SUPRANATIONAL RIGHTS PROTECTION REGARDING AIRPORT NOISE POLLUTION IN THE EUROPEAN LEGAL SPACE

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I. INTRODUCTION

As Advocate General Cruz Villalón noted, *"airport noise is one of the most serious environmental challenges facing urban areas."*[1] Collective interests such as effective transport of people and goods weigh heavily against the similarly collective – however, somewhat more distant – pursuit of environment protection and the individual rights of people living in the proximity of busy airports. However delicate such balance might be, the playing field seldom seems to be level. Keeping in mind the immediate monetary gains associated with the former interests and the usually weaker negotiating position of people living in urban areas around airports, it is less surprising that individuals often feel that their grievances of growing nuances as a result of increasing airport traffic fall on deaf government ears.

Imagine that you are a high school teacher owning a home in the proximity of an international airport. In the last two decades, as taking a flight transformed from a luxury few could afford to a household means of transport and global output tripled, the house you live in became significantly noisier day and night with shingles regularly breaking loose the pressure of commercial and cargo planes flying above, threatening with serious injuries. Your wage has not been adjusted for inflation and the property you live in lost 40 per cent of its nominal value. Changes happened gradually, enabled by ever-changing and obscure low-level regulations regarding airways, noise limits and seat quotas.

For an increasing number of people worldwide, this scenario is a reality. In this paper, I offer three supranational fora before which a European individual could seek remedy for the above sketched grievances.

[1] Opinion of Advocate General Cruz Villalón, delivered in Case C-120/10, § 1.

II. THREE FORA

The first possible option is the European Court of Human Rights ("ECtHR"), a judicial body of the Council of Europe adjudicating cases regarding the compliance of Member States with the European Convention of Human Rights ("ECHR"). The second forum is the Compliance Committee of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the "Aarhus Convention" and the "Aarhus Committee") and the third is the Court of Justice of the European Union ("CJEU") which has the final say upon matters regarding the interpretation and compatibility of Member State acts with EU law.

II.1. Individual access (standing)

Considering standing, the ECtHR and the Aarhus Committee offer the easier path as both fora accept individual complaints. Besides the requirement for the grievance to fall within the scope of the respective convention, both institutions refuse anonymous complaints, filter for the abuse of rights and reject manifestly unreasonable (manifestly ill-founded) motions.[2] The "significant disadvantage" requirement of the ECHR is similarly mirrored in the *de minimis* criterion developed in the Aarhus Committee's practice.[3] Another similarity is the requirement of the exhaustion of domestic remedies.[4] Unique to the ECHR are the requirements of victim status – being directly affected by the impugned measure[5] – and the six-month application deadline.[6]

Individuals seeking remedy before the CJEU are in a slightly more difficult situation. In accordance with its comprehensive and multilayered jurisdiction, applications can reach the

[2] Decision I/7, Review of Compliance ECE/MP.PP/2/Add.8 § 18-20 and Articles 34-35 ECHR.
[3] United Nations Economic Commission for Europe: *Guide to the Aarhus Convention Compliance Committee*. (Second edition, May 2019) § 100.
[4] Annex to Decision I/7, *supra*, § 21 and Article 35 (1) ECHR.
[5] WILLIAM SCHABAS: *The European Convention on Human Rights – A Commentary*. (Oxford, 2015) pp. 737-745.
[6] Article 35 (1) ECHR.

CJEU on different grounds and through distinct paths. Among those, the most relevant in the scenario set out in Chapter I of this paper appears to be the preliminary reference mechanism.[7] Such procedure is applicable in procedures that are pending before national courts of Member States where the interpretation or the validity of EU law is in question and (i) either the decision of the CJEU is necessary for the domestic court to render its judgment, or (ii) in instances where there is no judicial remedy available in the domestic setting. In this procedure, the national court has standing, and not the concerned individual. Direct actions, where standing could be sought by the individual, however, seem to be incompatible *rationae materiae* with the subject grievances.[8]

In conclusion, the Aarhus Committee and the ECtHR seem considerably more accessible for individuals than the CJEU in the subject domain. Even though the first forum's standards seem the most lax, in practice a considerable majority of cases that reach the Aarhus Committee are brought by NGOs, as opposed to the ECtHR where the overwhelming majority of judgments consider individual applicants.

II.2. Relevant Rights and Case-Law

The most evident difference between the three fora lays in the grounds upon which the application or referral can be made. The following part offers a brief overview of the relevant context for framing the subject grievances in a manner compatible with the specific admissibility requirements of the respective fora.

II.2.1. *Prospects Before the ECtHR*

The ECHR does not expressly mention environmental protection or, more specifically, noise pollution. According to the ECtHR, neither Article of the ECHR is *"specifically designed to*

[7] Article 267 of the Treaty on the Functioning of the European Union (TFEU)
[8] Relevant are Articles 263, 265 and 340(2) TFEU.

provide general protection of the environment as such".[9] In the context of noise pollution, the ECtHR formulated this fact in an even more straightforward manner by stating that *"there is no explicit right in the [ECHR] to a clean and quiet environment"* – the word "explicit", however, already reflects the fact that such claims have nevertheless found their way to the ECtHR.[10]

In essence, the ECtHR *"has derived »environmental rights« from traditional fundamental rights since the 1990s"*[11] in instances where *"environmental pollution has adversely affected one of the rights safeguarded"* by the ECHR.[12] Different environmental effects might give rise to grievances pertaining to the interference with multiple Articles. Most relevant to our subject are *(i)* the prohibition of ill-treatment under Article 3; *(ii)* the right to respect for private and family life under Article 8; *(iii)* protection of property under Article 1 of Protocol 1 and *(iv)* the adjacent right to remedy under Article 13.[13]

With a view to the prohibition of inhuman or degrading treatment, the ECtHR's standard of minimum level of severity has not been attained in noise pollution cases.[14] The scope of Article 8, however, is rather wide given the general and far-fetching nature of the four basic rights it protects. The ECtHR has expressly stated that *"the concept of »private life« is a broad term not susceptible to exhaustive definition".*[15] Article 1 of Protocol 1 also seems relevant with respect to property damage and loss of value.

[9] *Kyrtatos v. Greece* no. 41666/98. § 52.
[10] *Hatton and Others v. the United Kingdom [GC]* no. 36022/97 § 96.
[11] TELMO ESTEBAN FERNÁNDEZ: *Environmental cases in the ECHR. A focus in noise pollution*. In: Yearbook on Humanitarian Action and Human Rights (Universidad de Deusto: 2009) 6/2009, p. 136.
[12] *Kyrtatos, supra,* § 52.
[13] FERNÁNDEZ, *Environmental cases,* p. 136.
[14] The ECtHR explains the doctrine in, *e.g.*, *Jalloh v. Germany* no. 54810/00 § 67. For secondary literature, see SCHABAS, *Commentary*, pp. 171-173.
[15] See, e.g., *Pretty v. the United Kingdom* no. 2346/02. § 61.

