Decision no. 1/2019 KMJE
Uniformity decision no. 1/2019 KMJE

In the uniformity proceedings initiated by Panel Kfv.III of the Curia in accordance with Section 32 (1) b) of Act CLXI of 2011 on the organisation and administration of courts of Hungary, the Administrative-Labour Uniformity Panel of the Curia having five members adopted the following

uniformity decision:

I. Where in administrative authority proceedings the client has legal representation, the service of a document on the legal representative will amount to legally valid communication of the document. In the absence of such legally valid communication, time limits for remedies will not start to run.

II. Where the client obtains knowledge of the content of the decision and files a court action, the court may examine how the absence of the legally valid communication of the administrative authority decision has affected the client's remedy and fair trial rights and the requirement of legal certainty.

III. The uniformity panel no longer maintains decision No. EBH.2009. 2109 as a decision of principle.

Statement of reasons

I.

Under Section 32 (1) b) of Act CLXI of 2011 on the organisation and administration of courts of Hungary (hereinafter: "Bszi."), the panel of the Administrative and Labour Department of the Curia, for it wishes to deviate - in a point of law - from a decision of another judging panel of the Curia which was published as a decision of principle earlier, initiated to launch uniformity proceedings with a view to construe the legal validity of servicing documents on a client acting through a legal representative.

The petitioner submits that there is legal uncertainty about the issue how the absence of a service on the legal representative can be assessed if it is confirmed that the client has been notified of the decision and he files an application for redress by the time limit for remedy.

A number of courts take the view that in such cases the absence of service on the legal representative does not constitute a serious infringement of procedural requirements that affects the merit of the case and might justify the repeal of the decision.

However, according to the legal standpoint of the Supreme Court set out in its decision of principle no. EBH.2009.2109, if in administrative authority proceedings the client has legal representation then it is compulsory to include the legal representative in the proceedings. Therefore in the absence of the service on the legal representative, the decision will only be effective if it is served/communicated on the legal representative. No court action may be filed against a decision which is not final as a consequence of the absence of proper service, the application must be rejected without issuing a subpoena (the terminology used in Act I of 2017 on administrative procedures is "must be refused"), and in the event if the suit has already commenced, it must be discontinued.
The petitioner argued that it does not follow from the grammatic, taxonomic and logical interpretation of the relevant Sections of Act CXL of 2004 on the general rules of administrative proceedings and services (hereinafter: "Ket.") [paragraphs (1) and (7) of Section 40] that the service on clients having legal representation is legally valid only if it is performed on the legal representative. The petitioner is of the opinion that such a general principle of law cannot be declared without examining the underlying substantive legal relations; it cannot be concluded in any event that the client's procedural rights are infringed, it can only be declared if it expressly happened in the specific case. For this reason, considering the longer time that had passed since the adoption of the decision of principle and also the different interpretations of the procedural provisions referred to above expressed by the authority and the court, the petitioner deemed it necessary to "fine tune" the legal standpoint set out in the EBH. Lastly the petitioner pointed out that Act CL of 2016 on the general public administration procedures (hereinafter: the "Ákr.") does not contain any rules relating to the communication to the legal representative therefore in the course of the administration lawsuit initiated in a similar subject-matter only the regularity and time of the communication to the client should be examined.

The points of law raised in the petition are:

- whether the communication of a decision to the client who has legal representation can be considered legally valid i.e. the time limits for remedies start to run upon such communication,
- how the absence of communication to the legal representative can be assessed when judging a request for remedy (legal action, review request) filed by such time limit.

II.

Referring to Section 78 (1) as well as paragraphs (1) and (7) of Section 40 of the Ket., the Prosecutor General explained in his statement made on the uniformity motion that decisions may only be delivered directly to the client, instead of delivering them to the client's representative, if the client explicitly requests to do so. Communication of a decision has several legal consequences in relation to the client's rights and obligations including that, by way of example, the communication is an indispensable precondition of the decision becoming final and enforceable, and the time limits for remedies starting to run. Therefore non-compliance with the rules of delivery qualifies as a serious procedural infringement affecting the merit of the case.

In his statement, the Prosecutor General referred to the rule of law laid down in paragraph (1)

of Article B of the Fundamental Law, the right to seek legal remedy guaranteed in paragraph (7) of Article XXVIII thereof and the provisions of Article 25 (3) thereof stating that administrative courts make decisions with regard to legal disputes related to public administration. He took the view that non-compliance with the rules of delivery also results in the breach of Fundamental Law, “the client will be deprived of his right to seek legal remedy” because in the absence of proper delivery no administrative decision exists that could have legal consequences i.e. the decision cannot become final, and in lack of becoming final no suit may be brought as set out in Section 109 of the Ket. In such cases the courts cannot perform meaningful control over the legality of the administrative decision albeit it is a constitutional requirement arising from the joint interpretation of the provisions of the Fundamental Law referred to above.

