

THE LINKING POINTS OF EU LAW AND THE MEMBER STATE'S ADMINISTRATIVE PROCEDURE

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Abstract: *The European Union law continuously expands, intrudes the national law of the member state, and in certain fields, basically overwrites and ousts the preceding national provisions. The reason for this process is to ensure the legal conditions of the implementation of common European goals. Today the conclusion can be drawn also, that the expansion of the EU law has not stopped at the boundaries of individual branches of law. While previously, administrative law was viewed as a national area of jurisdiction, where EU law could not take a greater role, today EU law affects the national administrative law in several aspects. One of these aspects is linked to the administrative procedure.*

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I) The primacy of EU law

People, who deal with administration as well as the people, who work in administration, have to get accustomed to the fact that EU law (more precisely, the *acquis communautaire*) gradually “invade” the member state administrative law.

While in earlier periods, the formulation of member state administration, and particularly the definition of relating positive law, was generally viewed as a competence of the member state legislator, today this view definitely has to be revised. It is perfectly obvious, that EU law “invade” any branch of law, if it is required for reaching the goals of the community.

From the point of application of law, this means, that additional obligation devolves on public authorities that are to be familiar with the relating EU law and apply it likewise the Hungarian law, without considering the fact that it is not derived from a Hungarian legislative authority.¹

It is also apparent today that in case of the conflict of EU law and the national administrative (procedural) law, the priority of EU law predominates. In order to reinforce this statement, I cite the so called Alcan case.²

The facts of this case were the following: as a result of the increase in electricity prices, a German company (the Alcan) intended to close one of its aluminium smelt works. The director of the company had already given the employees notices, when the government of Rheinland-Pfalz Land offered the company 8 million marks, if it withdrew its decision and kept its workers.

The Committee of the European Union had received the news from the media and sent a notice to the German (federal) Minister of Economy. In this letter the attention of the minister was directed to the fact that the anticipated subsidy, offered by the federal ministry, is qualified as an illicit state

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¹ Kilényi G (ed), *A közigazgatási eljárási törvény kommentárja*, KJK, Budapest, 2005, p. 36.

² Land Rheinland-Pfalz v Alcan Deutschland GmbH (Case 24/95).

subsidy according to the EU law, and for this reason it violates the Treaty of Rome. Although the letter was forwarded to the federal government, the subsidy was paid to Alcan.

Thereupon the Committee considered the payment illegal and ordered the company to pay the money back to the Rheinland-Plalz Land. Neither Germany, nor the company requested the annulment of the decision.

At the same time, neither Germany, nor the involved Land discharged their obligation. None of them claimed the repayment of the amount, thus the Committee initiated a court action on violating the EC Treaty. The infringement was established by the court.

The competent German authority adopted an administrative decision on refunding the subsidy only after the court establishment. (For the record, 4 years had passed since the Committee had established the procedure on infringement of public rights)

The Alcan, however, was unwilling to refund the received subsidy, and in order to support its "resistance", it cited two reasons in its request for legal remedy:

- the company acquired its rights in good faith (one of the important principals of the German administrative procedure law is to defend well meant acquired rights), and
- all deadlines, established in the German administrative procedure law, concerning the claiming back had already been expired

The involved German court requested a preliminary decision from the Court of Justice of the European Communities. The Court of Justice of the European Communities decided, that the subsidy had to be refunded, basically without taking the relating national legal provisions into consideration.

Based on this case the following conclusion can be drawn: the primacy of EU law is explicit in the administrative procedure as well.³

II) Implied powers and effect utile

The EU does not have explicit jurisdiction concerning the regulation of administrative procedures between member states, but in spite of this, the EU law penetrates into the national administrative law by settling particular fields. However, generally, the EU does not regulate which authority should implement the given EU law according to which rules. (I am going to deal with this issue later)

On the other hand, according to the principle of implied powers, the acts of EU law can include any regulations that are necessary in order to fulfil the goals included in the Treaty of Rome. One can use this interpretation even if such a competence of the EU legislative authorities cannot be directly understood/interpreted from the Treaty.

There are several examples in several fields for the EU law to gain ground against the member state administrative law and administrative procedure law. In fact these are the fields in the administrative procedure, where the primacy of EU law predominates:

- an EU regulation in the given case, which concerns a certain administrative action (for example: customs procedure)
- issuing directives which concern the administrative procedure

Finally I have to mention that applying the national law in an EU-conform way, that is, in accordance with the aims of the EU, is a requirement. This is the principle of effect utile.⁴

III) Implementing EU law

The reasons for EU law penetrating into the administrative procedure in such an extent also have to be clarified. The most basic reason for this ground gaining is that the acts of EU law have to be implemented by the national administrative authorities in the same way as they have to implement the legal norms issued by the national legislative authorities.

