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Judicial Review of Statutory Public Bodies' Regulations in the Light of the Hungarian Code of Administrative Court Procedure*

Kontrola sądowa aktów normatywnych „podmiotów publicznych" w świetle węgierskiego Kodeksu postępowania sądowoadministracyjnego

ABSTRACT

The introduction of judicial review of statutory public bodies' normative administrative acts was long overdue in the Hungarian legal system. Prior to 2018, no subjective or objective legal protection was allowed against these acts, which resulted in a number of anomalies, especially in case of professional bodies (chambers) with compulsory membership. This issue was recognised by the legislature as well, which endeavoured to rectify this hiatus by adopting the Code of Administrative Court Procedure. However, the progressive rules of the Code regarding the judicial review of

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normative acts of professional bodies have never been put into practice, as a mere two years later it was altered in a way that reflected a reversion to the regulatory framework prior to the adoption of the Code. The aim of this paper is to examine the original regulatory framework as well as the new amended rules of the Code from the perspective of the twofold function of administrative justice: protecting individual rights, while also controlling the legality of administration. Our primary focus of research was on the qualitative examination of the rules of the Code, however we also touch upon judicial practice, where available.

Keywords: administrative justice; legal protection; judicial review; professional bodies; normative acts

INTRODUCTION

On 1 January 2018, after several years of codification work, Act I of 2017 on the Code of Administrative Court Procedure (hereinafter: the Code or CACP) entered into force in Hungary. The Code has fundamentally reshaped the system of administrative justice. By adopting the Code Hungarian administrative adjudication was able to break free from the very narrow constraint into which the legislature had placed it by regulating administrative court procedures as "special" civil procedures, and by focusing solely on the reviewability of individual administrative decisions of authorities. The Code substantially widened the scope of judicial review of administrative acts, as it implemented a general rule of access to court, which allows any administrative act to be the subject of an administrative dispute on the basis of the principle of effective legal protection.[1] One of the most important developments in this respect was that the Code allows judicial review of normative administrative acts of non-legislative character. This opened to door to the reviewability of soft-law instruments of regulatory authorities, regulations of universities and normative acts of statutory public bodies, just to name a few examples. The latter is of outstanding importance, as statutory public bodies play a prominent role in Hungary and are vested with strong regulatory powers, especially regulatory bodies of liberal professions, which may regulate the professional conduct of their members in great depth. Therefore, the judicial review of normative acts of statutory public bodies is indispensable under the principle of rule of law.

The purpose of our article is to examine how the new Code regulates judicial review of normative acts of statutory public bodies by quantitative methods. Thus, the article focuses on analysis of the rules of the Code, however we also examine the judicial practice. Furthermore, the aim of this paper is not only to describe the rules of the Code, but also to analyse them in view of the functions of administrative

[1] K.F. Rozsnyai, *Geschichte der Verwaltungsgerichtsbarkeit in Ungarn*, [in:] *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa*, eds. K.-P. Sommermann, B. Schaffarzik, Berlin–Heidelberg 2018, pp. 1577–1580, 1586–1587.

justice. The question which we intend to answer is whether the regulatory framework of the Code is sufficient to realize the two main functions of administrative justice: controlling the legality of administration and remedying infringements of subjective rights. This is a particularly current issue, as in 2019 a major amendment to the Code was adopted by Parliament, which touched upon the reviewability of normative acts as well.

METHODS

The paper is based on a jurisprudential method. Legal regulation and the dogmatical questions of the regulatory issues are analysed primarily by our paper. The Hungarian regulation is a flexible one,[2] the role of the practice of the courts is important. Therefore, the judicial practice – especially the practice of the Hungarian Supreme Court, the Curia (*Kúria*) – is analysed by our paper as well. Because of the limited number of decisions on the judicial review of the decisions of the statutory public bodies, the analysis is a content analysis, statistical methods cannot be applied reliably. As it can be seen below, the regulation on the judicial review of these bodies is a constantly transforming one, the approach of the historical comparison is partly applied as well. Since the Hungarian regulation follows the pattern of the regulation of other countries – as it can be seen below, mainly the German pattern has had a significant influence on the Hungarian regulation – the method of legal comparison is partly applied.

