

**Colloquium of the Association of the Councils of State and the Supreme
Administrative Jurisdictions of the European Union:**

***Consequences of incompatibility with EC law for final administrative decisions
and final judgments of administrative courts in the Member States***

The Supreme Administrative Court of Poland

Warsaw 2008

NATIONAL REPORT OF BULGARIA

Introduction

The Republic of Bulgaria is a full member of the European Union as of 01 January 2007. Within the period prior to our accession to the European Union Bulgarian legislation, including that in the field of administrative procedure, has been amended and refined with a view to its harmonization with Community law.

In the first place, codification of the administrative procedure is of significant importance for progress of the reform in the judicial system by the adoption of the Administrative Procedure Code (promulgated in State Gazette, Issue 30 of 11 April 2006, in effect as of 12 July 2006, and in its part for proceedings before court as of 01 March 2007), and in the next place the establishment of a system of 28 regional administrative courts and Supreme Administrative Court unique for the country to that date.

The main principles of the Community law are the principles of priority and of direct effect.

The principle of priority of Community law over national legislation is consolidated on the constitutional level – the provision of Art. 5, par. 4 of the Constitution of the Republic of Bulgaria, which reads as follows: “international agreements, ratified under constitutional procedure, promulgated and effective for the Republic of Bulgaria, shall be part of the internal legislation of the country” and “they shall have priority over those regulations of the internal legislations that contradict them”.

By virtue of the principle of direct effect the regulations of primary and the secondary Community law shall be applicable not only in respect to Member states, but also in respect to all subjects of the law in Member states – administrative bodies, natural persons and legal entities.

Institutional (regular) means of challenging administrative acts

Pursuant to the Bulgarian law in the field of administrative procedure – the Administrative Procedure Code, administrative acts (individual and general) can be challenged through administrative action – before the immediate superior administrative body, as well as before the court in respect of their conformity with the law.

Administrative acts can be appealed against before the court also without forfeiture of the possibility to challenge such acts through administrative procedure has not been exercised, unless the Administrative Procedure Code or a special law provides otherwise (for example – under the Tax and Social Security Procedure Code the appeal pursuant to the administrative procedure of auditors' acts is a condition sine qua non and a prerequisite for admissibility of their appeal to the court).

Court proceedings shall be initiated at the request of a person having a legitimate interest or by the public prosecutor in the cases stipulated by the Administrative Procedure Code or another law – i.e. the court should always be approached with a statement of appeal or a statement of objection, so it can not rule ex officio.

Only administrative acts, which have not come into effect shall be subject to appeal before the courts, with the procedure code providing for different terms of their appeal depending on the type of administrative act, as well as on the type of invalidity considered relevant. The administrative act may be challenged within 14 days from the date of its notification therefor, and the tacit rejection or implicit consent may be challenged within one month's term from expiration of the term within which the administrative body should have ruled on the case. The administrative act may be challenged by a request that the validity be quashed without limitation in time.

Administrative acts can be appealed against in two instances – before a court of the first instance and a cassation court. The second instance is the final regular one.

The court of first instance, which is the court of substance, makes an ex officio verification of the challenged administrative act's conformity with the law; this shall

not be restricted only to discussing the grounds, specified by the appellant. Based on the evidence submitted by the parties the court checks whether the grounds for appeal of the administrative acts are at hand. The grounds of an appeal are specified in the provisions of Art. 146, item 1-5 of the Administrative Procedure Code, as follows:

1. lack of competence;
2. non compliance with the established form;
3. substantial violation of administrative procedure rules;
4. contradiction to the legal provisions;
5. incompatibility with the objectives of the law.

The powers of the first instance court upon resolving the contestation are: to rule on the nullity of the administrative act; to revoke the entire act or a part thereof; to amend it or to reject the contestation.

The cassation instance shall observe ex officio for the validity, admissibility and compliance of the first instance court decision with the material law, where, in parallel therewith, it shall only discuss the defects of the resolution, which have been indicated in the appeal or the objection.

