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The right to good administrative procedure and its elements

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I. OBJECTIVES OF THE DISSERTATION

"The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress."[1] "Greater unity between its members" – the aim of the Council of Europe may be furthered in a range of different ways. Article 1 of the Statute of the Organization makes specific reference to the Council of Europe's mission in maintaining and promoting human rights and fundamental freedoms as a way of achieving this "greater unity". Administrative procedure requires common European regulation by all means, as this is that special field of law by which the administrative body directly meets the citizens. Consequently these cases carry danger that fundamental rights of citizens may be impaired – its occurrence in a constitutional state is undeniably not desirable by any means. Considering the present national administrative systems, the administrative official procedural law is being emphasized. Main tendencies in practice are to constrain the executive power of the state within constitutional frame of law and to guarantee gradually expand the fundamental rights of citizens, establishing the "good administration". Regarding the European administrative law, does European administrative procedural law exist at all? What forms and levels of standardization can be expected? The answer can be given through the documents of the Council of Europe achieved in this field of law.

Having subscribed to the European Convention on Human Rights, Council of Europe member states have agreed to respect certain principles which therefore govern the relationship of their authorities with private persons, including in the branch of administrative law. Those principles have been further refined in several conventions and various recommendations and resolutions which were adopted unanimously by the Council of Europe Committee of Ministers and which, thus, reflect the standards applicable in member states in pursuance of their devotion to the Rule of Law as expressed in the Statute of the Organisation. As regards the significance and practical impact of Council of Europe Recommendations and Resolutions, it is important to observe the following: contrary to conventions which states may have ratified, recommendations and resolutions have no legally binding effect on the states and governments. They do have, however, a moral and political effect on them. This effect stems from two facts: first of all, it is difficult, albeit possible, for a government to

[1] Statute of the Council of Europe, Chapter I, Article 1.

totally ignore for a long period of time certain standards to which all or most of the other democratic states of the region pledge commitment; moreover, there can be an obvious problem with a government's good faith in case a government itself is among those who have not only participated in the negotiations of a text, but also voted for its adaptation in the form of a recommendation, if such government later on refuses to conform to its own appeal.[2]

Fortunately, it seems so that the European legislator now focuses "not just on specific administrative acts, but also on the administrative procedures themselves. In other words, there has been a shift in emphasis from the outcome of administrative action (result) to the administrative behavior (functioning)."[3] And at the end of this process, "the principle of good administration could be to administrative law what 'good governance' and 'good legislation' are to international law."[4]

[2] *Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons. A Handbook* (hereafter referred as "*Handbook*"). Directorate of Legal Affairs. Strasbourg, 1996., p. 6.
[3] FORTSAKIS, Theodore: Principles governing good administration. *European Public Law,* Volume 11, Issue 2. Kluwer Law International, 2005. p. 217.
[4] FORTSAKIS, p. 211.

II. SUMMARY OF THE RESEARCH RESULTS

1. The notion of good administration

The right to good administration is procedural in character. As for its legal nature, it enables an individual to demand that the administration acts in a manner prescribed by law, but cannot claim that it issues a particular decision or grants him certain benefits.[5]

There are various theories on the role of procedural rights. The first of them is the 'gateway theory' which says that the importance of procedural rights can be explained by an assumption that the attainment of substantive rights is conditional upon the existence of procedures. This theory regards procedural rights as 'gateways' to substantive rights. The other important theory in this field is the 'dignity theory'. According to it, procedural rights ensure that public authorities pay sufficient respect to the individual. Procedural safeguards are an end in themselves and not just means to an end. The main aim of procedure is to protect an individual and to ensure fairness of proceedings. These two theories can be contrasted with the 'instrumental theory' which declares that procedural rules are designed to ensure efficiency, organise administrative activities and serve as an instrument for the achievement of accurate decisions.[6]

Before turning our attention to this process, we have to clarify the meaning of good administration. "The people's confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration."[7] The main task of the new federal government is to develop a good administration in order to gain confidence of the people and thus create a sense of common national citizenship.[8]

The expression has become somewhat fashionable and appears in various instruments both in European and in national level, but different authors give different definitions. According to Theodor Fortsakis, "the principle of good administration is at once a long-standing idea and a ground-breaking one. Its specific content has gradually been nurtured within the framework of the long-established concept of user protection and this principle, enshrined and elaborated on in various instruments and European case-law, now stands as one

[5] KANSKA, Klara: Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights. *European Law Journal*, Vol. 10, No. 3. Blackwell Publishing Ltd. 2004. p. 301.
[6] KANSKA, p. 301.
[7] A. Hamilton's speech at the Constitutional Convention, 1787.
[8] KANSKA, p. 296-297.

of the cornerstones of modern administrative law."[9] Good administration (some call as useful administration) means that "administrative bodies have a duty to exercise the powers and responsibilities vested in them by existing laws and regulations, by drawing on the prevailing concept of law, in such a way as to avoid an overly rigid application of the statutory provisions. In other words, not only must they avoid any unfair doctrinal approach but they must also endeavor to adapt the legal rules to social and economical realities."[10] The principle has an ambivalent function, "on the one hand, it acts as an umbrella, under which separate rules are clustered together around a common, guiding idea, namely the idea of good administration; […] on the other hand, it can itself serve as a springboard for specific new rules relating to the same idea."[11] The first interpretation is affirmed by Klara Kanska, who says that "the notion 'good administration' developed as an umbrella principle, comprising an open-ended source of rights and obligations".[12]

2. The way to good administration

The Council of Europe started its work in the sphere of administrative law quite early, in 1977 when its first resolution on protection of the individual in relation to the acts of administrative authorities was issued.[13] The ideological basis of the document was the ever-increasing importance of public administrative activities. Public authorities, in addition to their traditional task of safeguarding law and order, have been increasingly engaged in a vast variety of actions aimed at ensuring the well-being of the citizens and promoting the social and physical conditions of society. This development resulted in the individual being more frequently affected by administrative procedures. Consequently, efforts were undertaken in the various states to improve the individual's procedural position vis-à-vis the administration with a view to adopting rules which would ensure fairness in the relations between the citizen and the administrative authorities.

For this reason, in its resolution the Council of Europe worked out five principles: right to be heard, access to information, assistance and representation, statement of reasons and indication of remedies. These five principles can be considered as the very first step

[9] FORTSAKIS, p. 207.
[10] FORTSAKIS, p. 209.
[11] FORTSAKIS, p. 211.
[12] KANSKA, p. 305.
[13] *Resolution (77) 31 on protection of the individual in relation to the acts of administrative authorities* (Adopted by the Committee of Ministers on 28 September 1977 at the 275th meeting of the Ministers' Deputies)

towards good administration which means a part of the protection of the individual's fundamental rights and freedoms, which is one of the principal tasks conferred on the Council of Europe by its Statute. The resolution was later followed by many other resolutions and recommendations by the Council of Europe defining more and more substantial requirements regarding administration and administrative law, but the result of the systematic work was not gathered into one document.[14]

In 2003, Parliamentary Assembly carried out a recommendation[15] in which it urged the member states to create the institution of ombudsman at national level where it does not already exist. In this document the Parliamentary Assembly stated that the governments of Council of Europe member states should adopt at constitutional level an individual right to good administration following the drafting of a model text by the Committee of Ministers and they also should adopt and implement fully a code of good administration, to be effectively publicized so as to inform the public of their rights and legitimate expectations. The Assembly further recommended that the Committee of Ministers draft a model text for a basic individual right to good administration as well as draft a single, comprehensive, consolidated model code of good administration, deriving in particular from Committee of Ministers Recommendation No. R (80) 2 and Resolution (77) 31 and the European Code of Good Administrative Behaviour, with the involvement of the appropriate organs of the Council of Europe – in particular the Commissioner for Human Rights and the European Commission for Democracy through Law, as well as the Assembly – and in consultation with the European Ombudsman, thus providing elaboration of the basic right to good administration so as to facilitate its effective implementation in practice.

