásban', *Jogesetek Magyarázata*, Vol. 4, Issue 4, 2013, p. 48.

25 Construction Act Section 30/B. Unfortunately, the integrated plant approval procedure is only an option, not an obligation.

26 *E.g.* Curia of Hungary, Decision No. Kfv. III. 37.385/2012/7.

called *quasi*-parties). This provision may be traced back to the socialist ideology of the unity of power and offered the possibility of direct political control over administrative procedures. After the fall of communism, however, it took on an entirely new meaning with the emergence of civil society in Hungary. NGOs began to make use of this clause. Local self-government bodies increasingly took recourse to it to oppose large-scale projects. Even professional chambers sought to assert the particular interests of their members this way.

This development was triggered in environmental law by Section 98(2) of the EPC, which allowed for an action by associations in matters relating to the environment through the granting of the status of party – already from the promulgation of the act, several years before the adoption of the Aarhus Convention:

> "Civil organizations founded for the protection of environmental interests, which qualify neither as political parties nor as organizations for the representation of interests, have the status of parties in the administrative proceedings under environmental protection law in their functional area."[27]

This paragraph was an icebreaker and induced changes far beyond the realm of public participation in environmental protection cases. It had a gold-plating effect, as it became a parallel provision to Section 3(4) of the HuAPA1957 and resulted in the case law expanding the scope of 'organization' in this section so as to encompass both NGOs and administrative bodies. This was not the only aspect of public participation where the ordinary courts in this first period were open to the impulses of EU law and the Aarhus Convention: they interpreted the concept of 'matters relating to the environment' generously,[28] thereby encouraging public participation, in an effort to preserve the original meaning of the implemented regulations.[29]

3.2. Transplanting Institutions of Public Participation into General Administrative Procedural Law

Quite unexpectedly, the promulgation of the Aarhus Convention with Act CXXXI of 2001 brought about a narrowing of this case law formerly favorable to public participation. This development was owed to legislative changes, namely the recodification of general administrative procedural law. In the autumn of 2004, the new Act on the General Rules of Administrative Procedure (HuAPA2004) was passed, which diversified the rules on the status of parties and established a set of rules for the affected public. In this piece of legislation, the Europeanisation of

27 Gyula Bándi, 'A környezetvédelmi közigazgatási hatósági eljárás fogalmáról', *Közigazgatási Szemle,* Vol. 1, Issue 3, 2007, pp. 90-97.

28 As mentioned above, the Decision for the Uniform Interpretation of Law No. 1/2004. KJE was a milestone in this development, applying the Aarhus Convention already for the interpretation of the notion of an administrative matter relating to the environment enshrined in Section 98(1) EPC.

29 *See generally* Krisztina Rozsnyai, 'Public Participation in Administrative Procedures', *Curentul Juridic*, Vol. 58, Issue 3, 2014, p. 50.

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administrative procedural rules was quite apparent, especially when it comes to public participation. The new concept split up the notion of '*quasi*-parties' which included on the one hand the administrative bodies with duties affected by the administrative matter, unless proceeding as an authority or special authority in the procedure [Section 15(4) HuAPA2004]. On the other hand, NGOs safeguarding a fundamental right or a public interest affected by the case could also enjoy a quasi-party status, but only where sectoral law *expressis verbis* foresaw this.[30] The HuAPA2004 merely contained this possibility and did not grant any rights to NGOs.

Thus, it was the model of Section 98 of the Environmental Act that was followed.[31] Instead of the general status of NGOs as parties under Section 3(4) of the HuAPA1957, Section 15(5) of the HuAPA2004 only empowered the special legislator to grant NGOs parties' rights, but no longer directly granted NGOs any rights as parties. For the third category of the interested public, this way the developments at the national level in connection with the EIA unfortunately led to a narrowing of the possibility of public participation. The sectoral legislator was reluctant to use this form of public participation; the public was only involved where there was an external obligation to do so, primarily arising from EU law. Accordingly, NGOs have been given the position of party in administrative proceedings, apart from matters relating to the environment in some nature conservation and consumer protection issues, as well as in the anti-tobacco regulation (*e.g.* advertising and promotion of tobacco).

