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LOCAL SELF-GOVERNMENTS' COMPETENCES IN ADMINISTRATIVE PROCEDURES RELATED TO PRIORITIZED INVESTMENTS IN HUNGARY

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Abstract: *This study examines a special administrative procedural law instrument that serves the competitiveness of the economy in Hungary. This procedural regime on prioritized investments became a part of the law after the accession to the European Union. The research clarified the specialties of the process and the relations between them highlighted by the competent public administrative bodies, the Government and the local self-governments concerned with this procedure. The implementation of such investments raises constitutional issues, through the presumed violation of local self-governments' competences. The analysis presents the practice of the Hungarian Constitutional Court.*

Key words: *local autonomy, protection of local government competence, Hungary, regulation power on construction at local level, special administrative procedure on prioritized investments*

1. Introduction

Significant investments often play a crucial role in the economic development of a particular geographical area, country or region. They contribute to creating new jobs and infrastructures to facilitate and enhance the competitiveness of the economy. The state, through its administrative system, may have a considerable influence on the implementation and operation of investments, especially with procedures aimed at construction and environment protection authorization and permits (Papp, 2007, p. 31.; Hoffman, 2020, p. 22-23, 26). The competitiveness of national economies is strongly influenced by the efficiency of a country's public administration (PAPSDS 2014-2020, p. 12.) The priorities set by the State for the implementation of prioritized investment cannot be independent of the economic and social environment. Environmental sustainability has also become increasingly crucial in shaping a specific legal framework for investment. However, the implementation of prioritized investments raises fundamental rights and constitutional issues also (Stumpf, 2020, p. 215-222). That is why this legal instrument deserves special attention, because nowadays, there are more than

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1,500 such prioritized investments in Hungary. The prioritization process accelerated significantly after the government change of 2010. This is well illustrated by the fact that the possibility of such qualifications was used by the government in only twenty-one cases between 2006 and 2009. The study's investigation focused on the constitutional basic values concerned with the prioritization procedures and the administrative authorization processes. Nevertheless, the extension of examined fundamental rights is limited. The analysis explores whether local self-governments' basic competences, rights and interests are protected in connection with the implementation of these investments. This research presents the legal environment of prioritized investments and underlines the lack of possibility to enforce local self-governments' rights and interests. The exploration shapes the practice of the Hungarian Constitutional Court, decided in a lot of cases between 2015-2023, in connection with these types of investments, generally upon the request of involved local self-governments. The article discusses a part of the special Hungarian legal institutions concerned by the topic as preliminary issues, after that, some aspects of the special procedural regime and finally, the practice of the Hungarian Constitutional Court in connection with prioritized investments.

2. Grounds for the special regulation and preliminary issues

In Hungary, following the accession in 2004 to the European Union (Act XXX of 2004), a particular administrative procedural regime (PIMIA) was introduced in 2006 to facilitate and speed up the administrative authorization proceedings related to the implementation of investments that have national economic significance. These projects are implemented mainly from European Union funds or from the national budget, entirely or in part. This special regulation had relevance, because the European Union budgetary provisions determined short and strict deadlines for the use of supports from the Structural Funds (EU Financial Regulation, JD 2004). For that reason, investments supported by EU Funds and which required special management, were and currently are prioritized by Hungarian law. In the Hungarian law, the administrative procedural rules related to prioritized investments differ on a few points from the general administrative procedural regime (GPAPS 2004 and GPAP 2016). These derogations provide a framework for the authorization procedures, and therefore it facilitates rapid and efficient implementation of projects classified as of maximum importance from the national economic perspective. The procedural regime was adopted in a separate statutory law, but it had strong ties with general administrative procedural rules and with the regulations on the judicial review of administrative decisions (CCP 1952 and CAL 2017). Such administrative procedural provisions included the purported 'fast-track' procedures, shortened procedural deadlines, and forms of communication, especially the cooperation among authorities. These tools guaranteed the possibility of efficient, targeted and swift use of resources, either from the national budget or, particularly, from European Union funds, within the available time frame. By reason of the swift administrative procedures and guaranteed elements it is of great importance for clients to exercise and to enforce their rights and interests. The requirements related to the

