

**The 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**

**Report for
the Federal Administrative Court
of Germany
by
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Judge of the Federal Administrative Court**

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Introduction

The European Court of Justice (ECJ) has recently issued several judgements which concerned the influence of EC law on final administrative decisions and courts' judgments in the Member States. Therefore, the crucial question arises what are the consequences for the final decisions and judgments of their incompatibility with EC law.

The above mentioned problem was considered in the following cases of the ECJ:

- C-224/97 Ciola, [1999] ECR I-2517,
- C-201/02 Wells, [2004] ECR I-723,
- C-453/00 Kühne&Heitz, [2004] ECR I-837,
- C-234/04 Kapferer, [2006] ECR I-2585,
- C-422/04 i-21 Germany, n.y.r., and
- C-2/06 Kempter, (pending).

However, it seems that the ECJ has not yet fully developed the ultimately concluding case law on the matter. The basic problem concerns the relationship, and sometimes the tension, between the principle of full effectiveness of EC law, on the one hand, and the principle of legal certainty and stability of administrative decisions and courts' judgments (*res judicata*), on the other hand.

The analysis of the national provisions which provide the examples of exceptions from the principle of legal certainty and stability of administrative decisions and courts' judgments is of great theoretical and practical significance. The essential question whether national law should take into consideration requirements arising from EC law remains open.

The subject of the Colloquium concerns both elements: the national provisions and their application in the Member States. Especially, it is crucial to analyse ways of solving problems of incompatibility of administrative decisions and judgments of administrative courts with EC law. What is the influence of the ECJ's case law on the national practice? Have the courts in the Member States already faced the issues which have not yet been addressed by the ECJ?

In order to ensure the clarity and mutual understanding, we propose the following terminological convention with regard to some of the terms used in the questionnaire:

- "a decision" – a term which covers all the forms of administrative acts in individual cases;
- "to revoke a final administrative decision" – a term which covers several procedural means leading to the elimination of the decision, for example, its reversal, annulment, and setting aside; or declaring it null and void, invalid, etc.;
- "to reopen judicial proceedings" – a term which covers various procedural means which allow the case already decided by the court at the final instance to be re-examined.

- You are also asked to provide the terminology characteristic of the specific procedural institutions existing in your legal system.

Questionnaire

1. Are there any procedural means under your national law which allow a final administrative decision to be revoked, if it turns out to be contrary to Community law?

Please describe briefly the relevant provisions:

a) do the provisions relate specifically to the application of EC law; or

b) do they have general application?

The general principles of administrative law to be observed by an administrative body (not by a court) of the Federal state are set out in the Federal Administrative Procedure Act (Verwaltungsverfahrensgesetz – VwVfG). Similar – in fact identical - acts of the Länder cover the procedure of legal actions of administrative bodies of the Länder. The Act regulates the activity of an administrative body by administrative act ("decision" as referred to in the introduction), by administrative contract and by a very formal procedure reserved to certain fields such as planning a.s.o. The part of the Act dealing with the administrative act sets out under which conditions administrative acts are valid or invalid, lawful or unlawful. § 48 and § 49 specify how administrative acts may be withdrawn or revoked. The difference between the two provisions is: in the case of § 48 the administrative act is unlawful (either straight from the beginning or as a consequence of later events), while in the case of § 49 the administrative act is lawful. The two provisions make a difference of terminology: an unlawful act may be withdrawn, a lawful act may be revoked. - Despite the terminology, the true importance of § 49 is, that it empowers the administration to revoke a lawful administrative act (and, *e contrario*, all the more an unlawful one) in order to adapt it to a new legal and factual situation.

The provisions read as follows:

§ 48 VwVfG

48. Withdrawal of an unlawful administrative act

(1) An unlawful administrative act may, even after it has become non-appealable, be withdrawn wholly or in part either retrospectively or with effect for the future. An administrative act which gives rise to a right or an advantage relevant in legal proceedings or confirms such a right or advantage (beneficial administrative act) may only be withdrawn subject to the restrictions of paragraphs 2 to 4.