The quasi-party status of Section 15(4) HuAPA2004 granted to administrative bodies whose area of responsibility was affected was mainly used by local self-government bodies. This possibility neatly complemented the actions of NGOs. The local governments had this party status without limitation in all administrative matters, not only in environmental law, with the unique requirement that their area of responsibility be affected by the administrative matter. Since the local governments have a competence to act in all local public matters not falling within the competence of another state organ, establishing such a connection did not seem particularly complicated. However, according to the Decision for the Uniform Interpretation of Law No. 2/2004 KJE, case law required for standing that the area of responsibility be directly affected, which usually consisted in concrete duties like the initiation of a planning procedure, the introduction of traffic control measures, *etc.*

The HuAPA2004 also contained a special rule for the second category of the affected public: they were parties in mass proceedings[32] regulated with an irrefutable presumption: anyone who had a right registered in the land register within the impacted spatial area of a future facility was a party to the procedure for the (mostly planting) permission. Despite some uncertainties it was a great

30 István Hoffman, 'Access to justice in environmental matters in Hungary', *in* Tomoszková (ed.) 2014, p. 273.

31 And with this, Recommendation No. R (87) 16 of the Council of Ministers of the Council of Europe on administrative procedures affecting a large number of persons, at https://rm.coe.int/cmrec-87-16-on-administrative-procedures-affecting-a-large-number-of-p/1680a43b59.

32 Section 15(2) HuAPA2004.

achievement of the new general regulation that it combined the special rules of mass proceedings into one initial, but important type of procedure. Spill-over effects of the EIA regulation were two institutions integrated into the general administrative procedure law: the public hearing and the so-called administrative mediator, whose task was to mediate between opposing interested parties, or between the parties and the authority.

3.3. Erosion

In 2008, a major amendment of the HuAPA2004 took place, which also influenced the provisions on party status and thereby also the possibilities of judicial review. The new wording of the provisions of Section 15(3) HuAPA2004 made it clear that the general concept of party may not be restricted by the specialized legislator.[33] Here, the legislator followed the case law and in essence, codified it.[34] The concept of party in mass procedures was diluted, and transformed into an authorization for the sectoral legislator to create such a special rule in the sectoral regulation. Several government decrees had made use of this authorization and granted automatic party status to landowners in the area affected by the facility in various permission procedures.[35]

The legislator also decided to amend the provisions on the possible participation of NGOs in administrative procedures and to introduce a new three-fold rule. According to the first layer, all NGOs had a right to be heard – in any administrative matter. The second layer was to authorize the sectoral legislator to grant individual rights of participation to NGOs. The original text of the HuAPA2004 became the third layer, *i.e.* the authorization of the sectoral legislator to grant the right to be a party. This change can only be interpreted as a weakening of public participation, intended to deprive NGOs of the right of access to court while further granting them other – "less dangerous" – procedural rights. This is all the more the case if we take into account the newly introduced subsequent paragraph which made it possible to preclude the rights of parties in certain cases. Accordingly, remedies – including the appeal procedure – could be precluded by the sectoral legislator in the case of the party concerned not participating in the original first instance procedure despite having been notified of the procedure. The same applied if the party did not express objections in the procedure – if he did not make use of his procedural rights in the first instance, the law presumed he did not want to do so later neither and precluded him from

33 Section 15(3) HuAPA2004 read until the end of September 2009: "A more detailed definition of parties may be determined by act or government decree."

34 This was also formulated as a general guiding principle in Opinion 1/2007. KK of the Administrative Law College of the Supreme Court from 2007, in addition to concrete judgments (reprinted in BH 2008/3.).

