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Access to Justice for Environmental NGOs in Hungary – The Quest to Identify “Environmentally Relevant” Cases

ABSTRACT

Legal activism has been one of the main drivers of EU integration in the last decades with activist judges and affected litigants pushing the frontiers of integration ever further. At the same time, despite numerous calls from the Court of Justice (ECJ/CJEU) for effective means for enforcing EU rights on the national level, extensive differences persist in standing rights throughout the member states. Hungary as relatively new member state ensured the access to justice/standing rights for environmental non-governmental organizations (NGOs) from 1995. The pre-accession code on environment regulates the participation of NGOs in administrative proceedings covering the whole environmental sector. Even if the country belongs to a certain group of member states, where the NGOs’ standing rights was historically restricted by the ‘impairment of the rights’ doctrine (e.g. Germany, Austria, Czech Republic, Slovakia) leading to several ECJ/CJEU judgments in this regard, no such judgment has been issued related to Hungary.

This paper addresses the Hungarian compliance performance in NGOs’ access to justice cases with a special focus on the Hungarian judicial case-law throughout the last decades. Although, Hungarian courts formally do not restrict the personal scope of potential plaintiffs before national courts, there could be certain obstacles which might hinder the NGOs to fully have access to justice. The judicial case law in form of a so-called law unification decision of the Supreme Court interpreted the Environmental Code of 1995. This decision guarantees the standing right for NGOs only in ‘environmental cases’ leading to noncompliance concerns, as not including several ‘environmentally relevant’ further cases. Additionally, the circle of potential cases keeps changing related to structural and regulatory amendments of the legislation. ‘Salami slicing’ techniques also occurred by acknowledging standing rights only in some

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separated phases of permit proceedings along with other deficiencies. These elements of the compliance performance could be challenging, as the CJEU's sector-specific set of guarantees elaborated in its case-law on standing rights, as well as on further procedural issues, has an ever-greater cross-sectoral and at the same time sector-neutral relevance.

KEYWORDS: Aarhus Convention, Access to justice, Standing rights, Participatory rights, Effective judicial protection, Impairment of the rights doctrine, NGOs, national courts

I. INTRODUCTION

Legal activism – especially legal activism on the side of environmental NGOs (ENGOs) could provide crucial support for the proper enforcement of the EU's environmental legislation. Whether or not these ENGOs have standing rights before member state- or EU-level courts is of utmost importance from the aspect of how this legal activism can be realised.

The Court of Justice of the European Union (ECJ as a pre-Lisbon Treaty term, and CJEU as a post-Lisbon Treaty term) uses the wider access to justice of citizens before national courts as a tool to facilitate the enforcement of EU law concerning several policy areas – even if there is no direct EU competence to regulate the administrative procedural/judicial review requirements of the member states. The CJEU has always played a pivotal role in shaping European integration, while courts of member states, as courts/judges of EU law, are primarily in charge of implementing EU legislation (*indirect implementation*).

The subject of this paper is the third pillar of the Aarhus Convention-related EU legislation, which guarantees that the public concerned, including NGOs, shall have access to justice in environmental matters. The Aarhus Convention (Convention) is a unique international legal instrument, which combines the subject of environmental protection with the protection of human rights and with environmental activism as an enforcement tool. The focus of the paper is the Central and Eastern European (CEE) region, with special emphasis on the implementation of the access to justice requirements by Hungary. The EU member states of the CEE region, as partly post-socialist countries, have had to reconcile the EU's system on the protection of fundamental rights with the administrative regime built up during the communist period. How these new member states guarantee certain rights for the public as well as for the non-governmental actors regarding environmental matters could be considered as a democratic indicator, since their former state approach usually focussed on economic growth driven by industrialisation, while environmental protection was of a lower priority.

The CJEU has formulated several judgments on this issue and dealing with deficiencies in jurisdiction of various CEE member states. One of the main concerns is the impairment of the rights doctrine determining access to courts (standing rights). According to the doctrine, potential plaintiffs before national courts must declare the violation of their subjective rights, while NGOs acting in favour of general interests (protection of the environment) cannot meet this requirement *per se*. However, no major ECJ/CJEU judgment has been issued related to environmental NGOs' standing rights in Hungary. The Hungarian judicial case-law, in the form of so-called law unification decisions by the Supreme Court interpreted the Environmental Code of 1995. These decisions guarantee the standing right of NGOs without further formal requirements. Nevertheless, the dilemma of 'when' led to non-compliance concerns, as the judiciary insisted on providing access only in 'environmental cases/matters', which did not include several 'environmentally relevant' cases stemming from or impacting other policy areas. Additionally, the range of potential cases keeps changing in parallel with the structural and regulatory amendments to Hungarian legislation, while 'salami slicing' techniques were also employed by acknowledging standing rights in only some individual phases of permit processes/environmental impact assessments. Even if air quality plans-related litigation became highly relevant in some of the member states in recent years, the latest judgments of the Hungarian judiciary did not guarantee ENGOs' standing rights against these normative acts. The impairment of the rights doctrine is a common compliance factor among the diverse jurisdiction and court systems of the CEE region's member states. As a result, it might also be relevant whether any kind of judicial dialogue has been initiated between the member states on how the EU's wider access to justice requirements may be guaranteed.

As for the methodology, this paper analyses the access to justice of ENGOs with a special focus on the CJEU's related judgments compared with the Hungarian judicial case-law in the last decades. This is mainly based on the individual or special-type law unification decisions of the Supreme Court of Hungary (after 2012 renamed *Kúria*). Where necessary, reference will also be made to the decisions or further inputs of the Constitutional Court, the lower instance courts or other legal actors. Consequently, the basic structure of the Hungarian judiciary and some landmark cases, even from the era of the democratic transition of 1989/1990 are to be presented, although the paper primarily elaborates, how more recent judgments, judicial decisions and legislative steps have shaped the Hungarian 'implementation performance' of the related Aarhus requirements. The territorial scope and the focus of the targeted policy areas is somewhat broader, than the title might suggest. The paper therefore also deals with the wider range of environmentally relevant cases in Hungary due to the special national approach, while the potential impact of some CJEU decisions on other member states, as well as the regional judicial dialogue, will also be analysed in order to provide a comprehensive overview of the subject matter.

The following section gives an introduction to the share of competences between the EU and the member states in relation to access to justice and Aarhus-related matters. Section two describes the Aarhus Convention's third pillar requirements as part of the EU's legal framework. Section three, as the main part of this paper, deals with the Hungarian judicial case-law, legislative steps and legal practice regarding the subject matter. This section also examines the CJEU's case-law in relation to ENGOs' access to justice requirements. Section four draws conclusions and discusses what the main incentives for the national courts and further actors might be regarding the reformulation of access to justice cases.

II. THE AARHUS CONVENTION WITHIN THE EUROPEAN UNION'S LEGAL FRAMEWORK

1. The European Union's competences in relation to the Aarhus Convention

The promotion of public participation was included in the Rio Declaration as its 10th principle, yet it was undoubtedly the *Aarhus Convention* (Convention), adopted in 1998, that collected and systematised those elements of public participation in the environmental field which had already existed in international law and in national legal systems. The Aarhus Convention (The UN Economic Commission for Europe Convention on access to information, public participation and access to justice in environmental matters) defines three pillars in its structure: access to information, public participation in decision-making and access to justice. The access to justice of NGOs mainly refers to the third pillar provisions of legal standing before (national) courts. The Convention can moreover be considered as a mixed agreement. These are concluded by the member states as 'Parties' as well as by the European Community (EU), and have the same status in the community (EU's) legal order as purely community agreements inasmuch as the provisions of the mixed agreement fall within the scope of Community competence.¹ As a result, the Convention itself has a special legal status due to the related policy area of the environment and to the regulated three-pillar based structure of procedural guarantees. However, this paper only refers to the member state-level implementation of Aarhus requirements, even if EU-level implementation, in the form of the Aarhus Regulation, also raised several concerns.

