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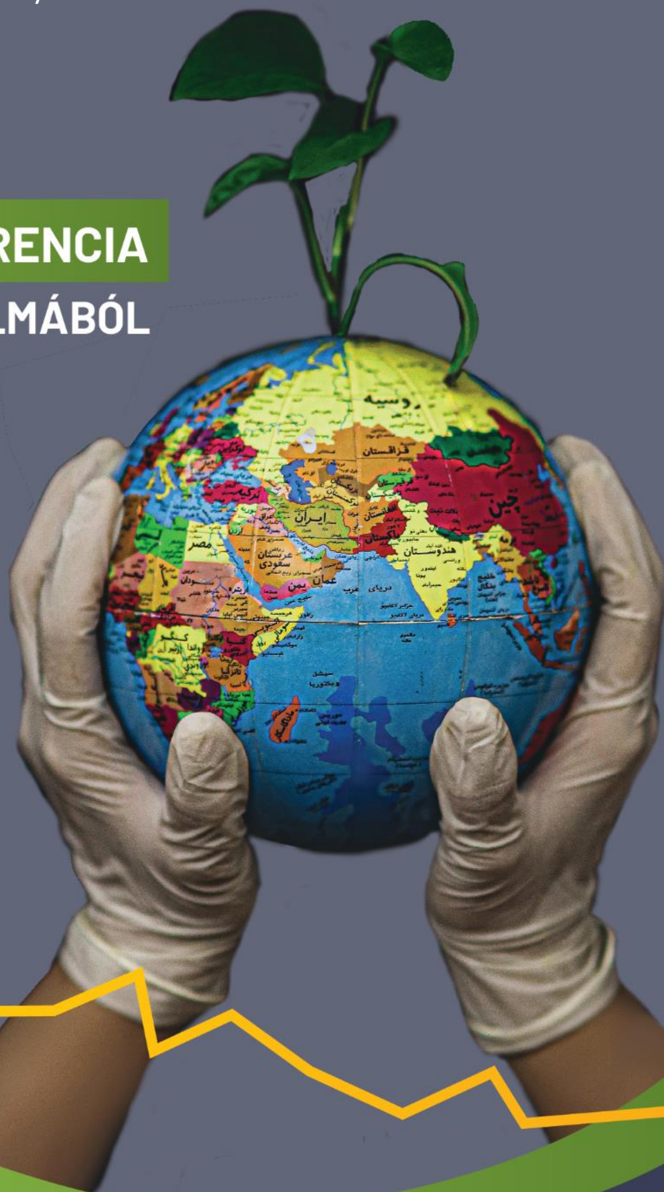

Sopron, 2021. november 4.
4 November 2021, Sopron

PANDÉMIA – FENNTARTHATÓ GAZDÁLKODÁS – KÖRNYEZETTUDATOSSÁG / PANDEMIC – SUSTAINABLE MANAGEMENT – ENVIRONMENTAL AWARENESS

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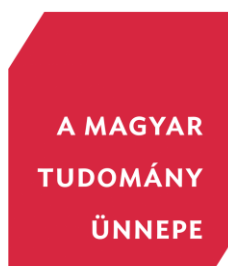

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Sustainability and EU Law. Latest Tendencies in the Field of Public Participation in Environmental Matters

Dr. Ágnes VÁRADI PhD
Research Fellow
Centre for Social Sciences Institute for Legal Studies

Abstract

"*Environmental issues are best handled with the participation of all concerned citizens, at the relevant level*". The wording of Principle 10 of the Rio Declaration draws the attention to the fact that public participation is a crucial element of ensuring environmental sustainability. The current paper aims to present developments related to two aspects of public participation in environmental matters at the level of EU law: the role of public consultation in environmental decision-making and access to justice in environmental matters. Concerning the first topic, the paper raises the question how public consultations appear in the recent case-law of the Court of Justice of the European Union, how their efficient implementation can be verified. As regards the second topic, the paper covers the new proposal, which aims to widen the possibility of access to justice for non-governmental organizations in environmental matters. Through the combination of the descriptive-analytical and the case-based approach, the findings of the current research can give useful insights into the practical and theoretical questions of public participation in environmental matters at the level of EU-law. At the same time the conclusions can support the more efficient participation of all concerned citizens in environmental matters.