35 Thus, Government Decrees No. 289/2012. (X. 11.) on railway construction, No. 159/2010. (V. 6.) on airports, as well as the Road Transport Act I of 1988.

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remedy procedures. The restriction of individual participation rights was only a first step to be followed by further restrictions in 2013.[36]

This stricter perspective gradually took hold in the case law as well. The Curia confirmed its Decision for the Uniform Interpretation of Law No. 1/2004. KJE in the new, already mentioned Decision for the Uniform Interpretation of Law No. 4/2010 with the clarification that it is not sufficient for the environmental protection authority (at that time the National Inspectorate for Environment, Nature Conservation and Water Management) to act as an authority or special authority in the procedure to qualify as 'matters relating to the environment'. Additionally, it must be a case within the scope of application of the EPC as it is only through Section 98 of this act that NGOs are granted the status of party and thus access to court. In all other cases where this authority proceeds and in cases that touch upon environmental elements but fall under the jurisdiction of other authorities (*e.g.* forestry), the NGOs only have participation rights in case the sectoral legislator expressly so provides. But apparently sectoral legislation hardly does provide for such rules.

This Decision for the Uniform Interpretation of Law became obsolete in 2015 (*cf.* Section 5.1.). It is a strong sign of backsliding, that the Curia of Hungary was not willing to revoke or alter its decision ever since, notwithstanding the fact the underlying regulatory concept was completely changed.

In 2015, work began on the creation of a Code of Administrative Court Procedure which strengthened 'recodificationalist' voices and finally resulted in a new Administrative Procedure Act, the Code on the General Rules of Administrative Procedure (HuAPA2016). The two new acts entered into force on 1 January 2018.[37]

Looking at the trends of the previous years, it was no great surprise that the HuAPA2016 did not bring any positive changes to the rules of public participation. On the contrary, related provisions were all omitted, as the concept of the new, general code was to regulate only those institutions that were actually relevant to all procedures. According to this concept, rules that cannot be applied in all procedures do not belong in the code on general rules of administrative procedure but must be transferred to sectoral law. Therefore, not only institutions such as the public hearing and the authoritative mediator were omitted, but also the rules on the quasi-party status, as well as the rules on mass

36 Participation in the first instance procedure could be circumscribed by the sectoral legislator: it could even establish substantive criteria which declarations or applications submitted in the administrative procedure had to meet [Section 15(6) HuAPA2004]. Furthermore, the sectoral legislator was also empowered to establish substantive criteria for the appeal in the appellate procedure. It was even allowed to stipulate that no further parties were allowed to join the proceedings at least six months after the decision had become final and thus, they could not claim legal protection even if they had not been informed of the proceedings [Section 15(6a) HuAPA2004]. The sectoral legislator had made use of these possibilities in the area of building permits, which is most affected by remedies [Section 53/A(11) and (12) Construction Act, and Government Decree No. 312/2012. (XI. 8.) on Construction law procedures].

37 Act CL of 2016 and Act I of 2017. *See* a detailed summary of the two acts in Krisztina F. Rozsnyai, 'Administrative Law Hungary – Chronicle for 2016 and 2017', *European Review of Public Law*, Vol. 29, Issue 4, 2017, pp. 1373-1394.

proceedings. This concept was flawed, as the sectoral legislators did not follow this concept and – with a few exceptions – did not regulate these institutions. For example, public consultation is only regulated in detail in the Nuclear Energy Act, but the mediator is not regulated in any of the sectoral acts, although it is mentioned, or even foreseen in several sectoral procedures. The sectoral rules promulged under the HuAPA2004 however remain in force, so that the affected public or NGOs still have the right to participate in some procedures. This represents a significant step backwards as regards the general procedural rules.