STATUTORY PUBLIC BODIES IN HUNGARY

Statutory public bodies (*köztestületek*) can be defined as associations of persons with legal personality, established by a legislative act, based on the membership relation between persons engaged or interested in the same activity, which enjoy self-governmental status and autonomy but are under the supervision of the state, have public authority, and carry out public tasks in relation to their membership or the activities of their members.[3] The statutory public bodies have a legal definition, as well: the general definition of these bodies can be found in Section 8/A (1) of the

[2] On the issues of interpretations of flexibility and resilience, see T. Țiclău, C. Hinţea, C. Trofin, *Resilient Leadership: Qualitative Study on Factors Influencing Organizational and Adaptive Response to Adversity*, "Transylvanian Review of Administrative Sciences" 2021 (Special Issue), pp. 138–140; D.C. Dănişor, M.-C. Dănişor, *Modern Solidarity and Administrative Repressions*, "Juridical Tribune" 2021, vol. 11(3), pp. 472–473.

[3] M. Fazekas, *A köztestületek szabályozásának egyes kérdései*, Budapest 2008, p. 181.

Act LXV of 2006. This definition shows that statutory public bodies have a special status in Hungarian law, as they have both private and public law characteristics.[4] Private law characteristics include the existence of a membership and a certain degree of autonomy from the state, while the aim of carrying out public tasks, exercise of public authority and state supervision can be regarded as public law features. This "Janus-faced" nature of statutory public bodies must be considered when it comes to the regulation of judicial review.

The most distinctive feature of statutory public bodies is that they are formed based on the principle of decentralization, which entails that they are vested with powers of self-government, and they enjoy extensive autonomy.[5] Self-governance means that each statutory public body is entitled to manage its own affairs *via* its membership, while autonomy ensures that no state authority can interfere with how the statutory public body governs itself. One of the most important aspects of self-governance is the regulatory autonomy (*Satzungsautonomie* in German), i.e. the power to adopt normative acts. This means that the state delegates some of its legislative powers to statutory public bodies, by which these bodies can adopt legally binding normative acts regarding their own organisation and functioning, as well as the activities of their members.[6]

It also warrants mentioning that the term "statutory public body" is not a homogeneous category, as this notion covers a number of different institutions.[7] Just to name a few examples, the Hungarian Academy of Sciences, professional associations or chambers of liberal professions such as bar associations and medical chambers (hereinafter: professional bodies), and public bodies of wine production are considered to be statutory public bodies as well.[8] The most important of these public bodies are professional bodies, therefore we will examine these in depth.

[4] Eadem, *Balancierung zwischen dem öffentlich-rechtlichen und zivilrechtlichen Status: Neue Probleme in den Berufskammerregelungen*, [in:] *Aktuelle Entwicklungen des Kammerwesens und der Interessenvertretung in Ungarn und Europa*, eds. M. Dobák, W. Kluth, G. Jenő, Budapest 2009, pp. 96–97.

[5] I. Hoffman, K.F. Rozsnyai, *The Supervision of Self-Government Bodies' Regulations in Hungary*, "Lex localis – Journal of Local Self-Government" 2016, vol. 13(3), pp. 486–487.

[6] H. Domcke, *Verfassungsrechtliche Fragen einer autonomen Satzungskompetenz der Bundesrechtsanwaltskammer*, "Zeitschrift Für Rechtspolitik" 1988, vol. 21(9), pp. 349–350; S. Kirste, *Theorie der Körperschaft des öffentlichen Rechts*, Salzburg 2017, pp. 430–434.

[7] Similarly to German law, where the notion "(Personal) körperschaften des öffentlichen Rechts" includes a number of different self-government bodies. See H. Maurer, *Allgemeines Verwaltungsrecht*, München 2011, pp. 608–611.

[8] M. Fazekas, *Balancierung*..., p. 95.

PROFESSIONAL BODIES IN HUNGARY AND THEIR FUNCTIONS

A professional body (*szakmai kamara*) is a statutory public body that consists of members practising a particular liberal profession. Professional bodies fulfil public tasks in relation to the professional activities of their membership, the most important of which is the public control over practitioners.

Practitioners of liberal professions are highly qualified persons who act with a high degree of autonomy and independence, providing services to their clients in a personal and confidential manner, the high quality of which is not only in the private interest of the client but also in the public interest. Examples include the professions of lawyers, doctors, pharmacists, engineers, architects, and accountants. Since any dysfunction in the provision of these services is detrimental to public interest as well, activities of the practitioners of such professions must be subject to state control through the public administration. For instance, the activities of lawyers are closely linked to the proper administration of justice, and as such to the right of access to justice.[9] Given the personal and confidential nature of such services, it is also important that, ideally, there is a public trust towards practitioners, which can easily be undermined by anomalies. Consequently, the regulation also aims to maintain public confidence in the profession.[10]

In case of liberal professions, the legislature decided to entrust this public control to professional bodies, which are self-government bodies of the practitioners. The main reason behind this is that practitioners are more likely to obey rules of professional conduct that were adopted with their own involvement.[11] In this respect, adopting professional rules of conduct can be considered as self-regulation. Furthermore, public bodies perform public tasks that require specific expertise. For instance, the creation of ethical codes necessarily implies taking a position on what is professionally acceptable and expected behaviour. However, public administrative bodies do not necessarily have the professional competence to make such a decision, therefore this task is entrusted to professional bodies, the members of which have the necessary expertise.

