

Hungary: The Europeanization of Judicial Review

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1 INTRODUCTION

In this report, we are going to discuss the changes affecting the judicial review of administrative action in Hungarian administrative law which have followed from Hungary's membership in the European Union and in the European Convention on Human Rights. We aim to identify the areas where pressures of legal convergence have emerged from European obligations. We also seek to explore what factors may lead to resisting the domestication of European influences. We are concerned specifically with European influences on the doctrine and practice of judicial review in Hungary and also with the question of whether European requirements could be adequately grafted onto the applicable domestic constitutional framework. The application of European law has now become an everyday exercise for Hungarian administrative authorities and courts, and domestic and European principles and doctrine now together determine the judicial supervision of administrative decisions. Although the article discusses matters that are specific to Hungarian administrative law, the dilemmas addressed have also emerged in other jurisdictions and, therefore, have a more general relevance.

With Hungary's 2004 entry into the European Union, public authorities were confronted with the novel task of applying and enforcing directly effective and directly applicable substantive and procedural provisions of EU law, the breach of EU law became a ground for establishing the illegality of administrative decisions, and the rights and principles following from EU law had to be taken into account in determining procedure and remedies before administrative authorities and courts. Since 1992, Convention rights, Articles 6 and 8 ECHR in particular, have formulated important legal benchmarks for administrative procedures and for courts proceeding in judicial review. In Hungarian administrative law, the process of legal adaptation to European requirements has led to controversial and constitutionally problematic developments. First, domestic administrative law, as other administrative laws in Europe, has been divided into separate domains where European and where domestic law is applied depending on the circumstances of individual cases.¹ This duplication of administrative law under European influence is most problematic when the applicable domestic and European principles and doctrine are different and there is a possibility, questionable under the rule of law, that similar cases will be decided differently under different bodies of law. Second, domestic administrative law relying on legitimate constitutional and doctrinal reasons is inclined to resist certain changes induced by the Europeanization process. The application of the principle of proportionality following from EU and ECHR law in the judicial review of administrative discretion appears to contradict the

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¹ See in this regard M. Fernandez Esteban, 'National judges and Community law: The paradox of the two paradigms of law' (1997) 4 MJCEL 143; J. Bell, 'Mechanisms for cross-fertilization of administrative law in Europe', in J. Beatson and T. Tridimas (eds.), *New Directions in European Public Law*, Hart Publishing, Oxford, 2000; C. Hilson, 'The Europeanization of English administrative law: judicial review and convergence' (2003) 9 EPL 125.

domestic principles determining the limits of the supervisory jurisdiction exercised by courts in judicial review in Hungarian law. In such circumstances, the resolving of tensions between domestic and European law requires the reassessment of law and doctrine on the domestic level. It needs to be examined, in particular, whether in light of European requirements domestic law and doctrine is sufficiently developed and whether the constitutional regulation of judicial review in Hungary needs to be reformed.

Arguably, these dilemmas could represent a case for furthering the influence of European law in Hungarian administrative law. Restoring the coherence of domestic administrative law and re-introducing economy and simplicity in the application of the law, in order to avoid the confusion and inequality caused by the duplication of the law, could require a legal spill-over from the law followed in European cases to the law applied in ordinary domestic cases. The reinstatement of the complete influence of traditional domestic doctrine is no longer viable. This, however, assumes a voluntary accommodation of European influences in domestic law, beyond the actual obligations following from law, and it necessitates a commitment from domestic actors to consider in a bottom-up process how European requirements could be integrated into domestic law. This latter needs to be integrated into a general overview of domestic administrative law and doctrine. The accommodation of European principles, such as the principle of proportionality, requires the adjustment of the constitutional doctrines of judicial review and Hungarian courts alone seem unwilling to undertake that task without explicit constitutional and legislative authorization. Change is inevitable as resisting, or delaying, the application and proliferation of European principles in purely domestic areas of administrative law would conserve a constitutionally unsustainable situation.

In Hungary, judicial review and administrative justice constitutes an area markedly distinct, as a matter of doctrine and practice, from civil or criminal justice. Its central purpose is to enable the control of the legality of administrative decisions by ordinary courts. The procedure for judicial review is regulated in separate provisions in the Code on Civil Procedure and, at first instance, jurisdiction for judicial review is given to separately organized administrative courts.² In the later phases of the procedure, jurisdiction is exercised by the administrative chambers of higher ordinary courts. The judicial control of the administration is regarded as a concrete manifestation of the separation of powers doctrine recognized in the Hungarian constitution which gives a special constitutional position to administrative justice within the Hungarian justice system. Under the current constitutional arrangements, the Constitutional Court is endowed with competence to control the compatibility of judicial decisions, including those delivered in administrative cases, with the Fundamental Law.

The recently adopted new Fundamental Law of Hungary has made the supervisory jurisdiction of ordinary courts more complete on the constitutional level. The Curia, the highest ordinary court of the country, was given the jurisdiction, which previously had been exercised by the Constitutional Court, to control the legality of legislation adopted by local authorities. The next step in this process, if it is regarded as a process of constitutional reform, could be the extension of the supervisory jurisdiction of the Curia to all legislation adopted by the executive including legislation (regulations) passed by the government, by ministries, or by regulatory agencies. This change would lead to a novel distribution of functions between the judiciary and the Constitutional Court in which ordinary courts supervise both legislation

² On the recent alterations in the Hungarian system of administrative justice, see K. F. Rozsnyai, *Änderungen im System des Verwaltungsrechtsschutzes in Ungarn* (2013) 9 *Die Öffentliche Verwaltung* 335. Administrative and employment courts are both organized alongside the system of first instance local courts.

and administrative action by the executive and the Constitutional Court exercises its powers of constitutional review with regards legislation adopted by Parliament.

The Hungarian system also contains non-regular avenues of legal redress against administrative decisions. These include trespassing cases where the legal office (the chief legal officer) of local authorities (“jegyző”) decides at first, which decision can then be challenged before first instance courts proceeding in civil matters. Their separate treatment is explained by the fact that the decision of the local authority affects matters of property and, therefore, full jurisdiction must be made available for the first instance court to re-examine the case on the basis of property law. The purpose of the procedure before the legal office of the local authority is to ensure that expedient legal redress is available against trespassers. Subsequent judicial involvement ensures that a complete legal re-examination of the administrative decision is offered to individuals before a court of law.

Public authorities may also proceed in cases involving minor criminal offences (misdemeanours) (“szabálysértés”), the decisions in which are typically open to challenge before first instance criminal courts. Upon its accession to the European Convention on Human Rights, Hungary submitted a reservation regarding the exemption of these administrative decisions from judicial review.³ The reservation was in force until the 1999 re-regulation of the area,⁴ which was again re-regulated in 2011,⁵ when in compliance with the ECHR judicial review was made available against decisions brought by public authorities in this area. In Hungarian law, administrative decisions concerning minor criminal offences and its judicial control are not regarded as constituting part of the system of administrative justice. They are distinguished from ordinary administrative cases, for instance, from the imposition of penalties for the breach of requirements laid down in administrative law on the basis of the different concepts of legal responsibility used in the two areas. While in minor criminal cases responsibility is established on the basis of categories used in criminal law, such as criminal intent and criminal negligence, administrative responsibility is based on a more objective and perhaps less developed system of responsibility. There are no further major doctrinal differences and the distinction whether a breach of law will fall under administrative law or under the law of minor criminal offences depends on the discretion of the legislator. In recent years, there was a considerable shift towards reclassifying minor criminal offences as administrative offences.⁶ The most significant change in this regard was the decriminalization of road and traffic offences, which are now subject to an objective (strict) system of administrative sanctioning. The rationale of the modification was that it had been nearly impossible to prove subjective/individual responsibility for the majority of these offences. Under the current system, the objective administrative fine can be imposed not only on the driver but, in case the driver remains unidentifiable, also on the owner of the motor vehicle without the public authority being required to prove which person committed the offence. Neither trespassing cases, nor cases involving minor criminal offences are examined in this article as part of the Hungarian system of judicial review of administrative decisions.

In the following, we are going to focus on three problem areas within the broader theme of the Europeanization of judicial review in Hungary. They involve domains where domestic doctrine appears to be in contradiction with European influences and where the legal disjunction of ordinary and European segments of domestic administrative law is a genuine possibility. These are the right to a fair administrative process, the right of access to judicial

³ Act 1993: XXXI, Section 4.

⁴ Act 1999: LXIX.

⁵ Act 2012: II.

⁶ For instance, the violation of smoking regulations is now an administrative offence.

review, and the judicial review of the use of administrative discretion, in particular, by means of the proportionality principle. We are going to concentrate on the influences emerging from EU membership and from the ECHR which have had broader doctrinal implications. We are not going to address the changes introduced following ECHR requirements which affected individual cases or particular areas of Hungarian administrative law. Before addressing these issues, however, we need to provide a short introduction to the law and doctrine of judicial review of administrative action in Hungarian law and we need to revisit the relevant European requirements.