efficiency of these procedures, especially the requirement for speedy procedures, could negatively affect the enforcement of clients' rights and the effective safeguard of interests. The keystone in the implementation process of a state investment from the topic of the study is, how the local self-governments may promote their interests and to protect their legal competences. The preliminary issues emerge in connection with the local self-governments' right to protection in the authorization processes related to the prioritized investments. They call for special clarification as to understand the violation of the local self-governments' rights, competences and interests. Thus, the (a) constitutional position of local self-governments, (2) the division of the local construction power between the Government and the local self-governments, (3) the legal protection tools of local self-governments, especially the constitutional complaint will be briefly discussed. This short reasoning demonstrates that the role of the Government and the possibility of local self-governments' rights protection were subject to fundamental change after the governmental change of 2010 and the adoption of Hungarian Fundamental Law in 2011, entered into force 1 January 2012. After 2010, there was a paradigm shift in the legal status of local self-governments. It was the result of the regulation on local self-governments in the Fundamental Law and the conceptual change of the Municipal Act (2011). A shift from local democracy as a core value to local administration was observed. The right to local self-government lost its fundamental right character (Csink, 2014, p. 159-161; Hoffman, 2015). The right to local self-government as a fundamental right was declared in the former Constitution of Hungarian Republic (1949), but this provision was reinserted into the Municipal Act (2011), not in the FL (2011). The legal protection of local self-government by the courts and the Constitutional Court faded. The fundamental reason was that both the right to local self-government and the rules for the protection of local self-government rights were transposed into the Municipal Act (2011) rather than in the FL (2011), as was the case with the previous constitutional provisions (Siket, 2016). In Hungary, both subjective and objective legal protection functions affect throughout the constitutional review. The FL (2011) came into effect on 1 January 2012, and the Constitutional Court Act (CC 2011) based on it, narrowed the previously widely applied objective legal protection and emphasized the subjective legal protection. The so-called ex-post norm control function, which used to be available for everyone and was considered *actio popularis*, has ceased to exist, and thus, local self-governments no longer have the opportunity to initiate ex-post norm control. Their constitutional legal protection has also been compromised, as the Fundamental Law does not include the right to local self-government as a collective constitutional fundamental right. As the only means, they can use the constitutional complaint as a legal institution, which is not considered as an effective legal protection tool (Köblös, 2015; Vissy, 2012, p. 5; Sulyok, T. & Szakály, Zs., 2016, p. 361-367; Varga, 2020, p. 66-73; Tilk, P., 2012, p. 42-51.) The direct form of constitutional complaint is still available for local self-governments, but the admissibility criteria of this type of complaint are very rigid. The violation of constitutional rights shall be direct, and in actual fact, the proposer shall be involved personally and there shall not be another remedy process opportunity for the proposer.

3. General characteristics of the special procedural regime and the conflicts of interests

The PIMIA contained in limited scope the special procedural and exceptional organizational rules; moreover, it entitled the Government to give a priority status for an investment, and to lay down in a more detailed manner the special organizational and procedural rules. The legislation adopted in 2006 determined the criteria for the classification as prioritized investment also, and only on this basis could the Government prioritize projects. The most important criteria were that the projects had to be implemented from European Union funds or from the national budget in part or entirely. As regards the cost concerned, the cost of the investment had to be at least 5 billion forints (at the exchange rate at that time approximately 20 million euros), or to establish at least 1 thousand new jobs. As may be traced, PIMIA originally narrowly defined the classification criteria. Nowadays, these conditions have fundamentally changed. The Government has an exceptional opportunity to prioritize investments. In fact any of the investments can be prioritized as exceptional in this manner, like for national security or law enforcement purposes, for environmental, educational, cultural, health and social purposes, for research, development and innovation purposes related to education and health, for religious and national purposes, for security of supply in the energy sector, investments related to the development of the Capital of Hungary, Budapest and the agglomeration, construction on a national and historical monument site, etc. (PIMIA Art.1.) Respecting the regulation method of the PIMIA, the legislator focused on the one hand on the construction authorization procedures and on the other hand on the development of public authorities' operations' efficiency. According to the PIMIA provisions, actually, the Government may determine not only procedural rules, but also lay down substantive rules, in connection with the implementation of investments, especially in those issues that were originally the subject of local self-governments' regulation power. The examination of the scope of construction regulations concerns the problem of the delegation and exercise of powers of local planning. The competence of local construction regulations is an essential part of local public affairs, subject to local self-government regulation power (FL 2011 Art. 32., FPBE 1997 Art. 6.). The Government is empowered by the provisions of PIMIA and FPBE to adopt the Government Decree and on the basis of very broadly defined legal titles, to go beyond and to overrule local regulation or derogate and throw out the local regulation in cases declared as highly important form a national economic point of view. Summarized, the Government Decrees contain the prioritization criteria and, in addition, organizational and procedural rules, and recently, on an increasing scale, substantive law provision also. Examined precedents from the Government Decrees in connection with the investments present the higher rate of installation of the territory, overruling the prohibition of change, changing the function of the land, etc. The power to regulate local public affairs, originally or due to the authorization of the law, is a key element of local autonomy. However, the legislator divides the power of local building regulations and the exercise of powers between the Government and the local self-government (FPBE Art. 4-6.). This is one of those points where the state interest and the local interest may be in conflict. By simplifying, the question may be raised, whether the local

