

Decisions with general scope in the light of special sectoral regulations in the Hungarian administrative system

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ABSTRACT

In the 21st century, the two administrative instruments that have the greatest impact on the legal situation of members of society, administrative enforcement and administrative legislation, have been and are being confronted with a number of social challenges (global economic crisis, refugee crisis, epidemics and pandemics). The challenges of the 21st century require public intervention to provide a rapid, accurate and effective response to the problems that arise, while ensuring legality and the protection of the rights of the citizens. The first responses to social problems are provided by sectoral regulations, which may conflict with general rules of administrative procedure. The study analyses administrative decisions of general scope in the light of special sectoral regulation and review the points of conflict with general rules of administrative procedure. The study concludes with a proposal.

KEYWORDS

administrative acts, administrative law, decision of general scope, epidemics, general administrative procedure

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1. INTRODUCTION

In the 21st century, the two administrative instruments that have the greatest impact on the legal situation of members of society, administrative law enforcement and administrative legislation, have been and are still being confronted with a number of societal challenges. These challenges include the global economic crisis, the refugee crisis, the emergence of climate protection objectives linked to the fight against global warming, competitiveness and digitalisation, and the *spread of various regional diseases and pandemics* (including epidemics affecting both human and animal populations).

The challenges of the 21st century require administrative intervention to *provide rapid, accurate and effective responses* to problems that arise, while at the same time ensuring that administrative law continues to serve its dual purpose. On the one hand, administrative law is an instrument for the management of administrative tasks, when it defines the public interest objectives and public tasks for which public intervention is necessary, and the legal means of intervention. On the other hand, administrative law establishes limits by protecting a society against arbitrary, unjustified and biased administrative decisions. The modern system of administrative instruments is, therefore, still expected to enforce the subordination of public administration to the law¹ and to ensure the legal protection of members of society and provide a rapid and effective response to social problems.

The effort to enforce these requirements is also reflected in Hungarian legislation. When the Act CL of 2016 on the Code of General Administrative Procedure (hereinafter: CGAP) was adopted, the central aim of the re-enactment of the general procedural law was to *ensure a fast and efficient administrative procedure*.²

The first response to the social problems that arise is not provided by general administrative procedural law, but by sectoral administrative legislation and sectoral administrative law enforcement. The drafting of general rules must, therefore, be based on an understanding and analysis of the tools and challenges of sectoral legislation, which determines the work of all those who apply the law. To use a commonplace example, I first measure the size and sew the shirt to fit, rather than first sewing the shirt and shaping it to fit the wearer.

This article deals neither with classic mandatory acts of public administration (legislation), nor with new types of regulatory acts, which are independent acts that are not related to a specific case, but which regulate management of administrative matters within a public administration's competence and thus determine a specific case procedure (so-called 'administrative acts of general scope'). Administrative acts of a general scope do not have a specific addressee (i.e. they are normative), but they do influence the conduct, the legal action, or the legal consequences of the conduct of a legal entity, either through a decision of an administrative authority on a specific administrative matter or in the absence of a decision of an administrative authority.³ This paper analyses the intervention instrument - the administrative decision with a

¹The requirement of the lawful functioning of public administration has been increasingly valued since the 19th century and is nowadays an indispensable condition for the democratic rule of law. Fábán (2021) 51.

²Balogh (2021) 96.

³Legal issues relating to the administrative act of general scope are well analysed in detail in the domestic legal literature. See Kovács et al. (2016); Rozsnyai (2018) 60–72; Rozsnyai (2019) 9–10; Kársz (2022) 1–10.



general scope, which appears in Hungarian sectoral administrative law, but has been little examined in the Hungarian legal literature, and which influences the legal situation of a group defined by an open addressee, even at the systemic level. The term ‘administrative decisions of a general scope’ is used in this paper to mean those decisions of public authorities falling within the scope of the CGAP which are open-ended, i.e. which do not specifically identify the addressees whose legal situation they are intended to influence. In short, the paper will examine normative acts hidden in individual administrative decisions.

In view of the above, the paper reviews the concept of administrative acts and the basis of their classification in Hungarian public administration, and then distinguishes between normative and individual acts. It then examines the emergence of decisions of general scope in the current Hungarian legal environment and in case law, and analyses the points of conflict between decisions of general scope in light of special sectoral regulation and the general rules of administrative procedure. The paper concludes with a proposal.

