PUBLIC PARTICIPATION IN SPATIAL PLANNING PROCEDURES

Comparative Study of Six EU Member States
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Introduction

Spatial planning is an elusive topic for lawyers, planning experts (geographers, architects, sociologists etc.) politicians, let alone for laymen who just try to understand one concrete procedure in which they feel the environment of their settlement endangered. Indeed, it is a very complicated, interdisciplinary field of environmental protection practice and research where the basic terms and the legal nature of the institution itself are so vague that people sometimes contemplate on conspiracy theories like this: whose interest is that in a typical spatial planning system we have at least half a dozen of closely interrelated planning procedures, on different legal backgrounds with different participants, different procedural rules, deadlines, legal remedies (if any...). We don’t really know the true answer, but one thing is sure: it is the vested interest of the concerned local communities as well as of the environment that spatial planning decisions are understood and influenced by all of the interested parties and their representatives. The aim of the present 6 country legal research is exactly this. We try to analyse our spatial planning procedures in depth and show how the short, medium and long term interests of the concerned settlements can be ensured the best. We work with the methodology of systematic legal comparison that has several advantages: it makes easier to understand the really sophisticated spatial planning rules and processes in the participating countries and also enables us to reveal dysfunctional, superfluous regulation elements in our respective spatial planning laws and practices.

The researchers taking part in the project have jointly decided that before entering into the core issue of this project, public participation in spatial planning, we would clarify some important background issues:

- the constitutional nature of the spatial planning decisions;
- the interrelationship between spatial planning, construction permitting and various other relevant branches of environmental law (air, water, wastes etc.) and also some closely related branches of administrative law (forestry, mining etc.);
- and the role of strategic environmental assessment as an integrative legal tool.

All the country studies (see in the first Attachment) and the following summary starts with these issues and then analyses the possibilities of public participation in spatial planning procedures, together with the legal remedies available to the members and organisations of the public in case their participation rights or substantial rights to environment are infringed.

In order to understand better the most typical local and national level environmental conflicts in the field of spatial planning and also to gain deeper insight into the legal ramifications of them we have performed a survey of 14 relevant cases of the Compliance Committee of the Aarhus Convention. Naturally, owing to the limited capacities of the Committee and the difficulties of local citizen groups and NGOs to prepare a case for this international forum, these cases represent only a special thin layer of the European spatial planning cases. However, they are numerous enough to reveal the major traits of the most controversial local environmental legal debates and the jurisprudence of the Committee in a serial of important issues concerning public participation in general (Article 7 or 8) type of decision-making procedures of the Aarhus Member States.
Based on these multiple sources of information, the researchers of this compound studies could formulate certain suggestions concerning national level and possibly European level legislation on spatial planning and public participation. We do hope that our suggestions will be able to influence the legal practice of municipality councils, administrative bodies and courts, especially in access to justice matters. With these suggestions, and, actually with the whole research we also have the ambition to give ideas and rough materials to legal scholars and significant help to those professional NGOs that undertake the difficult task to deal with spatial planning issues and facilitate the fight for local communities and grassroots NGOs for the liveable future of their environment.

Our most important findings

(constitutional background) Concerning the constitutional legal background of spatial planning, the legislative or administrative nature of the decision-making procedures and the weight assigned to the central or local level decisions are quite different from country to country. The country researchers attached positive and negative features to each of these solutions, therefore we cannot attach an unambiguous evaluation to any forms and combinations thereof. Extreme centralisation or decentralisation of the spatial planning decisions, or exclusive application of legislative or administrative procedures for them would have negative consequences – fortunately, such extremities are not typical in the region.

(stakeholders) Quite numerous authorities take part in the spatial planning decisions on all (usually three) levels: construction, environmental, cultural heritage, catastrophe prevention, public health and many others. Other stakeholders, like business representatives can also find their ways of influencing these decisions directly or indirectly. Deliberative negotiations are made quite possible by this organisational arrangement.

(STRATEGIC ENVIRONMENTAL ASSESSMENT) SEA procedures are in principle mandatory for the majority of the spatial plans and their modifications. However, there are loopholes in the relevant environmental laws and they do not appear in those laws directly applied by the authorities and other stakeholders in spatial planning procedures. The SEA responsibility for modification of the plan is frequently overlooked, substantial alternatives are seldom taken into consideration and those who perform the environmental impact studies are usually in close relationship with interested parties, first of all with the designers of the plans themselves.

In addition to the contradicting and too lenient national SEA laws and regulations, practice shows that the authorities and municipalities many times fail to run a SEA procedure, even in projects with major environmental significance and if they apply SEAs, the results of them do not exert strong enough effect on the content of the plans.

Spatial planning and other laws enlist ambitious legal principles (e.g. integration, sustainable development and intergenerational justice) and refer to those professional fields that are to be taken into consideration in spatial planning, while the authorities representing these professional interests are entitled to take part in the SP procedures. However, detailed rules of turning the principles into legal practice and strong enough rights for the participating authorities are missing and the officials leading SP fail to be willing and able to handle in one procedure several dozens of relevant legal sources. This leads to environmentally unacceptable spatial plans (urban sprawl, loss of buffer zones etc.) and to creation of longstanding local environmental conflicts. Also they put heavy burdens to the permitting authorities that are faced requests on concrete activities based on such spatial plans.
(Public participation in spatial planning) Many country legislators might be afraid of “mass participation” in case of introducing a liberal public participation regime, while there is no convincing practical evidence that a wide scope of public participation would lead to so many motions from the members and organisations of the public that caused serious workload for the competent authorities. In effect, the members and organisations have limited resources, too, therefore, as a rule, they will be quite selective in public participation, however wide possibilities are they given to that. As a consequence of the negative attitude of the legislators towards environmental democracy, some of the elements of the system of public participation in spatial planning is tailored to be too narrow and unsatisfactory. Either the scope of the participants or different factors of participation are limited in the examined countries: they might have the relevant information too late, they might have too short time to answer them, they might have to little background information or the guarantees of due consideration of the public comments might be totally missing.

(Access to justice in SP cases) If the legislators are afraid of overburdening their spatial planning bodies, they directly dread to put even the smallest burden on the courts by introducing meaningful legal remedies in these cases. Access to courts is even more restricted than general participation in spatial planning: long time, high costs, lack of injunctive relief lead to the situation that in the examined countries practically no spatial planning decisions are substantially revised by courts. We can conclude that by the end of a long and very complicated procedure of spatial planning justice more or less disappears.

1. The constitutional legal nature of spatial planning

a. The legal form of the spatial planning decision and the level of the decision-making body

The legal form of spatial planning decisions might determine the circle the authorities and other bodies that participate in the procedure and also can be a determining factor in public participation matters and especially in access to justice. Where spatial planning is subject to a legislative decision, the sovereignty of the legislator will more or less prevail, while where it is an administrative decision, legal remedies of administrative or judicial nature are more possible. Naturally, compound solutions are being developed, too, for instance a legislative decision-making procedure with the participation of the relevant authorities with different level of influence. The basic data about the constitutional legal nature of spatial planning decisions in the 6 examined countries are the following:

<table>
<thead>
<tr>
<th>country</th>
<th>legislative-administrative axis</th>
<th>decentralised-centralised axis</th>
<th>time dimension</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Czech Rep.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Estonia</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td></td>
<td></td>
<td>shifts to right</td>
</tr>
<tr>
<td>Slovakia</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td></td>
<td></td>
<td>simplification of the d-m tools</td>
</tr>
</tbody>
</table>

While the higher level (national, regional) spatial planning decisions are naturally brought by the central authorities or legislative bodies, in the case of the local level plans such decisions can be quite decentralised. The above table shows that any mixture of these two axes might work in rule of law countries, although the extreme centralised columns are, fortunately, empty.
We note that the former communist countries, after their change of political and constitutional regimes generally opted for giving spatial planning issues into the hands of their local communities, therefore in these countries spatial planning took the form of a local legislative decision. However, as years passed, these countries had to realize that more central, professional control was necessary above such local ordinances, therefore the higher level administrative features became stronger and stronger.

The dichotomy of decentralisation-centralisation offers arguments in both directions: a local decision can be more informed, more strongly influenced and better accepted by the local communities, while it can be more biased because of certain local interests and less aligned with higher level, regional and national spatial and development plans. We note that usually there is an internal hierarchy of plans on local level too: overall development plans go first and they are broken down to spatial aspects, usually in several steps. One spatial plan might cover the whole territory of the settlement and could be general in nature, while others might refer only to certain parts of the settlement with a more detailed description of the conditions of constructions or other activities.

The legislative form – at least on the local level – might have more procedural guarantees during the decision is made, while the form of an individual administrative spatial planning decision usually ensures a good line of administrative legal remedies. Extraordinary remedies, such as constitutional court (H) or supreme administrative court supervision (Cz) and even the revision procedures performed by special governmental offices or prosecutors can be ensured for spatial planning decisions in legislative form, too. In Slovakia, however, the legislative form ensures some substantial procedural rights for the public, but in fact there are no legal remedies against the final act.

As concerns the direction of the flow of the overall planning procedure, in the majority of the countries it seems to be natural that first of all the national level document is prepared and that is cascading down to the regional and local levels. However, it could be an inductive, bottom up procedure, too. In Slovenia, the local spatial planning decisions are being made already since the entering into force of the 2007 SP Act, while the new overall national level plan has not yet been issued (some former national plans are still in force, however). Furthermore, in Estonia, some of the lower level plans were also established before higher level plans definitely on purpose. This however did not mean that they were „binding” to the higher level plans. At any rate, these arrangements in Slovenia and in Estonia allow us to conclude that the central planners will at least take into consideration the lower level plans when they form the central one.

The centralisation-decentralisation level might differ depending on the topic, too. In certain issues, such as in planning transport, forestry, water management, waste management, mining, nature protection, even in determining the overall settlement pattern (Est., Sl., Sk.) the tendency is that more central planning takes place than local one (see the same phenomenon in the Austrian report, too). In other countries this line is not so clear cut, local municipalities have considerable planning authority even in such priority issues (Hu, Cz.).

2. Bodies that bring and control the local spatial planning decisions or take part in them otherwise

Entering into the constitutional positioning of the spatial planning decisions in more details, the legal systems of the examined countries show that there are quite a couple of bodies that take part in this kind of state decisions and sometimes even business circles can also find the formal legal ways to exert influence on the spatial planning decisions that determine the prospects of their development.
<table>
<thead>
<tr>
<th>country</th>
<th>decision-making body</th>
<th>controlling (reviewing) body</th>
<th>participating bodies</th>
<th>business influence</th>
<th>comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>local municipality</td>
<td>regional authority</td>
<td>all fields of administration have the possibility</td>
<td></td>
<td>controlling is an approval of the land use plan</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>local or city municipality assembly regional assembly (for regional plans) government (for National Development Policy)</td>
<td>higher level administrative bodies, administrative court</td>
<td>nature protection authorities, environment, public health, cultural heritage, catastrophe prevention etc.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Estonia</td>
<td>local municipality authority</td>
<td>higher level administrative bodies, administrative court</td>
<td></td>
<td></td>
<td>citizens’ suits are allowed</td>
</tr>
<tr>
<td>Hungary</td>
<td>local municipality council</td>
<td>governmental office; chief architect</td>
<td>environment, public health, catastrophe prevention etc.</td>
<td>spatial planning contracts</td>
<td>administrative controlling is only a legality supervision</td>
</tr>
<tr>
<td>Slovakia</td>
<td>municipality</td>
<td>Regional government authority</td>
<td>nature protection, health protection authorities, cultural heritage, water management etc.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td>municipal council</td>
<td>Ministry of infrastructure and spatial planning (controlling only the procedure of adopting local SP acts – in form of an approval)</td>
<td>Nature protection authorities, cultural heritage, etc.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

We see that the local spatial planning decisions are decentralised in all of the examined countries, while the administrative supervision only rarely (Aut.) represent direct and substantial control. In all of these countries spatial planning has three (in Slovenia only in principle, while in practice only two) levels and in all, including the lowest level, there are several forms of spatial planning decisions. Their harmony with each other is an extraordinarily difficult matter, if we take into consideration that these forms, especially on lower levels are changing quite frequently. The major task of the controlling bodies is therefore to ensure the best possible fitting to the higher level plans both outside the local planning authority (external hierarchy) and amongst the various plans within the same level, mostly on the level of the municipality (internal hierarchy).
3. Environmental concerns taken into consideration in spatial planning

a. Legal rules of SEA in spatial planning procedures

In harmony with the Directive 2001/42/EU spatial plans that might have significant environmental impact shall undergo a strategic environmental assessment procedure in all the 6 examined countries. However, there are considerable differences in these legal systems when the SEA is mandatory or optional and in a couple of other issues, too, that we summarize in the following table.

<table>
<thead>
<tr>
<th>country</th>
<th>mandatory SEA</th>
<th>optional SEA</th>
<th>SEA for modification</th>
<th>who is preparing SES</th>
<th>alternatives to be taken into consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>certain plans by the federal authority and the individual federal states with some loopholes; land use plans by the local municipality</td>
<td>all modifications</td>
<td>for significant changes at national level, not always at regional level</td>
<td>competent authority</td>
<td></td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>only for the national and regional levels</td>
<td>for all the rest it is facultative (i.e. for municipal level)</td>
<td>always mandatory</td>
<td>the ministry or the regional officials</td>
<td></td>
</tr>
<tr>
<td>Estonia</td>
<td>higher level comprehensive plans and detailed ones if for Annex I</td>
<td>Annex II, N-2000, any for administrative permits later</td>
<td>for all</td>
<td>experts contracted with the municipalities</td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td>local plans, too if concerning the whole territory of the settlement</td>
<td>any other plans with significant environmental consequences</td>
<td>only the plans for the whole territory of the settlements</td>
<td>the planner body’s experts (but have to be registered experts)</td>
<td>only if examined</td>
</tr>
<tr>
<td>Slovakia</td>
<td>all with exemptions</td>
<td>small areas, but not closely specified</td>
<td>for all</td>
<td>The planner body (its experts have to be registered)</td>
<td>compare alternatives and variants</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Annex I cases</td>
<td>Annex II cases, Ministry of Env. decides</td>
<td>External registered experts that are hired by planning body</td>
<td>possible alternatives</td>
<td></td>
</tr>
</tbody>
</table>
We see that local spatial plans are themselves not always subject to SEA obligation unless the authorities in charge decide so when using their discriminatory power. No wonder, therefore, that there is few attention on the modification of the plans (although, in spatial planning, typically having a long history, one can call almost all the procedures a modification) which offers a wide loophole and an irrationally large discretionary power either to the designer organisation of the spatial plan itself or the authorities deal with such plan in the examined 6 countries, except Czech Republic. We see that in the majority of countries – if it is regulated at all – the strategic environmental study is prepared by the planner body itself which general solution undermines the independence and unbiasedness of the evaluation of the possible environmental ramifications of the plan.

In some countries spatial planning and SEA procedures can be merged (Est.) in order to save time for important investments. In several other countries (e.g. Cz.) SEA for spatial planning is regulated both in the EIA laws and in the building-construction act, showing clearly that this is a borderline territory of law.

b. Practice of SEA in spatial planning procedures

SEA is not typically an organic development of the environmental law in the examined countries. No wonder, while the text of the EU directive is incorporated faithfully into the legal body of the Member States in question, the guarantees of proper implementation are not fully available.

<table>
<thead>
<tr>
<th>country</th>
<th>how far is SEA applied</th>
<th>how far results inform the SP decision</th>
<th>comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td></td>
<td></td>
<td>The standards vary widely, screening is not sufficiently implemented, SEAs bypassed; environmental authorities and the public are not always consulted.</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td></td>
<td></td>
<td>On municipal levels, the responsible authorities (regional offices) often decide not to apply SEA without proper justification. When SEA is carried out, the report is often very general, not really evaluating the impacts but only “mentioning possible effects, which will be assessed in detail later” – which, however, makes really strategic assessment impossible.</td>
</tr>
<tr>
<td>Estonia</td>
<td></td>
<td></td>
<td>Screenings by municipalities of poor quality, especially regarding Natura 2000 areas, leading to fail to initiate SEAs. Results of SEAs are mostly taken into account, but a) not always and b) results may be dictated by the developer if it pays for the assessment.</td>
</tr>
<tr>
<td>Hungary</td>
<td></td>
<td></td>
<td>The municipalities usually simply overlook the screening responsibility and do not initiate it, not seldom they do not even know about this legal responsibility.</td>
</tr>
<tr>
<td>Slovakia</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td></td>
<td></td>
<td>Slovenia has a good legal basis for SEA procedure, the transposition of SEA Directive was satisfactory, but the implementation is rather problematic.</td>
</tr>
</tbody>
</table>
In the practice, municipalities either do not initiate the screening procedure or perform a weak environmental study with not competent experts (see e.g.: Hu.). An important (and probably more general than one country) experience from Austria: plans and programs that aim towards the protection of the environment such as national waste management plans, national water management plans etc. have to undergo a SEA procedure (because that’s what the EU directives prescribe), whereas many plans and programs that have a huge impact on the environment, such as plans on certain infrastructures, energy, tourism do not have to undergo a SEA procedure since this is not specifically required by any EU directive and the SEA directive has not been implemented accordingly throughout the entire environmental system. So the ‘good programmes’ have to undergo a SEA, whereas the ‘tiny, hidden but really bad’ programmes are released ‘just like that’.

A Slovenian comment is also informative and points to quite general features: „One of the problems is that in some cases there is no SEA procedure, even though it is needed. Another problem is that there is no direct information to the public involved what happens with public’s opinions and remarks given to the draft plan. In some cases the government accepts more strategic documents, where the hierarchy among them is not defined. So there is a problem, when SEA procedure has to be done – the government wants to postpone the procedure, but the public wants the SEA procedure to be done as soon as possible. For that reason it can be concluded that SEA procedure in Slovenia still is a kind of burden for the sector policy, which everyone wants to avoid.” We see clearly in the Slovenian example that the multiple participation in hierarchical decision-making procedures is quite problematic – this is also going to be examined in the practice of the Compliance Committee (e.g. the EU and the Lithuanian case).

c. Cross-cutting issues taken into consideration in spatial planning

As we have seen in the previous chapter, SEA procedures in general cannot always substantially contribute to the protection of environmental and related interests. Now we have to examine how far some key issues, such as nature and biodiversity, public health, resource protection and waste management are represented in the spatial planning laws and procedures. In other words, in this chapter we wanted to see the integration principle in work.

<table>
<thead>
<tr>
<th>country</th>
<th>topics</th>
<th>principles</th>
<th>detailed rules</th>
<th>guarantees</th>
<th>other sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>All fields of administration shall be represented in the local land use plans</td>
<td>The regional authorities have to consider all specifications when drawing up land development programmes and sectorial or regional programmes</td>
<td>Health, water and resources and proper management of waste is regulated in the respective acts of the federal authority; federal states are responsible for the designation of nature reserves and habitats</td>
<td>Water Act, Waste Management Act, Nature protection acts, etc.</td>
<td></td>
</tr>
<tr>
<td>Country</td>
<td>Type of Plan</td>
<td>Social Principles Description</td>
<td>Environmental Intentions</td>
<td>Examples</td>
<td></td>
</tr>
<tr>
<td>-----------</td>
<td>-----------------------</td>
<td>------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------</td>
<td>--------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>balanced development, compensation</td>
<td>intergenerational justice (sustainable development of land), there are not enough detailed rules about how the principles would turn into practice</td>
<td>participation of envir. protection authorities, possibility to arrange for local protection zones for environmental reasons – in practice they hardly can counterbalance economic and political interests</td>
<td>nature protection act, water protection act, health protection act</td>
<td></td>
</tr>
<tr>
<td>Estonia</td>
<td>green networks, leisure and recreational areas</td>
<td>equity rules established by Supreme Court SP practice, due account of all relevant factors, interests &amp; rights</td>
<td>comprehensive plans use different terminology from the environmental sources</td>
<td>municipalities can arrange for local nature protection zones</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>municipalities can arrange for local nature protection zones</td>
<td>regulation on noise standards</td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td>an excellent list (see below)</td>
<td>weak details</td>
<td>municipality environmental planning (was) encouraged</td>
<td>environmental code, waste mgmt. act</td>
<td></td>
</tr>
<tr>
<td>Slovakia</td>
<td>for all</td>
<td>The planner body (its experts have to be registered)</td>
<td>The planner body (its experts have to be registered)</td>
<td>for all</td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td>SP Act prescribes coordination between various needs on national level.</td>
<td>On national level the procedural provisions on coordination between different authorities are not detailed enough (in form of a joint conference meeting, etc.) On local level coordination is worse and often not simultaneous (but rather sequential) whis means that final solution is hard to establish</td>
<td>list of protection topics to be included into the local SPs</td>
<td>environmental protection act</td>
<td></td>
</tr>
</tbody>
</table>
This table shows clearly the structural weakness of the spatial planning regulations of the examined countries: although in some cases there are great topics addressed and goals set with the most relevant legal principles of sustainable development and even intergenerational justice (Cz.), the detailed, implementing rules do not exactly follow this line and there are not enough institutional or procedural guarantees to implement the major environmental commitments in the everyday practice of spatial planning. We see the only way out of this contradiction if the decision-makers and bodies handling legal remedies in spatial planning cases were able and willing to use the available legal sources in a holistic, systematic way. This would mean that not only the building, construction and spatial planning rules had to be implemented in the spatial planning procedures but the relevant general and special (technical, with concrete standards etc.) environmental legal sources, too.

Hungary had a special situation when its Construction Act was prepared: the Act was drafted by a Ministry of Environment and Physical Planning. Therefore, there are plenty of progressive declarations in the spatial planning chapters of the Construction Act, while the lower level, detailed regulations cause disappointment to those who are for environmental protection and for interests longer term than that of the average local politicians. Lessening the transport needs, supporting healthy workplaces, sparing with free green spots and arable lands, operating with the term biological activity, lessening visual environmental pollution, supporting bicycle paths, green rings around settlements and encouraging brownfield management, a reference even to the city climate protection – these are the quotes from the 1998 Construction Act we especially liked to read. We don’t see, however, the guarantees of implementation: there is no clear institutional responsibility for the implementation, neither any sanctions, procedures etc.

As concerns the practice of consideration of environmental and related topics in spatial planning procedures, one of the most typical conflict is the loss of buffer zones, where activities with significant environmental pollution (e.g. several public transport or agricultural activities) can get right beside dwelling areas – either because the industry, agriculture or the dwelling area were designed into a non-proper place or because of the opposite case, the dwelling area sprawled near the already existing polluting or disturbing activities. In addition to that the Czech research has pointed out that even if the spatial planning documents are full of progressive environmental languages, a lot of concrete questions concerning environmental protection will be dealt with not in the spatial planning phase but only in the subsequent administrative procedures, such as land use permitting and building permit procedure, and also special environmental administrative procedures such as permitting exceptions from certain nature protection rules.

4. Public participation in spatial planning procedures

In the most important part of our comparative legal study we have examined first of all the subjects of public participation in spatial planning decision-making procedures, i.e. that which circles of local communities and NGOs (local, regional, national, professional etc.) has the right to take part in the spatial planning procedure, under what conditions, if any, and what the legal position of them in the procedure looks like. When surveying the details and the quality of public participation we have applied the criteria of and the conditions of public participation summarized in Article 6 of the Aarhus Convention mutatis mutandis to spatial planning cases. We have examined if only the individuals with direct interests at stake or communities, local groups and national level professional NGOs are also allowed to take part in spatial planning, and those who have the right to participate in principle, upon which conditions (scope of activity, being connected with the affected area etc.) can do that. Furthermore the country studies encompassed the issue how the notification is done about the onset of the procedure and how deep and detailed the information contained thereof;
if the procedure is iterative, in what stages the members and organisations of the public are allowed to have a say; also what the deadlines of issuing opinion are in these stages; and what the procedural guarantees of due consideration of public opinion are.

<table>
<thead>
<tr>
<th>country</th>
<th>who can take part</th>
<th>conditions of NGO participation</th>
<th>notification</th>
<th>information provided for the public</th>
<th>deadlines to express opinion etc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>every natural persons but only in SEA cases; personally affected parties only regarding their own interest</td>
<td>NGOs do not have the right to participate; some individual states organise round tables for SEA procedures where plans and programmes are drafted cooperatively with authorities, experts and the organised public (NGOs, chambers)</td>
<td>At the level of the individual federal states plans have already been set up when the public is involved; only in some individual federal states the Environmental Ombudsman has the opportunity to present its comments on the draft plan. Personally affected parties shall be informed individually and personally</td>
<td>Draft plan or programme</td>
<td>4-6 weeks</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>anyone can make comments, affected municipalities, land owners</td>
<td>and <em>representatives of the public</em> can make objections, too (representing 10% up to 200 people from a municipality, or 500 people from the region with respect to regional plans)</td>
<td>information about the draft published on public notice and internet; voluntarily most authorities publish also the draft online</td>
<td>all information is available at the responsible authority, mostly also via Internet</td>
<td>4-6 weeks</td>
</tr>
<tr>
<td>Estonia</td>
<td>anyone</td>
<td>within one month from the start of the official procedure</td>
<td>location, aims, consultations’ details/in the detailed phase summary of contents, impacts, terms of land use</td>
<td>ranges between 2-4 weeks</td>
<td></td>
</tr>
<tr>
<td><strong>country</strong></td>
<td><strong>pp. in several stages</strong></td>
<td><strong>guarantees of due consideration</strong></td>
<td><strong>form of communication</strong></td>
<td><strong>guarantees of due procedure</strong></td>
<td><strong>practical experiences</strong></td>
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</tr>
<tr>
<td><strong>Austria</strong></td>
<td></td>
<td>personally affected parties (owners) shall be informed individually and personally</td>
<td>public display on the Internet, notice boards, newspapers, exceptionally press conference, TV programme</td>
<td>participation of the state environmental ombudsmen</td>
<td>in some places roundtables are organised where plans are drafted in cooperation by experts, authorities and NGOs</td>
</tr>
<tr>
<td><strong>Czech Rep.</strong></td>
<td>all stages</td>
<td>the relevant authorities shall issue a decision on objections and this can be challenged at adm. courts</td>
<td>notice board, Internet</td>
<td>control by superior administrative authority, ex-post control by administrative court</td>
<td>the decisions are often of political nature, the participation process is often just formal</td>
</tr>
<tr>
<td>Country</td>
<td>Stages</td>
<td>Access to information</td>
<td>Opinions and suggestions</td>
<td>Legal remedies</td>
<td>Participation process</td>
</tr>
<tr>
<td>---------</td>
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</tr>
<tr>
<td>Estonia</td>
<td>all stages</td>
<td>official journal, daily national and regular county newspaper/notification board, as well</td>
<td>home page of the municipality</td>
<td>without opinion taking the plan is null and void</td>
<td>in the smaller portion of the cases the municipalities either fail to notify the public (&quot;minor modification&quot;) or excludes certain NGOs</td>
</tr>
<tr>
<td>Hungary</td>
<td>in all stages and phases except the negotiating trial with the chief architect</td>
<td>the mayor shall forward the refused opinions to the council before voting; a separate decision is brought upon them with explanations</td>
<td>mandatory public hearings in all the three stages; separate discussions with directly affected persons</td>
<td>control by superior state administrative authority and prosecutor</td>
<td>the public participation process is often just formal</td>
</tr>
<tr>
<td>Slovakia</td>
<td>in all three stages</td>
<td>notes shall be taken on not accepted comments</td>
<td>mandatory public hearings in all the three stages; separate discussions with directly affected persons</td>
<td>control by superior state administrative authority and prosecutor</td>
<td>the public participation process is often just formal</td>
</tr>
<tr>
<td>Slovenia</td>
<td>in all three stages on national level but only in one stage on local level (when the final draft of SP act is published)</td>
<td>Planning authority publishes a document, which consists of official answers/comments on proposals and comments made by public.</td>
<td>the website of the ministry and of the municipality</td>
<td>form of public display, with different options</td>
<td>Public participation is usually limited to formal options, on local level there is a lack of early and efficient public participation</td>
</tr>
</tbody>
</table>

Public participation consists of a system of legal institutions, usually called the pillars of public participation: possibilities for the public to have access to information, expression of their opinion, making suggestions and apply legal remedies. There is a fourth part of the system that is capacity building, i.e. the support and help from the authorities or from others in case it is necessary for the fair and equitable position of the members and associations of the public in the decision-making procedures (capacity building is regulated especially by Article 3 of the Aarhus Convention). Public participation regimes concerning spatial planning shall therefore be evaluated in a systematic manner: we have to examine the interrelationships of the elements of the system and shall be aware that usually the weakest element of a system manages to determine the efficiency of the whole.
As concerns the circle of the persons and organisations entitled to take part in the spatial planning procedures in the 6 examined countries the picture is rosy: with some exemptions generally anyone has the right to express his/her opinion on a draft spatial plan. NGOs, however, might have difficulties in some countries in certain types of decision-making procedures to have admittance into the cases. A special development could be noticed in Hungary, where, unfortunately, the brand new concept of “civil partners” might raise the suspect that the mayor or other municipality officials would more or less arbitrarily select those persons, local groups or NGOs who are “good partners”, and the rest of the interested persons would not be entitled to take part in the spatial planning decision-making procedures.

At the time being we have no practical data collected and analysed in the Hungarian case, therefore we cannot fully evaluate the true interpretation and consequences of this legal solution, but one thing is sure: it is really unfortunate to introduce such a vague term to designate the group of persons as entitled to participate (however leniently the selection procedure might be going at certain places). It is also disturbing the relations in public participation that according to the new Hungarian spatial planning law civil partners can be not only dwellers, local communities and NGOs, but business organisations and churches, too. As concerns business especially, it has plenty of formal and informal channels to influence spatial planning procedures, to take part in them also as a “civil partner”, using the tools of public participation is “double bite from the same apple”, at the best.

Leaving the static part of public participation behind us and entering into the field of dynamic issues, the first motion of the procedure, notification is made in due time in the majority of the examined legal systems. However, in Slovenia the start of the procedure seems to be considerably delayed. The notification of first intentions of adopting SP act is too late, and also public participation is too late if we look the whole process of adopting SP acts. Almost every detail is already decided when public is informed and has the right to participate. This is against the principle of early participation where all the options are still open.

The amount and quality of information to be provided to the participating members and organisations of the public is usually not regulated carefully enough. Some legislative hints, however, allow us to conclude that important portions of the planning documentation are withheld in many countries.

The time available for the public to form its opinion is usually enough to discuss the materials amongst themselves and with their experts. However, in Hungary a new concept has emerged, the expedited procedure for spatial planning procedures in connection with priority investments. The 15 days deadline in a larger, complicated matter might not be enough to properly elaborate the public responses.

As concerns the due consideration of the comments made by the public, the Slovakian rapporteur notes that even if the comments are duly discussed, there is no further legal guarantee of actually taking them into consideration. A regular legal remedy, e.g. a court review specially focusing on that issue could help here (see for this Chapter 1). The practical experiences arrived from some countries just reinforce this opinion of the Slovakian national expert of our project.
5. Legal remedies available in spatial planning procedures

In this chapter we examine what kind of remedies, if any, are available for the members and organisations of the public in order to challenge the procedural and substantial issues of the spatial planning decisions. The nature of legal remedies will certainly differ according to the constitutional nature of the decision (Chapter 1 above). Standing, fora, deadlines, and – mutatis mutandis – the four criteria of qualitative assessment of the access to justice procedures according to Article 9(4) of the Aarhus Convention were also visited here: we evaluated our legal systems that serve spatial planning and public participation in it concerning their fair, equitable, timely and not prohibitively expensive features. We could use the qualifiers thereof, too: adequate, effective and also the descriptive elements: accessibility of injunctive relief, decisions recorded in writing (might not make sense under our jurisdictions anymore) and being publicly accessible. Also the special capacity building issues included in Article 9(5) were taken into consideration, such as information provided to the public on access to several kinds of review procedures and existence of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. We differentiated between the supervision of the substantial issues (e.g. by a constitutional court review of a municipality decree or a decree of the relevant minister) and the review of the process, first of all public participation (e.g. a review of whether or how public comments have been considered/incorporated/dealt with by those authorities or legislative bodies that developed the plan).

At first we survey shortly the availability of the remedies itself in Point a) and then dwell upon the detailed issues of the quality of legal remedies available in Point b).

a. Availability of the remedies

<table>
<thead>
<tr>
<th>country</th>
<th>constitutional court</th>
<th>administrative court</th>
<th>regular court</th>
<th>administrative revisions (external)</th>
<th>others (ombudsman, prosecutors)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Czech Rep.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Estonia</td>
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<td></td>
<td></td>
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<tr>
<td>Hungary</td>
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<td></td>
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<tr>
<td>Slovakia</td>
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<td></td>
<td></td>
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<tr>
<td>Slovenia</td>
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</tr>
</tbody>
</table>

As we see from the above table, with the exception of Slovenia and Estonia, there are multiple legal remedies available for revision of spatial planning decisions. The scope of revision, as a rule, is much narrower for the constitutional court and the number of cases that are accepted by the constitutional courts is usually also quite limited (the Hungarian constitutional court’s 900 cases within 20 years might be an exceptionally high number). Administrative and regular courts might have much more capacities and their scope of revision is broader, too. In addition to that, administrative courts have a deeper insight into the professional issues. Taking all of these into consideration, a division of work seems to be logic and actually, this is the case in a couple of the examined countries: at least two kinds of court revision are made possible in these countries.
In connection with the administrative revision, we have to underline that in all countries this is different from the regular administrative revision procedures. As the Czech report points out, regular administrative remedies usually have suspending effect. In contrary to that, administrative revision available for spatial planning decisions are not sharing features with a second instance administrative procedure in the case of an individual administrative decision, because spatial planning decisions are more general in nature (see especially the explanations in the Cz. and Hu. reports).