2 THE JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN HUNGARY

According to Article XXVIII paragraph 7 of the Chapter of the Hungarian Fundamental Law on ‘Freedom and responsibility’, every person has a right to legal redress against judicial and administrative decisions which violate his or her rights or legitimate interests. This provision provides the constitutional foundation of the judicial review of administrative action in Hungary. The Hungarian system of administrative justice is operated by ordinary courts on three distinct layers of jurisdiction. General first instance jurisdiction in administrative cases is exercised by the 20 administrative courts, which as mentioned earlier are distinct from ordinary civil and criminal courts only in their organization. Appeal to appeal courts is allowed only in a special group of cases, indicated below, where decisions are reached in a single instance administrative procedure. Against the first instance and the appeal judgments, extraordinary appeal on questions of law may be submitted to the Curia (formerly called as the Supreme Court of Hungary) which will be examined by judicial chambers designated within the special administrative and employment law division of the Curia. The Curia is also endowed with the task of monitoring the practice of lower courts under its constitutional responsibility to maintain the uniformity of judicial practice in Hungary.

The statutory regulation of administrative procedure in Hungary⁷ recognizes, as a norm, that first instance administrative decision-making is followed by an appeal within the administration, which could then be challenged in judicial review in a single instance process. There is a special group of administrative cases where administrative decision-making takes place on a single instance (competition decisions of the Hungarian Competition Authority, decisions of the Hungarian National Bank on banking supervision, decisions of the Hungarian Public Procurement Authority, decisions of the National Media and Infocommunications Authority, or the decisions of the Hungarian Energy and Public Utility Regulatory Authority) and the first instance court proceeding in judicial review is, as a result, provided with jurisdiction to reform the administrative decision. In such instances, appeal against the first instance judgment is available to the Budapest Metropolitan Court which is a regional court located in Budapest with appeal jurisdiction reserved for such matters. Its judgments may be challenged in extraordinary appeal before the Curia.

The Fundamental Law contains further provisions relevant for judicial review. Article XXIV paragraph 1 of the Chapter on ‘Freedom and responsibility’ holds that every person has the right to have his or her case decided by administrative authorities in a reasonable time in an impartial and fair procedure. This also includes the obligation of public authorities to provide reasons for their decisions, as determined in statute. This constitutional provision, which also appears in the Act on Administrative Procedures as the right to fair (good) administration,⁸ must be distinguished from the separate constitutional right to a fair judicial

⁷ Act 2004:CXL on the general rules of administrative procedures and services rendered by the administration.

⁸ Article 4 Paragraph 1 of Act 2004:CXL.

process. The right to a fair judicial process is regulated by Article XXVIII paragraph 1 of the Fundamental Law as the right to have criminal charges against a person or civil rights and obligations determined within a reasonable period of time in a fair and open trial by an independent and impartial court established by law. The right to fair administration does not contain the requirement of independence and, arguably, its impartiality requirement operates with a lower threshold than that of the right to a fair judicial process.

Access to judicial review, as we saw earlier under Article XXVIII paragraph 7, is regulated in the Fundamental Law as the right to legal redress being available to every person the rights or legitimate interests of whom have been violated by a decision of an administrative authority. On the level of statutes, access to courts in administrative cases is regulated in the following manner. The Act on Administrative Procedures holds that parties to administrative procedures are persons the rights or legitimate interests of whom are affected by the case, who have been brought under administrative investigations, or regarding whom official databases contain data.⁹ The same statute also provides that standing in judicial review to challenge administrative decisions before a court of law is available to the parties of the administrative procedure, or to any other participant in the procedure.¹⁰ The latter may only challenge components of the administrative decision which were addressed to him. There are a number of administrative procedures where the applicable statute narrows the general statutory definition of what persons constitute as parties to the administrative procedure. In such instances, standing in judicial review would also be allowed to those who under the specific statutory provisions do not but under the Act on Administrative Procedures would qualify as parties to the procedure. This follows from Article XXVIII paragraph 7 of the Fundamental Law which, as indicated above, provides the right to legal redress to every person the rights or legitimate interests of whom have been violated by an administrative decision.

The law recognizes an important difference between the scope of appeal to the second instance administrative authority and the scope of judicial review. In the appeal, the party may make submissions on any relevant matter, including the illegality of the administrative decision, which does not affect him or her directly, or which does not violate his or her rights or legitimate interests. The abuse of discretion by the public authority or matters of expediency may also be raised. In contrast, in a claim for judicial review the party may only raise matters of administrative illegality which directly violates his or her rights or legitimate interests. This distinction was recognized by the courts in the formula that although the individual may have a right of access to judicial review, he or she may not have standing in judicial review in all matters raised.¹¹ In general, the narrow interpretation of the scope of judicial review and the relevant standing requirements could prevent the effective judicial control of the administration, which is particularly problematic in Hungary where the current interpretative approach of courts, depending on the circumstances of the case, could be regarded as overly restrictive.¹²

As in other jurisdictions, the scope and intensity of judicial review is a matter of constitutional importance and the relevant doctrines and principles of administrative law are

⁹ Article 15 Paragraph 1 of Act 2004:CXL.

¹⁰ Other participants of the procedure are expert witnesses and witnesses in connection with their fees and reimbursement of their costs.

¹¹ Standing in judicial review is a doctrinal concept in Hungarian law the applicable law on which is deduced by academics and practitioners from the standing provisions of the Code on Civil Procedure.

¹² See in this regard, M. Eliantonio et al. (eds.), *Standing Up for Your Right(s) in Europe: A Comparative Study on Legal Standing (Locus Standi) before the EU and Member States' Courts*, Intersentia, Antwerp, 2013, pp. 62-85.

based directly on constitutional principles and rules. The relevant judicial practice in Hungary acknowledges the constitutional relevance of judicial review and for this reasons courts exercise the jurisdiction available to them with restraint. The strict observance of the constitutional boundaries of judicial review by courts could, however, undermine the interest of the effective judicial control of the administration and it may jeopardize the right to effective judicial redress. It has been suggested that a strict approach towards the review of legality cannot be regarded as ensuring the effective review of administrative discretion.¹³ The strict constitutional approach of Hungarian courts also faces a challenge from EU law. In the judicial review of decisions of national regulatory agencies overseeing regulated markets, the regulatory and administrative activities of which are based on EU law, following the practice of other national courts Hungarian courts are required to observe a general obligation to ensure the effectiveness of judicial control and the extend their scrutiny to questions of legality, fact and policy.¹⁴

As a matter of scope, in Hungarian law, the judicial review of the legality of administrative action covers both breaches of procedural and substantive law and it excludes the review (the judicial reconsideration) of matters belonging to the merit of the administrative decision brought under direct statutory or under discretionary powers. The scope of judicial review is further restricted by the principle that the illegality of administrative decisions following from a breach of procedural provisions may only be established if that breach had an impact on the merits of the decision.¹⁵ We will return to this latter question below when we discuss the impartiality and fairness requirements imposed on administrative procedures.

In light of the requirement of effective judicial redress against administrative action, the most contentious issue in Hungarian judicial practice has been the interpretation of the constitutional limit (prohibition) on courts to examine in judicial review matters belonging to the merits of the administrative decision brought under discretionary powers. As it follows from the relevant statutory provisions and as acknowledged by courts, discretionary decisions by public authorities will be lawful when the public authority has managed to establish the facts of the case adequately, it has observed the relevant procedural requirements, it has taken into account in the use of discretionary powers transparent and relevant considerations, and the administrative decision delivered is reasonable as indicated in the reasons provided by the public authority.¹⁶ In order to explore the meaning of this formula, we first need to discuss the underlying principles and theoretical considerations.

In Hungarian administrative law, the discretionary powers available to public authorities follow direct authorization based on legislation. These include legislative provisions which enable a choice for administrative authorities between different decisional routes under the same factual circumstances. The legislative determination of the discretionary powers available to public authorities is a requirement under the rule of law. It includes, in particular, that legislation must spell out the boundaries of the discretion available and that it must indicate the considerations which need to be taken into account by public authorities acting under discretionary powers.¹⁷ It also follows from the rule of law that

¹³ See in connection with the dilemmas in this area, M. Andenas and S. Zlepting, *Telecommunications dispute resolution: procedure and effectiveness* (2004) 2 *European Business Law Review* 476-633.

¹⁴ P. Larouche and X. Taton, *Enforcement and Judicial Review of Decisions of National Regulatory Authorities*, Cerre (Centre on Regulation on Europe) Study, Brussels, 2011.

¹⁵ Article 339 Paragraph 1 of the Code on Civil Procedure.

¹⁶ Article 339/B of the Code on Civil Procedure.

¹⁷ These decisional alternatives may follow from the framework character of regulation, from the use of inadequately determined legal concepts, or from direct legislative authorization.

making legally unlimited discretion available for administrative bodies must be avoided and that the availability of broad discretionary powers must be restricted to instances where it is absolutely necessary.¹⁸

Generally, the use of discretionary powers by public authorities is guided by considerations recognized as relevant in legislation. These usually follow from terms used in legislative provisions, for instance, terms like ‘rational’, ‘guilty’, ‘unfair’, or ‘relevant’.¹⁹ The use of these terms enables integrating regulatory principles and objectives into the interpretation and application of legislative provisions by public authorities. In case legislation does not identify the considerations relevant for the use of discretionary powers, public authorities remain bound by the fundamental rules of logic and their decisions must be reasonable (“okszerű”). For instance, when only broad parameters are given for administrative sanctions, the imposition of the sanction must follow the legislative parameters and it must also be reasonable (it must be reasonable within the applicable legislative parameters). In other words, in Hungarian doctrine the use of discretionary powers will be lawful when public authorities decide according to the relevant legislative provisions and their decision is the most appropriate in the particular circumstances of the given case.