2. ADMINISTRATIVE ACTS AND THE BASIS FOR THEIR CLASSIFICATION

Public administration is the administration of the members and organisations of society and the orderly conduct of public interest, for which public administration has *a number of administrative instruments* based on the power to *intervene*.⁴ In its operation, public administration purposefully triggers various - not exclusively legal - effects, both in relation to its own system of organs and to other - typically external - legal entities, in order to achieve public goals. Thus, public administrations act both vis-à-vis other actors in the public administration, namely other public administrations, and vis-à-vis other, non-administrative entities. It follows from the principle of the legality of public administration that all administrative activities are carried out, albeit to a different degree, on the basis of legislation and within a legally regulated procedural framework. Administrative activities can take several forms, which form the basis for the typification of administrative acts.⁵

According to Hungarian administrative jurisprudence, the activities of administrative bodies can be divided into two groups. A distinction is made between *actual activities* which do not have legal effect, and *administrative acts* (acte administratif, Verwaltungsakt), which do.⁶ Actual activities are also regulated by administrative law, in other words, these activities are also subject to legal norms, but they do not have a legal effect; however, they are also closely related to administrative acts in many respects, complementing them and creating the conditions and circumstances necessary for their issuance.⁷ In the following, the study will focus exclusively on acts with a legal effect.

According to the Hungarian administrative law literature, an administrative act is a declaration of intent issued by the subject of public administration in order to perform the functions

⁴Kálmán (2020a) 10–13.

⁵Hulkó and Lapsánszky (2020) 176.

⁶Madarász (1989) 303.

⁷The Hungarian literature typically distinguishes six groups of actual activities: a) decision preparation, b) record-keeping actions, c) control, d) real acts, e) administrative actions, and f) substantive actions. Madarász (1989) 304–308; Szalai (2013) 74; Hulkó and Lapsánszky (2020) 181.



and public duties of public administration, which is characterised by a change in the legal position of the addressee of the act or other legal effects, and a causal connection between the act and the legal effect.⁸

The literature on administrative operations and acts classifies and groups administrative acts according to several criteria.⁹ Classification and grouping can be based on a) the characteristics of the issuing body (whether it is a body with general or special powers), b) the territorial scope (national, regional or local level decision), c) the composition of the decision-making body (collective or single-person decision), d) the duration (short or long term, fixed or indefinite), e) by the addressee (external or internal decision), f) by the degree of discretionary power (loose, tied or partially tied decision), g) by the possibility of judicial review (*administratio contenciosa* - *administratio pura*) or h) by the favourable or unfavourable nature of the decision (favourable or unfavourable decisions).

In addition to the categories of acts governed by administrative law described in the previous point, one of the most important bases for the classification of acts under administrative law concerns the delimitation, or more precisely the definition, of the scope of the addressee. On this basis, a distinction is made between (a) *normative* and (b) *specific administrative acts*. Normative administrative acts are general rules of conduct, the realisation of which is represented by individual acts.¹⁰ Taking the addressable circle as a basis, a third category is not known in domestic administrative jurisprudence.¹¹

3. THE DISTINCTION BETWEEN NORMATIVE ADMINISTRATIVE ACTS AND INDIVIDUAL ADMINISTRATIVE ACTS

The distinction between normative and specific administrative acts is based on the scope of the acts. The *scope of normative administrative acts is open*, which means that the elements of the set describing the subjects of the obligation or entitlement can change dynamically, in other words, the scope is constantly and continuously (at any moment) updated. A *normative administrative act has a continuous legal effect, irrespective of changes in the scope of the addressee*. As a result, the rights and obligations contained in normative administrative acts are permanently enforced against the addressees of the act and the addressees are not made specific (concretised) by the act, nor are they linked to a particular, individual case. In order for the scope of addressees to change, it is not necessary to amend the text of the normative administrative act, and the normative administrative act is capable of producing legal effects - automatically - even if the scope of addressees is constantly changing.¹² The legality of normative administrative acts is ensured by the guarantee rules of the legislative procedure and the instruments of norm control.

⁸Toldi and Pákay (1959) 15; Madarász (1989) 303; Patyi and Varga (2012) 202; Hulkó and Lapsánszky (2020) 178.

⁹Berényi et al. (1966) 294; Madarász (1989) 301–302; Berényi (1997) 50–52; Patyi and Varga (2012) 202–204, 225–24; Szalai (2013) 77; Patyi and Temesi (2013) 215–17.

¹⁰Szalai (2013) 72.

¹¹Pollák (2022) 590.

¹²Jakab (2020) 868.