**b. The quality of the available legal remedies**

<table>
<thead>
<tr>
<th>Country</th>
<th>Fair-equitable</th>
<th>Timely</th>
<th>Costs</th>
<th>Injunctive Relief</th>
<th>Review of process &amp; substance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Review is only possible if a regulation has been adopted and only upon directly affected persons</td>
<td>there are fixed deadlines for the court revision procedure (3 years to initiate and 90 days to finish the case)</td>
<td>It is possible to apply for legal aid</td>
<td>None</td>
<td>Both</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>Access to the court process is strongly based on property right, the national level plan cannot be challenged</td>
<td></td>
<td>Court cases have a cca 200 EUR fee</td>
<td>None</td>
<td>Both, but procedural faults lead to annulment of the plan only if they seriously infringed the rights of the complainant</td>
</tr>
<tr>
<td>Estonia</td>
<td>Administrative review is only for the affected, but the court review can be initiated by anyone</td>
<td>30 days for the complaint; administrative review shall be done within 10 days (can be prolonged to 30) in court cases these deadlines are 30 and 60 days of the final hearing (preparation and hearings can add considerable delays of up to a few years)</td>
<td>Loser pays the court fee (cca 15 EUR) and extrajudicial costs (e.g. lawyers) of the winning party; this can be reduced by the court on equity bases and there are financial assistance mechanisms, too (latter are only available in case of really serious financial difficulties)</td>
<td>Available both in the administrative and in the court review (and no bond or damage is to be paid by the initiating party). In effect it is suspending the validity of SP that halts other processes based on it</td>
<td>Both, the administrative review can encompass functionality issues of the plan, too</td>
</tr>
</tbody>
</table>
Hungary | ex officio procedures, but available for everyone to initiate | no time constraints | low or free | none | both
---|---|---|---|---|---
Slovakia | automatic, ex officio procedure, the public has no right to interfere/ the prosecutors’ intervention can be initiated by the public, its up to prosecutor if he will bring an action or not | mandatory administrative revision before the spatial plan is adopted | none | both
only interested parties | |

There are serious constraints in almost every countries to have access to legal remedies in case of spatial planning. The number of substantially revised cases is therefore pretty low. Under these circumstances it would be especially important that the revising bodies offer progressive interpretation of the underlying building, planning, environmental and other laws and also have a close look at the legality of the procedures the spatial planning bodies followed. Even if such sporadic examinations of the spatial planning decisions could send a positive message in certain cases to the stakeholders, their immediate value and effects are pretty low in such cases where the decision on revision follows the basic decision by several years. This is the case first of all with the constitutional court decisions, but in quite a couple of cases timeliness of regular or administrative courts are questionable, too.

Summary by the authors

At the beginning of the program, the authors have formed the following questions to help ourselves form the most important lessons of this comparative research. By the end of the program they all have found their respective answers.

How do you evaluate the level of environmental democracy in this field?

The Estonian country study concludes that the level of environmental democracy in spatial planning is fairly high. Also, the Czech general opinion was positive: the Czech law guarantees judicial review, setting forth special rules for it and this can be considered as one of the most effective legal instrument of judicial protection of the environment and related rights of the affected persons.

The overall Slovenian evaluation was much more negative: the Slovenian spatial planning system on local level is not in harmony with the Aarhus Convention and the public in general have no effective legal remedies against spatial planning acts. Likewise, according to the Slovakian report, public participation in their country in spatial planning processes is insufficient and does not meet the obligations set by the Convention.

According to the Austrian reporter the level of environmental democracy in the Austrian spatial planning procedures is relatively low, even if some individual federal states are very ambitious about public participation. Since the SEA directive has not been implemented accordingly and not in all relevant sectors, public participation and access to review procedures are very restricted. The overall picture of environmental democracy in spatial planning issues in Hungary seems to be definitely negative, too: as time goes on, restrictions on access rights are being introduced, while the earlier rights and procedural supports of the public are disappearing piece by piece: spatial planning is more and more centralised and formal administrative decisions take over the former deliberative procedures.
Where do you see the bottleneck(s) of a meaningful and effective public participation and access to justice in spatial planning (SEA) procedures in your country?

In Estonia the bottleneck seems to be the time the authorities display of spatial planning documents (2 or 4 weeks) whereas they are reluctant to apply the longer deadlines even in complex cases. Lack of capacities and willingness of the authorities to actually use the otherwise progressive spatial planning procedural rules is the main hindrance of meaningful public participation. Official obligations are frequently performed only formally, for instance the notification is done according to the law, but in a technical/legalistic language that makes hard the issue at stake to comprehend by the general public. In Slovakia the bottleneck is the actual consideration of the input from the public participation procedures. In the lack of clear legal obligations to do so, public participation becomes in majority of the cases a mere formality. In Austria many plans with crucial impact on the environment do not have to undergo a SEA procedure, such as plans regarding transport, energy and tourism, in several cases even the screening procedure is missing for such plans and programs.

In the Czech Republic the key problem of public participation and protection of the environment relates to the application of the doctrine of “impairment of rights” by the courts and in connection with that denial of standing of NGOs and the so called representatives of public in challenging the regional land use plans. In Hungary the worst features of the spatial planning cases are in the practical cases the several tricks the municipalities strive to circumvent public participation with: fragmented regulations, almost impossible to follow for the members and organisations of the public, frequent changes of the plans (in some cases even within one procedure: after the public and professional authority opinions were made, the designer of the spatial plan introduces major changes into the plan, this way bypassing these opinions) and sometimes even straightforward infringement of public participation rules.

Are there any grievous occurrences that reach the level of non-compliance with articles 9(3) or 9(4) of the Convention?

In Estonia we haven’t found such occurrences. In Slovenia, however, first of all because the overwhelmingly legislative nature of the spatial planning decisions, access to justice was found very weak. Especially on local level, public participation is not allowed at the early stage of the planning procedures, because the public is not informed on first goals and intentions concerning spatial planning and has no opportunity to propose alternative spatial solutions for some plans.

In Slovakia the members of the public has the right to request the courts to review the legality of both the process and the content of a spatial plan, but the requirements of Article 9.3 of the Aarhus Convention are generally not met in the review procedures. In Austria the major fault in implementing the Convention seems to be the late involvement of the public, by the time when the plans have already been set up. In addition to that civil society and the NGOs do not really have the right to participate. Outside the scope of SEA, spatial planning procedures do not truly allow civil society and the public in general to be involved in the decision-making procedures. Article 9(3) and 9(4) are not complied with either, because of extremely limited legal remedies available only to even the directly and personally affected persons.
The limited access of NGOs and representative of the public to the court remedies according to the Czech spatial planning laws was found as a breach of Article 9 of the Aarhus Convention in the Compliance Committee case No. ACCC/C/2010/50. Hungary had also a Compliance Committee case (No. ACCC/C/2004/4) where, although she was not found in direct infringement of the Convention, was strongly warned for not maintaining the non retrogression principle. The subject of this case was that Hungary, referring to the need to expedite of the planning and permitting procedures of certain priority investments, shortened the time period of public participation and excluded certain legal remedies for the members and organisations of the public. Even if these changes were definitely negative ones, the Hungarian party defended herself that the country’s overall public participation regime is still within the borders established by the Convention.

What would you qualify from the spatial planning laws and legal practice of your country as best practices or even as a possible meaningful input into drafting of the EU Access to Justice Directive?

The best practice in Estonia is that everyone is entitled to take part in the whole proceedings and may submit comments at any points of them and the authorities are obliged to reply to all comments within 4 weeks. Also, while the practice is diverse, there are good examples of finding effective communication channels such as blogs, mailing lists or Facebook groups used by some municipalities. In the field of access to justice, in Estonia everyone has the right to challenge final spatial planning decisions at the administrative courts (it amounts to an action popularis) and – contrary to the critics – this haven’t lead at all to overburdening the courts (spatial planning cases even together with construction cases were not more than 6 % of the total number of cases in administrative courts in 2011 and 2012). A strong suggestion coming from Estonia is to pay more attention to the costs of legal remedies. Otherwise just those who are most in need (on the account of whom the most legal abuses might take place), the poorest are totally excluded from the legal remedies once they have to afraid of paying the whole cost of the procedure including the cost of the third persons interested (e.g. tens of thousands of Euros that were paid by the real-estate developers to their professional lawyers). Although courts have the right to reduce the costs the loser party is obliged to pay and have often done so, it depends on the discretion of the judge and turns out only at the end of the procedure. Poorer parties should also have access to free and quality legal aid, especially in the cases where they raise an action in the protection of public interests (not only personal ones) which is quite frequently the case in spatial planning issues.

The best side of the Slovenian situation in spatial planning is that the Ministry of Infrastructure and Spatial Planning is preparing new legislation on spatial planning and construction permitting until 2014 and major Slovenian professional environmental NGOs are allowed to actively participate in that process. Some Austrian federal states organise roundtables and involve the public at an early stage of decision-making. It takes place whenever and where the authorities expect in some way to derive political benefit or public support from ensuring effective public participation regimes.

The court revision in the Czech spatial planning legal system is ensured in the early stage of the decision-making procedure and in the same time, there is a strict deadline for the regional courts to decide on such cases. A positive side of the Hungarian public participation system in spatial planning issues is the clearly deliberative, iterative nature of the procedure. From the onset of the procedure the members and organisations of the public have the right to make comments, suggestions or objections in several rounds whereas they can become familiar with the standpoints and arguments of all the other parties in the planning procedure.
Suggestions

Based on the country reports (Annex I.) and their summaries and also on the Aarhus Compliance Committee case studies (Annex II.), we put together a list of suggestions. These suggestions are not specific by their targets: they can be used by legislators and by legal practitioners on both the designers’ side or on the side of the members and organisations of the public.

(Constitutional background) Concerning the constitutional legal background of spatial planning, a good balance shall be found between the legislative or administrative nature of the decision-making procedures and the weight given to the central or local level decisions. Both the viewpoints of practicality (quick and effective procedure, simple, transparent structures etc.) and rule of law (proper professional, legal and community control above the whole decision-making procedure etc.) shall be satisfied. In addition to these, due account shall be given to environmental and intergenerational justice features. Any of the extreme solutions – exclusive use of administrative or legislative approaches or extreme centralisation or decentralisation – shall be avoided.

(Stakeholders’ participation) The iterative, deliberative qualities of the existing SP procedures shall be enhanced. Substantial role and responsibility shall be given to those quite numerous authorities that already take part in the spatial planning decisions (construction, environmental, cultural heritage, catastrophe prevention, public health and many others). On the other hand, it is avoidable that the interests of the business representatives could play a decisive role in the spatial planning procedures. Triggering off the start of the procedure, the SP procedure itself and the decision shall be ruled by the long term economic, social and environmental interests of the whole concerned community, not reversely: the short term economic interests shall find their satisfaction within the frames of the finalized spatial plans, not by directly or indirectly forming these frames.

(Building in SEA into the procedure more organically) Strategic Environmental Assessments shall be made more unambiguously mandatory for the majority of the spatial plans, especially their modifications. Vague terms and loopholes in the relevant environmental laws shall be eliminated and the responsibility to perform SEA shall appear in the laws directly applied by the authorities and other stakeholders in spatial planning procedures. In all the cases where the SEA responsibility is partly or fully overlooked, substantial alternatives are not taken into consideration or those who perform the environmental impact studies are not totally independent (in organisational, financial or any other ways) from the initiators and the designers of the plans shall be subject to serious sanctions and procedural automatisms that make the whole SP procedure without a proper SEA null and void. There shall be also serious institutional and procedural guarantees of full consideration of the results of the SEA procedures in the cases of projects with major environmental significance.

(Environmental principles in SP) Basic principles of environmental law, such as integration, sustainable development and intergenerational justice, polluter pays, public participation etc. shall be included into the SP laws and regulations and shall play determining role in the practice of SP, too, because their overall aim supporting long term sustainability in the communities is overlapping with thereof in SP. Integration principle shall especially permeate the SP procedures through strong procedural rules ensuring the participation of the representatives of all professional bodies relevant to the SP procedure and by making sure that their opinions are taken into consideration in the final spatial planning decision. In order to achieve these, the officials leading SP procedures shall be trained and motivated to apply in their procedures all the relevant legal sources and to effectively communicate with the representatives of other professions.

(Realisation of the values of public participation) Apart from professional preparedness and motivation, the authorities leading or involved in SP procedures shall clarify the actual conditions and true effects of public participation in SP. They all shall be aware of the number and rates of cases with meaningful public participation and shall have information about the effects of them, too.
Unless unbiased statistical data and analyses show that public participation causes an unbearable burden on the interested sectors of administrative bodies, opportunities to public participation shall be broadened. The scope of the participants or different factors of participation, the relevant information they receive, the time to answer them, the background information or the guarantees of due consideration of the public comments shall be effectively supporting both the cases with substantial participation and the preparedness and effectiveness thereof.

(Access to justice in SP) Meaningful legal remedies shall be established in the spatial planning cases. Access to fair and equitable court procedures in all cases when public participation was excluded or restricted in spatial planning shall be ensured in a timely manner, at low cost, with the effective possibility of applying injunctive relief. On longer run the annulment of a couple of spatial planning decisions and therefore duplicating the workload of all the participating authorities and other stakeholders causes much less harm than attaching no consequences to spatial plans that sacrifice or play havoc with the future of the concerned communities.

(Clear definitions) Legal nature (individual decision, plan, program, policy or legislative decision) and constitutional position (ouster clauses and civil law contracts hindering access to participation) of the spatial planning procedures should be clarified within each national law. Lack of clarity in an extremely complex flow of several kinds of decision-making procedures constraints meaningful public participation, therefore the whole process from initial designing of an investment to its actual operation shall be transparent and easy to understand for the members and associations of the public.

(Multilevel participation) Considering that large, environmentally significant investments usually undergo many levels of State decision-making procedures, where the content of the project might change dramatically, full-scale public participation according to the relevant provisions of the Aarhus Convention shall be allowed and supported by the decision-making bodies. Alternative methods of involving the members and organisations of the public, based on one-direction communication or deliberative discussions could be important additional tools for reaching balanced, long lasting decisions, but cannot substitute public participation according to the Convention, with due procedural guarantees.

(Taking into account the sustainable development principle) Several social, economic and professional (environmental, nature protection, cultural heritage, nature protection etc.) viewpoints shall be harmonised in the spatial planning decision-making procedures. Also the proper procedural arrangements shall serve this goal, such as determining the circle of participating authorities, municipalities and other role players, the rules of deliberative discussions and the rules of legal remedies.
SPATIAL PLANNING - AUSTRIA

1. The constitutional legal nature of the spatial planning

Due to the federal structure of Austria spatial planning is a horizontal issue. Certain matters are dealt with the federal authority, certain matters with the individual federal states and certain matters are dealt with the municipalities. The competent authorities for general spatial planning are the individual federal states.

a. Regional spatial planning by the federal authority

The federal authority has the competence to regulate spatial planning in the matters listed below:
- Transport (construction of railways, national roads, aviation, passage)
- Forestry
- Water
- Waste facilities
- Mining
- Military installations
- High voltage current

The provisions on spatial planning are part of the acts on the specific subject matters. Usually they lay down principles and guidelines. Regional spatial planning by the federal authority is not directly binding but shall be taken into consideration by the individual federal states and the municipalities.

b. General regional spatial planning by the individual federal state

The individual federal states have the competence to regulate spatial planning in the following matters:
- Building industry
- Land improvement, rural conservation
- Nature conservation
- Individual federal state roads

Furthermore, also the general spatial planning is regulated by the individual federal states. The major regulatory frameworks are the regional spatial planning acts (Raumordnungsgesetze der Länder). The regional spatial planning acts lay down the general objectives and principles of spatial planning for each individual federal state. They authorise the competent administrative authorities of the individual federal state to adopt land development programmes and spatial planning programmes (regulations) which determine the principles and guidelines for spatial planning. As regards specific subject matters, such as energy supply, nature conservation areas etc. sectorial programmes shall be adopted. Where appropriate, for certain regions regional programmes may be adopted. The planning instruments are organised in kind of hierarchical cascade. The objectives and principles laid down in the regional spatial planning acts are binding to the authorities. All measures are to be in accordance with higher-ranking planning instruments. A breach would entail automatic illegality of the measures concerned.
As regards the competency of the federal authority and the individual federal states their planning competences are equal in rank, both have to obey the principle of consideration (Berücksichtigungsprinzip).

c. Local spatial planning by the municipality

Local spatial planning is subordinated to general regional spatial planning by the individual federal states. The municipality is responsible for drawing up a development concept and to create a land use plan (Flächenwidmungsplan) which divides the entire municipality according to the objectives pursued and determines the dedication and usage types for each area (e.g. building land, grass land, areas for traffic etc.). All regulatory measures shall be in accordance with the objectives and principles of the regional spatial planning acts and with the regional spatial planning instruments by the individual federal states. As already mentioned before, spatial planning measures by the federal authority are not directly binding to the municipality. They have to be taken into consideration in the course of planning and shall be indicated in the land use plans. It is for the municipality to decide whether measures are in conformity with higher-ranking legislation, regulations or Union law and whether any measures are justified by objective reasons. The land use plan is approved by the regional authority. Based on this, the municipality may draw up a zoning plan (Bebauungsplan). Furthermore, the municipality is obliged to revise its plans and programmes on a regular basis on whether they continue to be in accordance with higher-ranking provisions. A breach would entail automatic illegality of the measures concerned.

When drawing up plans or programmes the spatial planning acts require all authorities to take into consideration concerns of public interest and, if necessary, to carry out a strategic environmental assessment (SEA).

2. Issues in connection with the protection of environmental elements and waste management taken into consideration in spatial planning

Due to the aforementioned federal structure of Austria the SEA Directive has not been implemented in only one legislative act, but in various acts at federal and regional level, depending on the respective subject matter.

At the level of the federal authority the Directive has been implemented in all sectors relevant for spatial planning. The respective acts lay down the conditions for applying a SEA procedure. Transport infrastructure plans and programmes, the national waste management plan, the national water management plan and water management programmes, noise action plans and the reduction of air-pollutant emissions plan have to undergo a SEA procedure. Usually new plans and programmes as well as significant changes to them have to undergo a SEA procedure. Screening procedures shall be carried out if no significant changes are made.

At the level of the individual federal states the SEA Directive has been implemented in the spatial planning acts and in acts of the specific subject matters. Carinthia adopted an environmental assessment act. Regional and local development concepts, spatial planning programmes and land use plans of the municipalities have to undergo a SEA procedure. However, the SEA Directive has not been implemented in all relevant subject matters. In the fields of agriculture, energy, fishery and industry respective provisions are missing.

In general, not all obligations arising from the SEA Directive have been implemented accordingly. Standards vary widely. Screening provisions have not or not sufficiently been implemented in most acts of transposition. Usually plans and programmes only have to undergo a screening procedure, if it is explicitly required by law or if projects reach a certain threshold. This leads to the fact, that many SEA procedures can be bypassed. In some individual federal states screening provisions are missing.
so that plans which may have a significant environmental effect do not have to undergo a SEA procedure. Often there is also no obligation to consult environmental authorities when deciding on the screening process. Furthermore, in most spatial planning procedures public participation is not early and effective, since plans have already been set up when the public is involved.

The implementation of the SEA Directive in Austria is tailored to spatial planning. However, due to the above mentioned, SEA procedures are sometimes with little practical relevance. Plans and programmes which have to undergo a SEA procedure such as national waste management plans, national water management plans etc. are usually aimed towards the protection of the environment and the public, whereas other plans and programmes which have crucial environmental impact often do not have to undergo a SEA procedure (e.g. transport, energy, tourism).

3. Cross cutting issues taken into consideration in spatial planning

Regional spatial planning by the individual federal states is the main instrument for the protection of crosscutting issues. Health, water and resources and proper management of waste is within the responsibility of the federal authority and regulated in the respective acts. The protection of nature and biodiversity is within the responsibility of the individual federal states. The regional authorities have to consider all specifications when drawing up land development programmes and sectorial or regional spatial planning programmes. Thereby, also relevant Union law shall be taken into consideration. E.g. the individual federal states are responsible for designating nature reserves and habitats, as required by the Habitats Directive.

As already mentioned in the beginning, local spatial planning by the municipality is subordinated to general regional planning by the individual federal states, while spatial planning acts of the federal authority shall be taken into consideration in the course of planning. All fields of administration in question shall be represented in the land use plan of the municipality.

4. The extension and intensity of public participation in spatial planning decision-making procedures

Public participation in spatial planning procedures which have to undergo a SEA procedure is regulated in the respective sectorial acts and in the regional spatial planning acts. As already mentioned before, not all obligations from the SEA Directive have been implemented accordingly and standards of public participation vary widely. The guidance document on public participation, issued by the Austrian Council of Ministers is not binding.

As regards regional spatial planning by the federal authority, in most subject matters public participation is neither early nor effective, since plans have already been set up when the public is involved.

The regional spatial planning acts of the individual federal states regulate public participation in regional and local spatial planning procedures. They do not truly allow civil society and public in general to be involved and to participate in the early stage of adopting local spatial plans and programmes. Only in some individual federal states the public must be informed about the initiation of local spatial planning procedures. In some individual federal states the Environmental Ombudsman has the opportunity to present its comments on the draft plan. The Environmental Ombudsman is sort of embedded in public administration and represents public interests of the environmental protection and nature conservation in certain administrative procedures. NGOs do not have the right to participate in the adoption of plans and programmes.

Usually public participation is only provided after the planning process. Draft plans shall be made available to the public 4-6 weeks before being adopted. The public is informed through public display, notice boards or newspaper publication. Some spatial planning acts require only public
display on the internet. In some cases drafts are announced via a press conference, a TV-programme and the most popular daily newspapers. Personally affected parties, such as owners, shall be informed individually and personally.

Public discussions, hearings, meetings etc. are not compulsory. Mostly opinions can only be delivered after the draft plan has been made available for the public. Usually everybody has the right to deliver opinions on the draft plan. In some individual federal states this right is reserved to the public directly affected or to persons who can demonstrate legitimate interest. In some subject matters the public can only participate through the internet. The planning authorities do not have to answer proposals or objections, but usually they shall discuss these opinions and ‘take them into consideration’. Many times the authorities do not issue a report on how the results of consultation have been taken into account.

However, in practice some individual federal states organise Round Tables, where plans and programmes are drafted cooperatively with authorities, experts and the organised public (NGOs, chambers). Vienna and Vorarlberg organised Round Tables in procedures regarding regional waste management plans and infrastructure plans, where different stakeholder groups were incorporated into the whole decision making process. In Vienna the SEA team was composed of environmental organisations (ÖKOBÜRO, Umweltdachverband, Umweltberatung), Environmental Ombudsman, Waste Management Authority, Environmental Authority, representatives of the Viennese Government, Coordination Office for Climate Protection, representatives of Energy Suppliers as well as external waste management experts from the Universities of Technology, Economics and Agricultural Sciences. Citizen’s groups, the Waste Management Organisation and the Chamber of Commerce participated within the public consultation procedure. In Eisenstadt, state capital of Burgenland, they organise citizens’ workshops and public consultation already before a draft integrated urban development plan is prepared. In certain other spatial planning procedures a citizens board may participate at an early stage of the procedure.

Outside the scope of SEA procedures spatial planning procedures do not truly allow civil society and the public in general to be involved and to participate in the decision-making procedures. Neighbours may stress the violation of rights regarding their own interest, but they cannot claim public interest or raise objections merely based on environmental considerations.

5. **Legal remedies available in spatial planning procedures**

Extremely limited legal remedies are available in spatial planning procedures, regardless of whether a SEA has been carried out or not. After a land use plan has been adopted, limited and complicated legal protection is available for directly affected landowners as regards their own interest. If they do not reach an agreement on compensation with the municipality they may file a claim with the supervisory authority or the district court. Neighbours may question the lawfulness of land use plans in proceedings against construction permissions. Subsequently, both may file a claim with the constitutional court. At the constitutional court proceedings they need to be represented by a lawyer, injunctive relief is not accessible. It is possible to apply for legal aid.

In general, proceedings to review a spatial plan or programme are only available if a regulation has been adopted. Proceedings to review the regulation can only be filed with the constitutional court upon request of a person alleging direct infringement of its rights by the unlawfulness of the regulation. Neither the Environmental Ombudsman nor NGOs have to possibility to challenge an unlawful spatial plan or programme. It is up to the authorities to file a claim with the constitutional court.
Summary

In conclusion, the level of environmental democracy in Austrian spatial planning procedures is relatively low, even if some individual federal states are very ambitious about public participation. Since the SEA directive has not been implemented accordingly and not in all relevant sectors, public participation and access to review procedures are very restricted.

Some individual federal states are very ambitious about public participation. They organise round tables and inform and involve the public at an early stage of decision-making. However, in general standards of public participation in the individual federal states vary widely. It is up to the legislative body and to the good-will of the authorities to what extent the public is involved. Authorities tend to ensure effective and early public participation if they expect in some way to derive political benefit or public support.

The SEA Directive has not been implemented in all relevant subject matters. Only certain plans and programmes have to undergo a SEA procedure. Many plans with crucial impact on the environment do not have to undergo a SEA procedure, such as plans regarding transport, energy and tourism. Often screening provisions are missing for plans and programmes which do not have to undergo a SEA procedure but may have a significant environmental effect. Furthermore, not all obligations arising from the Directive have been implemented. Many times early public participation is not provided, since plans have already been set up when public is involved. Civil society and NGOs do not have the right to participate in the adoption of plans and programmes. Public display on the internet is not sufficient. In the individual federal states the public in general does not have the right to deliver opinions on the draft plans. Outside the scope of SEA procedures spatial planning procedures do not truly allow civil society and the public in general to be involved and to participate in the decision-making process.

Access to justice in spatial planning is not in compliance with article 9 (3) and 9 (4) of the Aarhus Convention. Extremely limited legal remedies are available to directly and personally affected persons. Since it is up to the authorities to draw up plans and programmes, often no one can review or challenge their considerations. Members of the public such as NGOs do not have access to any administrative or judicial procedures to challenge spatial planning acts, plans or programmes which contravene provisions of national law relating to the environment. Procedures do not provide adequate and effective remedies including injunctive relief.

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SPATIAL PLANNING – THE CZECH REPUBLIC

1. The constitutional legal nature of the spatial planning

There are three types of spatial (land use) planning documents in the Czech Republic. These are the National Development Policy, Regional Development Principles and land use plans of cities and municipalities. National Development Policy is approved by the decision of the Government and does not have any specific legal form. Regional Development Principles and land use plans are issued in the form of specific administrative acts, called “measures of a general nature”, which have a mixed character between general norm and individual decision (for details see below).

The National Development Policy is the most general tool of land use planning determining basic requirements for development of the whole territory of the Czech Republic. Main tasks of spatial planning in national, cross-border and international contexts and projects of national importance (such as major roads, nuclear waste repositories, etc.) are defined in this document. The National Development Policy is processed by the Ministry of Regional Development and approved by the Government by its decision (resolution).

Act No. 183/2006 Coll., the Building Act, states that the National Development Policy is binding for the creation of Regional Development Principles and land use plans which shall not be contrary to it. However, it does not apply unconditionally. The Supreme Administrative Court held that the projects contained in it may not be taken over to Regional Development Principles and/or land use plans without further assessment of their feasibility, particularly regarding their environmental impacts. The court has also ruled repeatedly that the National Development Policy cannot be contested separately by a legal action, as, according to the court, it is a general instrument which does not impose specific rights and duties.

The Regional Development Principles are a planning document on the level of regions (there are 13 regions in the Czech Republic, plus Prague as the capital). They define especially projects of supra-local nature, i.e. major roads, railways, extensive industrial zones etc. The Regional Development Principles are prepared by Regional Offices and approved by the Regional Assemblies. The Regional Development Principles are binding for the creation of land use plans of municipalities - these shall not be contrary to them. However, the Regional Development Principles shall not contain too detailed regulation as this falls within the powers of municipalities.

Land use plans define the use of all areas within the municipality territory. It is determined for each area what type of construction is allowed to be implemented at the respective plot. The definition of possible use of the areas and the respective conditions are binding for the decision-making of the building offices and other authorities. Land Use plans are prepared by Municipal Offices (for small municipalities, offices of bigger cities prepare the proposal) and approved by the Municipal Assemblies. As stated above, Regional Development Principles and land use plans are issued in the form of so called “measures of a general nature”. “Measure of a general nature” is defined by law as binding administrative act, which is neither a piece of law nor an individual decision. There is a special administrative procedure for adoption of these acts and a special way in which they may be challenged at courts. (see parts 4 and 5 for more details).

When approving the land use plans or Regional Development Principles, the municipal or regional assemblies simultaneously decide on the objections submitted in the course of the process of their preparation by the land owners and representatives of public (see part 4 for more details. It can be said that individual decisions about the objections are integrated into the “measure of general nature” adopting the the land use plan or Regional Development Principles. Despite of this, the
decision on the objection may be separately challenged before court. However, it is not effective for the landowners to do that, as they may more effectively challenge the whole land use plan/Regional Development Principles as such. On the other hand, this is the only remedy available to the representatives of public (see chapters 4 and 5 for more details).

2. **Issues in connection with the protection of environmental elements and waste management taken into consideration in spatial planning**

General framework for SEA is set forth in Act no. 100/2001 Coll., EIA Act. However, a number of aspects of SEA procedures for spatial planning documents are regulated specifically by the Building Act.

On the grounds of the Building Act, SEA procedure is **obligatory** when adopting the National Development Policy and Regional Development Principles and **facultative** when adopting land use plans.

In the latter case, SEA procedure (“assessment of impacts on the sustainable development of the area”) must be carried out if the respective Regional Office decides so in the course of the first stage of land use plan adoption process, or, if the nature protection authority body does not exclude a possibility of an important impact of the plan on Sites of Community Importance and Special Protection Areas. When assessing if the SEA procedure concerning a land use plan should be carried out or not, same criteria should be applied as in case of any other SEA procedure (set forth by Annex 8 of Act no. 100/2001 Coll., EIA Act – e.g. cumulative and synergic nature of the impacts, risks for the environment and public health arising from the implementation of the plan, impacts on areas or landscape with the recognized status of protection at the national, Community or international level etc.).

SEA procedures on adopting the National Development Policy and Regional Development Principles are carried out by the Ministry of the Environment. SEA procedures on adopting land use plans are carried out by the Regional Offices.

It is not possible for the public to participate in the SEA procedure on any of the spatial planning documents as such. However, it is possible to comment on it in the process of the adoption of these documents (see chapter 4).

3. **Cross cutting issues taken into consideration in spatial planning**

In accordance with the general provisions of the Building Act (Art. 18), the objective of spatial planning is to create the preconditions for construction and for sustainable development of the area, consisting in the balanced relationship of conditions for the favourable environment, for economic development, and for cohesion of community of inhabitants of the area, and which satisfies the needs of present generation without endangering the conditions of life of the future generations.

For instance, according to Article 19 lett. c) and m) of the Building Act, the task of spatial planning is especially “... to examine and assess the need of changes in the area, public interest on their implementation, their contributions, problems, risks in respect to, for example, public health, environment, ...; to create conditions for protection of the area against negative impacts of plans concerning the area pursuant to special legal acts [note: such as Act on the Protection of Nature and Landscape, Act on the Protection of Water etc.] and to suggest compensatory measures ...”

Authority bodies responsible for spatial planning are obliged to cooperate with authority bodies responsible for the protection of specific segments of the environment, including human health.
Moreover, the protection of nature and biodiversity, health and resources and proper management of wastes is also dealt by SEA (see chapter 2).

The Regional Development Principles define projects of supra-local nature, i.e. major roads, railways or extensive industrial zones and, as superior planning documents, are binding for the adoption of land use plans of municipalities in the region in question. Consecutively, land use plans define the use of all areas within the municipality territory and are binding for subsequent building authorities’ decision-making (concerning mostly land use permits and building permits).

Thus, on the one hand, land use plans may set for limits and conditions which have to be complied with – they may determine areas where it is not possible to realise any building activity or set forth limits for certain activities (maximum height of buildings, type of industrial activities admissible in certain zones etc.). On the other hand, land use plans are still quite general documents (measures of a general nature) and, consequently, a lot of questions concerning the environmental protection must be dealt with only in the subsequent administrative procedures (procedures on issuing land use permits and building permits, procedures concerning exception from the protection of nature etc.).

In this respect, the Czech legislation guarantees that authority bodies which are to protect specific areas of environment or human health submit their opinions both in the process of land use/Regional Development Principles adoption and the subsequent administrative procedures. For instance Art. 2 para 2 lett. g) of Act no 114/1992 Coll., on the Protection of Nature and Landscape states that: “The protection of nature and the landscape pursuant to this Act is ensured in particular by ... participation in the process of spatial planning and building procedures, with the aim to enforce an environmentally balanced and aesthetically valuable landscape”.

4. The extension and intensity of public participation in spatial planning decision-making procedures

Procedures of adopting land use plans, Regional Development Principles and the National Development Policy are open for anyone (general public) to make comments. Further, procedure of adopting Regional Development Principles is open for the affected municipalities and representatives of public to make objections. Similarly, procedure of adopting land use plans is open for the landowners and representatives of public to make objections.

From the legal point of view, objections are “stronger” than comments as the authority body in question must issue a specific decision on each of them, stating if the objection was satisfied or rejected and why; this administrative decision being challengeable before courts.

For general public, to reach this “stronger” legal position, the only way is to designate a so-called representative of public on the grounds of Art. 23 of the Building Act. This legal provision enables specific number of citizens of a municipality (depending on its size) or a region (2000 people) in question who make the same comment to the land use plan/Regional Development Principles to delegate one person (natural or legal) who will represent them and jointly submit their comment with the legal strength of an objection. However, contrary to the landowners, this representatives of public may not challenge the land use plans/Regional Development Principles before courts. They may only challenge the decision on their objections issued by the authority in the scope of the land use plan/Regional Development Principles (see chapter 5 below).

NGOs have no special rights with respect to the procedures of adopting the spatial planning instruments; they may either submit comments as anybody from the general public or become a representative of public.
The procedures of adopting land use plans and Regional Development Principles are quite open to the general public to participate. Information is being published at official notice-board (both on-line and “in natura”), documents are free to be looked at, public may comment at different stages of adopting the plans and public hearings take place. Time limits for submitting comments and objections have been prolonged since 1/1/2013 and may be found sufficient.

Key criticism relates to the concept of the representative of public. First, it is quite difficult to designated a representative of public in time because a qualified number of signatures must be gathered in a quite tight time-limits. Moreover, the level of subsequent judicial protection of the representatives of public is very low (see chapter 5).

Concerning compliance with Art. 6 para. 3,4,8 of the Aarhus Convention (referred to by Art. 7 of the Convention in relation to land use plans), the Czech spatial planning legislation can be assessed as complying with these provisions. Possible breaches lie in practical implementation – namely with respect to whether the comments made by public are seriously taken into account or not. Our experience is that often the whole process is run correctly from the legal point of view; however, the comments of public are gathered and assessed only formally because the factual decision has already been taken on the political level.

5. Legal remedies available in spatial planning procedures

Measures of a general nature (including land use plans and Regional Development Principles) are binding acts, which are neither a piece of law nor administrative decisions. There are basically two types of legal remedies available in order to challenge the land use plans and Regional Development Principles - administrative remedies and judicial review.

