REPORT ON HUNGARY

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Access to Justice in matters of environmental law

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A. General Questions

1. What was the influence on your national legal order, if any, of the recent developments in the case law of the Court of Justice of the European Union (CJEU) on standing of individuals and/or NGOs (notably cases C-237/07 *Janecek*; C-263/08 *Djurgarden*; C 115/09 *Trianel*; C 240/09 *Slovak Brown Bear; C 416/10, Krizan*). Have environmental laws been amended? Please illustrate.

Environmental Protection Act of 1995 was amended, and since then environmental NGOs have legal standing in environmental cases in procedures initiated against administrative decisions, that operate in the impact area of an activity or facility. The amendment of the Environment Protection Act fixed the rights of the NGOs in administrative procedures.

2. Have there been any changes in the jurisprudence of the national courts concerning standing of individuals and/or standing of NGOs as a result of CJEU's recent judgements? Have the courts in your country relied on the principle of effective judicial protection or used arguments about CJEU case law in order to widen up standing for individuals and/or NGOs in environmental procedures since the signing/ratification of the Aarhus Convention? If so, please illustrate.

In a resolution for the uniformity of the law (2010) the Supreme Court declared, that NGOs have privileged legal standing in environmental administrative procedures, in which the regional environmental agency is a decision-making or a co-decision authority. In this resolution for the uniformity of law there was no reference either to the CJEU case law, or to the Aarhus Convention.

3. What are, to your opinion, the main challenges for judges in your national legal system when it comes to access to justice in the field of environment and the development of the CJEU´s case law?

For judges the main challange is to become aware of the CJEU's case law itself, and of the development of CJEU's case law.

4. Taking into account that access to justice in environmental matters is required to not be prohibitively expensive (cf. Art 25.4. IED; Art 11.4. EIA Directive, both reflecting Art 9.4. Aarhus Convention): How do you, all in all, evaluate the system of access to justice in your country when it comes to costs and liability for costs (e.g., court fees, lawyer´s fees, cost for administrative procedure, expert fees)? Do costs have a chilling effect in environmental litigation?

In order to initiate a court proceeding, the applicant has to pay the court tax or duty. Later, during the procedure the costs of evidence have to be pre-paid (deposited at the court) by those initiating the evidence. In case a witness needs to travel to a hearing, those who initiated his/her audition have to bear the costs and pay it to the witness. Also those filing an appeal have to pay the appellate court tax. During the court process, each party is responsible for paying his/her own attorney fees. Finally, after the judgment the losing party has to pay the expenses paid by the winning party.

A regular court tax against an administrative decision is EUR 100. There is no appeal in administrative

court cases, but if a request for extraordinary remedy is submitted, its court tax is EUR 220.

In environmental cases, other cost categories can vary between extremes according to the following, which is an estimate based on regular practice:

- travel cost of witnesses: EUR 10 to 50
- fee for witness for lost income/salary: EUR 50 to 100
- costs of holding an on-site visit by the court: N/A
- expert opinion: real estate evaluation in compensation case: EUR 200 to 1000; health report in personality protection case: EUR 200 to 800; on-site air quality or noise emission monitoring in environmental case: EUR 1000 to 4000; on-site nature conservation monitoring EUR 4000 to 8000;
- attorney fees are subject to agreement between the party and the attorney using marker prices, but may vary from EUR 40 for an hour of work to EUR 200, but can also apply a contingency fee method where 15 to 40 % from the successfully acquired amount is acceptable.

The bearing of the costs of litigation has to be defined in the judgment. The loser party is to be obliged to pay the costs of the winning party, with certain exceptions. All in all, these costs can have chilling effect in environmental litigation for individuals, but the court with its decision can grant four types of cost allowances for individuals:
-permit for subsequent payment of the court tax if losing the case: this applies if the prior payment of the court tax would mean a disproportionate burden taking into account his/her assets and incomes, especially if the court tax to be paid exceeds 25% of his/her annual per capita income before revenue taxing
-permit for subsequent payment of the costs of the procedure
-full waiver from paying any costs of the procedure except the expenses of the other party in case of losing
-partial waiver from paying some costs of the procedure except the expenses of the other party in case of losing.

The latter 3 types of allowances have their conditions defined in details, taking into account the assets as well as the income situation of this applying for it.

