GOOD ADMINISTRATION AND JUDICIAL PROTECTION - A HUNGARIAN PERSPECTIVE

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Abstract in original language:
Today we can witness the formulation of a new general principle regarding the administrative activity of the EC and the European states: the "good administration". The notion of good administration (or broadly good governance) is closely bound with the idea of user protection. Whereby the term "user" would mean any third parties who are affected by the regulatory (both general and individual) and productive activities of administration. The necessity of the protection of these third parties comes from the very principle of administrative legality. This protection operates either in a negative sense (it can prevent administrative bodies from taking steps that would harm the user's lawful interests and rights) or in a positive sense (it actively requires administrative bodies to exercise their statutory activities (by issuing administrative acts of any kind) and practical activities in such a way as to serve the lawful interests or specific rights of users.

Key words in original language:
Good administration, judicial protection, European Union, judicial review, effectiveness.

1. THE COMMON EUROPEAN TRADITION OF EFFECTIVE JUDICIAL REMEDIES

The citizens of the European Union are subject to both the European Community (and Union) law and to the law of their country. Both the member states and the EC are legal orders governed by the rule of law. And both have the rights and powers to regulate and decide cases, to impose sanctions, confer rights, they have the power to act as administrative actors.

In the interpretation of the European Court of Justice (the Court)[1] the EC is a "community based on the rule of law" since neither its Member States, nor its institutions can avoid judicial review of their actions (the judicial review of the legality of their actions, that means their conformity with the EC Treaty.

In the famous Johnston case the Court said: The requirement of judicial control […] reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Article 6 and 13 of European Convention for he Protection of Human Rights and Freedoms of 4 November 1950."

In the Heylens case[2], the Court cited the possibility of court remedies against administrative decisions as a key element of the effective judicial protection.

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[1] *Les Verts v. Parliament*, Case 298/83, Les Verts v. Parliament, 1986 E.C.R. 1357, para 23.

[2] Case 222/86 *Unectef v. Heylens* [1987] E.C.R. 4097, note 14.

2. THE RIGHT TO JUDICIAL PROTECTION AS A PART OF THE PRINCIPLE AND THE RIGHT TO "GOOD ADMINISTRATION"

Today we can witness the formulation of a new general principle regarding the administrative activity of the EC and the European states: the "good administration".

The notion of good administration (or broadly good governance) is closely bound with the idea of user protection. Whereby the term "user" would mean any third parties who are affected by the regulatory (both general and individual) and productive activities of administration. The necessity of the protection of these third parties comes from the very principle of administrative legality. This protection operates either in a negative sense (it can prevent administrative bodies from taking steps that would harm the user's lawful interests and rights) or in a positive sense (it actively requires administrative bodies to exercise their statutory activities (by issuing administrative acts of any kind) and practical activities in such a way as to serve the lawful interests or specific rights of users.[3]

The principle of good administration can be understood either an umbrella under which different rules and principles can be clustered together around a common and guiding idea. [These further principles can be: legality, access to documents, justification of decisions (giving of reasons), rights of defence during the administrative procedure, and namely the principle of establishing judicial protection, etc]. The principle of establishing an effective judicial protection (as a part of the right or principle of the good administration) should be one of these clustered principles and it implies the power of a tribunal to set aside or amend any administrative decision which infringe the lawful interests and rights of users. This principle – in my understanding – includes the compensation of any damage or loss suffered by users (persons affected) as a result of the unlawful performance of an administrative action – subjective approach.

When we speak about a broader meaning, the good administration can be formulated as a springboard (with the words of Prof. Fortsakis) for specific new rules, that can be function as the "good governance"

3. JUDICIAL PROTECTION UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE HUNGARIAN CONSTITUTION

3.1 ALTHOUGH THE PRINCIPLE (OR THE RIGHT) TO GOOD ADMINISTRATION IS STRICTLY CONNECTED WITH THE PRINCIPLE OF THE RULE OF LAW, IT IS TOO WIDE IN ITS MEANING TO SERVE AS A DIRECT AND CONCRETE LEGAL BASIS TO ENABLE USERS FOR A JUDICIAL PROTECTION. A STRONGER LEGAL BASIS CAN BE FOUND IN THE EUROPEAN CONVENTION OF HUMAN RIGHTS (CONVENTION):

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." [first section of Article 6.1. ECHR]

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[3] Theodore Fortsakis, Pinciples Governing Good Administration, European Public Law, Volume 11, Issue 2, 208. p.

The implementation of the judicial review of administrative acts is – on one hand – of high constitutional importance in every state and – on the other – is strictly connected to the general characteristics of the state in question.