Administrative review

As mentioned above, land use plans and Regional Development Principles are not regarded as individual administrative decisions. Consequently, regular administrative remedy which is an appeal in the Czech administrative law (having generally suspensive effect) is not available to challenge land use plans and Regional Development Principles. Still, it is possible to use a so-called “review procedure”.

In the course of the review procedure, administrative authorities shall ex officio review final decisions and, similarly, also measures of a general nature, if it is possible to reasonably doubt that a decision/measure of a general nature is in compliance with law. Anybody may make a motion to relevant authority bodies to start the review procedure in relation to the specific land use plan or Regional Development Principles. However, it is up to the authority body in question whether it starts the procedure ex officio or not.

Land use plans may be reviewed by the Regional Offices, Regional Development Principles may be reviewed by the Ministry of Regional Development.

Judicial review

Since 2005, the Czech law provides for judicial review of “measures of a general nature”, including the Regional Development Principles and land use plans (Art. 101a-101d of the Act no 150/2002 Coll., Code of Administrative Judiciary). This can be considered as one of the most effective legal instruments of judicial protection of the environment and related rights of affected persons, as it applies to the early stage of the decision-making and at the same time, there is a strict deadline for regional courts to decide in such cases (see below). The efficiency of this institute has been repeatedly confirmed in practice.
However, the crucial limitations relate to standing issues.

At the level of the judicial procedures, the prevailing concept for standing for all categories of subjects and in all areas of law, including the spatial planning, is the concept of impairment of rights which means that it is strongly “rights-based”. Consequently, the judicial review is mainly focused on securing the complainant’s individual rights. This leads to situations where objections which are not strictly related to the complainant’s rights are being dismissed by courts even though they are serious and completely reasonable. In general, the doctrine of impairment of rights affects NGOs most, including denying of standing in spatial planning issues.

According to the law (Art. 101a par 1 of Act 150/2002 Coll., Code of Administrative Judiciary), persons who assert that their rights have been infringed by issuing of the measure of a general nature have standing to sue the measure at court. This provision seems to be general enough to be interpreted in compliance with Art. 9 par 3 of the Aarhus Convention, however, the court practice concerning conditions for access to judicial review of the land use plans, based on the doctrine of impairment of rights, is too restrictive considering the requirements of the Aarhus Convention.

The Supreme Administrative Court has developed a restrictive jurisprudence, according to which only the right in rem, i.e. the rights related to the ownership of real estate, can be infringed by issuing a measure of a general nature (land use plans and Regional Development Principles in the area of spatial planning). Accordingly, only the affected landowners (i.e. owners of neighbouring buildings or grounds) are considered to have standing to sue the land use plans and Regional Development Principles; tenants, for instance, are denied thereof. Besides, in case of Regional Development Principles, also the municipalities are ex lege given standing to bring an action for the annulment thereof or the annulment of a part thereof.

As to the NGOs’ standing, the Supreme Administrative Court repeatedly ruled that the environmental organizations do not have standing to sue the land use plans/ Regional Development Principles as the Czech legislation does not establish their right to challenge these acts at courts and as the Aarhus Convention “is not a directly applicable international treaty”, NGOs cannot claim standing (directly) on the base of this Convention.

The position of the NGOs before courts is strongly influenced and weakened by the above mentioned doctrine of “impairment of right”, which the Czech courts apply. In accordance with this doctrine, NGOs can only successfully enforce court protection against intervention into their procedural rights in the decision-making procedures, as these are the only “subjective rights” they can have in the environmental procedures. This approach is further based on the case law of the Czech Constitutional Court, according to which NGOs cannot claim a right for a favourable environment, as it can “self-evidently” belong only to natural, not legal persons.

The Supreme Administrative Court applies the same approach with respect to environmental NGOs standing to sue the land use plans; so far, all such lawsuits of the NGOs have been refused. Following decisions can be quoted with that respect as examples:

1 The term “neighbouring property” was interpreted by the Constitutional Court (by its decision of 22. March 2000, no. Pl.ÚS 19/99, in a way that it covers all pieces of land, which can be influenced by an investment and its impacts (noise, emissions etc.). This question must be assessed in each case under the specific circumstances. Before that decision, only ownership of the land with direct border with the investment site was considered as the possible basis for the status of party of the land use and building procedures, and therefore also for standing to sue the relevant decisions. In a number of following decisions, both the Constitutional Court and the SAC approved the approach and ruled that the term “neighbouring property” shall be interpreted extensively.


3 For the first time, the Constitutional Court expressed this view in its Decision dated 6 January 1998, ref. no. I. ÚS 282/97.

It is impossible that a subject who cannot be infringed in its rights by an adoption of an act of general measure (a land use plan) would have standing to sue it. The infringement of rights must be directly related to adoption of the land use plan. It is not possible that an NGO could meet this requirement.

Decision of the SAC of 13 August 2009, no. 9 Ao 1/2008-34

An environmental NGO is not subject to substantive rights, infringement of which (by adoption of the land use plan) it could assert... Therefore, the court concluded that the NGO does not have standing to sue the land use plan as an act of general measure.

Decision of 27 January 2011, no. 7 Ao 7/2010 – 1336

It is necessary to insist on the requirement of infringement of right by the act of general measure which is subject to review... Only a person who has direct relation to the area, regulated by the land use plan, can be infringement on his right by adoption of the plan. Therefore, an environmental NGO is not entitled to file a lawsuit against the land use plan.

Denying standing to NGOs concerning the spatial planning issues was found to be a case of non-compliance with the Aarhus Convention by the Aarhus Convention Compliance Committee (findings ACCC/C/2010/50 concerning compliance by the Czech Republic): “... it is evident that in cases of land-use planning, if an authority has issued a land-use plan in contravention of urban and land-planning standards or other environmental protection laws, a considerable portion of the public, including NGOs, cannot challenge this act of the authority. The Committee finds that such a situation is not in compliance with article 9, paragraph 3, of the Convention.” [para 85]

The standing is neither acknowledged by courts to persons representing the public, the so-called “representatives of public” designated on the grounds of Art. 23 of the Building Act (see chapter 4 above). These persons may only file the administrative lawsuit against the decision concerning the objections they have submitted in the process of adopting the land use plan or Regional Development Principles. They are not entitled to challenge the land use plan/Regional Development Principles as such. Moreover, based on the above mentioned doctrine of impairment of rights, representatives of public may seek the judicial protection only against intervention into their procedural rights. The lack of judicial protection actually substantially debase the importance of the whole concept of a “representative of public” in the Czech spatial planning legislation.

Till the end of 2011, the Supreme Administrative Court had the sole jurisdiction to review measures of a general nature without any further remedy. Since 2012, the Regional courts have this jurisdiction and it is possible to file a cassation complaint against their decision to the Supreme Administrative Court.

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The courts have to review both substantial and procedural legality of the measures of a general nature. However, infringement of the procedural provisions concerning the preceding administrative process is a reason for cancelling the contested measure of a general nature, only if it is likely that it could substantially infringe the complainant’s rights. Even if the land use plan or Regional Development Principles are adopted in accordance with the law, they can be found disproportionate as to the extent of the infringement of the complainant’s rights and be cancelled on that grounds.

The lawsuit against “measures of a general nature” such as the land use plans must be filed within 3 years from the time they became effective.

Both fee for a lawsuit against a land use plan to the regional courts and fee for a cassation complaint to the Supreme Administrative Court is 5000 CZK (around 200 EUR).

The Code of Administrative Judiciary prescribes a deadline of 90 days for regional courts to deliver the final court decision in cases of lawsuits against the land use plans and Regional Development Principles. However, no deadline is prescribed for the Supreme Administrative Court to deliver decisions in cases of cassation complaints filed against the very rulings of regional courts.

As for the National Development Policy, the courts have ruled repeatedly that the is a general instrument which cannot infringe anyone’s rights, and, as such, cannot be considered as a measure of a general nature. Consequently, the National Development Policy cannot be challenged before courts. For instance, in decision of 18 November 2009, no. 9 Ao 3/2009 – 59, the Supreme Administrative Court held that: “the National Development Policy is a conceptual spatial planning instrument, not implementing ... In this sense it is necessary to interpret the binding nature of the Policy, which is primarily targeted at authority bodies, not those who are the recipients of the public administration.”

The problematic point here is that the National Development Policy actually predestines variants of some projects of national importance such as important motorways which cannot be challenged or alternated in later stages of spatial planning. For instance, if there is one trail for a specific motorway planned in the National Development Policy, the respective Regional Development Principles have to include this trail or, e.g. on the grounds of SEA decide, that the trail cannot be included as it is in breach with the environmental protection or public health requirements. However, no other variants may be introduced by the Regional Development Principles in this case. Consequently, it is not actually possible to challenge the variant introduced by the National Development Policy by those whose rights will be actually infringed by the project in the end.

**Summary**

Land use plans and Regional Development Principles are adopted in the form of so-called “measures of a general nature” for which the Czech law guarantees judicial review, setting forth special rules for it. This can be considered as one of the most effective legal instrument of judicial protection of the environment and related rights of affected persons, as it applies to the early stage of the decision-making and at the same time, there is a strict deadline for regional courts to decide.

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Key problems as to the public participation and protection of environment relate to applying of the doctrine of impairment of rights by Czech courts and, in connection with that, denying standing to NGOs and representatives of public as far as challenging of (regional) land use plans is concerned. This was also declared to be in breach of Article 9 of the Aarhus Convention by the Aarhus Convention Compliance Committee (findings ACCC/C/2010/50 concerning compliance by the Czech Republic, para 85). Besides, the National Development Policy cannot be challenged before courts according to existing case law.

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SPATIAL PLANNING – ESTONIA

1. The constitutional legal nature of the spatial planning

Spatial planning decisions are administrative acts in Estonia. Although they’re treated as individual decisions, they at the same time have a general (strategic) nature. As they influence rights and obligations of a number of people (landowners) who may chance during the validity of spatial plans, they are classified as “general orders” (üldkorraldus) in legal theory.

Being administrative acts, they can be directly challenged in administrative courts by private persons, e.g. companies, individuals and NGOs (unlike legislative acts that may be reviewed by courts under relatively restrictive terms) and need to be sufficiently reasoned.

There are 4 “levels” of spatial plans forming a hierarchy where the plans higher in the hierarchy are more general but need to be complied with by plans that are considered lower-ranking.

The levels are:

- National spatial plan (üleriigiline planeering) – covers the territory of the whole country, defining spatial development trends and principles (e.g. settlement patterns, transportation etc.) in broad terms. National spatial plans are adopted by the Government of the Republic. Last national spatial plan (Estonia 2030+) was adopted in 2012.
- County spatial plans (maakonnaplaneering) – cover (at least part of) territory of a county (there are 15 counties in Estonia), aim to balance national and local interests. County spatial plans are adopted by county governors.
- Comprehensive plans (üldplaneering) – cover (at least part of) territory of a municipality. The main aim is to determine general terms of land-use (e.g. for which functions areas can be used, height limits to buildings etc.) as well as location of streets and other (local) technical infrastructure. Comprehensive plans are adopted by local municipalities (there are over 200 municipalities in Estonia).
- Detailed plans (detailplaneering) – cover one or a few plots of land. Detailed plans determine the extent and terms of building rights (e.g. maximum height and surface area of specific buildings, location of access roads etc) and are used as basis for building permits. Detailed plans are also adopted by local municipalities.

2. Issues in connection with the protection of environmental elements and waste management taken into consideration in spatial planning

Spatial plans can be divided into two larger groups based on whether and how the SEA procedures are applied to them.
Spatial plans in the first category are always subject to SEA without any prior assessment of potential impacts needed. These include:

- national spatial plans;
- county spatial plans;
- comprehensive plans and
- detailed plans which are needed for carrying out activities listed in Art 6(1) of the Environmental Impact Assessment and Environmental Management Systems Act (EIA Act). The latter article transposes Annex I of the EU Directive 2011/92/EU (EIA Directive).

Spatial plans belonging to the second category are such, where a prior assessment of potential impacts (case-by-case screening decision) is required. These include:

- detailed plans that are needed for carrying out activities listed in Art 6(2) of the EIA Act, which transposes Annex II of the EIA Directive;
- detailed plans which may have negative impacts on areas belonging to Natura 2000 network (in Estonia, so-called Natura assessment required by Article 6(3) of the EU Directive 92/43/EEC (Habitats directive) is carried out as part of the SEA;
- amendments to all plans listed before;
- detailed plans not listed before that are needed for activities for which an administrative permit is required.

There are no special requirements to either the procedure or contents of SEA that is carried out for spatial plans. Art 1(5) of the Planning Act does provide that “when possible”, spatial planning and SEA procedures should be merged, however the practical application of this provision varies.

SEA scoping is carried out in the phase of drawing up an SEA “program” that determines how and what will be assessed within SEA. According to Art 36(2)1) of the EIA Act, scope of the SEA is determined based on the nature and content of strategic planning document. Therefore, a case-by-case approach needs to be taken.

According to the Art 40 (3)6), impacts that have to be assessed and described in the SEA report are potential significant direct, indirect, cumulative, synergistic, short and long-term, positive and negative environmental impacts, including impacts on human health and social needs and property, biological diversity, populations, flora, fauna, soil, water and air quality, climate changes, cultural heritage and the landscape, and assessment of the possibilities of waste generation as well as interconnection between different impacts.
3. Cross cutting issues taken into consideration in spatial planning

Protection of nature and biodiversity

Spatial plans are related to nature and biodiversity protection in several ways. Firstly, location and terms of use of so called “green networks” are determined in county and comprehensive plans. Secondly, municipalities may place areas or objects under nature protection on the local level with comprehensive or detailed plans.

Protection of health

County and comprehensive plans should, among others, also determine the location and terms of use of leisure and recreational areas, used for the benefit of public health.

Allowed environmental noise levels applicable in different areas are dependent on the “noise category” of an area, which should be based on comprehensive plans according to the Regulation of Minister of Social Affairs12. Practical application of this provision, however, has been rather difficult, as noise categories do not correspond to categories of land use determined in comprehensive plans.

Protection of resources and waste management

According to the Planning Act, county plans should include measures for the preservation of natural resources and determine the general terms of use for deposits of mineral resources and areas affected by mining. In practice, however, county plans have not been used as an effective tool for strategic planning of mining operations.

In general

In addition to the above-mentioned tasks of specific spatial plans, all spatial plans should take due account of all relevant factors, including nature, health and resource protection needs, waste management issues etc. Case law of Supreme Court of Estonia has been clear on this matter by stating that although local municipalities have a wide margin of discretion in making decisions in the field of spatial planning, they are on the other hand obliged to find out and take due account of all relevant factors, interests and rights. If necessary, additional data or expert assessments should be obtained (Supreme Court decisions in cases 3-3-1-42-0213, 3-3-1-54-0314, 3-3-1-79-0915 etc).

12 Regulation No 42 of the Minister of Social Affairs of 4 March 2002 „Standard limits for noise levels in residential and recreational areas, residential buildings and public buildings and methods for measuring noise levels“, available online in Estonian: https://www.riigiteataja.ee/akt/163756
13 Supreme Court decision from 10 October 2002 (Jaama 89 vs Tartu City Council), available online in Estonian: http://www.riigikohus.ee/?id=11&tekst RK/3-3-1-42-02
14 Supreme Court decision from 14 October 2003 (Estonian Nature Conservation Society and others vs Pärsti Rural Municipality Council), available online in Estonian: http://www.riigikohus.ee/?id=11&tekst RK/3-3-1-54-03
15 Supreme Court decision from 27 January 2010 (O. Skvortsova vs Harku Rural Municipality Council), available online in Estonian: http://www.riigikohus.ee/?id=11&tekst RK/3-3-1-79-09
4. The extension and intensity of public participation in spatial planning decision-making procedures

Who is entitled to participate?

According to Art 16(8) of the Planning Act anyone is entitled to make proposals or objections regarding any spatial plan (from national to detailed plans). This means any person may participate in the procedures and have their say. No qualifying criteria (e.g. substantiated interests) are applied.

Notifications related to spatial planning

General public must be informed of procedures for drawing up a spatial plan within one month of their start by the authority responsible for drawing up the spatial plan (i.e. Ministry of Internal Affairs, county governor or municipal government).

Notifications of the start of procedures for spatial plans must be published via different channels depending on the level of the spatial plan. The channels are following:
- national spatial plan - official journal State Gazette and at least one national daily newspaper;
- county spatial plans - regular county newspaper or at least one national daily newspaper as well as local (municipal) newspapers of the area concerned that are issued at least once a month;
- comprehensive plans and detailed plans (drafted and adopted by the local municipalities) - municipal newspaper that is issued at least once a month and regular county newspaper or at least one national daily newspaper. For detailed pans, an additional notification board must be placed by the area concerned.

All notifications must include:
- location and area (including borders) concerned with the spatial plan;
- aims of the spatial plan.

Newspapers mentioned above will also be used for notifying the public of consultations on draft comprehensive and detailed spatial plans.

Once the draft plans have been reviewed by the local municipality or county governor, a second public consultation will be held for county spatial plans, comprehensive plans and detailed plans. Again, the channels described above must be used. The notifications on public consultations must include:
- information on the size and location of the area subject to spatial plan;
- short summary of the contents of the spatial plan and potential impacts of its implementation;
- in case of detailed plans, also nature of buildings planned, most important terms of land use and building and whether the detailed plan proposes to amend the existing comprehensive plan.
Timing of the participation

There are a number of public consultations that are obligatory for different spatial plans, namely:
- in case of county plans – after review of draft plan by the county governor (min 4 weeks);
- in case of comprehensive plans – firstly a consultation of draft plan (min 2 weeks), later consultation of draft plan reviewed by the municipal government (min 4 weeks);
- in case of detailed plans - firstly a consultation of draft plan (in some cases compulsory, in others optional, min 2 weeks), later consultation of draft plan reviewed by the municipal government (min 2 or 4 weeks (if the plan would amend the comprehensive plan).

Public participation is, however, not limited to the above-mentioned stages. Anyone is entitled to submit their objections or proposals to any spatial plan before its adoption. These have to be given due consideration and replied to by the authority within 4 weeks of receipt.

5. Legal remedies available in spatial planning procedures

Final spatial planning decisions (adoption of spatial plans) may be challenged by two means:
- administrative review (vaie), which is optional and does not prevent a person from later judicial review, and
- judicial review, where a person brings a action to administrative courts.

Standing

Applications for administrative review may be submitted by persons who find that their rights have been affected.

Access to judicial review, on the other hand, is exceptionally wide in planning matters – it is the only instance of actio popularis in administrative matters in Estonian legal system. Anyone may challenge the legality of a spatial plan in administrative courts according to Art 26(1) of the Planning Act.

Scope of review

In administrative review proceedings, the administrative body in charge of review may assess both the legality as well as purposefulness of spatial plans.

In court proceedings, only the legality (both procedural as well as substantive) may be assessed by the courts. As administrative bodies have a wide margin of discretion in spatial planning matters, the courts cannot annul a decision on the grounds of efficiency, purposefulness etc. unless an evident mistake of discretion was made. There have been cases where courts have also assessed whether circumstances and interests were given due account by administrative bodies (i.e. whether they have evaluated their priority correctly), most prominently in the Supreme Court judgement in case 3-3-1-54-03-03.

Although in theory, administrative review has a wider scope, this is hindered in practice, as in spatial planning matters, local municipalities review their own decisions in administrative review. Therefore it is hard to imagine that they would normally find their previous decision to be lacking purposefulness.

16 Supreme Court decision from 14 October 2003 (Estonian Nature Conservation Society and others vs Pärsti Rural Municipality Council), available online in Estonian: http://www.riigikohus.ee/?id=11&tekst=RK/3-3-1-54-03
Fairness

Generally, fairness of court proceedings has not been considered a problem in Estonia, and there are guarantees in legislation to ensure it. Court hearings are generally public, decisions recorded in writing and publicly accessible.

Administrative review decisions are also recorded in writing.

Deadlines

Applications for administrative review must be submitted within 30 days of the moment a person gained knowledge of the administrative act or should have gained it.

Actions against decisions on adoption of spatial plans must be submitted within one month of the moment a person gained knowledge of the administrative act or should have gained it. If a person has chosen to first apply for administrative review, the deadline will start after the decision in administrative review has been made.

Regarding deadlines for decision making, administrative review decisions must be made within 10 days of submission as a rule. If additional info needs to be gathered, this may be prolonged by 30 days. There is no deadline for judicial review as such, but a judgement must be delivered within 30 days of the end of hearings as a rule (only in exceptional cases may this be extended to 60 days).

Injunctive relief

Injunctive relief is available both in administrative as well as judicial proceedings (in both cases application of the injunctive relief will be decided by a court). Injunctive relief may also be applied by a court itself in the course of judicial proceedings. If a person applies for a judicial relief and this is granted by the court, that person will not be liable for damages arising from injunctive relief.

In spatial planning proceedings, injunctive relief usually takes the form of suspension of validity of a spatial plan, which would be a basis for halting other procedures based on the spatial plan (e.g. procedures for construction or environmental permits).

Costs

As a rule, “loser pays” principle is applied in Estonia in administrative matters, meaning a losing party is obliged to pay all court fees (which are generally low, e.g. 15 € for presenting the action, 15 € for when applying for injunctive relief) as well as extrajudicial costs (e.g. costs for a lawyer) of the other party. The “other party” in this case means both the administrative body that has made the spatial planning decision as well as all other parties whose rights may be affected by the decision (e.g. real estate developer that applied for a spatial plan). Courts are, however, entitled to reduce the costs (partly or in whole) that must be incurred by the losing party as an exception when compensation of costs would be extremely unjust or unreasonable towards the losing party.

According to well-established case-law, administrative bodies should be able to manage with their own capacities in court proceedings as a rule and in case they have used external lawyers, compensation of their fees has been usually refused (for example in Supreme Court cases 3-3-1-19-0117, 3-3-1-48-0518). Costs of lawyers representing third persons (e.g. real estate developers) are, 17 Supreme Court decision from 24 April 2001 (V. Puolokainen vs Võru City Council), available online in Estonian: http://www.riigikohus.ee/?id=11&tekst=RK/3-3-1-19-01
on the other hand, eligible in principle. Therefore, a person bringing an action against a spatial plan that might affect rights of third persons, risks having to pay high lawyer fees of the latter person in case he/she loses the case.

As regards financial assistance, there are two mechanisms available. Courts may first exempt persons from paying court fees as a whole or partly, or decide that these have to be paid in instalments. Secondly, state-funded legal assistance may also be available (but only under very restrictive conditions). State legal assistance is provided by lawyers (Bar association members) who are initially paid by the state. This does not mean that the assistance would be unconditionally for free. In some cases, part of the costs still hast to be paid or costs paid in instalments either before or after the judgement. More info on state legal assistance is available on the web page of Ministry of Justice19.

Capacity building

There is quite a lot of information available online on both administrative review as well as judicial review procedures (also on official web pages of Ministry of Justice20).

One of the crucial elements in every administrative act (including final decisions on spatial plans) is a reference to the options and conditions for challenging the act. This is usually added to the very end of administrative acts.

6. Summary

Evaluation of public participation

Rules governing public participation in spatial planning matters in Estonia are very democratic in general. As best practice, two issues may be brought out. Firstly, everyone is entitled to take part in the proceedings and may submit their comments at any point of time in the proceedings. Secondly, the administrative bodies are obliged to reply to all comments made within a specific time (4 weeks).

On the other hand, the minimum deadlines for display of spatial planning documents (2 or 4 weeks) are rather short and in practice, administrative bodies have sometimes been reluctant to apply longer deadlines even in complex cases there this would be warranted.

Although rules themselves are democratic and should ensure a broad participation in spatial planning matters, this is not always the case. Main reason for it is the lack of capacities and/or willingness of authorities to foster meaningful participation. Rules are followed, but this is done in a formalistic way and only to the extent required by the law. For example, the notifications on initiating spatial planning procedures or public displays of documents are often written in technical/legalistic language hard to comprehend by general public and only channels required by law (e.g. newspapers) are used (but not social media and other channels/means). However, practice is diverse and there are of course good examples too (i.e. blogs, mailing lists and even Facebook groups used in some municipalities)21.

18 Supreme Court decision from 5 October 2005 (A. Lihtein vs Valga City Government, Valga County Government and Land Board), available online in Estonian: http://www.riigikohus.ee/?id=11&tekst=RK/3-3-1-48-05
19 http://www.just.ee/4616
20 http://www.just.ee/oigusabi and http://www.kohus.ee/37610 in Estonian, most important subpages also available in English.
21 For example blog „Kodukant Kuressaare“ in city of Kuressaare: http://kodukant.kuressaare.ee/, mailing list in city of Tartu
To overcome these shortcomings, a change in the practical application of legal norms governing spatial planning is needed. This can be brought on by both trainings as well as more developed case-law.

**Evaluation of A2I**

Access to justice in environmental matters is also in principle rather well ensured in Estonia. As a good practice, the right for everyone to challenge final spatial planning decisions (so-called *actio popularis*), could be mentioned. As opposed to widely held beliefs in legal theory in Estonia, this has not resulted in a flood of ill-intended actions. As court statistic shows, planning and construction cases make up only a small portion of actions brought to administrative courts (6.0% in 2011, 5.9% in 2012).

The main concern in this field is costs. Firstly, state legal assistance is only available in rare cases, where paying for legal costs by a person would be absolutely impossible (there would be no more money for fulfilling basic needs and the person does not have any assets to sell for paying the legal costs). Secondly, even if the person can manage to pay its own legal costs, they always face the danger of having to pay for all costs of the other party in case of losing the case. These costs include all legal costs of third persons, which in case of real-estate developers that use professional lawyers, may be really high (several thousand to tens of thousands of Euros). Although courts have the right to reduce the costs the loser is obliged to pay and have often done so, there are no guarantees in the legislation to ensure that actions in spatial planning matters do not result in prohibitive costs to the person challenging a final spatial planning decision.

The problem associated with costs would need action from the state, which could be done in two areas. Firstly, conditions for state legal assistance (including free legal aid) should be eased in cases where an action is brought in public interests (as opposed to sole interests of the person). This would ideally be combined with financial means for offering free legal aid (either by state-run or civil society organizations). Secondly, protection from excessive costs in case of losing a court case should be provided by legislation at least in circumstances where the action was brought in public interests and in good faith.

7. **Sources**

**Legislation**


8. Müra normtasemed elu- ja puhkealal, elamutes ning ühiskasutusega hoonetes ja mürataseme mõõtmise meetodid (Standard limits for noise levels in residential and recreational areas, residential buildings and public buildings and methods for measuring noise levels), Regulation No 42 of the Minister of Social Affairs of 4 March 2002, available online in Estonian: https://www.riigiteataja.ee/akt/163756

Case law

9. Supreme Court decision in case No 3-3-1-19-01 from 24 April 2001 (V. Puolokainen vs Võru City Council), available online in Estonian: http://www.riigikohus.ee/?id=11&tekst RK/3-3-1-19-01

10. Supreme Court decision in case No 3-3-1-48-05 from 5 October 2005 (A. Lihtein vs Valga City Government, Valga County Government and Land Board), available online in Estonian: http://www.riigikohus.ee/?id=11&tekst RK/3-3-1-48-05

11. Supreme Court decision in case No 3-3-1-42-02 from 10 October 2002 (Jaama 89 vs Tartu City Council), available online in Estonian: http://www.riigikohus.ee/?id=11&tekst RK/3-3-1-42-02

12. Supreme Court decision in case No 3-3-1-54-03 from 14 October 2003 (Estonian Nature Conservation Society and others vs Pärsti Rural Municipality Council), available online in Estonian: http://www.riigikohus.ee/?id=11&tekst RK/3-3-1-54-03

13. Supreme Court decision in case No 3-3-1-79-09 from 27 January 2010 (O. Skvortsova vs Harku Rural Municipality Council), available online in Estonian: http://www.riigikohus.ee/?id=11&tekst RK/3-3-1-79-09

Studies:


SPATIAL PLANNING – HUNGARY

1. The constitutional legal nature of the spatial planning

In Hungary the legal form in spatial planning decisions has changed several times in the last 20-25 years. The direction of changes is pendulum like. Before the change of regime, spatial planning was clearly a centralised administrative decision vastly influenced by political considerations. After the change of regime in 1989-90 the pendulum of SP legislation swung into the other extreme: almost all the decisions on physical development of the country were given into the hands of local municipality councils with practically no administrative control. The frames of the national and regional (county) level development plans were very loose and lenient, and even the smallest and less resourceful municipalities were allowed to freely decide on the use of their territories. The “dark side” of this democratic and very liberal solution turned out pretty quickly: in many instances the municipalities decided for the sake of short term advantages, they were usually willing to go along with any development plans offered by adventurer investors if the plans seemed to be lucrative enough to fill in the bigger and bigger holes on the municipality budgets. Corruption, typically by raising the value of real estates of friends or relatives of the municipality council members and especially the majors by voting for preferable changes in uses of lands prescribed in the municipality spatial plans seemed to proliferate, too. Yet, during the 90s and even a couple of years after them the principle of self governance, entailing with such extreme decentralisation were kept strong. A typical example of this is that the Constitutional Court abolished a governmental decree that would have tried to introduce a limited veto power for the minister responsible for construction and for the regional chief architects, saying that it was against the “principle of self governance of municipalities”.

In the second part of the last decade, however, the pendulum has started to move backwards. Two major directions of limiting the power of the municipality councils to establish their physical plans freely were the state control and the private economic influence.

As concerns for the influence of the state authorities on the decision of the municipality councils, this was steadily growing in the last decade, until it reached its present form by a governmental decree issued in 2012. The central (regional) influence on the municipality council decisions is much stronger now than what was abolished by the 2002 Constitutional Court decision as being too restrictive on the principle of self governance of the municipalities. At the very beginning of the

23 This country report was copy edited by Haiya Zhang, Erasmus Mundus Master of Environmental Science, Policy and Management (MESPOM) 2012-2014
24 In its Decision No. 69/2002. (XII. 17.) AB the Hungarian Constitutional Court has established that the last sentence of Article 9(6) of Act No. LXXVIII of 1997 on the development and protect of the built environment that sounds „furthermore in case of disagreement (of the minister or the chief architect) based on arguments in connection with non-compliance with laws the local spatial plans shall not be submitted to the municipality council” is counter constitutional and therefore has abolished that. In the explanation of its decision the Constitutional Court referred first of all to Article 43(2) of the Constitution, according to which „The rights and responsibilities of the local municipalities can only be established by an Act. Exercising the scope of authority of the municipalities shall be safeguarded by the courts and in protection of its rights the municipal self-government can turn to the Constitutional Court.” Furthermore the Court referred to Article 44/A(1)a of the Constitution according to which „the local municipality council shall independently regulate and administer the municipality cases and its decisions shall be supervised out of legality reasons, exclusively.” Concretely in this case, the Constitutional Court pointed out that the abolished part of the Article 9(6) of the Construction Act gave priority to the opinion of the minister and the regional chief architect that amounted to a veto right. No rules shall be established that limits the municipality rights as much as in essence depriving or emptying the basic constitutional rights of the municipalities.
25 Governmental Decree No. 314/2012. (XI. 8.) Korm. on the settlement development concept, the integrated strategy of settlement development and on the spatial planning tools
spatial planning procedure the major of the municipality shall send preliminary information to the relevant state administrative bodies that in turn inform the major about the legal requirements and also about the expectations of the respective administrative body and also their existing relevant policy determinations concerning territory of the given municipality26. At the end of the discussion period, the major shall send the draft spatial plan to the chief state architect that in his/her response sends back a professional opinion or organises a negotiation trial on the draft spatial plan. On this trial, led by the chief architect the participants are entitled to bring mandatory decisions and raise conditions the major will have to acknowledge and rewrite the draft spatial plan accordingly. With the renewed plan the same procedure shall have to take place until the chief architect and the negotiation trial (if he/she convenes it) accepts the plan27.

As concerns for the interference of the economic interests with spatial planning, the most important formal legal tool for it is the spatial planning contract. In this contract one party is the municipality, while the possible other parties are the owner of the land subject to spatial planning or the investor that aims to construct a facility on the land in question. In the contract the municipality undertakes to launch a spatial planning procedure with the content desired by the other contracting party(ies)28. Naturally, this direct economic influence might be overridden by the measures of the state bodies taking part in the spatial planning procedure as we have described above.

2. Issues in connection with the protection of environmental elements and waste management taken into consideration in spatial planning

The Hungarian strategic impact assessment rules29 in harmony with Directive 2001/42/EK determines certain activities that shall undergo a SEA procedure first without discretionary rights, enlisted in Annex 1 of the Hungarian SEA Governmental Decree and others that are subject to SEA only if the relevant authorities decide so. In the field of spatial planning, draft plans that refer to the whole territory of the given municipality are considered Annex 1 plans30, while at any other spatial planning cases the authorities shall examine individually whether the expected environmental effects are significant enough to underpin the necessity of initiating a SEA procedure31. Interestingly enough, only in the case of the first category (Annex 1 plans for the whole territory of the municipality) shall the authorities examine the necessity of a renewed SEA procedure when the plans are modified32. The selection criteria contain the following questions amongst others: how far the plan determine the frames for future activities of environmental significance by prescribing its place, technical specificities, size, consumption of natural resources etc.; how far it influences other plans or programs and how far it refers to a territory with existing environmental problems33.

The SEA Governmental Decree makes the environmental evaluation a relatively independent part of the documentation of the relevant plan or program. This evaluation shall be prepared by an environmental expert who meets the conditions established by the laws on the environmental, nature protection and landscape protection experts34 – we think that the independence and the professional background of the SEA experts are decisive factors of the effective, meaningful SEA procedures. These conditions are just partly met in the Hungarian case. The SEA documentation is

26 Article 30(1) and 30(2) of the Governmental Decree No. 314/2012
27 Articles 43(1)-(7) of the Governmental Decree No. 314/2012
28 Articles 30/A(1)-(7) of Act LXXVIII of 1997 on formation and protection of the built environment
29 Governmental Decree 2005. (I. 11.) Korm. on environmental examination of certain plans and programs
30 Article 1(2)b of the Governmental Decree No. 2/2005
31 Article 1(3)a and Annex 2 of the Governmental Decree No. 2/2005
32 Article 1(3)b and Annex 2 of the Governmental Decree No. 2/2005
33 Points 1,2 and 4 of Annex 2 of the Decree No. 2/2005
34 Articles 8(1)-(2) of the Decree No. 2/2005
prepared by the planning body itself and the experts who work on this part of the plan will be in civil law contractual relationship with this very planning body.