(2) An unlawful administrative act which provides for a one-time or continuing payment of money or a divisible material benefit, or which is a prerequisite for these, may not be withdrawn so far as the beneficiary has relied upon the continued existence of the administrative act and his reliance deserves protection relative to the public interest in a withdrawal. Reliance is in general deserving of protection when the beneficiary has utilised the contributions made or has made financial arrangements which he can no longer cancel, or can cancel only by suffering a disadvantage which cannot reasonably be asked of him. The beneficiary cannot claim reliance when:

1. he obtained the administrative act by false pretences, threat or bribery;

2. he obtained the administrative act by giving information which was substantially incorrect or incomplete;

3. he was aware of the illegality of the administrative act or was unaware thereof due to gross negligence.

In the cases provided for in sentence 3, the administrative act shall in general be withdrawn with retrospective effect.

(3) If an unlawful administrative act not covered by paragraph 2 is withdrawn, the authority shall upon application make good the disadvantage to the person affected deriving from his reliance on the existence of the act to the extent that his reliance merits protection having regard to the public interest. Paragraph 2, third sentence shall apply. However, the disadvantage in financial terms shall be made good to an amount not to exceed the interest which the person affected has in the continuance of the administrative act. The financial disadvantage to be made good shall be determined by the authority. A claim may only be made within a year, which period shall commence as soon as the authority has informed the person affected thereof.

(4) If the authority learns of facts which justify the withdrawal of an unlawful administrative act, the withdrawal may only be made within one year from the date of gaining such knowledge. This shall not apply in the case of paragraph 2, third sentence, no. 1.

(5) Once the administrative act has become non-appealable, the decision concerning withdrawal shall be taken by the authority competent under section 3. This shall also apply when the administrative act to be withdrawn has been issued by another authority.

§ 49 VwVfG

49. Revocation of a lawful administrative act

(1) A lawful, non-beneficial administrative act may, even after it has become non-appealable, be revoked wholly or in part with effect for the future, except when an administrative act of like content would have to be issued or when revocation is not allowable for other reasons.

(2) A lawful, beneficial administrative act may, even when it has become non-appealable, be revoked in whole or in part with effect for the future only when:

1. revocation is permitted by law or the right of revocation is reserved in the administrative act itself;
2. the administrative act is combined with an obligation which the beneficiary has not complied with fully or not within the time limit set;
3. the authority would be entitled, as a result of a subsequent change in circumstances, not to issue the administrative act and if failure to revoke it would be contrary to the public interest;
4. the authority would be entitled, as a result of an amendment to a legal provision, not to issue the administrative act where the beneficiary has not availed himself of the benefit or has not received any benefits derived from the admin-

istrative act and when failure to revoke would be contrary to the public interest, or

5. in order to prevent or eliminate serious harm to the common good.

Section 48 paragraph 4 applies mutatis mutandis.

(3) A lawful administrative act which provides for a one-time or a continuing payment of money or a divisible material benefit for a particular purpose, or which is a prerequisite for these, may be revoked even after such time as it has become non-appealable, either wholly or in part and with retrospective effect,

1. if, once this payment is rendered, it is not put to use, or is not put to use either without undue delay or for the purpose for which it was intended in the administrative act;

2. if the administrative act had an obligation attached to it which the beneficiary either fails to satisfy or does not satisfy within the stipulated period.

Section 48 paragraph 4 applies mutatis mutandis.

(4) The revoked administrative act shall become null and void with the coming into force of the revocation, except where the authority fixes some other date.

(5) Once the administrative act has become non-appealable, decisions as to revocation shall be taken by the authority competent under section 3. This shall also apply when the administrative act to be revoked has been issued by another authority.

(6) In the event of a beneficial administrative act being revoked in cases covered by paragraph 2, nos. 3 to 5, the authority shall upon application make good the disadvantage to the person affected deriving from his reliance on the continued existence of the act to the extent that his reliance merits protection. Section 48, paragraph 3, third to fifth sentences shall apply as appropriate. Disputes concerning compensation shall be settled by the ordinary courts.

Both provisions are applicable to administrative acts, which are still open to challenge, but especially to those which cannot be challenged by the addressee (beneficiary) because the time limit to do so (normally one month from the time of the notification of the administrative act to the addressee) has elapsed.

Both provisions are generally applicable; they do not relate specifically to the application of EC law.

It should be noted that specific administrative acts may contain special rules relating to the same questions, but giving a different answer. These special rules prevail, unless otherwise stated.