Keywords: sustainability, access to justice, public consultation, Aarhus Convention
JEL Codes: K32, K33, K41

1. Introduction

"The fish cannot go to court [...] The environment cannot protect itself if it is threatened or harmed. It is public good and should be supported by public voice." These words of Advocate General Sharpston (cited by Notaro–Pagano, 2019) summarize the rationale of public participation in environmental matters in a very concise and vivid manner.

From the theoretical point of view, public consultations, as central elements of transparency, support accountability, sustain confidence in the legal environment, make regulations more secure and accessible, less influenced by special interests (OECD, 2010, 71; OGP, 2011). Regarding the human rights aspect, the main connecting factor is the right of every citizen to take part in the conduct of public affairs (safeguarded among others in Article 25 of the International Covenant on Civil and Political Rights). From the practical point of view, public participation can be seen as a tool, which contributes to a higher level of commitment from the citizens: "*Recent political events show that game-changing policies only work if citizens are fully involved in designing them.*" (European Commission, 2019).

In the context of environmental matters, these goals are enshrined in several policy-documents – like the European Green Deal (European Commission, 2019) – and international declarations – like the Rio Declaration (United Nations, 1992) or the Paris Agreement (United Nations, 2015).

Furthermore, they are defined in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter: Aarhus Convention or Convention) at a normative level (UNECE, 1998). The European Union concluded the Aarhus Convention by its decision of 17 February 2005 (Council of the European Union, 2005) and is a Party to the Aarhus Convention since May 2005. By becoming a party to

the Aarhus Convention, the European Union undertook to ensure, within the scope of European Union law a general principle of access to environmental information, including in EU law at the same time the right to participate in environmental decision-making and the right to review procedures to challenge public decisions alleged to violate environmental law.

The current paper aims to present developments related to two aspects of public participation in environmental matters at the level of EU law: the role of public consultation in environmental decision-making and access to justice in environmental matters.

2. Background and methodology

The question of public participation in democratic processes is a thoroughly examined topic in the relevant literature (Gray at al., 2017; Fraenkel-Haeberle et al., 2015; Quick–Bryson, 2016; Edwards, 2013; OECD, 2005). In the field of environmental matters, the provisions of Aarhus Convention also stand in center of attention (Bándi, 2014; Lee, 2014; Kingston, 2013; Holder–Lee, 2012; de Sadeleer et al., 2005), with special regard to administrative cases and access to justice rights (Harlow–Leino–della Cananea, 2017; Hedemann-Robinson, 2014; Mendes, 2011; Harding, 2007). In the most recent literature, appears also the question of efficient judicial cooperation in environmental matters (Squintani–Kalisvaart, 2020).

The current paper aims contribute to this scientific discourse by raising the above mentioned two specific topics. Concerning the first topic, the paper examines the question how public consultations appear in the recent case-law of the Court of Justice of the European Union (hereinafter: CJEU), how their efficient implementation can be verified. As regards the second topic, the paper covers the new proposal, which aims to widen the possibility of access to justice for non-governmental organizations in environmental matters. Through the combination of the descriptive-analytical and the case-based approach, the findings of the current research can give useful insights into the practical and theoretical questions of public participation in environmental matters at the level of EU-law. At the same time the conclusions can support the more efficient participation of all concerned citizens in environmental matters.