The cassation grounds for contestation of a resolution are as follows:

1. null and void;
2. inadmissibility;
3. irregularity due to breach of the law, material breach of the legal proceedings rules or groundlessness.

The powers of the Court of Cassation are as follows: to sustain the decision or to revoke it in its contested part, if it irregular; to invalidate the decision in its contested part, if it is inadmissible by terminating the case, return it for new examination or forward it to the competent court or body; or where the decision is null and void – to rule on its nullity and if the case is not subject to termination, to return the case to the first instance for ruling of new decision.

Compensatory proceedings

The Administrative Procedure Code (APC) in Chapter Eleven on the Compensatory proceedings (Art. 203 – 207 of the APC) stipulates procedures for the examination of claims of compensation awards by the court for damages caused to citizens or bodies corporate as a result of acts or omissions of administrative bodies and officials.

A prerequisite for filing the claim is a revocation of the administrative act under the procedure stipulated therefor.

The law provides for an option whereby the claim for compensation may be joined to the statement of appeal for the revocation of the administrative act.

The court competent to rule on the claim for compensation is the respective first instance court as per the seat of the body that has issued the challenged administrative act or as per the seat or address of the appellant. In the event that the claim is joined to the action of contesting the administrative act, the mandatory jurisdiction is the one per the seat of the administrative body.

In the event that the damages are caused by an administrative act that was null and void or withdrawn by the administrative body, the illegality of the act shall be established by the court to which the claim for compensation has been brought.

The claim for compensation shall be brought against the legal entity represented by the body whose unlawful act, action or omission has caused the damages.

By request of a party to the lawsuit or by decision of the court the claim for compensation may be withdrawn, if its consideration will render difficult the procedure of contesting the administrative act. Consideration of the separated claim shall continue in the same court after the coming into effect of the decision to declare the act illegal or to revoke of it.

Where the proceedings of contesting the administrative act are terminated, this also terminates the proceedings in respect of the claim joined to it, unless such a claim is for damages caused by an unlawful administrative act or the proceedings of contesting have ended due to the withdrawal of the administrative act.

In the event that court rejects the statement of appeal against the administrative body, the court shall terminate also the proceedings on the claim for compensation. In the event of revocation of the court decision, by virtue of which the appeal has been rejected, the proceedings shall be reopened.

The Administrative Procedure Code provides for an option upon termination of the proceedings on the claim to reach an agreement on the compensation amount.

Reopening of proceedings concerning the issuing of administrative decisions

The Administrative Procedure Codes provides for reopening of proceedings in relation to the issuing of individual administrative decisions (Art. 99 – 106 APC). This is an exceptional verification method of re-considering individual administrative acts

that have formally not been appealed before the courts and entered into legal effect. In that case the addressees have not, after the issue of an individual administrative act, contested before the court, so after the expiry of the preclusive terms for contestation the act has entered into legal effect; or the act has been contested, but after expiration of the terms for contestation and by virtue of final decision the court has ruled that the statement of appeal shall not be considered and it has closed the proceedings.

The unassailable (one that has entered into formal legal effect) individual administrative act may not be withdrawn, amended or revoked either by its issuer, by the superior body under the administrative contest or by the court. The only means for the aforesaid is to reopen the proceedings on the issuance of the individual administrative act, upon availability of grounds for reopening, and within the statutory time limits.

Within the proceedings on reopening an individual administrative act that has entered into effect or a general administrative act that has not been challenged before the court, these may be revoked or amended by the immediate superior administrative body, and if the acts have not been subject to revocation under the administrative procedure – this may be effected by the body that has issued it.