In contrast to normative administrative acts, the *addressees of individual administrative acts are determinate*, which means that they are precisely and individually designated for a specific case and that the addressees can only be changed if the text and the provisions of the act itself change. In this case, the addressees are a frozen set at a given point in time - at the time of the act's entry into effect - which is not updated.¹³ The rights and obligations contained in individual administrative acts are only enforceable against the addressees of the act, since the act specifies (concretises) the addressees, linking them to a concrete, individual case. To change the addressees, the text of the individual administrative act must be amended. The legality of individual administrative acts is ensured by the rules of the enforcement procedure.

With regard to the two main, basic groups of acts, it is important to point out that *normative administrative acts may primarily contain normative (regulatory) provisions*, but may also contain specific provisions,¹⁴ *whereas specific acts may - even in theory - only contain specific provisions*. In theory, therefore, normative administrative acts may also - constitutionally speaking - contain only specific provisions, such as the budgetary regulations of local authorities or regulations establishing local protection or the imposition of a ban on changes. However, the incorporation of an individual provision into a normative act becomes unlawful - unconstitutional - if the provision deprives the person concerned of their right to legal remedy.¹⁵ Individual administrative acts may only contain specific provisions relating to specific legal entities, which are specific to a particular case, since they are not the result of legislation but of the application of law. By 'smuggling' a normative act into an individual administrative act, the issuer directly infringes Article T (1) of the Fundamental Law of Hungary, since the individual administrative act does not constitute a generally binding rule of conduct in the form of legislation.

Normative administrative acts include (a) *legislation adopted by administrative bodies* (government decree, decree of a member of the government, decree of the head of an autonomous regulatory body, municipal decree) and (b) *instruments of public law regulatory instruments* adopted by administrative bodies, thus normative decisions and normative instructions. It also includes (c) *other normative acts*, which include soft law legal norms such as codes of ethics of public bodies, notices of the Hungarian Competition Authority and recommendations of the Hungarian National Bank.

Within individual administrative acts, a distinction can be made between (a) administrative acts of a public authority and (b) administrative acts of a non-public authority. Within the group of specific acts of public authority, a distinction can be made between (a) *acts of public authority* and (b) *acts of legal supervision*. The addressee of official acts is an external legal entity outside the administration, the client, the legal situation of which is subject to a change brought about by the public authority in the exercise of its public powers. Acts of supervision of legality are specific acts of public authority, since they are typically concluded between two administrative bodies, one of which has relative autonomy (local self-government). Non-public administrative acts include (a) *acts issued in the course of hierarchical administrative activities* carried out under administrative authority and (b) *acts issued in the course of co-operative co-decision relationships*.

¹³Jakab (2020) 870-73.

¹⁴See e.g. Hungarian Constitutional Court (hereinafter: CC) Decision 6/1994 (II. 18.); CC Decision 4/1998 (III. 1.); CC Decision 7/2004 (III. 24.); CC Decision 3076/2013 (III. 27.).

¹⁵See CC Decision 6/1994 (II. 18.).



In the following, the study will only examine acts of public authority that are classified as individual administrative acts, with a view to determining whether their scope is closed in all cases, or whether, in the practice of administrative authorities, despite their theoretical exclusion, there are administrative decisions that establish, modify or abolish rights and obligations with an open scope.

4. THE EVOLUTION OF DECISIONS OF GENERAL APPLICATION IN THE HUNGARIAN LEGAL SYSTEM

In sectoral administrative law, as sector-specific measures, there have been and still are a number of acts which cannot be clearly classified in the dichotomy of normative and specific acts in administrative law. These are unilateral administrative acts, which apply an existing legal provision to a specific situation, typically one involving a threat to life, limb, health or natural values, but which define the addressees with general scope. In view of this, they cannot be considered individual decisions, nor are they normative acts, since they apply and implement a legal provision in the form of an official decision without specifying the addressees.

Before examining the current legislation, the study briefly discusses two acts which, in their original 'state', took the form of administrative decisions of general scope, but were modified by the legislator to resolve the problems arising from their general scope.

The first is a fire ban to prevent emergencies. Until 31 August 2017, in the event of an increased fire risk, the Minister could, by decision, impose a general fire ban for the whole country or a specific forested area, as well as for an area within 200 m of the forest boundary, for a temporary period.¹⁶ The decision to impose a fire ban and its lifting had to be published on the websites of the forestry authority and the Ministry headed by the Minister, as well as in two national newspapers and on public television and radio. The date of publication of the decision was deemed to be the date of first publication.¹⁷ However, in the event of an increased fire risk in the area of a county or municipality, the forestry authority could, in justified cases and for a temporary period, impose a ban on fires, with the agreement or on the proposal of the county or metropolitan disaster management directorate.¹⁸ The decision to impose a ban and its lifting had to be published on the websites of the forestry authority and the ministry headed by the minister, as well as in two national newspapers and on public television and radio. The date of publication of the decision was deemed to be the date of first publication.¹⁹ The decisions defined the fire bans on a geographical basis, with an open address range.