3. Public consultation in environmental decision-making and the case-law of the CJEU

When analyzing the approach of the CJEU to public consultations, the starting point is the understanding of the role of public consultation. Firstly, holding a public consultation is a formal requirement that can be part of the analysis of the factual background and taken into account as a necessary step in the legislative or project planning procedure.[1] Secondly, it appears as an element of legitimacy generally raised by the parties or in the opinion of the Advocate General.[2] In other cases, however, the role of public consultation is strongly related to the specific legal

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[1] C-669/16, E*uropean Commission v United Kingdom of Great Britain and Northern Ireland*, judgment of 18 October 2018 [ECLI:EU:C:2018:844] paras 21-27.
C-58/08, *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, judgment of 8 June 2010 [ECLI:EU:C:2010:321] para 5.
C-260/07, *Pedro IV Servicios SL v Total España SA*. judgment of 2 April 2009 [ECLI:EU:C:2009:215] paras. 58, 65.
Opinion of Advocate General Mengozzi [ECLI:EU:C:2017:925] delivered on 30 November 2017 in case C-5/16, *Republic of Poland v European Parliament, Council of the European Union*, para 48. See also the judgment in the same case of 21 June 2018 [ECLI:EU:C:2018:483] para 144.
Opinion of Advocate General Kokott [ECLI:EU:C:2011:755] delivered on 17 November 2011 in case C-567/10, *Inter-Environnement Bruxelles ASBL and Others v Région de Bruxelles-Capitale*, para 6.

[2] Opinion of Advocate General Campos Sánchez–Bordona [ECLI:EU:C:2017:910] delivered on 28 November 2017 in joined cases C-259/16 and C-260/16, *Confederazione Generale Italiana dei Trasporti e della Logistica (Confetra) and Others v Autorità per le Garanzie nelle Comunicazioni and Ministero dello Sviluppo Economico*, para 59.
Opinion of Advocate General Tanchev [ECLI:EU:C:2017:82] delivered on 2 February 2017 in case C-102/16, *Vaditrans BVBA v Belgische Staat*, para 63.
C-150/11, *European Commission v Kingdom of Belgium*, judgment of 6 September 2012 [ECLI:EU:C:2012:539] para 69.
Opinion of Advocate General Mazák [ECLI:EU:C:2010:743] delivered on 7 December 2010 in case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA*. footnote 30.

dispute. The results of the public consultation – especially if connected to the impact assessment – can serve as an argument when assessing the necessity and proportionality of a given decision-making procedure.[3]

As regards the specific aim of public consultations this instrument appears in the case-law mainly as a tool to discover alternatives of the planned project or regulation.[4] In certain cases, public consultations are treated – as a consequence of the practice followed by the European Commission – as part of the impact assessment of legal acts.[5] In other cases, however, a certain separation of the two concepts can be perceived: impact assessment and public consultation appear as separate elements of the decision-making procedure.[6]

The exact relationship of these concepts is extremely important as it defines the material scope of public consultations. If, public consultation is treated as part of the impact assessment, the findings of the evaluation of social, economic, environmental consequences cannot be commented on by the public concerned or this is at least significantly aggravated[7] (as the factors to be assessed are for the public much more difficult to discover on its own than to react on preliminary findings). The participation of the public concerned in identifying all possible consequences, however, could be also a significant task of public involvement.[8]

Such an interpretation is derivable from Regulation 1367/2006 (hereinafter: Aarhus Regulation) as well. Article 9 of the Regulation stipulates, namely, that „*Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment when all options are still open*." From this formulation would follow that the material scope of public consultations should be determined in a way that allows the broadest possibility for the public to express their views on the given project.

This argumentation seems to be applicable in the general context as well. In an opinion of the CJEU, the Advocate General mentioned that the public consultation brought to light practical problems in the given context.[9] This example shows that public consultation can contribute to finding the best regulatory or planning alternative; it helps to discover whether there is a problem that shall be addressed by means of legislation and to determine the extent and features of the given problem. Therefore, an interpretation should be preferred – and this would also be in line with the interpretation of the CJEU despite the conceptual uncertainties – which ensures that during the public consultation the results of the impact assessment can be commented on as well.[10]

As far as the personal scope of public consultations at EU level is concerned, the main dilemma is that widening the scope of public consultations could on the one hand enhance

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[3] Opinion of Advocate General Saugmandsgaard Oe [ECLI:EU:C:2018:241]delivered on 12 April 2018 in case C-151/17, Swedish Match AB v Secretary of State for Health, para 6 and the judgment in the same case of 22 November 2018 [ECLI:EU:C:2018:938] paras 41, 45.