The grounds stipulated by Art. 99 of the APC are as follows: when one of the requirements for legality of the administrative act has been substantially violated (item 1); when new circumstances or new written evidences of significance for the issuance of the act have been revealed that could not have been known by the party to the administrative proceedings when the administrative body was resolving the case (item 2); pursuant to the due court proceedings a criminal act has been established of the party, its representative or of the administrative body, when it is a one-man body or a member of it, when it is a collective body, when such criminal action has reflected on the decision of the issue – subject to the administrative proceedings (item 3); or the administrative act has been based on a document that pursuant to the due court proceedings has been acknowledged to be counterfeited, or act of court or other state institution that subsequently has been revoked (item 4); the same administrative body on the same issue and on the same ground has issued in respect of the same persons another administrative act that has entered into effect and these contradict one another (item 5); as a result of the breach of the administrative procedure rules the party has been deprived of the opportunity to participate in the administrative proceedings or it has not been duly represented, as well as such party was unable to participate in person or through a proxy due to the impediment that the party could not overcome (item 6); or by a decision of the

European court for protection of human rights a violation has been established of the Convention on the protection of human rights and the basic freedoms (item 7).

Jurisprudence and the court practice accept that grounds for reopening of proceedings are exhaustively listed and they shall not be applied extensively, since the reopening of proceedings affects the unassailability of the act and its legal consequences and the act shall only be revoked in case of extraordinary circumstances. Such approach is accepted with a view to the stability of legal consequences of the act and legal certainty.

There is no practice of reopening the proceedings on the issuance of the administrative act to be initiated in the event that the issuer of the act upon its enactment has interpreted or applied Community law and after the act has entered into legal effect, it has been followed by a decision of the European Court of Justice that gives a different interpretation in result of which the individual administrative act appears to be issued in breach of the Community law.

From the theoretical point of view, since the Community law is used by all internal procedural means of protection, stipulated with respect to the national legislation, it is possible that the decision of the European Court of Justice be taken into consideration, when grounds for reopening under Art. 99, item 1 of the APC exist: when one of the requirements for lawfulness of the administrative act has been substantially violated. The observance of the material law is one of these requirements, where the administrative bodies are obliged upon issuance of the act to apply the law of the European Union on the same grounds as the internal applicable law. In order that the decision of the European Court of Justice may serve as grounds for reopening the proceedings, of significance is the circumstance that such decision was issued and the request for reopening on such decision was filed within the preclusive term for admission of the reopening. Otherwise, when the request has been filed after the expiry of the term and is therefore inadmissible, it shall not be considered upon its merits.

The aforesaid opinion on the option that a decision of the European Court of Justice must be taken into account once the individual administrative act has entered into legal effect, has not been proven in practice and it is of a hypothetical nature.

In the case of Art. 99, item 1 of the APC the reopening of administrative proceedings shall be initiated by the administrative body or by counsel of the respective procurator or the ombudsman, and in the in the cases of Art. 99, items 2 – 7 of the APC – on the request of a party to the proceedings.

Reopening of administrative proceedings may be initiated by a person in respect of which the administrative act shall have effect, although such person has not been party to the proceedings, i.e. in such case legal interest of the reopening should be proven.

Reopening the proceedings under Art. 99, item 1 of the APC may be initiated within one month's term as of the date on which the act enters into effect. Reopening of the proceedings under Art. 99, items 2 - 7 of the APC may be initiated within a term of three months from becoming aware of the circumstance that serves as ground for revocation or amendment of the administrative act, but not later than one year as of the occurrence of ground. In the event that the occurrence of the grounds preceding the issuance of the administrative act, the initial moment of the term for reopening is the date on which the act enters into effect.

Within the proceedings for reopening the administrative body shall ex officio constitute as parties to the proceedings any third parties that have derived rights from the administrative act.

The competent administrative body shall consider the request for reopening of the contested administrative act through administrative procedure.

In the event that the request for reopening is well grounded, i.e. if any of the grounds for reopening of the proceedings are available, proceedings shall be reopened under the procedure for the issuance of individual administrative acts. In the event of availability of reopening grounds the administrative body shall have no option of judgment, but is obliged to commence new proceedings for the issuance of the administrative act.

In the event that the same administrative body on the same issue and on the same grounds has issued, in respect of the same persons, another administrative act that has entered into effect and it contradicts another individual administrative act that has entered into effect (ground under Art. 99, item 5 of the APC), the illegal administrative act shall be revoked.

The new administrative act that has been issued upon the reopening of proceedings, respectively the refusal to issue the act shall be subject to contestation under the general procedure stipulated in the Administrative Procedure Code.

