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Note on the Legislation Governing Administrative Courts

Executive Summary

- Independent Administrative Courts are not without precedent in Hungary. It was the Socialist approach to jurisprudence that abolished, as unnecessary, the system which operated from 1896 to 1949.
- Administrative justice provides legal oversight over the actions of administrative bodies which have legal effect, thus offering legal protection against executive overreach.
- The effectiveness of the administrative justice can only be ensured with the application of a procedure centered on judicial review of administrative acts, the assignment of judges in possession of special expertise and an autonomous institutional system.
- 2015 saw the beginnings of preparations for regulating administrative justice. Following consultations with the academic sphere and the representatives of professional bodies, first the Code on Administrative Court Procedure was passed in 2017 then the legislation on the independent Administrative Courts was adopted in 2018.
- The Hungarian legislation governing the institutional system of the Administrative Courts is modeled on the German regulation. There are 16 member states of the EU whose constitutions mention independent Administrative Courts in one way or another, thus the Hungarian law is far from unique.
- Administering the organizational structure of the independent Administrative Courts is in the competence of the Minister of Justice, however, the Minister can only recommend the appointment of an applicant as administrative judge from a list adopted by consensus by judicial councils.
- The Administrative Courts are protected from ministerial overreach or malpractice through the possibility of appeal, guarantees regarding the adoption and modification of the budget and the stringent regulation on the appointment of judges.
- Criticism directed at the law is fundamentally political in nature. The law itself is fully in line with the models already implemented in fellow EU member states.

PRECURSORS

The system of Administrative Courts separate from ordinary courts are not without precedent in Hungary. In our legal system, following the separation of public administration from the judiciary, it was Law XLII of 1883 that created the Financial Administrative Court which, in turn, formed the basis of Law XXVI of 1896 instituting the fully independent system of Administrative Courts. Therefore, an institutionally independent forum of Administrative Courts, with the ability to render material judgement was set up as an organic development in Hungarian law. **The Hungarian Royal Administrative Courts was abolished in 1949 – at a time at which according to our Constitution (Fundamental Law) we lacked sovereignty – thus we are reinstating an achievement of our historical constitution by once again creating a system of independent Administrative Courts from January 1, 2020.**

In the period following 1949 the competencies formerly assigned to the Administrative Courts were taken over by the regular courts, however judicial protection was incomplete. An extension of competences of administrative courts was made possible **by the 32/1990. (XII.22.) ABH Constitutional Court Decision calling on the Government to submit, no later than January 31, 1991 to the Parliament a bill to provide for judicial oversight of the legality of administrative acts in harmony with the Constitution in force at the time, the Law XX of 1949.**

The Law XXVI of 1991 on the extension of judicial oversight of administrative acts created the most basic procedural preconditions, however judicial oversight under the Law III of 1952 on the Code on Civil Procedure (hereinafter: CPC) was by default ad hoc. There were sever changes to the Law and decisions of the Constitutional Court (i.e. 39/1997. (VII. 19.) ABH Constitutional Court Decision regarding the substantive nature of oversight) which shaped the regulation passed in 1991. **However judicial oversight of administrative decisions continued to be characterized by a lack of an overarching Code on procedure and independent organization.** Those courts that were organized on the county level with jurisdiction over administrative matters had their names as well as their level in the institutional organization (county or local) changed several times, **but judicial oversight of administrative decisions was carried out by judges having a different view and being specialized in civil matters, under the regulation of the CPC. As a result, since the change of regime, legal scholars have kept looking into the legislation with hopes of reintroducing a system of independent Administrative Courts into Hungarian law.**

THEORETICAL BASIS

Professional literature recognizes three main models of regulation: the English, French and German models. The English model contains ordinary courts vested with the competence of administrative justice. According to the French model there are specialized authorities, bodies within the administrative framework that provide judicial oversight**. In the German model there is a separate branch of the judiciary independent both from the administrative framework and the ordinary courts providing judicial oversight. The Hungarian regulation in force until 1949, as well as the system to be introduced from 2020 follows the German model.**