4. The Influence of EU Law on Administrative Court Procedure

The new Code of Administrative Court Procedure (CACP) tried to follow some trends of Europeanisation. On the one hand, section 17 CACP regulates four categories of so-called privileged plaintiffs. Thus, on the one hand, administrative bodies are entitled to file an action if they did not participate in the preceding administrative procedure as an authority or special authority, but their area of responsibility is affected by the administrative action of another administrative body. This is particularly important for local governments, primarily in cases with a great impact on the local environment. The public prosecutor's office has this power within the scope of its non-criminal area of responsibility, supervising the lawfulness of the decisions of public administration. Similarly to the previous rules of the HuAPA2004, the CACP only empowers the sectoral legislator in Section 17 points *c)* to *e)*: NGOs in operation for at least one year and having the protection of public interest or human rights as their objective may be authorized by law to file an action if the administrative act is realized in their territorial area of activity, in case the act affects their field of responsibility. Although this provision follows the case law of the CJEU[38] as regards the criteria NGOs have to comply with, it precludes newly set up NGOs from access to court through the requirement of at least one year of operation. Yet it should not affect and narrow the rule of Section 98(1) EPC, as sectoral law can contain rules that depart from the CACP. This was a legislative response to some abusive practice.

Further rules in connection with collective actions are contained in the CACP for actions filed by more than four persons, as well as for notification in mass proceedings. A so-called model procedure was also introduced, which is meant to relieve courts in parallel actions. This institution is not so much to decide a pilot case, but to help the court cope with lots of similar actions (*e.g.* actions filed by persons directly affected living in the impacted area) – once a case is decided, the other cases with the same legal and similar factual grounds can be decided without a hearing. This is only a possibility for the court, not an obligation.

The concept of the serving or secondary role of procedural rules is also an important element of the doctrine of consequences of procedural vices in Hungarian administrative procedure. This concept finds its most important

38 *Cf.* Judgment of 15 October 2009, *Case C-263/08, Djurgården-Lilla Värtans Miljöskyddsförening,* ECLI:EU:C:2009:631.

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consequence in the thesis that violations of procedural rules have no effect on the existence of decisions if they do not affect the decision on the merits. Accordingly, the previous Hungarian CPR stated that the court shall set aside the unlawful administrative decision – with the exception where a violation procedural rules that had no effect on the merits. According to the case law, a procedural error has an impact on the merits if there is at least a theoretical possibility that without the procedural error the administrative decision could have been different. This principle was developed by the courts and finally incorporated into the rules of administrative court procedure in 2004.[39] Thus, the court should not overrule administrative decisions in the case of irrelevant errors.

This approach is at odds with the view of the intrinsic value of procedural rules and guarantees, foremost the assumption that if procedural rules are followed, it is likely that the decision will be lawful and just. This approach is also found in Hungarian law, where a regulation states that discretionary decisions can only be reviewed for procedural errors or errors of consideration and for misuse of discretion. The two approaches contradict each other to a certain extent. The CJEU accepted the concept of the serving role of procedural law in principle in *Gemeinde Altrip*, but at the same time narrowed its scope of application.[40] This decision influenced the new rules, which also reflect a growing appreciation of procedural rules. On the one hand, the previously cited rule was retained in a new version of Section 88(1) CACP:

> "(1) The court shall dismiss the claim, if
> a the claim is unfounded,
> b no direct violation of the right or legitimate interest of the claimant can be established,
> c the procedural infringement did not have a relevant impact on the evaluation of the case on the merits."

On the other hand however, Section 92 CACP regulates a ground for mandatory annulation if "*b)* the infringement caused by the violation of substantial rules of the preceding administrative procedure cannot be remedied in the action."

This mandatory annulation practically reflects on the third answer of the CJEU in *Gemeinde Altrip*. If the case law will use this clause properly, it may help in upholding the constitutional guarantee of good administration contained in Article XXIV of the Fundamental Law of Hungary – based on Article 41 EU CFR. This could somewhat mitigate the consequences of the regression with regard to procedural guarantees in general and also with regard to public participation.