The Committee of Ministers fortunately took this advice and began to drift a model code of good administration. Finally, in 2007 this process led to a substantive document declaring the necessity of the institution of good administration and ruling its regulations. In the foreword the document refers to all the other recommendations made by the Council of

[14] See for example:
- *Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities* (Adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies)
- *Recommendation No. R (84) 15 of the Committee of Ministers to member states relating to public liability* (Adopted by the Committee of Ministers on 18 September 1984 at the 375th meeting of the Ministers' Deputies)
- *Recommendation Rec (2003) 16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law* (Adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)
- *Recommendation Rec (2004) 20 of the Committee of Ministers to member states on judicial review of administrative acts* (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies)

[15] *Recommendation 1615 (2003) The institution of ombudsman*

Europe on the field of European administrative law mentioned above, and not only mentioned them but successfully incorporated their achievements as well.

3. The main principles of good administration

1. Lawfulness

> *Public authorities shall act in accordance with the law. They shall not take arbitrary measures, even when exercising their discretion and shall comply with domestic law, international law and the general principles of law governing their organisation, functioning and activities. Public authorities shall act in accordance with rules defining their powers and procedures laid down in their governing rules and exercise their powers only if the certain facts and the applicable law entitle them to do so and solely for the purpose for which they have been conferred.*

Since the ancient Greek philosophers, law is considered to the main mean to subject governmental power to control. As Aristotle said 'government by laws is superior to government by men.'[16] Nowadays jurisprudence distinguishes three aspects of rule of law. Firstly, the principle expresses a 'preference for law and order within a community rather than anarchy', which is the philosophical view of society linked with basic democratic notions. Secondly, the rule of law 'expresses a legal doctrine of fundamental importance, namely that government must be conducted according to law, and that in disputed cases what the law requires is declared by judicial decision'. Thirdly, 'the rule of law refers to a body of political opinion about what the detailed rules of law should provide' in matters both of substance and of procedure.[17]

The concept of good administration is founded on the rule of law. According to this principle, 'administrative authorities have to act on the basis and within the limits established by law'.[18] The general meaning of lawfulness is that every person (natural and legal) as well as all the authorities are subject to the law but in two different ways: citizens and legal

[16] BRADLEY, A. W. and EWING, K. D.: *Constitutional and administrative law.* Twelfth Edition. Longman, London and New York. p. 101.
[17] BRADLEY - EWING, p. 105.
[18] KANSKA, p. 299.

persons may do everything which is not prohibited to them, while state authorities only may act in such cases and only can do that which is subscribed for them by law. Lawfulness is considered as the very basic element of a state which is governed by law (rule of law), that is why all the principles are based on the assumption that the State accepts and adheres to the fundamental constitutional principle of the rule of law in the practice. As for the Council of Europe, the rule of law consists of three essential elements:[19] firstly, everybody – whether natural or legal person – is subject to the law. Secondly, it must be possible for everybody to take knowledge of his or her rights and duties under the law. Thirdly, observance of the law can be controlled by judges who are independent in the exercise of their functions and whose judgments must be enforced.

The principle of lawfulness requires not only that administrative authorities shall not breach the law, but also that all their decisions must have a basis in law and that their content complies with the law. Furthermore, it requires that compliance by the administrative authorities with these requirements may be effectively enforced. Implicitly, the principle of lawfulness also means that the law as to the functions and powers of the administrative authorities should be validly enacted, furthermore sufficiently clear and specific. The principle also requires that unlawful administrative acts must be withdrawn. However, other principles which protect individuals' rights may take precedence over that rule.[20]

Being such an elementary principle, lawfulness showed up quite early in the view of the Council of Europe. In the Recommendation No. R (80) 2 of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities[21] it was declared that an administrative authority, when exercising a discretionary power, does not pursue a purpose other than that for which the power has been conferred. In the year 2000, the Council of Europe invented and extended the principle in a new recommendation[22] stating that the public official should carry out his or her duties in accordance with the law and with those lawful instructions and ethical standards which relate to his or her functions; they should also act in a politically neutral manner and should not attempt to frustrate the lawful policies, decisions or actions of the public authorities.[23] In decision-making, the public official should

[19] *Handbook*, p. 8.
[20] *Handbook*, p. 10.
[21] Adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies
[22] *Recommendation No. R (2000) 10 of the Committee of Ministers to member states on the status of public officials in Europe* (Adopted by the Committee of Ministers on 11 May 2000 at its 106th Session)
[23] See Article 4 of the Recommendation No. R (2000) 10

act lawfully and exercise his or her discretionary powers impartially, taking into account only relevant matters.[24]

The rule of law bears with a high importance in Hungary as well. The Constitutional Court pointed out in many decisions that regarding the activities of public administration the subordination of public administration under the law is a requirement derived from the rule of law stated in the Hungarian Constitution.[25] It is necessary that the intervention of the public authorities into the private sphere must happen within the institutional limits determined by law and according to the procedure prescribed by law. The enforcement both of the lawfulness of administrative acts and of the rule of law must be secured.[26]

The principle of lawfulness means in Hungarian administrative law that administrative acts have to be bound by law. This raises the following requirements for administrative acts: the administrative authority must be established by law, as well as the jurisdiction and competence of the authority, the act must be in accordance with legal rules and last, during the procedure the authority must comply with the processual prescriptions. The importance of the principle is well-showed by the fact that the Hungarian administrative procedural act contains it in the very beginning, in the first Article, as follows: 'In their proceedings administrative authorities must abide by the provisions of legal regulations, and must enforce them upon others.'[27] According to this rule, public authorities have to enforce the statutory instruments ex officio; they cannot wait for the petition or complain of the client or other party of the procedure.[28]

2. Legal certainty

> *Public authorities shall act in accordance with the principle of legal certainty. They may not take any retroactive measures except in legally justified circumstances and shall not interfere with vested rights and final legal situations except where it is imperatively necessary in the public interest. It may be necessary in certain cases, in*

[24] See Article 7 of the Recommendation No. R (2000) 10
[25] 'The Republic of Hungary is an independent, democratic constitutional state.' See Article 2 of the Act XX of 1949 (The Constitution of the Republic of Hungary).
[26] See Decisions 56/1991. (XI. 8.), ABH 1991, p. 454., 456.; 6/1999. (IV. 21.), ABK 1999, april, p. 107., 109.
[27] See the first sentence of Article 1. Par. 1. of Act CXL of 2004 on the General Rules of Administrative Proceedings and Services (hereinafter referred as Ket.)
[28] For more see PATYI, András (ed.): *Administrative procedural law.* Dialog Campus. Budapest-Pécs, 2007. p. 92.

particular where new obligations are imposed, to provide for transitional provisions or to allow a reasonable time for the entry into force of these obligations.