The Prosecutor General noted in his statement that Section 13 (6) of the Ákr. - stating that where the party has a representative and the party has not indicated otherwise, the authority shall send documents to the representative, with the exception of the summons to appear in person - substantially overlaps the provisions of Section 40 (7) of the Ket. thus the same issues of interpretation of law are raised in the cases of similar subject-matter conducted under the Ákr. in relation to the absence of service on the legal representative as raised with respect to the provisions of the Ket referred to above.

The Prosecutor General takes the view that the absence of service on the legal representative of a client having legal representation qualifies - without any further examination - as a serious infringement of procedural requirements affecting the merit of the case except insofar as the client explicitly requested to serve the decision not on the legal representative but on him. Unlawful conduct of the authority arising from the infringement of the rules of service referred to above which also resulted in the non-compliance with the Fundamental Law cannot be rectified by recognizing the service legally valid with regard to the fact that the client or his representative challenged the authority decision and the client’s rights were not impaired. This would go beyond the scope of legal interpretation.

III.

The Uniformity Panel took the following view on the question raised by the petitioner.

Pursuant to Section 40 (1) of the Ket., where the client is not required by an act to proceed in person, the client may be substituted by his legal representative or by a person designated by the client or his legal representative, and in all cases the client may proceed together with his representative. The same person may not represent the adverse parties.

The representative is entitled to act on behalf of the client and to exercise the rights due to him within the limits set out in his authorisation, and is also entitled and obligated to perform his obligations for and on behalf of him. It should be emphasized that, in addition to the procedural relationship between the authority and the client, an internal legal relationship (civil law engagement) between the representative and the represented person also arises from the proxy, on the one hand, while the power of attorney creates an external (administrative procedure law)

relationship between the authority and the representative, on the other hand. Certain aspects of that external legal relationship are regulated by Section 40 of the Ket.

Section 40 (7) of the Ket. states that if the client has a representative, the authority shall send the documents to the representative; however, a summons instructing the client to appear in person shall be served only upon the client, with his representative notified at the same time. A client with legal capacity may request the authority to deliver the documents to him, regardless if there is a representative involved in the case.

Pursuant to the decision of principle no. EBH.2009.2109 referred to in the petition, if the client has a legal representative in the case and does not request the authority to deliver the documents to him, the decision is legally valid only if it has been communicated to the legal representative. EBH classified the non-compliance with the rules of communication that where an administrative decision is communicated - in a legally invalid manner - only to the client, the time limits for remedies do not run. Namely, according to the EBH, in the absence of proper delivery, the legal consequences of the decision are not created thus in that case there is no administrative decision which might be subject to judicial review. Pursuant to the EBH, as a consequence of the impediment of bringing legal proceedings, the first instance authority should have rejected the application without issuing a subpoena or should have discontinued the suit in accordance with Sections 130 (1) b) or 157 a) of Act III of 1952 on the Code of Civil Procedure.

So the first issue to be examined by the Uniformity Panel is whether, in the event of a client having legal representation, the service is legally valid if the decision has been delivered not to the representative but directly to the client.

Pursuant to Section 1 (1) of the Ket., in their proceedings administrative authorities must abide by the provisions of legal regulations, and must enforce them upon others. Section 40 (7) of the Ket. clearly lays down that where the client has a legal representative then the documents must be delivered to the latter; derogation from this rule is allowed only at the request of the client i.e. decisions may only be delivered directly to the client, instead of delivering them to the client's representative, if the client explicitly requests to do so. The essence of the legal institution of representation is that the representative has received an authorisation to act for and on behalf of the client. That authorisation - exactly in the interest of the client - may only be "restricted" by the client himself, by requesting the authority to deliver the decision to him.

Communication of the decision has significant legal consequences both relating to the course of proceedings and the client's rights and obligations. In many cases the authority wrongly delivers its decision to the client - instead of delivering it to the authorised representative - which results in the absence of communication and thus the decision will be unable to produce legal effects. And, what is more, before the lawful communication the time limit for filing a request for remedy cannot start to run. The Supreme Court ruled in several cases [Legf. Bír. Kfv.II.27.658/1997/4.; Kf.III.28.998/1999/9.; Kfv.III.38.087/2000/7.] that a decision that has not been properly served on all clients may not become final. So the service is also important

for the time limits for filing of legal actions and appeals since the time limit for filing a request for remedy should be counted from the date of proper service. Where the party has an authorised legal representative, the time limit for seeking remedy should be counted from the date when the decision is communicated to the legal representative [Legf. Bír. Kpkf.II.27.813/1999.; Főv. Ít. 2.Kf.27.326/2011/2.].