self-government can influence in any way what prioritized development takes place in its area. The central regulation and the local regulation may be in clash as to whether the local self-government is able to take legal action to protect local interest. Although prioritized investments serve the public interest in a broad sense, in the vast majority of cases, but local self-governments undeniably have a significant influence on the micro-environment, on local social and living conditions of the inhabitants. In the case of prioritized investments, at best, the legislator should give the right to consent or the right to express the opinion of the local self-governments concerned and to rule the conciliation process between the Government and the local self-governments involved. Nevertheless, the current legislation contains no such legal instrument, or procedural obligation for the Government.

4. Fundamental rights reviewed in the practice of the Hungarian Constitutional Court

The examination of the practice of the Hungarian Constitutional Court highlights whether it is able to defend the legally protected competence of local self-governments. In the period of 2015-2023, the Constitutional Court decided in a total of fourteen cases of constitutional complaints related to Government Decrees on the classification of prioritized investments. In the majority of cases, the Constitutional Court rejected the petition on formal ground (seven cases), in a few cases issued a decision rejecting on merits (five cases), and in two cases terminated proceedings due to changes in the legal rules (Siket, 2023). As a preliminary remark, it is worth adding, that the scope of the Government's legislative powers has not been examined by the Constitutional Court in any case, although it declared the absence of unconstitutionality related to Government Decrees on prioritized investment, because the Government was entitled to rule these legal relations. The refusals were based on the fact that, in the case of the exceptional constitutional complaint, the assessment of the accessibility criteria is of particular importance. The infringement shall be personal, direct and actual to the fundamental right of the complainant. [Decision 3454/2022 (X.28.) CC, Decision 3100/2020. (IV.23.) CC] The criteria were not met by the opinion of the Constitutional Court and therefore it rejected the constitutional complaints. The local self-governments and the other petitioners concerned in these Constitutional Court procedures have generally invoked in their constitutional complaints the violation of (a) the principle of the rule of law, the dysfunctionality of the legislation and the infringement of the legislative power of the local self-governments [FL Art. B sec. (1) and Art. 32.], (b) the general duty of environmental protection [FL Art. P sec. (1)], the right to a healthy environment [FL Art. XXI sec. (1)] (c) the European Charter of Local Self-Governments as an international treaty (FL Art Q), (d) the prohibition of discrimination [FL Art. XIV sec. (2)]. [e.g. Decision 3441/2022. (X.28.) CC, Decision 3454/2022. (X.28) CC, Decision 3264/2021. (VII.7.) CC]

(a) According to these arguments, the Constitutional Court did not declare in any case the infringement of the *rule of law*, because the violation of this principle may be referred to only in a few cases. It may be confirmed in the following cases, like legislation with retroactive effect and the lack of time to prepare for the application of the law. [Decision 3264/2021. (VII.7.) CC, Decision 32/2015. (XI. 19.) CC] The legislative power of the local self-governments shall be practiced only within the limit of the law. (FL Art. 32 sec. (1) a) in connection with local public affairs the municipal government

shall, within the framework of law adopt decrees.] Therefore, if the government is empowered by law to issue decrees, the Constitutional Court considers that the legislative power of local self-governments is not violated, whereas local self-governments shall exercise their powers only within the framework of the law. Where assessing the limitation of legislative powers, the Constitutional Court does not apply the necessity-proportionality test, but handles the assessing of the so-called *"emptying-out"* of competences. Therefore, only the emptying of the local self-governments' power may be the measure of the unconstitutionality against the legislator. [Decision 3311/2019. (XI. 21.) CC, Decision 8/2021. (III. 2.) CC, Siket (2021), Decision 3264/2021. (VII.7.) CC, Decision 3441/2022. (X.28.) CC]

