

SUMMARY

of the legal situation relating to the environmental permits of the BUD Airport, of the evaluation of the situation, of the letter of the National Society of Conservationists – Friends of the Earth Hungary (MTVSZ / NSC-FoE Hungary) to the BUD Airport, of the response of the BUD Airport to the letter of NSC-FoE Hungary and of the adjacent external communications

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The legal situation relating to the environmental permits of the BUD Airport

In order to set the scene and evaluate the legal situation relating to the environmental permits of the Budapest Airport Zrt., first of all Act No. 53 of 1995 on the General Rules for the Protection of the Environment must be taken into account. This Act regulates the rules of environmental impact assessment, environmental permit, environmental review and environmental operating permit. According to the wording of the Act:

Article 66 (1) The use of the environment may commence or be continued, with the exceptions specified in paragraph (2)

(a) in the case of activities subject to environmental impact assessment, except as provided for in subsection (b) and paragraph (1a), in the possession of the environmental permit issued by the environmental protection authority for the activity,

(c) in the case of activities subject to environmental review, in the possession of the environmental operating permit issued by the environmental protection authority, after the environmental protection permit has become final.

We can therefore conclude that in the case of activities subject to an environmental impact assessment, an environmental permit or an environmental operating permit are needed to start or continue an activity.

According to Article 68 of the Act, an environmental impact assessment must be carried out before the commencement of any activity that has or is likely to have a significant impact on the environment. We are of the opinion that such an activity with significant or likely significant effects on

the environment has already taken place at Budapest Liszt Ferenc International Airport after the relevant legislation entered into force. Despite this, the airport operator, Budapest Airport Zrt., has not initiated an environmental impact assessment procedure. Instead, it presented the environmental impact of the airport expansion to the competent authority in the framework of an environmental review.

According to the regulation on environmental review and Article 74 of the Act, if an investment starts its activities without an environmental permit, in the absence of such a permit, the applicant may initiate a review or the authority may require a review and the applicant shall obtain an operating permit subsequently.

Section 74 (2) The environmental protection authority shall also require the interested party to carry out a full or partial review in order to assess the environmental impact of its activities, if

(c) in the cases specified in Article 67(1), has not requested a preliminary assessment and has started or continues an activity subject to an environmental impact assessment or a standard environmental permit without an environmental permit or a standard environmental permit;

Under the other sections of the Act:

Section 79 (1) On the basis of the results of the review, the environmental protection authority shall

(a) authorise the continuation of the activity (hereinafter referred to as "operating licence");

(b) at the same time as the permit is granted, oblige the interested party to take the necessary environmental protection measures, including the obligations to provide security or environmental insurance as specified in the Government Decree;

(c) restrict, suspend, prohibit or initiate a procedure before the competent authority to restrict, suspend or prohibit the activity.

While in previous years, or even decades, we could say, there were many different, even subjective assessments, or even legitimate ones, as to whether Budapest Airport Zrt. complies with the environmental regulations, since the judgment of the Curia of 13 September 2023 there is no longer any room for debate on these issues.

In fact, the Curia has established the following as the background to the case (without citing the relevant history of the case since 2006, but focusing only on the immediate administrative background to the Curia's judgment):

[11] By decision No. KTF:2167-57/2015 of 26 March 2015, the first instance authority granted the defendant-intervener an environmental operating permit for the operation of the Airport. The operative part of its decision indicated, among the basic data, the environmental user, the location of the activity, the owners of the real estate concerned and the trustees (Part I). It contained a brief description of the facility, the total area of the real estate, the paved/built/unpaved area, defined the function of the facility as the operation of the airport, the number of terminals as two and the runways as 3010 and 3707 metres (Part II). Part III contained environmental standards based on waste management, remediation, noise and vibration protection and air quality protection. It also presented the resolution of the Metropolitan Disaster Management Directorate, Deputy Director of the Disaster Management Authority Department, with the registration number 35100-3061-5/2015.ált. It has determined that the environmental operating licence is valid until 31 December 2025.