This new concept was followed – only punctually yet – by the Constitutional Court, which declared the doctrine of irrelevance of procedural errors in the case

39 Section 339(1) of the (previous) CPR as until the end of 2017, administrative proceedings were governed by the CPR. *See* Krisztina F. Rozsnyai, 'The Procedural Autonomy of Hungarian Administrative Justice as a Precondition of Effective Judicial Protection', *Studia Iuridica Lublinensia*, Vol. 30, Issue 4, 2021, pp. 491-492.

40 Judgment of 7 November 2013, *Case C-72/12, Gemeinde Altrip and others,* ECLI:EU:C:2013:712.

of a serious procedural error to be unconstitutional.[41] In the newest case law of the highest courts on unlawful silence of administration we can also see the causation link requirement being left aside. The Curia of Hungary annulled already several decisions because of the administration exceeding procedural time limits[42] and the Constitutional Court also stated a constitutional requirement of the reduction of the sanction to be imposed in the case of a delay in the decision-making of the tax authority.[43]

5. Changes in the Administrative Organization Hindering Compliance with EU Law

5.1. Integration of the Territorial State Administration

In the last years the most significant problems of environmental authorization procedures were connected to the vast changes of administrative organization. For a long time, the Hungarian organizational setup was quite in line with Union law. There had been a ministry responsible for the protection of the environment since 1987, with subordinated territorial authorities acting as legal units with own competences.[44] There were some competences (*e.g.* forestry) that belonged to other authorities and thus to the field of competence of other ministries.

Since 2010, however, there has been a very strong tendency of centralization in Hungary. On the one hand, the number of ministries had been significantly reduced, integrating environmental protection into the Ministry for Rural Development. On the level of territorial public administration, administrative bodies operating at the county level were integrated into the County Government Offices set up by the new constitution, the Fundamental Law of Hungary. These Offices act as the territorial body of the Government with general competence. This meant a shift into the direction of the French 'prefecture' model. The National Inspectorate for Environment and Nature Conservation was among the few central administrative authorities that had been allowed to keep their territorial units. This was primarily owed to their regional territorial competence which differed from that of the county-based administrative bodies.

The next step of integration, however, also reached these administrative bodies. At this point in 2014, integration did not affect the material competences of the environmental authorities: integration was initially carried out in such a way that the substantive competence of the environmental protection authorities was conferred upon a unit of the Government Office. This unit was not an independent administrative body regarding its organization, but disposed of own competences free from the instructive powers of the Government Commissioner. Nevertheless, this situation did not last for long. In the next wave of integration, already in early 2015, all substantive competences were conferred from the

41 Constitutional Court Decision No. 3311/2018. (X. 16.) AB.

42 Curia of Hungary, Kfv.I.35.760/2016/6, Reasoning [64].

43 Constitutional Court Decision No. 25/2020. (XII. 2.) AB.

44 A central administrative agency for the Protection of the Environment and Nature Conservation had already been established in 1977, and successively transformed to a ministry in 1987.

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individual units of the County Government Office to its head, the Government Commissioner. This was a momentous step: the devolution of all competences did not only involve a transfer of competences for conducting environmental protection procedures and issuing decisions from the unit to the Government Commissioner, but it also "simplified" all (typical) procedures in which the environmental protection authority participated as a special authority. As a result, with the exception of municipal authorities' procedures, special authority procedures in the field of environmental protection became obsolete, since the Government Commissioner obtained the competences of all units. In effect, the legal construction of procedural integration was replaced by organizational integration.[45]

Since the integrated units of the County Government Office no longer had own competences, they could not proceed as special authorities. However, units of the County Government Office concerned with the special questions retained some consultative functions: instead of special authorizations they now give opinions on the special issue.