In Hungarian administrative law, the discretion of public authorities covers not only questions of law but also the assessment of evidence. This latter refers to the ability of public authorities, made available in legislation, to choose under the same evidence submitted to it between different decisional routes in the determination of the facts of the case. Before administrative authorities, just as in case of courts of law, the system of evidence is based on the free assessment of evidence. The public authority examines every piece of evidence individually and in relation with each other, and makes its assessment within its own discretion. This does not allow complete decisional freedom – public authorities are allowed discretionary powers only within the boundaries determined by the law of evidence.²⁰

In this regard, we need to distinguish between the discretionary and the non-discretionary assessment of evidence by public authorities. In the latter case, public authorities are not provided alternative decisional routes and they are bound to establish a certain fact on the basis of a certain piece of evidence. When pieces of evidence contradict each other, public authorities must follow the statutory provisions of the law of evidence.²¹ In case the contradiction remains unresolved on the basis of statutory provisions, the public authority may assess the evidence within its discretionary powers. The discretionary assessment of evidence works in the same way as the use of discretionary powers in the application of the law to decide individual cases. The only differences are that the power is made available to assess the evidence collected to establish the case, instead of discretion being used to decide the case on the basis of the law, and that the relevant considerations guiding the use of discretion are not provided by substantive administrative law but by the law of evidence. In both instances, the use of discretionary powers by the public authority must comply with the requirements of rationality, in other words, it must be reasonable.

¹⁸ It must be noted that Hungarian legal terminology uses the term ‘discretion’ (“diszkrecionális”) to describe instances where the decisional liberty of administrative bodies is legally unlimited. Discretionary decisions are decisions when legislation enables public authorities to make contradicting decisions under similar factual circumstances, and both decisions will be lawful. This is common in competition law when the relevant general legal concepts enable recognizing contradicting but equally valid economic rationales for a conduct, one of which would support declaring the conduct of undertakings illegal and the other lawful.

¹⁹ In competition law, such concepts are ‘effectiveness’, ‘fairness’ in pricing, or ‘demand-side substitutability’.

²⁰ This also follows from the fact that the relevant legal provisions do not include the term ‘free’ before the word ‘discretion’ (‘meggyőződés’) as in Article 206 Paragraph 1 of the Code on Civil Procedure, applicable to courts, and in Article 50 Paragraph 6 in Act 2004:CXL, applicable to public authorities.

²¹ For instance, the legal provisions on the burden of proof and the weight of evidence.

In practice, the use of discretionary powers to decide an administrative case and to establish the facts of a case on the basis of the evidence available may be difficult to distinguish. The relevant procedural rules, the Code on Civil Procedure, recognize two types of questions of fact: simple facts and facts the determination of which requires expert knowledge. Their separation is often controversial, and in special areas of law, such as competition law and the law of regulated markets, where economics-based evidence is used, in many instances it is unclear whether the public authority has to assess a question of expert evidence or a question of law.

The constitutional boundaries of the judicial review of administrative action are based on the prohibition for courts to substitute the assessment of the public authority on matters of substance with their own. The prohibition is a manifestation of the legal principle that administrative decisions may only be subject to judicial review on grounds of illegality. While in procedures for appeal within the administration or before courts interference with the merit of (discretionary) decisions is allowed, the limitation of review to questions of illegality is a characteristic of extraordinary legal redresses including, from this perspective, judicial review. The same applies to extraordinary appeals before the Curia where judicial decisions may only be reviewed on grounds of unlawfulness. In the limited circumstances when appeal is available against judicial decisions brought in judicial review, for example when the judgment brought by the Budapest Metropolitan Court in judicial review against the decision of the Competition Authority is open to appeal before the Curia, that appeal will be restricted to questions of illegality in the same way as the original application for judicial review.

The dividing line between the review of legality and the review of the merits of the case, however, is not always clear in Hungarian law. The appeal before the second instance administrative body covers questions of legality, procedure and facts, and it also includes matters of expediency. This latter is regarded as enabling the superior public authority to interfere with the merits of the (discretionary) decision brought at first instance. Questions of expediency are, however, often inseparable from the rationality and the reasonableness of administrative decisions. Therefore, it is not excluded that during the judicial control of the use of discretionary powers courts, trespassing unintentionally the boundaries of their jurisdiction, examine matters of expediency. A similar problem emerges in connection with the review of evidence and the ordering of a further examination of evidence in judicial review. Arguably, the fact that judicial review is restricted to the examination of illegality should not exclude the review and further assessment of evidence by the reviewing court. Its effect is simply that it narrows down the usual parameters of the taking of evidence by courts.

According to Article 164(1) of the Code on Civil Procedure, the claim for judicial review may contain submissions regarding the incompatibility of the facts established by the administrative authority with the evidence collected (with the file), or submissions concerning the fact that the public authority has failed to determine the facts of the case adequately. This does not, however, enable the individual to challenge the assessment of the evidence by the public authority within the discretionary powers made available in legislation. In case the public authority followed all procedural requirements and the rights of the defence were observed, only those pieces of evidence may be used in judicial review, which were omitted from the administrative procedure outside the fault of the party to the procedure. Only in special circumstances may evidence unavailable during the administrative procedure (e.g. evidence which for objective reasons was impossible to obtain) be introduced in judicial review. In the majority of cases, problems with the assessment of evidence by the public authority are raised as submissions concerning procedural irregularity i.e. that the public authority was prevented from establishing the relevant facts on account of a breach of a procedural requirement. In such circumstances, courts must act carefully as their assessment

of the evidence collected is constrained by their jurisdiction as a court proceeding in judicial review and they must not replace the discretionary assessment of evidence by the public authority with their own.

In extraordinary appeal before the Curia, submissions may be made only with regards questions of illegality and further assessments of evidence are excluded. The examination of evidence is excluded not because the jurisdiction of the Curia is limited to questions of illegality, but because statute excludes examining evidence in such procedures.²² It follows that the limited jurisdiction available to the Curia in extraordinary appeal does not itself exclude the taking of new evidence; it, nevertheless, necessarily constrains its scope and prevents the Curia from examining in this connection questions of merit. This indicates, although primarily with regards the issue of examining evidence in order to establish the facts of the case, that in Hungarian administrative law the judicial review of the legality of administrative action and the prohibition on courts in judicial review to second-guess public authorities could be separated conceptually. It must be noted, however, that its relevance is exclusively procedural, as it only limits the procedural instruments available to applicants, and from a substantive point of view, it does not question that the jurisdiction available in judicial review is determined completely by the prohibition for courts to address matters belonging to the substance of the administrative decision.

Following this discussion, we could summarize the central doctrine relating to the judicial control of administrative decisions brought within discretionary powers as allowing the judicial challenge of the use of administrative discretion in case it contradicts the file (i.e. it is based on an unlawful assessment of evidence) or it is unreasonable. Unreasonableness refers to the use of administrative discretion in breach of the rules of logic. Errors relating to the file (i.e. errors of fact) are examined within the review of discretion, however, as a matter of conceptual clarity it must be emphasized that this does not refer to errors in the discretionary assessment of evidence but to legal and procedural errors committed when taking evidence. Fundamentally, the judicial review of the use of administrative discretion stands for the judicial control of the reasonableness of administrative decisions. As stated earlier, the difference between appeal and judicial review follows from the prohibition of courts in judicial review substituting the assessment of public authorities with their own, which also has the impact of reducing the scope for courts examining evidence in procedures for judicial review.²³

Finally, we need to distinguish between the judicial review of administrative decisions on grounds of their unreasonableness and their control on grounds expediency. Expediency is a matter which can be examined in applications for appeal. Expediency allows considering in the assessment of the reasonableness of the challenged administrative decision whether alternative decisional routes could have been followed under the discretionary powers available. This is not available in the judicial review of administrative discretion using unreasonableness as a head of review. As a result, in procedures for judicial review submission regarding the possibility of more reasonable, more optimal, or better administrative decisions than those challenged will be rejected, and only those will be examined by the court which allege that the use of discretion by the public authority was

²² Article 275 Paragraph 1 of the Code on Civil Procedure.

²³ It must be noted that the prohibition has different statutory meanings with regards the judicial review of administrative action and the review of the judgment delivered in judicial review by the Curia in extraordinary appeal, because the Curia has jurisdiction to substitute the legal assessment of the lower court with its own. However, the Curia, as it follows from the general principles of the system of redress against administrative action, lacks jurisdiction to replace the legal assessment of the administrative decision with its own. It remains bound by the relevant Article 339/B of the Code on Civil Procedure.

manifestly unreasonable,²⁴ i.e. the administrative decision contains a serious logical contradiction. This also follows from the prohibition of courts in judicial review interfering with the merit of the administrative decision. That constitutionally relevant prohibition excludes courts in judicial review disagreeing with the use of discretionary powers by public authorities as manifested in the administrative decision under challenge even in circumstances where it is evident that a better, more reasonable decision could have been reached. In certain circumstances this involves courts being prevented to assess the considerations governing the use of discretionary powers from a perspective or with a weight which is different from that selected by the administrative authority. In the contrary case, the administrative judge would be able to argue that its own assessment is more reasonable than that of the public authority, which is much different in its scope and intensity from courts examining whether the use of administrative discretion in the given case was unreasonable. This doctrinal position on the boundaries of the jurisdiction available in judicial review appears to be difficult to reconcile with the conduct required from courts under the principle of proportionality as it follows from the jurisprudence of the EU Court and the Court of Human Rights in Strasbourg.