The importance of this principle is well-shown by that some authors consider it (together with proportionality) as one of the key-elements of the measure of good administration.[29] Administrative authorities must be consistent in their administrative acts so as to respect the legitimate trust which private persons ought to be able to place in them. Private persons thus acquire vested rights which basically mean that administrative acts may not have retroactive effect unless expressly authorized by law or unless such acts are to the private person's advantage.[30]

The principle of legal certainty was interpreted by the Hungarian Constitutional Court so many times that it can be regarded without exaggeration as the most often cited constitutional principle. Legal certainty is the essential element of the rule of law. It establishes an obligation for the state (mainly for the legislator) to ensure that the law in whole and its branches shall be clear, obvious, calculable and foreseeable for the addressees of the norm.[31] The well-understandable attribute of the rule is a constitutional expectation.[32] The grammatical phrasing of statutory instruments is always general, so it may be problematic to decide whether the rule could be used for a certain state of affairs. If the statement of the facts of the norm is too tight, it may restrict the judicature and hinder the regulation of the social relations. On the other hand, if the statement of the facts is too general, it might be widen by the judicature at his discretion. Such a rule may give an opportunity for a subjective decision and for a distinctive practice which results in the lack of a coherent and harmonized operation of law and infringes the principle of legal certainty.[33]

The procedural guarantees ensuring personal rights and obligations are derived from the constitutional principle of legal certainty; without proper guarantees the principle of rule of law would be infringed.[34] Legal certainty puts up a dual demand against the legislator. First of all, the procedural safeguard of the stability of legal relations must be ensured; however, it shall not prevent the exercise of certain procedural rights for the clients. It follows the requirement of calculable and effective action of the administration on one hand and the insurance of the exercise of law for the individuals on the other. The balance must be secured

[29] FORTSAKIS, p. 209.
[30] *Handbook*, p. 13.
[31] See Decision 9/1992. (I. 30.) ABH 1992, p. 59, 65.
[32] See Decision 26/1992. (IV. 30.) ABH 1992, p. 135, 142.
[33] See Decision 1160/B/1992. ABH 1993, p. 607, 608.
[34] See Decision 75/1995. (XII. 21.) ABH 1995, p. 376, 383.

by the Constitutional Court; it may lead to the violation of the Constitution if legal regulation would provide unilateral primacy for the one or the other.[35]

Regarding public administration, legal certainty specifies the requirement for legislation to establish the procedural guarantees of stability of closed legal relations. It shall be noted however that legal validity (i.e. the use of legal remedies) is not enough for reaching the abovementioned; legal certainty needs other additional guaranteed in this field of law. The activities of public administration serve the protection of public interest or interests of a particular social group, the enforcement of law, etc. In case of an unlawful decision, not only the rights of the individual, but also the public interest may be infringed; for example when the act is favourable for the client but infringes the rights of other individuals (e.g. a building permission which infringes the environment protection prescriptions). For that reason, legality is also a constitutional principle regarding decisions of the public authorities.[36]

3. Equality before the law

> *Public authorities shall act in accordance with the principle of equality. They shall treat private persons who are in the same situation in the same way and not discriminate between private persons on grounds such as sex, ethnic origin, religious belief or other conviction. Any difference in treatment shall be objectively justified.*

Together with the principle of lawfulness, the general principle of equality is the other pillar of European administrative law. Since the EC Treaty expressly contains this principle,[37] it could less clearly deliver from the national legal systems (like the principle of proportionality). However, the developing role of the European Court cannot be neglected in this field either.[38] The rule can be applied with various degrees of rigour. If it is interpreted less strictly, the person concerned must prove that he is in a situation similar in all or at least the irrelevant cases are handled different. More strictly, the courts have to intervene whenever

[35] See Decision 46/2003. (X. 16.)
[36] See Decision 2/2000. (II. 25.)
[37] See Article 6, 40 (3) and 119 of the EC Treaty
[38] See among others Case C-224/00, *Commission v. Italy* [2002] ECR I-2965. and Case C-388/01, *Commission v. Italy* [2003] ECR I-721. Citing: TATHAM, Allan F.: *EC law in practice: a case-study approach.* HVG-ORAC Kiadó. Budapest, 2006. p. 32-36.

a person is treated differently from others who are in a comparable situation. This last interpretation gives the judiciary a more powerful mean for review.[39]

The aim of this principle is to forbid unfair discrimination by ensuring that persons *de facto* or *de iure* in a similar situation should be treated on the same way. We cannot speak about the infringement of the principle of equality if the discrimination in the treatment rests on a reasonable ground. Unfair discrimination arises only in that case when the different treatment cannot be justified regarding the aim or the effect of the chosen measure. This principle does not exclude the possibility for the administrative authority to change its proceeding referring to the public interest or because of its former unlawful or improper practice. This latter issue can be interesting for the reason that by this point the question of equality is connected to the principle of legitimate interests.

Equality before the law means in general that where cases are objectively the same, their treatment must be the same and where cases are objectively different; there will normally be corresponding differences in treatment. However, this principle does not mean that the administrative authorities should not carefully and fairly consider each individual case by reference to the applicable laws and rules; the laws and rules should not be so drawn up as to prevent the administrative authorities from treating every case in a manner appropriate to its circumstances.[40] There are also some limitations connected to this principle. Equality before the law cannot be invoked to justify applying an illegal practice more widely. Differences in treatment resulting from changes of general application in policy or practice with regard to the exercise of discretionary powers do not of themselves infringe this principle.[41]

The Hungarian Constitutional Court dealt in many decisions with the legal questions of equality.[42] It stressed out in its earliest decision that the prohibition of discrimination does not mean that discrimination in every case, even aiming a higher social equality, is forbidden. This prohibition is applied to the fact that the law must consider every person equal (equal dignity) so the principle of human dignity cannot be infringed. The aspects of the distribution of rights and obligations must be determined with the same respect and prudence, considering all personal aspects the same.[43] The Court also pointed out that regarding discrimination, the central element is to decide who shall be considered as a member of a common group; the

[39] NOLTE, Georg: General principles of German and European administrative law. A comparison in historical perspective. *The Modern Law Review*, Vol. 57, No.2. Blackwell Publishing Ltd. 1994. p. 194.
[40] *Handbook*, p. 11.
[41] *Handbook*, p. 12.
[42] Regulated in Article 70/A. of the Act XX of 1949 (The Constitution of the Republic of Hungary).
[43] See Decision 9/1990. (IV. 25.) ABH 1990, p. 46, 48;

prohibition of discrimination is applied only to members of the same group.[44] If the legal regulation establishes different provisions for different group of people, the discrimination is not impermissible; it only arise within a comparable group of situation.[45] The Hungarian Constitution prohibits discrimination only in connection with human rights; the restraint however expands to the whole legal system if the discrimination affects the basic right to human dignity.[46]

Equality before the law must be enforced in every procedure, certainly in administrative procedural law as well. According to the Administrative Procedural Code, 'In proceedings of the authorities all clients shall have equal rights in the court of law and shall be treated without undue discrimination, bias or prejudice. Administrative proceedings must be conducted without any discrimination or restrictive treatment aimed at or resulting in any violation of the principle of equality in the court of law, or any diminishment in the legal rights of clients and other parties to the proceeding granted under this Act. In all proceedings the principle of equal treatment must be strictly observed.'[47] The principle has a double function in this sphere. On one hand, it shows up as an independent case which has to be decided separately; on the other hand, it has to be enforced in every single administrative procedure. However, equality before the law cannot serve as a ground for legitimize an unlawful situation, it cannot result that the official cannot depart from its former, false practice. In this case, the authority has to change its practice and has to act in accordance with law.[48] This rule is connected to the principle of objectivity stating that the administrative authority has to reach its decision on the ground of the relevant facts and must neglect those personal attributes which might infringe equality.[49]

4. Impartiality

> *Public authorities shall act in accordance with the principle of impartiality. They shall act objectively, having regard to relevant matters only and not act in a biased manner. They shall also ensure that public officials carry out their duties in an impartial manner, irrespective of their personal beliefs and interests.*

[44] See Decision 1009/B/1991., ABH 1992, p. 479, 479-480.; Decision 49/1991. (IX. 27.) ABH 1991, p. 246, 249.
[45] Decision 21/1990. (X. 4.) ABH 1990, p. 73, 79.; Decision 881/B/1991. ABH 1992, p. 474, 477.; Decision 4/1993. (II. 12.) ABH 1993, p. 48, 65.
[46] See Decision 61/1992. (XI. 20.) ABH 1992, p. 280., 281.
[47] See Article 2. Par. 1. and 2. of Ket.
[48] See Administrative Decision of the Hungarian Supreme Court Nr. 1/2002.
[49] PATYI, p. 106-107.