Having studied the judicial practice related to the provisions referred to above it can be established that the legal consequences of improper service are assessed in a uniform manner when examining the issue of compliance with the time limits for remedies. Not only the EBH referred to in the petition but also other decisions of the Curia [Kfv.III.37.318/2016/6, Kfv.35.731/2015/7. KGD2016. 22.] follow the settled practice that the client may not be deprived of his right to legal remedy by reason of the improper service of the decision if he can exercise that right by the due date. Legal consequences of lateness may not be applied to the detriment of the party since in the absence of proper service the time limit for filing a legal action did not run therefore the claimant could not be in default with filing his application. If , in spite of the absence of proper service, the action has been filed, the proceeding court must order the claimant's legal representative to make a statement when he obtained knowledge of the service of the decision i.e. when it was given to him by his client. The court can adopt a position on the compliance of the time limit for filing of the legal action only upon the assessment of the content of that statement. [Főv.Ít. 3.Kf.27.330/2007/2.] All of this means that in such cases obtaining knowledge of the decision is indispensable even if the communication was not proper since the time limit for remedy starts to run. However it should be stated that the omission committed by the authority - the service on another person than the legal representative - has a consequence which is detrimental to the authority: the client's legal representative may make a statement that the decision has been provided to him which reference must be accepted subject to evidence to the contrary, and that reference might be a ground for an application for excusal of the failure to comply with the time limit for filing the action. A party can be relieved of the detrimental legal consequences of a legally invalid communication such as lateness through filing an application for excusal.

According to the arguments set out in judicial practice, the constitutional interest in the unchangeability of final decisions and the possibility to exercise the right to legal remedy can be reconciled in a manner that the date when the client obtained knowledge of the decision must be examined if the first instance decision was improperly served on the client, and he challenges it by filing an appeal after a considerable period of time. In view of the obligation to act in good faith arising from Section 6 (1) of the Ket., should non-notified clients obtain knowledge of the decision, they are obliged to file an application for excusal by the time limit prescribed by law, to submit an appeal against the decision or to request the service of the decision, and exercise their right to appeal subsequently. This process must be followed also in the court remedy proceedings otherwise the undesirable situation that a client having obtained of a decision may challenge the decision even after an unlimited period of time, referring to the legally invalid communication thereof; such a situation would be contrary to the function of objective legal protection of proceedings set out in the Kp. In proceedings involving more clients, this would specifically impair the rights of clients who obtained rights

in anticipation of getting a final (or, according to the terminology used in the Ákr., definitive) decision [e.g. in a construction case, in the event if the second instance authority or the court annuls a construction permit believed to be final (definitive) for several years, the builder might be obligated to demolition or to apply for a continuance permit].

The second issue to be examined by the Uniformity Panel is how the absence of communication occured by reason of improper service can be assessed if the decision has not been served on the representative but on the client, and the client seeks legal remedy against the decision within the statutory time limits.

The Uniformity Panel of the Curia considered that the judgment of a request for remedy filed by its due date - in addition to the examination of the grievance suffered by the client - may not be refused only on the grounds of the absence of legally valid communication.

It is a basic principle that the aim of administrative authority proceedings is to reach a well-founded decision whereby the rights of the client will be fully enforced. The procedural principles named in the Fundamental Law and international documents apply both to court and administrative (authority) proceedings. The Constitutional Court takes the view that the requirement of fair trial is a quality that can only be assessed taking into account the entire proceedings and all circumstances thereof. Consequently, in spite of the absence of certain details, as well as notwithstanding the compliance with all detailed rules, the proceedings can be inequitable or unjust, or even unfair. [Decision No. 6/1998 (III. 11.) of the CC]

The right to a fair trial also includes the right of access to a tribunal, the organizational side of which is the principle of judicial monopoly of justice which is also declared by the Fundamental Law. The correlation of the two principles referred to above as the subjective and organisational sides of that right has been examined by the Constitutional Court, too. Organizational side appears from the side of individuals however, under the Fundamental Law, it can be limited by procedural Acts on the basis of the test for necessity and proportionality. Those limitations include the obstacles of initiating a lawsuit or the exclusion of judicial review. [Decision No. 71/2002 (XII. 17.) of the CC]

In the Constitutional Court's interpretation, the right to a legal remedy laid down in Article XXVIII (7) of the Fundamental Law means the possibility to appeal - in relation to decisions on the merits - to other bodies or to a higher forum within the same organisation. [Decision No. 5/1992 (I. 23.) of the CC] „The Fundamental Law requires that the legal protection provided by the right to seek legal remedy should be effective i.e. it should enforce in practice and should be able to remedy the prejudice caused by the decision. Several factors can influence the 'effet utile' of the right to seek legal remedy including inter alia the extent of the possibility to revise the decision, the time limit set for conducting the legal remedy, or the rules of service of the decision complained of and the actual accessibility thereof." [Decision No. 22/2013 (VII. 19.) of the CC] Furthermore, the possibility to seek redress is a material and immanent element of every legal remedy i.e. the legal remedy both conceptually and substantially includes the fact that the grievance can be remedied. It does not follow from all this that the body judging the

legal remedy must grant the application in all circumstances nonetheless it does follow from the abovementioned that the remedy procedure should be conducted within the limits defined by the rules of procedure, and the merits of the request for remedy should be examined in accordance with the legal regulations. [Decision No. 9/2017 (IV. 18.) of the CC]