[12] The predecessor defendant, which had been hearing the appeals against the first instance decision, upheld the first instance decision by decision No. OKTF-KP/9586-15/2015 of

15 September 2015. In its reasoning, it explained that, during the appeal proceedings, it had requested the defendant intervener to provide information on any changes in the traffic data, which the defendant intervener had complied with. It also examined the compliance with the legal conditions in the documents in relation to the geological environment, noise and vibration protection, landscape and nature protection, waste management and air quality protection. It concluded that the first instance decision was lawful as regards the protection of the geological environment, that the requirements had been complied with as regards remediation and that a monitoring system was in place on the site.

As a result of the arguments put forward by the parties in the case, the Curia finally annulled the previous judgment of the Administrative and Labour Court of Budapest and, at the same time, the environmental operating permit granted by the first instance authority to Budapest Airport Zrt. on 26 March 2015. The decision of the Curia was based on the following grounds, noting that, of course, the supreme judicial body did not agree with all the arguments of the applicants, i.e., the petitioners for review. Nevertheless, the Curia paid particular attention to the relationship between the environmental permit, the environmental impact assessment and the environmental review.

On the basis of Government Decree No. 314 of 2005 on environmental licensing, it examined whether the scope of the sectoral legislation covers specific activities, installations and their significant modifications and changes. In the light of this provision, not only the commencement of activities with significant environmental impact, but also the modification or alteration of activities already commenced is of particular legal significance. According to the Curia, it can be concluded that, where an activity covered by the legislation has already been started, has been authorised before it is started, but is subsequently substantially modified, the environmental effects of the activity must always be assessed. This may be dispensed with in order to allow the continuation of the activity if, after the activity has started, it can be established that there is no significant change, i.e., the activity continues under the same or almost the same environmental conditions. If, however, there is a significant change after authorisation, the authority must in all cases investigate the impact of the change on the use of the environment. If there is a significant change in the volume and conditions of the previous exposure, a re-assessment of the effects cannot be avoided.

In point 116 of its judgment, the Curia held that the possibility of a significant change or lack thereof in the activity of the airport operated by Budapest Airport Zrt. was not properly examined by the authority, and therefore the primary responsibility lies with the authority, but it should be borne in mind that the authority always bases its decision on the evidence presented by the applicant, so the involvement of Budapest Airport Zrt. in creating this unlawful situation cannot be disputed.

According to the Curia, the examination of the criteria for determining whether significant changes had been made to the airport as a result of any development should have been carried out in the procedure prior to the issuing of the operating licence. The fact that this had been done and the assessment of the results of that assessment should have been set out in the statement of reasons. However, these are absent from the decision and in themselves make it impossible for the court to examine the merits of the issue in order to make a substantive finding as to whether there has been a significant change.

The judgment of the Curia also clarifies the question in point 126 whether only a change in the length of the runway or other factors also justify the need for an environmental permit. The Curia states that it is not only the length of the runway that determines this issue, so that an environmental impact assessment may be required for any significant change, including a 25% increase in volume, which results in a significant change from the date of the previous authorisation. The judgment requires the first-instance authority to re-examine the facts and, in the light of the investments and developments which have taken place since the date of the environmental operating permit issued in 2006, to assess whether there has been a significant change in the activities of Budapest Airport Zrt., namely

in the operation of Budapest Liszt Ferenc International Airport, which could have an impact on traffic and which would have justified the carrying out of an impact assessment procedure.

As a result, it can be concluded that currently Budapest Liszt Ferenc International Airport does not have an environmental operating permit, so its current operation can be considered as a kind of extra-legal status.