3 EUROPEAN REQUIREMENTS

In this section, we are going to provide a short overview of European legal requirements which influence the judicial review of administrative action on the domestic level. The most general requirement addressed to national courts in EU law can be found in Article 19(1) TEU which lays down the general clause of effective legal protection. This, as the corresponding principle/right to effective judicial review/protection before domestic courts,²⁵ is aimed at the procedural and remedial arrangements in national justice systems. It requires that effective legal redress is available in the Member States for the protection of rights derived from EU law. The jurisprudence also recognizes more concrete requirements following from the right to effective judicial protection concerning ‘an individual’s standing and legal interest in bringing proceedings’ before national courts, the national provisions regarding which must meet, within the discretion available to the Member States in this connection, the general principles of equivalence and effectiveness developed in EU law.²⁶ The autonomy of the Member States in regulating national procedures is expressly recognized in connection with the introduction of procedural measures for the protection of legal certainty²⁷ and regarding the determination of the details of those rules in the context of national procedural law.²⁸ In

²⁴ Manifest unreasonableness is interpreted as the logical inconsistency of the decision having an impact on its substance or merits. This implies that the application for judicial review, after establishing the manifest unreasonableness of the administrative decision, must be able to demonstrate what would have constituted a reasonable decision. This then could be acknowledged by the court when reforming the administrative decision, provided that it is endowed with such jurisdiction.

²⁵ Case 222/84 *Johnston* [1986] ECR 1651 and Case 222/86 *Heylens* [1987] ECR 4097. See also, Case C-424/99 *Commission v Austria* [2001] ECR I-9285, where the Court held that internal appeal to an administrative authority cannot be regarded as being equivalent with a review by a genuine judicial body.

²⁶ Joined Cases C-87/90 to C-89/90 *Verholen* [1991] ECR I-3757, para. 24; Case C-13/01 *Safalero* [2003] ECR I-8679, para. 50; Case C-12/08 *Mono Car Styling* [2009] ECR I-6653, para. 49; Joined Cases C-317/08 to C-320/08 *Allassini* [2010] ECR I-2213, para. 48.

²⁷ Case C-246/09 *Bulicke* [2010] ECR I-7003, para. 36; Case C-63/08 *Pontin* [2009] ECR I-10467, para. 48.

²⁸ *Ibid.*

particular, EU law allows the Member States to impose, in their discretion, reasonable time-limits in national law for challenging final administrative decisions contravening EU law.²⁹

The obligation of national courts to provide an effective protection of rights derived from EU law could follow from explicit clauses in EU legislation. The definition of that obligation in the jurisprudence would be based on the relevant legislative provisions.³⁰ The Court has relied on the general principle and duty of consistent interpretation to secure that national courts observe the right to effective judicial protection by giving effect to provisions regulating the principle of access to justice (Article 9(3) of the Aarhus Convention) and by enforcing the corresponding objective of securing access to judicial review in order to challenge national administrative measures in breach of EU law.³¹

The principle of effective judicial protection addressed to national courts could be interpreted as an obligation to provide an effective remedy when national law prevents access to judicial redress or fails to secure an effective judicial redress under the scope of EU law.³² The judgment in *Johnston* made it clear that access to judicial review must be provided to enable individuals ‘to pursue their claims by judicial process’ and receive effective protection from national courts.³³ In *Heylens*, the EU Court recognized the right to a remedy of a judicial nature (the right to an effective judicial review) against decisions by national authorities in breach of EU law and argued that individuals must be provided ‘the best possible conditions’ to defend that freedom and must be able to decide on the basis of their knowledge of the relevant information whether ‘there is any point in their applying to the courts.’³⁴

In the complex discussions in *Unibet* concerning the right to effective judicial protection, the Court insisted, regarding the question of whether a freestanding action should be made available under national law for the examination of compatibility of national measures with EU law, that the requirements of EU law should be observed when the remedies ‘which made it possible to ensure, even indirectly, respect for an individuals’ rights’ under EU law are not provided.³⁵ The ultimate solution was found in the EU Court arguing that alternative avenues of judicial redress available in national law could secure the effective judicial protection of rights derived from EU law subject to the explicit reservation that offering only a single avenue for redress which requires individuals to breach the law to gain access to national courts and to face penalties as a consequence will not be accepted as an alternative.³⁶

²⁹ Case C-2/06 *Kempter* [2008] I-0411, paras. 58-59; Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, para. 34. Regarding the limits of national discretion in this respect Case C-208/90 *Emmott* [1991] ECR I-4269, para. 16.

³⁰ Case 98/79 *Pecastaing* [1980] ECR 0691, para. 22 and Opinion of Advocate General Capotorti in Case 98/79 *Pecastaing* [1980] ECR 0691; Case C-459/99 *MRAX* [2002] ECR I-6591, paras. 100-103; Case C-235/09 *DHL Express France* [2011] ECR I-2801, para. 58; Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paras. 46-69 (applied as a basis of an extensive examination of the national system); Case C-175/11 *H.I.D., B.A.* nyr., paras. 80-81 and 102-104.

³¹ Case C-240/09 *Lesoochranárske zoskupenie VLK* [2011] ECR I-1255, paras. 50-51. See below, the discussion on the Europeanization of the right of access to a court in Hungarian law.

³² Case C-430/10 *Gaydarov* nyr., para. 41; Case 222/86 *Heylens* [1987] ECR 4097, paras. 14-15; Case 222/84 *Johnston* [1986] ECR 1651, paras. 18-19.

³³ Case 222/84 *Johnston* [1986] ECR 1651, paras. 16-20.

³⁴ Case 222/86 *Heylens* [1987] ECR 4097, paras. 12 and 14-15. See also Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, para. 22. See also the recognition of the possibility for national competition authorities to participate, as a defendant or respondent, in judicial review proceedings against their decisions, Case C-439/08 *VEBIC* [2010] ECR I-12471, paras. 59-63.

³⁵ Case C-432/05 *Unibet* [2007] ECR I-2271, paras. 40-42 and the case law cited.

³⁶ *Ibid* paras. 60-63 and 64. See also Case C-13/01 *Safalero* [2003] ECR I-8679, paras. 54-56 holding that the right to effective judicial protection does not preclude national legislation under which an individual cannot

The ruling in *Europese Gemeenschap* concerning the obligations of national courts under Regulation 1/2003/EC³⁷ and the limitations on the jurisdiction following from the same measure indicated the broader institutional framework within which national courts need to construct their institutional identity and tasks. The Court discussed the respective roles of national courts, EU courts and the EU Commission in the enforcement of EU competition law, and it held that the right to an effective judicial redress is secured by the judicial review available before EU courts against the decision of the Commission and there is no need for procedures before national courts to meet the requirements arising from that right.³⁸ Regarding the limitations following from Article 16 of Regulation 1/2003/EC, the judgment highlighted that the said provision does not deprive national courts of their ‘full jurisdiction’ and in a claim for damages under EU law they remain free to assess the existence of loss and of a direct causal link between the loss and the anti-competitive practice in question.³⁹

National courts form part of the ‘complete system of judicial protection in the EU’⁴⁰ and they have been labelled as ‘the guardians’ of the EU legal order.⁴¹ Besides the above mentioned requirements, in relation to the action for annulment of EU measures before EU courts this position comes with the particular obligation of interpreting and applying, so far as possible, national procedural rules governing the rights of action before national courts so as to guarantee that individuals, who have been turned away by EU courts on account of the lack of *locus standi*, are able to challenge before national courts ‘the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act’.⁴² This will then create the possibility for the national court to contest the validity of the EU measure in question before the EU Court in a reference for a preliminary ruling, which is regarded as an adequate alternative to the judicial avenue provided by the action for annulment under Article 263 TFEU.⁴³

EU law also contains principles which influence the substance of the supervisory jurisdiction exercised by national courts in judicial review. National courts, when the case before them falls within the scope of EU law, could be required to protect legitimate expectations⁴⁴ and they must apply the principle of proportionality when controlling the decisions of administrative authorities and the sanctions imposed by them.⁴⁵ The application of the proportionality principle entails examining, beyond the control of administrative decisions on the basis of the applicable legislative requirements, the question of whether the choice made by the administration within the discretion available to it was suitable, necessary and proportionate in the sense that it has struck a fair balance between the advantages and

bring court proceedings to challenge a decision taken by the public authorities, where there is available to that individual a legal remedy which ensures respect for his rights and which enables him to obtain a judicial decision finding the provision in question to be incompatible with EU law.

³⁷ Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

³⁸ Case C-199/11 *Europese Gemeenschap* nyr., paras. 52-63.

³⁹ *Ibid* paras. 65-67.

⁴⁰ *Inter alia* Case 294/83 *Les Verts* [1986] ECR 1339, para. 23; Case 315/85 *Foto-Frost* 1987 ECR 4199, para. 16; Case C-461/03 *Gaston Schul* [2005] ECR I-10513, Case C-131/03 *P.R.J. Reynolds* [2006] ECR I-7795, para. 40.