In connection with the Decision for the Uniform Interpretation of Law No. 4/2010 KJE,[46] however, this meant that public participation was only ensured in cases where the County Government Office acted as an environmental protection authority. In all other procedures, where the environmental protection authority was only responsible for enforcing environmental protection as a special authority and the NGOs enjoyed the party status because of the special authority involvement of the environmental protection authority, this guarantee was no longer available. Section 66/A, inserted into the Environmental Protection Act (EPA) at the end of 2015 states that in an authorization procedure of an activity resulting in the use of environment, the enforcement of environmental protection aspects is examined as a special issue. In Section 98(1a) the EPA states that if the opinion of the unit on the special issue must be obtained, this procedure is considered to be an environmental matter and thus the party status of NGOs is ensured. However, there are no further procedural rules that clarify whether and how environmental organizations are to be involved in these proceedings. It was suggested by lower courts that the Decision for the Uniform Interpretation of Law No. 4/2010. KJE should be amended or replaced in light of this development in order to reflect the new legal situation and to better guarantee the status of party. Yet this request was not followed by the Curia of Hungary, and none of the persons who could have filed a motion for a procedure for the uniform interpretation of law have made use of this right so far. Thus, the cited KJE decision does not include such participation involving the provision of an opinion on a special issue.

The Constitutional Court examined this rule in light of the dissolution of environmental protection authorities. Although it examined the differences between the two types of environmental protection authority involvement at

45 The authorities for water protection being separate authorities still proceed in numerous cases as a special authority.

46 This decision upheld Decision No. 1/2004. KJE, *see* above, at Section 3.3.

length and found that the new regulation lacked any procedural guarantees, it held that the substantive guarantee of Section 66/A(2), which states that the authority may not authorize the planned activity if it would endanger or harm an environmental element, was not contrary to the non-derogation principle. Instead of annulling the contested provision, the Constitutional Court only established an unconstitutional omission on the side of the legislator, on the grounds that the administrative body is not bound by the opinion given on the special issue, *i.e.* the environmental impact of the matter in the administrative decision.

The Constitutional Court also established the constitutional requirement[47] that environmental concerns must not be subordinated to any other considerations in the decision-making of authorities.[48] However, this requirement is formulated very vaguely and cannot heal the unconstitutional regulation. A substantive legal duty governing decision-making without procedural guarantees is not sufficient to allay environmental law concerns. If we compare this new form of participation of the County Government Office's Unit of Environmental Protection following the transfer of responsibilities to the Government Commissioner with the model of participation as special authority, that is, the former territorial authority for environment and nature conservation as an independent authority, it is striking, that in the latter case, there are strict procedural guarantees, through which the failure to take account of environmental law concerns also has an effect on the validity of the decisions. Where the special authority was not involved in the procedure or it was involved, but its opinion was not taken into account, the decision of the authority conducting the procedure was null and void. Although the new rule of the EPC states that the 'opinion on the special issue' is binding on the authority conducting the proceedings, and the authority may not grant the permit in case the activity to be authorized would endanger or harm an element of the environment, in case it nevertheless unlawfully grants the permit, this shall not entail nullity of the decision. As of yet, it is unclear how the Curia of Hungary will deem such errors.

The new rule in Section 66/A(3) EPC is a step in the right direction. With this provision, the legislator fulfilled the legislative obligation imposed upon it by the Constitutional Court with a one-year delay in 2020. Just like the constitutional requirement itself, this provision also focuses on formal aspects. It obliges the authority to establish in the operative part of its decision that the special issue was assessed, what the result of the examination was and what special

47 This is a special power of the court to spare the legal norm, where instead of annulment the Constitutional Court merely sets for the constitutional interpretation of the norm. In recent years the Constitutional Court has resorted to this type of decision instead of annulment. *See* generally Eszter Bodnár, 'Disarming the Guardians', *in* Martin Krygier *et al.* (eds.), *Anti-Constitutional Populism,* Cambridge University Press, Cambridge, 2022, pp. 279-286.