The content of the environmental evaluation section of the plan shall be as follows:
- a description of the process of environmental evaluation;
- interrelationship of the plan with other plans or programs;
- suggestions made by other participants during the procedure;
- sources of data;
- the examined alternatives;
- the goals of the plan;
- the environmental effects and consequences;
- a reference to relevant international, EU, national or local environmental plans and directions;
- a description of the relevant element of the concerned environment;
- the cleaning capacities of the relevant environment; existing environmental conflicts on the concerned territory;
- the expected environmental effects, including the indirect social and public health effects, too;
- effects on biodiversity on landscape, climate and other environmental elements, especially Natura 2000 territories etc.

A feature of Annex 4 of the SEA Decree specific on spatial planning is that the environmental examination shall encompass a description of the effects on the optimal spatial structure and use of territories. There shall be also a chapter on prevention or mitigation of the harmful environmental effects and also an analysis of the synergetic effects with other plans and also a chapter on monitoring. Finally a non-technical summary shall be attached to the environmental evaluation.

**Legal practice**

In the Budapest XVII District spatial planning procedure the municipality failed to contact the regional environmental inspectorate in order to initiate a screening procedure where the necessity of an SEA procedure could have been established. It should have sent the goal of the planning procedure (the title of the program, the type and content of it, the affected territory) and also the data necessary to evaluate the significance of the modification compared to the previously accepted, existing spatial plan. A similar failure happened in the case of the Pilisszentkereszt village spatial plan with the difference that the plan in question was a settlement structure plan that per definitionem encompasses the whole territory of the village, therefore, according to the above referred to rules of the Hungarian SEA Decree, a SEA procedure had not been a subject of discretionary decision, it would have not even required a screening procedure. The statement of the Office of the Ombudsman for Future Generations (FGO), evaluating these decisions upon the complaints of the dwellers and NGOs of the concerned municipalities underlines that the spatial plan shall not be submitted to the municipality council unless it has undergone a SEA screening procedure or a full-fledged SEA procedure where it is necessary. From another angle, the opinion taking procedure determined in the Construction Law and the implementing Governmental Decree shall be considered null and void in these cases, because the participating local communities and NGOs, as well as the other participants could not receive the necessary environmental information from the SEA analyses, therefore they were not in the position of formulating properly substantiated opinions.

In a Szentendre City spatial plan case the municipality has duly initiated and proceeded with a SEA procedure. However, the mayor did not hire experts with proper professional background. He just let the officials of the municipality to try to create the environmental evaluation documentation. No wonder that the documentation suffered a serial of shortcomings: it failed to analyse the interrelationships with higher level (national and regional, concerning the territory of the agglomeration around Budapest) spatial plans; failed to develop alternatives; in the chapter titled “restoration of biological activity values” had no references to the protected plant species growing on the concerned territory and therefore had not sketched an action plan to protect them. The ombudsman has evaluated this SEA procedure as null and void and called the municipality council to abolish its decision based partly on such a faulty SEA study.

3. Cross cutting issues taken into consideration in spatial planning

We have seen in the previous chapter that if a spatial planning procedure undergo a SEA examination, certain Natura 2000 protection viewpoints play a role in the screening decision and naturally, the substantial requirements of the evaluation contains nature protection elements, just like certain requirements to assess the social and public health effects, since these topics are as a rule, mandatory parts of any environmental assessments.

The most basic legal source of the spatial planning and construction is the Act on forming and protection of the built environment. The chapter on the basic requirements of settlement development and spatial planning is full of progressive environmental references. The definition of these two terms itself sounds as a sustainable development declaration: “The goals of settlement development and spatial planning are in order to amend the quality of life of the dwellers and the competitiveness of the settlement to form a settlement structure that is in favour of sustainable development and good quality environment (...) enhancement and protection of the natural, landscape and architecture values and promotion of the reasonable and environmental friendly use of resources.” Thereafter the legislator gives the details of this definition in 16 consecutive points. Not less than 13 out of them reflect direct or indirect references to environmental protection such as

- lessening the transport needs;
- formation of healthy workplaces;
- protection of cultural heritage;
- ensuring the access to the best landscape for as many as possible;
- an economical management of the free space and arable lands;
- supporting herb culture based medicines and
- protection and enlargement of the green surfaces in the settlements.

36 Szentendre, Pismány Egres street spatial planning procedure in order to change the zoning for the concerned territory case No. JNO-159/2010 at the FGO
37 Points 3.6.1.2-3.6.1.3 of Annex 4 of the Decree No 2/2005
38 Point 3.6.1.4 of Annex 4 of the Decree No 2/2005
39 Act LXXVIII of 1997 – in that time spatial planning was part of the portfolio of the Ministry of Environment and Physical Planning, therefore the staff that prepared the text of that Act was full of experienced environmental lawyers. Hence the rich set of environmental and nature protection references in the otherwise development oriented Act.
40 Article 7(1) of Act LXXVIII of 1997
41 Article 7(2) of Act LXXVIII of 1997
In the following paragraphs the Construction Act goes even further: it gives a quite ambitious list of activities serving these goals. This list contains amongst others such items as
- retaining natural water resources in the vicinity of the settlement;
- keeping or raising the calculated number of biological activity;
- forming a green ring around the settlements in order to avoid a continuous chain of territories of built environment;
- encouraging brownfield development etc.

However well sounding they are, we can call these items legal lip services, because the legislator failed to ensure the proper legal tools of their implementation, such as detailed rules with clear division of responsibility for the implementation, sanctions, proper institutional and budgetary background, streamlined procedures etc. Even themself the Construction Act when it comes down to the concrete steps and procedures of spatial planning fails to give the proper references to the above natural goals, rather it focuses on the operational tasks, such as infrastructure development.

A similar dichotomy can be found in the Governmental Decree that regulates the technical, procedural details of spatial planning. Still there is a low rate, but fair representation of the environmental topics in the detailed description of the content of the general, preparatory document that starts the spatial planning procedure: out of more than 120 items of this document, roughly 20 are environmental, some of them quite substantial, such as
- ecological network;
- ratio of the green surface;
- brownfield developments;
- bicycle paths;
- environmentally sound energy systems;
- visual environmental pollution;
- protection of the environmental elements;
- waste management and protection against radiation (most certainly not only against ionizing radiation);
- environmental conflict management and city climate issues.

Unfortunately, the lists of content of the concrete spatial plans contain far much less direct or indirect references to environmental protection, while there are much more practical economic, industrial, construction, infrastructural etc. requirements in them.

Apart from the laws and regulations on spatial planning, there are other closely related environmental planning procedures that, at least in principle, spatial plans should be brought into harmony with. In 2008 a new environmental planning chapter was added to the Environmental Code of Hungary with vertical and horizontal systems of environmental planning from the state level to regional, county and local municipality planning on one hand and with several thematic agendas especially on upper levels on the other. The municipal environmental program shall contain chapters on the protection of each environmental element and on several branches of environmental management, such as green surface, precipitation, solid waste, energy and transport management. Optional topics are environmental safety, territorial management, protection of arable lands, protection of built environment, environmental education and support of public participation. While the list on the content of the environmental plans is much more detailed, contrary to the earlier rules.

42 Article 7(3) of Act LXXVIII of 1997
43 Governmental Decree No. 314/2012. (XI. 8.) Korm. on the settlement development concept, the integrated strategy of settlement development and on the spatial planning tools
44 Annex 1 of the Governmental Decree No. 314/2012
45 Act LIII of 1995 on the general rules of environmental protection, its municipal environmental chapter was inserted in 2008
on municipality environmental planning in the Environmental Code there is not anymore specific support or sanctioning mechanism for the municipalities in order to ensure the actual creation and use of their environmental plans. Before 2008, certain local taxes and other revenues and parts of central ones could not be channelled to the municipal budgets unless they had detailed environmental plans in which they determined the earmarked environmental spending of these resources. Under the new rules, municipalities can have any environmental revenues without any commitment to turn them into environmental purposes.

Before 2012 the Hungarian Waste Management Act46 obliged the municipalities to create their respective waste management plans, but since the new Waste Management Act47 entered into force only the regional and national level planning is mandatory. Even if so, in some lower level rules48 the concept of municipality level waste management plan still exists, so we can conclude that such planning is not prohibited and entails with certain advantages. Amongst these advantages we could specify the possibility to develop the spatial needs of waste management (not only the landfills or incinerators but also the so called “waste islands”, the local hubs of selective waste collection) and bring them into harmony with the spatial plans of the given municipality.

Legal practice
In connection with cross cutting issues between spatial planning and environmental protection, the Office of the Hungarian Ombudsman for Future Generations (FGO) has established that the core problem is that densely populated areas get closer, sometimes into a direct neighbour position with facilities of high environmental pollution by faulty designing the locality of either the new housing parts of the settlements or of the industrial, agricultural or service facilities that bring additional environmental burden and make the life of the dwellers in their vicinity unbearable49. In the Nyíregyháza city “Deer-hill dwelling park” case the city council decided to locate the new high quality dwelling developments right beside an existing old animal farm (with intensive sheep, pigs and poultry production). Even if in the opinion taking procedure the complainant (the owner of the farm) and several authorities (environmental, public health) called the attention of the municipality council on the high level noise and air pollution, the council insisted on its original plan, hoping that they would able to convince the farmer to move away from that site. However, the farmer had just invested considerable money into modernisation of its farm, so it would have been quite unreasonable for him to move. The FGO analysis of this stalemate situation was based on the hierarchy of the legal sources in the case. It pointed out that several higher level legal sources (air and waste management decrees on governmental and ministerial level) had established protective zones around the territories of high intensity animal farming, therefore the draft spatial plan of Nyíregyháza city is against the constitutional principle of rule of law.

4. The extension and intensity of public participation in spatial planning decision-making procedures

The Construction Act contains only the most important rules of publicity of the spatial planning procedures. It makes clear that the mayor is responsible for organising the so called “opinion taking” procedure and also for other forms to make spatial planning topics public. All the existing plans shall be available on the Internet homepage of the municipality and also individual requests for data concerning certain real estates shall be served without any expenses on the side of the requesters50.

46 Act XLIII of 2000
47 Act CLXXXV of 2012
48 Such as Governmental Decree No. 126/2003. (VIII. 15.) Korm. on detailed rules on the content of waste management plans
50 Articles 8(3)-(5) of Act LXXVIII of 1997
The detailed rules of the opinion taking procedure and public participation can be found in a separate governmental decree. These two notions are not identical, because many stakeholders, other than the members and association of the public take place in the spatial planning procedure, therefore public participation is just a subsection of the more general term opinion taking. An important legal guarantee is that without such an opinion taking procedure the spatial plan is null and void. The major groups that take part in this procedure are: concerned administrative bodies, concerned regional and local municipalities and the so called “partners”. Partners can be any dwellers, NGOs, business organisation and church. The Governmental Decree do not restrict the right of participation of the dwellers, actually it leaves this important question open. However, in the section about the partnership rules, the Decree enlists the topics in which the municipalities can regulate their own partnerships. These are: the method of notification and information of the partners, the method of registering the proposals and opinions, the way of reasoning in case of refused suggestions and also the ways of publicising the accepted spatial planning documents. Since we do not see any references in this list to the possibilities of the municipalities to limit the circle of the participants, our primarily interpretation would be that there is no such legal possibility at hands. This interpretation is reinforced by the Constitution according to which the municipalities can bring decisions, create local ordinances and determine its order of organisation and operation only within the frames of the laws. However the legal institution of partnerships can be found in the Hungarian legal system in other important places. First in the Act about public participation in legislation, where the ministers responsible for preparation of laws can select certain NGOs as strategic partners and make them quasi representatives of other NGOs in a given sector. Another Act, namely the Act on the basic conditions of the formation and operation of the NGOs also uses the term strategic partners when entitles the relevant minister to opt 3 NGO representatives into the National Civil Fund. Such resemblances and overlaps in legal terms might raise some concerns about the actual width of the circle of the NGOs that are allowed to take part in the spatial planning procedures according to the new wave of the Hungarian legislation. Since these laws are relatively new, only a couple of years long legal practice will tell what is the right interpretation of this vague stipulation in our the spatial planning law.

The Environmental Code contains provisions of public participation in spatial planning, too. The environmental NGOs have the right to take part in settlement development and spatial planning procedures, as well as in developing environmental programs and also in general give an opinion on municipal decrees that are in connection with environmental protection. There are certain limitations of this right, however, and anyone of them could and does actually trigger off longstanding legal disputes. First the NGO can act only on behalf of its membership’s interest, second, the registered field of interest and territory of operation shall cover the issue and the municipality at stake. Third, the NGOs shall be environmental one, and be absolutely non-profit and non-partisan, which features are also frequently questioned in the legal practice.

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51 Governmental Decree No. 314/2012. (XI. 8.) Korm. on the settlement development concept, the integrated strategy of settlement development and on the spatial planning tools
52 Article 28(2) of the Decree 314/2012
53 Article 28(1) of the Decree 314/2012
54 Article 32(1)a, b, and d of the Hungarian Constitution. We note, however, that the Constitution speaks about Acts, it is questionable therefore whether a governmental decree could determine the frames of the municipal legislation and other administrative acts.
55 Article 13(1) of Act CXXI of 2010 on public participation in the preparation of laws
56 Article 60(2)c of Act CLXXV of 2011 on the right of unification, the public interest legal status and on the establishment and support of civic organisations
57 Articles 98(1) and 98(2)a, b and d of Act LIII of 1995
The Hungarian Construction Act and its implementing Governmental Decree extends its scope of regulation to two concept of development of the settlement, integrated settlement development strategy which are not in strictest sense spatial development planning tools. Thereafter the Act and the Decree deals in details with the genuine spatial development tools such as: the settlement structure plan and the local construction ordinance. All these plans can be worked out in a full procedure or in a simplified (expedited) procedure when important social and economic interests are at stake. The simplified procedure gains time mostly on the account of omitting the preliminary phase and shortening the time available to make comments. The full procedure consist of the preliminary information, the discussion, the final evaluation and the acceptance and implementation stages. We note that the final evaluation stage belongs exclusively to the chief architect and in case of a negotiating trial is necessary for the approval of the chief architect the concerned members and organisations of the public are excluded from that59. The same applies to the case when the spatial plan is changed following to the claims of the chief architect60.

Notification
In the case of the most general spatial planning tool, the concept of development of the settlement the whole concept paper is sent to the partners in the very first step of the iterative planning procedure, in the same time as they are sent to the concerned authorities and municipalities and other participants. The same happens in the full spatial planning procedure in the preliminary information stage61. It is important to note that if some partners do not send back to the municipality their feedback within the deadline they will not be informed about the following stages of the procedure62.

Information
Again, as we have noted above, in the case of the most general spatial planning tool, the concept of development of the settlement the whole package of the primary concept is to be sent to the partners at the very onset of the planning procedure63. In the preliminary information phase the major sends a letter to the partners in which he/she specifies the aim of the planning procedure, the expected effects in a way and details that makes all the concerned parties able to submit comments, proposals and opinion64.

Deadlines for responses
In the case of the most general spatial planning tool, the concept of development of the settlement the partners have 21 days (in the capitol city: 30 days) to send their suggestions, comments and opinions65. The one grade more detailed (but still not broken down to spatial terms) development plan is the integrated settlement development strategy where the deadlines are the same66. The deadline is also 21 days in the preliminary information stage, while it is 30 days in the discussion phase, the main body of the opinion taking procedure67. In the simplified procedure the deadline is 15 days68.

58 Articles 41(1) and (3) of the Decree 314/2012
59 Article 40(2) of the Decree 314/2012
60 Article 40(7) of the Decree 314/2012
61 Article 30(1) and 37 (2)d of the Decree 314/2012
62 Article 37(7) of the Decree 314/2012
63 Article 30(1) of the Decree 314/2012
64 Article 37(3) of the Decree 314/2012
65 Article 30(2) of the Decree 314/2012
66 Article 31(1) of the Decree 314/2012
67 Article 38(3) of the Decree 314/2012
68 Article 30(3), (6) and (8) of the Decree 314/2012
**Procedural guarantees of taking the comments into consideration**

In the case of the most general spatial planning tool, the concept of development of the settlement the mayor in his/her addressing the municipality council before voting on the plan shall describe those opinions and their reasoning his/her team rejected during the preparation works. Also the mayor shall send this reasoning directly to those concerned in writing within 5 days after the council has accepted the plan. The same procedure shall be followed in case of the integrated settlement development strategy. In the actual spatial planning procedure the first guarantee is that the municipality council shall bring a separate in-between decision on accepting or refusing the comments given by the participants and also an explanation shall be attached to the refusals and the whole decision should be published. At the very end of the planning procedure the mayor shall publish the final text of the spatial planning tool.

**Public participation in SEA procedures in connection with spatial planning**

Contrary to the individual environmental impact assessment procedures in the screening/scoping phase of the strategic environmental assessment procedure there is no public participation. Only the decision on screening/scoping shall be published by the designer authority of the plan on its homepage or in any other available way. The information on the decision should contain the decision itself, its explanation and the fact whether the designer authority decided that there is no need for a SEA procedure.

The final environmental evaluation and the draft plan or program shall, however, be sent on one hand to the National Environmental Council (a governmental advisory body in environmental matters in which the one third of the member are elected by the National Assembly of the Environmental and Nature Protection NGOs) and be put on a public Internet domain. The information on the plan or program shall encompass the aim of the plan, the place where the whole planning documentation can be accessed to and commented. The deadline for comments shall not be less than 30 days.

**Legal practice**

We have witnessed spatial planning cases in Hungary where the municipalities failed to involve any members or organizations of the public into the opinion taking procedure, such as a Dunakeszi city, Liget street regulation plan and local construction regulation (the map and the written versions of the same lowest level spatial plans). The representatives of the municipality argued that first, the spatial plan referred only to a very small portion of the city (7 real estates) and second, that was only a slight modification of the original plan. However, the ombudsman survey have revealed that the municipality officials were right aware of the fact that this small piece of land was in the centre of local disputes and the direction of the modification of their use was quite controversial, too. The final evaluation of the case by the FGO established that the municipality has infringed the right to healthy environment of the concerned dwellers and also the principle of rule of law. In a similar case about the joint spatial plans of Nagymányok-Kismányok-Várälja-Hidas villages a regional NGO from Pécs city that was specialised in mining issues notified the municipality that they would want to participate in any administrative processes that were in any relationship with the surface mining activities in the small region of the mentioned villages. Even if the spatial planning procedure aimed

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69 Article 41(3) of the Decree 314/2012
70 Article 31(4) of the Decree 314/2012
71 Articles 39(2) and (3) of the Decree 314/2012
72 Article 43(4) of the Decree 314/2012
73 see Article 3(3) of Governmental Decree No. 314/2005. on the environmental impact assessment and IPPC procedures
74 Articles 8(1) and (5) of the Governmental Decree 2/2005.
75 Case No. JNO-206/2010 of the Office of the Ombudsman for Future Generations
76 Case No. JNO-715/2010 of the Office of the Ombudsman for Future Generations
to enable to open this strip mine activity, the municipalities decided that the NGO has no right to participate in the process because it is not a local NGO with a territorial scope of activity covering the regulated lands geographically. In the opinion of FGO, however, the terms “concerned” or “interested” should not be solely based on territorial relationships but topical ones, too, therefore the decision of the municipalities was unconstitutional.

Also in the Nagymányok village spatial planning case the mayor failed to notify the rest of the public about the onset of the procedure. In the ombudsman investigation the mayor was interviewed and he contended that the joint session of the municipality councils where they decided upon the launching of the modification procedure of the spatial plans concerning the territory of the future open surface coal mines was open to the public, moreover it was widely known in the concerned villages that the joint session would be organised and would discuss the issue of the mine amongst other topics. The FGO did not accept these arguments, because a formal notification in a public participation procedure has several substantial elements, first of all the warning of the members and organisations of the public that a decision with certain aims and contents would be made and that the concerned public has the right to submit opinion or suggestions. Similarly to the Nagymányok case, in a Törökbálint village case on spatial planning in the “Tükörhegy No. IV development region” the municipality simply informed the local community in the local journal of the municipality that a new spatial planning procedure would start. However, the municipality failed to give any further data or explanation of the procedure, especially failed to call the attention to the possibility of commenting the draft plans. In its analysis of the case the FGO evaluated this procedure as unconstitutional and pointed out the importance of early participation where the options are more open than in the later stages of the decision-making procedures.

5. **Legal remedies available in spatial planning procedures**

As we have seen in Chapter 1, the Hungarian spatial planning issues are decided by the municipality councils in the form of normative acts, i.e. a municipality decision or a municipality ordinance. Therefore, administrative legal remedies are impossible in the Hungarian case, rather the members and organisations of the public who feel a spatial planning decision unfair or harming their interests or the interests of the environment and the future generations will have to fall back on a couple of available extraordinary remedies. Many of these opportunities are basically ex officio ones, while sometimes a practice has been formed that individuals or organisations can informally approach the high ranked special bodies with a request to take into consideration a remedy. There are very few if any legal guaranties of due consideration of these informal requests and naturally, no further remedies are available if the high level body refuses the proposal or even fails to respond to it. Standing is generally not restricted, however. While these fora are not always easy to approach, their procedures are usually fair and as extraordinarily legal remedies, they put a special stress on equity approaches. Moreover these procedures are free as a rule. However, a backlash of not being regular legal remedies, in these procedures issuing injunctive relief or ordering any similar immediate operative measures are usually not possible. Capacity building is also not the strongest part of these extraordinary procedures and as such a little bit elitist remedy procedures (in many of them professional private attorney representation is either obligatory or highly advisable because of the sophisticated legal background).

The most practical legal remedy against a municipality council decision or ordinance is the application of the strong supervisory power of the Governmental Office, a county level, government appointed body. In the pendulum like development of the scope of authority of the municipalities along the decentralisation-centralisation axis, in the last 15 years a continuous shift can be experienced towards decentralisation. In the new Act on self governments of Hungary the

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77 Case No. JNO-703/2010 of the Office of the Ombudsman for Future Generations
78 Act CLXXXIX of 2011 on the self governments of Hungary
Governmental Office has the widest ever legality supervision authority that ranges from a legality warning and the mandatory initiation of summoning the municipality council, through initiating a Constitutional Court revision of a municipality order or a complaint at an administrative court for revision of a municipality decision, up to the most severe sanctions that seriously threaten the prestige and the budgetary balance of the municipality, such as initiation of the dissolution of the municipality council or initiation of freezing a certain part of the State Budgetary subventions, together with initiating a Central State Audit procedure against the municipality or the leading officials.79. Unfortunately there is no official citizens’ initiative towards the county Governmental Offices and the experiences of our legal practice are not positive: complaints of citizens and NGOs can stay unanswered for months and even years.80

In the last twenty years the Hungarian Constitutional Court has issued more than 900 substantial decisions in connection with municipality level legislations, the majority of these decisions concerned spatial planning issues, too. Up to 2011 everyone had the right to turn to the Constitutional Court and ask for the revision of the constitutionality of a legislative act, including municipality ordinances. Unfortunately, the new Act on the Constitutional Court has seriously limited the scope of this actio popularis. Since this law entered into force, only those natural persons and NGOs can initiate a Constitutional Court case who are directly interested in the case and started a regular court procedure for remedies in vain. Moreover, in connection with a municipality ordinance they cannot ask a general control of the legality of the rule in question, only establishing the direct collision with the Constitution (for instance, a collision of the municipality ordinance with a higher level law falls apart from the scope of authority of the Constitutional Court).83. Since then, in the last two years there are only 10-15 cases annually about municipalities at the Constitutional Court. Earlier The Constitutional Court frequently dealt with citizen complaints about municipality spatial planning acts and abolished their concerned parts when it learnt that the procedural rules of opinion taking and discussion phases were not properly applied.84

Finally we have to refer to the ombudsman institution that is indirectly referred to in Article 9(1) of the Convention (with the difference that the findings and suggestions of an ombudsman are seldom directly binding to the administrative bodies, neither this is the case in Hungary). The Hungarian Parliament has amended the former Ombudsman Act in 2007 and inserted a new chapter on the independent ombudsman of the future generations. This office worked for 4 years successfully on many spatial planning cases until 2012 when the new ombudsman act entered into force. Even if according to this new law the environmental (future generations) ombudsman is not independent anymore (a deputy of the chief ombudsman, but having a high level legitimacy because of direct Parliamentary election with qualified majority) but together with the large office of the chief ombudsman he still has quite strong position. Local municipalities can be subjects of complaints in

79 Articles 132(1) a-l of Act CLXXXIX of 2011
80 See for instance from EMLA’s practice where as legal representatives of the Budapest VIth district, Liszt F. square dwellers we issued a complaint and a proposal to the head of the Capitol City Governmental Office half a year ago and haven’t received any answer. We note that in this case we have documented and analysed in details several clearly unconstitutional features of 3 spatial planning decisions of the VIth District Municipality Council in connection with a small square where as many as 22 night clubs and pubs (mostly with night shifts, too) are allowed to disturb the local dwellers with no legal consequences on the basis of the spatial plans.
81 Act CLI of 2011 on the Constitutional Court
82 Articles 26(1) a, b of Act CLI of 2011
83 Articles 37(1), (2) of Act CLI of 2011
84 Such as Decision No. 125/2009. (XII. 17.) AB on abolishing certain provisions of Baja City Local Construction Regulation, Decision No. 166/2008. (XII. 18.) AB on abolishing certain provisions of Budapest, XV. District Construction regulation and Decision No. 11/2004. (IV. 7.) AB abolishing certain provisions of Andornaktálya village General Spatial Plan because of no or faulty using of the procedural rules of Article 9 in the former Construction Act on the procedure of collecting opinions about the draft plans.
85 Act CXI of 2011 on the commissioner of basic rights
the new ombudsman office, too as far as the activity or omission of the municipality infringes basic constitutional rights, such as right to property, right to life and health, right to environment, right to information or right to a fair procedure. Once the ombudsman receives and accepts a complaint, with the help of his/her environmental deputy surveys the case and summarizes its facts in a publicly accessible report. Transparency and media conveying are important effectiveness factors of the procedure of the ombudsman. If the ombudsman finds an infringement of constitutional rights, he/she suggests the restoration of these rights to the surveyed organisation. As statistics of the annual Parliamentary reports of the Ombudsmen shows, in the majority of the cases the mere suggestions are enough to remedy the constitutional infringements. However, in case of disagreement the ombudsman has several channels to take the case further. He/she can turn to the prosecutors in charge with non-criminal cases and ask for their measures. Unfortunately, the new Act on Prosecutors is not containing anymore a clear reference on that the prosecutors are entitled to start a case against municipalities in case of a municipality decision or order, while in the detailed rules on the court procedures concerning the supervision of these rules there are some hints that the prosecutors can be amongst the initiators of such legal remedies.

A further possibility of the ombudsman is that he/she can enter into an administrative court case as amicus curae in order to support the supervision of the municipality decision. However, naturally, the condition of such a measure is that someone starts such a case. More precisely, the ombudsman can itself initiate a Supreme Court case directly for the revision of a municipality council decision on spatial planning.

Summary

The level of environmental democracy in the field of environmental protection is a (minimum) twofold question: on sociological side both the local communities (NGOs) and the authorities have been learning democracy, environmental protection and environmental democracy. The laws and regulations are more and more sophisticated, trying to respond all the important issues that were raised in the last twenty years, while the civil side is first of all realizing the importance of spatial planning in the fate of their immediate and broader environment and in the wellbeing of the future generations. If we consider only the legislative and legal practice side of the issue, our answer will have to be definitely negative: more and more restrictions on access to information, participation or remedies are coming and earlier rights and procedural revenues are disappearing piece by piece.

Like on a sensitive potentiometer values are shifting towards the negative end in a serial of matters. Spatial planning is more and more centralised and formal administrative decisions take over the former deliberative procedures. Instead of integrating environmental protection viewpoints into several branches of our social-economic life we see the proliferation of these material interests on the account of the longer term environmental values. For someone even this pace of degradation is too slow: these municipality councils and authorities simply cheat, they shamelessly sacrifice our liveable environment for their short sighted, selfish interests. This spirit of deception, strangely enough, appears in the legal texts, too. We see in our spatial planning laws high level professional explanations of the true essence of sustainable development, environmental principles mirroring the

86 Article 18(1)b of Act XCI of 2011
87 Articles 28(1)-(2) of Act XCI of 2011
88 Article 31 of Act CXI of 2011
89 Article 33 of Act CXI of 2011
90 Act CLIII of 2011 on the prosecutors
91 Article 33(3) of Act CXI of 2011
92 Articles 34 and 34/A of Act CXI of 2011

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latest developments of environmental sciences of the world. Sometimes in the very same laws or in their implementing lower level regulations, however, we see the rough reality of the short term economic interests that do not tolerate limitations by the environmental interests or by the agents of it using public participation tools.

The worst hindrance of a meaningful and effective public participation and access to justice in spatial planning (and SEA) procedures in Hungary is the systematic dismantling of participation rights in several areas: disappearance of *actio popularis* from the procedural rules concerning the Constitutional Court, eradication of the independent environmental ombudsman institution (FGO), exclusion of the local communities and environmental protection organisations from certain phases of the spatial planning procedure, limitations in the circle of persons who are entitled to participate and reducing the depth of their participation rights. These changes in the Hungarian law are against several articles of the Aarhus Convention, especially if we examine them in the light of the non-retrogression principle.

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Act LIII of 1995 on the general rules of environmental protection, its municipal environmental chapter was inserted in 2008
Act XLIII of 2000 on waste management
Act CLXXXV of 2012 on waste management
Act CLXXXIX of 2011 on the self governments of Hungary
Act CLI of 2011 on the Constitutional Court
Act CXI of 2011 on the commissioner of basic rights
Act CXLII of 2011 on the prosecutors
Governmental Decree No. 126/2003. (VIII. 15.) Korm. on detailed rules on the content of waste management plans
Governmental Decree No. 314/2012. (XI. 8.) Korm. on the settlement development concept, the integrated strategy of settlement development and on the spatial planning tools
Governmental Decree No. 314/2005. on the environmental impact assessment and IPPC procedures
Governmental Decree 2005. (I. 11.) Korm. on environmental examination of certain plans and programs

**Constitutional Court decisions**

Decision No. 69/2002. (XII. 17.) AB the Hungarian Constitutional Court
Decision No. 125/2009. (XII. 17.) AB on abolishing certain provisions of Baja City Local Construction Regulation
Decision No. 166/2008. (XII. 18.) AB on abolishing certain provisions of Budapest, XV. District Construction regulation
Decision No. 11/2004. (IV. 7.) AB abolishing certain provisions of Andornaktálya village General Spatial Plan

93 Without wishing to alienate the merits of the drafters of these laws, we note that the staff of the Office of the Ombudsman for Future Generations, with its widespread international and national professional networks played important role in appearing this quite progressive language in the new wave of spatial planning regulations in Hungary.

Practical cases
Case No. JNO-441/2011 from the practice of the Ombudsman for Future Generations
Szentendre, Pismány Egres street spatial planning procedure in order to change the zoning for the concerned territory case No. JNO-159/2010 at the FGO
Case No. JNO-206/2010 of the Office of the Ombudsman for Future Generations
Case No. JNO-715/2010 of the Office of the Ombudsman for Future Generations
Case No. JNO-703/2010 of the Office of the Ombudsman for Future Generations
EMLA’s case of the Budapest VIth district, Liszt F. square dwellers vs. Budapest District VI Municipality Council

Other sources
Decision of the Aarhus Compliance Committee No. ACCC/C/2004/04
5.

SPATIAL PLANNING - SLOVAKIA

1. The constitutional legal nature of the spatial planning

Question: In which legal form the decisions on spatial planning are brought in your country?

Extension: We need to examine the legal form of spatial planning at least along two axes: is that an administrative (and if administrative, it is in a form of an individual decision or rather a planning document in the form of plan, policy or program) or a legislative act from the one side, and how far it is centralised-decentralised on the other side. More concretely: which organisation brings what kind of decision on what legal basis (entitlement) in the field of spatial planning in your country?

Conditions and methods of drafting and approval of spatial use plans (process of spatial planning) are regulated by law. Spatial plan is adopted/approved on three different levels. So called „Concept of land use development“ is approved by the government of Slovakia in a form of government degree. So called „Land use plan of region“ is approved on the level of regions (there are 8 regions in the Slovak republic) by generally binding decisions of each region. On the level of municipalities, municipal spatial plan is approved by generally binding decision. Municipalities may approve spatial plan of zone, which is more detailed and is also brought by generally binding decision.

Thus from the viewpoint of the legal form, spatial plans on all three levels are approved in a form of generally binding legislative acts of a lower power than legislative acts, since spatial planning concerns large number of individually unspecified persons.

Municipal spatial plan as well as spatial plan of zone are binding documents for issuing land use decision or construction permit, which are individual administrative decision. In the case of the spatial plan of zone – it can even replace land use decision if it determines in sufficient detail conditions for locating construction and in its binding section spatial plan of the zone contains statement that it replaces land use decision. Construction code explicitly states that spatial plan of zone effects property rights of natural and legal persons.

From the content point of view it is beyond any doubt (and it the case of spatial plan of zone even explicitly state in the Construction code) that spatial plans of municipality and zone may in specific cases effect rights, legally protected interests or obligations of natural or legal persons (for example if the municipal spatial plan determines area for public benefit construction site, such property can be assigned for expropriation, hence there is no doubt regarding direct effect on related property owners).

Spatial plan of municipality as well as plan of zone is brought in a form of generally binding legal act, which however (from the content point of view) clearly has signs of individual administrative act. Slovak legal system however does not recognize such „combined“ administrative acts.

2. Issues in connection with the protection of environmental elements and waste management taken into consideration in spatial planning

Q: How far the SEA procedure requirements are applied for spatial planning in your country?
E: We need to examine the conditions of applying SEA procedure for the spatial planning cases. How the spatial planning cases subject to SEA are selected (screening), which cases shall undergo a SEA procedure, are there specialities in the SEA regulation tailored to spatial planning and what are the elements of the strategic environmental study (scoping).
Spatial plans are, according to the law, strategic documents subjected to mandatory SEA. Possible exception may be “strategic document, which determines use of small areas on local level” in which case such strategic document is subject to screening. Environmental impact assessment act (regulating SEA procedure as well) does not set criteria to determine such “small/local level” plan in specific cases. Hence it is not clear when screening should be applied in approval of spatial plans.

Strategic impact assessment must be conducted during procurement of land use plan, before its approval.

Strategic environmental study (scoping) concerning spatial plans contains data on applicant, characteristics of land use documentation, data on inputs and outputs, complex characteristics and assessment of environmental impacts [determining area, current environmental conditions, assessment of expected impacts, including impacts on health and assessment of their significance/extent of effect (expected impacts direct, indirect, secondary, cumulative, synergic, short-term, temporary, long-term, permanent), proposed measures to prevent, eliminate, mitigate and compensate impacts on environment and health, comparing alternatives and variants, methods used in the assessment process and methods and sources for obtaining data, deficiencies and uncertainties encountered during the process].