[4] Opinion of Advocate General Tanchev [ECLI:EU:C:2020:874] delivered on 29 October 2020 in case C-389/19 P, *European Commission v Kingdom of Sweden*, para 20.

[5] Opinion of Advocate General Saugmandsgaard in case C-151/17, para 6.

[6] C-671/16, *Inter-Environnement Bruxelles ASBL and Others v Région de Bruxelles-Capitale*, judgment of 7 June 2018 [ECLI:EU:C:2018:403] para 20.

[7] C-58/08, *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, judgment of 8 June 2010 [ECLI:EU:C:2010:321].para 65.

[8] "*In the course of the public consultation which followed that decision, L and others raised objections to that plan, in particular on environmental protection grounds*." C-463/11, *L v M*, judgment of 18 April 2013 [ECLI:EU:C:2013:247] para 15.

[9] "*It is clear from the responses of most Member State governments to the public consultation on the right to family reunification carried out in 2012 (see http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/consulting_0023_en.htm) that there is little in the way of statistical data on the extent of the phenomenon of forced marriage in the European Union.*" Opinion of Advocate General Mengozzi [ECLI:EU:C:2014:288] delivered on 30 April 2014 in case C-338/13, *Marjan Noorzia v Bundesministerin für Inneres*, footnote 5.

[10] C-105/09 and C-110/09, *Terre wallonne ASBL (C-105/09) and Inter-Environnement Wallonie ASBL (C-110/09) v Région wallonne*, judgment of 17 June 2010 [ECLI:EU:C:2010:355] para 40.

legitimacy, but on the other hand, due to the number and the divergence of the opinions obtained, one single argument could hardly have a real impact on the decision-making process. At the same time it can make it more difficult for decision-makers to properly evaluate and react to all arguments raised. Attention shall be drawn to a decision, in which the CJEU stated in the context of the Directive on the assessment of the effects of certain public and private projects on the environment that it "*allows Member States to place certain conditions on participation by members of the public concerned by the project. Thus, under that provision, the Member States may determine the detailed arrangements for public information and consultation and, in particular, determine the public concerned and specify how that public may be informed and consulted*."[11] At the same time, however, this solution has as disadvantage that it limits the voices heard. That is why a model based on consultation with only the interested groups can make it at least questionable, whether a sufficiently broad public involvement is safeguarded.

The broadest possible involvement is further supported by a general argument of the CJEU case-law as it states that the more effective public participation in the decision-making process can increase, "*on the part of the competent bodies, the accountability of decision-making*" and contribute to "*public awareness and support for the decisions taken*".[12] All these findings confirm that the CJEU interprets questions related to public consultations in line with the principle of presumption of public participation (for a detailed analysis of this aspect in relation to the single pillars of the Aarhus Convention see Váradi, 2018). The optimal balance between the need for public involvement and the room for manoeuvre of authorities shall be ensured by the details of the relevant legislation (including e.g. rules on how authorities should deal with the comments received, how the comments should be taken into account, how they shall be answered etc.)

4. New developments in the field of access to justice for non-governmental organizations in environmental matters

In case of access to justice for non-governmental organizations in environmental matters the standards and expectations towards legislation and implementation of laws are much clearer defined. Taking the EU's Aarhus Regulation as an example, the UNECE Aarhus Compliance Committee concluded that EU law does not comply with the requirement of access to justice of the public under the Convention; neither the relevant legal provisions, nor the case law of the CJEU ensure the implementation of or compliance with the relevant provisions of the Aarhus Convention as a) it covers only administrative acts, or omissions to adopt such acts, that have legally binding and external effects; b.) it covers only laws relating to the environment "adopted" under environmental law under the Convention instead of any that act may contravene environmental law; c.) it covers only acts of individual scope; d.) it limits as regards access to justice public participation to certain NGOs. (UNECE, 2017).

In October 2020, the European Commission presented a legislative proposal on the amendment of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (hereinafter: Proposal) as part of a wider effort to improve access to justice in environmental matters. The Proposal primarily due to the declared high commitment of the current Commission to promote sustainability and foster environmental protection as enshrined in the European Green Deal intends to remedy the shortcomings identified by the Compliance Committee.