However, from 1 September 2017, a new fire banning regime came into force in our country.²⁰ From that date, the general fire ban will *no longer* be announced by ministerial or forestry

¹⁶See the Minister of Agriculture's decision EVF/180/2017.

¹⁷§ 67 (1) of Act XXXVII of 2009 on Forests, Forest Protection and Forest Management (hereinafter: Act XXXVII of 2009).

¹⁸See decision HBG/01/04586-4/2014 of the Forestry Directorate of the Hajdú-Bihar County Government Office.

¹⁹Act XXXVII of 2009 § 67 (2).

²⁰The amendment was enacted by Act LVI of 2017 amending Act XXXVII of 2009 on Forests, Forest Protection and Forest Management and other related acts.



authority decision, but the period of increased fire risk will be specified²¹ and published, no longer in the form of a decision.²² The declaration of a period of increased fire risk is thus *de facto* effected by the publication of a map, the legal consequence of which is that the forest manager may restrict or prohibit access to and stay in the forest²³ and to light fires in the forest and on external properties within a radius of 200 m of the forest during the period of increased fire risk.²⁴

Besides the transformation of the fire ban, it is also worth highlighting the macro-prudential management²⁵ tool of the former Financial Supervisory Authority (hereinafter FSA).

Based on Act CXXXV of 2007 on the Financial Supervisory Authority (hereinafter the FSA Act),²⁶ from 1 January 2010 to 31 December 2010,²⁷ in the interest of the safe operation of the financial intermediary system, the FSA *could prohibit, restrict or impose conditions on* all entities and persons authorised to carry out the activities concerned, as defined in the sectoral laws, for a limited period of time, but not exceeding ninety days, the *performance of certain activities* also defined in the sectoral laws, the *provision of services, the conclusion of transactions, and the distribution of products* within the scope of these activities. The FSA issued the above provision *in the form of an administrative decision*.²⁸

However, a number of conditions had to be met before a decision could be taken under the FSA Act. Thus, it could only be taken if the performance of the activity concerned entailed a significant risk to the stability of the financial intermediary system from the standpoint of the functioning of the financial intermediary system as a whole, with the additional condition that the prohibition of the performance of the activity was subject to the condition that this risk could not be eliminated by other means. The conditions for carrying out certain activities had to be defined in the Decision in such a way as to be capable of eliminating the significant risk and not to result in a restriction of contractual freedom beyond what was strictly necessary to mitigate the significant risk. The decision had to be communicated to customers by publication on the website of the FSA. The decision was deemed to have been notified upon publication.²⁹

The above decision of the FSA was not a tool for micro-prudential supervision of individual financial institutions, but for macro-prudential supervision of the financial intermediary system

²¹Act XXXVII of 2009 § 67 (1).

²²See [link1](#).

²³Act XXXVII of 2009 § 67 (2).

²⁴Act XXXVII of 2009 § 65 (5).

²⁵For more on macroprudential management, see Kálmán (2020b) 576–96 and Kálmán (2016).

²⁶It was amended by Act CXLVIII of 2009 on Certain Amendments to the Act on Making the Supervision of the Financial Intermediary System More Effective (hereinafter: Act on Amendments).

²⁷FSA Act § 44/C (1).

²⁸See § 44/C (2) of the FSA Act.

²⁹FSA Act § 44/C (3)-(5).



as a whole.³⁰ The decision could be taken under the CGAP³¹ in force at the time, and its addressees were openly defined, since it did not contain a provision referring to a specific addressee, but to all entities providing services in the sector or the financial intermediation system. In this sense, the administrative decision *could be considered as a systemic administrative instrument and not as an individual instrument of intervention*.

The FSA decision had a normative content, in view of which, following the amendment of the Constitution,³² with the adoption of the new FSA Act, the introduction of temporary market barriers *became the subject of regulation*³³ - *thus the subject of a normative administrative act - which was maintained by the legislator after the integration of the FSA into the Hungarian National Bank*.³⁴

5. DECISIONS OF GENERAL APPLICATION IN THE CURRENT LEGISLATIVE CONTEXT AND CASE LAW

Based on an analysis of the existing sectoral legislation, it can be concluded that there is currently no rule of competence which *expressly* empowers an administrative authority to issue decisions of general application. However, in the application of certain sector-specific administrative instruments, in the case law of administrative authorities - in the context of administrative authority procedures under the CGAP - *issue administrative conclusive decisions of general scope* - called by some authors 'pseudo-norms'³⁵ - which are open-ended in scope. These sector-specific administrative instruments are mainly related to the prevention and management of emergencies, in particular epidemic emergencies and epidemics, and are therefore more prevalent in a) the *veterinary sector* and b) the *public health sector*. In these areas, there is an overriding public interest in ensuring that the public authorities have rapid and effective means of intervention.