⁴¹ Opinion 1/09 *The draft agreement on the European and Community Patents Court* [2011] ECR I-1137, para. 66.

⁴² Case C-50/00 *P. UPA* [2002] ECR I-6677, para. 42.

⁴³ *Ibid* para. 40. See to that effect Case C-550/09 *Criminal proceedings against E and F* [2010] ECR I-6213, para. 45.

⁴⁴ Case C-5/89 *Commission v Germany* [1990] ECR I-3437; Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591.

⁴⁵ See, T. Tridimas, *The General Principles of EU Law*, 2nd ed., Oxford University Press, Oxford, 2006, Ch 4.

disadvantages of the administrative decision.⁴⁶ The proportionality principle could require courts proceeding in judicial review to examine whether the administrative authority could have reached a more suitable and/or less restrictive decision.⁴⁷ The proportionality principle, especially this latter element, has been characterized as enabling courts to reach beyond the jurisdiction provided to them in judicial review under national law and interfere with the use of discretionary powers by public authorities beyond the examination of the reasonableness of the administrative decision.⁴⁸

Further, more concrete requirements concerning judicial review by national courts can be found in the judgment in *Roquette Frères* dealing with the judicial control of EU Commission investigatory powers available in the enforcement of EU competition law. Judicial review on the national level was discussed in the judgment as the jurisprudence identified national rules and guarantees as crucial safeguards for the protection of the right to private life in EU competition enforcement procedures.⁴⁹ Concerning the effective supervision (judicial review) by national courts of coercive measures used in EU competition investigations in the territory of the Member States, the Court confirmed the obligation of national courts to contribute to the effectiveness of EU competition procedures and examined the limitations barring national courts from questioning the necessity of Commission investigations and their lawfulness and the power available to them to ensure that 'the coercive measure envisaged is not arbitrary or disproportionate to the subject-matter of the investigation ordered.'⁵⁰

In this context, the EU Court distinguished between two scenarios. First, when the judicial review by the national court is carried out to examine whether the investigatory measures proposed are arbitrary, and second when the national court examines whether the investigatory measures concerned are disproportionate. Regarding the judicial review of arbitrary measures, the Court confirmed the requirement that national courts should control arbitrary coercive measures in EU competition investigations and examined how the Commission may facilitate the effectiveness of national judicial control for the protection of the rights of the undertaking concerned.⁵¹ The Court also urged national courts to assume a more autonomous role in applying EU law and to refrain from making preliminary references to the EU Court, which latter may hinder the effectiveness of the Commission's investigations. The judgment explicitly recognized the necessity for national courts to examine the proportionality of Commission investigatory measures. The EU Court also indicated the factors which need to be assessed by national courts in connection with the discretionary choices made by the Commission. They include the assessment of the seriousness of the suspected infringement, the nature of the involvement of the undertaking concerned or the importance of the evidence sought, and the ability of national courts to refuse in their jurisdiction to grant the coercive measure when the necessity to interfere with the rights of the undertaking concerned is minimal and the interference would be manifestly disproportionate and intolerable.⁵²

⁴⁶ *Inter alia*, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 0649.

⁴⁷ *Inter alia*, Case C-112/00 *Schmidberger* [2003] ECR I-5659.

⁴⁸ See the discussion in English administrative law, *inter alia*, J. Jowell and A. Lester, 'Beyond Wednesbury: substantive principles of administrative law' [1987] Public Law 368; J. Jowell and A. Lester, 'Proportionality: Neither Novel Nor Dangerous' in J. Jowell and D. Oliver (eds.), *New Directions in Judicial Review*, Stevens, London, 1988; I. Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' [2002] Public Law 265.

⁴⁹ Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paras. 30-32 and 34-30.

⁵⁰ *Ibid* paras. 51-52.

⁵¹ See *ibid* paras. 54-68.

⁵² *Ibid* paras. 77-80.

From the law of the ECHR, Article 6 has presented the most significant influence on the judicial review of administrative action in the Contracting States.⁵³ Article 6 ECHR lays down the right to a fair trial incorporating general and specific requirements, such as the fairness in conducting procedures, the rights of the defence and the requirement of a reasonable duration of procedures. As it follows from its wording, it applies fundamentally to judicial procedures in criminal and civil cases. However, Strasbourg jurisprudence has extended its application into certain judicial procedures under administrative law and there is an ongoing debate whether certain areas of administrative law, such as the enforcement of competition law where administrative authorities are endowed with serious investigatory and sanctioning powers, would fall under the criminal limb of Article 6.⁵⁴ As we will see below, the requirement that Article 6 ECHR should be observed in procedures involving administrative and judicial phases as a whole led to the Strasbourg court formulating detailed requirements concerning the scope and intensity of judicial review in the Contracting States. Despite the extension of the application of Article 6 to areas covered by administrative law, it must be distinguished from the principle and right to good (fair) administration which in imposing fairness and quality requirements on administrative procedures takes into account the particularities of the procedural environment, especially the weight of the interest of administrative effectiveness and efficiency.⁵⁵

National courts also need to take into account that, in cases under the scope of EU law, Convention rights could be applicable in national law with the mediation of EU law. This follows from Articles 52(3) and 53 of the EU Charter of Fundamental Rights which in essence require the rights of the Charter are interpreted and applied in a manner consistent with Convention requirements. In *DEB*, dealing with the liability of Member States in tort for the breach of EU law, the judgment gave much attention to the right to fair trial under Article 6 ECHR and the relevant Strasbourg case law in interpreting the relevant EU legal principles with reference to their application in the particular domestic environment. The choice of the ECHR as the basis of the interpretative solution followed from the interpretative obligations following from the final provisions of the binding EU Charter.⁵⁶ Article 6 ECHR had also been applied in connection with national provisions before the entry into force of the Lisbon Treaty. In *Steffensen*, national provisions regulating the admissibility of evidence in judicial procedures were subjected, among others, to the requirements emerging from right to a fair hearing under Article 6 ECHR. The Court established that beyond the general requirement of effectiveness national procedural rules adopted within the autonomy enjoyed by the Member States, if they fall under the human rights jurisdiction of the EU Court, also have to meet human rights requirements.⁵⁷

The Strasbourg jurisprudence relating to the application of Article 6 ECHR in administrative procedures has formulated far-reaching requirements concerning the scope and intensity of judicial review in the Contracting States. As it follows from standard case law, when the administrative procedure fails to meet the requirements of Article 6 ECHR the procedure as a whole may be found compatible with the ECHR provided that the

⁵³ *Inter alia*, S. Richard, 'The impact of Article 6 of the ECHR on judicial review' (1999) 4 *Judicial Review* 106. It must be noted that Convention rights have no direct effect in Hungarian law. In case domestic courts find that legislation is incompatible with the ECHR, they turn to the Constitutional Court to address that problem.

⁵⁴ See the development in judgments, such as *König v Germany* Series A no 27 (1978); *Feldbrugge v Netherlands* Series A no 99 (1986); *Salesi v Italy* Series A no 257-E (1993) and the jurisprudence listed *infra* n. 70.

⁵⁵ See, J. Wakefield, *The Right to Good Administration*, Kluwer Law International, Alphen aan den Rijn, 2007.

⁵⁶ Case C-279/09 *DEB* [2010] ECR I-13849, paras. 30-36.

⁵⁷ Case C-276/01 *Steffensen* [2003] ECR I-3735, paras. 71-72.

administrative procedure is followed by the opportunity to challenge any decision made against the person concerned in a procedure which offers the guarantees of Article 6 ECHR before a ‘judicial body that has full jurisdiction’.⁵⁸ The latter condition was interpreted as the national court having jurisdiction to review and ‘quash’ (*réformer*) all aspects, on questions of fact and law, of the administrative decision and examine all questions of fact and law relevant to the dispute before it. Although the jurisprudence accepts that the nature of administrative procedures can differ in numerous respects from the nature of criminal procedures, it maintains that this does not exonerate the Contracting States from meeting the requirements of the criminal limb of Article 6 ECHR.⁵⁹ Regarding the jurisdiction exercised by the review court, the Strasbourg court held that national courts, although they may lack the jurisdiction to review the merit of administrative decisions, must be able to verify the legality of administrative action and review whether the use of public powers was appropriate, in particular, whether the sanctions imposed by the administrative authority were appropriate, and also to assess whether the court should annul or modify (*remplacer*) those sanctions. Concerning the latter, it argued that the review court should be able to examine the logical coherence of the reasons supporting the decision and to provide a detailed analysis of the adequateness of the sanctions in the light of the applicable legal framework and the principle of proportionality.⁶⁰

As we can see from the short overview above, even on the level of rights and principles judicial review exercised by national courts is subject to requirements which affecting fundamental matters, such as the right of access to judicial review or the intensity of judicial review, reach down to the doctrinal basis of the jurisdiction available to national courts. The adjustments required are far from being revolutionary. The detailed assessments of the jurisdiction exercised by national courts, as in *Roquette*, or in *Menarini* and *Segame* were formulated in general terms and the requirements seem to have been selected so as to ensure their relatively unproblematic incorporation into domestic laws. This can be seen in how the judicial review of administrative discretion was conceptualized under Article 6 ECHR as requiring that the appropriateness of the administrative decision is examined imposing more exacting requirements only in relation to the imposition of administrative sanctions. The principle of proportionality poses a more difficult challenge. The problem follows not only from the fact that the principle may be incompatible with the constitutional and doctrinal foundation of judicial review on the national level, but also from the possibility that in case the use of proportionality is restricted for doctrinal reasons to cases having a European dimension the unity and integrity of domestic administrative law will be jeopardized. The impact of Europeanization in this domain, therefore, must be carefully considered and national administrative laws may need to undertake a wholesale reassessment of their underlying doctrines in order to avoid breaching requirements following from the rule of law, such as legal certainty and equality.