Nemo judex in causa sua. Reflecting the ancient principle – no one shall be his own judge – to the field of administrative law, we must underline the requirement that persons by executing the power of the state cannot reach a decision affecting the rights or interests of the citizens if they are bound to the case concerned in any ways and so they are considered to partial which influences the decision in the end. Exclusion serves as a mean for the validation of the requirement of impartiality; its destination is to prevent the acting of such a person from who the impartial and same treatment cannot be expected. The proceeding of such a person or authority jeopardizes the enforcement of fair process and establishes the danger of the infringement of the principles of equal treatment and equality before the law.[50]

The principle of impartiality concentrates to the institutional side of administration and to the objective standards of executive power. This guarantee has to be regarded as a leading principle of administrative law which is of particular importance where the administration enjoys discretion and therefore the possibility of judicial control is limited.[51] Similar to other principles, this requirement was also developed in the case law of the Community Courts, initially connected to the right of defence and the right to be heard.[52]

According to this principle, by reaching an administrative act, all factors relevant to a particular case should be taken into account while giving each its proper weight. Factors which are not relevant must be excluded from consideration. An administrative act must not be influenced by the private or personal interests or prejudices of the person taking it. Therefore, no civil servant or employee of an administrative authority should be involved in taking of an administrative act in a matter concerning his or her own financial or other interests, or those of his or her family, friends or opponents or in any appeal against an administrative act which he himself or she herself has taken, or where other circumstances undermine his or her impartiality. Even the appearance of bias should be avoided.[53]

Impartiality by discretional acts means that public authorities must objectively weight up all the interests involved in the case before reaching a decision; they must elaborate the complete case before taking any decision which means that they must gather enough data during the procedure and all the elements included in the case – and only those – must be

[50] PATYI, p. 165-166.
[51] SCHWARZE, Jürgen: The principle of proportionality and the principle of impartiality in European administrative law. *Rivista trimestrale di diritto pubblico.* 2003/1. p. 66.
[52] See Case T-450/93, *Lisretal* [1994] ER II-1177., Case T-167/94, *Nölle* [1995] ECR II-2589.
[53] *Handbook*, p. 13.

aimed at value judgements.[54] They cannot grab out or exclude an element; the aspects not connected to the case concerned must be avoided.

Impartiality is a constitutional demand in Hungary too; it is guarantied among others by the common rules of disqualification. The principle was developed on the field of justice where ensuring the independence and impartiality of the judge is essential. The Constitutional Court pointed out in its first decision in this sphere that the right to the impartial court establishes the claim to being fair-minded. It is an expectation for the conduct of the judge on the one hand and an objective requirement for the procedure on the other; all situations must be avoided where there might be any doubt regarding impartiality of the judge.[55] According to another decision, judges must be free of personal stereotypes (subjective element) and must also seem to be impartial; the regulation has to provide due guarantees to exclude any doubt.[56] In this decision the Court examined the principle of fair trial protected in Article 6 of the European Convention on Human Rights and underlined the importance of the test applied by the European Court of Human Rights. As to this test, at first, the conduct of the judge must be checked in the certain case, i.e. if there were any manifestation which can conclude to the lack of impartiality. Secondly, it is followed by the inspection if the applicant had any well-founded and objective reason to assume the impartiality of the judge. The principle of impartiality sets out the requirement of relative neutrality for the administration which means that all cases must be handled without any discrimination and favour.[57]

'Any person whose right or lawful interest is directly affected in a case may not participate in proceedings pertaining to that case.'[58] The Hungarian Procedural Code rules the conditions of exclusion as well as the absolute and relative causes of it and the procedural order to apply. [59] It should be noted however that the requirement of impartiality in administrative procedure differs from other procedures. Namely, the authority could be interested in the certain case as the validator of the public interest which appears clearly when the public authority shows up as a party in the administrative lawsuit before the court after the administrative procedure.[60]

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[54] See SOLÉ, Julio Ponce: Good administration and European public law. The fight for quality in the field of administrative decisions. *European Review of Public Law,* Vol. 14, No. 4. Esperia Publications Ltd. 2002. p. 1520.
[55] See Decision 67/1995. (XII. 7.) ABH 1995, p. 346., 347.
[56] See Decision 539/B/1997. ABH 1998, p. 734., 736.
[57] See Decision 521/B/2003.
[58] Art. 42 of Ket.
[59] PATYI, p. 167-173.
[60] See PATYI, p. 108.

5. Proportionality

> *Public authorities shall act in accordance with the principle of proportionality. They shall impose measures affecting the rights or interests of private persons only where necessary and to the extent required to achieve the aim pursued. When exercising their discretion, they shall maintain a proper balance between any adverse effect which their decision has on the rights or interests of private persons and the purpose they pursue. Any measures taken by them shall not be excessive.*

The principle of proportionality concerns substantive administrative law and traditionally restrains the interference of administrative authorities into the private sphere of the persons. This principle, which traces back to German origins and is also recognised in public administrative law, was originally not at all common in all Member States. The application of the principle of proportionality was either limited to some exceptional cases or even completely unknown. For now, the situation has changed. In England, discretionary administrative decisions could only be challenged successfully if they fulfilled the requirement of the so-called 'Wednesbury test'. According to this test, these requirements were only met if the decision of the authorities was so unreasonable that no reasonable authority could ever come to it. Today, English courts have gained more control over the proportionality of administrative decisions without, however, explicitly referring to the notion of proportionality.[61] In France, those cases which concern the expulsion of EU citizens are now subjected to a full examination of proportionality. Similarly, in Italy it was only in the wake of the ECJ's judgments that this principle has attracted any attention. In other EU Member States, European origin is not always clearly ascertainable.[62]

The principle was filtered into the judicature of the EU via the case law of the courts; for lack of written community law, the Court of Justice had to develop its essential content.[63] Today it can be regarded as an overriding principle seeking to restrict the scope of Community rules and to set limits to administrative actions which impose duties ad interfere

[61] SCHWARZE, Jürgen: The convergence of the administrative laws of the EU Member States. *European Public Law*, Vol. 4. Issue 2. Kluwer Law International Ltd. 1998. p. 195.
[62] SCHWARZE, Jürgen: The convergence of the administrative laws of the EU Member States. *European Public Law*, Vol. 4. Issue 2. Kluwer Law International Ltd. 1998. p. 196.
[63] See among others Case 11/70, *Internationale Handelsgesellschaft* [1970] E.C.R. 1125. About the case see TATHAM, Allan F.: *EC law in practice: a case-study approach.* HVG-ORAC Kiadó. Budapest, 2006. p. 25-26.