Article 8 - Right to respect for private and family life

In order for the nuisance to fall within the scope of Article 8, the adverse effect caused to the individual has to attain a certain level of severity.[16] Relevant to such assessment are, among others, the intensity, duration and effects of the nuisance in question.[17]

Even though Article 8 primarily encompasses negative obligations,[18] *"there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves"*.[19] The applicable principles are similar: *"in both instances regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation"*, the latter referring to a certain leeway offered to domestic decision-making with respect to the principle of subsidiarity.[20]

Article 8 is a qualified right. If an applicant can demonstrate that their claim falls within its scope and an interference is present, the ECtHR will assess whether the State can put forth convincing reasons under Paragraph 2 of Article 8 (the "limitation clause") that justify the interference. In the cases described below, the Article 8 claim typically turns on whether a fair balance is found to be struck between the interference imputable to the State and the legitimate aim pursued.

The first case in which the ECtHR had to address the issue of adverse effects of air traffic on people living in the vicinity of big airports was *Powell and Rayner* in 1990.[21]

[16] Which is lower than that of Article 3, see SCHABAS, *Commentary,* pp. 370, 388.
[17] *Denisov v. Ukraine* no. 76639/11 § 111.
[18] *Kroon and Others v. the Netherlands* no. 18535/91. § 31.
[19] *Evans v. the United Kingdom [GC],* § 75.
[20] *Evans, supra, ibid.*
[21] *Powell and Rayner v. the United Kingdom* no. 9310/81.

Mr Powell lived in a house under a flight departure route of Heathrow International Airport. In 1984, the airway has been modified in order to reduce adverse effects on residents. Before that date, noise levels fell into a "low noise annoyance" category, with lower values after the route modification.

Mr. Rayner's house was located directly underneath a different airway with noise levels that classified the location *"an area of high noise-annoyance for residents"*.[22]

With respect to Article 8, the applicants argued that the high level of noise constituted unreasonable disturbance which the UK Government failed to properly redress, which amounted to a violation of their privacy rights to private life and home.

The Commission in 1986 declared both respective complaints under the substantial aspect of Article 8 inadmissible, at the same time distinguishing the two cases.[23] In Mr. Powell's case, the Commission did not expressly take a stance whether the nuisances amounted to an interference with his Article 8 rights but merely stated the presence of "ample justification" under the limitation clause.[24] In Mr. Rayner's instance, however, the Commission found a "clear interference" with the rights protected in Article 8 prompting an assessment of the State's positive obligations. Ultimately, the Commission found that the interference was *"justified in a democratic society in the interests of the economic well-being of the country"*.[25]

In its judgment, the ECtHR reviewed in length the economic role of Heathrow in the course of establishing the relevant facts of the case. The judgment listed, among others, the number of employees, yearly passenger traffic and cargo value and the sizeable contribution of the airport to the UK's budget. Consequently, it seems reasonable to assume that these factors were all

[22] *Powell, supra,* § 9.
[23] The Commission was of the opinion that the second applicant's Article 13 (lack of an effective remedy) claim with respect to Article 8 was of merit, meaning his case fell under the scope of Article 8 but the situation did not lead to an Article 8 violation.
[24] As reconstructed in *Powell, supra,* § 38.
[25] *Powell, supra, ibid.*

relevant in the context of the respondent State's economic well-being, against which the ECtHR balanced the extent of the interference.

Another important factor that the ECtHR considered was the extent of measures the Government took to *"control, abate and compensate"* the adverse effects of the airport.[26] Among these were noise reduction and noise quota measures, night flight restrictions and financial support to homeowners pursuing noise insulation.

The ECtHR also noted that the extensive scope of measures had been *"adopted progressively as a result of consultation of the different interests and people concerned"* and established international standards had been taken into account.[27] These above factors weighed in favor of the Government.

The ECtHR highlighted that the question is of national policy involving difficult social and technical questions which offers the States a wide margin of appreciation. Ultimately, the judgment found the lack of even an arguable claim under Article 8.[28]

Eleven years after the *Powell* judgment, a case regarding the problem of aircraft-related noise around Heathrow reached the ECtHR again. The eight applicants with dwellings in various areas near Heathrow complained that even though a quota system was in place since 1993 that aimed to restrict noise exposure at designated timeframes, the noise exposure in the sleeping hours has increased significantly since that date and noise levels rose above WHO standards.

The excessive noise exposure which the State failed to prevent therefore constituted an interference with their private life and the peaceful enjoyment of their home. They further

[26] *Powell, supra,* § 43.
[27] *Powell, supra,* § 43.
[28] The finding of a lack of such "arguable claim" also rendered moot the adjacent Article 13 claim. For further explanation see SCHABAS, *Commentary,* pp. 550-552.

argued that adequate scientific studies had either not been executed or not relied upon by the Government.

They acknowledged the economic importance of Heathrow – the busiest international airport in the world at the time – but argued that individual consideration of the economic importance of night flights have not been assessed which in itself merited the finding of a violation of Article 8 because relevant and sufficient reasons would be a necessary component of proving that the interference was necessary in a democratic society.[29]

Relying on *Guerra and Others v. Italy*, where the ECtHR found that the Government's omission to inform residents of environmental pollution constituted a violation of Article 8,[30] they further complained of the lack of essential communication regarding *"the extent of an environmental threat to their moral and physical integrity"*.[31]

In its judgment delivered in 2001, the Chamber distinguished the case from earlier cases, most notably the *Powell* case on the basis that the applicants in those instances complained generally about aircraft noise whereas the applicants in the present case narrowed their claim to night noise. Furthermore, the ECtHR distinguished on the basis that the applicants in *Hatton* complained predominantly about the *"increase in night noise which they say has occurred since the Government altered the restrictions on night noise in 1993, whereas the previous applications concerned noise levels prior to 1993."*[32] Since the Government did not own, control or operate nor the airport neither the aircrafts, the ECtHR, assessed the positive obligations of the State.

[29] The applicants also contested whether the interference was prescribed by law.
[30] The Court held that *"essential information that would have enabled [the applicants] to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory." Guerra and Others v. Italy* no. 14967/89 § 60.
[31] *Hatton and Others v. the United Kingdom* no. 36022/97 § 81.
[32] *Hatton (Chamber), supra,* § 94.

The Chamber accepted that it is "*at the very least, likely that night flights contribute to a certain extent to the national economy as a whole"*, however, it noted that *"the importance of that contribution has never been assessed critically"*.[33] Paired with the fact that no serious attempt was found to have been made by the Government *"to evaluate the extent or impact of the interferences with the applicants' sleep patterns"* and the general *"absence of a prior specific and complete study with the aim of finding the least onerous solution,"*[34] this omission constituted a violation of the applicants' Article 8 rights.

Upon the UK Government's request, the case was referred to the Grand Chamber ("GC") for review.[35] Following an extensive review of the underlying facts, the GC acknowledged that the implementation of the 1993 regime *"was susceptible of adversely affecting the quality of the applicants' private life and the scope for their enjoying the amenities of their respective homes, and thus their rights protected by Article 8 of the [ECHR]"*.[36] At the same time, the GC emphasized the subsidiary role of the ECHR stressing that States are in principle better positioned to assess local conditions as well as design and implement solutions.