4 THE EUROPEANIZATION OF JUDICIAL REVIEW IN HUNGARY

⁵⁸ Judgment of 27 September 2011 *Menarini Diagnostics v Italy* (App. 43509/08, not reported), paras. 58-61 and the case law cited; *Segame v France* ECHR 2012, paras. 54-55 and the case law cited; *Valico S.r.l. v Italy* ECHR 2006-III.

⁵⁹ *Menarini Diagnostics v Italy*, paras. 62-65 and *Valico S.r.l. v Italy*. See *Segame v France*, para. 56 on the powers of the review court holding that ‘il apprécie tous les éléments de fait et de droit et peut non seulement annuler ou valider un acte administratif, mais également le réformer, voire substituer sa propre décision à celle de l’administration et se prononcer sur les droits de l’intéressé’.

⁶⁰ *Menarini Diagnostics v Italy*, para. 66 and *Segame v France*, paras. 58-59.

In the following, we are going to examine three areas in Hungarian administrative law where European influences have led to considerable adjustment or to considerable controversies. These are the law on procedural fairness and impartiality, the right of access to judicial review, and the review of administrative discretion by courts under the proportionality principle. The legal changes induced may not be spectacular and they may not have had a universal impact on domestic administrative law. Nevertheless, they indicate a recognizable fertilization of domestic administrative law with European elements and they reveal how Europeanization may cause tensions within domestic doctrine and law.

4.1 FAIRNESS AND IMPARTIALITY IN ADMINISTRATIVE PROCEDURES

As we saw earlier, the right to a fair procedure before administrative authorities and before courts is recognized in the Hungarian Fundamental Law (Articles XXIV paragraph 1 and XXVIII paragraph 1 respectively). The latter is synonymous with Article 6(1) ECHR. The explicit constitutional distinction follows from the different functions of administrative authorities and courts in Hungary. Public authorities, when they proceed upon application or *ex officio*, serve the public interest and their task is to enforce the public interest against individuals. Typically, administrative procedures are launched *ex officio*, although in different areas of the administration this may be different,⁶¹ and they do not involve opposing private parties, instead they entail a procedure between a public authority and the individual. The purpose of *ex officio* administrative procedures is to establish whether the individual has committed an unlawful act, and because at the time the procedure is launched the unlawful conduct by the individual is assumed by the public authority, the impartiality of administrative procedures cannot be interpreted as an absolute constitutional requirement of procedural justice. The presumption of innocence is not observed in administrative procedures, and administrative authorities may only examine and take into account evidence and facts favouring the procedural position of the individual when legislation explicitly orders so.⁶²

This does not mean that public authorities in Hungary would not have to observe certain requirements of procedural fairness. Some of these follow from domestic legislation and others from external sources, such as the jurisprudence of the EU Court. The Luxembourg case law has recognized a wide range of requirements of procedural justice including the right to a hearing,⁶³ the right of access to the file,⁶⁴ the duty to give reasons,⁶⁵ the requirement of conducting the procedure within a reasonable time,⁶⁶ the right to legal professional privilege⁶⁷ and the privilege from self-incrimination.⁶⁸ Concerning the potential impact of European developments, it must be recalled that in Hungarian law the breach of procedural fairness in administrative procedures may only lead to the annulment of the administrative decision when the procedural error has had an impact on the merit of the case.⁶⁹ This depends primarily on

⁶¹ In planning law, most procedures are initiated upon the application of the parties. Nearly all taxation cases are commenced by the tax authority itself.

⁶² This is the case in taxation cases.

⁶³ *Inter alia*, Case C-349/07 *Sopropré* [2008] ECR I-10369.

⁶⁴ *Inter alia*, Case C-477/10 P *Agrofert nyr.*

⁶⁵ Article 296 TFEU and *inter alia* C-24/62 *Germany v Commission* [1963] ECR 63.

⁶⁶ Article 41 of the EU Charter of Fundamental Rights and *inter alia* Case C-385/07 P *Der Grüne Punkt* [2009] ECR I-6155.

⁶⁷ Case C-550/07 P *Akzo Nobel* [2010] ECR I-8301.

⁶⁸ *Inter alia* Case C-407/04 P *Dalmine* [2007] ECR I-0829.

⁶⁹ Article 339 Paragraph 1 of the Code on Civil Procedure.

the facts of the individual case and the progression of the relevant procedure, and it is not excluded that the breach of fundamental procedural guarantees will not lead in the circumstances of the given case to procedural irregularity which has affected the substance of the case. The possibility that submissions based on the breach of procedural justice will be ignored in judicial review before Hungarian courts could reduce the incentive to borrow from European law.

In general, procedural fairness could be conceived as a convenient head of review as the reviewing court may be able to avoid examining issues of substantive administrative law or the use of discretion by public authorities. Focusing on procedural lawfulness and fairness enables the assumption by the court that in case the procedure has been conducted fairly, i.e. the fundamental procedural guarantees were observed, the facts of the case were established on the basis of relevant evidence, the party had access to the file and exercised its right to be heard, and the legal arguments of the individual were refuted by reasons provided by the public authority (in other words, the reasoning provided revealed a reasonable administrative decision), it is likely that the administrative decision under challenge is also correct and fair in a substantive sense. With this, Hungarian administrative law, as other administrative laws in Europe, seems to recognize and operate following an assumed connection between the fairness of the procedure and the fairness of the decision reached in that procedure.

In the context of procedural justice in administrative law, Article 6 ECHR on the right to a fair trial in a reasonable time should, in principle, have had the most influence in Hungary. Article 6, as it follows from the relevant Strasbourg jurisprudence discussed earlier, may apply in procedures before administrative authorities and it also formulates concrete requirements concerning the scope and intensity of judicial review before national courts. Hungarian law accepts that the procedure before the Public Procurement Arbitration Board of the Hungarian Public Procurement Authority falls under Article 6 ECHR. However, it has been consistent practice that Article 6 does not apply in procedures before the Competition Authority and the National Tax and Customs Authority. The case law of the Court of Human Rights, which having regard to the weight of the sanctions imposed has in individual instances declared the applicability of Article 6 in taxation and competition cases,⁷⁰ has not been implemented in Hungarian law. This is explained by the consistency of long standing domestic judicial practice on this matter which either declares tax and competition cases as falling under the criminal limb of Article 6 and applies the requirements of fair criminal trials, or regards them as administrative cases and applies the requirements arising from the right to fair administration. In this latter case, Hungarian courts, rather controversially, ignore the Strasbourg case law arguing that the procedure falls outside the scope of Article 6 ECHR.⁷¹ Courts proceeding in judicial review have consistently refused to apply Articles 6 and 8 ECHR, the two provisions raised most frequently in applications in judicial review against decisions of the Competition Authority, in competition cases.⁷² This approach follows from

⁷⁰ See, Commission Decision of 11 July 1989 *Soci t  Stenuit v France* D.R. 61, 131; Report of the Commission of 30 May 1991 *Soci t  Stenuit c France* Series A no 232-A (1991); Decision of 3 June 2004 *OOO Neste St. Petersburg and Others v Russia* (App. 69042/01, 69050/01, 69054/01, 69055/01, 69056/01, 69058/01, not reported); *Jussila v Finland* ECHR 2006-XIII.

⁷¹ They would also argue as a secondary line of reasoning that in the particular case Article 6 ECHR has not been breached. It follows from this that the future incorporation of the developing Strasbourg jurisprudence concerning the applicability of Article 6 in competition cases is on the agenda.

⁷² See, for example, Decision Vj-130/2006/239, point 8; Judgment 2Kf.27.360/2006/29; Judgment Kfv.IV.39.399/2007/28. The application of Article 8 ECHR was raised in Hungarian law concerning ‘dawn raids’ by the competition authority at company headquarters suspected of serious violations of competition law. As a result, courts having regard to the particular circumstances, courts have been reluctant to extend the notion of ‘private life’ to such instances.

the judicial recognition of the criticism addressed against the Strasbourg case law which does not seem to distinguish adequately between natural and legal persons in the application of Convention rights, which should be offered under a human rights convention.⁷³

The law, however, is not entirely consistent and, more importantly, judicial practice is not stationary. In a recent case, the Curia declared the mobile frequency auction procedure of the National Media and Infocommunications Authority as falling under the civil limb of Article 6 ECHR,⁷⁴ and it rendered that provision and the relevant Strasbourg case law applicable and established its breach.⁷⁵ The case concerned the Authority regulating as a precondition for incumbent service providers entering the auction procedure that they will have to undertake a domestic roaming service obligation in the prospective scenario of a new state owned mobile telecommunications operator entering the market. The measure in question did not regulate the possibility of such an obligation being open to legal challenge on grounds of its proportionality and justifiability. The Curia held that in this connection a separate administrative procedure should have been conducted in which the Authority would have been required to establish the lawfulness of imposing such an additional burden on incumbents. It argued that in the absence of that procedure the incumbent service providers had been prevented from exercising their right to legal redress and, as a result, their right to a fair trial was violated.⁷⁶

Another significant change was the tying, as now recognized in the Fundamental Law, in Hungarian administrative law of the right to fair administration to the requirement of reasonable duration of procedures, which followed mainly from influence of the jurisprudence of the Strasbourg court.⁷⁷ Traditionally, the reasonable duration requirement had only applied in judicial procedures, and administrative authorities had been bound only by the procedural time-limits laid down in legislation. In judicial practice, failing to meet the statutory time-limits has never been regarded as a fault affecting the merits of the administrative decision, which would have led to its annulment. Nevertheless, the damages arising from such procedural errors have always been open to be vindicated in an action for damages against administrative authorities.