48 Constitutional Court Decision No. 4/2019. (III. 7.) AB. *See generally* Katalin Sulyok, '4/2019. (III. 7.) AB határozat – Zöldhatóságok integrációja', *in* Fruzsina Gárdos-Orosz & Kinga Zakariás (eds.), *Az Alkotmánybírósági gyakorlat: Az Alkotmánybíróság 100 elvi jelentőségű határozata,* (Vol. 1.), HVG-ORAC, Budapest, 2021, p. 955.

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requirements, if any, were set forth on this basis. The statement of reasons must contain the detailed results of the assessment of the special issue. This rule is very helpful in one respect: it renders the already mentioned rule in Section 98(1a) ECP, inserted in 2017, applicable, stating that where there is an opinion on a special issue, is to be considered an administrative procedure for the protection of the environment. With this regulatory link, in such cases the ECP now grants party status and thus also access to court to NGOs, overriding the Legal Uniformity Decision No. 4/2010 of the Supreme Court. Coming back to the first part of this article, in such cases the NGOs must be notified of the launch of a procedure, as well. Meanwhile, other procedural guarantees are, of course, still very much lacking.

5.2. Centralization at the State Level

The integration of territorial administrative organization was followed by the centralization and the abolishment of the majority of the central agencies in 2016. These agencies all functioned in hierarchical subordination to the different ministries with the main profile of handling second instance and special first instance administrative cases. The National Inspectorate for the Environment and Nature Conservation as a central agency was no exception: the agency was dissolved and its competences were conferred upon the County Government Office of the Central Hungarian Province of Pest almost without exception. This change diminished the level of environmental protection. Firstly, the lack of a central agency means that the task of governing territorial environmental administration was split up between two bodies: the supervisory authority responsible for managing the professional work is the Ministry of Agriculture (from May 2022 on the Ministry for Technology and Industry[49]). However, this authority does not deal with appeals; instead, a designated County Government Office acts as the appellate body over other County Government Offices. This artificial separation the function of managing professional work creates both lacunes and superfluous, overlapping activities, by far not enhancing the authorities' effectivity. At the same time, first-instance competences were transferred to the subordinate territorial units of the County Government Offices: the district offices.[50] This way, at least for a transitional period, the County Government Office of Pest County (the Central Hungarian County

49 This reorganization well illustrates the level of importance accorded to environmental issues in the present governmental structure.

50 Competences were transferred only to selected district offices which proceeded this way with a territorial competence not for a district, but at least for one county (or even several counties).

around Budapest) acted both as a first-instance authority and as an appellate body.[51]

In addition, the County Government Offices are subject to a twofold, hierarchical management: the supervision of professional activities lies in the hands of the ministry responsible for that specific field of administration, meanwhile, organizational matters such as structure, finances, personnel, *etc.* are managed by the Chancellor's Office. This double subordination weakens professional supervision to a certain extent, and in the concrete case, the control of administrative activities of the government office as environmental protection authority.

The other negative consequence of this restructuring is that the organizational structure of the County Government Offices is determined by the Chancellor's Office. Thus, it may be the case that in some County Government Offices there is no independent environmental protection unit, but instead, these issues are put together in one unit with other, often competing areas (*e.g.* transport) – a situation which is difficult to reconcile with Union law.

6. Conclusion

Apparently, the transposition of EU law did not achieve lasting change in Hungarian administrative culture. The changes in case law also proved to be ephemeral. Unfortunately, the analyzed developments show that following a good start, where European law had a strong influence on Hungarian law in the field of environmental protection, and even spill-over effects were recorded in both administrative procedure and administrative court procedure, Hungarian courts' case law as well as legislation tried to hinder public participation in matters relating to the environment. In more recent legislation, the level of protection already achieved was not maintained owing to changes on the level of both the organization of public administration and general administrative procedural law. The institutions that had been transplanted to general administrative procedural law especially with regard to procedures relating to the environment were undermined or abolished. Unfortunately, we can still, or rather, increasingly report implementation concerns in this area.[52]