In the early days of European integration, environmental policy was not mentioned by the European Treaties. However, energy policy could gain momentum via

¹ Judgment of the Court of 7 October 2004, *Commission v France*, C-239/03, EU:C:2004:598, para 25.; Judgment of the Court of 30 May 2006 *Commission v Ireland*, C459/03, EU:C:2006:345, paras 128–133.

Euratom Treaty, one of the two treaties signed in Rome in 1957. The Single European Act of 1987 introduced a new Environment Title. The Maastricht Treaty of 1993 made the environment an official policy area, with qualified majority voting within the Council, while less substantial further amendments have also been introduced within the last decades. The Lisbon Treaty kept the Treaty on the European Union (TEU) and renamed the Treaty establishing the European Community to the Treaty on the Functioning of the European Union (TFEU). The TFEU included a new energy policy article, while its environmental policy section also explicitly refers to climate change.²

In accordance with Articles 4–6 of TFEU, the EU has exclusive, shared, or supporting competencies. A whole set of environmentally relevant policy areas are shared competences, regarding which both EU and the member states are allowed to regulate subject matters such as the environment, Trans-European energy networks, energy policy and climate change. Moreover, these areas are also connected to others, that might be relevant for environmental policy-making, including competition policy (state aid) and the internal market (financial issues, transparency and taxation). As such, a broader scope of policy areas needs to be evaluated when analysing the implementation of Aarhus requirements.³

ENGOs' access to justice, and administrative judicial review cases in general have a special status compared to the classic categorisation of the share of EU/national competences. Implementing EU law has always been the responsibility of national courts and authorities, while national autonomy, in respect to organisational issues and general rules of administrative procedure still applies today (*indirect implementation*). National judges/courts and authorities are obliged to apply EU law in their function as 'bodies of the Union'.⁴ There are certain mechanisms, which have been introduced to refer cases to the CJEU.

Having standing rights (*locus standi*) before national courts to enforce the rights guaranteed by EU law is a matter of utmost importance, even if the member states theoretically have autonomy in regulating procedural matters. The CJEU (and formerly the ECJ) has been facilitating broader access to justice for individuals (even NGOs) before national courts since the beginning of European integration, in order to enforce Community law against the not always loyal national administrations.⁵ This

² M. Roggenkamp, C. Redgwell, A. Ronne and I. del Guayo, *Energy Law in Europe – National, EU and International Regulation*, (Oxford University Press, Oxford, 2016).

³ C. Vajda and M. Rhimes, Greening the law: The reception of environmental law and its enforcement in international law and European Union law, (2018) 24 (2) *The Columbia Journal of European Law*, 455–495.

⁴ Cases Judgment of the Court of 22 June 1989, *Fratelli Costanzo SpA v Comune di Milano*, C-103/88, EU:C:1989:256; Judgment of the Court of 9 September 2003, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato*, C-198/01, EU:C:2003:430.

⁵ B. De Witte, The Impact of Van Gend & Loos on Judicial Protection at European and National Level: Three Types of Preliminary Questions, in A. Tizzano, J. Kokott, and S. Prechal (eds), *50th Anniversary of the Judgement in Van Gend & Loos (1963–2013)*, (Office des Publications de l'Union Européenne,

paper focuses on formal standing requirements and the circle of relevant procedures. Moreover, other issues might also be relevant as major obstacles to legal activism, which are not to be elaborated in this paper.⁶

Access to justice in the CEE region is determined by the *impairment of the rights doctrine*. In these jurisdictions, judicial review is primarily intended to protect subjective (own) rights. Therefore, the dilemma arises from the fact that – in principle – NGOs acting to protect (several) collective rights/interests cannot initiate legal action before national courts in the absence of any violation of their (own) subjective rights. A similar problem might occur, when a mere economic interest of the affected parties could be considered as the impairment of the right, especially in the case of network industries, in which EU requires access to the network to be guaranteed for certain private parties.⁷

Various process types, such as actions for annulments, preliminary rulings and infringement procedures, guarantee the uniform application of EU rules and the protection of individuals' rights before the CJEU. Additionally, during the first period of European integration the CJEU/ECJ elaborated several different doctrines, on how the national judges/courts (or even authorities) should deal with the collision of EU norms and national provisions (*collision doctrines*). The ECJ thus followed a clearly activist approach in shaping the fundamental issues of EC/EU law. These support national judges by providing instructions on how to deal with such collisions when applying EC/EU law. As a result, there is a *supremacy* of EC/EU law over national provisions.⁸ The *direct effect* of EU law obliges national judges to set aside national provisions in the event of a collision,⁹ while its *indirect effect* requires national law to be interpreted in light of EU law provisions.¹⁰

Moreover, the implementation deficit of EU law at national level in order to create a well-functioning harmonised internal market, as a cornerstone of European integration was identified long ago as a major concern.¹¹ According to some scholars,

Luxembourg, 2013) 93–103.; H. H. J. Weiler, Revisiting Van Gend & Loos: Subjectifying and Objectifying the Individual, in A. Tizzano, J. Kokott, and S. Prechal (eds), *50th Anniversary of the Judgement in Van Gend & Loos (1963–2013)*, (Office des Publications de l'Union Européenne, Luxembourg, 2013) 11–23.

⁶ Such as cost/expenses of proceedings – recently Judgment of the Court (First Chamber) of 15 March 2018, *North East Pylon Pressure Campaign Limited and Maura Sheehy v An Bord Pleanála and Others*, C-470/16, EU:C:2018:185.

⁷ ACA Europe 2022. *Tour of Europe – Country Report on administrative jurisdiction in Germany, Austria, Czech Republic, Hungary*, <http://www.aca-europe.eu/index.php/en/tour-d-europe-en> (Last accessed: 30 December 2021).

⁸ Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, C-6/64, EU:C:1964:66.

⁹ Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62, EU:C:1963:1.

¹⁰ Judgment of the Court of 10 April 1984, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, C-14/83, EU:C:1984:153.

¹¹ F. Duina, Explaining Legal Implementation in the European Union, (1997) 25 (2) *International Journal of the Sociology of Law*, 155–179. <https://doi.org/10.1006/ijsl.1997.0039>; C. Knull and A. Lenschow, Coping with Europe – The Impact of German and British Administration on the

the post-socialist new member states from the CEE region's compliance culture might lead them to a different compliance performance, which could be identified as some kind of Eastern problem.¹²

Even though the EU has no direct competence to regulate administrative procedural/judicial review requirements, several sector-specific provisions have been enacted by the EU's secondary legislation to guarantee the application of EU law requirements in certain policy areas. This sector-specific approach necessarily has an (indirect) impact on the general administrative codes and on the regulation of the administrative judicial review systems.¹³ At the same time, the CJEU case-law elaborated the principles of equivalence and effectiveness.¹⁴ These oblige member states to meet minimum requirements on how to apply EU norms in the framework of national procedural provisions.¹⁵ Some scholars even concluded that there is no principle of 'procedural autonomy' of the member states, considering the ever broader case-law of the CJEU.¹⁶ The right to an effective remedy has also been enacted the EU primary law as part of the EU Charter of Fundamental Rights (Article 47) and by Article 19(1) TEU. The Charter of Fundamental Rights also requires EU bodies as well as member states to ensure the right to good administration and related procedural guarantees (Article 41) when implementing EU legislation. What makes the function of the CJEU even more relevant is the fact, that the evolution of these rights and guarantees

Implementation of EU Environmental Policy, (1998) 5 (4) *Journal of European Public Policy*, 595–614. <https://doi.org/10.1080/13501769880000041>; T. A. Börzel, Why There is No 'Southern Problem'? – On Environmental Leaders and Laggards in the European Union, (2000) 1 (7) *Journal of European Public Policy*, 141–162. <https://doi.org/10.1080/135017600343313>