Public control of liberal professions can be described schematically with the terms of "regulation", "supervision" and "sanctioning". The whole process is based on normative acts, i.e. ethical codes and other rules of professional conduct drawn up by the chambers, which define the expected behaviour towards practitioners.

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[9] For example, see judgment of the ECtHR of 20 May 1998, *Schöpfer v Switzerland*, Application no. 25405/94, paras 28–34.

[10] M. Fazekas, *Chambers of Professional Services and Europeanisation*, "Annales: Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominatae Sectio Iuridica" 2007, vol. 48, pp. 168–169.

[11] See S. Kirste, *op. cit.*, pp. 305–308.

These rules have a binding effect on members of professional bodies, as they have to abide by them voluntarily. The professional body monitors compliance with these rules within the framework of supervision and if it detects a case of professional misconduct, i.e. an ethical or disciplinary offence, it initiates an ethical or disciplinary procedure, which may conclude with the imposition of sanctions on the practitioner. These sanctions may even result in the temporary or final exclusion from the practice of profession, therefore legal guarantees throughout the process of public control are of utmost importance.[12] This is underlined by the fact that under the case law of the European Court of Human Rights (ECtHR), individual decisions of public bodies with compulsory membership that may result in the termination or suspension of membership, such as disciplinary or ethical decisions fall under the scope of the civil limb of Article 6 of the European Convention on Human Rights.[13]

NORMATIVE ACTS OF PROFESSIONAL BODIES

The range of normative acts issued by professional bodies is quite diverse in Hungary. The most common normative act of professional bodies are regulations which, although do not qualify as acts of legislation or administrative decrees, are formally recognised by Act CXXX of 2010 on law-making.

Regulations can be divided into two groups depending on the subject that they regulate.[14] Firstly, professional bodies may adopt internal regulations that cover their internal organisation and operation. Therefore, these have a binding effect only in relation to the internal affairs of the public body, such as the organisational structure, election of officials, or imposition of membership fees. On the other hand, professional bodies also have the power to adopt external regulations, which regulate the activities of members in the course of practice of their profession. These regulations go beyond the internal functioning of the professional body, as they lay down binding rules of professional conduct for members, furthermore they may even touch upon the rights and obligations of clients indirectly. Most notable examples of such regulations include ethical codes and other rules of professional conduct, which convey the expected form of behaviour towards practitioners. Professional bodies may also adopt regulations on the rules of disciplinary and ethical procedures.

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[12] M. Fazekas, *A köztestületek…*, pp. 47–57; R. Zuck, *Die anwaltliche Berufsgerichtsbarkeit – Entwicklungslinien und Modellvorstellungen*, "Zeitschrift für Rechtspolitik" 1997, vol. 30(7), pp. 276–279.

[13] See judgment of the ECtHR of 23 June 1981, *Le Compte, Van Leuven and De Meyere v Belgium*, Application nos 6878/75 & 7238/75, paras 44–51; judgment of the ECtHR of 10 February 1983, *Albert & Le Compte v Belgium*, Application nos 7299/75 & 7496/76, paras 27–29.

[14] See I. Hoffman, K.F. Rozsnyai, *op. cit.*, pp. 487–488.

Furthermore, professional bodies can issue other normative acts that do not qualify as regulations. For instance, some professional bodies are entitled to adopt soft-law instruments, which do not have a binding effect, but they aim to influence the conduct of persons or decision-making processes;[15] various professional bodies regularly publish statements and recommendations on different professional issues.

From the perspective of judicial review, it is also important to note that normative acts of professional bodies may exert their legal effects in two ways. In some cases, normative acts have direct legal effects on legal entities, i.e. they directly create rights and obligations. For instance, generally, members of professional bodies are obliged to comply with the rules of conduct specified in ethical codes without individual decisions. However, normative acts in other cases may have "indirect" legal effects, i.e. their substance is conveyed to the addressee by an individual act. The most notable example is an individual ethical or disciplinary decision of a professional body which imposes a sanction on the practitioner because of a breach of the rules of conduct specified in the professional body's ethical code. This shows that the same normative act may in some case have indirect, in other cases direct effects on individuals.