3. Cross cutting issues taken into consideration in spatial planning

Q: How far a spatial planning decision in your country determines the following fields of administration?
   - the protection of nature and biodiversity
   - the protection of health
   - the protection of resources and proper management of wastes.

E: What are the substantial legal and procedural guarantees that these important social interests are taken into consideration in the spatial planning decisions? Are there for instance mandatory nature protection, public health and resource-economy parts in the preparatory materials which the decision-maker bodies need to take into consideration before bringing their decisions?

Due to the content of spatial plan of municipality or zone (see above), there is no doubt that approved plan may have direct effect on mentioned areas of public interest (municipal land use plan for example determines disposition and functions of municipal territory in connection with its surroundings; determines permissible, limited and banned use of territory; contains principles for protection of nature and elements of living environment, including municipal green areas etc.)

Sufficient consideration of protection of nature and biodiversity, protection of health, protection of natural resources and proper waste management is provided by the Construction Code in the process of spatial planning in the following ways:

Procurement of spatial plans must reflect existing documents and information regarding territory, namely it is mandatory to use
a) sustainable development strategy, strategy of environmental policy, environmental action programs and sectoral concepts
b) projects of land development, forest, water-management and irrigation adjustments
c) documents of local system of ecological stability, programs of land-scape and nature protection
d) programs of culture and historical heritage protection
e) programs of waste management
f) concepts of development of different areas of municipal life and strategies and programs of regional development
During the spatial planning process different state institutions and authorities, which should advocate interests protected by other legislation (e.g. nature protection authorities, health protection authorities), have right to comment different stages of the process. Opinion expressed by such „involved“ authorities, within powers determined by relevant legislation, is binding and must be reflected in the spatial plan.

When the spatial plan is submitted for approval, authority is obligated to review whether the content of such proposal as well as process of its preparation are in compliance with relevant legislation and assessment of binding opinions is also subject of review. Compliance is reviewed by higher instance planning authority. If spatial plan draft is not in compliance, it may not be approved. In case it is approved despite non-compliance, such approval is invalid.

4. The extension and intensity of public participation in spatial planning decision-making procedures

Q: Which circles of local communities and NGOs (local, regional, national, professional etc.) has the right to take part in the spatial planning procedure, under what conditions, if any and what is the legal position of them in the procedure?

E: Apply the criteria of the conditions and quality of public participation of Article 6 of the Aarhus Convention mutatis mutandis to spatial planning cases. Only interested individuals or communities, local groups and national level professional NGOs are allowed to take part in spatial planning and if yes, upon which conditions (scope of activity, being connected with the affected area etc.)? How is notification done about the onset of the procedure and how deep and detailed the information contained thereof? If the procedure is iterative, in what stages the members and organisations of the public are allowed to have a say? What are the deadlines of issuing opinion in these stages? How do you see the procedural guarantees of due consideration of public opinion. These questions apply both for the case when an SEA is done and for cases without SEA.

In the process of spatial planning public has right to participate in the following ways:

Legislation outlines three stages of spatial planning (layout, concept and proposal/draft) and in each stage public can submit its comments. Construction Code uses general term „public“ (with the exception of spatial plan of zone), therefore everyone may comment spatial plan regardless of legal or other position in the concerned territory (e.g. existence of property rights). Layout, concept and proposal must be made public for the time period minimum 30 days and public has right to comment within 30 days since notification. There is a mandatory public hearing within each stage of the process and generally understandable explanation must be provided in the stage of the concept.

Comments must be assessed and in case of their non-acceptance, they must be discussed with the person submitting such comments. Notes are taken regarding assessment of comments.

In case of the spatial plan of zone there are certain exceptions, e.g. municipality must invite concerned persons to express their comments and must discuss proposal with directly aggrieved persons.

Concerning conditions set by the Article 6 of the Aarhus convention it must be noted that given the Slovak legislative frame, spatial planning decision-making is regulated by Articles 7 and 8, not Art. 6 of the Convention, since it is a plan adopted/approved as a normative/legislative legal act. Despite the fact and reflecting wording of the Article 7 of the Convention, which refers to article 6.3, 4 and 8, it may be stated that spatial planning decision-making does not meet conditions of the Article 6.8 of the Aarhus Convention („Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.“). This condition is not met since public has right to comment, even have comments discussed, however there is no legal tool to influence authority to actually
reflect comments in the spatial plan proposal/draft submitted for approval. Slovak legislation does not contain provision, which provides for due consideration of public comments. If planning authority meets obligation to discuss comments, it does not have further obligation to consider comments brought by public and public has no relevant legal tools to make authority consider content of its comments and settle them in any relevant way (e.g. by seeking court review).

5. Legal remedies available in spatial planning procedures
Q: What kind of remedies, if any are available for the members and organisations of the public in order to challenge the procedural and substantial issues of the spatial planning decisions?
E: The nature of legal remedies will certainly differ according to the constitutional nature of the decision (Question 1). Standing, fora, deadlines, and – mutatis mutandis – the four criteria of qualitative assessment of a2j procedures according to Article 9(4) of the Aarhus Convention: fair, equitable, timely and not prohibitively expensive. We could also use the qualifiers thereof, too: adequate, effective and also descriptive elements: accessibility of injunctive relief, decisions recorded in writing (might not make sense under our jurisdictions) and being publicly accessible. Also the special capacity building issues included in Article 9(5) shall be taken into consideration, such as information provided to the public on access to several kinds of review procedures and existence of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. We will have to differentiate between the supervision of the substantial issues (e.g. by a constitutional court review of a municipality decree or a decree of the relevant minister) and the review of the process, first of all public participation (e.g. a review of whether or how public comments have been considered/incorporated/dealt with by the developer of the plan).

As mentioned above, public has right to submit comments during all stages of spatial planning. Those comments must be discussed.

After the spatial plan is approved however no member of public has right to challenge such plan – its procedural or substantial issues - at a court or other impartial body. Formally spatial plan is a normative legal act and court review, as provided by Code of Civil proceedings for individual administrative acts, does not apply (this despite the fact that from the content point of view spatial plan may have features of individual administrative act, which have court review guaranteed – both as stipulated by the Article 9.3 of the Aarhus convention as well as the Slovak Constitution).

Spatial plan is subject to review of the higher instance authority before it is approved, which checks its legality. Public has no procedural rights in this proceeding. This review does not meet conditions of the Article 9.3 and 4 of the Convention.

After the spatial plan is approved it can be subject of court review initiated by public prosecution in accordance with the Prosecution Act. Prosecution inspects legality of public authorities and within this competence it has a power to issue „protests“ if it is convinced that certain act of public administration (including spatial plan) is illegal. If authority does not comply with the „protest“ issued by prosecution, prosecution has right to submit court petition requesting the court review. This process however does not meet conditions set by the Art.9.3 and 4 of the Aarhus Convention, even if prosecution initiates court review based on appeal of a member of public. It is up to an independent consideration of prosecution, whether such public appeal will be granted or not. Prosecution may or may not issue a „protest“ and prosecution may or may not request court to review act, by which spatial plan has been approved. Public has no guarantee that disputed spatial plan will be reviewed by court. Article 9.3. provides for a direct access of members of public to court to review legality of acts of public authorities before and independent and impartial body, which meets conditions of the Art.9.4 of the Convention.
Current case law is not more favorable – in general Slovak courts turn down requests for court review of spatial plans with the exception above mentioned when petition is filed by public prosecution.

**Summary**

How do you evaluate the level of environmental democracy in this field? Where do you see the bottleneck(s) of a meaningful and effective public participation and access to justice in spatial planning (SEA) procedures in your country? Are there any grievous occurrences that reach the level of non-compliance with articles 9(3) or 9(4) of the Convention? What would be your suggestions to change the rules and/or the practical implementation of them?

What would you qualify from the spatial planning laws and legal practice of your country as best practices or even as a possible meaningful input into drafting of the EU Access to Justice Directive?

It is our opinion that public participation in the spatial planning process is insufficient and does not meet obligations set by the Aarhus Convention.

Public has right to submit comments in every stage of the process and public comments must be discussed, however decision-making authority is not obligated to take comments into consideration and reflect them in its decision. Therefore, effective participation in the spatial planning may be only a „formality“.

From the point of view of access to justice, no member of public has a right to request court to review legality of spatial plan process and content. Since there is no doubt that spatial plan is an act issued by public authority which may contravene provisions of national law relating to the environment, in accordance with the article 9.3 of the Aarhus Convention, conditions of this article are insufficiently reflected in the legislation and application practice of the Slovak republic.

**Sources**

Following this closing section of the substantial country study, please list your sources, such as the official name of the quoted or used laws, regulations etc. with a rough English translation in brackets and also, some sources about legal practice (such as court decisions, appropriate sections of ombudsman or prosecutors’ reports, ministerial or other official analyses, articles from the environmental legal literature, including university study books and NGO pamphlets etc.). While the possible sources are abundant, we might need resources for more than 3-4 practical cases as references (but, naturally, they might be referred to at several places in the text).

**Legislation:**


**Case law:**

Supreme court of Slovakia in its decision No. **5Sžo/232/2010** stated that petition seeking court review of adopted spatial plan submitted by the local civic association, has been submitted by an unauthorized person and the proceeding has been terminated.

Similarly Supreme Court of Slovakia in its decision No. **8 Sžo 195/2008** ruled that spatial plans are not individual administrative acts, which are subject to court review. Additionally the court stated that inactivity of administrative authority is an action subjected to court review.

Constitutional Court of Slovakia, in its decisions No. **II. ÚS 105/07, II. ÚS 103/02, III. ÚS 176/03 and IV. ÚS 196/2011**, stated that spatial plan is not an individual administrative act, which constitutes, changes or abolishes rights or obligations of aggrieved person and therefore it is not a subject to court review.
6.

SPATIAL PLANNING - SLOVENIA

1. The constitutional legal nature of the spatial planning

Question: In which legal form the decisions on spatial planning are brought in your country?

Answer:

Spatial Planning in Slovenia is divided into two levels – on national level and on local level. The state prepares laws, policies and other strategic documents but also has the authority to perform measures concerning spatial development activities and construction of national significance (like railways, state roads, big infrastructure objects, etc.). On the other hand local communities have the right to perform spatial management and planning on their territories (with exception of those activities which are under direct jurisdiction of the state). In Slovenia we do not have spatial planning on the regional level due to the fact that we do not have counties although regional planning is partly foreseen in the Spatial Planning Act. In the frame of Ministry for Infrastructure and Spatial Planning The Spatial Planning Directorate is dealing with spatial planing in general.

Slovenian spatial planning system was subject to many changes on the legislative level in recent years and that is why there are now many different types of valid spatial planning acts. A lot of them are old types (more than 25 types) and should be replaced in near future with new ones according to the Spatial Planning Act (adopted in Year 2007, it is covering acts on regional and local level) and to Act regarding the siting of spatial arrangements of national significance in physical space (adopted in Year 2010, it is covering acts on national level). Our legislation aknowledge 5 types of spatial planning acts (3 types are exercised in practise):

1. national strategic spatial planning act (državni strateški prostorski načrt - DSPN)
   Until 2013 it was not adopted yet. It should be a spatial planning document, which is based on the development needs of the country and takes into account the protection requirements in the field of environmental protection, nature conservation, sustainable use of natural resources, cultural heritage protection and preservation of human health and determines the objectives of spatial development guidelines as well as guidelines for the design of spatial arrangements of national and local importance. It should be adopted by the National Assembly (on the proposal made by the Government).

2. national spatial planning act (državni prostorski načrt - DPN)
   It contains spatial arrangements of national importance and the implementing conditions for them. It is adopted by the Government in the legal form of Regulation.

3. regional spatial planning act (regionalni prostorski načrt)
   This type is not mandatory but can be adopted by few local municipalities. It could regulate the spatial management of local importance, which extend to the territory of several municipalities and could be used for implementation of the regional development program. It could be adopted by several municipalities (municipal Councils).

4. local spatial planning act (občinski prostorski načrt - OPN)
   It contains a strategic and executive part and covers the territory of one local municipality. A strategic part of this act can be adopted as local strategic spatial planning act (občinski strateški prostorski načrt – OSPN). An executive part is the legal basis for obtaining a building permit. OPN is adopted by Municipal Council.

5. local detailed spatial planning act (občinski podrobni prostorski načrt – OPPN)
   The act contains detailed spatial arrangements in specific areas of local municipality where rehabilitation of dispersed settlement, expansion of settlement, areas for exploitation of mineral resources or major economic infrastructure are planned. This act is also legal basis for obtaining building permit. It is adopted by Municipal Council.
These spatial planning acts are all treated as legislative acts and not administrative act. They are placed in the hierarchic system and all lower acts have to be in accordance with the highest acts. Acts are not formally sorted on strategic and executive acts but DSPN is the only act with a strategic nature while other acts (DPN, OPN, OPPN) contain both a strategic and an executive part.

2. Issues in connection with the protection of environmental elements and waste management taken into consideration in spatial planning

Q: How far the SEA procedure requirements are applied for spatial planning in your country?

Answer:

SEA procedures are implemented in Environment Protection Act and not specifically by legislation on spatial planning (Spatial Planning Act and Act regarding the siting of spatial arrangements of national significance in physical space). The Legislator has the intention to incorporate SEA procedures in the process of adopting spatial planning acts until 2014. At the moment SEA is more like special procedure (comprehensive environmental impact assessment) incorporated in the procedure of adopting spatial planning act. It is delegated for all type of spatial planning acts (except for national strategic spatial planning act - DSPN).

Before the proposal of the spatial planning act is prepared an originator of a plan shall provide definition, description and evaluation of impacts of the implementation of the planning act on the environment and possible alternatives in the environmental report. If the planning act refers to the protected area, the report should also take into consideration nature conservation regulations according to the Nature Conservation Act. The authority will prepare the proposal of the planning act and send it together with the draft of the environmental report to the Ministry of the Environment that will forward it to official authorities responsible for individual areas of environmental protection. These authorities have 21 days to send comments on the acceptability of the environmental report – but if they do not respond, it is assumed that they agree with it. During the process, the general public also has to be informed about the planning act and the environmental report in open to public discussion that lasts at least 30 days. If there could be some environmental impacts across state border, the neighbouring state is invited to the process. The final decision is made by the Ministry of the Environment about the acceptability of the impacts of the proposed planning act on the environment. The decision may be positive or negative. Against this decision it is possible to appeal. If the plan maker is the State, then the Government decides about the appeal. If the plan maker is a local community, then there is no appeal, but it is possible to go directly to the Administrative Court (some legal experts consider that this is possible only for local communities although the Environmental Protection Act does not directly say so). So maybe going to the Administrative Court against SEA could also be possible for others after they have proved their legal interest – but we do not have a case yet. Such regulation is a special kind of administrative regulation procedure. For some plans, an SEA is always mandatory, for others, which could have a significant impact on the environment, the Ministry of the Environment decides about this obligation.

Slovenia has decided for a wider definition of cases in which SEA is obligatory (Annex II of the Directive). They are defined in Decree on the categories of activities for which an environmental impact assessment is mandatory (2006, Uredba o vrstah posegov v okolje, za katere je potrebno izvesti presojo vplivov na okolje).

Our organisation does not deal specifically with SEA processes so unfortunately we can not give you more detailed answer at the moment.
3. Cross cutting issues taken into consideration in spatial planning

Q: How far a spatial planning decision in your country determines the following fields of administration?
- the protection of nature and biodiversity
- the protection of health
- the protection of resources and proper management of wastes.

Answer:
The Article 3 of Spatial Planning Act sets goals of spatial planning in providing a coherent spatial development with treatment and coordination between various needs and interests of the development on one hand and public benefits in the areas of environmental protection, nature conservation, cultural heritage, protection of natural resources, defense and protection against natural and other disasters on the other hand. Interventions in the environment and spatial planning should be designed so that they provide also protection of nature, natural resources, nature conservation and protection of human health. The proper management of wastes is not specifically exposed as the field that has to be considered in setting goals of spatial planning acts.

Article 43 of Spatial Planning Act sets executive conditions that have to be incorporated and defined in local spatial planning act (OPN) and among five of them are also conditions for integrated conservation of cultural heritage, nature conservation, environmental protection and protection of natural resources, protection against natural and other disasters and conditions for protection of human health. Management of wastes is not specifically determined as a factor that has to be taken into account in spatial planning acts.

Environment Protection Act sets management of wastes and nature conservation as fields in which SEA process has to be implemented. As mentioned above the environmental report is prepared before the official SEA process is made. In that environmental report all the impacts on the environment are defined, described and evaluated, as well as possible alternatives regarding the planning act. The Decree on the content of report on the effects of intended activity into the environment and its method of drawing up (2009) is the executive act that specifies which factors (nature, health) have to be taken into consideration and evaluation.

4. The extension and intensity of public participation in spatial planning decision-making procedures

Q: Which circles of local communities and NGOs (local, regional, national, professional etc.) has the right to take part in the spatial planning procedure, under what conditions, if any and what is the legal position of them in the procedure?

Answer:
Public participation in spatial planning process is different on national and on local level. On national level the process of adopting national spatial planning acts is in accordance with Aarhus Convention regarding public participation. General public (meaning every person, NGO, organization, local community, etc.) has the right to participate in the procedure in three stages. Within 30 days when the Ministry announces an initiative to prepare a spatial planning act on its website, public has the right to make suggestions, recommendations, guidelines, opinions and suggestions on it. During that period a public consultation in a form of a public conference can be held. After receiving all the guidelines and suggestions Ministry has to analayze them in next 30 days. Then the draft of an act is drawn up in few different options or solutions. Ministry as a coordinator and initiator of the planning act must publicize study of most suitable solutions and organize a public debate that lasts at least 30 days. During this time a public hearing must be hold in which general public has the opportunity to make comments and suggestions. Officials have to take these comments into consideration and express their views on them within 60 days. This document is published on the Ministry's website.
and sent to citizens. When one solution is confirmed, a planning act is drafted in that way together with a report on the environmental impacts and the draft of environmental permit. Public has to be informed about these documents and the public debate is held that lasts at least 30 days. In the meantime public has a right to make comments and suggestions on the draft of the planning act, a draft of report on the environmental impact and on the draft decision on the environmental permit. Official express their views on public comments and publish them on the website of the Ministry.

On the other hand the procedure of adopting local spatial planning acts is not in compliance with Aarhus Convention because it does not allow general public to be informed and to participate in the early stage when the spatial planning act is drafted and when the debate on alternatives is still open. It only allows general public to participate in the public debate in the phase of the final draft of the municipal master plan, which lasts 30 days. In this stage all options are already defined and public cannot truly influence the planning act because all other alternatives are already closed and act is already an official final proposal (not really a draft of an act). In those 30 days, the municipality must provide a public hearing and general public (every person, NGO, organization, etc.) can make comments and suggestions on the draft of an act. Comments have to be taken into consideration and municipality has to express their opinion on them in next 30 days and then publish document on the webpage. Taking into account the views of the public comments and suggestions municipality prepare a proposal of a local spatial planning act. Comment made by an NGO or a group of people or some professionals does not have more important status as the one made by individuals. Officials are not obliged to follow any comments.

5. Legal remedies available in spatial planning procedures

Q: What kind of remedies, if any are available for the members and organisations of the public in order to challenge the procedural and substantial issues of the spatial planning decisions?

Answer:
There is limited access to legal remedies. This is a very serious problem for public participation, NGO participation and engagement in the process of spatial planning. In hierarchy of legal acts, spatial planning acts are general acts, not individual. Therefore, it is not possible to go to Administrative or other court to challenge them. The Constitutional Court can review a general act only in terms of compliance with the Constitution and other acts. The review is allowed only if the interested party can prove their legal standing. This was applicable until 2007, when the Constitutional Court decided that in spatial planning cases legal interest exists only if all legal remedies have been exhausted (decision U-I-275/07). Since then, there are no legal remedies in the procedures against adopted spatial planning acts. It is only possible to get involved in the process of issuing a building permit, use legal remedies and then go to the Constitutional Court. There were few court cases on Administrative Court regarding detailed local spatial planning acts (OPPN) where people tried to challenge OPPN on the basis of being an individual and not general acts but none of them got an official epilogue yet. That is why the Constitutional Court stays as the only possibility in case of non-compliance of spatial planning acts.

Individual has the opportunity to join the proceedings as a side participant in the process of issuing a building permit and in the procedure of environmental consent and environmental permit under the Environmental Protection Act. If the person who should be a party or side participant under the General Administrative Procedure Act was not given the opportunity to participate in the process, this is also the reason for the appeal or retrial.

95 http://www.sodisce.si/vsrs/odlocitve/10844/
Summary

How do you evaluate the level of environmental democracy in this field? Where do you see the bottleneck(s) of a meaningful and effective public participation and access to justice in spatial planning (SEA) procedures in your country? Are there any grievous occurrences that reach the level of non-compliance with articles 9(3) or 9(4) of the Convention? What would be your suggestions to change the rules and/or the practical implementation of them?

What would you qualify from the spatial planning laws and legal practice of your country as best practices or even as a possible meaningful input into drafting of the EU Access to Justice Directive?

Answer:
Regarding legal remedies and access to justice the spatial planning system in Slovenia is not in compliance with Aarhus Convention. Public in general does not have effective legal remedies like an appeal or a lawsuit against adopted spatial planning acts. That is valid for both levels – national and local. Public participation in forms of public hearings and possibility to give comments and suggestions is better on national level but very weak on the local level due to the fact that participation is not possible in an early stage. Public is not informed on first goals and intentions of the local spatial planning act and does not have an opportunity to give comments or to propose different spatial solutions for some territory. Ministry for Infrastructure and Spatial Planning is preparing new legislation on whole package of Acts regarding spatial planning and building permit until 2014 and our organisation as well as other NGOs associated in two networks covering land use and spatial planning “Mreža za prostor” 96and “Odgovorno do prostora” are actively trying to cooperate with the Ministry (well, we are searching different solutions and giving proposals and legal initiatives which we hope they at least read and evaluate). Nevertheless we were recognized as a suitable party to talk to in order to have at least some public participation in legislative process.

Sources
Following this closing section of the substantial country study, please list your sources, such as the official name of the quoted or used laws, regulations etc. with a rough English translation in brackets and also, some sources about legal practice (such as court decisions, appropriate sections of ombudsman or prosecutors’ reports, ministerial or other official analyses, articles from the environmental legal literature, including university study books and NGO pamphlets etc.). While the possible sources are abundant, we might need resources for more than 3-4 practical cases as references (but, naturally, they might be referred to at several places in the text).

- Spatial Planning Act:
  http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=742CA385D2BCD548C1257AE0042935B&db=urad_prec_bes&tip=doc (only Slovenian Text)
- Act regarding the siting of spatial arrangements of national significance in physical space
  http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=5DD7BF996DAF988EC1257A6100458236&db=urad_prec_bes&tip=doc (only Slovenian Text)
- Environment Protection Act
  http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/izbranZakonAkt?uid=2DE6D85E93E4F7B5C1257A5C0035944F&db=urad_prec_bes&tip=doc (only Slovenian text)

96 http://mrezaprostor.si/
(English Version - older)
(older webpage of former Ministry but information is mostly still valid)
Within the frames of a large, international Life project, supported by the EU and accomplished by public interest environmental lawyers from as many as 10 EU countries we have formed a 6 member team to study, analyse and compare experiences with spatial planning regulations and practices. It seems to be a logical extension or rather a useful underpinning of this work to study the relevant decisions of the Aarhus Convention Compliance Committee, the most active and successful implementation body so far in the history of international environmental law. During the first ten years the Committee has received 83 complaints and has issued 37 substantial responses to the communications on public participation related matters. More than a third of these decisions are closely related to spatial planning – members and organisations of the public have recognised that such planning procedures determine the fate of their environment, and therefore this is the attacking point for someone who is not willing to sit idly until the last piece of green lands in his or her vicinity is transformed into highways, shopping malls, greenfield industrial investments or glass and concrete dwelling sites.

The rough material of the 14 decisions we have worked through is very complex, with many cross references and even sometimes with slight contradictions. We have divided the relevant excerpts from the Compliance Committee decisions, as their content offered, into four chapters. First and most importantly, we deal with the definition problems: usually parties argue endlessly about whether a certain decision-making procedure falls under the more detailed rules of Article 6 as an individual project or as an Article 7 plan which grants poorer access to participation and legal remedies. In the second chapter we analyse another frequently emerging problem: do the members and organisations of the public have the right to take part in more than one stage of a long chain of decision-making procedure or once they had their say at a certain phase, thereafter they should let the authorities and the investors decide the matter amongst themselves. The richly explained decisions of the Compliance Committee allow an insight as well to the sophisticated nets of social and economic interests behind each case they hear. In the third chapter we highlight the legal ramifications of some of these collisions (between several branches of law), while in the fourth chapter we deal with the practical experiences of the most important procedural rules of public participation according to the rules of the Aarhus Convention.

Those who still remember the years with night-long discussions of the drafting of the Convention between 1996 and 98 can probably second my opinion that the creation of the text of one of the most progressive piece of international environmental legislation of our age was a hard fight between those who truly believed in environmental democracy and those who thought that the interference of laymen in the professional work of the environmental administrative bodies should be kept within rather narrow frames, otherwise the enthusiastic but unprofessional crowd will rob too much precious time and energy from the authorities. The cases on the table of the Aarhus Compliance Committee might tell that the attitudes of the administrators remain unchanged. The authorities try to arrange as many substantial questions as possible behind closed doors, especially at the beginning of the decision-making procedures, alleging for instance that these “pre-decisions” are not yet decisions, therefore the public shall have no access to them. In later stages they might acknowledge that the decision-making procedure has started already, but try to find such legal forms that restrict public participation as much as possible. They issue parliamentary acts in individual cases (claiming that “law cannot be unlawful”) or create clauses that divert especially important and urgent matters from the usual channels of participation. They also might simply conclude an administrative

97 I would like to express my gratitude for the help in editing this study to Ms. Kelly Brouse (American University, Washington College of Law), who worked as an intern at EMLA during the Summer, 2013
or spatial planning contract with the developer and demand that business secret prevents anyone else from seeing the documents. Some national legislators or leading authorities form procedural regimes where the members and organisations of the public have late and incomplete notifications and the time for forming their opinion is very restricted – ironically, sometimes in a several years long decision-making procedure the public gets only a couple of days to express their opinion on the substance of the case.

Even if it is so, the law and practice of environmental democracy is steadily developing. Non-ebbing efforts of local communities to protect their environment and the environment of their children raise hopes, and the wise and consequentially progressive legal analyses and instructions from the Aarhus Compliance Committee keep the fighting spirit alive.

I. Definition of spatial planning decisions in the system of the Aarhus Convention

Spatial planning decisions can take various legal forms starting from individual administrative decisions, through planning, programming or policy making decisions done by an administrative body or a council of local or regional representatives, up to the several forms of legislative acts, such as municipality ordinance, a decree from the minister responsible for development/planning or even a parliamentary act. Possibilities for public participation and access to legal remedies might differ according to these different legal forms, while the content of the decision-making procedure remains basically the same: a decision regarding the fate of a piece of land and all of those who live or work on that, use it otherwise or are affected by the environmental emissions of the activity on the land now and in the future. A clear definition of the content and form of the decision is therefore a pivotal issue of environmental democracy and sustainable development in connection with spatial planning.

As we have pointed out, almost one third of the decisions of the Aarhus Compliance Committee is in connection with spatial planning issues, together with other forms of decisions by the Parties to the Convention closely interrelated with them. The definition problem within the context of the Aarhus Convention mostly appears in the form of differentiation between Article 6 (individual decisions), Article 7 (plans, policies and programs) and Article 8 (normative) decisions. The selection of the legal format of a spatial planning decision depends on the legal history of the Parties to the Convention, on the structure of their constitutional and administrative laws and, quite frequently, also on the political will to ensure, encourage or restrict public participation.

I.1. The main definition elements of differentiation of specific (individual), general (planning) and legislative types of decision-making (Article 6-7-8) in the Armenian case

In the Armenian Dalma Orchards case98 the spatial planning decision was made by several Governmental Decrees. The communicants, however claimed that, in adopting the relevant decrees, “the Government failed to notify the public about the decision-making process; to ensure public participation in it, including by taking account of the public comments; and to publish the adopted decisions. They alleged that these omissions constituted failure to comply with multiple provisions of

98 The Aarhus Compliance Committee decision issued on 10th of May, 2006 with regard to compliance by Armenia with its obligations under the Aarhus Convention in relation to the development of the Dalma Orchards area where the communication ACCC/C/2004/08 was submitted by the Centre for Regional Development/Transparency International Armenia, the Sakharov Armenian Human Rights Protection Centre and the Armenian Botanical Society.
articles 6 and 7 of the Convention. They also alleged that adoption of government decrees without a public participation procedure had contravened article 8 of the Convention. They further claimed that a failure to address the administrative appeals challenging the relevant decisions and a failure to provide for an appropriate judiciary appeal procedure constitute noncompliance with article 9, paragraph 2, of the Convention.”

The communicants in the Dalma Orchards case seemingly hesitated between Article 6, 7 and even 8. First of all, the decision in question refers to an individual project (referring to a concrete location within the Orchards region and even naming a concrete wrist watch factory plan of a concrete investor). In the same time, the position of the decision in the whole decision-making procedure is earlier than an individual administrative permit, from this angle it is rather a planning document. Finally, the Dalma Orchards decisions take the form of a legislative decree from the Government. Anyway, abstracting from this legal dilemma, the communicants felt that access to justice should be available for such cases unconditionally; even if so, they referred only to Article 9(2) but not to Article 9(3). They also failed to point out if the Armenian national law provides for access to justice in Article 7 or Article 8 matters other than Article 9(3).

We can conclude from the Armenian case that the differentiation between the three kinds of decisions might take place on several layers: the position and timing in a planning procedure; concretisation of the plan to places, persons, investments etc.. The legal form of the decision might be a starting point in the analysis, too, but – as we can see for instance in the Armenian case, it is far from being overwhelmingly decisive. The opinion of the Committee forms the basis of this conclusion: “The government decrees referred to in the communication deal with the designation of land for a particular type of commercial activity. Typically, this would be considered as a type of decision falling within the scope of article 7 of the Convention. However, some of the decrees specify not only the general type of activity (e.g. manufacturing, agriculture) that may be carried out in the designated areas but also the specific activity (e.g. watch-making factory, construction of a diplomatic complex) and even the names of the companies or enterprises that would undertake these activities. These elements are more characteristic of a type of decision falling within the scope of article 6 of the Convention.”

And similarly, later in the Dalma Orchard decision “The Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions. Notwithstanding that, the fact that some of the decrees award leases to individual named enterprises to undertake quite specific activities leads the Committee to believe that, in addition to containing article 7-type decisions, some of the decrees do contain decisions on specific activities.” Acknowledging that there is a lack of clear differentiation between the two terms, not specifically defined by the Convention, the Compliance Committee differentiates general (“a type of commercial activity”) and specific (a concrete factory and housing complex with the names of enterprises) decision-making procedures for Article 7 and 6 respectively.

In selecting the legal format of the Dalma Orchard planning decision some political considerations might have played a role, too. It was a really controversial case with investment plans on a historical site of high natural and cultural values. “It is noteworthy that the failure to provide for public participation in this case appears to also contravene Armenian national legislation. The Armenian Law on Environmental Impact Assessment (article 15, paragraphs 3 and 4) requires that, inter alia, socio-economic, urban construction, industrial and environmental protection plans, programmes, complex designs and master plans be subject to public hearings and be communicated to the public.

99 Point 2 of the decision No. ACCC/C/2004/08
100 All italics throughout the document are stresses added by the author.
101 Point 23 of ACCC/C/2004/08
102 Point 28 of ACCC/C/2004/08
at least 30 days in advance of the hearing. The law also requires that public opinion be taken into consideration.”

In this point the Committee addresses the very important interrelationship between the two basic sources of environmental democracy: direct public participation rules and the rules on the procedures for environmental impact assessment type legal institutions (such as individual EIA and SEA on plans, programs and policies and many other members of the “EIA family of laws”). These two institutions might support each other. Even if the Government would not acknowledge that the decision shall undergo an EIA procedure, certain public participation rules according to the Convention and also to the strategic environmental assessment type national regulations refer to the general (planning) type of decision-making procedures, too. Once a decision – whatever it is labelled for – contains so much significant environmental traits, the concerned members and organisations of the public shall not be deprived from the possibilities of meaningful participation in the whole procedure.

Finally, even if the communicants in the Armenian case did not want to miss any legal possibilities, they alleged that failure to ensure public participation in the development and adoption of the government decrees constituted noncompliance with article 8 of the Convention. In the Committee’s understanding, however, “the decrees in question do not fall under generally applicable legally binding rules. Rather, they seem to constitute a form of adopting decisions on plans for designation of land (article 7) and to some extent a form of decisions mandating specific activities (article 6)”

There is room to generally conclude, that in order to establish an Article 8 decision, there should be a nationwide, general, normative decision which was not the case in the Armenian complaint, whatever form is given to the decision concerned by the complaint.

I.2 Differentiation of Article 6 and 7 in the Albanian case

The Albanian Vlora Bay case was quite similar to the Armenian case in several aspects. As the Committee summarized the facts: “On 19 February 2003, the Council of Territorial Adjustment of the Republic of Albania approved, through Decision No. 8, the site of an industrial and energy park immediately to the north of the city of Vlora. Through this Decision, signed and stamped by Mr. Fatos Nano, Chairman of the Council, who was the Prime Minister at the time, the Council “Decided: The approval of the territory for the development of 'The Industrial and Energy Park – Vlore’”. Decision No. 8 furthermore deemed that the Ministry of Industry and Energy “should coordinate work” with various Ministries and other bodies “to include within this perimeter [of the industrial and energy park] the projects of the above mentioned institutions, according to the designation 'Industrial and Energy Park’”. It stated also that various Ministries “must carry out this decision” and that “This decision comes to force immediately.”

Similarly to the Armenian case in the Albanian case the spatial planning decision had the form of a normative act, this time a council of ministers decision which had the same legal effect as a governmental decision. A governmental decision, however, has less normativity and more operative elements in it than a governmental decree, because the addressees of this motion is not the general public but only ministries and other bodies directly subordinated to the government.