The GC outlined the two relevant aspects in cases when State decisions relate to environmental issues. One is the assessment of the *"substantive merits of the government's decision,"* and the other is the evaluation of *"the decision-making process to ensure that due weight has been accorded to the interests of the individual."*[37]

The GC noted that according to the sleep study the Government relied on, only 2-3% of individuals were adversely affected by air traffic noise in the designated areas, mainly due to their own sensitivity. It further noted that in other environmental cases where the ECtHR found

[33] *Hatton (Chamber), supra,* § 102.
[34] *Hatton (Chamber), supra,* § 106.
[35] *Hatton and Others v. the United Kingdom [GC]* no. 36022/97.
[36] *Hatton [GC], supra,* § 118.
[37] *Hatton [GC], supra,* § 99.

a violation – such as the *López Ostra*[38] and *Guerra and Others* cases –, the respondent Government had in some form violated its own domestic law. This element, as the GC noted, was *"wholly absent in the present case"*.[39]

Ultimately, the GC was of the opinion that the economic interests of the country had to be weighed against the disturbance caused to the applicants in the course of implementation of the 1993 scheme, in which the State enjoyed a certain margin of appreciation. The GC also accepted the Government's argument that house prices were not affected by the noise, from which the GC concluded that the applicants could have moved without financial loss. Accordingly, the GC found that the Government did rely on relevant data, did the adequate consultation and reviewed the scheme regularly enough not to overstep its margin of appreciation with respect to the merits of the scheme. Th Grand Chamber also did not find *"fundamental procedural flaws in the preparation of the 1993 regulations"*[40] and hence did not find a violation of Article 8.

In 2011, the ECtHR adjudicated a case involving noise pollution not from aircraft turbines but road traffic. [41] The applicant lived in a town outside of which ran a motorway. Following the introduction of a toll in the motorway, commercial and private traffic increased on the toll-free road running through his town and along his home. Due to the increased traffic, noise levels rose. The applicant brought suit before the domestic courts arguing that *"the noise, vibration, pollution and odour caused by the heavy traffic nearby had made his property almost uninhabitable"*.[42]

The ECtHR framed the matter as a review of the State's success in striking a balance between the interests of road-users and those of the inhabitants of the surrounding areas. In this context,

[38] *López Ostra v. Spain* no. 16798/90.
[39] *Hatton [GC], supra,* § 120.
[40] *Hatton [GC], supra,* § 129.
[41] *Deés v. Hungary* no. 2345/06.
[42] *Deés, supra,* § 22.

the ECtHR considered relevant the domestic authorities' efforts to mitigate the negative impact on the applicant. Ultimately, the ECtHR concluded that the Hungarian Government's efforts *"consistently proved to be insufficient, as a result of which the applicant was exposed to excessive noise disturbance over a substantial period of time"* which created a *"disproportionate individual burden for the applicant."*[43] The ECtHR summarized its prevailing practice by stating that *"noise pressure significantly above statutory levels, unresponded to by appropriate State measures, may"* in themselves constitute a violation of Article 8.[44]

Article 1 Protocol 1 – Protection of property

The other promising aspect analyzed in this paper is Article 1 of Protocol 1 as pollution in general has the potential of reducing real estate value while actual property damage such as falling shingles is a common consequence of air pressure and vibration resulting from overhead airplane traffic.

As FERNÁNDEZ notes, the main characteristics of the protection offered under Article 1 of Protocol 1 are similar to that of Article 8. Protection of property also does not merely offer a safeguard against active state measures but includes the requirement to take positive measures to protect property rights.[45]

Similarly to Article 8, neither is Article 1 of Protocol 1 an absolute right: both expropriation and other measures can legitimately interfere with the enjoyment of property if certain conditions are met: the measures have to be *"in the public interest and subject to the conditions provided for by law and by the general principles of international law".*[46] In this context,

[43] *Deés, supra,* § 23.
[44] *Deés, supra,* § 23.
[45] FERNÁNDEZ, *Environmental cases,* p. 145.
[46] ECHR Article 1 of Protocol 1.

national authorities enjoy a wide margin of appreciation in deciding what measures to implement in their pursuit of such general interest. These measures nevertheless must be proportionate and strike a fair balance between the relevant competing interests.[47]

In *Bistrović v. Croatia*, the applicant owned a plot of land, part of which the State expropriated to build a motorway, for which the applicant was duly compensated.[48] The applicant argued, however, that the value of the rest of the property which he continued to own decreased significantly as to its function as a farmland was compromised by the motorway. For that loss, he could neither get compensated under the Expropriation Act nor find other remedy.

The ECtHR ultimately found that the loss in character of the original plot has not at all been accounted for. The expert involved in the process did not even visit the site in person and was found to have made errors in mapping the property. Consequently, the ECtHR held that the Croatian Government failed to *"establish all the relevant factors for establishing the compensation for the applicants' expropriated property"* which resulted in the applicants not getting indemnified for their loss. This constituted a failure to *"strike a fair balance between the interests involved and […] to make efforts to ensure adequate protection of the applicants' property rights"*.[49]

Critical assessment of the case-law of the ECtHR

The jurisprudence established in environmental nuisance cases strongly suggests that some form and degree of "domestic irregularity" or non-compliance with domestic rules is a prerequisite of a successful Article 8 claim.[50] Such an approach is demonstrated in *Deés*. In cases where domestic rules are generally observed, two procedural paths remain available for

[47] FERNÁNDEZ, *Environmental cases*, p. 145 relying on *Fredin v. Sweden (No. 1)* no. 12033/86 § 51 and *Chapman v. United Kingdom* no. 27238/95 § 120.
[48] *Bistrović v. Croatia* no. 25774/05.
[49] *Bistrović, supra,* § 44.
[50] FERNÁNDEZ, *Environmental cases*, p. 142.

potential applicants: (i) they can argue that the Government failed to strike a fair balance between the relevant competing interests and (ii) that the policymaking process and risk assessment lacked the sufficient inclusiveness, did not provide adequate opportunities for participation for the affected interest groups and was not legally disputable. The *Powell and Rayner* and *Hatton [GC]* cases suggest that these paths are rather narrow. As for the balancing of interests, in addition to the margin of appreciation of the States, the vast economic importance of international airports seems to weigh heavily in the equation. It is to be noted that this might also distinguish the above described *Deés* case dealing with road noise as the increased secondary road usage was not so directly linked to the economic well-being of the region as avoiding the highway for the toll-free road predominantly serves the private interests of the transporter. In a 2012 case against France regarding an airport extension, the Court found that, partly due to regulatory efforts, noise levels did not increase sufficiently and therefore only assessed the policymaking process which it found to have sufficed and did not find a violation.[51] This also suggests that the *Deés* case a year prior did not have major implications with respect to airport noise pollution jurisprudence. As for the second aspect, the Court has not yet found a violation in this context due to insufficient policy planning. In sum, there is no clear set of standards applied by the ECtHR regarding the exact nature and magnitude of omissions actually constitute a violation under that procedural sub-aspect of Article 8, seriously hampering the prospects of prospective applicants: Though it could be argued that *Hatton [GC]* marks the minimum threshold of inclusion in policymaking, the ECtHR does not explicitly say how far that case was to the threshold.