That is because the legal acts of the EU are implemented by the member state's administrative authorities and organisations (indirect implementation) and not by EU authorities and organisations (direct implementation). In case of indirect implementation, the member state's administrative authorities and organisations proceed based on the legal acts of the EU (for example misappropriate EU funds have to be refunded based on an EU regulation). During this

³ See Kökényesi J (ed), *Közgazgatási eljárások*. Köztisztviselői továbbképzési program, Tananyag és oktatási segédletek, ÖTM, Budapest, 2005, p. 3.

⁴ See U Fastenrath, M Müller-Gerbes, *Europarecht Grundlagen und Schwerpunkte*, NOMOS, Baden-Baden, 2000, pp. 180-181.

implementation, EU law have to be applied, which is mainly substantive law by nature, but rarely, it can be adjective law as well.

In case of direct implementation, EU authorities and organisations must apply EU law exclusively. EU law does not include too many operative rules, rather the principles of the European Court of Justice are taken into consideration when implementing legal acts. This is because the European Court of Justice has drawn up several prevailing procedural principles as a result of having studied the member states' codices of administrative procedures, which have to be applied by EU authorities and organisations. On this level one can find examples of the member state law's influencing the legal principles of the EU and the applications of EU law.

EU law – as I have already mentioned – retain to regulate the administrative procedure in a general, codex-like way, this is left to the member states. This main rule is based on a principle which is called the “procedural autonomy of the member states”.

This principle means that national administrative authorities have to implement the EU law based on national law, in so far as EU law provides otherwise.

Therefore the Hungarian authority is going to adopt a decision according to the Hungarian procedural law even if the subject of the case is related to the implementation of an EU law.

Still, the EU has certain expectations in case of such legal implementation. National procedural law, its application and interpretation have to comply with the requirements, which are necessary to effectively implement EU law.⁵

Basically there are two such requirements, which have to be complied with when indirectly implementing EU law:

1. prohibition of discrimination,
2. principle of efficiency.

Based on this, national administrative procedure law can only be applied while implementing the acts of EU law, when

- it does not discriminate or does not violate the rights other EU citizens
- and it does not prevent the efficient implementation of EU law

These requirements first occurred in the “Milchkontor” case⁶. In this case, the proceeding German administrative court asked the European Court of Justice for pre-decision in several questions related to previous cases. The questions concerned the transfer of EU funds and the refunding of misappropriate EU funds.

According to the literature and practice of the law, the principle of efficient implementation means that the national procedural law cannot prevent the implementation of EU law or cannot encumber it disproportionately.

Another requirement joins the above mentioned, that is any tools can be used by national authorities in order to implement the aims of the EU norms successfully. The so called “Table wine” case is a clear example of this requirement⁷.

The brief facts of the case are the following: During the 1984/85 economic year, the European Commission defined in its decision the amount of the table wine, which the winemakers had to distillate.

The competent German authorities issued about 600 administrative decisions, but they did not order the immediate implementation of these decisions (that is the immediate distillation of “table wine”). About 500 decisions were appealed by the farmers. The appeals had delaying force on the implementation of the decisions, and during the period of the appeal, the winemakers sold the greatest portion of the wine in the market.

The Commission interpreted the procedure of the German authorities as a violation of the EC Treaty, and turned to the European Court of Justice. The Court declared the violation of the Treaty on the plea that the member states cannot refer to their own legal system or other internal circumstance in case of default on obligations. So Germany pleaded in vain that, ordering immediate implementation was not necessary according to German law.

IV) Additional legal principles elaborated by the European Court of Justice

⁵ F O Kopp, U Ramsauer, *Verwaltungsverfahrensgesetz, Kommentar*, C.H. Beck, München, 2003, p. 25.

⁶ Deutsche Milchkontor GmbH and others v Bundesrepublik Deutschland (Case 205/82-215/82).

⁷ Commission v Bundesrepublik Deutschland (Case 217/88).