- ¹² T. A. Börzel and Á. Buzogány, Governing EU Accession in Transition Countries: the Role of Non-State Actors, (2010) (45) *Acta Politica*, 158–182. <https://doi.org/10.1057/ap.2009.26>; A. L. Dimitrova, The new Member States of the EU in the aftermath of new Enlargement: Do new European rules remain empty shells?, (2010) 17 (1) *Journal of European Public Policy*, 137–148. <https://doi.org/10.1080/13501760903464929>; U. Sedelmeier, After Conditionality: post-accession compliance with EU law in East Central Europe, (2008) 15 (6) *Journal of European Public Policy*, 806–825. <https://doi.org/10.1080/13501760802196549>; G. Falkner and O. Treib, Institutional Performance and Compliance with EU Law: Czech Republic, Hungary, Slovakia and Slovenia, (2010) 30 (1) *Journal of Public Policy*, 101–116. <https://doi.org/10.1017/S0143814X09990183>; T. A. Börzel and F. Schimmelfennig, Coming together or drifting apart? The EU's political integration capacity in Eastern Europe, (2017) 24 (2) *Journal of European Public Policy*, 278–296. <https://doi.org/10.1080/13501763.2016.1265574>
- ¹³ V. Götz, Europarechtliche Vorgaben für das Verwaltungsprozessrecht, (2002) 117 (1) *Deutsches Verwaltungsblatt*, 1–7.
- ¹⁴ Gombos K. and Sziebig O. J., *Az európai környezetvédelmi szabályozás legújabb irányai*, (Ludovika Egyetemi Kiadó, Budapest, 2021).
- ¹⁵ H.C.H. Hofmann, General principles of EU law and EU administrative law, in C. Barnard and S. Peers (eds), *European Union Law*, (Oxford University Press, Oxford, 2014) 196–233.
- ¹⁶ M. Bobek, Why There is No Principle of "Procedural Autonomy" of the Member States, in B. de Witte and H. Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States*, (Intersentia, Cambridge, Antwerp and Portland, 2012) 305–324.

is mainly based on CJEU case-law.¹⁷ Moreover, there is no clear distinction between effectiveness and effective (judicial) protection in the ECJ/CJEU's case-law, but the relevance of Article 47 instead of effectiveness is clearly increasing with the EU's ever-greater impact on national procedural autonomy.¹⁸ As such, it is a further question, whether environmental cases as well as the Aarhus Convention might have an even broader (sector-neutral) impact on the EU as well as on its member states.

2. The Aarhus Convention in the EU's legal framework

The Aarhus Convention has a rather special structure, which is mainly based on interrelated pillars. Pillar three (third pillar), as the access to justice part of the Convention, incorporates Article 9(1) guaranteeing access to justice in the event of infringement of first pillar (access to information) rights, while Article 9(2) refers to access to justice for an infringement of second pillar (public participation) rights. Additionally Article 9(3) contains a broader and relatively independent further provision on access to justice in environmental matter as such. The focus of this paper mainly refers to the Article 9(2) and Article 9(3).

The Convention's Article 9(2) has been transposed by EU' secondary legislation, addressed directly to member states.¹⁹ These provisions contain that member states (Parties under the Convention) shall ensure that NGOs, as members of the 'public concerned' have access to a review procedure before a court of law or another independent and impartial body established by the law. 'The public concerned' means the public affected or likely to be affected by, or having an interest in the environmental decision-making procedures referred to in Article 2(2) (under the Convention: 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 organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Article 9(3) – in contrast to Article 9(2) – intends to ensure access (beyond the possibility of review and without prejudice to it) to administrative and judicial procedures not just for the public concerned but also for the public as a whole. According to Article 2 of the Convention and Article 1(2) of the Directives, 'the public' means one or more natural or legal persons and, in accordance with national legislation or practice, their

¹⁷ J. Saurer, *Der Einzelne im europäischen Verwaltungsrecht*, (Mohr Siebeck Verlag, Tübingen, 2014). <https://doi.org/10.1628/978-3-16-152479-0>

¹⁸ R. Widdershoven, National Procedural Autonomy and General EU Law Limits, (2019) 12 (2) *Review of European Administrative Law*, 5–34. <https://doi.org/10.7590/187479819X15840066091222>

¹⁹ Articles 10a, 15a of the Directive 2003/35/EC, Article 11 of Directive 2011/92/EU, as a codified version of the former environmental impact assessment (EIA) and Article 25 of Directive 2010/75/EU on industrial emissions.

associations, organisations or groups. Article 9(3) has however not been transposed into EU secondary law therefore the question has also occurred in this case, of whether it had a *direct effect* on a primary legal basis due to the mixed agreement nature of the Convention.

National judges and authorities need to take into consideration the general principles of equivalence and effectiveness, the primary and secondary sources of EU law, and national legislation, as well as the related case-law of the CJEU/ECJ, while applying EU requirements in access to justice-related cases. This multi-layered structure of legal requirements made it difficult for national courts to interpret the national procedure rules in conformity with the Convention and with the related EU law. However, the CJEU's case-law created a potential for more activist dialogue between diverse jurisdictions, too, especially in the case of member states in the CEE region. These countries had to face the same dilemma, namely how to reconcile the EU's Aarhus requirements with the tradition of the *impairment of the rights doctrine*.

III. THE HUNGARIAN LEGISLATION AND PRACTICE ON ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

1. The administrative judicial review cases after the democratic transformation of 1989/1990

In most CEE member states, the function of the administrative judicial review was historically characterised by the *impairment of the rights doctrine*. The German, Austrian, Czech, Slovak and Hungarian jurisdictions even nowadays restrict the personal scope of potential plaintiffs before national courts, and declare the violation of subjective rights, sometimes the violation of interests, as a prerequisite to that.²⁰

This doctrine can be considered as a 'product' of an era when the whole system of administrative judicial review was based on a particular vision of the relationship between the state and its citizens. In the second half of the 19th century the administrative judicial review, with its orientation towards the protection of subjective rights, characterised the fundamental approach of the German *Kaiserreich* and the Austro-Hungarian Monarchy. 'These legal systems, balancing between democracy and monarchy, have recognised the legal status of the individual, but only to the extent that the individual citizens could enforce their own interests.'²¹

²⁰ Szegedi L., *Közigazgatási bírói jogvédelem uniós átalakulás alatt – Eltérő jogvédelmi mércék az EU jogának uniós és tagállami végrehajtása során*, (HVG-Orac Kiadó, Budapest, 2019).

²¹ J. Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: europäische Impulse für eine Revision der Lehre vom subjektivöffentlichen Recht*, (Duncker und Humboldt Verlag, Berlin, 1997) 219. <https://doi.org/10.3790/978-3-428-48928-2>

As for Hungary, the status of civil society or any local groups that were allowed to exist was very limited in the socialist era, even if this kind of activism could gain some momentum just before the democratic transition. The activism of locals could have some impact on the communist party's decision-making regarding the cancellation of a nuclear waste disposal site next to Paks nuclear power plant in 1988.²² Mass demonstrations against the communist party's plan to complete the Nagymaros Dam on the river Danube even became crystallizing points for opposition groups.²³ The Aarhus implementation included several pro and con arguments over guaranteeing greater participation rights for the public. In general, if the action is dismissed, the (local) social acceptance of the decision may be higher if the standing rights are guaranteed in general.²⁴ Broader participatory rights might make such proceedings longer and costlier, while environmental cases require highly qualified professionals who are not always available to these organisations. However, the extent to which non-state actors were allowed to participate in both legislation and law enforcement – especially in a former communist state – could be perceived as a democratic indicator.²⁵ In Hungary, the ENGOs followed diverse strategies, from party formation, lobbying, and partnership with public authorities to acting as 'watchdogs' of the state.²⁶ Strategic litigation before national courts with involvement of international/EU-level enforcement mechanism mainly refers to the ENGO's role as a watchdog; however, only limited number of such organizations had and have the capacity to act this way on a continuous basis.²⁷

As a consequence of the democratic transformation, major changes were introduced to the Hungarian legal system. The former Constitution²⁸ was substantially amended, which brought about the creation of Hungary's Constitutional Court as well as the position of the Parliamentary Commissioner for Civil Rights (Ombudsman). The introduction of Act XXVI of 1991 extensively broadened the judicial review of administrative decisions. In the first decade after the democratic transformation, judicial review was introduced, intended to challenge administrative acts and regulated

²² Nagy R., Glied V. and Barkóczi Cs., *Nukleáris energia, társadalom és környezettudatosság az Atomvárosban. Helyi társadalmi hatások az építkezéstől a bővítésig*, (Publikon Kiadó, Pécs, 2014) 44–46.