(b) The FL Art. P) includes a general obligation to protect the environment, which declares that the State has a duty to ensure access to natural resources. This provision of the FL is closely linked to the right to a healthy environment, contained in Art. XXI sec. (1). The local self-government is also responsible for the protection of the environment, because it represents the interests of the inhabitants of its territory and the local community. However, the local self-government is not capable of providing the institutional protection duty, therefore it is infringed by the government decree prioritization. According to the Constitutional Court, the right to a healthy environment is not a fundamental right, and it is not a purely constitutional task (State target), but is part of the objective, institutional protection aspect of the right to life. [Decision 48/1998. (XI. 23.) CC, Decision 16/2015. (VI. 5.) CC, Decision 17/2018. (X. 10.) CC, Decision 3454/2022. (X.28) CC] Consequently, the local self-government is the addressee of the protection of the environment, and its duty to ensure the right to a healthy environment and therefore it shall not claim a breach of fundamental rights. [Decision 3454/2022. (X.28) CC]

(c) The local self-government, as a petitioner, claimed that the Government Decree eliminated its right to determine or regulate on their own competence the basic parameters of the built environment, including the quality of life, in the exercise of the right to a healthy environment and the right to local self-government. In this context, the petitioner referred to the European Charter of Local Self-Government, especially the definition of local self-government. (Art. 3. of the Charter) The Constitutional Court declared, that the petitioner local self-government is not entitled to invoke a violation of the European Charter of Local Self-Government under the CC Act, because the proceedings may be requested by one quarter of the Members of Parliament, by the Government, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights. [Decision 3264/2021. (VII.7.) CC]

(d) The infringement of the non-discrimination provision of the FL referred to a constitutional complaint, on the basis that the petitioner could be considered an opposition-led local self-government. In the opinion of the petitioner, there was no constitutional justification, in accordance with common sense and fair process, to have been discriminated against. In the petitioner's view, the effect of the Government Decree showed the so-called "chilling effect", i.e. the chilling effect of the legislation on the exercise of fundamental rights, because the local regulation is unpredictable if the Government can rewrite the building regulations individually at any time. The Constitutional Court did not reflect in its decision on the argument. [Decision

3441/2022. (X.28.) CC]

And finally, there is another constitutional question in connection with the local self-governments' rights protection. Protection of local self-governments' rights by courts and by the Constitutional Court is limited, cannot be fully enforced, because the right to local self-government and the rules for the protection of local self-government rights are not laid down in the FL. Local self-governments are entitled to submit a constitutional complaint, but the research highlighted that it is not effective, because of the above-mentioned statutory law limits. The Constitutional Court emphasized that local self-governments can act only within the limits of the law, and if the empowerment of the Government is determined by statutory law, only the emptying of the local self-governments' competence shall be the indicator of assessing constitutionality.

5. Concluding remarks

The special procedural regime related to the prioritized investments, does not provide a chance for local self-governments to enforce their interests, and it lacks any conciliation procedure between the Government and local self-governments in the classification and implementation of investments. The designation is at the absolute discretionary power of the Government and in its regulation it may determine not only procedural and organizational issues, but, beyond these, substantive law provisions also. The Government may overrule the local regulations with substantive law provisions, and it hereby may change the local conditions. Unfortunately, a part of the investments may be identified as serving private interests, and against this type of investments the local self-government has no legal tool.

The case law of the Constitutional Court, presented here, underscores the controversial nature of the regulation of prioritized investments. Local self-governments are unable to act effectively to protect the interests of the local inhabitants on its territory - in the absence of appropriate legal instruments, highlighting the need for effective legal regulation to protect local self-governments' interests.

Summarizing, for local self-governments the only instrument of constitutional legal protection, namely the constitutional complaint, does not serve entirely for the protection of their responsibilities and competences.

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