An important question concerning the Convention is about its applicability to public law or administrative law matter, rights and obligations?

Administrative acts (measures or decisions) are taken in the exercise of public authority and often directly affect the rights and freedoms secured under the Convention.

It is known that the Convention was not originally intended to apply to the administrative field. The European Court of Human Rights (ECHR) stated the following in its Ringeisen judgment: "to be applicable to a case ("contestation") it is not necessary that both parties to the proceedings should be private persons (…). The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc) and that of the authority which is invested with competence in the matter (ordinary court, administrative body, etc) are therefore of little consequence".

3.2 THE COUNCIL OF MINISTERS OF THE COUNCIL OF EUROPE FIVE YEARS AGO HAS ACCEPTED A RECOMMENDATION[4] "CONSIDERING THAT EFFECTIVE JUDICIAL REVIEW OF ADMINISTRATIVE ACTS […] IS AN ESSENTIAL ELEMENT OF THE SYSTEM OF PROTECTION OF HUMAN RIGHTS."

The Recommendation takes into account that reality and efficacy of the judicial control is of high importance and that the specific nature of administrative acts lies in the fact that public organs excercise public power – and no other authority is entitled and empowered to use that unique power.

From this fact, the member States of the Council of Europe should ensure that their judicial organization and control procedures are in line with the requirements of the ECHR in order to guarantee the effectiveness of the control of administrative acts.

Today we face the unforeseen expansion of the public sector in the member States and the effects of such expansion on people's lives are highlighting the need for special new arrangements, the states still remain free to define the framework and procedure for supervising administrative acts.

However, given that the lack of a judicial remedy against administrative acts might be interpreted as a denial of justice, member States are required to guarantee the reality and efficacy of the control of such acts while not encroaching on the independence of the judge or of the competent court or tribunal.

The Recommendation unifies the aforementioned two constitutional basis of the judicial review: the the principle of Rule of Law and the right to fair trial.

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[4] Recommendation Rec No. (2004) 20 of the Committee of Ministers to member states on judicial review of administrative acts (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies)

There are five main principles which cover or embody the real and efficient judicial protection and which are to be applied by the Eurpean States. These principles concern

1. the scope of judicial review,
2. access to judicial review,
3. the independence and impartiality of the courts,
4. the right to a fair trial and
5. the effectiveness of judicial review.

Provisions of the Hungarian Constitution – concerning the judicial review of administrative acts

“Art. 2. 1 The Republic of Hungary is an independent, democratic constitutional state.

Art. 50. 2 The courts shall review the legality of the decisions of public administration.

Art. 57. 1 In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law.“

4. WHAT WE MEAN UNDER “ADMINISTRATIVE ACTS“

All legal acts – being of individual or of normative character– and all physical (real) acts of the administration taken in the exercise of public authority that may affect the rights or interests of natural or legal persons, and situations of refusal to act or an omission to do so in cases where the administrative authority is under an obligation to implement a procedure following a request.

Private acts lie outside the ambit of the text.

under “judicial review“

The original meaning of this expression goes back to the supervisory jurisdiction if the superior English courts over all inferior jurisdiction and refers to a collection of the main judicial means, the mandamus, certiorari, prohibition, to supervise and to protect individuals against all persons or bodies that exercise public powers over others.

The examination and determination by a tribunal of the lawfulness of an administrative act and the adoption of appropriate measures, with the exception of review by a constitutional court.

This concept of judicial review is broader than that consisting in merely examining the lawfulness of an act; it also encompasses the tribunal's power to annul an act following its review or to award compensation. The administrative court's role is to protect individuals by means of the law. Therefore, the tribunal must be empowered to instigate proceedings to verify the lawfulness of administrative acts, including administrative silence or failure to act, and to draw the requisite conclusions from its findings. Judicial review is an objective activity which can be initiated at the request of an individual or of another body, particularly a public body. One of the functions of judicial review is the protection of the individual vis-à-vis the

administration. However, such control is also geared to safeguarding and clarifying the administration‘s powers.

As the Decision 39/1997. (VII. 1.) AB of the Hungarian Constitutional Court held the right to an impartial and fair trial as the main constitutional basis for the judicial review of administrative acts, it is of high importance to analyze and understand the meaning of that right.

The Hungarian Constitutional Court in 1990 annulled the provisions of the Administrative Procedure Act (APA) that restricted the citizens' right to the judicial review. The 1990 decision opened the gate and established the possibility of a broader review and compelled the Parliament to enact new legal provisions concerning the judicial review under that Act. However, the review is not applicable for all kinds of “administrative acts”, only for the ones that fall under the definition of the (new) APA and the provisions of the Civil Procedure Act (CPA).