²³ Lányi A., *Porcelán az elefántboltban: Az ökológiai politika kezdetei Magyarországon*, (Válasz Kiadó, Budapest, 2009).

²⁴ D. Murswiek, *Ausgewählte Probleme des allgemeinen Umweltrechts. Vorsorgeprinzip, Subjektivierungstendenzen am Beispiel der UVP, Verbandsklage*, (2005) (38) *Die Verwaltung*, 243–279.

²⁵ Börzel and Buzogány, *Governing EU Accession in Transition Countries: the Role of Non-State Actors*, 158–182. <https://doi.org/10.1057/ap.2009.26>

²⁶ Á. Buzogány, *Representation and Participation in Movements: Strategies of Environmental Civil Society Organizations*, (2015) 63 (3) *Südosteuropa*, 491–514. <https://doi.org/10.1515/soeu-2015-630308>

²⁷ Scheiring G. and Boda Zs., *Zöld közpolitika befolyásolás az Európai Unióban*, (2006) (4) *Politikatudományi Szemle*, 41–73.

²⁸ Act XX of 1949 on the Constitution of the Republic of Hungary, No longer in force.

by Chapter XX of the former Code of Civil Procedure²⁹ without there being any specialized code on administrative court procedures.³⁰

The Supreme Court of Hungary was responsible for reviewing final decisions in administrative cases as a form of extraordinary remedies, for adopting so-called law uniformity decisions binding on all courts and for publishing decisions on legal principles. In the last decades, special courts exclusively responsible for administrative cases have been set up for a certain period; however, no specialised highest instance court has been introduced to Hungarian court system with exclusive authority on administrative judicial review cases.³¹ Alongside the changes in the judiciary, the new system of local, regional and central administrative authorities responsible for environmental issues has also been erected and modified on numerous occasions (in the case of environmental law, these were the so-called specialised environmental inspectorates, later merged into county-level agencies).

Even before the ratification of the Aarhus Convention, the Hungarian legislator decided to guarantee participatory rights and relatively broad access to justice in environmental matters with the codification of the general rules of environmental protection.³² The Environmental Code, which was drafted after several years of consultation with stakeholder groups, incorporated many basic elements of the EU's environmental legislation.³³ According to its section 98(1):

Associations formed by citizens for the representation of their environmental interests and other social organizations not qualifying as political parties or interest representations – being active in the impact area – (hereinafter: organisations) shall be entitled in their area to the legal status of being a party in environmental administrative proceedings.

Most of the related case-law of the Hungarian judiciary in relation to the Convention's third-pillar implementation issues exists due to this particular provision of the Environmental Code, namely how broadly the range of 'environmental proceedings/matters/cases' can/should be interpreted. This interpretation is crucial, especially considering that proceedings of environmental relevance might be much broader than those laid down by the legislator or by the judiciary in its law unification decisions. There was less focus on the formal requirements of the NGOs' standing rights, even if this issue has also been brought up occasionally during NGO-related litigation procedures.

²⁹ Act No. III of 1952 on the Code of Civil Procedure, No longer in force.

³⁰ ACA Europe 2022.

³¹ ACA Europe 2022.

³² Act LIII of 1995 on the General Rules of Environmental Protection (Environmental Code).

³³ Buzogány, Representation and Participation in Movements: Strategies of Environmental Civil Society Organizations, 507.

As a result, NGOs labelled as ENGOs became less relevant in Hungarian practice. In contrast, the dilemma of ‘when to act’ became highly debated. Moreover, overcoming the bureaucratic mentality and practices of the judiciary, inherited from socialism, and gaining technical competence to hear complex cases also took a while, even if the judiciary clearly made progress by establishing its independence and investing resources in the development of its capacity.³⁴

The democratic transformation of 1989/1990 led to major changes to Hungarian legislation as well as in functioning of the judiciary and administrative authorities. This development included the institutionalisation of the cornerstones of legal activism for all society as well as for the NGOs. In Hungary, ENGOs also started to act as watchdogs even before the democratic transformation, although several strategies were followed to enforce environmental rights. The ‘role of watchdog’ became clearly relevant, even if this specialised activist strategy required substantial legal background knowledge and financial resources as well as some kind of a partnership from the side of the legislator and the judiciary.

2. The administrative judicial review and the Aarhus implementation in the 2000s

The CJEU/ECJ started to elaborate the Aarhus-related compliance requirements of NGOs’ standing rights in the 2000s. Interestingly one of the first judgments in this regard referred to Scandinavia, not the CEE region. The Swedish regulation, which reserved access to justice to environmental NGOs with at least 2,000 members exclusively, was not in conformity with Article 10 of the Directive, given that only a small number of associations could fulfil this condition.³⁵

The Hungarian ratification of the Convention in 2001 showed a formal commitment to the related requirements.³⁶ However, full implementation remained a low priority for the government: it did not take further implementing measures nor start relatively close cooperation with ENGOs and made only modest investments into administrative resources.³⁷

The pre-accession negotiations with the EU dealt with the issue of ‘rule of law’ requirements, as well as the capacity of candidate countries to implement the EU *acquis*. Nevertheless, the EU could only indirectly influence the general administrative rules of the new member states or the related requirements of indirect implementation.

³⁴ E. Kover, *Judicial Capacity in Hungary in Monitoring the EU Accession Process: Judicial Capacity*, (Open Society Institute, Budapest, 2002); A. Antypas, *The Aarhus Convention in Hungary*, (2003) (6) *Environmental Liability*, 199–208.

³⁵ Judgment of the Court (Second Chamber) of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, C-263/08, EU:C:2009:631.

³⁶ Act LXXXI of 2001 on the Ratification of the Aarhus Convention.

³⁷ Antypas, *The Aarhus Convention in Hungary*, 200.

The new general code on administrative procedure³⁸ was passed in the year of the Hungarian EU accession. Therefore, this Act already took Hungary's EU membership into consideration, just like the potential for broader EU-wide cooperation between administrative authorities.³⁹ The Code also granted the right of standing for NGOs by recognising their legal status in the administrative proceedings. Further participatory requirements of EU law in sector-specific proceedings were transposed by Hungarian law, mostly in form of diverse decrees.⁴⁰ Additionally, a further tendency also started in this period, as the Hungarian legislator started to enact specialised rules to hasten the implementation of projects deemed high priority for the national economy.⁴¹ These steps were meant to support partly EU-funded projects, which led to a highly criticised parallel set of rules for environmentally relevant areas, such as major constructions or infrastructure development projects.⁴²

Due to the relatively abstract wording of the Environmental Code, it was up to the judicial practice to clarify the scope of relevant environmental proceedings in the light of section 98(1) of the Code. This occurred in the form of law unification decisions, which were issued by the Supreme Court of Hungary. This type of special decision with *quasi* legal binding force has long been criticised by legal scholars.⁴³

Law Unification Decision No. 1/2004 of the Supreme Court of Hungary held that NGOs are entitled to the status concerned – and so to the right of standing – in proceedings where the resolution of the environmental authority as a consultant authority is required by law. Consequently, the involvement of NGOs and the recognition of their legal status in administrative proceedings depended on the inclusion of environmental authorities as consultants in the prior administrative procedure. As such, excluding environmental authorities from the decision-making process would potentially lead to the exclusion of NGOs. Law Uniformity Decision No. 2/2004 finally laid down that judicial review was primarily intended to the protection of (subjective) rights which has already been part of the judicial practice before.

³⁸ Act CXL of 2004 on the general rules of administrative proceedings and services, hereinafter CAP. No longer in force.