This situation created by the judgment of the Curia dated 13 September 2023 was even aggravated by the judgment of the Metropolitan Court of Justice just 6 days later, on 19 September 2023 that annulled another important permit of the airport, i.e., the so-called noise protection zone decision. While this is only a first instance judgment, although final, and it can be overturned at the Curia – or on the contrary, it can also be reaffirmed, its findings are alarming for the airport operator. The Court of Justice said in its decision that

[120] On the basis of the above, the expert opinion concludes that the calculation documentation in the decision does not comply with the requirements of neither the method of calculation, nor the documented starting data. From the available data it can be concluded that the determination of the standard operating figures was not carried out in accordance with the provisions of Joint Decree 18 of 1997 and the definition of the basic data was inadequate.

These are quite serious shortcomings of the administrative decisions relating to the airport and they resulted in the annulment of the two most important environmental permits of the airport, thereby creating a situation where the airport has no environmental permit and its noise protection zone is not defined.

The evaluation of the situation by NSC-FoE Hungary

The NSC-FoE Hungary has been following the developments related to the operation of the Budapest Liszt Ferenc International Airport, especially its expansion and development, for a long time, with special regard to the compliance with environmental requirements.

On 2 March 2020, NSC-FoE Hungary was the organisation that, together with the Association for Civilized Air Transport (CATA / KLKE) lodged a complaint with the European Investment Bank (EIB) and initiated proceedings alleging that the approval of certain airport investments financed by the EIB was contrary to the environmental standards of the European Union and Hungarian law, and that the relevant Bank regulations were violated as a result. The complaint was registered by the Bank under number SG/E/2020/03.

We believe that the decision of the Curia does not differ conceptually, but rather only in its reference basis, from the conclusion of the European Investment Bank's report of 21 October 2021. The report concludes (point 6.1.10) that the EIB's Complaint Mechanism “did not find any evidence that at least a screening determination was carried out for any of the project components for which construction had already started (eg. Cargo City);” a list of developments is included in Annex 1 to the Bank's Report. Going further (point 6.2.5), the Bank also found that the environmental operating licence issued did not comply with the requirement for development contributions under the European Union's Environmental Impact Assessment Directive (Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment). Finally, the Bank also concludes (point 6.4.17) that it does not have sufficient evidence that the development consent for the airport was granted in accordance with the EU and international law rules on community participation, i.e., that the public was properly informed and involved in the decision-making process.

The European Investment Bank Report makes several recommendations in point 7. For example, it calls on the airport operator to identify and involve stakeholders in the relevant procedures and to carry out appropriate environmental impact assessments. We note only that the same requirements were confirmed by the Bank in an email reply sent to NSC-FoE Hungary on 2 December 2022.

We evaluate the situation in the same way, with the addition that now it has already been established by two court judgments in Hungary, one of them being the highest judicial forum, the Curia.

The letter of NSC-FoE Hungary to the BUD Airport

While there has already been an exchange of views between NSC-FoE Hungary and the Budapest Airport Zrt., NSC-FoE Hungary believed that after the judgment of the Curia, in light of the findings of the court, there is a need to refresh correspondence between the stakeholders.

Previously Budapest Airport Zrt. stated in its letter of dated 14 September 2022 to NSC-FoE Hungary that

"All developments and investments of Budapest Airport have been and will be carried out in the future on the basis of the permits issued by the Hungarian authorities in accordance with the Hungarian legislation and legal provisions in force."

The information to the contrary, which is now confirmed by the judgment of the Curia in Case No. Kfv.II.37.460/2023/5, led NSC-FoE Hungary to first ask Budapest Airport Zrt. itself about the company's position, and then to inform the European Investment Bank both about NSC-FoE Hungary's position on the issue and about Budapest Airport Zrt.'s position on the same issues.

The purpose and direction of our request for information is as follows: NSC-FoE Hungary continues to believe that Budapest Liszt Ferenc International Airport and its operator Budapest Airport Zrt. do not fully comply with the requirements of Hungarian and EU law with regard to environmental protection. In view of the above, we requested Budapest Airport Zrt. to kindly provide us with information on the following.