JUDICIAL REVIEW OF NORMATIVE ACTS OF PROFESSIONAL BODIES

1. General remarks

It is clear that under the principles of self-governance and autonomy an extensive regulatory autonomy is granted to public bodies, especially professional bodies. However, these principles do not grant an exemption from the principle of legality of administration,[16] therefore some degree of external control over the normative acts adopted by public bodies has to exist. However, it has to be taken into account that interference by state organs with the operation of public bodies may render their autonomy non-existent. Therefore, in the Hungarian legal system this external control extends only to legality aspects, and it is split between the administrative (executive) and the judicial branch. All public bodies are subject to state supervision either by the competent minister or by public prosecutors; however, the most intrusive measures, such as annulling a public body's act is reserved to

[15] L. Sossin, C.W. Smith, *Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government*, "Alberta Law Review" 2003, vol. 40(4), p. 871.

[16] See in detail Zs.A. Varga, *The Constitutional Basis of the Hungarian Public Administration*, [in:] *Hungarian Public Administration and Administrative Law*, eds. A. Patyi, Á. Rixer, Passau 2014, pp. 205–207; N. Chronowski, *The Post-2010 'Democratic Rule of Law' Practice of the Hungarian Constitutional Court under a Rule by Law Governance*, "Hungarian Journal of Legal Studies" 2020 vol. 61(2), pp. 154–155.

be undertaken by the courts at the initiative of the supervisory body, as the courts' impartiality and independence is taken into account to be an important safeguard.[17]

Generally, the judicial scrutiny exercised over administrative acts, including normative acts of professional bodies has a twofold function. On the one hand, administrative justice aims to ensure that no administrative act contrary to higher legal standards can remain in the legal system, even if it does not result in a violation of subjective rights. This is called "objective" legal protection or the control of legality of administration. On the other hand, judicial review of administrative acts also aims to ensure that infringements of individual, subjective rights caused by administrative acts are remedied. This can be characterised as "subjective" legal protection or protection of subjective rights.[18] Importantly, these two functions must prevail together and not at the expense of each other.[19] In the context of normative acts, this implies that supervisory bodies with the purpose of ensuring the lawful functioning of the administration, as well as individuals injured in their subjective rights must be able to challenge these acts; furthermore, administrative courts must have the power to annul normative acts and to remedy violations of individual rights that they cause.

2. Judicial review prior to 2018

Judicial review of normative acts of professional bodies prior to 2018 was contingent and insufficient. This was the result of two key factors. Firstly, regulating administrative court procedures in the Code of Civil Procedure meant that administrative adjudication revolved completely around individual decisions of public authorities,[20] thus the legal framework did not allow for the judicial review of normative acts. In fact, not even all individual acts of professional bodies were to be challenged in administrative courts. This issue was linked to the second key factor, namely that the status of statutory public bodies was unclear as well, which meant that no general rules of public law nature have been adopted regarding them. This allowed sectoral legislation to regulate important issues such as state supervision in an inconsistent and arbitrary manner.[21]

[17] M. Fazekas, *A köztestületek*..., pp. 87–101.

[18] See K.F. Rozsnyai, *Current Tendencies of Judicial Review as Reflected in the New Hungarian Code of Administrative Court Procedure*, "Central European Public Administration Review" 2019, vol. 17(1), pp. 11–13; H. Küpper, *Magyarország átalakuló közigazgatási bíráskodása*, "MTA Law Working Papers" 2014, vol. 1(59), pp. 19–24.

[19] K.F. Rozsnyai, *Hatékony jogvédelem a közigazgatási perben*, Budapest 2018, pp. 26–30.

[20] Some authors call this a "decision-based model of administrative justice". See A. Patyi, *A magyar közigazgatási bíráskodás elmélete és története*, Budapest 2019, pp. 211–227.

[21] See I. Hoffman, K.F. Rozsnyai, *op. cit.*, p. 493.