THE CODIFICATION PROCESS

In May 2014, Minister of Justice László Trócsányi announced that he considered it a task of paramount importance to reform procedural law – regulating the administrative justice was a major part of this. The process was kick started by the Government resolution (1011/2015 (I. 22.) on the elaboration of the concept of the Code on Administrative Court Procedure and the Government resolution (1352/2015 (VI. 2.) on the members and responsibilities of the Codification Commission of the Code of Administrative Court Procedure. Codification was coordinated by a generally recognized expert in the field of administrative justice as ministerial commissioner. Numerous representatives of the academical sphere and highly experienced professionals contributed to the process. The proposed bill on Administrative Court Procedure was made public on April 3, 2016 and **was submitted to public scrutiny and debate** until April 15. The aim of the bill was on one hand to summarize the rules related to administrative justice into a separate law and on the other to set up a system of independent Administrative Courts with instances of regional jurisdiction ie. exclusive competence in multiple counties and an Administrative High Court.

ADOPTION OF THE LAW ON ADMINISTRATIVE PROCEDURE

On September 23, 2016 the Government submitted Bill **T/12234 on administrative procedure to the Parliament**. However, the bill was only adopted on December 6, following several amendments as there was no consensus on changing the organizational structure of the judicial system. As a result, the adopted law would not create new courts but assigned new competences to existing courts. The president sent the law to the Constitutional Court for review and on January 13, 2017 the Court struck down several of its provisions regarding the new competences and as a result the **Parliament had to adopt the amended Code on Administrative Court Procedure anew, which happened on February 21, 2017.** The Law was made promulgated on March 1, 2017 and came into force on January 1, 2018.

ADOPTION OF THE LAW ON ADMINISTRATIVE COURTS

The personal and institutional prerequisites for Administrative Courts are not currently in place. Due to the extremely multidimensional nature of administrative justice the possibility for specialization must be provided for. That is, judges must focus exclusively on administrative matters and specialize further within the administrative field. As a result, it becomes necessary in certain fields of administrative justice to have a court with a country-wide jurisdiction to settle certain administrative disputes. The **Parliament adopted the Seventh Amendment to the Constitution (Fundamental Law) on June 20, 2018 which mandated the establishment of Administrative Courts**. In the wake of this event the Government restarted the codification of the regulation on the organizational structure of the Administrative Courts with the assistance of a committee of experts. On October 25, 2018, **the Ministry of Justice submitted to public scrutiny and debate two bills: one on the Administrative Courts and another on the entering into force of the Law on Administrative Courts and certain transitional provisions**. Comment on the bills was invited until October 30, 2018. Subsequently the Government initiated discussions with the parliamentary political parties and, on November 6, 2018 bills T/3353 and T/3354 were submitted to the Parliament. The general debate was held on November 14. The detailed debate was conducted on November 20 and December 6. The final vote was on December 12.

ABOUT THE LAW ON ADMINISTRATIVE COURTS IN GENERAL

Of the two laws promulgated on December 21, 2018, Law CXXX of 2018 on the Administrative Courts will come into force on January 1, 2020 while Law CXXXI on the entering into force of the Law on Administrative Courts and certain transitional provisions came into force on February 1, 2019. The most important substantive element of the laws is that **eight administrative courts will be set up** (Budapest Capital, Budapest Environs, Debrecen, Győr, Miskolc, Pécs, Szeged, Veszprém) **along with the Administrative High Court.** Territorial jurisdiction of these courts will correspond to the territorial jurisdictions of the Administrative and Labor Courts with regional jurisdiction under the Code on Administrative Court Procedure. In a small number of special cases, such as cases pertaining to elections or referenda, norm review of decrees issued by local governmental institutions and lawsuits against the decisions of authorities regarding the exercise of the right to assembly, the Administrative High Court will act as a court of first and supreme instance. The purpose of the regulation is that the Administrative High Court has an active role in adjudicating certain cases and that appeal could, in all cases, reach it. All other cases that the Code on Administrative Court Procedure refers to regional courts (ordinary courts in county level) and particularly to the Budapest Capital Regional Court will remain under the sole jurisdiction of the Budapest Capital Administrative Court. Labor matters will remain at the county level.