In the *veterinary sector*, an example is that, in order to prevent, detect, prevent the spread of, reduce the damage caused by, or eradicate an animal disease, and in accordance with the nature and extent of the disease, the food chain control body may take *animal health measures* to the extent and for the duration necessary to eliminate the risk,³⁶ such as (a) a *local closure*, (b) a *quarantine*, (c) a *protection zone* and (d) a *surveillance zone*.

³⁰As stated in the explanatory memorandum to the FSA Act, the FSA is entitled to restrict, condition or prohibit the performance of an activity *at sectoral level and for a temporary period* if the performance of the activity in question entails significant risks and there are reasonable grounds to assume that the interests of a number of customers and creditors will be harmed or the transparency of the operation of the financial intermediary system will be reduced.

³¹Act CXL of 2004 on the General Rules of Administrative Procedure and Services.

³²§ 7 of Act CXIII of 2010 amending Act XX of 1949 on the Constitution of the Republic of Hungary included the FSA among the constitutional institutions and conferred on its President the power to issue decrees.

³³See § 117 (2) of Act CLVIII of 2010 on the Financial Supervisory Authority.

³⁴See § 172 of Act CXXXIX of 2013 on the National Bank of Hungary.

³⁵Balázs and Hoffman (2020) 3.

³⁶Act XLVI of 2008 on the Food Chain and Official Supervision, § 51 (3) (d)-(f), (s).



In practice, the imposition of a *local closure* is rendered by an administrative decision of an administrative authority subject to the CGAP, which does not even define the scope of the case, but defines the administrative area subject to the community seal on a territorial basis, sometimes by providing GPS coordinates, the duration of the community seal and the obligations arising from the seal.³⁷

A *quarantine* order is also issued by an administrative decision of the administrative authority under the CGAP, specifying the geographical area covered by the *quarantine* and the obligations arising from it, without directly defining those bound by it.³⁸

The *protection zone* and the *surveillance zone* are established by specifying the geographical area covered by the sector-specific administrative instrument in an administrative decision under the CGAP. The decisions do not contain specific clients, but link to the geographical area the detailed obligations to be respected by farmers in the area concerned.³⁹

In fact, the sector-specific administrative instruments contained in the above administrative decisions are not substantive decisions, taken in relation to individual clients on individual administrative matters, but *normative acts containing obligations for an open addressee, contained in an administrative decision* issued in the context of an ex officio procedure. They are also characterised by the fact that they are issued by the territorial administration and have a particular scope, in other words, they are specific to the territory defined in the administrative decision.

The *public health sector* has become a priority in recent years as a result of the SARS-COVID-19 epidemic. At the same time, this priority and the measures taken by the epidemiological authorities have also led to the involvement of a wide range of legal entities and the impact on their legal position, given the global nature of the epidemic.

In the event of an epidemic risk, the state health administration (in this case, the national public health officer) *may directly take all the official measures and procedures* necessary to avert the risk of an epidemic. A decision taken in this context may be declared immediately enforceable on public health or epidemiological grounds.⁴⁰ Another sector-specific administrative instrument to be highlighted is that the public health administration body (in this case, the National Public Health Centre) *takes direct action* in the context of its health administration and coordination tasks when an exceptional circumstance (epidemic, natural disaster and other disasters, sudden shortage of doctors, etc.) makes this necessary.⁴¹ The above sector-specific administrative instruments empower the public administration to influence the legal situation of legal entities in certain circumstances, but in such a way that the administrative instruments that can actually be used are not specified in the legislation; the choice of the instruments to be used, the determination of the need for their application and the precise content of the instrument

³⁷See, for example, the decisions of the Gödöllő District Office of the Pest County Government Office No PE-07/ÉÁO1/00793-3/2020 and the Miskolc District Office of the Borsod-Abaúj-Zemplén County Government Office No BO-08I/ÁÉ/2012-4/2020 ordering the closure of a municipality.

³⁸See e.g. the decisions of the Bács-Kiskun County Government Office BK/EBAO/181-11/2020. and the Csongrád-Csanád County Government Office CS/I01/02692-3/2021.