with the private sphere of the citizens.[64] Regarding the European jurisprudence, the principle both in German law as a homeland and in other states taken from there (e.g. England) can be divided into two components. The one is the suitability (*Geeignetheit*) means that a particular measure must be theoretically capable of achieving its aim, therefore a measure which is incapable or furthering its aim is necessarily excessive or disproportionate. The same can be said with respect to the other requirement, the necessity (*Erforderlichkeit*) which demands that the least restrictive of severe possible mean must be used by the administrative authority. Nowadays the last principle is treated as an independent requirement by the German and European courts.[65] It can be regarded as an important tendency that the principle of proportionality influenced by community law gains space in such countries where former was not present (e.g. the UK). Therefore the rule can be considered as a typical instance for the way in which an unwritten legal principle that once had been created in the legal order of one member state and after that may finally gain acceptance in Community law and from there may also influence the laws of other member states.[66] Italy may be regarded like the abovementioned; however the Italian law contains a requirement similar to proportionality, the principle of *buon andamento*. This principle is an interpretation rule in fact, stating that all acts of the administration must be guided by proportionality and good faith.[67]

The principle of proportionality implies on the one hand that the use of means commensurate to the aims to be pursued and on the other hand, the measures taken should strike a fair balance between the public interests and the private interests involved, so as to avoid unnecessary interference with the rights and interests of private persons. This principle applies to a hypothesis of administrative authorities not sticking to the limits which the laws assign to their acts. The observance of the principle of proportionality constitutes an all-embracing requirement in a state governed by the rule of law. There must be a reasonable relation between the means chosen and the purpose pursued. This means that any restriction of the rights of the citizens must not only be suitable for the purpose indicated by the legislator, it must also be necessary that the purpose could not be achieved by another means which would impose fewer restrictions on private rights and interests. Moreover, the burden

[64] SCHWARZE, Jürgen: The principle of proportionality and the principle of impartiality in European administrative law. *Rivista trimestrale di diritto pubblico.* 2003/1. p. 53-54.
[65] NOLTE, Georg: General principles of German and European administrative law. A comparison in historical perspective. *The Modern Law Review*, Vol. 57, No.2. Blackwell Publishing Ltd. 1994. p. 193.
[66] SCHWARZE, Jürgen: The principle of proportionality and the principle of impartiality in European administrative law. *Rivista trimestrale di diritto pubblico.* 2003/1. p. 65.
[67] See SOLÉ, Julio Ponce: Good administration and European public law. The fight for quality in the field of administrative decisions. *European Review of Public Law*, Vol. 14, No. 4. Esperia Publications Ltd. 2002. p. 1515.

imposed on the private person must stand in a reasonable relationship to the benefit which the person concerned and the general public will draw from the act. A breach of the principle will only be acknowledged where the burden imposed on an individual has no acceptable relationship with the importance of the matter in question. The prohibition against using excessive means where more stringent means are not more promising as regards the achievement of the purpose pursued.[68]

The principle of proportionality is one of the most often referred principles in the jurisprudence. According to Schwarze,[69] it consists of three main parts. First, it means that the measures of the state must be suitable for achieving the pursued aim. Second, these measures must also be necessary for that aim, i.e. the authority has no other, less restrictive mechanism at its disposal. Third, the measure may not be disproportionate to the restrictions that it involves.[70]

6. Transparency

> *Public authorities shall act in accordance with the principle of transparency. They shall ensure that private persons are informed, by appropriate means, of their actions and decisions which may include the publication of official documents; they shall respect the rights of access to official documents according to the rules relating to personal data protection. The principle of transparency does not prejudice secrets protected by law.*

It is generally recognized that a democratic system can function more effectively when the public is fully informed about the issues of public life, because to be informed is a perquisite of acceptance, participation and adherence. It is, thus necessary that the public have, subject to unavoidable exceptions and limitations, access to the large quantities of record and information of general interest and importance which administrative authorities hold at all levels. Moreover, in order to protect the rights of the private person, it is most important that the person concerned be aware of the information held by the administrative authorities concerning himself or his interests. Such openness is also likely to strengthen the

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[68] *Handbook*, p. 13.
[69] See SCHWARZE, Jürgen: Enlargement, the European Constitution and Administrative Law. International and Comparative Law Quarterly, Vol. 53. Part 4. 2004. p. 972.
[70] About the principle of proportionality also see TATHAM, Allan F.: *EC law in practice: a case-study approach.* HVG-ORAC Kiadó. Budapest, 2006. p. 36-38.

confidence of the public in the administration. Without having to show any specific interest, everyone is entitled upon request to be given information which is the possession of an administrative authority within a reasonable time in the same way as anyone else by effective and appropriate means.

Within the Council of Europe, the principle of public access to official documents began to be developed in Recommendation No. R (81) 19 on access to information held by public authorities. An example of European co-operation in this field is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in Aarhus, Denmark, on 25 June 1998. Another recent example from the European Union is the adoption of Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. In the course of the last years, there has been growing interest among the member states in making provision in domestic law for measures to ensure open government and public access to official information. It should be noted that Article 19 of the Universal Declaration on Human Rights and Article 19 of the International Covenant on Civil and Political Rights appear to grant a wider right of access to official information than the European Convention on Human Rights as these provisions also contain a right to seek information.[71]

Access to information may be subject only to such limitations as are necessary in a democratic society for the protection of legitimate public interests and privacy and other legitimate private interests. Where access to information is refused, the administrative authorities must give a statement of reasons and the refusal must be subject to judicial or other independent review.[72] Fortsakis considers this right closely bound to the right to be heard. According to the later, the administration has a duty to provide users with any information in the possession of the administrative departments that concerns them, while offering them the opportunity to state their views.[73] There are two other principles which must be added to the former one: the principle of the need to regulate the formation, composition and operation of corporate bodies and the principle of the need to apply to administration action rules of administrative procedure.[74]

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[71] *Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents* (Adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies)
[72] *Handbook*, p. 14.
[73] FORTSAKIS, p. 209.
[74] FORTSAKIS, p. 210.

Access to information was originally regarded as ancillary to the right to be heard, for in its absence the latter cannot be effectively exercised. Nowadays, however, it is considered as a separate entitlement of its own.[75] Within the European Union, the principle was developed in competition cases stating that 'it is not for the Commission alone to decide which documents are useful to the defence'.[76] According to the rule of equality of arms, both parties must be given the same knowledge of the contents of the file. The right has now been enshrined on the highest level.[77]

Regarding the EU, it can be said that the general right to access to information has grown to a basic procedural principle connected to the democratic principle of equality of arms in the administrative procedure. According to the case law, this principle serves to bring about open government and accountability ensuring that a person would be grated a right of access to his file even if no formal proceedings were taking place.[78]

7. Appeals against administrative decisions

> *Private persons shall be entitled to seek, directly or by way of exception, a judicial review of an administrative decision which directly affects their rights and interests. Administrative appeals, prior to a judicial review, shall, in principle, be possible. They may, in certain cases, be compulsory. They may concern an appeal on merits or an appeal on the legality of an administrative decision. Private persons shall not suffer any prejudice from public authorities for appealing against an administrative decision.*

As the Latin maxim says: 'Where there is a right there is a remedy.'[79] The possibility of judicial review and so the accountability of the administration is traditionally considered as the very first and most important step against executive arbitrariness; therefore it is a basic element of good administration as well. The principle guarantees that public administration has to be forced to comply with the procedural rules; otherwise the decision will be nullified. Regarding this rule, in a wider sense courts ensure good administration indirectly with the

