Recent development – Hungary

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1. Right to environment – Constitutional Court decision

Since the adoption of Fundamental Law in 2011, the interpretation of the new and extended vision of this Law in terms of the right to environment has not taken place. Now, the Constitutional Court could issue its first decision in the merits of the right to environment (decision No. 16/2015), proving on the one hand the continuity of the interpretation of the previous constitutional setting and the current Fundamental Law, and emphasizing the added value of the latter as compared with the previous one. Two additional conceptual elements shall be underlined: once the question of sustainable development which did not appear in the previous version of the constitutional right and as a second element – according to the Court - is the widening of the extension of those subjects, bound by the obligation to protect the environment. This means here that the Fundamental Law does not limit its scope to the state as the major obligor, but stipulates that the protection of the environment is the general obligation of everybody. The non-retrogression principle – being probably the most well-know element of the previous interpretation of the Constitutional Court, between 1994 and 2011 - has not been changed.

Interestingly enough, the current case is very similar to that of the first Constitutional Court decision (decision No 28/1994. (V. 20.)), focusing also on the protection of nature conservation areas, in connection with ownership rights of land and forests. The major question here is also connected with the likely lack of effective protection of nature conservation interests, if the property is managed only from the point of view of economic efficiency. Thus, there is a certain likelihood that those land and forests areas, having a protected status, managed up till now by the nature conservation directorates, which shall be managed by the state asset management afterwards, might have a lower level protection, as the additional guarantees, which might serve the nature conservation interests are missing. The Constitutional Court emphasizes in this respect the special role of proper administration in safeguarding the different environmental interests.

According to the Court (point 110): „The chance that the nature conservation interests are not sufficiently implemented, or even might be regarded as secondary aspects might generate long lasting negative externalities, social costs or even damages, which shall be taken as contrary to the obligation of Par. (1) of Art. P) of the Fundamental law, referring to the need to protect biological diversity, also to the safeguarding of endemic flora and fauna for future generations, but also contrary to the right to healthy environment as stipulated on Par (1) of Art XXI. If the legislator still wishes to grant nature conservation duties on organs having a business orientation, this may only be handled if special material and procedural guarantees are also available, in order to avoid that nature conservation objectives are subordinated to economic interests, mostly having a focus on profit. Knowing that these guarantees are missing from the current

regulation, there is a risk of having a precedence of efficiency of business activities over nature conservation aspects."

Unfortunately, we could not come closer to the context of the two above mentioned novelties of Fundamental Law, which means consequently that we are still waiting for the Constitutional Court to find the means of appropriate interpretation.

2. Waste management legislation - public services of municipal solid waste

The current waste management act has been adopted at the end of 2012, entering into force January 1, 2013. Since that time there were more then 400 (!) items amended in the act, many of them entering into force in some days, not allowing enough time for proper implementation. The National Environmental Council already at 22 December 2014 issued its general opinion on the problems of waste management legislation, warning the Government and the legislator that the lack of satisfactory preparation, the constant changes and the lack of conceptual vision have altogether negative impact on the situation of waste management. One major idea of the Government is to centralize the public services and practically nationalize – of course, not directly with a legal order, but indirectly with unfavourable conditions – the public services in waste management. The same National Environmental Council also in last October and this March commented the new and new drafts in this respect, always emphasizing the need to stop the constant and hectic changes in the system, which might have finally a likely fatal consequence on the service providers.

The most recent changes in March and April 2016 refer to the need of implementing EU requirements, but without referring to any exact data. Also these changes refer to the need to have a planned system of public services, while the special regulation which introduces a new special planning obligation related to public services was adopted later then the whole new system. This proves the total lack of concept. The public services are going to be coordinated, as it has already been stipulated at the end of 2012, but since that time the fourth (!) version and organizational structure is in force of how to make it. A good example of the notorious centralization is the need to regulate local public services in a central legal regulation, by ministerial order. This was the original setting since 2013, but they could not succeed and now instead of changing the concept the organs are changed.

From April 1, 2016 not only the adoption of the fees is centralized, but the payment shall go to the central organ, which decides how to give the money back to the service providers, who are in theory individual companies having a majority local government or government share.

3. Political and public pressure on courts – red mud case and criminal liability

In October 2010 Hungary had to face the greatest environmental accident or industrial catastrophe in our history – the red mud flood at Ajka[1]. The collapse of a part of the reservoir could cause fatal consequences and the whole environment around the area

[1] For details see, e.g.: https://en.wikipedia.org/wiki/Ajka_alumina_plant_accident

was heavily polluted, villages and houses destroyed. There were three different types of legal answers:

- a huge fine had been imposed on the company (MAL Zrt.) immediately,
- several civil law cases could start, most of them for compensation,
- 15 persons – managers of the company – were accused in connection with the three basic environmental crimes (damaging the environment, damaging nature and infringing the order of waste management).

While the compensation cases under civil law have been and are mostly successful, in the criminal proceedings against the managers could lead – at least in first instance – in January 2016 to the acquittal of the accused persons. The reasoning underlines that the accused persons could not have the chance to realize objectively the danger, which was mostly the consequence of bad planning (the given subsoil is not capable for storing such a huge amount of mud properly). The case is going on in second instance.

Why I mention this case is not the outcome of the first instance judgment, but the immediate reaction on behalf of a part of the public and unfortunately on behalf of many active politicians, also from the governing party. As a general rule the whole case from the early beginning was highly politicized, and there were several greater of smaller attempts to influence the judiciary. The other extremely important feature of this case and many others, is the role of the experts in any environmental cases and also the subordination of legal interpretation to the scientific evidence and its understanding.

Those critical views are willing to disregard the major difference between administrative, civil and criminal liability. While the first two are mostly based upon the no-fault concept, in case of criminal liability the direct participation, direct intervention of the accused person and also the intent or at least negligence shall be required.

In any case, the politicians – mostly those, who are sitting in governing position – should not undermine the public trust in the judicial system.

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