As a result, both subjective and objective legal protection suffered from serious deficiencies. Subjective legal protection against normative acts of professional bodies having direct effect was non-existent, as individuals could not challenge these norms directly. Formally, normative acts with indirect effects could not be challenged by individuals either. In some cases, however, courts pronounced that normative acts of professional bodies conflicting with legislation have to be disregarded by courts,[22] but this was not prevailing view among judges. In most cases, courts ruled that individuals do not have standing to argue the illegality of normative acts even if the challenged individual decision is based thereon.[23] Regarding the objective control of legality, sectoral legislation allowed supervisory bodies of professional bodies to challenge their normative acts if those were contrary to a higher normative act.[24] This meant that the only way administrative courts were allowed to scrutinize norms of professional bodies was if the supervisory body opted for initiating court proceedings. However, the lack of unified rules for state supervision and the inadequate rules of civil procedure proved to be a pervasive problem in practice.[25] It is hardly surprising that, with a few exceptions,[26] these court proceedings have been rarely initiated by supervisory bodies.

3. Judicial review in the Code between 2018 and 2019

One of the primary goals of the Code was to ensure the effective judicial review of all types of administrative acts, including normative acts from both a subjective and an objective standpoint, which is mentioned explicitly in Article 2 of the Code. One of the most important novelties, by which this goal may be achieved, was the introduction of the notion of "administrative dispute" in Article 4, which serves as a general rule of access to court. This provides that all activities of administrative bodies that are regulated by administrative law may be subject of an administrative dispute (i.e., judicial review by an administrative court), provided they aim to alter the legal situation of a legal entity or have such an effect.[27] The Code specifies the types of administrative activities reviewable by court, which includes "provisions of

[22] G. Barabás, *A Kúria ítélete a Magyar Orvosi Kamara tagdíjszabályzatában foglalt regisztrációs díjfizetési kötelezettséget előíró szabály hatályon kívül helyezéséről*, "Jogesetek Magyarázata" 2014, vol. 5(4), p. 61.

[23] For example, see decisions Kfv. 37.531/2010/7 and Kfv. 37.811/2012/6 of the Curia; decisions Pf. 21.195/2018/6. and Pf. 20.456/2017/4 of the Metropolitan Regional Court of Appeal.

[24] See M. Fazekas, *Közigazgatási bíráskodás a hatósági ügyeken túl (A közigazgatási perrendtartás tárgyi hatályának néhány kérdése)*, [in:] *350 éves az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kara. A jubilieumi év konferenciasorozatának tanulmányai. I. kötet*, eds. A. Menyhárd, I. Varga, Budapest 2018, pp. 220–221.

[25] Eadem, *Chambers…*, pp. 171–173.

[26] For example, see decision Kfv. 37.540/2012/5 of the Curia.

[27] See K.F. Rozsnyai, *Current Tendencies…*, pp. 9–11.

general application". This notion basically covers normative acts of non-legislative nature,[28] and as such is of utmost importance, since this is the provision that allows the judicial review of all normative acts of professional bodies. However, due to the deficiencies regarding the regulation of statutory public bodies in substantive law, Section 8/A of Act LXV of 2006 which contains some public law rules on statutory public bodies has been amended with a provision making it absolutely clear that all normative acts of these bodies are reviewable by administrative courts.

Article 4 of the Code also includes a separate rule on standing in relation to normative acts. This rule originally stated that a provision of general application (i.e., normative act) may only be challenged in conjunction with the individual decision that was based thereon. Basically, this rule was pertaining to normative acts with indirect legal effects. However, in case a normative act exerted its legal effects directly, without an individual act, the Code allowed it to be challenged on its own by way of exception. This provision covered normative acts with direct legal effects and allowed these to be scrutinized by courts at the initiation of individuals too.

The review of the legality of professional bodies' normative acts could take place in two types of procedure, depending on whether it was initiated with the aim of subjective or objective legal protection. This can be best described as a two-pillar system.

Regarding the subjective legal protection, individuals suffering a violation of a subjective right as a result of a professional body's normative act, either in a direct or indirect form, were allowed to challenge this act in a general administrative court procedure. Provided the court found that the normative act was unlawful, it had the power to annul its unlawful provisions. Although the Code did not mention this specifically, courts also had the power to exclude the application of unlawful normative acts.[29] Administrative courts had a wide margin of appreciation to decide which measure was to be applied. Annulment could be reasoned in case the normative act did not only cause a violation of subjective rights but was also contrary to a higher legal norm. This allowed administrative courts to control the objective legality of administration in court procedures that have been initiated by individuals as well.

Regarding the objective legal protection, the Code institutionalised a special type of court procedure, called "supervisory action against statutory professional bodies", which could only be initiated by the minister or public prosecutor exercising supervision over the professional body, provided that extra-judicial means proved to be ineffective. This special supervisory procedure could be initiated in case of any kind of irregularity in the functioning of the professional body, one of which is the adoption of a normative act contrary to a higher legal norm. If the

[28] See in detail I. Hoffman, *Néhány gondolat a normakontroll- eljárásoknak a Közigazgatási perrendtartásban történő szabályozásáról*, "Jogtudományi Közlöny" 2017, vol. 72(7–8), pp. 340–344.