Besides the above mentioned requirements the administrative procedural law of a member state, the authorities' application of law as well as the interpretation of law have to comply with the additional legal principles elaborated by the European Court of Justice. These are the following:

1. principle of lawfulness,
2. principle of proportionality (intervention must be proportionate with the aim to be fulfilled),
3. principle of subsidiarity,
4. principle of impartiality,
5. requirement of comprehensive and careful clarification of facts,
6. cooperation between authorities and the involved individuals
7. right of representation and access to information
8. right to hearing
9. right to inspection of files
10. principle of reasons for acts
11. data protection
12. protection of acquired and practiced bona fide rights

These guarantees cannot be disregarded by the proceeding authority while implementing an EU law, even when the relating national law does not recognise these principles.⁸

The legislation of administrative procedure – as I have already mentioned – not only have to be based on, but have to be applied and interpreted according to these principles.

Application and interpretation means if national procedural law assign law of equity, discretionary powers or decision right to the authority concerning an EU related case, then, within these possibilities only those decisions can be made that are in accordance with the aims of EU law.

V) The effect of EU requirements on administrative judicial procedure

Following the examination of the related EU judicial procedure it can be stated that not only the administrative authorities have to take EU specifications into consideration when implementing EU law, but also those courts, or administrative courts, which proceed in administrative cases as the authority of judicial remedy.

There are such decisions⁹ of the European Court of Justice, which explicitly set requirements concerning the judicial body. The most important relating requirements are the following:

1. The proceeding court can only suspend the implementation of a EU law based decision if there is a well-grounded suspicion concerning the validity of the underlying EU norm.

2. The proceeding court can only enact a temporary measure when judging an underlying EU decision, if

- a.) there is a well-grounded suspicion concerning the validity of the underlying EU norm,
- b.) the court intends to turn to or has already turned to the European Court of Justice concerning validity,
- c.) irreparable damage would occur without enacting a measure and
- d.) the applicants interests are more powerful than the interest of applying EU law

3. When the applicant sues a member state at the member state's court based on a directive, the given member state cannot refer to the expiration of the deadlines of the procedures, until the EU directive is entirely transposed to the national law.

In order to be precise, it is worth mentioning, that the listed principles and the practice of the European Court have to be taken into consideration only, if the given legal EU specification does not contain any concrete procedural rule concerning the given question.

VI) The Hungarian administrative procedural law and the EU requirements

Act no. 140 of 2004 on the general rules of the public administration authority procedure and service has several references related to the European Union and to the EU acts.

First of all, according to the preamble of act no. 140 of 2004, the aim of the act was to "create harmony with the requirements of operating as an EU member state, make the extension of

⁸ R Thienel, *Verwaltungsverfahrenrecht*, Verlag Österreich, Wien, 2002, p. 65.

⁹ Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe (Case 143/88); Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn (Case 92/89); Atlanta Fruchthandels-gesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft (Case 465/93); Fantask A/S and others v Industriministeriet (Case 188/95).

international cooperation possible during the administration of official cases and make direct cooperation with foreign authorities possible”.

In the following I am going to refer to those important decrees which have to be applied if the EU acts differ from act no. 140 of 2004.

- The “European Union binding (highlighted by me: A.F) legal act” may contain rules different from act no. 140 of 2004 concerning legal authority.¹⁰

- The provisions of law concerning administrative actions, that are not mentioned in section 13 paragraph (1) and (2) in act no. 140 of 2004, can only differ from the provisions of act no. 140 of 2004, if this act explicitly allows it or if it is necessary to implement legal acts of the EU or international agreements.

- EU law may overwrite the rules concerning legal authority of act no. 140 of 2004.¹¹

- The legal acts of the European Union may authorise the proceeding Hungarian and foreign authority to sign a cooperation agreement in order to mutually promote their joint implementation of their official tasks.¹²

- Transmitting personal data may happen according to the legal acts of the European Union within the framework of international legal assistance¹³

- The authority, if otherwise provided by the legal acts of the European Union, refuses the fulfilment of the foreign petition even if the petition complies with the rules of act no. 140 of 2004.¹⁴

- Foreign decision can be implemented based on the acts of the European Union, on international agreement or on reciprocity.¹⁵

- A decision, made by a Hungarian authority, can be implemented in a foreign country based on the acts of the European Union, on international agreement or on reciprocity.¹⁶

If one thinks it over again, that the primacy of the European law is obvious in the member state’s administrative law as well, than the rules of the act no. 140 of 2004 are nothing more than tautology.

That is EU law has primacy, irrespective from the act no. 140 of 2004, while implementing an EU law. Therefore it is completely irrelevant whether or in what relations the act no. 140 of 2004 mentions the possibilities of different rules of EU law. The regulation is tautological, since act no. 140 of 2004 generally says that “if the directly applicable legal act of the EU or an international contract defines a procedural rule in a case that is subject to the effect of this act, than the regulations of this act is not applicable”¹⁷.