Moreover, the Administrative Procedure Act provides the possibility to review an administrative procedure even if it has been closed in a final and binding way. The relevant § 51 reads as follows:

§ 51. Resumption of proceedings

(1) The authority shall, upon application by the person affected, decide concerning the annulment or amendment of a non-appealable administrative act when:

1. the material or legal situation basic to the administrative act has subsequently changed to favour the person affected;
2. new evidence is produced which would have meant a more favourable decision for the person affected;
3. there are grounds for resumption of proceedings under section 580 of the Code of Civil Procedure.

(2) An application shall only be acceptable when the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a legal remedy.

(3) The application must be made within three months, this period to begin with the day on which the person affected learnt of the grounds for resumption of proceedings.

(4) The decision regarding the application shall be made by the authority competent under section 3; this shall also apply when the administrative act which is to be annulled or amended was issued by another authority.

(5) The provisions of section 48, paragraph 1, first sentence and of section 49, paragraph 1 shall remain unaffected.

The main difference between § 48 and § 51 is: who is taking the initiative to change an administrative act. If the administrative body is going to do so (acting *ex officio*), then § 48 is the relevant provision; the result is normally to the detriment of the addressee. If the addressee of the administrative act is looking for a remedy, then § 51 opens a possibility to file an application. The outcome of this step is, unless it fails, a better position of the addressee. Nevertheless, § 51 paragraph 5 leaves open to the addressee to rely on § 48 or § 49. Another difference is: If the administrative body has issued a decision that has become binding and final and which continues to be a burden to the addressee, he must use § 48 to obtain relief. If the administrative body has denied a demand to issue a positive decision, and this denial has become final and binding, then § 51 is the way to be chosen.

The three provisions of § 48, 49 and 51 show that German legislation provides rather comprehensive, sometimes sophisticated, tools to make the principle of lawfulness going ahead unless good reasons call for the principle of stability to prevail. The system established by the three provisions is somewhat like a balance between the two principles, and the rather piecemeal decision of the legislator, which one should prevail, does considerably reduce the discretion of the administrative body.

- 2. Do national provisions concerning the revocation of final administrative decisions:**
 - a) grant discretionary powers to competent administrative bodies to decide the matter; or**
 - b) provide the obligation to revoke a decision under certain conditions?**

Normally, the aforementioned provisions of § 48 and § 49 grant discretion. This is expressed by the word “may” or “can” (in German: “kann”), being a technical term opposed to “must” or “must not” (“muss”, “darf nicht”). However, as it has just been shown, the legislator reduces the margin of this discretion (more in § 48, less in § 49) by giving a very detailed directive how to solve the various types of cases. And as a general rule, this already restricted discretion may be reduced to null by the specific factual circumstances of the case, thus leaving to the administrative body no other choice than to withdraw (or to revoke) the administrative decision. The Federal Administrative Court has ruled that this is the case if holding up an unlawful decision would be simply intolerable because the decision was violating basic principles of good customs, morality or equality, or if the decision was manifestly unlawful¹.

3. Does the possibility (or obligation) of revocation of final administrative decisions depend on the reason of its incompatibility with EC law? Please consider the following cases:

- a) in the light of the ECJ’s subsequent judgment, an administrative decision turned out to be incompatible with EC law or based on the misinterpretation of EC law (as in the Kühne & Heitz and Kempster case);**
- b) the provisions of national law which provided the legal basis of a contested decision were incompatible with EC law (as in the i-21 Germany case);**
- c) an administrative decision infringed EC law or was issued without giving due consideration to the ECJ’s case law.**

Since EC law is considered to be of the same level as national law (but below constitutional law level), administrative decisions infringing EC law follow the same principles as decisions infringing national law that is not meant to implement EC law. German law does not consider incompatibility with EC law as a special case deserving different treatment. So, normally, unlawful decisions may become binding if they are not challenged in due course, or if a final court decision gives its approval. The provisions of the articles 48, 49 and 51 of the Administrative Procedural Act may be considered as sufficient to meet the requirements of a state of law. As it has already been mentioned, the ECJ generally accepts this position. Should the ECJ establish some special rules regarding the revocation of final administrative decisions, such rules would have to be inserted into the national legal order. Until now, the ECJ has not established such rules; its rulings in the cases mentioned in the question concern special circumstances of these cases and are not very likely to be widely applicable. There are just two principles which the ECJ is looking for to be generally respected by the national administration and jurisdiction: the principle of Equivalence (national rules applied to cases involving community law must not be less favourable than those governing similar domestic actions) and the principle of Effectiveness (national procedural law must not render impossible or unduly difficult in practice the exercise of rights conferred upon a person by EC law).