[75] MILLETT, Lord: The right to good administration in European Law. *Public Law*, Summer 2002. Sweet & Maxwell Ltd., 2002. p. 314.
[76] See Cases T-30, 31 & 32/91. *Solvay v. European Commission* [1995] E.C.R. II-1825.
[77] See EC Treaty 255.
[78] See KANSKA, p. 319.
[79] '*Ubi jus ibi remedium.*' Citing: MILLETT, p. 309.

separation of powers in view. Judicial control prevents administration to act rashly and uncarefully by guaranteeing that constitutional and legal principles imposing duties act positively are complied with.[80]

The Council of Europe has already grounded this requirement in its first legal document in the field of constitutional administrative law. Private persons shall be entitled to seek, directly or by way of exception, a judicial review of an administrative decision which directly affects their rights and interests. Administrative appeals, prior to a judicial review, shall, in principle, be possible. They may, in certain cases, be compulsory. They may concern an appeal on merits or an appeal on the legality of an administrative decision. Private persons shall not suffer any prejudice from public authorities for appealing against an administrative decision. To ensure the effective protection of the rights of the person concerned any administrative act which adversely affects his rights, liberties or interests should be accompanied by information on the remedies which are available against it. The indication of remedies should of course include all the information required for applying for the remedy, particularly the designation of the body competent to deal with the remedy, and the time-limit.[81]

8. Right to be heard

> *If a public authority intends to take an individual decision that will directly and adversely affect the rights of private persons, and provided that an opportunity to express their views has not been given, such persons shall, unless this is manifestly unnecessary, have an opportunity to express their views within a reasonable time and in the manner provided for by national law, and if necessary with the assistance of a person of their choice.*

The right to be heard is considered as a very basic principle of administrative law; all the authors in this field recognize its importance. According to Fortsakis, this gives the right to persons to be invited by the administration to express their views and to be actually heard by the administration – and it should be underlined that – prior to the adaptation of any

[80] See SOLÉ, p. 1520.
[81] *Resolution (77) 31 on protection of the individual in relation to the acts of administrative authorities* (Adopted by the Committee of Ministers on 28 September 1977 at the 275th meeting of the Ministers' Deputies)

individual decision that might adversely affect them.[82] The right to be heard is a fundamental procedural principle which has a dual basis. First, it is central to the concept of natural justice from the view of the individual; on the other hand, it promotes the efficiency of the decision-making process, because the person may serve with useful information for the authority as well.[83]

The principle was not accidentally put to the very front of the first EC document aiming good administration; its importance is also outstanding in jurisprudence. The principle *audi alteram partem* derived from Roman law, has embedded itself in the administrative procedures of all European countries.[84] It was the Court of Justice who played an important role in the spreading of the principle across Europe; it consistently stood up for it.[85] The temporal character was refined so that the public authority has to hear the person concerned before the decision is taken, however it is implicitly results from its factual enforcement. The jurisprudence considers the principle to such an important rule which also includes other, appraised principles such as right to have access to files, the duty to give reasons, the reasonable duration of the process, etc.[86]

The Handbook says that this principle guarantees the right for persons concerned to submit facts, arguments or evidences to the authorities. The right has a two-fold rationale: it is part of the private person's right to fair trial in cases where an administrative authority takes the initiative of an administrative procedure which may affect the private person's rights, interests or liberties, on the other hand, it should allow the administrative authority to take the best act possible, i. e. the act which is based on an accurate and equilibrated assessment of facts and arguments. Although persons concerned have the right to submit all kinds of facts, arguments or evidence, the administrative authorities will, of course, often consider some of the material as irrelevant and not base their administrative acts thereon.[87]

The right to be heard cannot miss from the Hungarian Administrative Procedural Code either; the Code contains the rule as follows: 'The client has the right in a proceeding to make a statement, or to refuse to make a statement.'[88] The Code rules the right by ascertaining of the relevant facts of the case, the statement of the client hereby becomes evidence. Regulating this institute as a right has dual consequences: on one hand, the client has a right to make a

[82] FORTSAKIS, p. 209.
[83] MILLETT, p. 314.
[84] See KANSKA, p. 315.
[85] See Case 17/74, *Transocean Marine Paint Association* [1974] E.C.R. 1063.
[86] SCHWARZE, Jürgen: Enlargement, the European Constitution and Administrative Law. International and Comparative Law Quarterly, Vol. 53. Part 4. 2004. p. 973.
[87] *Handbook*, p. 18.
[88] See Art. 51. Par. 1. of Ket.

statement, he cannot be deprived from this right; on the other hand, if the procedure was not started ex officio, the client cannot be obliged to declare and cannot be sanctioned for this miss. Nevertheless, if the client exercises this right, he has to be truthful; on the contrary he can be fined by the authority.[89]

9. Reasonable time limit

Public authorities shall act and perform their duties within a reasonable time.

'Slow administration is bad administration', so the fast handling of cases is a basic criteria of good administration.[90] The principle bears with high importance in cases where a permission or contribution must be provided by the public administration before lawfully practicing an activity. In that case it is essential for the applicant to get this permission as soon as possible. If there would have been no time limit for the authority for reaching its decision, the applicant would be in an uncertain situation for an indeterminate time which would put a considerable burden on him and would realize a form of arbitrariness.

It depends on many factors to decide what constitutes reasonable time in a certain case regarding the complexity of the case, the urgency of reaching the decision, the number of the persons concerned, etc. On European level the case law connecting to the European Convention on Human Rights shows the method to determine reasonable time, in administrative cases inter alia. The use of this principle is supported by the 'principle of silence' which means if the administrative authority fails to reach its decision within a reasonable time, another empowered authority may supervise this situation.

Prompt expedition of any procedure for the determination of private persons' rights and obligations is an intrinsic element of justice. The promptitude requirement in respect of procedures, which is also to be found in Article 6, Paragraph 1 of the European Convention on Human Rights, is imposed further by the objective of certainty of the law. In fact, before an act terminating an administrative procedure is taken, the procedure remains pending and hence the legal situation undefined; only this administrative act opens the possibility of taking action against the procedure or the final administrative act. That is why if a procedure requires the taking of a formal administrative act at the end of it, the administrative authority involved

[89] PATYI, p. 281-282.
[90] See KANSKA, p. 313.

must complete the different stages of the procedure and take the act within a reasonable time. This principle applies no matter whether the procedure was initiated by the administrative authority by itself or by a private person. A failure to act (silence or inaction) must, under national law, either be considered, after a specified period of time, as equivalent to an act (positive or negative decision) or be subject to possible control by an administrative or judicial authority competent for that purpose (control for omission).[91]

There are generally no precise time-limits on administrative action within the EU law, the duty of the administration to act within reasonable time was recognised by the courts.[92] The Court of Justice stressed out in many decisions that the infringement of a time-limit has to be regarded to such a severe procedural mistake that it entails the annulment of the decision.[93]

The Hungarian Constitutional Court developed the requirement of reasonable time primarily regarding administration of justice. The interpretation of the requirement of fair trial in a broad sense includes the requirement of judging upon the case within a reasonable period of time, and it can justify the introduction of simplified forms of procedure, and in a certain scope of cases even out-of-hearing administration can be accepted. Still, the requirement of time-limits is only one of the elements of fair trial, and its enforcement shall not be exaggerated to the extreme: it shall not gain priority over other aspects of fair trial, and it shall never violate another fundamental right. The 'time gained' by restricting the right to defence is no value significant enough to justify the limitation of constitutional rights and requirements. Such a consideration would be a merely practical attitude unworthy in respect of the constitutional operation of the judiciary system, contradicting the court's obligation to examine the cases thoroughly, to weigh the evidence with circumspection, to explore all the aggravating and mitigating circumstances, and to adopt a just decision in line with the law.[94]