Similarly to that of under Article 8, the ECtHR also takes a rather deferential view in the context of Article 1 of Protocol 1: if the domestic procedure was not "fundamentally flawed", the Court will generally defer to the assessment of the national authorities with regards to

[51] *Flamenbaum and Others v. France* nos. 3675/04 & 23264/04.

adequate compensation for the loss of property value due to noise pollution. The supranational standards of what flaws are deemed fundamental are rather foggy.

II.2.2. *Prospects Before the Aarhus Committee*

The Aarhus Convention *"is based on the premise that greater public awareness of and involvement in environmental matters will improve environmental protection. It is designed to help protect the right of every person of present and future generations to live in an environment adequate to their health and well-being."*[52] To facilitate that goal, the Convention establishes three pillars of action: *"the rights of access to information, public participation in decision-making, and access to justice in environmental matters".*[53] In a prospective referral to the Aarhus Committee, the individual in our example has to frame their grievances as a result of a lack of compliance with the specific requirements set out in the Aarhus Convention, most relevantly, a lack of proper inclusion in the planning of either a physical extension of the runway or the legislative framework regulating airways, noise limits, nighttime flights. Hence, in this context, the procedure leading to the establishing of the framework is the primary target of the claim. Article 6 which requires signatories to notify the affected individuals *"early in an environmental decision-making procedure"*, mandates a provision of *"reasonable time-frames for the different phases"* designated for public participation, that participation shall be made accessible at a phase *"when all options are open"* and that all relevant data shall be available to the affected public "*for examination"*.[54] Article 7 sets up a framework for *"public participation concerning plans, programmes and policies relating to the environment"* while Article 8 extends the requirement of inclusion to the lawmaking process *"where that may have a significant effect on the environment"*. The third pillar mandates a judicial process to enforce

[52] EURlex summary on Access to information, public participation and access to justice in environmental matters.
[53] Article 1 of the Aarhus Convention.
[54] Paragraphs 2-4 and 6 of the Aarhus Convention.

freedom of information rights under the Aarhus Convention as well as judicial remedies regarding *"acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"*, extending the scope of mandatory remedy to the actions of private actors – often relevant stakeholders in the context of airport operation.

The Lithuania Landfill Case[55]

A decision of the Aarhus Committee that has explanatory value regarding aspects that might be relevant in cases relating to airport development concerns the development of a landfill in Lithuania with an aim to serve as a regional landfill for the entire Vilnius region. The landfill was located in the in the immediate proximity of the residential area where the affected individuals lived. Lithuanian laws regarding the approval of the project required detailed plans and various permits. Central to the project was a dedicated waste management plan which was ultimately adopted by the county council.

The NGO alleged that sufficient information regarding the planning was not provided *"early in an environmental- decision-making procedure"*[56] as the public was informed only eight days prior to the completion of the comprehensive plan – also in violation of domestic law which required a 20-days-prior notice. Furthermore, the information provided fell short of being adequate as it did not even describe properly what kind of installation is planned and the nature of possible decisions to be taken. Additionally, the communication was not effective as it was printed in a weekly official journal which nobody really read instead of a local newspaper with more circulation.

[55] Case no. ECE/MP.PP/2008/5/Add.6, the "Lithuania Landfill Case"
[56] Article 6, paragraph 2 of the Aarhus Convention.

The Committee found that the circulated information was worded in such a manner (titled "development possibilities of waste management in the Vilnius region") which did not adequately reflect the fact that a landfill of considerable capacity is to be built in the area. The Committee was of the opinion that *"(s)uch inaccurate notification cannot be considered as "adequate" and properly describing "the nature of possible decisions" as required by the [Aarhus] Convention."*[57] Additionally, the authorities should have used local press with a considerably larger reach to effectively circulate the information. Accordingly, the Committee found a violation of Article 6, paragraph 2.

The Aarhus Committee further found that, with magnitude, impact and complexity of the project, the 10 working days prescribed by Lithuanian law for the public to familiarize itself with the environmental impact assessment report after its publication was not a reasonable timeframe under the Aarhus Convention.

The communicant further alleged that even the above insufficient opportunity to participate was offered too late, when only two possible locations remained on the table and the major method of waste management had already been pinned down. In this respect, the Aarhus Committee was of the opinion that that the *"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."*[58] In the specific instance, the Committee did not find a violation, noting that signatories have a *"certain discretion as to which range of options is to be discussed at each stage of the decision-making"*.[59]

The communicant further alleged that Lithuanian regulation which made the developer responsible for the organization of public participation and compiling public input fell short of

[57] Lithuania Landfill Case § 66.
[58] Lithuania Landfill Case § 73.
[59] Lithuania Landfill Case § 71.

the standards of the Aarhus Convention regarding public involvement. The Aarhus Committee agreed, finding that it was implicit in the subject provisions that *"the relevant information should be available directly from public authority, and that comments should be submitted to the relevant public authority"*.[60]

The Committee also a chance to make clear that the wording Article 6, Paragraph 7 which mandates that *"public participation procedures shall allow the public to submit ... any comments, information, analyses or opinions"* is substantially different from the wording of the then-applicable Lithuanian law which limited the right to submit comments to members of the public who were deemed to be concerned by the plan. Such requirement of "motivated proposals" which in effect narrowed the pool of entitled individuals was found to be incompatible with the Aarhus Convention.

The Belfast Airport Case [61]

In the context of airport traffic, the Aarhus Committee received a communication of an NGO which alleged that the UK failed to comply with the Aarhus Convention *"by making the decision to expand Belfast City Airport operations through a »private« Planning Agreement […] which allows the public no right of appeal other than judicial review."*[62] Specifically, the communicant invoked Paragraph 1 of Article 3 which mandates the provision of a *"clear and transparent framework to implement the provisions of the [Aarhus] Convention"*.[63] The communicant also contended the non-transparent manner in which the UK managed the development of the airport. The complainant was also unsuccessful in their attempt to mount a court challenge against the disputed decisions, following which the Department of Environment charged the full costs of the proceedings – £39,454 – to the complainant. In their

[60] Lithuania Landfill Case § 78.
[61] Case no. ECE/MP.PP/C.1/2010/6/Add.2, the "Belfast Airport Case"
[62] Belfast Airport Case, § 2.
[63] Belfast Airport Case, § 29.

communication, they alleged that such decision rendered the proceedings "prohibitively expensive" which constituted a breach of Article 9 of the Aarhus Convention (Access to Justice).