As a general rule, the ECJ respects the national provisions concerning the revocation of a final administrative decision. The ECJ also accepts that the national administrative body generally has a discretionary margin whether or not to revoke. The German provisions (as set out in No. 1 of this questionnaire) tend to keep a fair balance between the principle of lawfulness and the principle of legal certainty and stability of administrative decisions. This has been accepted by the ECJ. It has not ruled that the EC law principle of full effectiveness does call at all costs for the revoking of administrative decisions infringing EC law. It has, however, ruled that the

¹ e.g. BVerwGE 95/86, 92; 121/226, 230.

national legal order must provide a fair chance to give EC law full effect and that no national provision might impose an unacceptable hindrance to that effect.

a) The Kühne & Heitz case is a case which falls within the scope of § 51 of the Administrative Procedure Act (see No. 1 of the questionnaire). As set out above, the administrative body is obliged to wind up the procedure if the material or legal situation basic to the administrative act has subsequently changed to favour the person affected. German Courts have constantly ruled that another interpretation given by a court to a specific provision does not constitute a change of the legal situation and therefore does not entitle the person concerned to ask for a resumption of a procedure. Under German law the mere fact that a legal provision has been declared null and void by the federal Constitutional Court does not give rise to a resumption of proceedings unless they are still pending. Decisions which have not yet been enforced, may, however, no longer be executed.

Not entirely in line with this, the ECJ had ruled in Kühne & Heitz that national administrative bodies, upon application, were obliged to wind up an administrative procedure in order to comply with the interpretation of ECJ given to a specific provision of EC law. But the ECJ gives this obligation some rather strict contours: The right to ask for resumption of the procedure is only granted to those applicants who invoked, in the foregoing procedure, the unlawfulness of the national administrative act on the ground of its incompatibility with EC law. Further, the right is restricted to those persons who pursued their case until the last instance, and to those cases where the last instance failed to meet its obligations to ask for a preliminary ruling according to art. 234 EC. From all this it appears that the right to apply for resumption is as much restricted as the right to ask for damages according to the Köbler case.

b) In the i-21-case, the ECJ has stressed that administrative decisions must be open to revocation where the provisions of national law which provided the legal basis of a contested decision were manifestly incompatible with EC law. This is quite in line with the standing jurisdiction of German courts that the discretion of the administrative body to revoke an unlawful decision is regularly reduced to null when the unlawfulness of the decision is manifest.

c) The case that an administrative decision infringed EC law or was issued without giving due consideration to the ECJ's case law seems to be the basic case. As explained above, this is not considered as a case that should be treated differently, but should follow the same principles as decisions infringing national law.

4. In order to revoke a final administrative decision which is contrary to Community law, is it a precondition that a party (a person concerned):

a) contests (challenges) the decision in the course of the administrative procedure?

b) appeals against the decision to the court? Is it sufficient to appeal to the national court of the first (lower) instance or is it necessary to exhaust all means of judicial review?

c) makes use of any other available legal means provided under national law? What kind of means (ombudsman, etc.)?

For most of the answer, please revert to No. 1 of the questionnaire. Under German law, an administrative decision may generally be challenged before the administration, and the administration has to reconsider the matter and may alter its decision, or stick to it. So, legal means are: to protest against a decision of an administrative body. The protest is to be directed against the administrative body or the superior administrative body, and the answer is again a

decision of an administrative body. Normally, this second decision (called *Widerspruchsbescheid* in German) is a prerequisite for an appeal to an administrative court (there are, however, more and more exceptions from this principle, and quite a lot of administrative decisions may directly be appealed in court).

So, a decision of an administrative body may become final (binding) in different ways:

- a) the person concerned does not challenge the decision;
- b) the person concerned who has challenged the decision does not challenge the final decision of the administrative body or fails to appeal against that decision in due time;
- c) the person concerned having appealed to a court refrains from exhausting (or fails to exhaust) all means of judicial review;
- d) the person concerned exhausted all means of judicial review but lost his case in the last judicial instance.