Regarding public administration, the Constitutional Court deduced the principle from legal certainty which is an essential element of the rule of law. It bears with high importance that the conduct of the official, including the time limits of his procedure shall be calculable for the individual. Public administration has an obligation to exercise its power which means that the officer has to reach his decision within the deadline prescribed by law; public

[91] *Handbook*, p. 20.
[92] See Case 120/73, *Lorenz v. Germany and Rheinlad-Pfalz*, [1973] ECR 1471; Case T-81/95 *Interhotel v. Commission* [1997] ECR II-01265; Case 223/85 *RSV v. Commission* [1987] ECR 4617. Citing: KANSKA, p. 313.
[93] See Case 187/97, *Saarland et al. v. Ministry of Industry* [1988] E.C.R. p. 5037. Citing: SCHWARZE, Jürgen: Developing principles of European administrative law. *Public Law*, Summer 1993. Sweet & Maxwell Ltd., 1993. p. 232.
[94] See Decision 20/2005. (V. 26.)

administration shall not have any discretion in this field. The time limits of the procedure also serve as guarantee for the public or individual interest, therefore the principle of legal certainty and rule of law would be infringed if the legislator has not provided effective remedies for the client in case of breaching the deadlines of the procedure.[95]

The Hungarian Procedural Code uses the expressions of 'administrative time limit' and 'time-limit determined by law' instead of reasonable time. 'Clients are entitled to receive fair treatment and have the right for a decision to be adopted in their official affairs within the time limits prescribed by law, as well as the right for use of their native language during the course of proceedings.'[96] It should be stressed out that the administrative time limit (i.e. the time limit for reaching the final decision) is never absolute, because it always depends on the circumstances of the certain case (when does it start, when does it end, what kind of procedural steps have to be executed within it which fall out of the scope of administrative time limit, etc.). The Hungarian Code of Administrative Procedure rules a general time limit of thirty days as administrative time limit against the former thirty days deadline. 'Resolutions, rulings for the termination of the proceedings, and the rulings of appellate authorities for the annulment of decisions of the first instance and for reopening the case shall be adopted within thirty days from the date specified above and measures shall be taken to have the decision published within the same time limit. A shorter time limit may be established by any form of legislation, whereas a longer one may be established only by an act or government decree.'[97] It is important to mention the latest modification of the Code which states 'where this Act fails to prescribe the time limit for the execution of any procedural step, the authority shall take measures without delay, but within eight days, for having the procedural step in question carried out'.[98] According to this rule the authority cannot postpone the act even if there is no specific time limit prescribed.

10. Duty of reasoning

> *Appropriate reasons shall be given for any individual decision taken, stating the legal and factual grounds on which the decision was taken, at least in cases where they affect individual rights.*

[95] See Decision 72/1995. (XII. 15.)
[96] See Art. 4. Par. 1. of Ket.
[97] PATYI, p. 150-156.
[98] See Art. 33. Par. 1. of Ket.

The administrative act must be notified to all persons concerned. In most legal systems, an administrative act which has not been regularly notified is not invalid but, as long as the person concerned has not been regularly notified of it, it can not produce its legal effects for that person. Reasons must be stated in writing for all acts which may adversely affect the rights or interests of private persons. The act itself should either state the reason upon which it is based or clearly indicate where those reasons can be found. The statement of reasons must be adequate, clear and sufficient. It will normally indicate the main facts, arguments and evidence as well as the legal basis on which the administrative authority based the administrative act.[99] Statement of reasons – also called as justification of decisions – is such a basic principle that according to many authors, it does not call for any particular comments, as it is already widely accepted in virtually every European legal system.[100]

The principle acts as a basic rule in the European Union as well, it is among those few which are grounded in a treaty of the Community.[101] Today, in many Member States there no longer exist any notable contradictions between national law on the one hand and the principles of administrative law established by the ECJ on the other. However, this development is not so much based on influences of Community law but rather on the increasing significance of the European Convention on Human Rights and on the common roots of many legal provisions German and French administrative law. The convergence of national administrative law principles become especially apparent with regard to the question of whether and to what extent reasons should be given for administrative decisions. In many Member States the legislature has introduced an obligation to give reasons for decisions of individual cases only in the last decade while in Germany, for example, this obligation is explicitly laid down in the German law of administrative procedure. In France, this requirement has traditionally been regarded as a threat to an effective execution of the law by the authorities, but nowadays changes are perceptible. In England it remains to be seen whether a general obligation to give reasons will gain acceptance in the English legal order. However, hints in the courts' judgments to this respect make clear that a considerable potential exists for such a development. This development has possibly been accelerated by the ECJ which in the Heylens judgment insisted upon the requirement of giving reasons, as a

[99] *Handbook*, p. 20-21.
[100] See FORTSAKIS, p. 210.
[101] See ECC 190 and 191. Referring to it: HARLOW, Carol: Global administrative law: the quest for principles and values. *The European Journal of International Law*, Vol. 17, No. 1, 2006. p. 5.

precondition for an ordered administration, for the purpose of the protection of the four freedoms of the common market and the guarantee of adequate legal protection.[102]

The duty to give reasons is not only a formal requirement, but also a safeguard to ensure that public administration decides carefully. Therefore, the authority must state the essential grounds on fact and law, as well as the criteria taken into account when reaching a decision.[103] It is the competence of the public authority to decide, how detailed shall the reasoning be and how the notification shall happen. The authority determinates the extent of the reasoning according to the decision concerned, regarding to the aim of the duty which is the evaluation of the decision for the person.[104]

The Hungarian Constitutional Court defined the duty to give reasons from the view of the justice instead of administration, regarding it as an outstanding element of judicial independence. 'The basic criterion of judicial activity is that the decision goes together with the obligation of reasoning.'[105]

The Hungarian Administrative Procedural Code contains the formal and material requirements of the resolution in a uniform frame. The resolutions shall contain the name of the competent authority, the case number and the name of the officer in charge; the name and home address or registered office of the obligor or obligee, and the identification data the client has supplied in the application; description of the subject matter of the case. In the operative part the authority's decision, and information on the form of remedy available, the place and the deadline for filing, and information on the remedy procedure, the name of the special authority involved and the operative part of its assessment, the decision ordering payment of the duties and fees charged for the proceedings to the client, etc. In the disposition the relevant facts of the case and the underlying evidence, the evidence presented by the client and found inadmissible, and the reason for this finding, for resolutions adopted under the principle of weighing and deliberation, the criteria and facts employed, the explanation for the special authority's assessment, the statutes upon which the authority has adopted the resolution. In the last part it contains the venue and the time where and when the decision was adopted, the name and title of the competent officer, and the name and title of the issuer, if

[102] SCHWARZE, Jürgen: The convergence of the administrative laws of the EU Member States. *European Public Law*, Vol. 4. Issue 2. Kluwer Law International Ltd. 1998. p. 197-198.
[103] SOLÉ, p. 1521.
[104] For the obligation of reasoning also see *Recommendation No. R (87) 16 of the Committee of Ministers to member states on administrative procedures affecting a large number of persons* (Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies)
[105] Decision 54/2001. (XI. 29.)

other than the competent officer and the signature of the issuer of the resolution and the stamp of the authority.[106]