In previous practice, the requirements of fairness and reasonable duration in administrative procedures were always interpreted in the context of the statutory timeframe applicable in the procedure. This meant a reduced scope and intensity for judicial review where courts focused on the statutory boundaries and refused to scrutinize the fairness of the procedure beyond those bounds. The judicial control of procedural fairness was based on public authorities meeting objective, statutory time-limits and it did not address the question of what the reasonable duration requirement would demand in the circumstances of the given case.⁷⁸ This judicial approach entrenched a doctrinal separation between the otherwise supplementary principles of procedural fairness and reasonable procedural duration. This also meant that administrative lawfulness could be conceptualized without having regard to the interest of administrative effectiveness. Administrative authorities, not being bound outside of

⁷³ See, R. Whish and D. Bailey, *Competition Law*, 7th edition, Oxford, Oxford University Press, 2012, p. 249.

⁷⁴ *Allan Jacobson v Sweden* Series A no 163 (1989), *Mats Jacobson v Sweden* Series A no 180-A (1990).

⁷⁵ Judgment Kfv.III.37.666/2012.

⁷⁶ It must be pointed out that the Curia made reference to the relevant ECHR jurisprudence (*Deweert v Belgium* Series A no 35 (1980); *Marpa Zeeland B.V and Metal Welding B.V. v the Netherlands* ECHR 2004-X) in connection with the provisions of the applicable EU directive, having taken into account the EU Charter of Fundamental Rights.

⁷⁷ *Inter alia, König v Germany* Series A no 27 (1978); *H. v United Kingdom* [1987] ECHR 14.

⁷⁸ They are considered in light of the given procedural avenue and not having regard to the circumstances of individual cases.

the legislative framework by a general requirement of administrative fairness, were able to assume that administrative lawfulness would necessarily entail administrative effectiveness and courts were unable to argue that administrative lawfulness must be interpreted with reference to the demands of administrative effectiveness and that effectiveness considerations could be enforced over considerations inherent in the concept of fair and lawful administrative procedures. This position in light of the new constitutional provision could change.

The convergence of the right to fair administration and the right to a fair trial in Hungarian law following European patterns has led to legislation determining general procedural time-limits for courts proceeding in judicial review. Traditionally, legislation regulating judicial procedures had established time-limits only for certain procedural actions within the overall procedural framework before courts. This followed from standard judicial practice which regarded the use of general procedural time-limits as incompatible with the reasonable duration requirement because the reasonableness of the length of judicial procedures depends primarily on the circumstances of individual cases.⁷⁹ The new time-limits are an indication of the increasing administrative character of judicial review and, perhaps, of the eradication of differences between the administrative and judicial function. The problem of enforcing the reasonable duration requirement through statutory procedural time-limits in procedures for judicial review is that it may jeopardize the lawfulness of judicial procedures in the same way as the reasonable duration requirement may jeopardize the effectiveness of the administration. The final destination of these legal developments is somewhat uncertain, and it is unclear whether the convergence of fairness requirements in the administration and in the judicial system will continue and what impact it will have on the capabilities of administrative systems and on the lawfulness of judicial decisions.

4.2 ACCESS TO JUSTICE AND STANDING IN JUDICIAL REVIEW

In the interpretation of the standing condition that the applicant must have a legitimate interest in bringing an application for judicial review, the practice of Hungarian courts has been traditionally restrictive. This approach is also followed in environmental cases where, although the right of access to judicial review of environmental pressure groups has been recognized according to the Aarhus Convention, the determination of what constitutes an environmental case is based on a strict interpretation of Article 9(2) of that convention. These include cases dealt with in procedures conducted by the environmental authority, but not those concerning nature preservation, and procedures where the opinion of the environmental authority must be obtained before a final decision is reached.⁸⁰ In case of large-scale construction projects, where a planning permission may only be issued after an Integrated Pollution Prevention Control licence has been obtained from the environmental authority, only the environmental licence is open to challenge in judicial review. This could mean that the planning permission will not be affected by the unlawfulness of the procedure conducted by the environmental authority. Hungarian practice also observes Article 9(3) of the Aarhus Convention and it applies the regular standing requirements in the cases listed therein. On this basis, cases concerning hunting rights and hunting licences are not considered as environmental cases, although after the judgment of the EU Court in *Lesoochranárskezoskupenie VLK*⁸¹ this interpretation may not be sustainable.

⁷⁹ Decisions 152/B/2009 and 1/1994 of the Constitutional Court.

⁸⁰ Administrative uniformity decision (a binding opinion delivered for the purpose of establishing the consistency of judicial practice) 4/2010 on the legal position of NGOs in environmental cases and their standing in judicial review.

⁸¹ *Supra* n. 31.

A further questionable practice by Hungarian administrative courts is that they do not recognize economic interests, not even the interests of competitors in competition cases, as direct legitimate interests capable of securing standing in judicial review.⁸² This could contradict the requirements of EU competition law, when national authorities and courts proceed under the scope of Articles 101 and 102 TFEU, and in case of regulated markets, such as telecommunications or energy, this restrictive interpretation of standing conditions could prevent economic operators seeking to protect their interests from challenging the decisions of regulators in judicial review and from exercising their right to effective judicial protection guaranteed by EU law. Pressure to reconsider domestic practice could also follow from the ruling in *Streekgewest*, where the EU Court held that an individual may have an interest in bringing procedures when that person seeks ‘to erase the negative effects of the distortion of competition’ created by an unlawful state aid, or when that person wants ‘to obtain a refund of tax levied’ in breach of EU law, irrespective whether he or she ‘has been affected by the distortion of competition’.⁸³

Considerable change in the interpretation of standing conditions is expected from the recent reference for a preliminary ruling from the Curia concerning the definition of which persons may constitute parties to the administrative case in the area governed by EU energy (natural gas) law.⁸⁴ Although, the term party ‘affected’ has been interpreted by the EU Court in telecommunications cases,⁸⁵ the practice of the Court in the areas of electricity and gas has not provided a definition, especially, with regards decisions from national regulators confirming the operational and commercial codes of service providers (or determining their substance). The main issue in the preliminary reference is whether besides the system operator, on the request of which the code was published or on the request of which the decision confirming the code was modified, the gas supplier is also entitled to bring judicial review for protecting its contractual rights adversely affected by the administrative decision. The judgment of the EU Court could change the law, which in its current state excludes economic interests, such as the ability to enter into contracts with the system operator, from the range of legitimate interests recognized in the rules on standing and which unduly limits the standing of economic operators in judicial review.

4.3 THE JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION AND PROPORTIONALITY

We discussed earlier that in Hungarian administrative law the judicial control of administrative discretion covers only the judicial scrutiny of the reasonableness of administrative decisions. The jurisdiction available in judicial review is constrained by the constitutional prohibition for courts to substitute the assessment of the public authority on the merits of the case with their own. The examination of evidence in judicial review may offer the possibility of a more intrusive judicial intervention, however, the jurisdiction available in this regard is subject to the same constitutional limitation. The law and the doctrine specifically exclude that courts examine alternative decisional pathways which may have been available for the public authority and they also prevent courts from identifying more reasonable decisions for closing the administrative case. In principle, the judicial review of

⁸² Judgments EBH 2004.1100 and Kfv.III.37350/2007/5.

⁸³ Case C-174/02 *Streekgewest* [2005] ECR I-0085, para. 19.

⁸⁴ Decision Kfv.III.37.502/2012/10.

⁸⁵ Case C-426/05 *Tele2* [2008] ECR I-0685; Case C-55/06 *Arcor AG* [2008] ECR I-2931.

administrative discretion on the basis of the proportionality principle, as it follows from EU and ECHR law, seems incompatible with Hungarian doctrine and the related judicial practice and its use may only be legitimate, as a matter of domestic doctrine, if legislation explicitly enabled national courts to apply that principle in judicial review.