103 Point 26 of ACCC/C/2004/08
104 Point 34 of ACCC/C/2004/08
105 The review of compliance by Albania with its obligations under the Convention, initiated by the communication No. ACCC/C/2005/12 from the Alliance for the Protection of the Vlora Gulf (Albania) concerning public access to information and participation in decision-making on the construction of an industrial park and a thermal electric power station in Vlora
106 Point 31 of ACCC/C/2005/12
Even if the decision of the Albanian Government took the form of a normative act, the government itself conceptualized that as a concrete, individual project, because the Party itself informed the Committee that this Council decision had been subject to an EIA procedure. However, the EIA was not detailed because the separate components of the proposed park were each supposed to conduct their own, more demanding, EIA examination. Either because not having an SEA procedure or falsely identifying the true legal nature of the decision as a planning one, the government silently acknowledged the more concrete nature of its decision. Spatial planning in this case took place on governmental level (although formally issued by a council of certain ministers only, but it handles the relevant ministries as subordinates). The decision is about an industrial park which is the level of abstraction and generality typical to plans, policies and programs (Art. 7). This is underlined by the fact that further individual EIAs will take place whenever the territorial plan is broken down to individual investments. We can see from Point 37 of the Albanian case that exactly the same form of decision-making took place in a more concrete form, about the thermal-electric station where the exact location, size and layout were decided in connection with a concrete power plant.

In the Albanian case the Compliance Committee refers to an authoritative, legislative interpretation from an EU legal source: “In reaching this conclusion, the Committee notes the definition of “plans” in the European Commission Guide for Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment: “Plan is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas.” Definition of “program” is “the plan covering a set of projects in a given area... comprising a number of separate construction projects.”

We see that according to the definitions of the Guide a “program” is more concrete than a “plan” because it refers concretely to a group of investments, while the “plan” stays only at the level of group of projects with no specific number or even just a type of project. I think, however, that the Commission itself goes much further than this more or less tautological and exemplary definition from the EU guide and from the SEA Directive.

The Committee in the Albanian case reinforced the principle of independence from the label of a kind of decision and entered into a more substantial discussion on the definitions. “The decisions have in common that they are crucial for the entire decision-making in relation to these sites, constructions and activities. The Committee will first have to consider whether the relevant decisions amount to decisions on specific activities under article 6 of the Convention, or decisions on plans under article 7. In one of its earlier decisions, the Committee, pointed out that "When determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, [...] is determined by the legal functions and effects of a decision..." (ECE/MP.PP/C.1/2006/4/Add.2, para. 29).”

After excluding Article 8, the Committee had to decide if there is an Article 6 individual permitting decision or rather a more general, planning motion being better covered by Article 7: “Decision No. 20 simply designates the site where the specific activity will take place and a number of further decisions to issue permits of various kinds (e.g. construction, environmental and operating permits) would be needed before the activities could proceed. Nevertheless, on balance, it is more characteristic of decisions under article 6 than article 7, in that they concern the carrying out of a specific annex I activity in a particular place by or on behalf of a specific applicant. (...) Decision No. 8 on the industrial and energy park, on the other hand, has more the character of a zoning activity, i.e.

107 Point 32 of ACCC/C/2005/12
108 Point 65 of ACCC/C/2005/12
a decision which determines that within a certain designated territory, certain broad types of activity may be carried out (and other types may not). This would link it more closely with article 7.” 109

While the Committee offers here a couple of valuable new viewpoints for differentiating Article 6 and Article 7 decisions, this time it seems a little inconsequential. Although the Albanian governmental decision specifies the place and the persons concerned, it fails to describe even the major technical features of the future investments. Therefore, as the Committee itself goes on, there will be additional decisions, this time “really” specific ones. We do not think that in this case we can call the governmental decision an Article 6 decision, just the opposite, we are inclined to say that any decision that is not yet specific enough to enable the investor to start the planned activity shall be rather an Article 7 than an Article 6 decision (the reverse statement is not true, however). It deems to us that the Compliance Committee uses this very argument right in the following point of its decision: “The proposed industrial and energy park includes several separate construction projects, each of which would require various kinds of permits. From the information received from the Party concerned and the communicant, it is not clear to what extent the industrial park itself, as distinct from its components, would require further permitting processes, which would in turn allow opportunities for public participation. This too might be a factor distinguishing Decision No. 8 from Decision Nos. 9 and 20, because it is clear that the latter decisions will be followed by further permitting decisions for the respective projects.” 110

We can conclude that a plan about one technically well enough described project in a particular place by or on behalf of a specific applicant seems to be an Article 6 case, while a decision which fails to encompass all these three elements, but determines certain broad types of activity within a certain designated territory is rather an Article 7 case. In both cases several further permitting procedures might follow, therefore the immediate readiness of the Government to implement the project on the spot has less value in differentiating these two kinds of the cases.

I.3 Differentiation between Article 6 and Article 7 in the Lithuanian case

The Lithuanian decision111 of the Committee seems to represent an approach different from the Armenian and Albanian decisions. According to the explanation of the decision “(...) detailed plans in Lithuanian law have the function of the principal planning permission authorizing a project to be located in a particular site and setting the basic parameters of the project. This suggests that, despite the label in Lithuanian law and the fact that detailed plans are treated as plans under article 7 of the Convention in the Lithuanian national implementation report of 2005, the detailed plan for the Kazokiskes landfill generates such legal effects as to constitute a permit decision under article 6 rather than a decision to adopt a plan under article 7 of the Convention. Considering the function and legal effects of the EIA decision and the IPPC decision, these decisions too constitute permitting decisions under article 6 of the Convention.” 112

Here the selection of a particular site and setting the basic parameters seem to be the differentiating factor for an in essence Art. 6 project, notwithstanding again its official denomination. However, important elements from the previous decisions of the Committee are missing: the Kazokiskes landfill planning decisions are not specific either in terms of technical details or in the persons, processes of actually establishing the facility. We would like to call the attention to a specific phrase the Committee use in this text: “planning permission” which underlines that the borders between Article

109 Points 67-8 of ACCC/C/2005/12
110 Point 69 of ACCC/C/2005/12
111 Communication ACCC/C/2006/16 issued by Association Kazokiskes Community (Lithuania) on 4th of April, 2008 concerning decision-making on the establishment of a landfill in Kazokiskes
112 Point 58 of ACCC/C/2006/16
6 and Article 7 decisions can be nebulous, floating that under certain conditions a decision can fall under both categories in the same time.

I.4 The locus of the decision

In addition to the many features the Committee revealed in its Armenian and Albanian decisions, according to the Lithuanian decision we can establish that – naturally – the person or body that brings the decision could also be taken into consideration when we decide about the Article 6-8 nature of certain decisions. “The drafting and approval of the waste management plan was undertaken in accordance with provisions of the national legislative acts that were in effect at the time. (...) According to the provisions of these legislative acts, regional waste management plans were to be approved by the county council. In addition, they were required to be endorsed by all eight municipal councils within the county.”

We can see that the waste management plan is promulgated by the county council and subject to approval by the concerned municipality councils. Such councils are usually not formed to decide upon individual matters, but rather for negotiating and promulgating more general local issues. The waste management and siting plan in the Lithuanian case is therefore first of all of Article 7 or even Article 8 nature, too.

I.5 Ouster clauses and channelling regular cases to legislation in order to bypass public participation

In the Armenian decision the Committee dealt with the so called ouster clauses, which serve as an exemption from the court revision of certain very sensitive administrative decisions, for example, in the field of military or nuclear power production decisions. “(...) The Committee acknowledges that national legislature, as a matter of principle, has the freedom to protect some acts of the executive from judicial review by regular courts through what is known as ouster clauses in laws. However, to regulate matters subject to articles 6 and 7 of the Convention exclusively through acts enjoying the protection of ouster clauses would be to effectively prevent the use of access-to-justice provisions. Where the legislation gives the executive a choice between an act that precludes participation, transparency and the possibility of review and one that provides for all of these, the public authorities should not use this flexibility to exempt from public scrutiny or judicial review matters which are routinely subject to administrative decisions and fall under specific procedural requirements under domestic law. Unless there are compelling reasons, to do so would risk violating the principles of the Convention. In this case, the Committee has not been made aware of any compelling reason justifying the choice of this form of decision-making.”

Ouster clauses – or the case that has the same effect, where a singular matter that otherwise would undergo an administrative procedure with court remedies is solved by a legislative act, therefore foreclosing the authority of a regular administrative court – should not be used as an abuse against public participation. In our opinion the best way to preclude this practice would be strict regulation of an exclusive list of subject matters where the clause could be applied. In the Armenian case – and actually in a couple of other cases of the Committee – the legislative form was used solely for diverting certain issues from the court revision and, at the same time, preventing the public from having any meaningful tools to get information about and to have a say in respect to a major spatial planning decision.

113 Point 21 of ACCC/C/2006/16
114 Point 38 of ACCC/C/2004/08
I.6 Interrelationship of the definition problem with early participation

The requirement of Article 6, paragraph 4 – early public participation when all options are open – which is relevant to Article 7 decisions, too, is closely related to the issue of differentiation between Article 6-7-8 decisions. If, starting out of a false differentiation between different types of decisions, the locations and major options of a waste management activity are decided before substantial public participation starts, there will be not too much to discuss. As in the Lithuanian case the communicant alleges that “the possibility to participate was offered to the public only after certain options had already been decided upon (landfill or waste incinerator) and when only two possible locations were being discussed”115.

Actually, the Party concerned has reinforced that by saying that “the decisions on the choice of landfill (as opposed to incineration or other options) and its two possible locations were taken at the stage of the Waste Management Plan”116. The Committee’s evaluation on this fact refers back to a stage of the long decision-making procedure that was not directly addressed by the complaint: “Lithuanian law envisages public participation in decision-making on plans and programmes. With this in mind and considering the structure of the consecutive decision-making and the legal effect of the different decisions in Lithuania, the fact that certain decisions took place when certain options were already decided upon (e.g. landfill or waste incinerator) and when only two possible locations were discussed does not seem to exceed the above limits of discretion.”117

For making the whole picture clear, the participants of the case should have clarified whether during the general decision-making stages public participation was allowed and ensured, and if yes, why the concerned public was unable/unwilling to take part in it. However, the EIA was not detailed because the separate components of the proposed park were supposed to each conduct their own, more demanding, EIA examination.

In the first EU case118 in connection with the Lithuanian case, the Committee expressed its opinion that the requirement of Article 6(4) shall be fulfilled in every stage of a longer, compound decision-making procedure. We can go along with this opinion very much as far as it is not considering the tiered decision-making of a flexible construction where it is almost indifferent that in which stages public participation takes place. As the explanation sounds: “The requirement for “early public participation, when all options are open” should be seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. Thus, according to the particular needs of a given country and the subject matter of the decision-making, Parties have a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programmes) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological specifications related to specific environmental standards. Within each and every such procedure, where public participation is required, it should be provided early in the procedure when all options are open and effective public participation can take place.”119

115 Point 43 of ACCC/C/2006/16
116 Point 44 of ACCC/C/2006/16
117 Point 72 of ACCC/C/2006/16
118 Communication ACCC/C/2005/17 submitted by the non-governmental organization Association Kazokiskes Community (Lithuania) against the European Community as adopted by the Compliance Committee in April 2008
119 Point 51 of ACCC/C/2005/17
Taking into consideration the quite lenient phrasing in the text “where public participation is required” we doubt that the term “early participation” could be compartmentalised so much. In the merits of public participation, the whole investment is what counts, rather than individual decision-making procedures. It is not probable that the concerned public can afford to participate in half a dozen separate procedures where several, in themselves meaningless, details are discussed. Hence, they might easily skip certain procedures about too general issues and it is no use to have “early” participation in a procedure at a later stage of the whole investment flow once in the beginning parts, say, the public had no right to access to information and to express their opinion, and by the time it can participate – “early” in the given stage – there are actually not too much remaining to discuss.

I.7 Spatial planning as Article 6 decision-making procedure in the French case

In the French case we can see that the flexibility to position the spatial planning decision on the scale from Article 6 through Article 7 to Article 8 has serious limitations. In the complaint sent to the Committee the communication alleged that the Party concerned failed to provide for public participation in the decision-making processes that led to the construction by Communauté Urbaine Marseille Provence Métropole (CUMPM) of a centre for the processing of waste by incineration at Fos-sur-Mer. (…) The CUMPM failed to provide for public participation, as set out in article 6, paragraph 4, of the Convention, before adopting, on 20 December 2003, resolutions which decided (i) on the particular method of processing household wastes, basically through incineration, (ii) on the site for the installations, and (iii) to resort to a public service concession procedure for the construction and management of the installations; (…) The Party concerned disagreed with the communicant, and argued that only the authorization by the Prefect of 12 January 2006 amounted to a decision according to article 6 of the Convention. According to the Party concerned, the preceding acts and decisions made by CUMPM did not imply an authorization of the plant. Moreover, the Party concerned argued that the Prefect’s decision of 12 January 2006 was a single act that covered all aspects of the installation, and that it had been preceded by public participation, in accordance with the Convention. Thus, the Party concerned held that at the stage of the Prefect’s decision, all options were open, and the application could have been turned down if the Prefect so decided, also taking into account the views of members of the public. During the discussion, the Party concerned pointed out that there were about 50 such refusals by prefects per year in France.

The conflict between the communicant and the Party concerned seems to be quite clear. However, most probably driven by the very intricate legal questions on the table, the Committee this time had the ambition to draw a (very complicated) full picture of the case. The Committee focused first of all to Article 6 issues: “(…) While the resolutions to choose modalities and location were instrumental to the formation of the installation and for the municipality’s work on the management of household wastes, in no way did they as such permit the waste treatment centre. Nor did the resolution to launch a tender procedure imply a permit for the installation or the operator in spe. Rather, for such classified installations, the Environmental Code sets out that a permit is required by the Prefect. Thus, while there may be many good reasons to provide for public participation before adopting municipal resolutions of this kind, they did not amount to decisions on whether to permit the activity, as set out in article 6 and annex I of the Convention. The Committee is fully aware that

121 Points 2. and 8 of ACCC/C/2007/22
different types of decisions and acts, regardless of whether they amount to a decision under article 6, may narrow down the scope of options for the final decision. Whether that is the situation in this case will be considered when examining the 2006 authorization by the Prefect. In any case, the Party concerned did not fail to comply with article 6 of the Convention, by not ensuring public participation before the adoption of the resolutions of 20 December 2003.”

A little later in the French case, the Committee logically examined the question of Article 7 and even some decisions earlier to the city council decision that was subject of the complaint, too: “When the resolutions were adopted, on 20 December 2003, there was already a land-use plan of 1991 and a zone development plan of the industrial and port zone of 1993 in force for the location in Fos-sur-Mer. According to the information given to the Committee, none of these plans forbade the construction of the waste treatment centre. The resolutions neither had any legal effect on these plans, nor conferred any right to construct or operate the waste treatment centre or to use the site, nor in any other respect did they entail legal effects amounting to that of the applicable planning instruments. Moreover, they did not take the form of programmes or policies. Thus, the Party concerned did not fail to comply with article 7 of the Convention either, by not ensuring public participation before the 2003 resolutions were adopted.”

It is difficult for us to understand if a procedure in which, amongst other questions, the land use elements are specified (since the earlier zoning plans just did not exclude the waste management activities) will not qualify as an Article 7 decision. I think, de minimis we can establish a principle that any meaningful, concrete decisions in the chain of planning and permitting measures of the bodies of the legislative and the administrative branches shall belong either to Article 7 or Article 6. At the most general level of the process, as determining the general obligations concerning the plans and programs, naturally, Article 8 can also be taken into consideration.

In the next points of the French Decision, the Committee turns its attention back to Article 6: “The resolution adopted by CUMPM on 13 May 2005 approved the municipality’s choice of concessionaire for the waste treatment project. In the resolution, the municipality also defined the modalities for the processing of the waste. While this resolution was also instrumental for the formation of the installation as well as for the permit application to be examined at a later stage by the Prefect, it did not imply or amount to a permit for the waste treatment plant or the means of processing the waste that would fall within the scope of article 6 of the Convention. Thus, the adoption of the resolution as such without public participation did not result in a violation of article 6 of the Convention. As stated in paragraph 32, the Committee realises that different formal and informal decisions, regardless of whether they amount to a decision under article 6 of the Convention, may narrow down the scope of options for the final decision. This issue will be considered when examining the 2006 authorization by the Prefect, however.”

While the Committee here acknowledges the importance of the decision of the city council, it fails to acknowledge that it amounts as a decision in itself. Putting aside for a moment the legal dogmatic arguments, it seems to be doubtful that environmental democracy can be so elusive that during a long planning or preparation procedure the members and organisations have no say at all during important in between stages of the decision on a major waste treatment project. It is probable that during the 2001 and earlier actual spatial planning decision, the public had had proper ways to express their concerns (it would fall out of the scope of authority of the Compliance Committee, since at that time the Convention was not yet in force). We see that in the decision of the Prefect in 2006, most probably the public participation rights were properly implemented. Still there was a stage at the city council, where three important medium level details were decided – we think that if

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122 Point 31 of ACCC/C/2007/22
123 Point 33 of ACCC/C/2007/22
124 Point 34 of ACCC/C/2007/22
not all the decision-maker authorities, at least all the important details should be subject to public participation in each and every Aarhus cases.

Arriving at the stage of concrete decisions, where, as we have already referenced, public participation rules were duly implemented, the Committee emphasizes the importance of leaving alternatives open: “Whether all options were in fact open to the Prefect and effective public participation could take place in the decision-making procedure, as required under article 6, paragraph 4 of the Convention, depends on many factors. The first issue to consider is whether the Prefect was in any way constrained by earlier decisions, so that all options were no longer open and, for that reason, effective public participation could not take place.” and “As shown by the communicant, the authorization by the Prefect was preceded by several acts by CUMPM and the private operator. Leaving aside the plans from 1991 and 1993, respectively, the resolutions by CUMPM had the effect of narrowing down what was considered by CUMPM as the only relevant method and site for treatment of household wastes. When deciding to establish a public tender, to approve the choice of concessionaire and to enter into a contract with the private operator, CUMPM in practice also narrowed down its scope of considerations of relevant forms of waste treatment. However, the question is whether any of these steps and decisions, together or in isolation, had the effect of “closing” different options in the decision-making process. As stated by the Committee in its findings with regard to communication ACCC/C/2006/17 (European Community), where several permit decisions are required in order for an activity covered by article 6, paragraph 1, to proceed, it is not necessarily sufficient to apply the public participation procedures of article 6 to just one of the permitting decisions (ECE/MP.PP/2008/5/Add.10, para. 42). When deciding whether public participation is required in several procedures for one activity, the legal effects of each decision, and whether it amounts to a permit, must be taken into account.” 125

The next step in the chain of arguments of the French decision of the Committee is an examination of the existence of a more or less independent content of the individual, Article 6 decision. “In the present case, to meet the criteria that all options are open and effective public participation can take place, it is not sufficient that there is a formal possibility, de jure, for the Prefect to turn down the application. If the practice in the jurisdiction of the Party concerned is such that, despite the possibility of the permit authority rejecting an application, this never or hardly ever happens, then de facto all options would not be open at the stage in question. Thus, there would be no room for effective public participation as required by the Convention. The information given to the Committee does not suggest that this is the case with the authorization procedures before the French Prefects. According to the Party concerned, about 50 applications before the Prefects are refused in France each year. While the communicant argued that the Prefect could not question the usefulness of the activity, it neither confirmed nor contested the figure of refusals given by the Party concerned. It thus appears to the Committee that at the stage of deciding on the application, the Prefect indeed was in a position to reject the application on environmental or other grounds, as set out in French law. For that reason, the Committee cannot see that the Prefect was already constrained during the procedures for public participation or was unable to take due account of the views of members of the public on all aspects raised. Thus, the Party concerned did not fail to comply with article 6, paragraph 4, of the Convention on this ground.” 126

In our opinion, this argument has some factual, logical and legal flaws. First, France is a large country, it seems to be necessary to gauge if the 50 refused applications represent a meaningful amount of the total decisions or just a small per cent of them. Second, a yes or no decision might not be called a full, free determination of a matter, if the Prefect would never be in the position to substantially influence some basic features of the waste management and siting issues. Moreover the members

125 Point 37 of ACCC/C/2007/22
126 Point 39 of ACCC/C/2007/22
and organisations of the public are interested not only in a negative decisions (public participation is not proven by a sheer denial of certain developments), but might have the ambition to offer liveable compromises between the short term social and economic interests of the community and the long term environmental interests of the same community. Third, as it was clearly seen from other decisions of the Committee, public participation forms a system, some sporadic, partial elements of it will not amount to a valid implementation of the rules of the Convention.

As a sum of this long and complex deduction, the Committee establishes: “(...) While it was not for the Prefect to try the application on its usefulness, in the Committee’s view the decision-making procedure before the Prefect appears as a single act that covers all aspects of the location, design and operation of the installation. Thus, the fact that no provision was made for public participation with respect to the other decisions referred to does not constitute failure to comply with article 6, paragraph 1, of the Convention. However, while the Committee does not find that the Party concerned failed to comply with article 6 of the Convention, it notes that the French decision-making procedures, as reflected in the present case, involved several other types of decisions and acts that may de facto affect the scope of options to be considered in a permitting decision under article 6 of the Convention”127.

We see that at least the Committee left some room for claiming further participation according to Article 6, while it is strange that it did not open the question of implementation Article 7, contrary to other cases at the Committee. Regardless, the French case offers many lessons for the practitioners and also bridges towards another important topic that is also present in several decisions of the Committee. Therefore, in a following chapter we deal with the multilayer participation in more details.

1.8 Several levels of SP decisions in the French law – the evaluation of the complexity of the system itself

The complicated system of land use and related decision under the French law is a good study for the possible borderline cases between decisions of individual and general scope. The difficulty ensues from that even a formally general decision can refer to individual cases, whereas the legal subjects are supposed to follow the detailed provisions of law without any further assistance from the authorities. This solution of “general permitting” has been quite popular in many EU countries. As the Commission surveys: “The French Town Planning Code provides for different town planning documents. Integrated land-use plans (schémas de cohérence territoriale) establish the basic town planning guidelines for a group of municipalities, with prospects for their development. Local town plans (plans locaux d’urbanisme) or land-use plans (plans d’occupation des sols) establish the rules and restrictions that are directly applicable to any public or private person executing any works or construction or the opening of classified installations as specified in the plan. Concerted development zones (zones d’aménagement concerté) are zones in which a competent public authority or institution decides to intervene to develop and equip sites, often in order to transfer them or grant them on concession to public or private users. In addition, each Department must define its priorities with regard to the disposal of household waste and related waste in a particular departmental plan, as set out in the Environmental Code (code de l’environnement).”128

We note that as Points 15-17 proceed in describing the whole system of development planning and permitting in France, there are further decisions, such as the environmental and construction permits and also a public budget procedure that are needed for the actual start of an activity. These kinds of

127 Point 40 of ACCC/C/2007/22
128 Point 14 of ACCC/C/2007/22
decisions fall out of the scope of the recent study, except the issue of multiple participation that will be addressed in a following sub-chapter. The reason we considered it important to quote these points of the analysis of the French spatial planning system is to point out a more or less general feature that can be found in many other countries: by making spatial planning extraordinarily complicated, the investors and their allied supporters at the different municipal bodies, councils and authorities can easily duck from actual public participation. Laymen will in no way understand such systems, let alone have enough time and resources to learn the tiny differences between the several procedural stages, authorities and other participants. No wonder that even such well-prepared professional NGOs, as the complainants to the French case, could not identify the exact role of the city municipality decision-makers in such a long and sophisticated procedure. Indeed, they complained against the less reasonable parts of the chain of decisions in the case in question.

The decisions of several planning and permitting bodies can be added by the decision of the investor in cases similar to the French one, where the large community waste management plan was implemented by a public body as the Committee established: “On 20 December 2003, CUMPM (as a reminder from the earlier parts: the Marseille regional council, that played the role of the investor of the large waste project in the French case at the Compliance Committee) adopted two resolutions for the purpose of implementing a project for the construction and management of a complex for the disposal of household and related wastes with a total incineration capacity of 450,000 tons of waste per year, together with a sorting-methanization centre for about 150,000 tons per year. Thereby, the municipality chose the method of processing its household wastes as well the location for the installations. Finally, it decided to resort to the public service concession procedure, i.e. to have a private operator carry out public services. At the time of the resolutions, a land-use plan of 1991 and a zone development plan for the industrial and port zone of 1993 were in place. Neither of these plans forbade the construction of the incinerator.”

This Point of the Committee’s decision underlines therefore, that even the general, introductory decisions of COMPM are not equal with the separate (earlier phase) land use plans and zone development plans – hence the categorisation of the still quite general type of decisions of COMPM as specific decisions definitely fall under the category of article 6 decisions.

Having considered this very complicated system it is no wonder that the issue of “clear, transparent and consistent framework to implement of the provisions” of the Aarhus Convention was raised. “According to the communicant, because of the lack of clear legislation in conformity with the provisions of the Convention, the Party concerned failed to comply with article 3, paragraph 1, of the Convention. However, the Committee finds that there is no information provided in this case that substantiates such a violation by the Party concerned.” It is an interesting point in our view that the complicated and incoherent regulation in itself would establish an infringement of the capacity building rules of the Convention that, generally, cannot be abandoned.

### I.9 Compound decision-making procedures for SP, including administrative contracts

In the first Spanish case we can also see that in a complicated chain of planning decisions of a large real estate program even the first part of the planning procedure (SP) is put together by

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129 Point 18 of ACCC/C/2007/22
130 Point 31 of ACCC/C/2007/22
131 Communication ACCC/C/2008/24 concerning compliance by Spain the Spanish non-governmental organization (NGO) Association for Environmental Justice (Asociación para la Justicia Ambiental (AJA)) submitted on behalf of itself and the Association of Senda de Granada Oeste Neighbours on a residential development project in the city of Murcia, Spain
numerous decision-making procedures. Since all stages can significantly determine the fate of the protected lands in the given case, the complainant Spanish NGO logically claimed some aspects of public participation in each of them. The procedures mentioned by the Committee were: “Arguments are made concerning compliance with the Convention of procedures related to:
(a) The agreement between the Murcia City Council and Joven Futura in 2003;
(b) The screening decision of the Environmental Quality Office in September 2004;
(c) The approval of Modification No. 50 to the Murcia City General Plan in April 2005;
(d) The approval of the Land Allotment Plan ZA-Ed3 in November 2005;
(e) The approval of the Urbanization Project UA1 of the Land Allotment Plan ZA-Ed3 in April 2006.”

The legal nature of these decisions was – as usual – the starting point of the case: “The communicant maintains that the three approvals mentioned above under letters (c), (d) and (e) have “a permitting nature” in relation to projects covered by article 6 of the Aarhus Convention. Moreover, according to the communicant, applicable Spanish laws require the carrying out of an EIA procedure for all the steps; hence these three approvals fall within the ambit of paragraph 20 of the annex I to the Convention and therefore under article 6, paragraph 1 (a), or alternatively within the ambit of article 6, paragraph 1 (b). (…) Furthermore, the communicant maintains that the 2003 agreement between the Murcia City Council and Joven Futura (under subpara. 31 (a) above), as well as the screening decision (under subpara. 31 (b) above) are parts of the decision-making process leading to approval of the Modification No. 50 to the Murcia City General Plan, and therefore they both also fall within the ambit of article 6.”

The argument of the complainant in the first Spanish case brings in a new viewpoint in the differentiation of Article 6 and 7 cases: once an EIA (rather than SEA) procedure is required for a decision, it certainly might be an individual, Article 6 decision. The notion of “decision” itself is questionable in cases of administrative-civil law agreements between the municipality and the future investor, and also the constitutional value or general rule of law nature of such an agreement that serves private development interests on one side and determines the spatial planning decisions of a whole community including the descendants of them. However, once such an agreement is evaluated as lawful by a country’s law, it would be more than beneficial that it was transparent. In our experience, in the overwhelming majority of such agreements one or both parties would refer to business secrets that usually successfully close the details of the deal from the members of the communities whose interests are at stake.

I.10 The relative importance of the differentiation between Article 6 and 7 cases

In the Spanish case the Committee itself could not fully share the opinion of the communicants about the legal nature of the mentioned decisions: “The legal nature of the decisions mentioned in paragraphs 59 and 60 above is not clear enough for the Committee to determine whether they are subject to the requirements of article 6 or article 7 of the Convention. The names of the decisions could suggest that they have the legal nature of plans subject to article 7, although the name “project” of the Urbanization Project UA1 suggests that this decision may be subject to article 6. The Party concerned denies that any of these decisions qualify as permitting decisions under article 6, but fails to provide any explanation as to their legal nature. (...) The Committee has been confronted with similar problems and refers to its previous findings where it stated that the Convention does not establish a precise boundary between article 6-type decisions and article 7-type decisions when it

132 Point 31 of ACCC/C/2008/24
133 Points 33-34 of ACCC/C/2008/24
determines how to categorize the relevant decisions under the Convention (ECE/MP.PP/2006/2/Add.1, para. 28 (Armenia)). Their labels under the domestic law of the Party concerned are not decisive (ECE/MP.PP/2006/4/Add.2, para. 29 (Belgium)), but rather the issue is determined on the basis of the context, taking into account the legal effects of the decision (ECE/MP.PP/2008/5/Add.6, para. 57 (Lithuania)) (…) In this case, the Committee recognizes that different interpretations are possible and decides, as it has previously done, to “focus on those aspects of the case where the obligations of the Party concerned are most clear-cut. In this respect, […] the public participation requirements for decision-making on an activity covered by article 7 are a subset of the public participation requirements for decision-making on an activity covered by article 6. Regardless of whether the decisions are considered to fall under article 6 or article 7, the requirements of paragraphs 3, 4 and 8 of article 6 apply. Since each of the decisions is required to meet the public participation requirements that are common to article 6 and article 7, the Committee decides to examine the way in which those requirements have or have not been met” (ECE/MP.PP/2007/4/Add.1, para. 70 (Albania)).

The Commission points out here again that while the label is not decisive, the name “plan” naturally refers to Article 7, while the name “project” suggests individual decision, under Article 6. It also adds, referring to earlier cases with similar problems, that the context (i.e. the other factors the Committee has determined in thereof) is the deciding factor in this definition matter. In the Spanish case the Committee see a practical approach to avoid the clear-cut decision about the nature of the elements of this really complicated chain of decisions by saying that public participation rights are identical anyway in several aspects for Article 6 and 7, therefore the differentiation has only relative importance.

I.11 Relation between article 7 and 8 and 9 respectively in the Austrian case

In the Austrian case a special sub-category of spatial planning was the subject of discussions, the determination of the route of a highway. This decision was intricately and mutually connected with the decision on directing the traffic from one road to another. “The communication concerns decision-making processes related to the consideration of alternative transport solutions in the Enns Valley in the Austrian Province of Styria and to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320, as well as a link between the two decision-making processes: (a) In its initial communication the communicant alleges that in the decision-making process regarding the consideration of alternative transport solutions for the Enns Valley, the Austrian authorities failed to comply with article 7, in conjunction with article 6, paragraphs 3, 4 and 8, of the Convention by not providing for adequate public participation in that decision-making process. In relationship thereto, the communicant also alleges that Austrian authorities failed to comply with article 2, paragraph 5, of the Convention by not allowing the communicant to participate in the decision-making process. In addition, the communicant alleges that the Austrian authorities failed to comply with article 8 of the Convention by not providing adequate public participation opportunities in connection with decision-making on executive regulations. The communicant further alleges that no opportunity to challenge relevant decisions was available and thus that Austrian authorities failed to comply with article 9 of the Convention. (…)”

134 Points 61-63 of ACCC/C/2008/24
135 Communication ACCC/C/2008/26 submitted by the non-governmental organizational Nein Ennstal Transit-Trasse Verein für menschen- und umweltgerechte Verkehrspolitik (NETT) regarding compliance by Austria with its obligations under the Convention in connection with decision-making processes related to alternative transport solutions in the Enns Valley in the Austrian Province of Styria and to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320
136 Point 2 of ACCC/C/2008/26
This way a very well established communication brings Article 7 and 8 cases closer together and with these it alleges the infringement of Article 9, as well. The Austrian complainant started out from the legislative form of the decision, and, therefore, she did not question its Article 8 nature, instead arguing for Article 7 as a decision type that entails more concrete, substantial possibility for the public to participate. However, the complaint does not specify whether it bases its Article 9 related claims more specifically on Article 9(2) or more generally on Article 9(3). Ensuing from the lack of details in the complaint, it also fails to argue for having Article 9(2) remedies for Article 7 issues because of the direct reference to Article 6(3), (4) and (8) thereof.

I.12 The definition of the decision making procedure itself

The frequent element of Article 6 and 7 cases is an effort from the authorities to narrow the options of public participation in a preliminary decision-making procedure, where they prefer to decide some basic issues behind closed doors, not really making early public participation possible in a stage where all the options are still open. In extreme occurrences this problem can take the form of an argument on the definition of the decision-making procedure itself – once the decision-maker strives to start the procedure on its own with the exclusion of the public, it frequently tries to convince the excluded stakeholders that the meetings, discussions and even certain decisions in question are “not yet part of the substantial decision-making procedure”. In the Austrian case “the Committee notes that the planning process is still on going. Important in this respect is the assurance of the Party concerned that during the strategic assessment, still to be conducted based on the SP-V Act, all options will be open and considered and participation in accordance with the Convention will be afforded. In this context, the Committee, however, expresses concern in respect of the motion adopted by Styrian Provincial Government of 21 April 2008 and the document dated 27 March 2008 which provides the basis for this motion. These documents express a strong presumption in favour of the 4-lane option (corroborated by information available on the website of the Styrian Government), which may de facto narrow down the available options and thus hamper participation at an early stage when all options are still open and due account can be taken of the outcome of the public participation. Similarly, the Committee expresses concern with respect to the statements of the member of the provincial government, Mag. Kristina Edlinger-Ploder on public television and in newspapers stated that the 4-lane road will be built, excluding the consideration of other options.”

We can classify this phenomenon in even more general terms: once there are certain planning steps at the beginning of the overall planning procedure without public participation, one cannot say that these steps were taken totally in vain, with no real effect on the later stage “true” decision-making procedures; therefore, in our opinion, in such cases certain decisions were actually taken with the exclusion of the concerned public. It can be said, however, that such preliminary decision-making steps served exclusively the revealing all the meaningful options, but even in this case it is difficult to accept that no evaluation of these options has started yet, and also it seems to be a not really defendable standpoint that the members and organisations of the public should not take part in developing such options.