[29] See decisions Kfv. 37.983/2019/10 and Kpkf. 37.318/2019/2 of the Curia.

court established that the norm was in fact unlawful, it had the power to annulate it. Furthermore, the court could apply various other legal measures aimed at restoring the lawful functioning of the professional body, such as appointing a supervisor with temporary effect. It is clear, that this special type of court procedure served the purposes of controlling the legality of the normative acts of professional bodies.[30]

The original framework of the Code provided for effective legal protection against normative acts of professional bodies both in a subjective and an objective sense. Widening the scope of judicial review to include normative acts of professional bodies was a long-awaited development. The rules of standing allowed individuals to challenge normative acts of professional bodies as a remedy for infringements of individual rights, while the special rules of supervisory action provided for an effective way of objective control of legality. Overall, this two-pillar system of procedures provided for a fortunate balance between subjective and objective legal protection.

4. Judicial review in the Code after 2019

Regrettably, however, the legislature decided to alter this regulation in a negative direction with the adoption of Act CXXVII of 2019 on the amendment of certain Acts in relation to the single-instance administrative procedures of district offices (hereinafter: the Amendment Act). Although the main goal of the Amendment Act was to repeal the possibility of administrative appeal as a general remedy,[31] it also introduced a number of unrelated amendments to the Code. These included alterations to the framework of rules regarding the reviewability of professional bodies' normative acts, which had a detrimental effect on the level of both subjective and objective legal protection. The Amendment Act brought two major changes in this relation.

The first amendment concerned the rules on standing. As a result, if a normative act of a professional body causes an infringement of a subjective right directly, the aggrieved party does not have standing to challenge it, as now courts can only review normative acts having direct effects at the "request" of the supervisory body of public prosecutor.[32] This means that the possibility of challenging professional bodies' normative acts having direct effect by individuals has been repealed. However, it is unclear what "request" means in this context. The Amendment Act added

[30] I. Hoffman, M. Fazekas, *A köztestületi felügyeleti per alapja és eljárási szabályai*, [in:] *Kommentár a közigazgatási perrendtartásról szóló 2017. évi I. törvényhez*, eds. G. Barabás, K.F. Rozsnyai, A.Gy. Kovács, Budapest 2018, pp. 726–736.

[31] See in detail I. Hoffman, *Application of Administrative Law in the Time of Reforms in the Light of the Scope of Judicial Review in Hungary*, "Studia Iuridica Lublinensia" 2020, vol. 29(3), pp. 107–113; K. Rozsnyai, *The Procedural Autonomy of Hungarian Administrative Justice as a Precondition of Effective Judicial Protection*, "Studia Iuridica Lublinensia" 2021, vol. 30(4), pp. 497–501.

[32] Article 4 (5) CACP.

a new category to the list of privileged plaintiffs in Article 17 of the Code, which means that "request" means initiating a court procedure. However, subsection b) of Article 17 already contained a separate rule which allows supervisory bodies to initiate the above-mentioned special supervisory court procedure. Therefore, adding subsection f) to Article 17 was either a codification mistake or it could be interpreted in a way that it allows supervisory bodies and public prosecutors to challenge professional bodies' normative acts outside the realms of the supervisory court procedure, in a general administrative court procedure. The latter interpretation would mean that legislature decided to repeal the clear two-pillar system of the Code, as this would inevitably lead to the blending of the two types of procedure, with no visible benefits.

Furthermore, it is not clear what role the Amendment Act assigns to public prosecutors in relation to judicial control over professional bodies' normative acts. Article 4 (5) names public prosecutors in addition to supervisory bodies and grants them the right to challenge normative acts if there is no supervisory body. However, the consistency of this provision with Act CLXIII of 2011 on the Prosecution Service of Hungary is highly questionable. According to Article 26 (1) thereof, the public prosecutor's power to protect the public interest may be established only by the act itself or by a separate law. At the same time, neither the act on public prosecution nor sectoral laws grant public prosecutors general powers to take action against norms of professional bodies. The rules of the Code cannot, in themselves, be interpreted as conferring a general right of such action on prosecutors without substantive legal provisions. This would also be contrary to the rationale behind the act on public prosecutors, which expressly sought to break with the concept of general supervision of legality and instead aimed to introduce a regulatory framework in which public prosecutors protect the public interest by exercising specific powers laid down by law.[33]