In 1997 the Court widened the scope of judicial review, extending it to administrative discretion (discretionary acts), deciding that “it is a constitutional requirement that the court (the ordinary courts) shall decide on the merits of the case (...) the legal rule regulating the public administration's competence to decide must contain an appropriate aspect or measure on the basis of which the court reviews the legality of the decision.”

From the Reasoning: (taking into account the similar wording of the Art. 6.1. of the Convention and the Art 57. 1 of the Hungarian Constitution) “Supervising the legality of the decisions of public administration therefore cannot be limited constitutionally to reviewing only the formal legality of decisions of this kind. (...) For this reason not only that legal rule can be unconstitutional which expressis verbis excludes the judicial review going beyond the questions of law (...) but also that legal rule which by giving an unlimited discretionary power to the public administration does not provide for any legal measure for judicial review.

We are 12 years after that famous Decision and nothing important has changed in the Hungarian administrative law. We are still far from fulfilling the requirements of the Decision and of the 5 principles of the CoE Recommendation.

5. THE FIVE PRINCIPLES

Principle 1: The scope of judicial review

a. All administrative acts should be subject to judicial review. Such review may be direct or by way of exception.

The principle means that judicial review may take two forms.

It is direct when it deals with the act contested before the court. It is by way of exception (or indirect) when, in proceedings concerned with an act, the tribunal reviews another act connected with it (for instance, when the tribunal reviews the lawfulness of the normative act on which the decision challenged is based). It should be noted that if an administrative act cannot be referred direct to a tribunal (as is the case with normative acts in several legal systems), the state should ensure that the act can be reviewed by way of exception.

The exercise of a discretionary power, in principle, is exempt from judicial review, the tribunal (the court) may seek to determine whether the administration has overstepped

permitted limits in the use of its discretionary power or whether it has committed manifest errors.

b. The tribunal should be able to review any violation of the law, including lack of competence, procedural impropriety and abuse of power.

The arguments on which the applicants can base their complaints embrace

violation of the law, that may take the form of a lack of legal basis, a direct violation of a legal standard or a legal error, in which latter case the administration has misjudged the scope of a rule.

including lack of competence, that may stem from spatiotemporal considerations or the subject of the decision.

procedural flaws include such irregularities as a failure to conduct compulsory consultation and

abuse of authority refers mainly to cases where an authority uses a power vested in it by law, but for another purpose than that provided for by law..

The Recommendation draws a distinction:

- formal violations and those arising out of lack of competence,

- misapplication, misinterpretation or ignorance of the law, on the other.

Principle 2: Access to judicial review

a. Judicial review should be available at least to natural and legal persons in respect of administrative acts that directly affect their rights or interests.

In order to protect collective or community interests that have been jeopardized by an administrative act, the possibility of granting associations or other persons or bodies empowered to protect these interests the capacity to bring proceedings before a court is a question of high importance.

The reference is to administrative decisions which adversely affect not just one individual but also those which affect any community. Such decisions, which might relate, for instance, to the environment or consumers‘ rights, could be eligible for judicial review without the direct interests of any particular individual being at issue.

b. Natural and legal persons may be required to exhaust remedies provided by national law before having recourse to judicial review. The length of the procedure for seeking such remedies should not be excessive.

The right of access to judicial review must be an effective right. The Recommendation seeks to ensure that the obligation for natural and legal persons to exhaust other remedies first does not prevent them from seeking judicial review of the administrative act. It specifies that the time needed to deal with the case must be reasonable even during the preliminary procedure, as from the taking of the initial act. It is true that the safeguards laid down by Article 6 of the ECHR have, in principle, only to be respected at the judicial proceedings stage. However,

according to the case-law of the European Court, the reasonableness of the length of proceedings conducted before one or more administrative courts partly depends on the length of any preliminary proceedings before an administrative body, where such an administrative procedure exists as a remedy which must be exhausted before the case can be brought before the courts. The period to be taken into account can therefore begin as soon as an administrative appeal is lodged with an administrative appeal body (König judgment, 1978).

c. Natural and legal persons should be allowed a reasonable period of time in which to commence judicial review proceedings.

States are accordingly required to set a reasonable time-limit for challenging the lawfulness or legitimacy of an administrative act before a tribunal, in order to guarantee the applicant effective access to judicial review. National legislation generally specifies the reasonable time. In certain justified circumstances this period may be extended.

d. The cost of access to judicial review should not be such as to discourage applications. Legal aid should be available to persons lacking the necessary financial resources where the interests of justice require it.