137 ACCC/C/2008/26
I.13 Too complicated decision-making chains, administrative agreement in the Irish case

In the Northern Irish case we can also note the general (unfortunate) trait of the spatial planning procedures where in an extraordinarily complicated system there are several expert, public, administrative and other procedures. It is a question of which procedures can even be called a decision, and if a decision, whether it is a general or individual one. “The communicant alleged that the Party concerned failed to comply with article 3 of the Convention by making the decision to expand Belfast City Airport operations through a “private” Planning Agreement, a type of instrument enforceable only between its contracting parties and which allows the public no right of appeal other than judicial review. The communicant also alleged that, in making the Planning Agreement, the Party concerned failed to comply with the public participation requirements under the Convention, in particular by opting for an “examination in public” instead of a public inquiry.”

We do agree that this arrangement raises an Article 3, capacity building question, therefore the responsibility lies with the Parties to create a clear, transparent and consistent framework for public participation, rather than act as “capacity destroying” with blurred terms and a nebulous system of decision-making stages in spatial planning.

The decision for such a large project as an airport extension in the Irish case would logically require an administrative decision-making procedure with EIA. However, a formal EIA in harmony with the European legal requirements actually was not required in the given case, but instead Northern Irish Authorities ran a mandatory public examination (EiP). “In March 2003, the Belfast City Airport management applied to the Department of the Environment under article 41 of the Planning (Northern Ireland) Order 1991 for determination of the question whether an increase in the seats for sale at the airport from 1.5 million to 2.5 million in any 12-month period would require planning permission. At that time, operators using the airport were not permitted to offer for sale more than 1.5 million seats on scheduled flights in any 12-month period according to the Planning Agreement of 22 January 1997. The application referred to a forecast of a 50 percent increase in passenger numbers over the next decade and also indicated a forecast of 3 million passengers by 2018. (...) By letter dated 30 June 2003, the Department of the Environment informed Belfast City Airport of its determination issued pursuant to article 41 of the Planning (Northern Ireland) Order 1991 that an application for planning permission was not required on the basis that an increased offer of seats for sale did not constitute development as defined in that act. The determination clarified that the decision-making on the proposed activity would be made through the formal review of relevant revisions of the existing Planning Agreement of 22 January 1997, and that it was not subject to environmental impact assessment procedure according to the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999. The determination was not subject to public participation and the public was not informed of the determination at that time. (...) On 6 July 2004, the Belfast City Airport management made a submission to the Department of the Environment requesting the formal review of the Planning Agreement which governed its operations. The review commenced on 19 November 2004 with a public consultation process to decide on whether a public inquiry should be held. The Department of the Environment launched the consultation by inviting specific comments from relevant Councils as well as other key public representatives, stakeholders, local residents’ groups and other interest groups. At the end of the consultation process, in October 2005, the Environment Minister announced that the next step in the process would be an examination in public (EiP) conducted by an independent panel. (...) In January 2006, the independent panel was appointed to conduct this EiP and, according to the terms of reference, the

138 Communication ACCC/C/2008/27 concerning compliance by the United Kingdom of Great Britain and Northern Ireland about an allegation that the Party concerned failed to comply with article 3 of the Convention by making the decision to expand Belfast City Airport operations through a “private” Planning Agreement

139 Point 2 of ACCC/C/2008/27
EiP panel was requested, inter alia, to have regard to representations made in respect of the public consultation exercise. While exercising this function it identified the following persons as the principal interested parties: the Department for Regional Development (interests include “noise” and the “Forum”), the Department of the Environment (interests include the Planning Agreement and environmental issues), the airport operator, the airlines, residents’ groups and bodies representing the public and business at large, including Belfast City Council (BCC), North Down Borough Council (NDBC), the General Consumer Council for Northern Ireland (Consumer Council) and the Confederation of British Industry (CBI). (...) Preliminary meetings were held in March and May 2006 and a substantive hearing was held on 14 and 15 June 2006. The communicant attended and made representations during the various hearings in public. During the EiP, the public learned of the June 2003 determination for the first time. The EiP panel report, including recommendations on the future content of the Planning Agreement, was published on 12 December 2006. One of the recommendations by the panel related to the restriction regarding seats for sale at Belfast City Airport. It recommended that this limit should be increased to 2 million (paras 5.6.37 and 7.1.11). Its recommendation was made as subject to the following terms: (a) the establishment of a forecasting and scrutiny system; and (b) the airport operator committing to install a noise and track keeping system.”140

We can see that if an administrative decision takes the form of an administrative agreement, it doesn’t prevent the authorities from running an environmental investment or equivalent project and also encouraging meaningful public participation. However, even if the public and its representative bodies could take part in certain stages of this very complicated decision-making chain, they had no chance to embrace the whole procedure and therefore they had no real chance to substantially influence its outcome or even any major elements of the decision.

I.14 The definition of “decision” in the Irish case

The communicant in the Irish case has also specifically raised the problem that the complicated arrangement and the nebulous “contract” nature of the decision hinders the early and effective participation: “With respect to article 7, the communicant alleges that the 30 June 2003 determination by the Department of the Environment was in breach of article 6, paragraph 3, in conjunction with article 7, of the Convention as it permitted the 2008 Planning Agreement to increase the number of seats for sale without the possibility for public participation at that stage. It alleges that the determination excluded the proposed activity from an environmental impact assessment and relevant opportunities for the public to participate in the decision-making process. The communicant also alleges that article 6, paragraph 4, in conjunction with article 7, has been violated by the Party concerned through its choosing the EiP procedure instead of a public inquiry. The EiP procedure prevented all options being presented and effective public participation on the proposed expansion of the operations at Belfast City Airport. (...) In response to the communicant’s allegations, the Party concerned takes the view that article 7 of the Convention is not engaged with respect to the expansion of operations of the Belfast City Airport, since there is no relevant plan, programme or policy relating to the environment. Moreover, even if either article 6 or 7 were applicable to the decision to expand the operations of the Belfast City Airport, there has been no breach of the public participation requirements under the Convention.”141

It is an interesting additional trait of these complicated SP procedures that the Party concerned herself sees grounds of excluding both Article 6 and Article 7 rules, saying in effect that the decision-making procedure has not even started. This view is certainly based on the agreement nature of the

140 Points 20-24 of ACCC/C/2008/27
141 Points 30 and 32 of ACCC/C/2008/27
decision having been taken in the case. The Committee had to take a side in this argument: “The Committee also considers whether the amended Planning Agreement of 14 October 2008 is a plan relating to the environment within the scope of article 7 of the Convention. What constitutes a “plan” is not defined in the Convention. The fact that the document is entitled “Planning Agreement” does not necessarily mean that it is a plan; rather, it is necessary to consider the substance of the document. Having considered the substance of the document, the Committee finds that the “Planning Agreement” in this case is in fact a decision on a specific activity that would properly be the type of activity under article 6. However, as held above, the activity does not meet the threshold of article 6.4. The Committee therefore finds that the “Planning Agreement” in this case is not covered by article 7.”

Interestingly, the Committee intertwines the definition of Article 7 and Article 6 procedures, using a logic similar to the SEA Directive (once a plan establishes the frames for a future EIA procedure it should be subject to a SEA). However, the wording of Article 7 is clear in that respect that the scope of it shall not be determined according to Article 6, but rather according to Article 2(3).

### 1.15 Article 6, 7 or 8 in the second British case

In the second British case a very controversial definition issue emerged where Articles 6, 7 and 8 could equally play a role. The decision was about the traffic order of a single, concrete road, but in a legislative format: “The Convention provides for somewhat differentiated requirements for public participation in the framework of decisions on specific activities (art. 6), plans, programmes (art.7) and policies (art. 7), or executive regulations and generally applicable legally binding normative instruments (art. 8). Whether the Traffic Regulation Order falls within the scope of article 6, article 7 or article 8 of the Convention must be determined on a contextual basis, taking into account the legal effects of the Order (cf. the findings on communication ACCC/C/2006/16 concerning Lithuania (ECE/MP.PP/2008/5/Add.6), para. 57). (…) The TRO1 provides direction on how traffic would be organized in a certain area. It is not an act permitting a specific activity, but has general application to all persons that are in a similar situation and unlike a plan or programme, it creates binding legal obligations. As such, it is an act within the scope of article 8 of the Convention.”

Perhaps any solution would not do, but it does not seem 100 percent convincing to say that the legislative act called TRO1 does not permit a specific activity and as such it falls under article 8, because legislative acts should be normative in their nature, that means regulating a wide range of activities in general way. In the present case the subject matter of the regulation was a single part of a concrete street which topic doesn’t seem to reach the level of abstraction of a general legal norm. Visiting this issue from the angle of public participation: in a normative act the scope of the concerned people and communities is undetermined, while here there is a concrete community with certain people whose interests were directly concerned. Therefore they would have deserved many more participation rights than that could be ensured under the Article 8 regime. In our opinion the dispute could encompass even Article 6 (because organising one individual traffic situation) or Article 7 decision (on the basis that, although regulating quite specific issues, on a certain locality, narrow professional issues, it is still lacking the details of the behaviour of legal subjects).

142 Point 41 of ACCC/C/2008/27
143 Communication ACCC/C/2010/53 concerning compliance by the United Kingdom of Great Britain and Northern Ireland submitted by Moray Feu Traffic Subcommittee of Lord Moray’s Feuars Committee alleging amongst others that the City of Edinburgh Council has denied meaningful participation with respect to the permanent rerouting of traffic through the residential area of the Moray

144 Points 82-83 of ACCC/C/2010/53
Discussion of Chapter I

There are two seemingly contradictory principles of Article 6 of the Aarhus Convention: the early participation and the informed participation requirements. The contradiction is just an artefact (quite frequently raised in legal disputes, however), there is no objective obstacle that would prevent the application of both principles in the same time: the earliest possible participation with as much information as available. The hindrances are, however, inbuilt into the system of the Convention, too: Article 8, the legislation that usually forms the general base for decision-making has less participation rights than Article 7 that is generally the second step in designing and implementing investment plans, and in Article 7 there are fewer participation rights than in Article 6, the third level (levels, actually) of any long decision-making procedures that might cause significant changes in the environment. Those investors and authorities, therefore, who are reluctant to allow the fullest transparency and accountability in their planning-permitting procedures are typically interested in shifting their decisions towards the more general side of this continuum. We have seen in several Compliance Committee cases that a planning decision in an Article 8 legislative form allows no or very little rights for the concerned public to participate. This solution has the same effect as the so-called ouster clauses, with the basic difference that ouster clauses themselves are true legislative products, where the legislator applied the form of an exhaustive list of activities in which public participation and especially access to justice should be seriously restricted.

Unfortunately, there is one step further along this line. Studying the Committee's cases we have witnessed that some decision-makers pretend that their discussions, researches and preliminary discussions on certain investments are not at all part of the decision-making procedures where the members or organisations of the public might have a say. This can be the case when the investor tries to evaluate the options ahead of it; until this procedure moves totally at private domain with no other participants, no one can cry breach of law, even if it would be wiser from the investor to try to involve the concerned public to this early evaluation, in order to avoid a possible future conflict with them. In the same time, if the investor is a public body, say a municipality council, its constituency should have the rights to interfere, based on the very broad scope of Article 7 of the Convention.

These are the main legal forms of restricting environmental democracy. As concerns the substantial arguments, on one hand we have the usual general reasons that underpin the necessity of public participation in all kinds of decisions with significant environmental effects, most oftentimes with the additional moral weight of intergenerational justice. Such reasons are amongst others the supremacy of democratic values, the constitutional rights to life, health and their precondition, healthy environment, food, drinking water, etc. Also we usually refer to the higher quality of the decisions that have undergone a tighter public scrutiny and profited from the ideas and suggestions of the concerned communities and the better chances of proper implementation of such decisions and social peace in general, too. On the other hand, the Parties of the Aarhus Convention shall be aware not only the letters but the spirit of the Convention that can be established from the Preamble, from the general rules and from the whole context (structure, substantial interrelationships and cross references between the paragraphs and also the ubiquitous, obvious desire of the legislators to serve environmental democracy that radiates from the text everywhere). In addition to all of these, there are arguments on more genuine, early and well informed public participation more specifically in the decision-making procedures belonging to our topic, because spatial planning decisions determine the future of the community, the environment of their settlement, their health and living conditions, the value of their real estates on long run etc. The decisions of the Compliance Committee keep referring to this set of arguments.

Even if we are convinced that public participation shall permeate the whole decision-making procedure from its very beginning, we have to acknowledge the relative importance of a better definition of projects belonging to Article 6 or 7 and, possibly in some cases, to Article 8.
The Committee has developed a good system of criteria which can help to successfully analyse and determine the essential nature of decisions on the table. These criteria are to following:

- the name of the decision (e.g. “project” refers to individual decision, “plan” to general one), although the Committee has underlined several times that the label the decision-maker or the investor use cannot in itself define the nature of the decision;
- similarly to the first point the name, nature (individual or a commission) and constitutional position (belonging to a certain branch of power etc.) of the decision-making body is an important key, but not always decisive alone;
- the positioning of the given decision in a larger chain of decisions referring to the same investment: the earlier decisions seem to be (or: ought to be) strategic, while proceeding forward in the line of decisions, the procedures tend to become more and more specific;
- the more general or rather more specific nature of the decision: how far it refers to a concrete location, activity or even persons or organisations to run the activity;
- in close connection with the previous features: general decisions usually let many the alternatives, options (but certainly not all of them) yet open, while the specific decisions answer these open questions one by one;
- also connecting to the earlier points: how far the decision entitles the developer to start the activity and also how many and how exhaustive technological details it contains are;
- starting a public service concession procedure, in order to specify the operator and also the conditions of the operation makes a project an Article 6 one more probable;
- the operative features of the decision: even if a decision is formally a general one, once it dispatches operative tasks to several administrative bodies and comes into force immediately, we might rather speak of an Article 6 project;
- the nature of environmental assessment runs parallel with the given decision-making procedure: if it is a strategic environmental assessment, we will have most probably an Article 7 decision, while an environmental impact assessment or in some Eastern European countries “expertise” refers to individual decisions pretty safely;

The practice of the Compliance Committee ensures a rich source of definition elements, while the Committee has also pointed out several times that there are cases which represent transitional or mixed forms of Article 6 and 7 and sometimes even Article 8 projects. As concerns Article 6 and 7, the stake of a precise differentiation is not so high: due to the direct references to Article 6, Paragraphs 3, 4 and 8 and indirectly, also Paragraph 10 shall be applied in Article 7 cases, as well.

II. Multilevel participation

Large investments with greater environmental significance usually go through several years of multi-stage designing, deliberating, permitting and controlling procedure. The organisations and communities of the territories affected by the environmental effects of the planned activity would like to be present during the whole flow of events: at the beginning because then the alternatives are still open, at the middle because the discussions are still substantial and almost all the relevant information is available already and, naturally, at the end of the procedure because they want to see how much of their contribution influenced the merit of the decisions and, in order to be able to fully consider legal remedies for damages inflicted by the final decision. Such a multilevel and multiplayer procedure is difficult for the authorities to handle, and it is time-consuming and costly. The authorities would prefer a concise, well structured, streamlined procedure only between themselves and the investors. The legislators often find the complaints of several industrial lobby groups well based and are willing to make public participation a scapegoat of slow economic development. Therefore they are apt to listen to the suggestions of certain industrial lobbyists and cut back environmental democracy.
In this way, multilevel public participation is not just a set of legal technical problems. Although the Compliance Committee found quite a couple of interesting examples of them and analysed them with the legal wit and eloquence as usual. We can be sure that while writing their explanations on this issue, the members of the Committee were more than aware of the above theoretical, legal-sociological facts, too.

II.1. Caselong participation in the Armenian case

Even in the very early decision of the Committee on the Armenian case145 there appears the important topic of “caselong participation”, i.e. when the case develops from financial and spatial planning, through environmental planning (EIA) up to construction permitting, environmental permitting (IPPC), operation permitting and control measures with public demands that participation should be ensured at every stage. The opposite opinion is that “double participation” is unnecessary; a single opportunity for members and organizations of the public to participate should be sufficient, and the authorities and the investors should not be bothered by the recurrent arguments and objections from the public. “The types of activity for which the land was designated (e.g. construction of houses, buildings or complexes, other planned activities exceeding the threshold value of 1,000 square metres, and forest restoration) should be subject to an environmental impact assessment (EIA) procedure in accordance with the Armenian Law on Environmental Impact Assessment. This procedure, in turn, requires public participation. It is not clear from the facts presented to the Committee whether a further (article 6-type) permitting process must be undergone, with public participation, before any specific activity can proceed.”146 After a couple of more paragraphs the Committee continues right from here: “Another question that arises is whether a further, more detailed permitting process, with public participation, is envisaged for the various specific activities. The information available to the Committee on this point is somewhat ambiguous. The communicants maintain that Armenian legislation requires that an EIA be carried out, with public participation, for such activities (see para. 10). If this takes place, it would certainly help to mitigate the lack of public participation in the formulation of the decrees. However, even if public participation is included at that stage, the scope of the decision on which the public would be consulted would be more limited than should be the case for article 6–type decisions, in the sense that some options (such as the option of not building any watch factory at a particular location) would no longer be open for discussion (cf. article 6, para. 4).147

The Committee expresses here one of the strongest arguments for case-long participation, i.e. that the scope of the decision-making procedures and the options themselves are different at different stages. As we have noted earlier, this is a double direction procedure: usually, as we go ahead in the planning procedure, alternatives keep closing down, while it cannot be excluded that in some cases just the opposite happens: new facts and therefore new alternatives might be raised at later stages of the procedure, too.

145 Communication ACCC/C/2004/08 by the Center for Regional Development/Transparency International Armenia, the Sakharov Armenian Human Rights Protection Center and the Armenian Botanical Society (Armenia) with regard to compliance by Armenia with its obligations under the Aarhus Convention in relation to the development of the Dalma Orchards area.

146 Point 12 of ACCC/C/2004/08
147 Point 29 of ACCC/C/2004/08
II.2 Multiple participation and early participation in the Albanian case

In the Albanian case the Committee underlines that any possibilities for public participation in later stages of the establishing of the project will not make public participation superfluous in the early phases of planning. “The Committee is aware that at least one of the two decisions that it has chosen to focus on would need to be followed by further decisions on whether to grant environmental, construction and operating permits (and possibly other types of permits) before the activities in question could legitimately commence. However, public participation must take place at an early stage of the environmental decision-making process under the Convention. Therefore, it is important to consider whether public participation has been provided for at a sufficiently early stage of the environmental decision-making processes in these cases.”

It is important that in this decision the Committee anchors the issue of multilevel public participation to the exact requirements of Article 6(4), early participation. The early phases of the chain of the decision-making procedures are most frequently the scenes of attempts to limit public participation.

II.3. Plans and permits developed by different authorities concerning the same investment

In the Lithuanian case there is a list of decisions the complainant claimed she had a right to take part in. “The national legal framework for approving a landfill consists of several consecutive procedures, including:
(a) A waste management plan;
(b) A detailed plan;
(c) An EIA decision;
(d) Approval of the technical project and construction permit;
(e) An IPPC permit.”

The Committee calls such a compound of decisions a “tiered” decision-making procedure. We see that waste management plan in this case encompasses the decision on siting, too. It is questionable, however, whether one single branch of administration, serving an important but still a single set of interests (waste management) can substitute a typically complex decision-making procedure such as spatial planning. The new element of the multiple participation topic in the Lithuanian case therefore is the professional division of work between the authorities. Even if one argues that the public could have a say in an earlier phase about an investment that is identical with the investment discussed in the later phases, still the supporters of a more substantial environmental democracy could respond that in several phases several different authorities bring decisions in the case, from quite different professional backgrounds.

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148 Communication ACCC/C/2005/12 from the Alliance for the Protection of the Vlora Gulf (Albania) concerning public access to information and participation in decision-making on the construction of an industrial park and a thermal electric power station in Vlora, Albania
149 Point 71 of ACCC/C/2005/12
150 Communication ACCC/C/2006/16 by Association Kazokiskes Community (Lithuania) concerning decision-making on the establishment of a landfill in Kazokiskes
151 Point 19 of ACCC/C/2006/16
II. 4 The two meanings of early participation principle in the Lithuanian case

The intimate relation between early participation principle and the tiered participation is raised also in the Lithuanian case, but contrary to the Albanian case, this case dealt with public participation not only between several kinds of decision-making procedures, but within one procedure: “The requirement for “early public participation when all options are open” should be seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. Thus, taking into account the particular needs of a given country and the subject matter of the decision-making, each Party has a certain discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programmes) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological details related to specific environmental standards. Within each and every such procedure where public participation is required, it should be provided early in the procedure, when all options are open and effective public participation can take place.”

Even if the Committee did not take a clear standpoint here about the necessity or superfluous nature of multiple participation in serial decision-making procedures concerning a complex investment and appears to accept the discretion of the respective countries in that matter, some lines of this paragraph suggest that the inherent logic of the development of a project plan would dictate a certain level of multiple public participation. At least first the basic issues (usually determined in the planning, Article 7 phases) such as location and major waste management choices, second, the EIA type complex analysis of the interplay between the new, the existing facilities and their surrounding environment, and third, the decision on technical details (such as an IPPC or a construction permit) would address different quality of matters and therefore need separate public participation opportunities. However, one thing seems to be sure from the Lithuanian case: within each stage where public participation is allowed, the early participation rule of Article 6 (4) of the Convention shall be applied.

As we have learnt, there is a really unfortunate arrangement in the Lithuanian law, namely that the IPPC permitting is handled like an operational permit and, therefore, belongs to the monitoring phase of an activity rather than its permitting procedures that led the Committee to a very difficult field of arguments. “Bearing in mind the general considerations in paragraphs 73 to 75, a system whereby the IPPC permitting process starts after the construction is finalized, as is the case in Lithuania, need not itself be in conflict with the requirements of Convention, though in certain circumstances it might be. Once an installation has been constructed, political and commercial pressures may effectively foreclose certain technical options that might in theory be argued to be open but which are in fact not compatible with the installed infrastructure. A key issue is whether the public has had the opportunity to participate in the decision-making on those technological choices at one or other stage in the overall process, and before the “events on the ground” have effectively eliminated alternative options. If the only opportunity for the public to provide input to decision-making on technological choices, which is subject to the public participation requirements of article 6, is at a stage when there is no realistic possibility for certain technological choices to be accepted, then this would not be compatible with the Convention.”

152 Point 71 of ACCC/C/2006/16
153 Point 74 of ACCC/C/2006/16
The Committee here has returned to the level of the whole chain of decision-making procedures and underlined again the unquestionable principle that the members and organisations of the public shall have at least one possibility to express an opinion on every important matter for the development. However, in our opinion it is not the same to express a general opinion on certain issues, while being excluded from the evaluation of the same matter when it is discussed in more detail. The IPPC procedure is a specific procedure run by specific authority(ies). In other words, the technical feasibility in environmental terms can be revealed and decided only in an IPPC procedure. An IPPC decision after the facility is built up, therefore all technical solutions are determined finally, cannot be expected in any sense as a genuine examination and discussion of these technical-environmental conditions. Even if these technical issues were raised in earlier decision-making procedures concerning the plan in question, data revealed in a specific IPPC procedure could not help the participants to form their opinion and suggestions. In general terms, we can conclude that even if within certain stages of the chain of the decision-making procedures public participation was duly allowed (early enough when all the options are still open and in other aspects, too) it might not be enough. Public participation shall be ensured at every stage where significant environmental issues are examined by specific authorities in specific processes.

II.5 Public participation in multiple permitting procedures in the first EU case

In the EU case154, which was in close connection to the Lithuanian case, the communicants hired serious legal consultants who approached the case from the formalities of legal dogmatism: “The communicant maintains that the requirements of article 6 of the Convention should be applied in relation to all decisions on whether to permit proposed activities listed in annex I of the Convention. In its view, if a national legal framework requires a number of decisions/permits covering different topics ‘which are relevant in respect of environmental pollution and danger to the public concerned’, public participation is required in relation to each and every such decision/permit and in each case all of the requirements of article 6 should be applied. The communicant further maintains that in situations where there is a sequence of permitting decisions, limiting the range of options may be allowed only provided that public participation was carried out at an earlier stage of the decision-making where certain options were debated, and provided that all the relevant activities which fall within the scope of annex I of the Convention are subject to public participation at both respective stages. (...) In this context, the communicant indicates that although European Community law envisages public participation in relation to two different stages of decision-making, i.e. EIA and IPPC permits, not all activities listed in annex I of the Convention are subject to both procedures, since neither Annex I of the EIA Directive nor Annex I of the IPPC Directive are identical with annex I to the Convention.”155

In our opinion the lawyers of the communicants are right: on what basis shall we decide that in the case of separate, individual decision-making procedures that all fully meets the criteria of Article 6 or Article 7 (or both, as we have seen in Chapter I) in which parts we abandon public participation? Do we have entitlements from the Aarhus legislator to do that? Naturally, the only exemption under the rule these questions clearly suggest is the case when public participation would be a mere repetition of that from an earlier phase, but in such cases, we think the members and associations of the public should have the right to decide that their participation in the whole repeated procedures would not make any sense.

154 Communication ACCC/C/2005/17 submitted by the non-governmental organization Association Kazokiskes Community (Lithuania) alleging non-compliance by the European Community with its obligations under article 6, paragraphs 2 and 4, and article 9, paragraph 2, of the Convention, as adopted by the Compliance Committee in April 2008.
155 Points 21-22 of ACCC/C/2005/17
The Communicant in this case also points out that the idea of multiple participation is present in the EU environmental law itself. For us, however, it seems irrelevant if a given activity is listed both in the EIA and in the IPPC Directives: they are the works of the same legislator that was aware of the possible overlaps between the two permitting procedures. Once they included an activity in both lists, they obviously wished to ensure a double procedure with all the necessary procedural elements, public participation included.

In the same case, the Committee expressed its view on multiple participation, as well. “The first issue to be examined with regard to article 6 of the Convention refers to multiple permitting decisions for landfills. The Committee does not consider that article 6 necessarily requires that the full range of public participation requirements set out in paragraphs 2 to 10 of the article be applied for each and every decision on whether to permit an activity of a type covered by paragraph 1. First, the very title of the Convention (ending with the words “in environmental matters”) implies that even though it is not spelled out in article 6, the permitting decisions should at the very least be environment-related. Second, even within the environment-related permitting decisions that might be required before a given activity may proceed, there may be large variations in their significance and/or environmental relevance. Some such decisions might be of minor or peripheral importance, or be of limited environmental relevance, therefore not meriting a full-scale public participation procedure. (…) On the other hand, nor does the Committee consider that where several permitting decisions are required in order for an activity covered by article 6, paragraph 1, to proceed, it is necessarily sufficient for the purposes of meeting the requirements of article 6 to apply the public participation procedure set out to just one of those permitting decisions. Where one permitting decision embraces all significant environmental implications of the activity in question, it might be sufficient. However, where significant environmental aspects are dispersed between different permitting decisions, it would clearly not be sufficient to provide for full-fledged public participation only in one of those decisions. Whether a system of several permitting decisions, where public participation is provided with respect to only some of those decisions, amounts to non-compliance with the Convention will have to be decided on a contextual basis, taking the legal effects of each decision into account. It is of crucial importance in this regard to examine to what extent such a decision indeed “permits” the activity in question. (…) The Committee is well aware that Parties to the Convention in their national legal frameworks provide a variety of approaches to regulatory control of activities listed in annex I of the Convention. Not all decisions required within national frameworks of regulatory control should necessarily be considered as “decisions on whether to permit proposed activities”. On the other hand, this does not mean that there is necessarily only one such a decision “to permit proposed activities”. In fact, many national frameworks require more than one such permitting decision. The Committee therefore considers that some kind of significance test, to be applied at the national level on a case-by-case basis, is the most appropriate way to understand the requirements of the Convention. The test should be: does the permitting decision, or range of permitting decisions, to which all the elements of the public participation procedure set out in article 6, paragraphs 2 to 10, apply embrace all the basic parameters and main environmental implications of the proposed activity in question? If, despite the existence of a public participation procedure or procedures with respect to one or more environment-related permitting decisions, there are other environment-related permitting decisions with regard to the activity in question for which no full-fledged public participation process is foreseen but which are capable of significantly changing the above basic parameters or which address significant environmental aspects of the activity not already covered by the permitting decision(s) involving such a public participation process, this could not be said to meet the requirements of the Convention.”

156 Points 41-43 of ACCC/C/2005/17
It is regretful that the Committee started the analysis of the quite interesting arguments of the complainants with a narrowing legal interpretation. In opposition to that was said by the complainants that all decision-making procedures on environmentally significant matters the Convention require (full) public participation, the Committee has no right to claim contra legem that not in all environmentally significant (only in cases which are more significant than others) and not always full procedure of public participation is required. We cannot say, in procedural terms that the several kinds of administrative decisions required for an investment count to be the same procedure. There are different facts, different professional and legal backgrounds for these administrative cases, let alone that usually the decision-making bodies, authorities themselves are different in all of the consecutive procedures. Finally, “what permits an activity” is a very difficult matter, we would transform this question into a statement that from a public participation standpoint, permits are anything without which the given activity could not be started.

II.6 Alternatives to public participation according to Article 7 in the Belarus case

In the Belarus case157 the concerned Party argued for alternative methods instead of the ways for establishing environmental democracy by the Aarhus Convention. “The communicant alleges that the Party concerned failed to comply with article 7 of the Convention, because it did not take any steps to provide for public participation in adopting plans, programmes and policies in the field of nuclear energy. In particular, the communicant considers that the 2005 Energy Security Strategy is a policy and that Directive No. 3 of 14 June 2007, Decree No. 565 of 12 November 2007 and Decision No. 1 of the Security Council of 15 January 2008, signed by the President on 31 January 2008, were all plans or programmes in the meaning of article 7 (see paras. 17–18 above), irrespective of the fact that they were not called “policy”, “plan” or “programme”. These acts were adopted by the highest executive bodies for the purpose of future nuclear projects and the public was never informed about their adoption. (…) The Party concerned disagrees with the communicant’s allegations: the public was adequately informed about these acts through printed and digital media and actively involved in any decision relating to future plans for the country’s energy sector. Sociological surveys had been conducted to analyse public opinion in that regard and meetings with staff from the public and private sector and with local authorities had been organized. In particular, for Decision No. 1 of 2008, which dealt with preparatory work for the NPP, a large-scale public information campaign had been organized and due account had been given to public opinion (see also appendix 2 to the response of the Party concerned with a list of comments and questions received). (…) In addition, according to the Constitution and the relevant legislation, it is possible for the public at any time to initiate a referendum on the NPP and the nuclear energy strategy.”158

Let us play with the thoughts for a moment: isn’t it even more democratic to systematically gauge public opinion on the environmental issues of the decision-making procedure than just simply give an opportunity to have a say to the most active community agents (certain individuals, NGOs etc.)? The only problem with the Belarus case is that these interesting and useful methodology solutions were offered by the Party not as an additional tool to amend the possible shortcomings of the regular public participation procedures but as a complete replacement. As the things are such, the methodologies offered by the Party are not transparent enough, and we need to realise that the most active community agents are usually value driven and active members of their societies, and, therefore, their priority position in such a public participation procedure is well-deserved.

157 Communication ACCC/C/2009/44 concerning compliance by Belarus raised by the communication submitted by European ECO Forum and a coalition of citizens’ organizations and non-governmental organizations (NGOs), in relation to a project to construct a nuclear power plant

158 Points 46-48 of ACCC/C/2009/44
The other methodology, raised by the Party concerned is public referendum which roughly shares the objections just raised about the sociological opinion survey, while it is more transparent and usually bolstered with strong procedural guarantees in putting together the questions, informing the voters, collecting the votes etc. Serious counterarguments, however, could be the high cost and considerable time this solution usually requires.

II.7 Alternative ways to take into consideration public opinions

Similarly to the Belarus case (the similarity is just formal, because here the offered solutions are most probably not total alternatives of the regular public participation tools, but only additional ones to them), in the second UK case the Party concerned offers a couple of alternative solutions of public participation in a long chain of decision-making procedure that starts with a legislative act and continues with several commission planning decisions and administrative decisions, too. “The Party concerned submits that as the proposal for the tram and the traffic rerouting was approved by Acts of Parliament in April 2006, the scheme was subject to full parliamentary scrutiny and there were opportunities for public participation in this process. It notes that paragraphs 3.4 to 3.7 of the Statement of Case for the Traffic Regulation Orders describe these opportunities (annex 2 to Party’s response). A full Scottish Transport Appraisal Guidance report was undertaken at the parliamentary approvals stage and the parliamentary process promoted further design refinements in response to various objections received at that time (specifically, two bill amendments were published and were in turn subject to an objection period). Information for Objectors to Private Bills is available on the Scottish Parliament website. (…).

The Party concerned adds that, although the Council did not, in the exercise of its discretion under the 1999 Regulations, ultimately decide to hold a hearing of objections in relation to the Traffic Regulation Orders, it undertook extensive informal consultation during the preparation of those Orders. The Party concerned submits that the absence of a public hearing does not signify a lack of opportunities to participate in the decision-making process, since the bulk of consultation, both informal and formal, precedes any hearing, if one is held. The steps taken to consult members of the public are detailed in the Statement of Case for the Traffic Regulation Orders, which provides an overview of the development of the tram project and how it met the relevant statutory requirements with respect to public participation (see section 6 in particular). The thorough public consultation carried out for the tram Traffic Regulation Orders is also outlined in the response to the Ombudsman (annex 1 to the Party’s response). In addition, public exhibitions of the draft Traffic Regulation Order drawings were held in September 2008 “to give the public the opportunity to view and comment upon the emerging [Traffic Regulation Order] proposals …”, while “comments arising from this process will be considered and, as far as possible, will be incorporated in the finalization of the design” (annex 3 to the Party’s response). (…) The Party concerned submits that an example of how residents’ concerns were taken into account can be seen in the modification of the Traffic Regulation Orders following concerns about increases in traffic on Shandwick Place (see para. 32 above). The Party concerned contends that the draft Orders were also modified in a number of other respects as a result of comments received during the above-mentioned exhibitions. (…) The Party concerned reports that, since the communicant submitted its communication to the Committee, there have been a number of relevant developments, in particular the TRO1 Review (annex 6 to the Party’s response), which set out actions to address objections to the tram Traffic Regulation Orders. One of the recommendations was to set up workshops to engage with the local communities to investigate and consider potential mitigation measures in relation to the required Shandwick Place restriction.