This amendment severely limits the effectiveness of subjective legal protection against normative acts of professional bodies, since now the redressability of an infringement of an individual right does not depend on the aggrieved person's own decision to bring an action, but on the discretionary decision by an external state organ. Furthermore, the aggrieved person has no means of enforcing such a decision by the supervisory body or the public prosecutor, as she/he may only notify these bodies about the unlawfulness of a normative act, but these organs are not obliged to initiate a court procedure based thereon. This is due to the fact that supervisory bodies have been entrusted with the control of legality of administration and therefore are not suited for the purpose of subjective legal protection. If these bodies

[33] Zs.A. Varga, *Ombudsman, ügyész, magánjogi felelősség. Alternatív közigazgatási kontroll Magyarországon*, Budapest 2012, pp. 199–204.

decide not to exercise their right to bring an action, the breach of subjective right caused by the directly applicable normative act cannot be remedied at all.

In such a case, the only way for the aggrieved person to challenge the legality of the directly applicable norm is to deliberately violate it, thereby incurring a sanction, which, as an individual decision can be challenged in court in conjunction with the underlying normative act. However, this solution raises serious concerns, particularly in the case of professional bodies with compulsory membership, where members can only obtain judicial review of the rules of professional conduct at the risk of incurring a temporary or final ban on practising their profession.[34]

The second amendment resulted in a restriction on the annulment powers of administrative courts. If an individual suffering a breach of his or her subjective rights challenges a normative act of a professional body, courts may only exclude the application thereof; annulment may only take place if the supervisory body or public prosecutor makes such a request to the court.[35] The Code now explicitly mentions the exclusion of application in individual cases as a legal consequence, which is a welcome change; however, the reasons for the restriction on annulment powers are unclear. This can lead to an absurd situation where a normative act can remain a part of the legal system, although it has been found to be unlawful by a court. This makes it virtually impossible for the courts to exercise their function of control of legality of administration, i.e. objective legal protection in actions brought by individuals.

Under this new set of rules if the court finds that a normative act of a professional body is contrary to substantive law and that it should be annulled, it must notify the supervisory body or public prosecutor of the possibility of entering into the procedure as an interested party or must involve it in an obligatory manner in the procedure.[36] The supervisory body or prosecutor must then examine the provision of the normative act in question, and in case it finds it to be unlawful, it has to decide whether it is necessary to make a motion for the annulment thereof. Only then can the court exercise its power of cassation.

However, this solution raises a number of problems. The main issue is that there is no guarantee that the supervisory body or prosecutor will actually make a request for annulment, as they are not obliged to do so. The making of such a motion depends entirely on what infringements the supervisory body or prosecutor considers to have been committed.[37] Further questions arise as to how such a limitation can

[34] As the ECtHR concluded, although in a different context, "no one can be required to breach the law so as to be able to have a 'civil right' determined in accordance with Article 6 § 1" (judgment of the ECtHR of 24 September 2002, *Posti and Rahko v Finland*, Application no. 27824/95, para. 64).

[35] Article 89 (1) and (4) CACP.

[36] Article 20 (4) and (6) CACP.

[37] G. Barabás, *op. cit.*, pp. 61–62.

be reconciled with the rules of the Code allowing courts to act *ex officio* based on the principle of investigation.[38] For instance, according to Article 85 (3) of the Code courts have to examine *ex officio* whether the challenged administrative act is null and void, and in that case have the obligation to annul it. The purpose of this provision is precisely to enforce objective legal protection in court proceedings initiated by individuals too. Therefore, in such a case the intervention of the supervisory body or prosecutor is completely superfluous, since the court must exercise its power of cassation by default.

In addition, the unclear role of public prosecutors is a problem in this context as well. Neither the act on public prosecution, nor sectoral legislation provide for a general right of action for the purpose of filing a motion for the annulment of professional bodies' norms, therefore it is not clear why public prosecutors are named in addition to supervisory bodies in Article 89 (4) of the Code.

This amendment significantly reduced the level of objective legal protection against normative acts of professional bodies, as the exclusion of the application of a normative act may be sufficient from the point of view of subjective legal protection, since the court and the professional body may no longer apply it to the plaintiff in the future, but this does not affect the possibility of its application in other cases. This can be particularly problematic in ethical cases: if a court finds that a provision of an ethical code is contrary to an act of legislation, but only excludes its application in the individual case, there is nothing to prevent the professional body from applying this provision to other members, which may generate further individual court procedures. Overall, as a result of this amendment, the bringing of an action by the aggrieved party can no longer serve as an "occasion" for the objective judicial review of the professional body's norms, which results in the marginalisation of objective legal protection.