³⁹ Kilényi G., A Ket. szabályozási előzményei és céljai, in *A közigazgatási eljárási törvény kommentárja*, (KJK-Kerszöv, Budapest, 2005) 15–19.

⁴⁰ EMLA – Environmental Management and Law Association, *Kézikönyv a jogorvoslati jogokról Magyarországon*, <https://www.clientearth.org/media/dlrltzw/2020-01-06-jogorvoslati-jogok-magyarorszagon-kezikonyv-ext-hu.pdf> (Last accessed: 30 December 2021) 7.

⁴¹ Act LIII of 2006 on the acceleration and simplification of the implementation of investments of special importance to the national economy.

⁴² Agócs I., Múlt, jelen és jövő szövetsége a települési környezet alakításában és védelmében, in Tahyné Kovács Á. (ed.), *Vox Generationum futurum – Ünnepi kötet Bándi Gyula 65. születésnapja alkalmából*, (Pázmány Press, Budapest, 2021, 23–33) 30.

⁴³ Karsai D., A jogegységi határozatok alkotmányossági vizsgálata, (2016) (1) *Fundamentum*, 103–110.; Villám K., A jogegységi határozatok jogi jellegének alkotmányossági problémái, (2017) 64 (4) *Magyar Jog*, 239–255.

In the Hungarian practice, the legal form of organizations and formal requirements led to fewer compliance concerns compared to the abovementioned Swedish regulation. In 2005, the Constitutional Court of Hungary declared the decision of the Hungarian legislator to exclude public foundations from the circle of those organisations that had standing rights according to Article 98(1) of the Environmental Code to be constitutional. Its argumentation was mainly based on the fact that the two forms of organisations (*foundations vs. public foundations*) were substantially different, which justified the exclusion of such public bodies.⁴⁴ On the other hand, the Metropolitan Court (*Fővárosi Bíróság*) guaranteed standing rights for the 'Foundation for Budapest World Heritage' based on Article 3 of the Aarhus Convention, regardless of the fact that the site of the contested construction of a hotel building was located outside of the landscape protected by the UN's World Heritage Programme.⁴⁵ This somewhat activist approach by the judiciary could also be identified in the case of the NATO radar system planned to be installed to a protected area called Tubes next to the city of Pécs (and originally planned for a protected area called Zengő, which led to a great wave of demonstrations). After more than a decade, these cases made it clear that a new era had begun as NGOs' watchdog role became highly relevant once more being backed by the EU- or even international-level actors.⁴⁶ The Supreme Court concluded in the Tubes case, by referring to the ratifying provisions of the Article 9 of the Aarhus Convention, that access to justice must be ensured if information rights had not been taken into account, were denied or no official response was given by the authorities.⁴⁷ It has also been raised, whether country-level NGOs' self-declaration in their establishment documents enable them to act locally. In the Hungarian practice the involvement of country-level organisations in 'local' proceedings has been accepted in general by authorities.⁴⁸

Hungary ratified the Aarhus Convention relatively soon. However, some of the related legislation dated back to the former era of democratic transformation and already referred to the requirements arising from the (drafted) Convention. The codification measures of this decade were also based on the EU-accession conditionalities, including the broader involvement of NGOs as well as the emerging EU-wide administrative cooperation networks. A new wave of strategic litigation initiated by NGOs began as these organisations expanded their role as watchdogs to enforce the related international or EU norms. Identifying environmental matters was based on the inclusion of

⁴⁴ Constitutional Court of Hungary, Decision No. 1146/B/2005.

⁴⁵ Főv. Bir. I.K.33.389/2005/28.

⁴⁶ Sz. Kerényi and M. Szabó, Transnational Influences on Patterns of Mobilisation Within Environmental Movements in Hungary, (2006) 15 (5) *Environmental Politics*, 803–820. <https://doi.org/10.1080/09644010600937249>

⁴⁷ Legf. Bir. Kfv.IV.37.629/2009/70.

⁴⁸ EMLA, *Kézikönyv a jogorvoslati jogokról Magyarországon*, 24.

sector-specific environmental authorities by the related law unification decision, while the judiciary followed a broader interpretation in formulating the formal standing requirements of such organisations.

3. Post-accession compliance fatigue after 2010?

In the decade of the 2010s, several CJEU judgments referred to Aarhus third pillar requirements with a special focus on the CEE region (and on its impairment of the rights doctrine), which led to some CEE-wide interaction between the different jurisdictions.

Due to the Czech Republic's general restrictive practice based on its procedural legislation, – only some of the public concerned had access to judicial review in environmental matters. Hence, in procedures for issuing land use permits, only the owners of the affected buildings and plots and their tenants had the right to initiate the review procedure, while in noise protection, nuclear and mining procedures, only the investors had such rights. NGOs could only successfully claim an infringement of their own procedural rights, as these were the only subjective rights they could have in the environmental procedures.⁴⁹ Consequently, the CJEU ruled against the Czech Republic for failure to transpose Article 10a(1–3) of the Directive.⁵⁰

The CJEU made it clear in the *Trianel* case,⁵¹ initiated by a German court, that member states have no discretion in determining the criteria, such as impairment of the rights, to restrict an NGO's access to justice. In the main proceedings at national level, *Trianel* intended to construct and operate a coal-fired power station, in which the standing right of an NGO was to be decided. As a result of this ruling, the *locus standi* requirements of German administrative law had to be modified in environmental cases. Some legal scholars asked whether, in light of the broad interpretation framework of the CJEU, there was any issue within environmental law in which the member state would be allowed to legislate regardless of the EU law.⁵²

⁴⁹ Justice and Environment, *Selected Problems of the Aarhus Convention Application*, http://www.justiceandenvironment.org/_files/file/2009/09/access_to_justice_collection.pdf (Last accessed: 30 December 2021); L. 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, (2014) (1) *ELTE Law Journal*, 117–134.

⁵⁰ Judgment of the Court (Eighth Chamber) of 10 June 2010, *European Commission v Czech Republic*, C-378/09, EU:C:2010:337.

⁵¹ Judgment of the Court (Fourth Chamber) of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg (intervening party: Trianel Kohlekraftwerk Lünen GmbH & Co. KG)*, C-115/09, EU:C:2011:289.

⁵² J. Berkemann, Die unionsrechtliche Umweltverbandsklage des EuGH – Der deutsche Gesetzgeber ist belehrt >so nicht< und in Bedrängnis, (2011) (126) *Deutsches Verwaltungsblatt*, 1258–1260.

In the *Slovak bears/Lz VLK I* case.⁵³ the CJEU concluded that Article 9(3) of the Convention has no *direct effect* in EU law (para 52), given that it does not contain a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. Therefore, the CJEU expressed, in a clearly activist way, that the national courts are required to interpret the national procedural rules (*indirect effect*) in conformity with para 50 of the Convention (safeguarding the objective of effective judicial protection of the rights conferred by EU law), regardless of the lack of transposition of Article 9(3) into EU law. The *Slovak bears/Lz VLK I* judgment had a clear impact on the case-law of neighbouring countries. The Federal Administrative Court of Germany (*Bundesverwaltungsgericht*) referred to this judgment, even before the required legislative changes following Trianel, to guarantee wider access to justice for NGOs, just like in the Czech Republic.⁵⁴ In contrast to that, the Supreme Administrative Court of Austria (*Verwaltungsgerichtshof*) seemed rather reluctant to follow the activist approach and focused rather on the lack of direct effect of the Convention's Article 9(3).⁵⁵ Although the Aarhus-related case law of the CJEU⁵⁶ broadened access to justice in the case of Austria as well, it did not however, do so for NGOs, but with regard to neighbours as affected parties (paras 42–43) at that time.