In order to make judicial review widely accessible to natural and legal persons, the cost of proceedings must not constitute a deterrent to judicial action. The point at issue here is the cost of access to judicial review, rather than merely the cost of judicial review itself.

Principle 3: An independent and impartial tribunal

a. Judicial review should be conducted by a tribunal established by law whose independence and impartiality are guaranteed in accordance with the terms of Recommendation No. R (94) 12.

b. The tribunal may be an administrative tribunal or part of the ordinary court system.

In view of the specific risks surrounding an administrative judge since he or she is required to settle disputes concerning the public authorities, this principle reasserts the requirement of both subjective impartiality (taking account of the judge's personal conviction or interest in a given case) and objective impartiality (which consists in ascertaining whether the judge offers sufficient guarantees to exclude all legitimate doubt in this respect)

"judges should, in all circumstances, act impartially to ensure that there can be no legitimate reason for citizens to suspect any partiality."

The independence and impartiality of judges adjudicating in administrative cases are essential for guaranteeing the effective protection of citizens‘ rights.

Principle 4: The right to a fair hearing[5]

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[5] The right to a fair hearing originally formed a part of the so called *natural justice* rules in English Administrative Law: the two main rules governing the procedures of the administration: audi alteram partem/riht to a fair hearing; nemo iudex in causa sua/the rule against bias. Today the right to a fair hearing is a group of different sub-principles and other rules. This right can also be connected to the so called *rihts of defence* under the European administrative law (in the case law of the CFI, ECJ). Those refer to the rules of the administrative procedure. The Recommendation refers to the **Administrative court** procedure.

a. The time within which the tribunal takes its decision should be reasonable in the light of the complexity of each case and of the procedural steps or postponements attributable to the parties, while respecting the adversary principle.

The reasonableness of the time-limit stipulated in Article 6 of the ECHR must always be evaluated in the light of the specific circumstances of the case, such as its complexity, the applicant‘s conduct and the manner in which the case is dealt with by the administrative or judicial authorities. The “reasonable“ length of time stipulated in Article 6 of the ECHR does not refer solely to the duration of the proceedings conducted before the administrative tribunal. The time taken into consideration may begin on the day the party starts an appeal procedure within the administration, if this is a precondition for the judicial review in question.

b. There should be equality of arms between the parties to the proceedings. Each party should be given an opportunity to present his or her case without being placed at a disadvantage.

The equality of arms can also be called “the principle of an equal playground”.

The concept of a fair trial necessitates respect for the principle of equality of arms between the parties to proceedings. In administrative cases there is a particular risk of infringement of this principle by the parties‘ relative positions, with one side representing the authorities and the other demanding that their rights be respected.

c. Unless national law provides for exceptions in important cases, the administrative authority should make available to the tribunal the documents and information relevant to the case.

Access by parties to the administrative file is one of the preconditions for a fair trial. According to the case-law of the European Court, this principle implies that a citizen must have access to the administrative file as forwarded to the tribunal by the administration. This requires the administration to supply all the facts on which its act was based.

d. The proceedings should be adversarial in nature. All evidence admitted by the tribunal should in principle be made available to the parties with a view to adversarial argument.

According to the case-law of the ECHR, the fundamental right to adversarial proceedings "means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party" (Ruiz-Mateos judgment, 1993). This includes documents and all information admitted by the tribunal. That does not prevent various means of protection being given by the tribunal to sensitive documents (for instance in order to protect national security, professional secrecy or intellectual property rights).

e. The tribunal should be in a position to examine all of the legal and factual issues relevant to the case presented by the parties.

f. The proceedings should be public, other than in exceptional circumstances.

Proceedings must be public in order to protect the citizens against any secret, arbitrary judicial approach.

In proceedings before a court of first and only instance "exceptional circumstances" must be shown in order to justify dispensing with a hearing[6] (Göç judgment, 2001). Such circumstances are difficult to prove where the court deals with questions not only of law but also of fact (Fischer judgment, 1995). The parties should be able to waive the right to a public hearing of their own free will, either expressly or tacitly. However, this waiver should be ineffective where it runs counter to an important public interest (Schuler-Zgraggen judgment, 1993).

g. Judgment should be pronounced in public.