CONCLUSIONS

The adoption of the Code was a historic moment, as its creation allowed courts to provide effective judicial protection against all types of administrative acts, including normative acts of professional bodies. These may affect rights and obligations of practitioners of liberal professions, as well as clients, there it is of utmost importance that they are reviewable by administrative courts. The original regulatory framework of the Code allowed these to be challenged by individuals with the aim of protecting their subjective rights as well as by supervisory bodies with the aim of controlling the legality of administration. However, after a mere two

[38] See K.F. Rozsnyai, *The Procedural Autonomy…*, pp. 497–498.

years the legislature adopted the Amendment Act, leaving no time for the practice to adapt to this novelty and realise its potentials.[39]

The modifications introduced by the Amendment Act significantly reduced the effectiveness of subjective and objective legal protection against normative acts of professional bodies, with no apparent reason. These modifications apparently had the aim of strengthening objective control of legality of administration in relation to normative acts of professional bodies. This is evidenced by the effort to increase the importance of supervisory bodies and public prosecutors. However, in reality, these modifications failed to raise the level of objective legal protection, but at the same time "managed" to weaken subjective legal protection. This is due to the fact that, as we already emphasised, subjective and objective legal protection must prevail together and not to the detriment of each other.

Consequently, the full realisation of objective legal protection is not to be expected from restricting the individual right of access to court regarding normative acts having direct effects or from tying the hands of the judges with regard to the applicable legal consequences. Instead, objective legal protection may be strengthened by giving individuals the right to challenge all normative acts of professional bodies, and by allowing courts in these procedures to apply procedural rules which reflect the principle of investigation and serve the purpose of objective legal protection, if necessary. This shows the intertwined nature of subjective and objective legal protection. Furthermore, the more proactive action of supervisory bodies could also contribute to the more effective control of the legality of professional bodies. That being said, the repeal of the reviewability of normative acts having direct effects is unjustifiable in itself from the perspective of subject legal protection. The newly introduced possibility of bringing an action by prosecutors is also not suitable for filling the gaps of either objective or subjective legal protection. These amendments are related to the transformation of the judicial review of the administrative acts: it can be interpreted as part of the limitation of the protection of subjective rights, instead of the original concept during the codification of Act I of 2017 on the Code of Administrative Court Procedure.[40]

One can only hope that the Amendment Act was a one-off "error", and that in the future the Code returns to a regulatory framework that provides effective subjective and objective legal protection against all normative acts of professional bodies.

[39] The jurisprudence generally found it difficult to adapt to the new rules of the Code. See eadem, *Anfängliche Schwierigkeiten bei der Anwendung der ungarischen Verwaltungsprozessordnung*, [in:] *Jahrbuch für Ostrecht*, München 2020, pp. 185–206.

[40] See eadem, *The Procedural Autonomy*..., pp. 496–497.

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ABSTRAKT

Wprowadzenie do węgierskiego systemu prawnego kontroli sądowej aktów normatywnych wydawanych przez podmioty publiczne („ustawowe organy publiczne") nie mogło przez długi czas dojść do skutku. Przed 2018 r. nie dopuszczano podmiotowej ani przedmiotowej ochrony prawnej przed takimi aktami, co skutkowało szeregiem nieprawidłowości, zwłaszcza w przypadku organizacji samorządu zawodowego (izb) o obowiązkowym członkostwie. Kwestia ta została dostrzeżona również

przez ustawodawcę, który starał się wypełnić tę lukę przy okazji uchwalania Kodeksu postępowania sądowoadministracyjnego. Jednak nowe przepisy Kodeksu dotyczące kontroli sądowej aktów normatywnych organizacji zawodowych nigdy nie zostały wprowadzone w życie, ponieważ zaledwie dwa lata później zostały znowelizowane w sposób odzwierciedlający powrót do ram regulacyjnych sprzed uchwalenia Kodeksu. Celem artykułu jest zbadanie pierwotnych ram regulacyjnych, a także nowych zmienionych przepisów Kodeksu z perspektywy dwojakiej funkcji sądownictwa administracyjnego: ochrony praw jednostki przy jednoczesnej kontroli legalności działań administracji. Głównym celem badań była ocena jakościowa przepisów Kodeksu, niemniej tam, gdzie było to możliwe, omówiliśmy również praktykę orzeczniczą.

Słowa kluczowe: sądownictwo administracyjne; ochrona prawna; kontrola sądowa; organy samorządu zawodowego; akty normatywne