

Questions:

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 and national case-law:

a) do the legal provisions have general application or do they relate specifically to the application of EC law?

b) which authority (administrative body or national court) is empowered under your legal system to make use of the procedural means in question?

2. Do national provisions concerning the revocation of final administrative decisions by an administrative body:

a) grant discretionary powers to decide the matter; or

b) provide the obligation to revoke a decision under certain conditions?

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

a) in 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 Kempter* 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.

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 administrative decision (as in the *Kühne* case); or

b) to reopen the judicial proceedings?

9. The ECJ's judgment in the *Kapferer* case concerned 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 national courts?

Answer:

There are procedural means under Italian law which allow a final administrative decision to be revoked if it turns out to be contrary to Community law. The legal provisions have a general application and both the body that adopted the decision and the national court are empowered to make use of the procedural means in question.

Article 21-*nonies* of Law 7, August 1990, number 241, paragraph 1, as modified by Law 11 February 2005, number 15 provides that:

“[a] final administrative decision, unlawful in accordance with Article 21-*octies* [breach of law, misuse of authority, incompetence] may be, within a reasonable time, set aside by the administrative body which has adopted it, or by other bodies provided by the law if public interest so requires, taking into consideration the personal interests of all parties involved (beneficiaries and counterparts).”

Previous to this article, the settled case law on the annulment of a final administrative decision by the same body that had adopted the decision, or by any body provided by law, followed the same general rule as provided in the previously mentioned article.

The main conditions for setting aside a final administrative decision by the same body which had adopted the decision, are that the decision has to be unlawful (breach of law, misuse of authority, incompetence), the annulment must be consistent with the actual, concrete public interests, the beneficiaries and counterparts' legitimate interests must be taken into consideration, and the time that has passed between the adoption of said final decision and its annulment must be reasonable (as time passes the beneficiaries' legitimate expectations are reinforced). This is the general rule.

A final administrative decision which is contrary to the Community law falls within the category of breach of law; therefore a final administrative decision which was contrary to Community law is unlawful and may be annulled by the body which adopted it. The settled case law states that when, as a consequence of the unlawful decision, public money is spent and the passage of time between the adoption and the annulment of the decision was reasonable, the decision can be set aside regardless of the beneficiaries' legitimate expectations (Council of State, section IV, 22 October 2004, number 6956).

According to the above considerations, recent case law of the European Court of Justice (Kühne & Heitz NV, and i-21 Germany), and the principle of supremacy of Community law, it can be concluded that a final administrative decision which violates the fundamental values of the European Community law and impedes the Community law from reaching its fundamental goal and its useful effects, is obviously unlawful and requires annulment.

According to the above rule, the problem of a *res judicata* which turns out to be incompatible with EC law or which is based on misinterpretation of EC law, can be overcome. An administrative decision that can no longer be challenged (according to a final judgment of the national court, i.e. *res judicata*), but which according to a new jurisprudence of the Court of Justice is later found to violate the fundamental values of the Community law, must be set aside by the administrative body which adopted that decision. Actually, that decision would imply a State's liability for damages and therefore would also imply the waste of public funds.

Questions:

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.?)
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 national court? (this issue has been raised in the Kempter case)

Answer:

It is not a precondition that a party must have contested the decision in the course of the administrative procedure in order to revoke a final administrative decision which is contrary to Community law, it is sufficient to appeal to the national court of the first instance. When an administrative decision turns out to be incompatible with EC law according to a new jurisprudence of the Court of Justice, the decision must be revoked by the body that adopted the decision, on its own motion.

Question:

6. Pursuant to national law, does the national 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)?

Answer:

Pursuant to national law, the Italian court takes into consideration the provisions of Community law on its own motion as long as the subject of the complaint involves, in some way (also implicitly), a question on the provisions of Community law, e.g.: if the complainant asks for an administrative decision (in breach of an internal law) to be set aside, the court (on its own motion) does not apply the internal law which is against the Community law, therefore rejecting the claim.

Question:

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

Answer:

No, the powers described in Question 6 are not treated differently.

Question:

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 to introduce, if necessary, procedural means to ascertain that the principle of full effectiveness of EC law is respected?
- 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?

Answer:

The ECJ accepts the principle of procedural autonomy of the Member States provided that the principle of full effectiveness is respected.

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.

Answer:

Yes, Italian law complies with the principles of equivalence and effectiveness.

“It must be borne in mind that, according to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see, inter alia, C-78/98 Preston and Others [2000] ECR I-3201, paragraph 31, and Case C-201/02 Wells [2004] ECR I-723, paragraph 67).”
The breach of Community law is equivalent to the breach of Italian law and an administrative decision that is in breach of Community law is unlawful. In addition, if there is a contrast between Italian law and Community law, the principle of supremacy of the European Community law requires that the Italian law not be applied.

Question:

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 national courts?

Answer:

Yes, it is necessary to interpret Italian law in compliance with Community law when the case under consideration concerns the revocation of a final administrative decision. For example, even if not provided in internal law, internal courts have applied the principle (based on Community law) that the reasons for the exclusion of someone considered 'tender for contract' must be stated and contested.

Question:

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 judgment of the ECJ – should have general application? (this issue has been raised in the Kempter case.)

Answer:

No, the provisions of Italian law (as in the above-mentioned Article 21-nonies) do not prescribe any time limit for submitting a motion to revoke a final administrative decision. It is enough that the motion is submitted within a reasonable time. Keeping always in mind Article 21-nonies, I do not believe that the fourth prerequisite for the revocation of final administrative decisions set in the Kühne case should have general application in Italian law.

Question:

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-46/90 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 undertaken concurrently?

Answer:

I believe that due to the existence of the state liability for damages in cases of infringement of Community law, final administrative decisions in breach of Community law, have to be set aside by the administrative bodies which adopted them. The Ordinary Courts (which are Serial Courts and not Administrative Courts) are the competent bodies to decide on state liability cases. For further distinction: when the liability for damages is based on an unlawful administrative decision, the Administrative Court is the competent body, according to Article 7 of Law 6 December 1971,

number 1034, as modified by Article 7 of Law 21 July 2000, number 205, which states: “The Administrative judge is competent for recovering damages deriving from an unlawful administrative decision. In cases where the liability for damages is based on a judgment in breach of or in misinterpretation of the Community law, the Ordinary Courts are the competent bodies.

Question:

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

Answer:

I find that the ECJ’s judgment, dated 18 July 2007 (Lucchini), can be considered in compliance with the above considerations. According to that judgment ”Community law precludes the application of a provision of national law, such as Article 2909 of the Italian *Codice Civile* (Civil Code), which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission of the European Communities which has become final.”

It can be added that there is an Italian Draft Law which provides that a final conviction can be reviewed when the European Court for Human Rights has determined, by final judgment, the violation of some provisions of Article 6, paragraph 3 of the European Convention on Human Rights. The revision is admitted under the following circumstance; when the violation of the norm provided by Article 6 as ascertained by the European Court, was a determining factor in the final judgment; or when the convicted is, or has to be detained, or is subject to a measure alternative to detention or the pecuniary punishment.