B. Examples:

The aim of the following examples is to facilitate understanding of standing rules and conditions for access to justice in the various legal systems. The aim is to illustrate how different countries provide for access to justice in environmental matters and to prepare a discussion on the topic. **Please highlight the specific aspects of your legal system without going to much into detail. If possible, please deal with all the examples.** *Please feel especially welcome to illustrate your answer by referring to examples of national case law.*

Example 1: The competent authority has adopted an action plan on air quality that will not adequately reduce the risk of exceeding EU air quality limits (contrary to relevant secondary EU law).

Questions Example 1:

B.1. What are the possibilities open for the public to legally challenge the plan and to ensure that an adequate plan is adopted and implemented? If any, who (individuals, NGOs, other) is entitled to challenge the plan? Is the appellant/plaintiff required to provide evidence on potential harm/damage

and to specify the measures that should have been taken?

It depends in which form the action plan was adopted. If the action plan was adopted by the local government, it can be challenged for the Supreme Court of Hungary, in the frame of an administrative litigation, in which the decision was taken on the ground of the action plan.

If the action plan was adopted by the environment authority, it can be appealed, and if the second instance level approves the decision, one can bring an action against the authority to the court. The petition is mainly lodged by effected individuals, NGOs. Ombudsman and deputy ombudsman for future generations can also investigate the actions or omissions of public authorities.

According to the procedural rules, those have to provide evidence who are interested to prove something. It is most frequently the plaintiff. In Hungary, there is a system of free evidence, i.e. no proof has a predefined strength and any form of evidence (witness, expert opinion, visiting a location, documents, objects) can prove a standpoint in a court procedure. However, in environmental cases the most convincing is an expert opinion. The plaintiff only has to provide evidence on the potential harm/damage, but does not have to specify the measures that should have been taken.

Example 2: The competent authority has issued a permit for an infrastructural construction project (e.g., a motorway, a power line or a funicular). Part of the site concerned is situated in a Natura 2000 area. In spite of a negative assessment of the implications for the Natura 2000 site, the competent authority agreed to the project for imperative reasons of overriding public interest (Art 6.4. Habitats Directive).

Questions Example 2:

B.2.1. Who (individuals, NGOs, other) is entitled to challenge this decision by legal means? In what way do individuals need to be affected by the decision in order to have standing? With regard to standing rules for individuals and NGOs, does it make any difference whether the project in the example is subject to an EIA or not?

The permit can be appealed, and if the second instance level approves the decision, one can bring an action against the authority to the court. The petition is mainly lodged by effected individuals, NGOs. Ombudsman and deputy ombudsman for future generations can investigate the actions or omissions of public authorities.

Those individuals whose rights or legitimate interests are affected by the case have legal standing in the administrative procedure. If the law regulates so, these are those individuals who own a real estate in the impact area of the activity or facility or whose rights relating to such a real estate are registered officially. In the judicial procedure those have legal standing whose rights or legitimate interests are affected. This can be proven for instance by demonstrating that the person participated in the administrative procedure that precedes the judicial phase in a case. It does not make any difference, that project is a subject to an EIA or not.

B.2.2. Does an administrative appeal or an application for judicial review automatically have a “suspensive effect” on the decision at stake? In case there is no automatic suspension in your national legal order: Under which conditions can the appellant obtain a suspension of the permit decision for the infrastructural project? Are there other measures of interim relief available to prevent negative harm to the environment until the final decision has been taken? In case of an automatic suspension: Can the developer of the infrastructural project ask for a “go-ahead-decision” in your national legal order?

In case an administrative decision is appealed, the appeal has automatic suspensive effect and the rights granted by the decision cannot be exercised. The first instance decision-making organ, however, can declare its decision immediately enforceable if it is needed to prevent or remedy a life threatening or highly damaging situation, if national security, national defence and public order so requires, or a further law makes it possible for – inter alia – environmental, nature conservation, public health, historic monument protection or soil protection, etc. reason.

A lawsuit filed against a final administrative decision has no automatic suspensive effect, however, in the motion or afterwards during the court case a request can be submitted to the court to suspend the enforceability of the disputed administrative decision. After receiving the request the court has to make a decision on the suspension within 8 days. Criteria to be taken into account during decision-making are: can the original situation be restored, will be omission of suspension cause more harm than the suspension would. Beside injunction relief, there are no other measures to prevent negative harm to the environment until the final decision.

Example 3: The competent authority has issued a permit and established permit conditions for an installation falling under the scope of the Industrial Emissions Directive – IED (e.g., a waste treatment facility or a tannery) The national permit procedure had been carried out in accordance with requirements on public participation (Art 24 IED).