11. Execution of administrative decisions

> *Public authorities shall be responsible for the execution of administrative decisions falling within their competence. An appropriate system of administrative or criminal penalties shall, in principle, be established to ensure that private persons comply with the decisions of the public authorities. Public authorities shall allow private persons a reasonable time to perform the obligations imposed on them, except in urgent cases where they shall duly state the reasons for this. Enforced execution by public authorities shall be expressly prescribed by law. Private persons subject to the execution of a decision are informed of the procedure and of the reasons for it. Enforced execution measures shall be proportionate.*

It is necessary to maintain the trust of private persons in the administrative and judicial system and that, for this reason, both decisions by administrative authorities entailing obligations for private persons and judicial decisions in the field of administrative law recognizing rights for private persons should be executed. The action of the administrative authorities presumes that their decisions are efficiently implemented by private persons and the efficiency of justice requires that judicial decisions in the field of administrative law be executed, in particular when they are addressed to administrative authorities; moreover the execution of administrative decisions should have regard to the rights and interests of private persons. On the ground of the abovementioned, the Council of Europe made a recommendation on the execution of administrative and judicial decisions in the field of administrative law in which it was declared that member states should provide an appropriate legal framework to ensure that private persons comply with administrative decisions that have been brought to their knowledge in accordance with the law, notwithstanding the protection by judicial authorities of their rights and interests. The use of enforcement by administrative authorities should be subject to the following guarantees: enforcement is to be expressly provided for by law; private persons against whom the decision is to be enforced are to be given the possibility to comply with the administrative decision within reasonable time except

[106] See Art. 72. Par. 1. of Ket. and PATYI, p. 341-355.

in urgent duly justified cases; the use of and the justification for enforcement are to be brought to the attention of the private persons against whom the decision is to be enforced; the enforcement measures used including any accompanying monetary sanctions are to respect the principle of proportionality.[107]

Administrative execution is the enforcement of an obligation prescribed by an administrative act in case of the lack of voluntary fulfilment of the obligation.[108] Therefore execution is connected to the field of law enforcement which is primarily pecuniary and shall only exceptionally affect the person of the individual.[109]

12. Compensation

> *Public authorities shall provide a remedy to private persons who suffer damages through unlawful administrative decisions or negligence on the part of the administration or its officials. Before bringing actions for compensation against public authorities in the courts, private persons may first be required to submit their case to the authorities concerned. Court orders against public authorities to provide compensation for damages suffered shall be executed within a reasonable time. It shall be possible, where appropriate, for public authorities or private persons adversely affected to issue legal proceedings against public officials in their personal capacity.*

Compensation is considered as a part of judicial protection by many authors, however it notably has separate characteristic. Compensation has also been arise in a former recommendation, on the following way: Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule.[110] This provision defines the factors which must be present for public liability to arise. The standards of conduct which public authorities might reasonably be expected in law to observe depend on their tasks and the means at their

[107] *Recommendation Rec (2003) 16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law* (Adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)
[108] PATYI, p. 577.
[109] About administrative enforcement see PATYI, p. 577-621.
[110] *Recommendation No. R (84) 15 of the Committee of Ministers to member states relating to public liability* (Adopted by the Committee of Ministers on 18 September 1984 at the 375th meeting of the Ministers' Deputies)

disposal. Public authorities must consequently be in a position to perform a series of tasks and provide a number of services to the community, the definition, scope and nature of these activities being established by legal rules. When a public authority fails to comply with a duty required by the legal rules and damage to citizens ensues, it should be possible for the latter to obtain reparation from the public authority in question, regardless of any personal liability of the agents or officials who caused the damage.

'Administrative authorities shall be subject to civil liability for damages caused to the client by any unlawful proceedings.'[111] This Hungarian administrative rule is in conformity with the ancient requirement of the rule of law stating that the state has to be liable for the damages caused for the citizens; referring to its power the government cannot avoid responsibility, the general rules of private law has to be applied to this field. Therefore, the compensation for the damages caused by the administration is regulated in the Hungarian Civil Code as follows: 'Liability for damages caused by the public administration shall be determined when the damage cannot be obviated with ordinary remedies or the aggrieved party has already taken these remedies.'[112] Only damages with administrative nature, i.e. in connection with the administrative activities exercised with governmental power or administrative malpractices shall be considered to administrative damages.[113]

13. Participation

> *Unless action needs to be taken urgently, public authorities shall provide private persons with the opportunity through appropriate means to participate in the preparation and implementation of administrative decisions which affect their rights or interests.*

The principle was detailed in a former recommendation of the Council of Europe.[114] That recommendation declared that the persons concerned must be informed of the main features of the proposed action. Such information should enable them to determine whether and in what way they are or may be affected by the project. Depending on the scale of the

[111] See Art. 4. Par. 2. and 3. of Ket.
[112] See Act 4 of 1959 on the Hungarian Civil Code Art. 349. Par. 1.
[113] See Decision PK 44. of the Supreme Court of Hungary.
[114] See *Recommendation No. R (87) 16 of the Committee of Ministers to member states on administrative procedures affecting a large number of persons* (Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies)

project and the number of persons potentially affected, the information methods used, either individually or in combination, could include the following: circular letter, notice in the town hall, notice at the future site of the project, public announcement in the local or regional press, exhibition with plans and scale models, etc.

The Hungarian Administrative Procedural Code provides the opportunity of participation for the clients who constitute a quite wide range of person. According to the general notion 'client shall mean any natural or legal person and any association lacking the legal status of a legal person whose rights or lawful interests are affected by a case, who is subjected to regulatory inspection, or who is the subject of any data contained in official records and registers.'[115] The right of participation is connected to the procedural position of being affected; there must be a causal link between the procedure of the authority and the right or lawful interest of the person concerned. The general notion is detailed later by the Code: 'An act or government decree may define the persons who can be treated as clients - in connection with certain specific types of cases - without prejudice to Subsection (1). Without prejudice to what is contained in Subsection (1), all owners of real estate properties located in the impact area specified in the relevant legislation, as well as any person whose right related to such properties has been registered in the real estate register shall also be treated as clients. The rights of clients are also conferred upon the bodies of vested competence, other than those participating in the case in the capacity of an authority or special authority. In specific cases interest representation organizations may be vested with the rights of clients, as well as non-governmental organizations whose registered activities are oriented for the protection of some basic rights or the enforcement of some public interest.'[116]

4. Conclusions

Modern states assign to public administration various duties and powers in order to meet its increased obligations. The scope of the administrative functions is basically determined by three factors: the objectives, priorities and values of modern democracies and their legal framework; the technical, human and economic resources which administrative authorities have at their disposal; and the trust which is placed in the efficiency of the

[115] See Art. 15. Par. 1. of Ket.
[116] See Art. 15. Par. 2-5. of Ket.

administrative apparatus.[117] The range of administrative activities goes from the classic minimum functions of defense, levy of taxes, education, etc. to newer ones like social security, health care, protection of environment, etc. It must be stressed out that in some countries there is now a grooving tendency to hand over certain public functions to be carried out by private entities instead of public bodies.

The variety of tasks assumed by public administration for the benefit of the community as a whole often affects traditionally protected competing private rights. A fair balance must be struck between them and the public interest. This is the role of administrative law which, thus, appears not only as the instrument which organizes the public administration but also the law that regulates the exercise of the administrative powers and provides for the control of its use. Clear rules and principles of that latter branch of administrative law strengthen the certainty of law in this area and reduce the possibility of arbitrariness, without curtailing the necessary legal margin of discretion which must be left to administrative authorities for the sake of fair and efficient management of public affairs.[118]

[117] *Handbook*, p. 5.
[118] *Handbook*, p. 5.

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