The key decision reviewed by the Committee was the UK authorities' signing of the private planning agreement which actually increased the permitted sellable seats (and hence significantly increasing potential airport traffic). However, as the Committee highlighted, *"Paragraph 8 (a) of annex I is the only paragraph of the annex relating to airports, but it concerns the construction of airports with a basic runway length of 2,100 metres or more"*, limiting the scope of the entire Article 6.[64] Since at the time the Belfast City Airport showcased a runway length of only 1,829 meters and the impugned increase in seat sales did not affect the material length of such strip, the Committee found the question to fall outside of the scope of the Aarhus Convention. As for the costs, however, the Committee did reach the conclusion that the imposition of the almost £ 40,000 *"rendered the proceedings prohibitively expensive"* and therefore incompatible with Article 9 Paragraph 4.[65]

Critical Assessment of the Practice of the Aarhus Committee

Despite a non-restrictive right to standing, there are certain limitations with respect to an individual's prospects of a meaningful remedy. Most importantly, the opinion of the Committee does not bind the concerned State. The practical results of finding of a violation are therefore dependent on the State's willingness to comply – even though FASOLI and MCGLONE argue that the Committee *"has become an enforcement mechanism capable of generating*

[64] Belfast Airport Case, § 38.
[65] Belfast Airport Case, § 50.

decisions with legal effect rather than a 'soft remedy'."[66] The scope of the Aarhus Convention is also rather limited in comparison to the basic rights approach of the ECHR.

Also, it is not unprecedented that the Committee simply states it is unable to decide a matter, somewhat undercutting, in my opinion, a sense of its authority.[67] It is also to be considered that the EU as a collective is also an independent signatory of the Aarhus Convention, therefore it is part of EU law and the judgments of the CJEU are binding.

Regardless of the above practical limitations, the Committee's work does in fact offer an authoritative interpretation of the Aarhus Convention, thereby contributing to the establishment of a detailed framework of procedural standards regarding public inclusion in decisions concerning the subject area.[68]

II.2.3. *Prospects Before the CJEU*

Given the complexity of EU law as opposed to a singular codified convention and the different paths available as opposed to the unified respective procedures of the other two fora, identifying the most relevant – or most practical – grounds for litigation is the most difficult of the three. In a decision regarding the interpretation and validity of a Council Directive on the disposal of waste oils,[69] the CJEU pronounced that *"the Directive must be seen in the perspective of environmental protection, which is one of the Community's essential objectives."*[70] A year later, the Single European Act ("SEA") amended the 1957 Treaty of Rome to include explicit law and policymaking powers of the Community in environmental

[66] ELENA FASOLI – ALISTAIR MCGLONE: *The Non-Compliance Mechanism Under the Aarhus Convention as 'Soft' Enforcement of International Environmental Law: Not So Soft After All!* In: Netherlands International Law Review 65, 27–53 (2018). p. 51.
[67] In the Lithuana Landfill case, the Committee stated that it was *"not able to conclude whether [the subject article] was implemented correctly"*. (§ 84)
[68] FASOLI and MCGLONE suggest that opinions of the Aarhus Committee are binding on signatory States as per Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties *"to the extent they are normative and, when endorsed by the [Meeting of the Parties], by consensus."* FASOLI – MCGLONE: *The Non-Compliance Mechanism, supra,* p. 52.
[69] Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (no longer in force).
[70] *Procureur de la République v Association de défense des brûleurs d'huiles usagées* Case 240/83. § 13.

issues.[71] The Treaty on European Union ("TEU"), a major overhaul of the entire EU, introduced new Articles 2 and 3 which included explicit reference, respectively, to *"sustainable and non-inflationary growth respecting the environment"* and made it a task of the Community to establish *"a policy in the sphere of the environment"*. The EU is a signatory of numerous international conventions regarding environmental matters[72] and has today a wide-ranging body of legislation in various areas of environmental issues.[73]

It seems though that the EU focuses more on the procedural aspects, rather than substantive rights in the environmental domain.[74] Article 37 of the EU Charter, titled Environmental protection, reads: *"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."*[75] On its face, Article 37 frames environmental protection as an obligation of the EU in the course of its policymaking, not as a human right. Article 7 of the EU Charter is titled Respect for private and family life. It consists of one sentence which is practically identical to the first paragraph of Article 8 of the ECHR: *"Everyone has the right to respect for his or her private and family life, home and communications."*

Among the extensive body of regulations in the field of environment protection, the following secondary legislation has specific relevance with respect to the narrower topic of this paper, noise pollution.[76]

[71] Articles 95 and 174-176 of the Treaty of Rome as amended by the SEA.
[72] See, *eg.* the Aarhus Convention, the Lugano Convention and the Strasbourg Convention.
[73] See, among others, EC Directive 2004/35 on the framework of the environmental liability, 82/501/EEC Directive regarding major accident hazards of certain industrial activities and the 2006/12/EC Directive on waste.
[74] PETRIDEAN: *The European standpoint, supra,* p. 19.
[75] MANUEL KELLERBAUER et.al. *[Eds.]: The EU Treaties and the Charter of Fundamental Rights: A Commentary.* p. 2198.
[76] Regulation 1367/2006/EC on the application of the provisions of the Aarhus Convention is a legal instrument that, *inter alia*, allows standing for NGOs in certain matters that fall under the scope of the Aarhus Convention.

Directive 2002/49/EC is relating to the assessment and management of environmental noise. At the outset, the Directive states in its preamble that *"the Commission addressed noise in the environment as one of the main environmental problems in Europe."*[77] In order to implement a common approach aiming to *"avoid, prevent or reduce […] the harmful effects, including annoyance, due to exposure to environmental noise"*,[78] the Directive obliges the Commission to submit legislative proposals to the European Parliament and Council.

Regulation No 598/2014 facilitates the introduction and the unification of procedures regarding noise-related operating restrictions at Union airports *"so as to help improve the noise climate and to limit or reduce the number of people significantly affected by potentially harmful effects of aircraft noise"*.[79]

Directive 2011/92/EU aims to harmonize the assessment procedures of projects with an environmental impact, including noise. The directive also emphasizes the importance of involvement of affected communities in the decision-making regarding *"projects likely to have significant effects on the environment"*[80] and requirements regarding the scope of the environmental impact assessment preceding the decision.

Right to Environment Protection under the Charter

A key case in the domain of airport noise pollution is *European Air Transport* judgment in a preliminary referral.[81] The main proceedings before the Belgian *Conseil d'État* were initiated

However, the scope of the Regulation is limited to the application of the Aarhus Convention to Community institutions and bodies which include *"any public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity."* Due to its limited scope, the Regulation falls outside of the scope of this contribution.

[77] Preamble (1) of Directive 2002/49/EC

[78] Article 1 (1) of Directive 2002/49/EC

[79] Article 1 (1) of Regulation No 598/2014.

[80] Article 2 of Directive 2011/92/EU.

[81] *European Air Transport SA v Collège d'environnement de la Région de Bruxelles-Capitale and Région de Bruxelles-Capitale*, Case C-120/10.

by an air transport company which was fined by the Belgian authorities for infringing the national legislation regarding noise pollution in urban areas.