In Hungary, the most relevant legislative change of this period was the new Constitution, named the Fundamental Law (*Alaptörvény*), which passed with effect as of 2012. It guarantees the protection of natural resources and environmental elements (Article P), the right to physical and mental health (Article XX) and the right to a healthy environment (Article XXI). The ombudsman for future generations, formally as deputy commissioner for fundamental rights, is responsible for environmental matters as a specialised actor.⁵⁷ However, the competences of the deputy commissioner are much more extensive, since the interests of future generations need a much broader and comprehensive interpretation scheme than just the 'green policy area'. Civil society's involvement within the programme- and law-making activities of public administration was formally possible; however real deficiencies could be detected,⁵⁸ and, for NGOs, acting as a watchdog remained a rather specialized activity among their other missions.

⁵³ Judgment of the Court (Grand Chamber) of 8 March 2011, *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Slovak bears/Lz VLK I case)*, C-240/09, EU:C:2011:125.

⁵⁴ Bundesverwaltungsgericht (BVerwG) judgment 'Luftreinhalteplan Darmstadt' of 5th September 2013, No. 7 C 21.12 para 48.; Nejvyšší správní soud České republiky judgment of 13th October 2010 No. 6 Ao 5/2010.

⁵⁵ Verwaltungsgerichtshof (VwGH) judgment of 27th April 2012 No. 2009/02/0239.

⁵⁶ Judgment of the Court (Fifth Chamber) of 16 April 2015, *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten and Others*, C-570/13, EU:C:2015:231.

⁵⁷ Act CXI of 2011 on the Commissioner for Fundamental Rights.

⁵⁸ Á. Rixer, The relationship between civil organisations and public administration in Hungary, in A. Patyi and Á. Rixer (eds), *Hungarian Public Administration and Administrative Law*, (Schenk Verlag, Passau, 2014) 252–287.

Several elements in relation to third pillar-related Aarhus implementation remained unchanged. In the absence of any comprehensive judicial interpretation of environmental matters, the Supreme Court of Hungary issued a new law unification decision in 2010. Law Unification Decision No. 4/2010 excluded NGOs' ordinary status as a party in environmental administrative proceedings (matters). It held that it would lead, in *contra legem* practice, to granting NGOs an ordinary status of party in matters not regulated by the Environmental Code, in the absence of an explicit provision of other laws stipulating that this Code shall be applied, except regarding nature protection/conservation-related issues. More recent case-law of the Supreme Court of Hungary (*Kúria*) shows that Law Unification Decision No. 4/2010 practically precluded environmental NGOs' access to justice with regard to some environmentally relevant decisions.⁵⁹ Further legislative changes in 2015 merged the structurally independent environmental inspectorates into centralised government agencies, which made it even more difficult to identify environmentally relevant interests/issues in the (environmentally relevant) proceedings.⁶⁰

Even if no Aarhus-related CJEU judgment has been issued in the case of Hungary, the standing rights as well as the impairment of the rights doctrine occurred in the CJEU's case-law.⁶¹ In accordance with the Hungarian interpretation of the doctrine, mere economic interest does not constitute a legal basis to be recognized as plaintiff. The Supreme Court of Hungary (*Kúria*) followed a cross-sectoral approach in wording its preliminary ruling question, by referring to the application of the broader standing rights requirements of the CJEU's telecommunication judgments⁶² to energy sector.⁶³ By analogy with the *Tele2* judgment, the CJEU revealed that the related EU law on networks is to be interpreted as constituting protective measures adopted in the interests of network users (including potential customers) without their having concluded contracts. The CJEU also referred to the limits of national autonomy

⁵⁹ K. Rozsnyai and L. Szegedi, The mandatory nature of Environmental Impact Assessment decisions and the legal status of local governments in administrative litigation cases in the Hungarian Supreme Court's (Curia) Judgement of 3rd December 2012, (2013) (4) *Jogesetek Magyarázata*, 48–61.; Szegedi, The Eastern Way of Europeanisation in the Light of Environmental Policymaking?, 117–134.

⁶⁰ Rozsnyai K., *Hatékony jogvédelem a közigazgatási perben*, (ELTE Eötvös Kiadó, Budapest, 2018) 114–115.

⁶¹ L. Szegedi, The Role of the Court of Justice of the European Union in the Reformulation of the Hungarian Energy Policy, in M. Misik and V. Oravcová (eds), *From economic to energy transition: Three decades of transitions in Central and Eastern Europe*, (Palgrave Macmillan, Cham, 2021) 395–427. https://doi.org/10.1007/978-3-030-55085-1_14

⁶² Austrian preliminary ruling proceeding: Judgment of the Court (Second Chamber) of 21 February 2008, *Tele2 Telecommunication GmbH v Telekom-Control-Kommission*, C-426/05, EU:C:2008:103; German preliminary ruling proceeding: Judgment of the Court (Fourth Chamber) of 24 April 2008, *Arcor AG & Co. KG v Bundesrepublik Deutschland*, C-55/06, EU:C:2008:244.

⁶³ Judgment of the Court (Fourth Chamber) of 19 March 2015, *E.ON Földgáz Trade Zrt v Magyar Energetikai és Közmű-szabályozási Hivatal*, C-510/13, EU:C:2015:189.

over procedural regulation. As a result, EU law requires, in light of ‘the principles of equivalence and effectiveness, that the national legislation should not undermine the right to effective judicial protection, as provided for in Article 47 of the Charter of Fundamental Rights’ (para 50). In its later decision with principle, the *Kúria* concluded that the standing rights of (potential) plaintiffs must be guaranteed, even if based on the infringement of their economic interests.⁶⁴

Some amendments to the CAP were also introduced in this period after 2010, according to which exercising the right of a party (properly notified of the initiation of the proceeding) may be subject to the party submitting a request or making a statement during the first instance proceedings [section 15(6)]. According to further amendments to the CAP, instead of the general status of party, NGOs were only granted the right to make a statement [section 15(6a)]. This modification left more room for the sectoral legislator to decide on the actual right of NGOs in certain sectoral proceedings. In its more recent case-law, the CJEU, has revealed how access to justice and the participatory rights of NGOs can be restricted concerning time limits. In the Slovakia-related *Lz VLK II* judgment, the CJEU concluded that wide access to justice was not guaranteed for organisations, if the procedure may be definitively concluded before a definitive judicial decision on an organisation’s possession of the status of party was adopted, requiring the organisation to initiate a separate procedure,⁶⁵ just like when a national procedural rule has imposed a time limit on an environmental organisation, pursuant to which a person lost the status of party to the procedure and therefore cannot bring an action against the decision resulting from that procedure if it failed to submit an objection in good time following the opening of the administrative procedure and, at the very latest, during the oral phase of that procedure.⁶⁶ In this Austria-related judgment, the CJEU also referred to the Slovak bears/*Lz VLK I* judgment to ensure effective judicial protection (para 45) but requiring national courts to set aside conflicting national procedural rules with the use of direct effect as collision doctrine (paras 54–57). Moreover, both judgments made a direct reference to the importance of Article 47 of the Charter (effective judicial protection), in the same way as in the abovementioned gas transmission judgment in the *E.ON Földgáz* case.

The dilemma of ‘salami slicing’ could also lead to concerns, as some member states treated only certain parts of the project as being environmentally relevant, sometimes applying EIA thresholds only in a formal way.⁶⁷ As a result CJEU case-law requires that the cumulative effects of certain public and private projects must be

⁶⁴ Decision of principle of *Kúria* (former Supreme Court of Hungary) No. EBH 2016, K.8.

⁶⁵ Judgment of the Court (Grand Chamber) of 8 November 2016, *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín (Lz VLK II case)*, C-243/15, EU:C:2016:491, para 73.

⁶⁶ Judgment of the Court (Second Chamber) of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, C-664/15, EU:C:2017:987, para 101.

⁶⁷ Judgment of the Court (Fifth Chamber) of 21 March 2013, *Salzburger Flughafen GmbH v Umweltsenat*, C-244/12, EU:C:2013:203.

taken into account.⁶⁸ A similar concern also occurred in relation to the expansion of Hungarian Ferihegy International Airport, as the special environmental decision on the lack of an EIA could not be challenged separately.⁶⁹ However, more recent practice showed a more activist approach.⁷⁰ The Aarhus Convention [Article 2(3)] clearly refers to the comprehensive interpretation of environmental cases, including most effects on the environmental elements, which has also been supported by the abovementioned case-law of the CJEU.