159 Communication ACCC/C/2010/53 concerning compliance by the United Kingdom of Great Britain and Northern Ireland submitted by Moray Feu Traffic Subcommittee of Lord Moray’s Feuars Committee alleging amongst others that the City of Edinburgh Council has denied meaningful participation with respect to the permanent rerouting of traffic through the residential area of the Moray
These workshops (three in total, two chaired by a representative of the communicant) commenced in January 2011. (...) The Party concerned invites the Committee to note that the Ombudsman did not uphold the complaint that residents of the area were excluded from meaningful participation in the decision-making process (Ombudsman findings of 22 June 2011, paras. 27–29). The Ombudsman concluded specifically that residents made representations on the bills in question and were heard as to their concerns, and that they have and will continue to have the opportunity to make representations on the development of the Traffic Regulation Orders.160

As the complainant has pointed out, exhibitions, workshops and even the Ombudsman procedure are rather just one way communication and might not qualify as a multilateral discussion of the problem, meaningful public participation would require. Also, the informal research that could qualify as carefully listening to the opinion of the public has a procedural shortcoming: it is not transparent enough, the rules to follow during such a research procedure are rather scientific than administrative with its necessary procedural guarantees. In sum, we have to underline again that such additional methods of environmental democracy are welcome, unless they are aimed as substitutes for those required under and meeting the requirements of the Aarhus Convention.

II.8 Interrelationship between the participation rules of Article 6 and Article 7

A partial examination of the conditions of meaningful public participation took place in the Belarus case. A further value of this case, however, is that the Committee retrospectively analyses a couple of its own former decisions. “The legal framework and the facts of the present case show that the public participation process was scheduled to take place when the location for the project had already been selected. The submissions of the Party concerned, and also the letters of the Ministry of Energy dated 1 June 2007, 8 May 2008 and 13 January 2009 (see annexes 2, 3 and 4 to the communication), show that extensive assessment and feasibility studies had already been under way, including the study for the selection of the project location, since 2007 (see information contained in annex 2 dated 1 June 2007), while a number of acts had been adopted towards implementation of the project. (...) The public participation process for the NPP was part of the EIA (OVOS) procedure undertaken by the developer. The question that arises is whether public participation at that stage was not limited, given that advance preparations for the project had been undertaken since at least 2007 and that the project site and the developer — which had established project offices near the site (project documentation was accessible there) — had been selected. It appears that the option of not building the NPP at the particular location was no longer open for discussion. (...) As already noted in the past (findings on communication ACCC/C/2006/16 concerning Lithuania, ECE/MP.PP/2008/5/Add.6, para. 71, and findings on communication ACCC/C/2006/17 concerning the European Community, ECE/MP.PP/2008/5/Add.10, para. 51), the requirement for “early public participation when all options are open” should be seen first of all within a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage. Thus, taking into account the particular needs of a given country and the subject matter of the decision-making, each Party has a certain degree of discretion as to which range of options is to be discussed at each stage of the decision-making. Such stages may involve various consecutive strategic decisions under article 7 of the Convention (policies, plans and programmes) and various individual decisions under article 6 of the Convention authorizing the basic parameters and location of a specific activity, its technical design, and finally its technological details related to specific environmental standards. Within each and every such procedure where public participation is required, it should be provided early in the procedure, when all options are open and effective public participation can take place. (…)
The Committee has not been provided with any evidence that the public was involved, in forms envisaged by the Convention, in previous decision-making procedures which decided on the need for NPP and selected its location. Once the decision to permit the proposed activity in the Ostrovets area had already been taken without public involvement, providing for such involvement at a following stage could under no circumstances be considered as meeting the requirement under article 6, paragraph 4, to provide for “early public participation when all options are open” (see also findings on communication ACCC/C/2005/12 concerning Albania, ECE/MP.PP/C.1/2007/4/Add.1, para. 79; and findings on communication ACCC/C/2009/41, ECE/MP.PP/2011/11/Add.3, paras. 61–63). This is the case even if a full EIA procedure is being carried out. Providing for public participation only at the stage of the EIA (OVOS) procedure for the NPP, with one hearing on 9 October 2009, effectively reduced the public’s input to only commenting on how the environmental impact of the NPP could be mitigated, and precluded the public from having any input on the decision on whether the NPP installation should be at the selected site in the first place, since the decision had already been taken. Therefore, the Committee finds that the Party concerned failed to comply with article 6, paragraph 4, of the Convention.

In our opinion the Committee failed to examine the issues of adequate notification and the early and timely participation within the context of Article 6 and Article 7 together. Instead it analysed public participation matters in the case only separately, although the result of these approaches are quite similar. In our opinion, however, it would have an additional value to underline that even if the notification and early participation requirements of Article 6 of the Convention are fully complied with, the Party is not in compliance with the Convention under Article 7 because in earlier stages the Party failed to ensure effective public participation through notification and early opportunities to express views on the given project.

Discussion of Chapter II

Although it is sometimes quite difficult to decode, taking everything into consideration the Committee’s standpoint is quite solid: in all decision-making procedures (meaning a procedure handled by one authority that starts with an application or an ex officio measure and ends with a decision with possible legal remedies) that corresponds with the conditions set in Article 6(1) of the Convention, the full public participation procedure described in Article 6(2)-(10) shall be applied. While Article 6(1) sets a condition that the subject of decision-making procedures shall be “whether to permit proposed activities”, the term “permitting” shall be interpreted broadly in our opinion: every decision without which the given activity should not legally start shall be considered as “permitting” in this context. Naturally, the decisions determining the frames and conditions to the activity too broadly will belong not to Article 6, but Article 7 or 8 (see in Chapter I the wide range of ramifications of these definition issues).

As concerns the explanations of this principle provided for by the Committee in several cases we can refer to the following considerations. Every decision that has a meaningful contribution to the establishment and the operation of an investment with environmental significance by changing the scope of the other decisions following it in the chain of decisions will qualify as an Article 6 decision where full public participation shall be ensured. Furthermore, certain decisions that might not be the final in this chain, but can reveal new facts and new expert evaluations thereof shall be also an Article 6 decision and shall require a full public participation regime.
While more or less acknowledging certain shortcomings in their Aarhus type public participation systems, Parties under Compliance Committee procedure tend to refer to many alternative methods through which the Parties still ensure that the members and organisations have a say in environmentally significant decision-making procedures where public opinions can somehow influence the content of the decisions. There are basically two groups of such methods. The one-sided ones are for example sociological surveys, opinion polls and public information campaigns where the authorities (sometimes with the contribution from the investors) try to find out and influence the public opinion without entering into bilateral discussions with the people and organisations. Actually, in most cases the ombudsman (environmental ombudsman if there is such) procedures belong to this same group, where, although there are certain activities from the members and organisations of the public, too, they are mostly exhausted by a mere complaint, further on, the examination and evaluation of the facts of these cases are upon the discretion of the officials working in the ombudsman’s offices.

There are more or less deliberative types of procedures, as well, to communicate the plans of investments with environmental significance and collect some feedbacks from the concerned public. These are local, regional or national referenda, public hearings, informal consultations, and workshops. A common trait of these measures is that although they might serve the authorities with important and useful information, there are no procedural guarantees that ensure that the rights of the participating agents will be maintained (e.g. being fully notified at the earliest time, fully informed about the facts and expert opinions in the case and have accessible legal remedies). We could include into this second group also the several sustainable development councils or the Parliaments’ environmental committees. They generally do a great job, but generally operate with few if any of the mentioned procedural guarantees.

III. Possibilities of expression of the economic and environmental interests in the spatial planning procedures

Spatial planning is a melting pot of several interests; both economic and financial interests and environmental and cultural heritage interests fight for attention in this procedure. In some of the cases of the Compliance Committee the complainants or the Committee itself found it important to reveal and quickly examine these interests, in order to be able to understand and explain the motivational background of the respective spatial planning procedures. The financial-economic and the environmental-heritage sides should not always be controversial, however. In the long run, their interests are very close if not identical: no investment could be profitable if it is burdened with a long lasting local or regional environmental conflict. Public protest, bad publicity, legal procedures of administrative (monitoring and enforcement) and civil (e.g. for damages) nature might undermine the operation of such projects, possibly resulting in the permanent discontinuation of project.
III.1 Spatial planning with typical economic activities in the background

The Armenian case shows very well the net of the economic interests that usually start and direct the spatial planning procedures: “The communication concerns access to information and public participation in the decision-making on modification of land use designation and zoning as well as on the leasing of certain plots in an agricultural area of Dalma Orchards.”

Spatial planning decisions are closely related to the development plans and concrete economic activities of the concerned municipalities. For a better transparency and accountability of such planning decisions it would be vital to reveal these economic backgrounds and sets of interests. Opponents argue that their business secrets prevent the public from getting access to these financial aspects of the cases. However, one can object this argument, because as they are handling, not their own investments, but acting in the name of their respective communities, operating with community properties, and therefore the members of the community are entitled to get full access to the information of such SP related financial matters.

III.2 Interrelationship with financial decision-making procedures

The Albanian case clearly reveals that without the financial support of large international banks, many of the environmentally sensitive projects could not enter into the planning procedures. “Noting that the ultimate responsibility for implementation of and compliance with the provisions of the Convention lies in the hands of individual Parties, the Committee: (...) (b) Is mindful of the fact that the involvement of these institutions in the TES project has probably stimulated a gradual increase in the application of the public participation and consultation procedures to the decision-making process by the national authorities; (c) Also notes with appreciation the interest expressed by both the World Bank and EBRD to support a structured approach to the implementation of the Convention in Albania.”

The Commission examined the role of international financial institutes (IFIs) in the decision-making procedure and underlined the positive effects of their contribution. However, according to many sources (Bankwatch for instance), IFIs bear an enormous responsibility in selecting the investment plans, their locations and evaluating their environmental features initially only as a risk factor. IFIs are arguably less democratic and more disconnected from the public than national governments. International Financial Institutions by the nature of their position and work cannot be bound by the same requirements for public participation as their member state governments, but they should approach the environmental democracy standards more closely – the Albanian case is an example of initial efforts of some major international banks into that direction. Even if it is so, the basic content of their support decision, i.e. an oil refinery and an oil based power plant occupying a large part of a pristine national park will not shed a positive light on the operation of these IFIs.

162 Communication ACCC/C/2004/08 by the Center for Regional Development/Transparency International Armenia, the Sakharov Armenian Human Rights Protection Center and the Armenian Botanical Society (Armenia) with regard to compliance by Armenia with its obligations under the Aarhus Convention in relation to the development of the Dalma Orchards area

163 Point 2 of ACCC/C/2004/08

164 Communication ACCC/C/2005/12 from the Alliance for the Protection of the Vlora Gulf (Albania) concerning public access to information and participation in decision-making on the construction of an industrial park and a thermal electric power station in Vlora, Albania

165 Point 90 of ACCC/C/2005/12
III.3 Financial plans, decisions

In the first EU case the connection between international financing and the content of the planning decision becomes more evident. The situation in that case is special: where the financing organisation is itself a Party to the Aarhus Convention and as such, it should be attentive to the indirect effects of its financial contribution and other measures on the compliance of the Member States. “The communicant maintains that although a decision of the European Commission to co-finance a project does not itself, in its view, represent a decision on “whether to permit” an activity to which the provisions of article 6 of the Convention would apply, the European Commission, when making such a decision, was nevertheless under an obligation to ensure that the relevant provisions of the Convention were followed during the national decision-making related to the relevant project, and should have refused to finance a project where such provisions were not strictly followed. (...) The Party concerned maintains that in its view the Convention’s requirements are fully implemented in the respective Community legislation and according to the information available to it, the relevant provisions of this legislation are being appropriately applied in relation to the project in question.”

As it is seen from these points above, the EU as Party to the Convention would not exclude in principle that a financing decision should undergo the Aarhus rules even if only indirectly (through influencing a national level decision-making procedure) even if in the given case it denies its responsibility. Indeed, in bona fide application of her international environmental legal responsibilities the EU should not contribute to a project which seemingly infringes those rules. It is still an open question, however, how deeply the EU should examine the implementation of the Convention in general or in connection with certain projects it supports financially.

III.4 Interdependence with economic development plans

In the Spanish case the scope of financial interests come to the light, too, this case shows the complexity of the economic drives both on the side of the investors and on the side of the municipal and other bodies responsible for spatial planning. “In February 2003, a private company, Joven Futura (Future Youth), made a proposal to the Murcia City Council to start negotiations for the development of a residential area near the city of Murcia covering 92,000 square meters to construct houses for young families. The proposal also envisaged the conclusion of an agreement between the company and the Murcia City Council to enable urbanization of the land concerned near the city of Murcia. The proposed agreement included an obligation for the City Council to take the steps necessary to reclassify part of the land, where the houses would be constructed, from “non-residential” to “residential”. (...) Among others, the agreement included the following legal obligations for the City Council: to adopt a modification to the urban plan, to reclassify a land allotment of 110,000 square meters and to approve a project for the urbanization of the area. The agreement also committed the regional government to approve the planning steps and to incorporate the area into the building zone (“City General Plan”) of the city of Murcia. The land would become the property of Joven Futura for the construction of approximately 733 apartments.”

166 Communication ACCC/C/2005/17 submitted by the non-governmental organization Association Kazokiskes Community (Lithuania) alleging non-compliance by the European Community with its obligations under article 6, paragraphs 2 and 4, and article 9, paragraph 2, of the Convention
167 Points 17 and 19 of ACCC/C/2005/17
168 Communication ACCC/C/2008/24 concerning compliance by Spain the Spanish non-governmental organization (NGO) Association for Environmental Justice (Asociación para la Justicia Ambiental (AJA)) submitted a communication to the Compliance Committee on behalf of itself and the Association of Senda de Granada Oeste Neighbours on a residential development project in the city of Murcia, Spain
169 Points 13-14 of ACCC/C/2008/24
Non-sustainable plans are frequently initiated by economic circles, real estate developers under such labels as “youth”, “future” or quite typically some compound words with “green” to cover mere real estate speculations. The motivations of the mostly municipal decision-makers are mixed in such contracts: local economic development, taxes, employment and personal interests (e.g. close connections with the owners of the lands whose prices will be multiplied by the news about the development plan). The contracts are seldom proportionate, and rarely contain enough long term advantages for the local community. Moreover, as we have referred to in the earlier chapters, from constitutional viewpoints it is rather doubtful whether a local legislative decision by the representative body of the local community could be a subject to civil law contract. The same applies to any permitting type administrative decisions concerning the land under this contract.

III.5 Multiple protection interests

The Spanish case shows the other side of the coin, too: nature protection and protection of cultural heritage are also such interests that could be determining, sometimes even driving forces of spatial planning procedures. “As mentioned above, at the time of the conclusion of the agreement, the land in question was classified as non-residential by the Murcia City General Plan, last revised on 31 January 2001. This latest revision of the City General Plan had been subject to an EIA before its adoption, as required by national and European Community (EC) law. The EIA verified the historical, cultural, environmental, scientific and archaeological values of the land, in order to classify some of it as non-residential. Such non-residential land is subject to a special protection regime that is incompatible with urbanization. (...) The land allotments allocated for the project are located within the area of Huerta Tradicional (traditional garden). Those allotments were under special protection under the City General Plan and were classified as non-residential because their conservation was considered to be essential for the quality of the environment of the metropolitan area of the valley.”

Cultural and natural reasons of protection of a land are oftentimes interwoven. The major task of the fair and equitable spatial planning procedure is to allow for a clear and transparent comparison of these interests and the economic interests behind the planned new activities.

III.6 The role of local governments, municipalities in SP

Finally we have to deal with the subjects of spatial planning as carriers of the interests that we have examined. In the Spanish case, the municipalities appeared as focal points of many kinds of interests taking part in the decision making about the future use of a piece of land in their territory. “On 24 June 2004, the Murcia City Council decided to initiate the procedure regarding Modification No. 50 to the City General Plan for the establishment of the residential zone ZM-Ed3, Espinardo. The notice was published on 22 July 2004 in the Murcia Region Official Journal and set one month for public comments.”

Municipality councils usually have decisive role in SP even if the frames of their decisions are determined by superior plans and/or subject to approval by some higher level governmental/administrative bodies. This very issue was examined by the European Parliament, too: “The Committee takes note of information available in the public domain that the European Parliament recently criticized extensive urbanization practices in Spain. The resolution adopted by the European Parliament in March 2009 refers to the “frequently excessive powers often given to town planners and property developers by certain local authorities” at the expense of communities.”

170 Points 15-16 of ACCC/C/2007/22
171 Point 18 of ACCC/C/2007/24
and the citizens who have their homes in the area. The resolution calls for the suspension and revision of all new building projects which do not respect the environment or guarantee the right of ownership and calls for adequate compensation for those affected. (European Parliament resolution of 26 March 2009 on the impact of extensive urbanisation in Spain on individual rights of European citizens, on the environment and on the application of EU law, based upon petitions received (2008/2248(INI)).”172

The European Parliament resolution seems to blame excessive decentralisation of the SP decisions, but in our understanding the primary targets of the criticism are rather the content and spirit of such local decisions. Financial, economic interests might easily overwhelm nature and heritage protection interests in those instances, too, where the right of decision in spatial planning matters is taken into the hands of higher level State authorities or even of the legislating power of the Parliament. What is essential from the procedural side – we have to underline again – is the quality of the procedure; the openness of the whole decision-making process for the members and associations of the public and also for depository bodies of general interests such as nature protection and cultural heritage.

Discussion of Chapter III

In the spirit of sustainable development it is always important to take into account the interests and professional motivations of the role players in the decision-making procedures. In the cases arriving to the Compliance Committee we can see that in spatial planning conflicts financial, real estate development and other economic interests stand on one side and historical, cultural, environmental, scientific and archaeological values on the other side. Successful, effective decision-making procedures need transparency where all the interests are clarified and taken into consideration by all the participants. Therefore, public participation principles should not be confined and narrowed down as we have seen in the previous chapters but rather broadened, expanded to the earlier stages of decision-making, first of all to the national, regional and local development planning and even to the financial procedures that largely determine the fate of the projects ensuing from these development plans. Several international financing institutes have agendas other than just a sheer profit, especially those which are directly affiliated with the UN or the European Union. Yet, even in these cases, decisions on financial support of certain projects are conducted behind closed doors and serve only a limited circle of interests.

This basic arrangement of the large structure of the whole (truly the whole) decision-making procedure is reflected in such legal institutions as spatial planning or even in wide scale administrative agreements where economic actors can pave a smooth, long path for their investments, not having to be afraid of any future interference from the concerned communities. This intrusion of civil law institutions into the field of constitutional and administrative law raises therefore a couple of constitutional legal problems, first of all in the areas of division of state powers and also hierarchy of legal sources. Increasing the development and concreteness of legal principles and interpretation tools shall be an urgent task for scholars and legislators working on this field.

Another legal institution that is used to mask the rough interests behind such agreements, and developmental and spatial planning motions is business secret. In many countries, however, a legal principle has started to gain acknowledgement, according to which business secret a) cannot cover any transactions in which money from state, municipality or any other community sources are used; b) no one should refer to business secret as a defence mechanism for his legally or morally questionable investments and operation of thereof.

172 Point 66 of ACCC/C/2007/24
IV. Procedural rules

The majority of spatial planning decisions are brought under Article 7 type regimes. Article 7 has no direct procedural rules but only references to the process described in Article 6 and the general principles that can be deducted from the whole system of public participation, starting with the requirement of fair and transparent procedure. Having this relatively looser connection to the stricter procedural rule, in the decision-making procedures concerning plans, policies and programs, especially in the spatial planning field, we frequently witness procedural “tricks”, strange and unfair procedural solutions that aim to exclude the majority of the public from the possibilities of substantial participation (e.g. through poor notification systems) or once they are in the process, to constrain their participation rights (e.g. through not ensuring enough time for participation or providing faulty or by extending to them misleading scientific background information).

IV.1 Notification according to Article 6(2) in the SP procedure

In the Lithuanian case there was a difference between the Party concerned (first part of the quote) and the Committee (second part thereof) in understanding the proper content and method of notification of the members of the public on the onset of the planning procedure. “The Party concerned maintains that:
(a) The notification was sufficient and fully in compliance with the applicable rules:
(i) There was a notice in the local newspaper;
(ii) Additionally, 14 property owners living within the “sanitary zone” were informed by registered letters;
(b) The information forming the basis for the approval of the plan was sufficient for this (early) stage of the procedure, where only the general characteristics of the project and its location were being approved;
(c) The public did not demonstrate great interest (only five persons participated in the hearing). (...)

The requirement for the public to be informed in an “effective manner” means that public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate. Therefore, if the chosen way of informing the public about possibilities to participate in the EIA procedure is via publishing information in local press, much more effective would be publishing a notification in a popular daily local newspaper rather than in a weekly official journal, and if all local newspapers are issued only on a weekly basis, the requirement of being “effective” established by the Convention would be met by choosing rather the one with the circulation of 1,500 copies rather than the one with a circulation of 500 copies.”

We see that the Committee did not fall back on the vague phrase given by the Party “local newspaper” but clarified that it was an official paper, rather than a widely read popular journal, therefore the methodology of dispatching the information about the planning procedure was not enough user friendly. On the other hand the Committee has accepted the argument of the Party concerned that the notification was made at an early stage of the decision-making procedure, therefore the content of notification acceptably was very small and simple. We note here that although Article 7 does not directly refer to Article 6(2) on notification, it is hard to imagine that a meaningful public participation could take place without due notification from the decision-making body, therefore in our views the rules on notification in Article 6 should apply to Article 7 procedures mutatis mutandis. The same concludes from the reference done to Article 6(2) in the text of Article 6(3) which is part of the Article 7 procedure, too.

173 Communication ACCC/C/2006/16 by Association Kazokiskes Community (Lithuania) concerning decision-making on the establishment of a landfill in Kazokiskes
174 Point 26 and 67 of ACCC/C/2006/16
**IV.2 Reasonable time frames under article 6, paragraph 3**

Also in the Lithuanian case the communicant (first quote in the below text), the Party concerned (second quote below) and the Committee (third and fourth quote) had different views on the timeframes of public participation in a decision-making procedure under Article 7. “The communicant alleges that the 10 working days envisaged in the Lithuanian EIA law for getting acquainted with the documentation (including the EIA report) and preparing to participate is not reasonable. (…) The Party concerned maintains that the period of 10 working days is commonly approved by Lithuanian legislation and that until now no one has questioned such a period as being unreasonable. (…) The requirement to provide “reasonable time frames” implies that the public should have sufficient time to get acquainted with the documentation and to submit comments taking into account, inter alia, the nature, complexity and size of the proposed activity. A time frame which may be reasonable for a small simple project with only local impact may well not be reasonable in case of a major complex project. (…) The time frame of only 10 working days, set out in the Lithuanian EIA Law, for getting acquainted with the documentation, including EIA report, and for preparing to participate in the decision-making process concerning a major landfill, does not meet the requirement of reasonable time frames in article 6, paragraph 3. This finding is not negated by the fact that the fixed period of 10 working days is commonly approved by Lithuanian legislation and that until now, according to the Party concerned, no one has questioned such period as being unreasonable.”175

We agree that the nature and complexity of the planned activity determines the necessary time frame. On the other hand, the abilities of the participants should also be taken into consideration: for a larger community it also takes considerable time to organise, spread out the information to community members, convene meetings, contact experts or mainstream NGOs for help, etc., and discuss the project thoroughly and form an opinion within the participating organisations.

**IV.3 Who is performing the EIS?**

Environmental Impact Assessment has a close relationship with Article 6 and Article 7 decision-making procedures. Article 6 of the Convention especially was tailored according to a standard EIA procedure, while the list of the activities that should undergo an Article 6 procedure contains a direct reference to EIA, too (Annex I, point 20). A similar procedure is run with similar background materials for Article 7 procedures that usually called strategic environmental assessment and impact study, respectively. Since Article 7 directly refers to the requirement of fair procedure, I think it is relevant that the EIA like procedures supporting the decision making of Article 6 and 7 shall be fair, too. In the Spanish case176 the EIA has played an important role. “In May 2004, the Urbanization Unit of the municipality submitted to the City Council a formal draft “Modification” to the City General Plan for the new residential zone, known as ZM-Ed3, Espinardo, accompanied by a document called “Environmental Accident Study”, developed by the company, and by a draft EIA study for the creation of the urban zone ZM-Ed3, Espinardo. The last of these documents followed the requirements stipulated in Spanish legislation to develop an EIA for modifications introduced on city plans. The Environmental Accident Study claimed that the land proposed for reclassification “has no special significance as a garden”.”177

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175 Points 41-42 and 69-70 of ACCC/C/2006/16
177 Point 17 of ACCC/C/2007/22
The EIS prepared by the developer can hardly be called unbiased. Since these studies are prepared by experts in contractual relationships with the developer or the planner (the municipality or other bodies), the experts would actually infringe their contractual responsibilities if they highlighted the negative traits of the planned investment or change in the spatial plan.

The same issue was raised in the Austrian case 178 where some procedural arrangements were mentioned that could counterbalance the unfortunate and unfair situation created because the evaluation of the environmental consequences of the plan is done by structurally biased experts. “The Federal Act on the Strategic Assessment of Transport (SP-V Act), published in the Federal Law Gazette (FLG) I No. 96/2005, requires that network alterations of the major road network, such as some of the transport solutions being considered in the Enns Valley, be submitted to a strategic assessment in which potential substantial adverse environmental impacts are to be considered. After the conduct of the strategic assessment, the remaining option(s) would be subject to an environmental impact assessment based on the Federal Act on Environmental Impact Assessment 2000 (EIA Act 2000), FLG I No. 697/1993, last amended in 2008 (see FLG I No. 2/2008). Both Acts serve to implement the Convention and relevant European Community Directives. (...) The SP-V Act requires the initiator, which in case of the high-level road network (such as motorways) is ASFINAG (Austrian Organization for Financing Motorways), when suggesting alterations to the network, to present a proposal including an environmental report, prepared in cooperation with the Ministry of Transport (article 4 of the SP-V Act). The aim of the proposal is the inclusion of the proposed road on the Annex to the 1971 Federal Roads Act by way of a decision taken in Parliament (article 3(1)(3) of the SP-V Act). The Act requires the operator when assessing alterations to the high-level network, inter alia, to ensure sustainable passenger and freight transport, taking into account social and safety conditions, to ensure a high level of environmental protection and optimal utilization of available capacity, and to provide interoperability and intermodality within and between different modes of transport. In addition, possible substantially adverse impacts of, as well as reasonable alternatives to, the proposed alterations of the network have to be considered in the proposal (article 5(1) of the SP-V Act). The Act, furthermore, requires the operator to consult the Federal Minister of Agriculture, Forestry, Environment and Water Management as well as the environmental authorities of the provinces involved. The proposal and the environmental report are to be published on the Internet on a page hosted by the Federal Ministry of Transport, and notifications are to be placed in at least two daily newspapers (article 8(1) of the SP-V Act). After the publication of the report, the public is entitled to make statements during a period of six weeks (article 8(1) of the SP-V Act). In conducting the strategic assessment, the Minister of Transport is to collect statements by the public and other public authorities and to take such statements into account (article 5(2) and article 8 of the SP-V Act). The draft parliamentary decision as well as a document indicating how statements from the public and environmental considerations have been taken into account is also to be published on the website of the Ministry of Transport (article 9 of the SP-V Act). Subsequently, a decision is taken in Parliament, which is subject to the general legislative procedure.” 179

The unfortunate arrangement where the investor prepares the EIS can be partly balanced by close cooperation with the interested authorities (although some of them are also biased for the investment, especially in the infrastructure cases such as the Austrian case) and also by a well-developed and structured public participation regime. The joint preparation of the SEA study and the mandatory consultation with a third ministerial body is a good start which continues with a fair, 6 weeks opinion collection term and a fair feedback on the opinions that arrive during this period.

178 Communication ACCC/C/2008/26 submitted by the non-governmental organizational Nein Ennstal Transit-Trasse Verein für menschen- und umweltgerechte Verkehrspolitik (NETT) regarding compliance by Austria with its obligations under the Convention in connection with decision-making processes related to alternative transport solutions in the Enns Valley in the Austrian Province of Styria and to the proposed introduction of a 7.5 tonnage restriction for lorries on route B 320.

179 Points 17-18 of ACCC/C/2008/26
Even if it is so, the parliamentary level, as we noted earlier, seems not to be the most practical and best way of decision-making in spatial planning issues.

IV.4 The onset of the Article 7 procedure

The difference between when the spatial planning actually starts and when the planning is claimed to have started is a definitional problem. However, this very issue can be understood as a procedural problem, as well. In the Austrian case we followed this latter approach. “The Party concerned maintains that the participatory processes undertaken prior to 21 April 2008 involved a pre-planning phase in which possible options for a road in the Enns Valley were assessed having regard to the legal limitations on the available options, in view of, among others, the European Community Habitats and Birds Directives2. Consequently, the Party concerned maintains that article 7 of the Convention does not apply to the actions challenged by the communicant. It maintains that the planning process and thus the application of article 7 will only start with the launching of the Strategic Traffic Assessment in furtherance of the motion adopted by the Styrian Provincial Government on 21 April 2008. The Party concerned submits that in this process, public participation is envisaged in conformity with the Convention. Furthermore, the Party concerned maintains that in that process, all options remain open. The Party concerned also points to the five Round Tables which were organized in the pre-planning stage in order to involve NGOs and points out that since February 2006 the communicant declined to participate in these Round Tables. Finally, the Party concerned disputes the allegation by the communicant that at that stage all options were no longer open.” 180

As we have seen in the earlier chapters, planning procedures can be long and complicated. The authorities might claim that certain parts of them are not really parts of the “true planning”, but, instead, are just part of a so called “pre planning” phase, where the authorities and any other planning agents can arbitrary establish the procedural rules of public participation, if any.

Discussion of Chapter IV

Procedural rules discussed in this chapter would aim to ensure the quality of public participation, yet, in many cases, similarly to the topics discussed in the previous chapters, these rules are still about excluding the members and organisations wholly or partly from the decision-making procedure or from a part of it. A late notification or a notification in a very limited circle, such as in an official journal hardly read by anyone from the general public, or leaving very limited time for the members and organisations of the public to reveal and understand the facts in connection with the decision-making procedure and create the necessary social connections that would help them to interpret and critically evaluate the professional side of the decisions. The gap between experts and laymen is to be seen the best in case of those decision-making procedures where some kinds of environmental impact studies are prepared. If the investors – who are usually in charge themselves of preparing the professional, environmental, social etc. evaluation of their own plans – follow the regular EIA procedure, than proper public participation rules will apply, too. Unfortunately, in spatial planning procedures there are several similar social-environmental evaluation methods that are obligatory, but entail with a very poor or no public participation at all.

180 Point 33 of ACCC/C/2008/26
Aarhus Convention Compliance Committee Recommendations Regarding Spatial Planning—Concluding Notes

The Aarhus Convention provides a resource and guidelines for the public to affect environmental policies at a national and local government level. The Aarhus Convention’s requirements for public participation are especially important for spatial planning policies and decisions that can have an immediate and large effect on the lives of public. An examination of Aarhus Convention Compliance Committee decisions regarding public participation during spatial planning processes reveals a complex and often fact dependent set of public participation requirements.

In analysing the public participation requirements for spatial planning decisions, parties must first determine whether the decision falls under the Article 6, Article 7, or Article 8 requirements. The article under which a decision falls determines the level of participation required. In spatial planning processes, important decisions can take many forms and can be decided at a number of levels. These decisions could take the form of an individual permitting decision or a general development plan, an administrative decision or a more legislative decision. What these varying decision types have in common is that they all affect the land and environment in some way. Under the Aarhus Convention, individual decisions are governed by Article 6; plans, policies, and programs fall under Article 7; and decisions regarding normative instruments fall under Article 8. The specific article determines the necessary level of public participation. Because the article determines the level of participation, the classification of a decision is an important one. However, distinguishing between the different types of decisions can be difficult. Often the difference between an Article 6 and an Article 7 decision rests on the level of specificity. For example, a decision designating that a certain area of land can be used for commercial enterprises will likely qualify as an Article 7 decision, but if that same decision deals which specific types of commercial activity are permitted, the decision may move into Article 6 territory. Furthermore, if the decision delegating certain lands for commercial use took the form of a nationwide, normative act, the decision could qualify as an Article 8 decision.

Another problem emerges when parties must determine how early public participation should occur and, when decision-making is a multi-tiered process, how often public participation should occur. The question of when public participation should be permitted is important because some options are only available at certain points in the decision-making process. Generally, earlier public participation will allow the public a broader participation because more options are available. When the public is only allowed to participate late in the process after options have been eliminated, the public does not have the option for real participation. Analysis of the Compliance Committee decisions regarding early and multiple participation reveals that for Article 6 decisions public participation should be allowed for all decisions that meet the guidelines outlined in Article 6(1). Furthermore, the question of which decisions should fall under Article 6 should be interpreted broadly, especially when deciding which activities should be permitted. Generally speaking, full public participation should be allowed for all decisions that meaningfully impact on a project with environmental significance.

Alternative procedural methods should not take the place of full participation in spatial planning decisions. Some governments might use sociological surveys or referendum in lieu of actual public participation. While these tools can be helpful for determining general public opinion on a spatial planning issues and providing officials with information, they can easily suffer from a lack of transparency. These tools are not an appropriate substitute for full public participation throughout the decision-making process and should not be interpreted or enacted as such.

181 This Chapter was written by Kelly Brouse.
Further problems occur when conflicting interests fight for influence over the decision-making process. Often, when spatial planning decisions are discussed, the economic interests sit in contrast to the environmental and cultural interests. The roles that each of these interests take in the final decision, can cause conflict. Transparency can play an important role in alleviating the effects of conflicting interests. If all parties are open about their interests, the decision-making process can better adjust and accommodate differing interests and encourage cooperation and compromise.

Finally, the procedural rules for public participation in spatial planning decisions can affect the ability of the public to participate. The potential procedural problems can be seen in Article 7. While this Article provides instruction on public participation for a certain type of decision-making, it does not specify a required procedure for public participation. The looseness of procedural requirements under Article 7 have allowed for „procedural tricks” to stand in the way of public participation. To protect public participation during Article 7 decision-making procedures, officials should use the Article 6 procedural rules, including requiring adequate notification and adequate time for opponents to collect information and prepare opinions, ensuring a fair and transparent Environmental Impact Assessment, and allowing public participation to begin as early as possible in the planning process.

To best comply with the requirements of the Aarhus Convention, Member States should strive to provide an open and transparent decision-making process. By providing early information and early opportunities for public participation, Member States should allow public participation when all possible options are still open and create an environment of real public participation.

Contact information:

name: dr. Sándor Fülöp Ph.D.
organization: J&E
address: 1076 Budapest, Garay u. 29-31.
tel/fax: 36 1 3228462/36 1 4130300
e-mail: info@justiceandenvironment.org
web: www.justiceandenvironment.org

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