ON THE LEGAL STATUS OF JUDGES

The legal status of judges will not change in any substantial way: in complete accordance with the Constitution (Fundamental Law) **the safeguards for judicial independence remain intact**, the Constitution (Fundamental Law) makes no distinction between an administrative judge and an ordinary judge. Under the Law on Administrative Courts, paragraph 64 (1), **an administrative judge is a member of the unified judiciary**. Only minor deviations from standards applied to ordinary judges are permitted in the case of administrative judges when evaluating professional experience, and in absence of other regulations the Law on the Legal Status of Judges remains applicable. **Those judges who are currently ruling in administrative cases, provided they apply before April 30, will automatically be transferred to Administrative Courts** or the Administrative High Court. Further, if a high level post terminates (as there will be less of these) a holder of this post, if appointed for a fixed-term, will continue to receive the remuneration for the duration specified in the nomination for the post.

RULES PERTAINING TO THE FILLING OF THE POSTS OF JUDGES

Regarding the calls for applications to appoint judges it should be noted that **the Law on Administrative Courts deviates from regular rules only where administrative experience is concerned** (paragraph 65). Conditions not enumerated by law may only be set if the post requires special expertise; such conditions may only be set in direct reference to said expertise and must be clearly identified in the call for applications. 80% of the point total of a call must be apportioned based on an objective evaluation of the applicant's qualifications, professional knowledge and experience (paragraph 70) and pertaining to the evaluation of this, objective part of the tender **there will appeal to the Disciplinary Court.** Stricter rules will apply to declaring calls for applications failed in the cases of administrative judges and judges in senior positions compared to the rules that apply to the ordinary courts.

During the application process, **first the council of judges of the court in situ will provide an opinion, then the National Administrative Judicial Council's (NAJC) Personnel Council will determine the objectively apportioned points**, and then it will hold interviews and apportion subjective points (20% of the total score). Only those applicants will be brought to the attention of the Minister who are within 85% of the score garnered by the leading candidate and above 50% of the total score attainable**. The Minister can only deviate from the leading candidate and the sequence of the list submitted to his attention following an interview, based on a reasoning submitted to the President and the NAJC. Declaring a call for applications failed, in general, can only happen due to a recommendation from the NAJC.**

ADMINISTRATIVE COMPETENCE OF THE MINISTER

The president judge of an Administrative Court is appointed by the Minister of Justice and he will also act as employer for purposes of labor law, **this however in no way means that the Minister can infringe upon the judicial autonomy of the judge**. The Minister cannot give instructions **in connection to any matter under adjudication, and has no influence over case assignment**. Case assignment will be determined by the president of the court in view of the advice received from the administrative judicial council by the December 1 latest of the preceding year. Further, it is important to underline that the President of the Administrative High Court is elected by the Parliament, which serves as a guarantee of independence.

FURTHER GUARANTEES OF THE JUDICIAL INDEPENDENCE OF ADMINISTRATIVE COURTS

The budget set aside for the functioning of the Administrative Courts is determined by the Parliament as a separate chapter of the budget and consequently it can only be modified by the Parliament. The Parliament will decide on the budget taking into consideration the recommendation of the Minister, the President of the Administrative High Court and the NAJC (paragraphs 30-31). Modifications to the budget will require the consent of the Chief Judge of the Administrative High Court and the NAJC (paragraph 32).

Frequently Asked Questions Regarding Administrative Justice

1. Why was the new Code on Administrative Court Procedure necessary?

There is a consensus among academic circles that for a dispute between an administrative body and a client, in contrast to the otherwise generally used concept of equality between private parties is insufficiently applicable for the purposes of subjective and objective legal protection due to the asymmetric legal relationship of the parties. With its procedures and general clause defining its objective jurisdiction the Code on Administrative Court Procedure **seeks to provide protection of rights in a dispute with the state without recourse to special regulation** (effective legal protection). Previous legislation was insufficient in this regard.