³⁹See the decisions of the Bács-Kiskun County Government Office BK/EBAO/00052-25/2022. and the Csongrád-Csanád County Government Office CS/I01/00829-71/2020.

⁴⁰See § 11 (5) of Act XI of 1991 on Health Authorities and Administration (hereinafter: HAA).

⁴¹HAA § 6 (1) l).



used, i.e. the determination of the rights and obligations to actually influence the legal situation of legal entities, are left to the - *broad - discretion of the legislative body*.

In addition to the above, the sectoral law provides that the public health administration may, in the event of an epidemic, restrict or prohibit a) the operation of any institution, event or activity that could contribute to the spread of the epidemic; (b) the movement of persons, animals or goods between certain areas; (c) contact between residents of certain areas and residents of other areas; (d) visits to in-patient clinics; (e) leaving certain areas; (f) the sale or consumption of certain foodstuffs; (g) the consumption of drinking water; and (h) the keeping of certain animals.⁴²

In order to tackle the SARS-COVID-19 epidemic, the National Medical Officer of Health ordered,⁴³ among other measures, a ban on visits to all inpatient healthcare providers - both publicly funded and non-publicly funded - in Hungary,⁴⁴ and to all social care institutions providing specialised care in Hungary.⁴⁵ These decisions applied not only to these institutions, but also to the entities living or being treated in these institutions and to the entities entitled to have contact with these entities. On the same legal basis, the National Public Health Center ordered all social institutions providing specialised care in Hungary to cease their activities and, also on that legal basis, ordered all general practitioners to vaccinate against COVID-19 in the context of their primary care activities.⁴⁶ In addition to the above, the National Public Health Center prohibited health care providers providing specialised dental care⁴⁷ from carrying out non-emergency dental procedures.⁴⁸

The sector-specific administrative instruments in the public health sector, as in the veterinary sector, are not in fact substantive decisions on the merits of the individual obligee in individual administrative cases, but *normative acts containing obligations in an administrative decision*, issued in the context of an ex officio procedure, with an open addressee. They are also characterised by the fact that, unlike in the veterinary sector, they are typically issued by the central public administration, in view of which they have national scope.

6. DECISIONS OF GENERAL APPLICATION AND RULES OF GENERAL ADMINISTRATIVE PROCEDURE

The existence of administrative authority decisions with a general scope and thus normative content causes a significant break in the general administrative procedural law in several respects, and the general rules of the CGAP do not provide adequate guarantees for the legal entities affected by the decisions.

⁴²§ 74 of Act CLIV of 1997 on Health Care (hereinafter referred to as the 'Health Care Act').

⁴³The legal basis for the decisions in question was § 11 (5) of the HAA.

⁴⁴The secondary legal basis for the decision in question was § 74 (2) of the Health Care Act. See Decision No 42935-1/2020/ECIG of the National Public Health Center.

⁴⁵See the National Public Health Center's Decisions 13305-16/2020/ECIG and 42935-2/2020/ECIG.

⁴⁶See Decision No 16427-4/2021/JF of the National Public Health Center.

⁴⁷The legal basis for the decision in question was Section 6 (1) (I) of the HAA.

⁴⁸See decision of the National Public Health Center No 15150-1/2020/ECIG.



Without claiming to be exhaustive, the paper reviews the following breaking points: a) the decline in the status and rights of the party of the administrative procedure, b) the prevalence of officially known facts in the clarification of the facts, c) the violation of the general rules on the content of the introductory part of the administrative decision, d) the relationship between the right to appeal and immediate enforceability, and e) the communication of decisions of general application.

6.1. The status of party and the decline of party rights

Party status in administrative procedural law is a matter of *constitutional importance*, given that party status is linked to party rights and enforcement possibilities. The determination of the status of the party is an obligation of the authority, a question of evidence and factual clarification, which requires a thorough examination of the law and factual issues of the specific case before the authority.⁴⁹ It is also important because the procedural legal relationship between an administrative authority and at least one specific party is by *definition* established in order to settle the case before the authority. Without a concrete party, there is therefore no administrative authority procedure and no procedural relationship. Furthermore, given that the procedural law of administrative authorities provides for the advance legal protection of members of society against interference by administrative authorities exercising public authority, their party status is the basis for the rights of the party that can guarantee this legal protection (right to information, right to be informed, right to make a statement, right to a remedy, etc.).