In the decade of the 2010s, the CJEU intensified its activity in setting the procedural rules for national judges on how to be in compliance with the Aarhus requirements, while even cross-sectoral and regional relevance emerged on standing right and further Aarhus-related issues. This tendency – even if the CJEU’s judgments have a rather narrow interpretation area limited to certain policy areas – necessarily had an indirect impact on the general rules of administrative proceedings/judicial review cases in the different member states. Meanwhile, Hungary and the Hungarian judiciary followed a rather restrictive practice, as Law Unification Decision No. 4/2010 restricted the circle of environmental matters in which NGOs might have access to justice. Moreover, the identification of environmentally relevant proceedings became even more difficult due to the related legislative changes.

4. Recent changes in the Hungarian legislation and the judiciary’s case-law

While analysing Aarhus implementation a broader subject matter must be taken into account; how the CJEU formulated its decisions on environmentally relevant *plans and policy documents*, just like on *diverse environmental elements*. In *Janecek*, the ECJ/CJEU clarified that the persons directly concerned by the related risk must be in a position to require the competent authorities to draw up an action, if necessary by bringing an action before the competent courts – regardless of having any alternative legal tools.⁷¹ The CJEU concluded that air quality thresholds,⁷² and water pollution requirements⁷³ are to be enforced by the affected public or by the NGOs at national level.

⁶⁸ Recently Judgment of the Court (Grand Chamber) of 29 July 2019, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres*, C-411/17, EU:C:2019:622, para 71.

⁶⁹ Judgment of Kúria (former Supreme Court of Hungary) No. Kfv.37.221/2012/6.

⁷⁰ Judgment of Kúria (former Supreme Court of Hungary) No. Kfv.37.835/2012/7.

⁷¹ Judgment of the Court of 25 July 2008, *Dieter Janecek v Freistaat Bayern*, C-237/07, EU:C:2008:447.

⁷² Judgment of the Court of 19 November 2014, *ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs*, C-404/13, EU:C:2014:2382.

⁷³ *Nördliches Burgenland and Others; Request for a preliminary ruling from the Verwaltungsgericht Wien (Water Pollution)*, C-197/18, EU:C:2019:824.

In Hungary, the Constitutional Court has taken various decisions over the last years with regard to 'environmental' rights and fundamental guarantees giving Article XXI of the Fundamental Law (right to healthy environment) an ever-closer interpretation as a right instead of just as a subject of general protection.⁷⁴ Nevertheless, it has also dealt with the structural changes of the environmental inspectorates.

Two legislative acts seemingly introduced an entirely new era in the regulation of administrative procedures. Act CL of 2016 on the Code of General Administrative Procedure has replaced the former CAP. According to Section 10 of this Act, clients (parties) are any natural or legal persons, or other entities, the rights or legitimate interests of which are directly affected by a case, while the sectoral legislator can also lay down the circle of further persons and entities that can be treated as clients. The most important legislative step, structurally, was Act I of 2017 on the Code of Administrative Court Procedure, as this was the first time that a separate code for administrative court procedures has been enacted after the democratic transition of 1989/1990. It became even more relevant as administrative judicial/court procedures became the main tools for legal remedy in the environmental cases excluding appeal procedures.⁷⁵ As for the Aarhus third pillar rights, Section 17 point d) of this Code regulates that, *inter alia*, the following shall be eligible to bring an action as plaintiff

in the cases specified by acts or government decrees, the non-governmental organisation which has carried out its registered activity to protect a fundamental right or to enforce a public interest for at least a year in the geographical area affected by the administrative activity, if the administrative activity affects its registered activity.

However, this new provision should be read in conjunction with the Environmental Code as well as with the outdated Law Unification Decision No. 4/2010 just like before. The modification of the Environmental Code pointed out only some of the proceedings in which the legal standing rights should be guaranteed, including environmental licensing or EIA proceedings.⁷⁶ Consequently, the new codification wave left most of the former deficiencies in relation to access to justice issues unsolved. The Constitutional Court made it clear that the creation of government agencies merging former environmental inspectorates into centralised bodies on county level can be constitutional. However, the Hungarian legislator was required to clarify further how the protection of the environmental elements and further natural resources shall be

⁷⁴ Constitutional Court, Decisions No. 17/2018.

⁷⁵ Act CX of 2019 on the modification of acts related to the simplification of the functioning of county-level/metropolitan governmental agencies.

⁷⁶ Act L of 2017 on the modification of acts related to the entry into force of the Act CL of 2016 on the General Public Administrative Procedures and of the Act I of 2017 on the Code of Administrative Court Procedure.

represented in the decisions of these agencies.⁷⁷ Moreover, even today a non-legislative act regulates the formalities on the content of specialized environmental questions, which would also require further clarification steps to be taken by the Hungarian legislator.⁷⁸ In contrast, there are other policy areas in which a much clearer legislative approach was followed. According to Act XXVIII of 1998 on animal welfare and protection, NGOs have the status of parties in the administrative proceedings initiated by them based on the violation of *any animal welfare legislative acts* – without formally restricting the scope of the related proceedings.

As for the abovementioned enforcement of *plans* alongside the CJEU's related judgments, a new wave of cases occurred in recent years at national level on the enforcement of air quality plans.⁷⁹ In Hungary there was a clear legal obstacle for normative acts to be the subject of judicial review. The new category of administrative acts ('of general scope to be applied in a specific case') and the expansion of judicial disputes to this category have been one of the main achievements of the Hungarian codification processes of the late 2010s. Moreover, the air quality concerns in several Hungarian areas have also been pointed out by the CJEU itself.⁸⁰ However, the Hungarian Supreme Court (*Kúria*) made it clear in its most recent judgment that NGOs were only allowed to express their opinion on *air quality plans* without having direct access to justice against them. These plans should instead be considered as planning documents, which cannot be challenged before the courts as specific normative acts. The main argument of the Hungarian Supreme Court's judgment referred to the categorisation of the planning procedure. This cannot lead to administrative acts, nor administrative court procedures. It has only been mentioned by the documents of the proceeding, but the 'action for failure to act' (also newly enacted type of procedure in the Code) has not been initiated by the NGO – seemingly resulted to a failure in strategic litigation.⁸¹ Additionally, in 2019 the Hungarian legislator restricted the scope of potential plaintiffs against the abovementioned normative acts to only members of the prosecution service or to the organs exercising the supervision of legality – seemingly prioritising state-related plaintiffs.⁸²

⁷⁷ Constitutional Court of Hungary, Decisions Nos. 4/2019 (III. 7.) and 12/2019 (IV. 8.).

⁷⁸ Deputy Commissioner for Fundamental Rights of Hungary (Deputy Commissioner) – jövő nemzedékek szószólója, Figyelemfelhívás a környezeti elemeket érintő hatósági eljárások résztvevői számára az Alkotmánybíróság 4/2019 (III. 7.) AB határozatában megállapított alkotmányos követelményeknek való megfelelés és az alaptörvény-ellenesség kiküszöbölése érdekében No. AJB-4950/2019; Szamek G., Változások a környezet védelmét szolgáló eljárások területén, in Tahyiné Kovács Á. (ed.), *Vox Generationum futurum – Ünnepi kötet Bándi Gyula 65. születésnapja alkalmából*, (Pázmány Press, Budapest, 2021) 445–454.

⁷⁹ As an example, see BVerwG 27th February 2018, No. 7 C 26.16 and 7 C 30.17.

⁸⁰ Judgment of the Court (Seventh Chamber) of 3 February 2021, *European Commission v Hungary*, C-637/18, EU:C:2021:92.

⁸¹ Judgment of Kúria (former Supreme Court of Hungary) No. Kfv.IV.37.700/2020/5.