Even though the narrow question of the case was regarding the scope of "operating restrictions", the Advocate General (AG) in his Opinion was of the conviction that the issue is *"not simply an exercise in interpreting an instrument of secondary legislation but an operation fraught with difficulties, which takes us […] into particularly sensitive territory."*[82] The AG summarized the problem at the heart of such cases as follows:

"Airport noise is one of the most serious environmental challenges facing urban areas. The various interests at stake are no less significant: on the one hand – to name but a few – air transport, the movement of goods and people and the economic policies of each Member State; on the other, the protection of the environment and of people's health. This case gives the Court of Justice an opportunity to express its view on that delicate balance."[83]

The AG also pointed out a trend of constitutional recognition of environment protection, in which process *"the constitutional traditions of the Member States have played a part."*[84] The AG also made express reference to the ECHR and the jurisprudence of the ECtHR, pointing to the *Hatton* case. The AG argued that an interpretation of the "operating restrictions" by the CJEU that would lessen the Member States' power to establish effective limits on airport noise would expose Member States to a risk of violating Article 8 of the ECHR. This led the AG to conclude that the CJEU should not find the Belgian restrictions to run afoul of EU law. Ultimately, the CJEU did not go into the evaluation of the competing interests and passed its opportunity to *"express its view on that delicate balance"*.[85] Since it found that the debated

[82] Opinion of AG Cruz Villalón, *supra*, § 3.
[83] Opinion of AG Cruz Villalón, *supra*, §§ 1-2.
[84] Opinion of AG Cruz Villalón, *supra*, § 78.
[85] Opinion of AG Cruz Villalón, *supra*, §§ 1.

Belgian noise restrictions did not themselves constitute "operating restrictions", the further questions became moot.

Impact Assessment

In *Commission v. Spain*, the CJEU found that Spain failed to fulfil its obligations under EU law because its omission to conduct an impact assessment in the process of constructing a segment of the Valencia-Tarragona railway line. The relevant EU law mandated an impact assessment before developments that might affect communities.[86] The CJEU found that the scope of the relevant Regulation extended to developments that increase traffic along existing railway lines, rejecting the line of argument that such project is not a *"construction […] of lines for long-distance railway traffic"* but merely an improvement of an existing project. The CJEU held that such a project is likely to *"produce significant noise effects,* inter alia*, so that it must be included in the scope of the Directive."*[87]

In the *Paul Abraham and Others* case,[88] the *Cour de Cassation* of Belgium turned to the CJEU with preliminary questions that emerged in a dispute initiated by residents affected by the noise pollution increase due to a development of Liège-Bierset Airport. The claimants in the main proceedings sought compensation for the harm suffered due to the restructuring of the airport. The same Council Directive 85/337/EEC that we have seen in *Commission v. Spain* served as the basis of the national court's inquiry.[89] In this instance, however, the question arose whether the term "construction" extended to a reclassification and development of an airport without extending the runway.

[86] The ECJ assessed the matter in light of Council Directive 85/337/EEC which is no longer in force. Directive 2011/92/EU which repelled it uses, in the relevant parts, similar language.
[87] *Commission v Spain*, Case C-227/01 § 49.
[88] *Paul Abraham and Others v Région Wallonne and Others*, Case C-2/07.
[89] Point 12 of Annex II of Council Directive 85/337/EEC. The repelling Directive 2011/92/EU uses the same wording in its Point 7(a) of Annex I which suggests the Judgment's prevailing relevance.

The CJEU held that *"(i)t would be contrary to the very objective of Directive 85/337 to exclude works to improve or extend the infrastructure of an existing airport"*[90] and consequently the relevant wording of the Directive *"must be regarded as also encompassing works to modify an existing airport".*[91] The CJEU also held that the increase in the activity of the airport, which goes hand in hand with increased noise pollution, has to be taken into account by the authorities in the impact assessment.

Pecuniary Damage

In the *Jutta Leth* case,[92] the applicant pursued compensation for the pecuniary damage which she allegedly suffered as a result of the decrease in the value of her home in particular as a result of aircraft noise following the extension of Vienna-Schwechat airport in Austria.[93] She also sought a declaration that the State will be liable for any further damage suffered in that domain. She linked her claim to the *"late and incomplete transposition of"* the relevant EU law and *"the failure to carry out an environmental impact assessment"*.[94]

The CJEU held, in the context of Directive 85/337,[95] that the environmental impact assessment mandated by the Directive *"does not include the assessment of the effects which the project under examination has on the value of material assets"* and *"the fact that an environmental impact assessment has not been carried out, in breach of the requirements of that directive, does not, in principle, by itself […] confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of the environmental effects of that project."* Ultimately, the CJEU deferred to the national courts in their assessment of a causal link between the alleged breach and damages.

[90] *Paul Abraham and Others v Région Wallonne and Others*, Case C-2/07 § 32.
[91] *Paul Abraham and Others, supra,* § 33.
[92] *Jutta Leth v Republik Österreich, Land Niederösterreich,* Case C-420/11.
[93] The case reached the CJEU as a preliminary reference from the Austrian *Oberster Gerichtshof.*
[94] *Jutta Leth, supra,* § 15.
[95] No longer in force, see footnote 89 above.

Critical Assessment of the Case-law of the CJEU

In addition to difficulties regarding standing, it is also unclear what framing would hold the promise of success keeping in mind the robust web of complex body of law on the EU level regarding various environmental issues. Airport noise pollution issues so far arose in the context of rather specific technical issues. It is strictly within that context that the CJEU draws on the abstract concepts of effective environmental protection, the quality of life and the right to privacy, home and property. Due to such narrowness of the scope of issues brought before the CJEU, it seems less in the position to develop a more comprehensive approach. This barrier is reflected, for example, in the *European Air Transport* case where the AG's opinion regarding the existence of a trend of constitutional recognition of environment protection was ultimately neither endorsed nor rejected by the CJEU. This inherent limitation is further enhanced by express deference to the assessment of the national courts with respect to pecuniary loss suffered due to airport noise, as demonstrated in the *Jutta Leth* case.

II.3. Synthesis of Critical Findings

Among the three fora, the Aarhus Committee and the ECtHR offer fairly easy access for individuals with the subject grievances. Reaching the CJEU is the most difficult out of the three plena given the lack of a practically applicable individual complaint mechanism where the actions of domestic authorities – and not EU institutions – are the cause of the individual's hardships. With respect to the actual prospects of attaining substantial remedies, there are certain difficulties before all three bodies. The scope of the Aarhus Convention is limited to the planning stages of development projects and regulatory reform, whereas EU law does not offer a clear path of success under either above analyzed possible aspect of the subject problem. As opposed to the Aarhus Committee, the wording of the ECHR does not initially limit its scope to procedural aspects. However, the ECtHR's practice shows that that court is also

reluctant to take up a more comprehensive approach and restricts its scope of review to the adherence to domestic law and the policymaking process.