2. Why was a new judicial organization necessary?

Administrative justice requires not only special procedural rules, but also special judicial expertise. A professional environment must be created where judges might gain experience in the particular field (a high number of cases) and might concentrate on a certain type of cases (specialization).

3. What other countries have similar judicial structures to that of Hungary?

A majority of EU member states have judicial systems with partially or fully separate, independent Administrative Courts. The constitutions of 16 EU member states provide for a rule on Administrative Courts **– where administrative justice is separate from ordinary courts, for the most part, this separation is provided for in the constitution**. **There are ten countries with fully separate, multi-level administrative judiciary, these are: Austria, Bulgaria, Finland, Germany, Greece, Poland, Latvia, Lithuania, Luxemburg, Portugal and Sweden**. In the Czech Republic there is only an Administrative High Court, ordinary courts act as courts of first instance. In Croatia and Slovenia, the Administrative Courts are subordinated to the Supreme Court. In Estonia, Malta and Spain administrative courts are only present on the first instance level. In Cyprus the Supreme Court acts as a single instance administrative court.

4. Why does the Minister of Justice have administrative competence over the Administrative Courts?

There is ministerial oversight in several EU member states. The ministers of justice of Austria, the Czech Republic, Germany and Finland exercise administrative oversight over the administrative courts. In Sweden and Latvia special judicial bodies subordinate to the ministers exercise such rights. Another approach to administering the judiciary, namely self-regulation was tried out in Hungary from 1997, but there was an academic consensus for abolishing it. Legislation created a new Judicial Office to exercise oversight in 2011. Administrative Courts require special administration and as such cannot be integrated with that of the ordinary courts. A further argument for ministerial administration of the Administrative Courts is that the Minister of Justice is politically accountable to the Members of the Parliament.

5. Why is an Administrative High Court necessary?

The legislative intent was to set up a full-fledged, autonomous system with appeal provided for within the administrative justice structure. Further, an autonomous judicial system presupposes a judicial level that acts as a court of final instance and thus provides for among other considerations, the uniformity of judicial practice.

6. Why are Administrative Courts with regional territorial jurisdiction necessary?

Statistical data on the judicial system studied during the codification process showed that the county level would not generate the caseload necessary for judges to specialize. The required judicial expertise can only be attained if cases are adjudicated by panels of three judges on regional courts responsible for multiple counties instead of single judges on the county level.

7. Why is administrative experience in Administrative Courts important?

The source of the substantive and procedural legal expertise required to adjudicate administrative cases is experience earned while in the service of administrative bodies. There were several cases where courts delivered decisions, sometimes even unconstitutional ones, because they used legal approaches from fields other than the necessary administrative legal perspective. **The new legislation's aim is to make sure that experience obtained in the administrative field does not represent a drawback compared to a fellow applicant with judicial experience, or in other words it seeks to ensure that experience from the administrative field is properly valued.**

8. What guarantees are there that the Minister will not make a political appointment?

The Minister can only appoint a judge from a list of the most qualified applicants, primarily in the order of the scores represented on the list. He can only deviate from that order based on strict requirements (personal interviews and reasoning), further, declaring a call for applications failed is tied to a proposal from the NAJC.

9. What guarantees are there that the Minister will not influence the judicial activity of the Administrative Courts?

The Minister's right to appoint court presidents does not result in an ability to issue orders influencing judicial activities. If an administrative decision on the part of the Minister, however, raises the suspicion of the court president that it might affect judicial independence **there is recourse to appeal**. Case assignment is prepared by the court president by December of the preceding year, so that too is beyond influence by the Minister.

10. Why do some seemingly politically sensitive cases fall under the jurisdiction of Administrative Courts?

Jurisprudence clearly determines which cases fall under the auspices of Administrative Courts. Some cases such as norm review of decrees by local government institutions, cases pertaining to the right to assembly and election related cases not only figure the State as a party, but also carry additional weight due to the public interest (the legal relationship crosses the threshold into public law) – sometimes a particular case might become politically significant purely due to the presence of the State as party. The uniform nature of administrative justice requires that the classification of all cases follow from their legal significance, not fleeting political fancy.