The decisions of the Constitutional Court interpreting the relevant provisions of the Fundamental Law lead to the following conclusions concerning the legal issue examined by the Uniformity Panel.
In the specific case referred to by the petitioner, the client had the possibility to seek legal remedy, he had filed an appeal against the authority's decision, and the second instance final decision had been reviewed by the court in administrative proceedings. Thus the constitutionally protected content of the fundamental right to seek legal remedy set out in the Fundamental Law had been complied with. (In addition, the petitioner also had the right to file a review request.) Thus, the client's right to seek legal remedy has not been infringed.

Similarly, the requirement of fair trial has not been infringed either and, what is more, the right to referral to the court including that requirement as well as the principle of judicial monopoly of justice - which is the organisational aspect of the former right - have also been complied with since the client has obtained knowledge of the decision on the merits, he could refer to the court against that decision, and the court has ruled on the substance of his application. In the particular case, the latter two principles - and thus the right to a fair trial as well - would have been infringed particularly if the court, with regard to the absence of a legally valid service, had not examined the client's application in substance. For the purposes of this, particular account should be taken of the requirement arising from legal certainty that there are no effective procedural means of legal remedy to enforce the proper service of the decision, or to cancel the clause reinforcing the rights which is included in the final (definitive) decision - i.e. intended to produce legal effects - planned to be challenged but failed to have been communicated properly while properly communicated to other clients, in addition to the statutory right to file an appeal against the basic decision or to bring an administrative action against the basic decision. For this reason, improper service may not give rise to the infringement of the client's right to seek legal remedy.

The CC Decisions also show that the enforcement of the requirement of fair trial can only be assessed taking into account the entire proceedings and all circumstances thereof. The enforcement of the client's rights is an important issue laid down amongst the basic principles of the Ket. (paragraphs (2) and (3) of Section 1 thereof), the impairment of which qualifies as a major infringement of rules which affects the substance of the proceedings. The fact that the client is in a situation that he is able to exercise his right to legal remedy does not necessarily mean that his rights as a client are fully enforced, neither that the authority may ignore Section 40 (7) of the Ket. and disregard - in the external legal relationship - to invite the representative into the proceedings without any legal consequences. Therefore the court needs to consider carefully how the absence of legally valid communication affected the client's right to legal remedy, and how certain procedural acts performed in disregard of the legal representation affected the merits of the case. Whether the client's right to a fair trial, and the client's rights

under the Ket. intended to facilitate his effective legal protection and the requirement of legal certainty have been impaired to such an extent that it can only be remedied by repeating the administrative authority proceedings. Thus, establishing the legal consequences of the infringement of procedural requirements by the authority is an issue of legal interpretation for the judicial practitioners at all events.

Pursuant to Section 13 (6) of the Ákr., where the client has a representative and the client has not indicated otherwise, the authority shall send documents to the representative, with the exception of the summons to appear in person. This rule substantially overlaps the provision set out in Section 40 (7) of the Ket. Consequently, in the proceedings conducted in accordance with the Ákr., the provisions of the present Decision of the Uniformity Panel shall apply to the absence of service on the legal representative, in the light of any changes in the rules of service.

IV.

The Uniformity Panel is of the view that - in proceedings where the client has a legal representative - as a general rule, service on the client is not legally valid, the time limits for remedies do not run, they only start to run if the client obtains knowledge of the content of the decision through the improper service or by other means. In such cases, the protection of the rights of the client exercising his right to seek legal remedy should also be ensured, the court therefore may examine always in light of the particular facts of the case how the absence of the legally valid communication and disregarding the legal representative in the administrative proceedings as implemented infringements of the procedural rules affected the merits of the case, whether they affected the client's rights to legal remedy and fair trial as well as the requirement of legal certainty.

As a result of its position expressed above, the Uniformity Panel no longer maintains Decision No. EBH.2009.2109 as a decision of principle.

For the reasons stated above, with a view to ensure the uniform application of law by courts and to improve the judicial practice, the Uniformity Panel adopted the decision set out in the operative part hereof [Section 40 (2) of the Bszi.].
In accordance with Section 42 (1) of the Bszi., the Uniformity Panel will publish its Decision in the Official Bulletin of the Official Journal called 'Magyar Közlöny', on its central website and on the website of the Curia.

Budapest, 14 January 2019

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