Questions Example 3:

B.3.1. Are individuals in your country entitled to challenge the permit decision on the grounds that permit requirements of the IED have not been met: say, that the best available techniques have not been applied and energy is not used efficiently?

In certain frames, yes, if they can prove, that their rights or legitimate interests are effected.

B.3.2. Is an NGO entitled to judicial review of the permit decision, even if it did not previously take up the opportunity to participate in the decision-making procedure?

Yes, the only condition is, that the NGO should operate in the impact area of an activity or facility.

Example 4: Citizens are concerned about a landfill that has been granted permission but is obviously operating in breach of permit conditions. Samples that have been taken by an NGO indicate that there is imminent danger of a drinking water source being contaminated. The competent authority is not taking any action.

Question Example 4:

Evaluate the possibilities of members of the public (individuals, NGOs) to ensure that (remedial) action is taken.

There are a number of possibilities to submit claims to court directly against private individuals or legal entities. First of all, if the defendant has done damage to the applicant, the latter can claim regular private law compensation for the loss. As a subset of this, the applicant to be potentially damaged can claim that the court order the defendant to prevent the damage. In case the defendant operates a dangerous facility or performs a dangerous activity (which is every activity using the environment as a resource or as a target of emission) then the burden of proof is shifted to the defendant and s/he has to prove that the damage was attributable to an unpreventable external cause (objective or strict liability).

Secondly, direct claims can be formulated as nuisance claims in case the defendant disturbs the applicant with environmental impacts, e.g. fumes, noise, other disturbances. This option is mostly used in a neighborhood context where the applicant and the defendant reside in proximity.

Thirdly, personal integrity claims can be submitted against those who harm the integrity of an individual, the latter including health, well-being, right to life or right to home.
Finally, the Environmental Protection Act and the Nature Conservation Act both contain a legal opportunity for environmental and/or nature conservation NGOs to file lawsuits against polluters or those damaging natural values. Such cases are adjudicated by regular private law courts and applicants may claim that the court order the defendant to stop pollution/damage to nature and introduce preventive measures in order to avoid pollution/damage.

In case there is an environmental problem, there are other means of remedies available besides the actions of administrative organs and lawsuits initiated at courts. Some of these remedies respond to factual problems in the environment (e.g. a pollution) while others tackle suspected maladministration of environmental issues by public authorities. These are the following:

-public prosecutor: Public prosecutors have two types of powers with which they respond to both types of problems: pollution and maladministration. In terms of pollution, the prosecutor is entitled by the Environmental Protection Act to start a lawsuit against a polluter for stopping the activity or ordering the polluter to pay compensation; also according to the Civil Procedure Act, the public prosecutor can start a lawsuit if those who are otherwise entitled are not able to enforce their rights, except when the enforcement of rights requires personal enforcement action. In terms of maladministration, the public prosecutor within its competence of public interest protection can issue a call to any public authority against its final decision not adjudicated by the court that deems unlawful. The call has to be issued within one year and the addressee of the call is the superior authority of the decision-making organ. In case the call fails the prosecutor can start a lawsuit against the unlawful decision.
-ombudsman: The ombudsman can investigate the actions or omissions of public authorities and in case the latter harm or endanger basic rights of citizens can take respective measures. These measures can be: issue a recommendation to the superior authority of that investigated, initiate a process at the prosecutor, initiate a process at the National Data Protection and Freedom of Information Authority, initiate a process at the Constitutional Court, or can be an *amicus curiae* in administrative court cases in environmental matters.
-deputy ombudsman for future generations: Previously this position was an independent environmental ombudsman position; however, from 1 January 2012 the position is one of a deputy. Powers of the deputy ombudsman are: survey the enforcement of interests of future generations, regularly inform the ombudsman of its impressions, call the attention of the ombudsman for the threat of unlawfulness affecting a larger group of people initiate an investigation of the ombudsman, participate in such investigations and suggest a process before the Constitutional Court.

In case of maladministration (inappropriate administrative action, administrative inaction or omission) there are a number of remedies available, such as:

- complaint to the ombudsman,
- complaint to the public prosecutor,
- in case of administrative silence (if the authority is inactive), the superior authority calls the decision-making organ to act upon a petition submitted by a party to the case; if the inaction persists, the superior authority can appoint another authority with the same competence to make a proper decision; if all these has not produced a result, one can initiate a case at the court.