The principle that judgments should be pronounced in public, which is confirmed by Article 6 of the ECHR, requires all interested parties to have access to a judgment in which they have a legitimate interest, whereby judgments of general scope should also be accessible to a broad public, taking account of language considerations and such facilities as publication in a journal or in the electronic media (Pretto judgment, 1983).

h. Reasons should be given for the judgment. Tribunals should indicate with sufficient clarity the grounds on which they base their decisions. Although it is not necessary for a tribunal to deal with every point raised in argument, a submission that would, if accepted, be decisive for the outcome of the case requires a specific and express response.

Reasons must be given for the judgment pronounced by the tribunal. The reasoning of the judgment should be presented in writing and relate to the tribunal‘s response to all of the applicant‘s arguments, justifying the decision reached. The scope of this obligation may vary in accordance with the nature of the judgment. The reasons given must be specific and suited to the facts of the case, not confined to mere references to certain pieces of legislation. However, no detailed reply is required to each argument, as the Court confirmed in its Ruiz Torija judgment (1994). Any lack of or inadequacy in the reasons given is liable to invalidate the judgment in formal terms. The terminology used in the reasons is extremely important for the parties‘ understanding of them. Special attention must be paid to the use of terms from other fields which might prove inappropriate in the judicial context.

i. The decision of the tribunal that reviews an administrative act should, at least in important cases, be subject to appeal to a higher tribunal, unless the case is directly referred to a higher tribunal in accordance with the national legislation.

Proper judicial protection involves the right to two-tier proceedings. Nevertheless, while appeal facilities are not compulsory under the ECHR, they are still possible with a view to reducing the risk of arbitrary decisions, inter alia within the judicial system. This principle should be applied to the most important cases, particularly those involving heavy administrative sanctions, subject to any exceptions provided for in domestic legislation. The applicant‘s right to appeal against the judgment pronounced should be recognized in each State within a reasonable time-limit defined by the individual national system. States will decide the extent to which appeals can be lodged with higher courts.

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[6] The existing model of judicial review in **Hungary** (with a main rule of a first and only instance) will hardly meet these requirements, especially in the form of the non-adversarial review, where hearing is not compulsory, but depends on the judge’s discretion.

6. THE EFFECTIVENESS OF JUDICIAL REVIEW

a. If a tribunal finds that an administrative act is unlawful, it should have the powers necessary to redress the situation so that it is in accordance with the law. In particular, it should be competent at least to quash the administrative decision and if necessary to refer the case back to the administrative authority to take a new decision that complies with the judgment. It should also be competent to require of the administrative authority, where appropriate, the performance of a duty.

The Recommendation does not exclude the possibility of the tribunal replacing the administrative act where such a measure would be compatible with national legislation. The case-law of the Court does not require the administrative tribunal to substitute an act held to be unlawful. Nevertheless, the tribunal must be in a position to impose its judgment on the administrative authority when the latter issues a fresh decision, on referral after the original judgment has been set aside. This rule does not apply to cases where after annulment of an act the administration is not required to take a new decision (for instance, in appointment matters, if an appointment decision is annulled, the administration has discretionary power to decide whether to resume the appointment procedure).

b. The tribunal should also have jurisdiction to award costs of the proceedings and compensation in appropriate cases.

The tribunal has jurisdiction not only to deal with the substance of a complaint, but also, where the complainant is successful, to award some form of redress. Where appropriate, compensation for both pecuniary and non-pecuniary damage resulting from a violation must in principle be possible. In general, compensation is made by setting the decision aside. The tribunal should also be empowered to exempt parties from liability for costs where justified.

c. The necessary powers to ensure effective execution of the tribunal‘s judgment should be available in accordance with Recommendation No. R (2003) 16.

The execution of judgments is an important aspect of the effectiveness of control, and it is imperative to ensure that the administrative authorities in question execute the tribunal‘s judgments. This Recommendation endorses Recommendation No. R (2003) 16 on the execution of administrative and judicial decisions in the field of administrative law. The possibility of enforcing the administrative authority's compliance with the judicial decision should be guaranteed.

d. The tribunal should be competent to grant provisional measures of protection pending the outcome of the proceedings.

The last principle is aimed at ensuring that implementation of the contested measure can be suspended in cases where its enforcement would place the person concerned in an irreversible situation (Jabari judgment, 2000, and Ćonka judgment, 2002). The Recommendation recognizes that the tribunal should have authority to grant provisional measures of protection pending the outcome of judicial proceedings. Such measures can include the full or partial suspension of the execution of the disputed administrative act, thus enabling the tribunal to re-establish the de facto and de jure situation which would prevail in the absence of the administrative act or to impose appropriate obligations on the administrative authorities.