⁸² Act CXXVII of 2019 on the modification of acts related to the introduction of one-instance level administrative procedures.

Even if this issue only has an indirect link to Aarhus third pillar requirements, the review of further normative acts might also be interesting due to the state-related potential plaintiffs and to the already criticised parallel rule-setting. Not just prosecutors and administrative organs but other actors also have such rights. In a typical parallel rule-setting case in a town near Lake Balaton, the Hungarian Supreme Court (*Kúria*) annulled the local municipality's rules on re-categorization of certain project areas, as these rules would have rewritten the categories laid down by norms having higher status in the hierarchy of norms. This case was initiated by the affected locals, but formally (drafted by the Deputy Commissioner for future generations) submitted by the Ombudsman.⁸³ The Hungarian legislator's new category of 'special economic zones' has rewritten the regulatory competences as well as the property rights of the local municipalities, transferring these zones to county municipalities.⁸⁴ This continued 'parallelisation' could make the clarification of competences in certain matters/zones even more complicated,⁸⁵ as well as obfuscating how to guarantee the participatory rights and the effective judicial protection of the public concerned.

In recent years, the CJEU has kept up its activity in setting the procedural requirements for national judges related to Aarhus requirements as well as to general issues of environmental law. Law Unification Decision No. 4/2010 still imposes a relative obstacle on the Hungarian judiciary. However, the more restrictive approach can be identified in relation to most recent Hungarian legislative steps, which, in favour of particular interests modify the laws governing a wide circle of administrative proceedings. The goal of speeding up or reregulating these proceedings based on structural centralisation and investors' interests also have an impact on environmentally relevant proceedings – partly deprioritizing them.

IV. ACCESS TO JUSTICE IN HUNGARY AND ACCESS TO JUSTICE IN A BROADER CONTEXT

1. Third pillar rights in Hungary – From activism to the era of the restrictions?

The democratic transformation of 1989/1990 changed all of the Hungarian legislation and judiciary, as well as public administration, also including the creation of new democratic actors such as the Constitutional Court and the Ombudsman. This 'country-in-transition' period lasted over a decade and resulted in a relatively activist

⁸³ Judgment of *Kúria* (former Supreme Court of Hungary) No. Köf.5.004/2019/5.

⁸⁴ Act LIX of 2020 on special economic zones and on the modification of related acts.

⁸⁵ Agócs, Múlt, jelen és jövő szövetsége a települési környezet alakításában és védelmében, 30.

approach to the general framework of democracy and democratic accountability, with the broader involvement of civil society and NGOs as well. Their activism expanded to pursuing diverse strategies; they were also active as political actors and policy partners as well as watchdogs initiating judicial cases to enforce the newly enacted environmental legislation. A typical 'product' of this period is the Environmental Code, guaranteeing access to justice for NGOs in a relatively wide range of environmentally relevant proceedings. Consequently, the impairment of the rights doctrine could formally prevail, although the major question referred to judicial procedures was 'when' access shall be ensured, but not the dilemma of 'to which organisations'.

The next decade of the 2000s led to the accession of Hungary to the European Union, while major codification and legislative steps, including the ratification of the Aarhus Convention, were also taken. This period resulted in a multi-layered system of Aarhus third pillar requirements. The quest for the judiciary to take a decision on the circle of environmental matters, in which (when) the NGOs as watchdogs enforcing the EU-related (or even international) environmental laws could act became inevitable. The interpretation of the formal requirements remained relatively broad, while the circle of cases was bound to the involvement of sector-specific environmental authorities. This interpretation scheme has been challenged each time the legislator started to re-regulate the general or sector-specific legal framework of the administrative procedures, driven by diverse motivations, from the swifter allocation of the EU funds to the opt-out of certain projects, territories or policy areas. Meanwhile, the EU and especially the CJEU began to formulate ever-wider stipulations to ensure the proper implementation of Aarhus requirements, including access to justice rules. This tendency has further intensified as the Aarhus requirements are being read in conjunction with the non-sector-specific effective judicial protection laid down in the EU's Charter of Fundamental Rights.

In recent years, the CJEU has kept its intensified activity on setting the procedural requirements for national judges, while judgments have also been issued in relation to Hungary dealing with protection of certain environment elements. The interpretation scheme of the abovementioned law unification decision left the Hungarian judiciary in a rather unclear situation, even if the legislator is clearly required to clarify some issues in the current legislative framework of environmentally relevant cases. In light of the Commission's Green Deal, providing a much more horizontal character for the 'green issue' with a potential impact on every other policy areas, the reconsideration of the judiciary's interpretation model and further legislative steps seem to be inevitable. Nevertheless, the sometimes 'opt-out-based' legislation also continued in Hungary, while Aarhus-based strategic litigation led to the reformulation of some procedural principles in the CEE region.

2. Third pillar rights in the CEE region – Beyond tradition towards wider access to justice and more effective judicial protection?

The CJEU's intensified activity might have substantial cross-sectoral as well as regional relevance. Consequently, it might also be interesting to identify the major milestones in its Aarhus third-pillar related case-law along with the main incentives for the member states in this regard.

Broader standing rights are not just a policy-specific issue, but also a general objective of the EU, especially of the ECJ/CJEU to empower Union citizens (and NGOs as well) to enforce EU requirements before national courts as described above. The impairment of the rights doctrine might be an obstacle to this general goal of empowerment, as the legal tradition of certain member states collides with the goal of potentially broader enforcement. The turning point of recent years' case-law was not just the implementation of the Aarhus Convention, but the increasing relevance of the effective judicial protection that was being bindingly codified in the Charter of Fundamental Rights⁸⁶ and laid down by Article 19(1) TEU. The reprioritization of effective judicial protection also provides an opportunity to reinterpret the general protection of fundamental rights within the EU with a special focus on the scope of application between sector-specific vs. more sector-neutral approach.

As Widdershoven concluded, taking the examples of environmental law, asylum cases and public procurement, the EU's secondary legislation is increasingly regulating aspects of adjudication by national courts. The CJEU's Aarhus-related case-law became highly relevant in interpreting those rules guaranteeing very wide access to the court, and has its most positive effects by introducing the obligation to provide access and remedies that did not exist in national law before.⁸⁷ The German and parts of the Austrian legal system excluded NGOs as potential plaintiffs in environmental matters; similar deficiencies occurred in Slovakia and in the Czech Republic. These fundamental structures had to be modified based on the CJEU's case-law. Further CJEU judgments also had an impact on other elements of member states' procedural autonomy.⁸⁸ In the *Lz VLK II, Project Umweltorganisation* judgments, the CJEU directly referred to the Aarhus Convention read in conjunction with effective judicial protection. The approach of *Lz VLK II* on the 'exhaustion of available administrative remedies as a prerequisite for bringing a judicial remedy' has been applied in a Slovak data protection case.⁸⁹ The CJEU dealt with Hungary on the impairment of the rights doctrine as well as standing

⁸⁶ Article 47 CFR.

⁸⁷ Widdershoven, National Procedural Autonomy and General EU Law Limits, 5–34.

⁸⁸ Time limits in *Lz VLK II, Project Umweltorganisation*; or procedural requirements in *C-137/14 Germany vs. Commission*.

⁸⁹ Judgment of the Court (Second Chamber) of 27 September 2017, *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy*, C-73/16, EU:C:2017:725.

rights regarding network industries (using the analogy of the telecommunication judgments in a gas transmission case). Consequently, the CJEU's sector-specific set of guarantees elaborated in its case-law on standing rights, as well as on further procedural issues, has an ever-greater cross-sectoral and at the same time sector-neutral relevance. The impairment of the rights doctrine still prevails in the CEE region; however, its importance decreased in several policy areas. The effective judicial protection laid down by Article 47 CFR and by Article 19(1) TEU could provide a much broader sector-neutral scope of application for those guarantees which have been elaborated in the sector-specific case-law of the CJEU. The Aarhus-related case-law, as some kind of a 'pioneer area', could further contribute to this tendency by guaranteeing wider access to justice for NGOs.