In all these cases, § 48 of the Administrative Procedure Act is open to the person concerned. Nevertheless, this way does not hinder the administration to act *ex officio*, if it becomes apparent that its decision was or has become unlawful; the right of the administrative body to proceed according to § 48 und to revoke its unlawful administrative act is not depending of a challenge brought forward by the person concerned (but sometimes restricted, if it granted a favour). The precondition of § 51 is, that the person affected was, without grave fault on his part, unable to enforce the grounds for resumption in earlier proceedings, particularly by means of a challenge before the administrative body or by a legal remedy offered by a court. So § 51 would only be open for those who did their best to have their case reviewed (case d).

From this it appears that the normal field of application of § 51 is the case where the unlawfulness of the administrative act is a result of later developments, including a clarification brought by an EC judgment. If the person concerned went through the legal remedy system without success, and then it becomes patent that even the final court decision was wrongful because the court neglected its obligation to refer the case to the ECJ, than the ECJ considers the violation of EC law to be such a manifest one that a reopening of the case is imperative (*Kühne & Heitz*).

The administrative courts are acting on three levels, the second one being competent for appeals against the judgements of first instance courts, and the Federal administrative court being competent for the review of judgments issued by the courts of second instance. Getting from one level to the next needs a special leave to appeal granted either by the court, which issued the decision, or by the court of next instance. Leave to appeal is subject to rather narrow prerequisites.

Final court decisions may be challenged in the Federal Constitutional Court with the allegation that the decision was affecting fundamental rights of the person concerned.

5. As far as the admissibility of revocation of final administrative decisions contrary to Community law is concerned, does it matter whether a party (a person concerned) raises the question of the infringement of Community law in the course of administrative procedure or the proceedings before the administrative court? (this issue has been raised in the *Kempter* case).

Normally, it does not matter for which reason an administrative decision is unlawful. It is in the discretion of the administrative board to revoke or not to revoke it. The Kempter case falls within the scope of § 51 of the Administrative Procedure Act. As set out above, the resumption of a case according to § 51 normally cannot be applied for on the ground that the ECJ has given an interpretation of EC law which has rendered unlawful the decision. Under the influence of the ECJ, this is different if EC law is involved. In this case, an obligation of the administrative body to resume the procedure may depend on the fact whether or not the person concerned has raised the question of the infringement of community law (see above answer to No. a 3 a). The outcome of the Kempter case may stress this prerequisite among the other rather strict prerequisites, which have to be fulfilled in order to create a strict obligation of the administrative body to revoke its decision or to resume the procedure. At least, this was the issue raised by the Hamburg financial court in its preliminary question in the Kempter case.

- 6. Does pursuant to national law an administrative court reviewing the legality of administrative decisions take into consideration the provisions of Community law:**
- a) on request of the parties only?
 - b) on its own motion (*ex officio*)?

Always *ex officio*. Nevertheless, the parties are invited (and well advised) to give a hint to the court if the court is likely to miss the point.

- 7. Are the powers described in Question 6 treated differently, if the case is examined by the court against whose decisions there is no judicial remedy under national law?**

No. Of course, there is the important difference that Art. 234 EC establishes an obligation of the court of last instance to refer a preliminary question to the ECJ, while other courts have the right but not the obligation to do so.

- 8. When an administrative decision, which has become final as a result of a judgment of a national court, turned out to be contrary to EC law, is it appropriate:**
- a) to revoke the decision (as in the Kühne case); or
 - b) to reopen the judicial proceedings?

The appropriate measure is to revoke the decision. Both § 48 and § 51 of the Administrative Procedure Act open the possibility to get a positive answer of the administrative body, and if this fails, the decision not to revoke may again be challenged in court. Reopening judicial proceedings is much more difficult, and the mere fact that a court decision was erroneous is not sufficient. In fact, the stability of court decisions is considerably higher than that of decisions of an administrative body.

- 9. The ECJ's judgment in the Kapferer case concerned the matters of civil law. Do you think that the position of the ECJ (paragraph 24 of the Kapferer judgment) is also applicable to the judgments of administrative courts?**

In my view, there are no sensible reasons why the position which the ECJ adopted in the Kapferer case should not be applicable to the judgments of administrative courts. However, the need to protect the position of the state which had acted wrongfully by negligence might be considered less eminent than the need to protect the interests of a private party which had

acted in good faith. But this would rather be a question of discretion than a question of principle.