However, there are some developments that give reasons for hope. NGOs try to maintain their positions, as does the deputy ombudsman elected by Parliament

51 This problem was also the subject of an application for a review of the act by the Budapest-Capital Administrative and Labor Court. Here, too, the Constitutional Court, in its *Decision No. 12/2019. (IV. 8.) AB* did not actually remedy the unconstitutionality by annulling the Decree with a retroactive effect, but only annulled it *ex nunc*. It stated in an undogmatic way that the court should handle this situation breaching the right to effective remedy as if the Government Commissioner had not proceeded as a second instance authority, but had amended its own first-instance decision (to which authorities are entitled in certain circumstances under the rules of administrative procedure).

52 László Szegedi, 'The Eastern Way of Europeanisation in the Light of Environmental Policymaking? Implementation Concerns of the Aarhus Convention-related EU Law in Central and Eastern Europe', *ELTE Law Journal,* Vol. 2, Issue 1, 2014, p. 134.

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to protect the interests of future generations, colloquially known as the 'Green Ombudsman'. This deputy-ombudsman has few powers of his own, but he can still do a lot to protect the environment. To challenge legal acts before the Constitutional Court he must naturally involve the ombudsman, the Commissioner for Fundamental Rights, who rarely makes use of this competence. One such occasion though was the *ex post* constitutional challenge brought against the amendment of the Forest Act by the Ombudsman, upon which the Constitutional Court annulled several amendments for infringing the right to a healthy environment and the environmental interests of future generations as enshrined in Article P of the Fundamental Law.[53]

Another important instrument is publicity. The Green Ombudsman is very active in raising his voice against 'constitutional inconsistencies' in the field of environmental protection. He regularly publishes statements of position, for example, against the integration and centralization of the administrative organization of environmental protection,[54] or against the dysfunctions of waste management,[55] the rules of which do not comply with the basic principles of environmental law. These statements of position are his most important instrument. For example, an earlier opinion against the planned abolishment of the requirement to obtain a permit for private well drilling played a major role in the Constitutional Court annulling the new regulation based on the non-derogation principle.[56]

What we can identify as a first sign of a more lasting change in legal culture is that environmental law is becoming an independent subject taught at almost all Hungarian law faculties, in some cases taking the place of the former subject 'agricultural law' or gradually reshaping its content. This may lay the groundwork for the new generations of lawyers to be more inclined to foster public participation in favor of future generations.

53 Constitutional Court Decision No. 14/2020. (VII. 6.) AB. *See* its analysis in Sulyok 2021, p. 360.

54 *See* at www.ajbh.hu/documents/10180/2762244/Elvi_%C3%A1ll%C3%A1sfoglal%C3%A1s_Fel%C3%BCgyel%C5%91s%C3%A9gek_integr%C3%A1ci%C3%B3ja_2018.05.08.pdf/f7b76ffa-f01a-3b8c-aaf0-ed6948efe5b7.

55 *See* at www.ajbh.hu/documents/10180/2896961/a_hulladekgazdalkodasi_kozszolgaltatas_mukodesi_problemairol.pdf.

56 Constitutional Court Decision No. 13/2018. (IV. 9.) AB. However, with the state of emergency regulation, the government then implemented this change with a much wider scope causing possibly much more harm: dwells for irrigation purposes can be drilled without any permission with effect from 1 January 2021. The Green Ombudsman yet again published a statement of position at www.ajbh.hu/documents/10180/3310290/k%C3%B6zlem%C3%A9ny+a+v%C3%ADzjogi+enged%C3%A9lyez%C3%A9si+szab%C3%A1lyok+enyh%C3%ADt%C3%A9s%C3%A9vel+kapcsolatos+alkotm%C3%A1nyos+agg%C3%A1lyokr%C3%B3l/8d836651-cafd-0539-ef8e-c9872adfc894.