However, with Hungary's European commitments in the Council of Europe and the European Union framework, domestic administrative courts have been increasingly confronted with the obligation of reviewing the use of discretionary powers by public authorities, affecting Convention rights or under the scope of EU law, by relying on the principle of proportionality. In this area, the domestic jurisprudence has recognized the applicability of the proportionality principle in a range of administrative cases. Proportionality has been used in cases determining whether the law had been breached by individuals, and in cases which concerned the adequate use of administrative discretion and which examined whether the appropriate sanction/penalty had been applied. The actual application of the proportionality principle, after its applicability has been established, seems to pose limited complications for Hungarian courts, although the quality and transparency of their reasoning in this context could improve. In a competition case dealing with the unfair manipulation of consumers, the questions were raised before the court whether the use of a product name capable of misleading consumers could be prohibited and whether imposing a re-labelling obligation on the economic operator affected would constitute a disproportionate interference with the sale of the product in Hungary. The product name was used in all other Member States of the EU and it stated that the product is the best available in the market. The court proceeding at first instance examined in detail the relevant case of the EU Court and held with reference to the facts of the case following a slightly condensed reasoning that establishing the breach of Hungarian consumer protection law did not constitute a disproportionate restriction of the free circulation of the product in question.⁸⁶

The parallel existence of European and domestic doctrine and legal principles, beyond the broader problem of separate bodies of administrative law and distinct modes of judicial review emerging in European and domestic cases in Hungarian administrative law, has caused considerable headaches to Hungarian courts in a recent case. Following a judgment of the EU Court in a procedure for preliminary ruling, they struggled with reconciling their obligation to review administrative sanctions on the basis of the proportionality principle, as it follows from EU law and from statutory provisions implementing the corresponding requirements of EU law, and the doctrinal prohibitions on substituting the assessment of the public authority regarding the severity of the penalty with their own and on reassessing the weight of the breach of law as determined by the public authority. In domestic doctrine, the judicial review of administrative penalties imposed under discretionary powers may only take place with reference to the statutory framework for imposing the penalty. As a result, courts would examine the statutory maximum and minimum amounts of penalties and they would volunteer to re-examine the assessment of the public authority only in exceptional circumstances, for instance, when the maximum penalty was imposed for insignificant breaches of formal legal requirements by individuals.

The case itself was a relatively insignificant transport administration case, one of the many tachometer cases before Hungarian courts, where a fine of 100.000 HUF was challenged by the transport undertaking arguing that considering the weight of its unlawful

⁸⁶ Judgments 2.Kf.27.430/2006/8, 7.K.30.482/2005/10 and reviewed decision of the Competition Authority in Vj-126/2004/39. See also the judgment in the on-line gambling case, Kfv.III.37.454/2010/5, where the Curia decided, somewhat controversially, the proportionality of the interference with the free movement provisions of the Treaty with reference to the proportionality of the sanctions applied.

conduct (out of 15 tachometer disks one failed to indicate the arrival position of the speedometer) the sum of the penalty was excessive. The private party submitted this argument despite the fine having been imposed on the basis of objective legislative provisions which did not allow public authorities to depart in the circumstances of individual cases from the sum specified. The Hungarian court proceeding in judicial review turned to the EU Court for a preliminary ruling asking whether the objective imposition of fines contravened the EU requirement on the proportionality of penalties imposed under the scope of EU law. In *Urbán*, the EU Court ruled that while an objective (strict) system of fines (a ‘strict system of liability’) is *prima facie* compatible with EU law, the imposition of the fine in the particular case was disproportionate.⁸⁷ It argued, among others, that ‘the amount of that fine is almost equivalent to the average monthly net income of an employee in Hungary. Consequently, the severity of the penalty appears, in the main proceedings, to be disproportionate to the infringement committed.’⁸⁸

The implementation of the judgment, because of the overlap of domestic and European principles, caused severe difficulties for the referring court. First, it was required to establish the illegality of the fine despite lacking jurisdiction under Hungarian law in this regard. As a matter of domestic law, the public authority acted *intra vires* on the basis of legislative provisions, which were held to be compatible with EU law, and it had no legal option other than to impose the exact fine determined in legislation. Although in such circumstances judicial interference with the administrative decision, under domestic doctrine, should be excluded, the referring court was obliged under EU law to declare the imposition of the fine on the basis of legislative provisions which allowed no discretion for public authorities as disproportionate. Second, it follows from the Court’s reasoning that, in principle, domestic courts are required to examine the proportionality of fines imposed under the scope of EU law on the basis of considerations not regulated in the relevant domestic legislation. The assessment of external considerations with regards the legality of the administrative decision represents a departure from domestic doctrine which enables judicial assessment only within the relevant legislative framework having regard, in particular, to the maximum and minimum amount of fines as relevant considerations. The judgment of the EU Court seems to suggest that the public authority should have taken into account considerations outside those listed in domestic legislation. Finally, it remains unclear whether following the judgment domestic courts are required, as a rule, to assess the proportionality of fines imposed under domestic law disregarding the relevant domestic legislative provisions. In this regard, it first needs to be clarified whether instead of the disproportionate application of the fine by domestic authorities the problem confronted in *Urbán* was that the EU requirement on proportionate penalties is unable to distinguish between legitimately introduced administrative sanctioning systems of different character.⁸⁹ These are matters of fundamental constitutional importance from the perspective of domestic public law, which may not be fully appreciated in the current EU jurisprudence.

⁸⁷ Case C-210/10 *Urbán* nyr., para. 52. See the note by Vincze in A. Vincze, ‘Objektív felelősség és az arányosság elve – Az Európai Bíróság ítélete a C-210/10. sz. Urbán Márton kontra Vám- és Pénzügyőrség Észak-alföldi Regionális Parancsnoksága ügyben’ (2012) 12 Európai Jog 37, which saw the Court’s reasoning indicating two uses of proportionality as a precondition of objective sanctioning systems being compatible with EU law, namely, an objectivised use of proportionality and the use of proportionality as a benchmark of fairness.

⁸⁸ *Ibid* para. 58.

⁸⁹ It must be pointed out that the Court was indeed in a particularly position. It had to respect Member State autonomy in selecting the type of the administrative sanctioning system, but it also had to ensure that the applicable principle of EU law is observed. The compromise solution achieved may seem appropriate from the perspective of the EU level, but it caused grave doctrinal problems on the level of the Member States.

The suggestion that the proportionality of fines should be assessed on the basis of the average earning conditions in a Member State can be particularly problematic in a cross-border perspective. For example, following the Court's reasoning Hungarian heavy-goods vehicle drivers could, in principle, challenge the proportionality of objective fines imposed by public authorities in wealthier EU Member States for minor infringements of road transport regulations on the basis that Hungarian wages are considerably lower than average wages in that country. This raises the more fundamental dilemma of whether objective administrative sanctioning systems, which for legitimate reasons do not recognize the financial circumstances of individuals as a consideration relevant in the exercise of sanctioning powers, could satisfy the proportionality requirement in EU law. Objective fines will affect people with different financial means differently without offering a justification for different treatment. Arguably, the judgment in *Urbán* could be regarded as an indirect judicial indication that objective sanctioning systems applied in the Member States for the enforcement of EU law risk violating the proportionality requirement of EU law and that they should be 'softened' by the Member States by introducing elements which distinguish with sufficient clarity and preciseness between individuals in different circumstances despite the autonomy they enjoy in regulating domestic administrative law.

5 CONCLUSIONS

This article revealed the pressures and changes experienced in the law and doctrine of judicial review in Hungary which followed from the European level. It identified gradual legal change and some resistance against European influences and it discussed the difficulties of grafting European requirements onto the domestic legal and doctrinal framework. Europeanization, as in other legal systems, has been partial and it seems that separate bodies of administrative law are emerging in European and in purely domestic cases. The uneven character of adjustment may necessitate further convergence which, however, should follow from domestic responses given to dilemmas faced on the national level. Further Europeanization could restore the integrity and coherence of Hungarian administrative law and it could remedy the unjust and illegitimate fragmentation of domestic administrative law under direct European influence. Moreover, taking Europeanization further could lead to domestic law reconsidering the constitutional mandate available to courts in judicial review and examining whether current law and doctrine ensure adequate judicial involvement in controlling the administration. Top-down interference with domestic law, such as than in *Urbán*, may not be the right approach as it may lead to further conflicts between domestic and European law and doctrine. Instead, voluntary convergence facilitating change and bottom-up adjustment on the national level should be encouraged to achieve more fitting legal outcomes.

Voluntary convergence is particularly important when the tension between the jurisdiction available for domestic courts to review the use of administrative discretion and the European requirement of proportionality is attempted to be resolved. The introduction of proportionality to replace unreasonableness as a general principle in determining the intensity of judicial review in Hungarian administrative law would require the reassessment of current doctrine and the reconsideration of the role of courts in the scrutiny of administrative discretion. Compared to the 'monolithic' unreasonableness principle, which leaves a limited opportunity for courts to adjust the intensity of review to the circumstances of the individual case, proportionality could introduce into domestic law a more structured and nuanced assessment of what constitutes a rational administrative decision. Although the boundaries between the review of legality and the review of the merits of administrative decisions could become less certain, the principle of proportionality by requiring public authorities to provide

more exacting justifications for their decisions, especially, when alternative decisions were available, and to defend the decisional route (and the choice between competing considerations) taken in light of the broader policy and governance context could enhance the role and relevance of judicial review and it would still keep judicial interference within its constitutional framework. This transformation, however, assumes a more defined position of courts in the system of administrative accountability and it requires that Hungarian law first explores the meanings and applications of the proportionality principle in the domestic setting, in particular, in comparison with unreasonableness principle.