10. What is your interpretation of the above mentioned judgments of the ECJ (Kühne, i-21 Germany):

- a) the ECJ accepts the principle of procedural autonomy of the Member States; or**
- b) it means the imposition of an obligation on the Member States to introduce, if necessary, procedural means to ascertain that the principle of full effectiveness of EC law is respected?**

The ECJ does neither presume nor require that the national legal order provides for remedies which reopen the way to reconsider final and binding administrative decisions or final judgments. If there are such remedies – as it is the case in Germany –, the ECJ leaves it to the national legal order to fix the borderlines between the principles of legal certainty and stability of administrative decisions and courts' judgments on the one hand and of lawfulness on the other hand.

Basically, the Kühne & Heitz judgment opens the way to a resumption of the procedure, provided the national law contains an adequate procedural provision applicable in such a case. Kühne & Heitz might enlarge the scope of applicability of such an existing provision. Within this frame, the ECJ accepts the principle of procedural autonomy.

Under these conditions, the principle of full effectiveness is limited to those cases where the applicant has fulfilled all requirements set out in the judgment, and the state (or its court) has neglected its procedural duties arising from EC law in a manifest way.

11. Does your national law in the discussed field comply with the principles of equivalence and effectiveness, as interpreted by the ECJ (see e.g.: case i-21 Germany, paragraph 57)? Please state your opinion.

The answer is yes. As set out above (see answer to question 1), the provisions of the German Act on Administrative Procedure give a broad range of possible and satisfying solutions in a very vast scope of cases, and the clauses are open to an interpretation which is in compliance with the principles of equivalence and effectiveness.

12. When the case under consideration concerns the revocation of a final administrative decision, is it necessary to interpret your national law in compliance with Community law?

Moreover,

- a) does such an interpretation have any influence on the scope of discretion of administrative bodies (the problem was discussed in the case i-21 Germany)?**
- b) are there any examples of the interpretation of national law in compliance with EC law to be found in the practice of administrative courts?**

In my opinion, EC law has but a slight impact on the interpretation of German procedural law. In principle, this law is quite in line with the general jurisprudence of the ECJ. As to material law, German courts use to interpret it in compliance with EC law. This may include the possibility to disregard national law which cannot be interpreted this way.

In the i-21-case, the ECJ has stated that it is up to the national court to find out whether the decision was “manifestly unlawful” in the sense of the national legal order. If this question was answered in the affirmative, the national court is under the obligation to take all the appropriate measures of revocation, which the national law provides for. I think this clearly confirms the thesis that the ECJ accepts the principle of procedural autonomy of the Member States (see question 11).

13. Do the provisions of national law prescribe any time limit for submitting a motion to revoke a final administrative decision or reopen the judicial proceedings when the contested decision or the judgment is contrary to Community law? Do you think that the fourth prerequisite for the revocation of final administrative decisions set in the Kühne case - that the person concerned files a complaint to an administrative body immediately after becoming aware of the decision of the ECJ - should have general application? (this issue has been raised in the Kempter case.)

As it may be seen from the wording of the German provisions concerning the withdrawal and the revocation of an administrative act or the resumption of the procedure, there are time limits to be respected. However, the time limit starts running from the day on which the person affected learnt of the grounds for resumption of proceedings, that means normally from the time on where the applicant got to know that the decision imposed on him was contrary to Community law and therefore unlawful. In § 48 and 49, the time limit for the administrative body is one year; in § 51 it is three month. Of course, if the applicant or the administrative body consent, the time limits may be disregarded. That means, the administrative body may withdraw its decision or reopen the procedure at any time if the addressee of the administrative act gives his consent.

Nevertheless, I would agree that under similar factual conditions the fourth prerequisite for the revocation of final administrative decisions set out in the Kühne & Heitz case - that the person concerned files a complaint to an administrative body immediately after becoming aware of the decision of the ECJ - should have general application, since the Kühne & Heitz case establishes far going consequences which should be kept in a rather narrow channel.