Act no. 140 of 2004 needlessly complicates the situation with sub-rules. For that matter, theoretically, the primacy of EU law principle could have been included in act no. 140 of 2004. However, omitting this principle does not mean that the EU norm does not precede the application of act no.140 of 2004 (or other procedural law).

VII) The most critical points of administrative procedure – from the point of view of the EU

I shall begin with those regulations of act no. 140 of 2004 that are clearly beyond the EU law or the practice of the European Court, like for example the client definition of the act in point.

According to act no.140 of 2004, “client is a legal or natural person or unincorporated body, who’s right, legitimate interest or legal status is affected by the given case, who is involved in administrative supervision or about whom the official register contains data, including his/her property, rights or assets.”¹⁸ The practice of the European Court of Justice – especially if it concerns the direct applicability of the EU directives – shows the tendency that a right or legitimate interest based on Community law substantiates client status.¹⁹

¹⁰ para. 10, art. 3 of Act.

¹¹ See para. 18, art. 1-2; para. 121, art. 1 of Act.

¹² para. 27, art. 5 of Act.

¹³ para. 27, art. 6 of Act.

¹⁴ para. 28, art. 1 of Act.

¹⁵ para. 144, art. 1 of Act.

¹⁶ para. 147, art. 1 of Act .

¹⁷ para. 13, art. 4 of Act.

¹⁸ para. 15, art. 1 of Act.

¹⁹ D Leeb, *Rechtsprobleme der Umsetzung des Gemeinschaftsrechts im Verwaltungsverfahren*, In H. F. Köck (ed), *Die Umsetzung des Gemeinschaftsrechts im innerstaatlichen Recht*, Johannes-Kepler-Universität, Linz, 2005, pp. 138-140.; J Hengstschläger, *Verwaltungsverfahrensrecht*, WUV-Universitätsverlag, Wien, 2004, p. 53.

Language use can also be a sensitive area from the judiciary point of view, if a citizen of the EU is involved in as a client.

Basically, according to act no. 140 of 2004, the official language of the procedure is Hungarian. If the administrative authority is not of Hungarian nationality, and it starts a procedure with immediate steps in a case of a non-Hungarian speaking client during his/her residency in Hungary, or a natural person client turns to the Hungarian administrative authority for immediate legal aid, the authority must ensure that the client is not in a disadvantaged position due to the lack of Hungarian knowledge.²⁰

A client without Hungarian knowledge – besides bearing the costs of translation and interpretation – can request the administrative authority to consider his/her plea in his/her mother tongue or in another mediator language – in cases that belong to neither of the above mentioned cases.

Act no. 140 of 2004 adds that “rules, other than (1) section, can be applied in administrative cases regulated by the compulsory acts of the EU or international agreements.”²¹

The quoted rules of act no. 140 of 2004 do not make the specifications obvious for the legislator, in case there is a citizen of the European Union among the clients. For my part in this context I would highlight the following:

- The procedure can proceed in Hungarian even if a citizen of the EU, other than Hungarian, is involved.

- The authority must pay extra attention in the case of an EU citizen, to ensure that he/she does not face any disadvantage as a result of not knowing the Hungarian language. Extra attention is also necessary, if the case does not involve immediate actions or there is no request for immediate legal aid.

- This does not mean that the EU citizen is not expected to have language knowledge, or to provide an interpreter in default of knowing Hungarian,

- The above mentioned statements still remain relative: they can be applied if the EU norm disposes otherwise.²²

In general, from the Hungarian point of view, it can be stated that when implementing EU law, probably the most critical point of law application is that the official in charge not only has to know the relating EU law and the practice of the court, but he/she has to apply it also.

VIII) Conclusion

The links between EU law and the member state's administrative procedural law are not related to the problems of competency sharing²³ between the member states, but they are related to the practice of competencies created by Community law.

During the practice of these competencies, that are based on EU law, the administrative authority of the member state can find itself in a situation, when it has to ignore the applicable national law and it has to proceed primarily according to Community law and practice.

The authority must proceed in a way, which its primary aim is not to focus on national common interest and legitimacy but to implement Community goals formulated as a general rule and especially in the given EU act.

Dissolving this conflict – as the cited cases show – is not an easy task.

²⁰ para. 9, art. 1; para. 10, art. 1 of Act.

²¹ para. 10, art. 2,3 of Act.

²² See F O. Kopp, U Ramsauer, n 5 above p. 321.

²³ More A J Gil Ilbanez, *A közösségi jog ellenőrzése és végrehajtása, A nemzeti és az európai közigazgatások szerepe*, Osiris, Budapest, 2000, p. 50.