Considering all aspects, the ECtHR's potential for a comprehensive approach and dynamic interpretation of rights relevant to the subject grievances as well as the binding nature of its judgments and easy accessibility still render it, in my opinion, the most promising forum of the three. Accepting that conclusion, the question arises whether there is a way to overcome some of the shortcomings of its current practice, namely the deference to national legislation and the lack of autonomous standards in the domain of balancing interests and the procedural review of the domestic policymaking process and risk assessment that the ECtHR seems willing to assess.

III. A PATH FORWARD?

In my opinion, a feasible aim of strategic litigation before the ECtHR would be to motion that court to expressly implement the standards of the Aarhus Convention as interpreted by the Aarhus Committee. This would establish a supranational framework in the European Legal Space regarding the substantial requirements of inclusive policymaking and a comprehensive and open risk assessment process regarding the establishment, extension and regulation of airports. This would raise the level of individual rights protection without asking the ECtHR to revise its own stance. The Aarhus standards would only fill and concretize the already adopted procedural approach of the ECtHR.

It is not without precedent that the ECtHR relies on external international material when it is *"necessary to elucidate the meaning of the ECHR"* within the context of Article 8.[96] One example is the domain of child protection, where the ECtHR adopted the general provisions of

[96] MAGDALENA FOROWICZ: *The Reception of International Law in the European Court of Human Rights.* (Oxford University Press, 2010) p. 145.

the United Nations Convention on the Rights of the Child (CRC), the 1980 Hague Convention on International Child Abduction (the "1980 Hague Convention") and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, allowing it to *"to close a very important gap"* in the ECtHR.[97] In FOROWICZ's opinion, the reliance on these instruments allowed the ECtHR *"to meet the changing international standards marked by a need to recognize child rights."*[98]

As the ECtHR noted in an Article 8 case where the court relied on the 1980 Hague Convention, the ECHR *"cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law."*[99] This approach is further supported by Art. 31 (3) c) of the Vienna Convention on the Law of Treaties. With a view to AG Villalón's assessment regarding the international trend towards the (constitutional) recognition of environment protection and the special attention airport noise requires in this domain, I think a similar need for the ECtHR to adopt a more comprehensive framework exists. In fact, the ECtHR itself declared its awareness *"of the increasing importance, as acknowledged nationally, as well as at European and international level, of access to information, public participation in decision-making and access to justice in environmental matters".*[100] Importantly, the proposed adoption of the Aarhus standards would not require the ECtHR to abandon its margin of appreciation doctrine. States enjoy a similarly *"important margin of appreciation in matters dealing with family law and juvenile justice"* and still, the ECtHR *"did not shy away from intervening in the domestic legal domain when it felt that this was necessary."*[101]

Moreover, the Parliamentary Assembly of the Council of Europe expressly "*recommends that the governments of member states […] safeguard the individual procedural rights to access to*

[97] FOROWICZ, *supra*, p. 123.
[98] FOROWICZ, *supra*, p. 145.
[99] *Neulinger and Shuruk v. Switzerland* no. 41615/07 § 131.
[100] *Lesoochranárske Zoskupenie VLK v. Slovakia* no. 53246/08 § 80.
[101] FOROWICZ, *supra*, p. 146.

information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention".[102] Already in 2004, the ECtHR referred, in general language, to the standards of the Aarhus Convention and found a violation of Article 8 in a case concerning the development of a gold mine in Turkey.[103] Notably, that State was not a signatory of the Aarhus Convention at the relevant time. Four years later in an Article 11 case, the Grand Chamber referred to the *Taşkin* judgment as an example of the ECtHR building its case-law *"largely on the basis of principles enshrined"* in the Aarhus Convention and concluded that *"in defining the meaning of terms and notions in the text of the"* ECHR, it *"can and must take into account"* external elements of international law along with their interpretations by competent organs as well as any *"consensus emerging from specialised international instruments."*[104] In 2011, regarding an Article 8 complaint with respect to a motorway, the ECtHR "bore the Aarhus Convention in mind" when it concluded that a lack of a fair balance had led to the violation of the ECHR.[105] In my opinion, these references – however scarce – hint that the ECtHR could be convinced of the *expressis verbis* reception of the Aarhus Convention standards in dealing with airport nuisance complaints under Article 8. This would contribute to a more robust individual rights protection framework without abandoning the procedural approach developed by the ECtHR in previous cases.

IV. CONCLUSION

In its attempt to analyze the current case-law of the three supranational fora on grievances regarding noise pollution in the proximity of airports, the paper sketches the similarities and differences in standing of an individual, possibilities of framing the problem and prospects of success before the three panels from an analytical perspective. Additionally, the paper looks at

[102] Recommendation 1614 (2003) of the Parliamentary Assembly of the Council of Europe, § 9, 9.3.
[103] *Taşkin and Others v. Turkey* no. 46117/99 §§ 99, 109.
[104] *Demir and Baykara v. Turkey [GC]* no. 34503/97 § 83, 85.
[105] *Grimkovskaya v. Ukraine* no. 38182/03 § 72.

the pros and cons of bringing grievances before the respective fora from a practical standpoint. Comparing these aspects, the paper finds that the ECtHR offers most effective individual rights protection of the three fora. However, the existing jurisprudence suggests that even before the ECtHR, the prospect of success is predominantly limited to procedural aspects of public involvement and the weighing of the relevant public and private interests. As a next step, the paper analyzes a possible route towards enhancing individual rights protection in the subject domain and finds that strategic litigation could aim at requesting the ECtHR to expressly rely on the procedural standards of the Aarhus Convention as interpreted by the Aarhus Committee. The most important findings are the sporadic but relevant existence of a reliance to the principles and standards of the Aarhus Convention by the ECtHR in its existing case-law as well as the synthesis of the justification offered by the ECtHR. The paper also draws an original parallel between the adoption of external bodes of law in the domain of child protection under Article 8 and argues that the justifications of that reliance are transposable to the proposed reliance on the Aarhus standards.

APPENDIX

PRACTICAL COMPONENT

Brief to the European Court of Human Rights regarding the Hungarian Regulatory Framework in the case of *X. v. Hungary*.[106]

The Applicant, X, is a Hungarian national owning a home in the close proximity of Ferihegy International Airport. In the last two decades, living conditions in the Applicant's home deteriorated significantly. Looking at a narrower timeframe, from 2012 to 2019, the number of flights from and to the airport increased from 87,560 to 122,813 and the number of passengers from 8,5 million to more than 16 million.[107] Noise levels in the neighborhood of the Applicant's home reached as high as 88,6 dB as recently measured by an independent expert.[108] While the statutory limit is 65 dB daytime and 55 dB at night, these are to be counted in an average-based way, enabling significantly louder noise pollution in shorter timespans. According to the Noise Observation and Information Service for Europe, a project under the auspices of the European Environment Agency with respect to Ferihegy Airport, currently a *"total of 31,700 people are exposed to day-evening-night average sound levels of 55 dB or higher from the airport including agglomeration."*[109] Such excessive level of noise, affecting the Applicant in her home as her most intimate private space, constitutes an interference with the Applicant's rights under Article 8 of the European Convention of Human Rights ("ECHR").