[11] C-216/05, *Commission of the European Communities v Ireland*, judgment of 9 November 2006 [ECLI:EU:C:2006:706] para 38.

[12] C-673/13 P, *Commission v Stichting Greenpeace Nederland and PAN Europe*, judgment of 23 November 2016 [ECLI:EU:C:2016:889] para 80. C-57/16 P, *ClientEarth v European Commission*, judgment of 4 September 2018 [ECLI:EU:C:2018:660], para 98.

The major innovation of the Proposal can be summarized as follows: *"[w]hereas currently an administrative review can only be requested for acts of 'individual scope' (acts which are directly addressed to a person or where the person affected can be distinguished individually), in the future NGOs will also be able to request review of administrative acts of 'general scope'. (…) The amendment removes the phrase 'under environmental law' from the definition of administrative act. (…) It provides clarity and legal certainty on the fact that any administrative act that contains provisions which may contravene EU environmental law may be challenged, irrespective of the act's legal basis or policy objective, as it is required under Article 9(3) of the Convention."* (European Commission, 2020)

This solution reacts to two problems identified by the Compliance Committee, but raises also new questions.

A problematic aspect stems from the exception of those provisions of the act concerned for which Union law explicitly require implementing measures at Union or national level. Some authors argue that the exclusion clause "*does not appear to be limited to provisions for which the decision under review explicitly requires implementing measures*" and therefore, "*there is a substantial risk that the exclusion clause would eventually be interpreted broadly*". (Paloniitty–Leino-Sandberg, 2021; similarly: ClientEarth, 2021)

Another concern stems from the fact that in case of administrative acts defined by the Regulation an internal review is possible in line with Article 10 of the Regulation and – by virtue of Article 12 of the Regulation – this may result in proceedings before the CJEU in accordance with the relevant provisions of the Treaty. A possible consequence of this solution is that it might not allow challenging the initial act adopted by the institution and forming the object of the internal review.

If the internal review request has been considered inadmissible, the measure that will be the subject of the judicial proceedings established under Article 12 of the Regulation will be the "written reply" from the institution not the original act. Therefore, it might be questionable whether the internal review procedure provides for adequate and effective remedies in accordance with Article 9 Paragraph (4) of the Aarhus Convention (Friel, 2020).

Not denying the relevance of these questions, it shall be recalled that a very important principle of interpretation of the Convention (Váradi, 2020) is the presumption for public participation, which is strongly related to the aims of the Convention, namely to the efficient protection of the environment.[13] Consequently, the provisions restricting public participation shall be interpreted narrowly, while other provisions ensuring the right of public involvement cannot be interpreted in a restrictive way. At the same time, relying on the principles of both the Convention and EU law in general can contribute to solutions that respect the role of public involvement but foster solutions that take the complexity and sensitivity of these issues into account also with regard to the specificities of EU law, competences and interests of Member States.

5. Conclusions

As a conclusion the following general consequences can be derived. The topic of public participation in environmental matters, with special regard to the provisions of the Aarhus Convention, is an equally substantial question at the level of legal regulation and political cooperation. The developments of the case-law and legislative proposals show a growing need for finding balance between different legal and non-legal factors.

In case of public consultations the need for the legislator to frame public policies with a sufficient margin of appreciation and the requirement of democratic control and efficient participation of the public concerned are the two main elements that shall be balanced. In the field of litigation in environmental matters based on the Aarhus Regulation, the Proposal seems to

[13] Case 470/16, *North East Pylon Pressure Campaign Limited and Maura Sheehy v. An Bord Pleanála and Others,* judgment of 15 March 2018 [ECLI:EU:C:2018:185] para 53.

be a compromise to broaden the access to justice rights of NGOs without provoking any far-reaching modification in the standard case-law of the CJEU.

These solutions necessarily imply unclarified questions. Therefore, the general principles of the Aarhus Convention might play a crucial role in improving openness and accountability in the field of environmental protection in the EU thus contributing to a more intense involvement and commitment of the public and of all stakeholders to the protection of the environment.

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