It also follows from the above that the intended legal effect of a public authority decision is to establish, modify or terminate the rights and obligations of the party. In this respect, the identification of the addressee of the decision is a matter of substance for the public authority, and the public authority decision must identify them with certainty. They are *defined in a closed manner in the public procedural law*, and new entities may only be subject to the decision by amending it.

Decisions of a general scope do not specify the actual parties, so that the addressees in the decision cannot be identified precisely on the basis of the administrative decision. In fact, the addressees are open and can change dynamically, since they are defined on the basis of some general characteristic. However, this also implies that the rights of the obligees are overshadowed and that the public authority procedure cannot achieve the objective of advance legal protection, since the addressees are not typically aware of the procedure, but only of the content of the decision.

6.2. Advancement of officially and commonly known facts in the clarification of the facts

According to the CGAP, the system of providing evidence in administrative proceedings is free, which means that any evidence that can clarify the facts may be used in them. Where the information available is insufficient to make a decision, the authority shall carry out a procedure for taking of evidence.

⁴⁹Barabás et al. (2018) 131.



In ex officio administrative proceedings, the burden of proof is on the authority.⁵⁰ The purpose and object of ex officio proceedings is typically to impose an *obligation on a party*; a legal disadvantage, a *restriction of rights*, or an administrative sanction, and thus generally to impose a disadvantage on the party. It follows that the initiation and conduct of the ex officio procedure and the involvement in the procedure are generally not in the interest of the party. In the ex officio procedure, the public interest and the enforcement of legality require the activity of the public authority, which must carry out procedural acts to prove the relevant legal facts. The burden of establishing the facts and providing evidence is, therefore, on the public authority, which *must prove the outcome of the ex officio procedure*.⁵¹ At the same time, in an ex officio procedure, there is no need to be certain about facts of which the public authority has official knowledge or which are common knowledge.⁵²

A fact officially known by the authority is one that is known to the head of the authority or the administrator in the course of their official duties⁵³ (e.g. the laboratory results of a sampling by another authority). Facts that are common knowledge are known by the judiciary as a whole or by a significant part of a community. A general state of affairs, a social, cultural or technological circumstance, a general social custom,⁵⁴ a commercial contractual practice,⁵⁵ local knowledge,⁵⁶ or a historical fact may be accepted as a commonly known fact.⁵⁷

In the case of decisions of a general scope relating to an epidemic situation, administrative intervention shall take place as soon as the relevant circumstances arise. Typically, the date of the opening of the ex officio administrative procedure coincides with the date of the decision, in view of which the factual clarification shifts towards the use of facts based on official or common knowledge, in other words facts that do not actually require proof in the course of the administrative procedure. Thus, the burden of proof, which is the party's instrument of legal protection and which is characteristic of ex officio proceedings, is *not effectively applied in the adoption of decisions of general application*.

6.3. Without prejudice to the general rules on the content of the introductory part of administrative decisions

The basic legal requirement - a guarantee - for the introductory part of administrative decisions is that it must contain all the information necessary to identify the party.⁵⁸ The data necessary for the identification of the addressee is that which allows the identification of the natural person, legal person or unincorporated entity to whom the administrative decision is addressed with absolute certainty. That is, the one who is affected by the administrative decision, whose

⁵⁰See Curia Kfv.II. 37.297/2012/8.

⁵¹Barabás et al. (2018) 637.

⁵²See § 62 (3) of the CGAP.

⁵³Barabás et al. (2018) 526.

⁵⁴See Szombathelyi KMB K.26.992/2012/12.

⁵⁵See Vas County Court I.K.20.237/2007/11.

⁵⁶See Vas County Court K.20.200/2008/13.

⁵⁷See Supreme Court. Kfv.III. 28.047/1996/4.

⁵⁸See § 81 (1) of the CGAP.



legal situation is changed, whose rights and obligations are created, modified or terminated. The definition of the party in an administrative decision is therefore a matter of substance, and an erroneous definition is an error on the merits.

In the case of decisions of general scope, the data necessary to identify parties is effectively missing; the decisions are not *aimed at identifying* specific parties but at *defining some open addressees*.

6.4. The relationship between the right to a remedy and immediate enforceability

Administrative proceedings under the CGAP are typically single-instance proceedings, where there is no right of appeal (internal remedy) and administrative decisions can only be challenged in an administrative court action. The only exceptions to this rule under the CGAP are local government bodies, with the exception of the representative body, and local law enforcement bodies.⁵⁹ Administrative proceedings do not have suspensory effect on the decision of the public authority, and the rights and obligations arising from the decision may be exercised and must be fulfilled even if an action has been brought against the decision. The only exception to this rule is the court, which may, on application, order a suspensory effect in the context of interim relief.