The revocation or amendment of the administrative act under the procedure for reopening shall not affect rights acquired by third parties acting in good faith.

Where an administrative act, respectively a refusal to issue an act, has been contested before the court, the procedure of revocation of effective court decisions shall apply.

Revocation of Effective Court Decisions

The Bulgarian procedure law provides for out-of-institution means for revoking effective court decisions, the latter being a special means of protecting against vicious court acts. The right to request revocation belongs only to a party to the suit in respect of which the attacked court act has been ruled, where such court act is adverse for the party. The right to request revocation belongs to any person in respect of which the decision has effect and is damaging, although such person may not have been party to the lawsuit.

The Supreme Administrative Court in different panels (panels of three members, five members or seven members) is competent to consider the request for revocation depending on what court has ruled on the act subject to revocation.

With a view to the fact that the revocation is a special means of protection and it is an exception from the soundness of the act, the grounds for revocation are exhaustively specified and they shall not be applied extensively. The latter have been stipulated in the provision of Art. 239, items 1 – 6 of the APC, pursuant to which the act shall be subject to revocation, provided that:

1. new circumstances or new written evidences of substance for the case have been revealed, which could not have been known to the party when the case was resolved;

2. pursuant to the due court procedure it be established that the testimony of the witnesses or the opinion of the experts on which the act is grounded are false or constitute a criminal act by the party, its representative or a member of the panel, established in relation to the resolving of the case;

3. the act has been based on a document that pursuant to the due court proceedings has been acknowledged to be counterfeited, or an act of court or other state institution that subsequently has been revoked;

4. between the same parties, for the same issue, on the same or another effective decision has entered into effect that contradicts the decision that is subject to revocation;

5. as a result of the breach of the respective rules the party has been deprived of the opportunity to participate in the case or it has not been duly represented, or where such party was unable to appear in person or through a proxy due to impediment that the party could not eliminate;

6. by a decision of the European court for protection of human rights a breach has been established of the Convention on the protection of human rights and the basic freedoms.

In such extraordinary proceedings the Supreme Administrative Court is bound by the subject matter and the grounds of the request. The latter shall be examined only in respect of the facts specified therein and it may not revoke a court act different from the one mentioned. Only in the hypothesis of item 4, Art. 239 of the APC, the court is not bound by the request for revocation and it shall revoke the decision that is irregular.

As evident from the above cited text, the breach of the Community law has not been specified as grounds for revocation of an effective court decision irregularly come into effect.

Revocation may be requested within a term of one year from occurrence of the grounds for revocation, and if it precedes the decision that is subject to revocation – as of the effective date of the decision. In any case the request may not be filed after three months from the date of becoming aware of the grounds for such revocation, and in the case under Art. 239, par. 5 – as of the date of becoming aware of the decision.

The powers of the Supreme Administrative Court in the revocation proceedings are as follows: to reject the request or to revoke the entire decision or a part thereof. Where the decision is revoked, the court returns the case for new hearing at the competent court by another panel and specifies where the new examination should commence from.

As evident from the above brief analysis of legislation in the field of reopening the proceedings concerning the issuance of administrative acts under the provisions of Art. 99 of the APC, as well as the specific means of revoking effective court decisions under the procedure of Art, 239 APC, the Bulgarian procedure law does makes no provision for special procedural rules to regulate the consequences of incompatibility of effective administrative acts and court decisions with Community law.

As at present date no court decisions have been ruled in relation to the reopening of proceedings concerning the issuance of administrative acts or revocation of effective court decisions due to ascertained incompatibility with Community law.

Irrespective of the aforesaid, the incompatibility with Community law bears the same significance as incompatibility with the national law.

Internal procedure rules that ensure the protection of rights of the persons derived by virtue of Community law are not less favourable than those regulating the protection of rights provided for by the national law (the principle of equivalence). At the very same time such procedure rules do not render impossible in practice or extremely difficult the exercise of rights granted by virtue of Community law procedure (the principle of effectiveness).

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