- 1. To what extent do your current operations comply with Hungarian and EU environmental legislation?**
- 2. What further steps does the Curia ruling imply that Budapest Airport Zrt. intends to take?**
- 3. What stage has been reached in implementing the conclusions and recommendations of the European Investment Bank's 2021 report?**

The response of the BUD Airport to the letter of NSC-FoE Hungary

The letter sent to Budapest Airport Zrt. was received on 27 October 2023 and the response of the airport operator was dated 17 November 2023. The letter – which is attached in Hungarian to the current summary – in sum states the following:

1. In our opinion, the operation of Budapest Liszt Ferenc International Airport complies with both Hungarian and European Union environmental legislation. We would like to emphasise that Budapest Airport Zrt. has been operating in the period covered by the Curia's judgement, i.e., since 2006, and has always obtained the required construction permits for all its major

investments and developments, on the basis of the documentation required by law and following the specified procedure, and in these permit procedures, it has been responsible for the enforcement of environmental standards. The environmental authority, as the competent authority responsible for ensuring compliance with environmental legislation, has always been involved as appropriate. The environmental authority has always had the opportunity to consult the environmental compliance with environmental standards and to take a position on the environmental impact of the construction works. The airport was obliged to comply with the environmental requirements laid down as part of the current licence.

3. Budapest Airport Zrt. has clarified with the European Investment Bank (EIB) all issues raised during the audit.

We believe that it is in our common interest that the operation of the airport is not only economically successful, but also that it does not create an environmental burden that is unbearable for the natural environment or the population. One guarantee of this is to comply as fully as possible with environmental legislation. As there are still unanswered questions in this respect, also after the responses of the airport operator, we believe that only with the cooperation of all stakeholders can we reach a satisfactory outcome.

The adjacent external communications

NSC-FoE Hungary has published a news piece on its website while waiting for the response from the Budapest Airport Zrt.; the news can be found here:

<https://mtvsz.hu/hirek/2023/11/legures-terben-repulunk-jogi-aggalyok-a-repuloter-mukodese-kapcsan>

Recommendations

We hope that the Hungarian legislation, the judgment of the Curia, the position of the Zrt. and our opinion will provide sufficient input for the European Investment Bank to decide on the continuation of its proceedings, possibly supplementing its Report of 21 October 2021, which was issued in response to our complaint. For the future proceeding and also for a broader context, we would like to formulate and communicate out recommendations to the EIB, also hopefully applicable for similar such procedures in the future.

- 1) We request that in the future, the EIB-CM should set a time frame for the implementation of the EIB-CM recommendations (given that it took two years in our case for the Promoter to prepare the updated ESMP); e.g., to give the Promoter and the EIB Services a deadline of one year from the release of the Recommendations to settle all pending issues according to the legal requirements.**
- 2) We advise the EIB-CM that they should encourage the Promoter's regular exchange with the Complainants. (In our case, the Budapest Airport Zrt. was not contacting NSC-FoE Hungary nor the Association for Civilized Air Transport (CATA / KLKE) actively and was reluctant to enter into exchange, refused meetings etc. but only responded in writing, in a PR letter.)**
- 3) We suggest that the financing by the Bank of the particular airport project, i.e., the Budapest Liszt Ferenc International Airport should be suspended until the airport operator**

meets the legal requirements in a solid and consistent manner, in a way that guarantees both the protection of the environment and the involvement of the affected communities.

4) We suggest that the EIB-CM mechanism should work out a so-called “highly important” or VIP category of cases and such issues involving the obvious breach of EU and national law relating to the environment – such is the case where the highest judicial forum of a country establishes the breach of respective norms – should be labelled highly important. Possibly, in such cases, slightly different procedural rules should be applied by the EIB-CM, amongst others requesting a more frequent reporting by the Promoter, a more active involvement of the Complainant and a more transparent and responsive proceedings with related obligations for the Promoter.

We hope that our suggestions for the future are worth considering by the EIB-CM mechanism and the Bank.

30 November 2023

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