Given that decisions of general application are typically issued by the territorial or central administration, they become administratively final upon communication and, if the time limit for execution is disregarded, enforceable, so that the declaration of immediate enforceability is irrelevant. It may be relevant in cases where the decision is not actually communicate - see the next point - and where, by imposing immediate enforceability, the authorities wish to make their acts of general application capable of producing legal effects despite the lack of communication.

6.5. Communication of decisions of general application

The decision of an administrative authority is *communicated by* the authority to *the parties to whom it applies*.⁶⁰ Communication is a key legal institution of administrative procedural law, as it is a precondition for the decision of the authority to have legal effect on the addressees. The date of communication of the decision is linked to the time limits for appeals, the time limit for enforcement and the date of administrative finality. As regards communication, the case-on-the-subject emphasises that a decision that is not issued by the public authority cannot be regarded as a decision having legal effect.⁶¹

One of the means of communication is *public announcement*, under which, if the circle of parties cannot be precisely established or it is prescribed by an Act or government decree, the authority publicly announce the decision.⁶² The authority shall publicly announce a conclusive decision with administrative finality made in a procedure involving the participation of more than fifty parties after it reached administrative finality or been declared immediately enforceable.⁶³ In situations where there is a threat to life or serious damage, the CGAP also allows the

⁵⁹See § 116 (2) of the CGAP.

⁶⁰See § 85 (1) of the CGAP.

⁶¹See Supreme Court Gf.I. 32.374/2000 and Kfv.V.39.252/2010.

⁶²See § 89 (1) of the CGAP.

⁶³See § 89 (4) of the CGAP.



public authority to communicate the decision by means other than that provided for by law (typically a decision published in the press). However, in this case, the guarantee rule is that the decision must be communicated to the parties concerned in writing at a later stage and in good time. In such cases, for the sole purpose of the calculation of the time limit for legal remedy, the day of the communication of the decision shall be the day of the communication in writing.⁶⁴

In the case of decisions of a general scope, given the open nature of those affected there is typically no communication to the parties, which means that these decisions would not have legal effects under the CGAP.⁶⁵ Decisions of general scope relating to particular areas are published on the websites of the authorities and on the notice boards of the municipalities, while decisions of national scope are communicated via the authorities' websites or, exceptionally, by publication in the Official Gazette.

7. SUMMARY

The study reviewed the concept of administrative acts and the basis for their classification, and distinguished between normative and specific acts. It then examined the existing legislation on the use of certain sector-specific administrative instruments of particular importance in the animal health and public health sectors, which are of particular relevance due to the wide application of epidemiological measures, and the case law relating to the use of administrative instruments. The study concludes that the sector-specific administrative instruments contained in the administrative decisions examined are not *in fact* substantive decisions taken by individual clients on individual administrative matters, but *normative acts* containing obligations in an administrative decision, issued in the context of an *ex officio* procedure, with an open addressee. The study then reviewed the points of conflict between normative acts contained in administrative decisions and the rules of general administrative procedure, concluding that these decisions cannot be incorporated into the system of the CGAP, and thus into the grouping of acts widely accepted by the public administration, and that the general rules of administrative procedure cannot fulfil their role of legal protection in the case of decisions of general application.

Sector-specific administrative instruments with normative content but which do not constitute legislation - which may be called *sui generis administrative decisions* or special administrative decisions - require uniform, general rules in order to ensure lawful and effective administrative intervention and the legal protection of clients.⁶⁶

There are two ways to achieve this. One option is to incorporate decisions of general application into the system of the CGAP as a specific type of decision, regulating the definition of the scope of the addressee, the different rules on the clarification of the facts, the rules

⁶⁴See § 85 (6) of the CGAP.

⁶⁵This issue is also addressed by István Balázs and István Hoffman in their study. Balázs and Hoffman (2020) 3.

⁶⁶The French Code of Administrative Procedure has already recognised this need. The Code of Administrative Procedure (the Code des relations entre le public et l'administration), which entered into force on 1 January 2016, already recognises three categories of administrative acts. Individual acts (les actes individuels), regulatory acts (les actes réglementaires) and non-regulatory, *sui generis* acts containing other decisions.



ensuring the legal protection of the client and the provisions on communication. The other option is to insert them among the other legal acts already appearing in the Legislation Act.⁶⁷ In this case, the rules should at least cover the bodies authorised to issue and the provisions on publication.

The author of the study favours the first solution, since the regulation of decisions of a general scope is a matter for general administrative procedural law in order to ensure the legal protection of clients.

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