14. What is the relationship (if any) under your national law and practice between the procedure for revocation of final administrative decisions and/or reopening of the court’s proceedings analysed above, on the one hand, and the proceedings concerning the state liability for damages in case of the infringement of Community law, on the other hand (cases: C-46/93 and C-48/93 Brasserie, [1996] ECR I-1029 and C-224/01 Köbler, [2003] ECR I-10239)?

Especially:

- a) are there any formal links between the two types of proceedings?
- b) which national court is empowered to decide on state liability cases (above all, is it an administrative court)?
- c) what are the main factors influencing the choice of the person concerned between the two abovementioned types of proceedings? (e.g.: time limit, costs, burden of proof)?
- d) can the two types of proceedings be taken concurrently?

It should be stressed that most of the answers given to the previous questions relate to revocation of administrative acts or reopening of administrative procedure and not to the revocation of court decisions or the reopening of court proceedings. Under No. 8 it has been explained

that the reopening of court proceedings is a very difficult matter. Instead, every applicant is well advised to apply to the competent administrative body. This body may grant relief even if its prior decision had been confirmed by a final judicial judgment.

The possibilities to reopen judicial proceedings are subject to the very narrow conditions set out in section 580 of the Code of Civil Procedure (mentioned in § 48 of the Administrative Procedure Act, see above question 1). These conditions are criminal acts and require a criminal punishment of certain persons; they are very difficult to fulfill.

A provision of the German Civil Code (§ 839 BGB) provides for state liability. This may include the case that the liability is due to an unlawful judgment. Damages which may be recovered under this provision are only payable by the state (and not by the judge), and only if the judge acted consciously unlawful, thus committing a criminal offence. Furthermore, the state is not liable if the person concerned failed to contest the unlawful judgment. This includes the obligation to apply for a reopening of the case, which is difficult to obtain, as has just been said. If administrative decisions are concerned, the obligation also includes to make use of the remedies offered under §§ 48, 49 and 51 of the Administrative Procedural Act. The "Köbler" case may perhaps be considered to render the access to damages easier, but I still have doubts as to the practical effect. Nevertheless, the "Köbler" case will strengthen the feeling of the court's obligation to refer under Art. 234 EC.

- a) There are no formal links between the two types of proceedings.
- b) Proceedings for damages resulting from state liability have to be introduced in the ordinary judiciary courts. This competence has historic reasons. Actually, efforts are under way to open the way to the court which is competent to rule on the administrative decision, and this would normally be administrative court, or, as the case may be, the fiscal court.
- c) As far as I can see the person concerned would be well advised to have the question of the lawfulness of the administrative act reviewed by an administrative court. This court is acting under the principle of investigation *ex officio* and is vested with vast powers to ask authorities for files and clarification. Should that court come to the conclusion that there was a manifest breach of EC law, it should be possible to recover damages without further proceedings. If this fails, the applicant may go to the ordinary court, relying on the foregoing judgment of the administrative court. The applicant may also go directly to the ordinary court and claim damages, but the risk is that the question of lawfulness of the administrative act would be treated incidentally by a court not specialized in this field. The ordinary court can only consider evidence presented by the parties and has no access to files of the administrative body.
- d) From c) it appears that the applicant can take either way. Nevertheless, the competent ordinary court would probably halt proceedings for damages while the administrative proceeding are pending.

15. Please provide any other information concerning national law and its application (above all, the examples of relevant national administrative decisions or court's judgments) which could in your opinion be interesting for the discussed subject matter and it was not covered by the questionnaire.

It may be interesting that the Federal Administrative Court dismissed the appeal in the i-21-case after the ECJ had rendered its decision of 19 September 2006 (see judgment of the Federal Administrative Court of 17 January 2007 – BVerwG 6 C 32.06 – NVwZ 2007, 709). The

court argued that the ECJ had stated that the administrative act issued against i-21 was unlawful because not in compliance with EC law, but that the authority was not obliged to withdraw its decision or to resume the procedure, because the unlawfulness was not manifest. The court confirmed its standing jurisprudence that the discretion granted to the administrative body may be reduced to null if keeping up the decision would be simply intolerable; and this would be the case if the administrative body would revoke or keep up its decisions in a manner contrary to the principle of equality, or if keeping up the decision would be immoral and against good faith, or – finally – if the decision was manifestly unlawful.