Similarly to the situation of Heathrow in the context of *Hatton and Others*,[110] the Hungarian Government does not own, control, or operate nor the airport neither the aircrafts. However, as established in *Hatton*, the *"State's responsibility in environmental cases may also arise from*

[106] The facts are inspired by a case of 14 applicants living near Ferihegy Airport, currently pending before the Court. In the instance that the case progresses, the brief can be included in the arguments of the Parties.
[107] Official Statistical data from: http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_odmj001.html
[108] https://www.kobanya.hu/index.php?module=news&action=show&nid=191551
[109] https://noise.eea.europa.eu/
[110] *Hatton and Others v. the United Kingdom [GC]* no. 36022/97.

a failure to regulate private industry in a manner securing proper respect for the rights enshrined in Article 8".[111] Accordingly, the Applicant argues that the Hungarian Government's failure to set up an adequate regulatory framework which would, through the proper inclusion of the affected individuals, guarantee that a fair balance is struck between the *"the economic well-being of the country"* as set out in Paragraph 2 of Article 8 and the individual rights of the Applicant under Paragraph 1 of Article 8.

The regulatory framework currently maintained by the Government with respect to noise control in the vicinity of already operating airports such as Ferihegy Airport consists of a complicated web of regulations. The Applicant in this brief focuses on the section of Act XCVII. of 1995 on the General Rules of Environment Protection (the "Act") titled "Noise and Vibration" which prescribes that *"(t)he noise reduction of the areas most affected by environmental noise and the preservation of the favorable condition of the areas not yet affected by noise must be implemented – on the basis of a separate legal act – by implementing action plans based on strategic noise maps."*[112] The separate legal act that regulates such action plans is Government Decree 280/2004. (X. 20.) on the evaluation and combating of environment noise (the "Decree"). The Decree states that any such *"action plan shall specify the noise reduction or other technical, organizational, town planning and other measures aimed at noise protection (such as the initiation of an official procedure) that can prevent the increase of noise in quiet areas designated by the municipality, from noise in areas to be protected or intended to be protected"*.[113] In the instance of Ferihegy Airport, the Decree mandates the establishment of a "noise committee" to which one member can be delegated by each affected municipality and one additional person representing local NGOs.[114]

[111] *Hatton and Others*, § 119.
[112] § 31 (3) of the Act.
[113] § 9 (3) of the Decree.
[114] § 13/B of 18/1997. (X. 11.) KHVM-KTM joint decree on detailed technical rules for the designation, use and elimination of noise protection zones in the vicinity of airports.

The legal framework hence only offers a very limited chance for the inclusion of the affected public in the design of the plan. The current action plan was produced by the operator of Ferihegy Airport in 2018.[115] With respect to public inclusion, the report contains an approximation of people affected based on the territories and number of houses.[116] Furthermore, title 5.2 of the report is titled *"Steps Towards the Improvement of Informing the Public"*. It states that the operator's management has good relations with the mayors of all affected settlements and that representatives of the company participate in public forums. However, the report does not indicate that any input was sought or has been accepted from the affected public with respect to such plan.

In the Applicant's opinion, the action plan is a central piece of the legislative framework set up by the Government. However, by setting up a framework that does not prevent noise levels as loud as 88,6 dB, the Government failed to strike a fair balance between the rights of the Applicant (and the other 31,000 people affected) and the economic well-being of Hungary and also its policy of combatting excess noise lacks the sufficient inclusiveness as it did not provide adequate opportunities for participation for the affected individuals, in particular, the Applicant with respect to the actual noise situation and the adequate steps that are desirable.

In the latter context, the Applicant highlights that the Parliamentary Assembly of the Council of Europe expressly "*recommends that the governments of member states […] safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention".*[117] Already in 2004, the Court referred, in general language, to the standards of the Aarhus Convention and found a violation of Article 8 in a case concerning the development of a gold mine in Turkey.[118]

[115] Ferihegy Strategic Noise Protection Action Plan, 2018; https://www.kormany.hu/download/e/ed/81000/intezkedesi.pdf
[116] Ferihegy Strategic Noise Protection Action Plan, 2018. pp. 12-13.
[117] Recommendation 1614 (2003) of the Parliamentary Assembly of the Council of Europe, § 9, 9.3.
[118] *Taşkin and Others v. Turkey* no. 46117/99 §§ 99, 109.

(Notably, Turkey, as opposed to Hungary, was not even a signatory of the Aarhus Convention at the relevant time.) Later, the Grand Chamber referred to the *Taşkin* judgment as an example of the Court building its case-law *"largely on the basis of principles enshrined"* in the Aarhus Convention and concluded that *"in defining the meaning of terms and notions in the text of the"* ECHR, it *"can and must take into account"* external elements of international law along with their interpretations by competent organs as well as any *"consensus emerging from specialised international instruments."*[119] In 2011, regarding an Article 8 complaint with respect to a motorway, the Court "bore the Aarhus Convention in mind" when it concluded that a lack of a fair balance had led to the violation of the Convention.[120]

In the Applicant's opinion, the Aarhus Convention's standards, to which both Hungary and the European Union are signatories, regarding public inclusion are relevant in the subject case as noise is a serious form of environment pollution while excessive noise nuance affecting an individual's home also falls within the ambit of Article 8 of the ECHR. Article 6 of the Aarhus Convention requires signatories to notify the affected individuals *"early in an environmental decision-making procedure"*, mandates a provision of *"reasonable time-frames for the different phases"* designated for public participation, that participation shall be made accessible at a phase *"when all options are open"* and that all relevant data shall be available to the affected public "*for examination"*.[121] This requirement extends to situations when a *"public authority reconsiders or updates the operating conditions"* of activities, such as airports above a runway length in excess of 2,100 meters such as Ferihegy Airport.[122]

[119] *Demir and Baykara v. Turkey [GC]* no. 34503/97 § 83, 85.
[120] *Grimkovskaya v. Ukraine* no. 38182/03 § 72.
[121] Paragraphs 2-4 and 6 of the Aarhus Convention, further relevant interpretation in *e.g.* Case no. ECE/MP.PP/2008/5/Add.6 of the Compliance Committee of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the "Compliance Committee")
[122] Paragraph 8 (a) of annex I of the Aarhus Convention.

In the Applicant's opinion, the basic framework of the Aarhus Convention in this respect serves as an indicator of a European consensus regarding the standards of public involvement in cases where the operating conditions are reconsidered, for example as in the current case in the form of mandatory noise reduction plans, of major airports. Continuing the Court's good practice of relying on the Aarhus Convention in order to better define the content of the required inclusion in the policymaking-process regarding airport noise would be an important step towards legal certainty and a more coherent European individual rights protection. At the same time, it would not deviate from the Court's doctrine of subsidiarity. As Hungary is a signatory of the Aarhus Convention – to which the Compliance Committee provides authoritative interpretation – the Court's adoption of such standards would not impose new international obligations upon the respondent State.