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

Questionnaire

Answers by the Supreme Administrative Court of Lithuania

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 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?

Comment: *This question focuses on the revocation of a final administrative decision in cases with Community element. However, if possible, the answer to this question should contain also the short description of all means, which allow the revocation of final administrative decisions in purely internal cases.*

When answering this question it is necessary to distinguish between the situation, when the administrative decision became final as a result of court judgment (i.e. it was contested before the administrative courts but was left unaltered), and when the administrative decision was not appealed against before the courts.

In order to safeguard the principle of legal certainty and stability of court's judgments after the court judgment becomes effective it has *res judicata* authority. However, *res judicata* effect is not absolute and a party is allowed to question the validity of the original judgment under certain circumstances. Decision, which has become final as a result of judicial proceedings, can be revoked if it turns out to be contrary to Community law by submitting a motion to reopen judicial proceedings. Grounds and basic rules for reopening the judicial proceedings are set by the Law on Administrative Proceedings of the Republic of Lithuania.

According to Article 153 of the Law on Administrative Proceedings, the proceedings may be reopened given *inter alia* these grounds:

- if obvious evidence is provided that there has been a substantial breach of material law which could have determined unlawful decision;
- new substantial circumstances emerge in a case;
- unlawful act which was the ground to decide the case has been annulled;
- it is necessary to ensure uniform practice of administrative courts.

There are no common national legal rules regulating the revocation of final administrative decision in case if it was not appealed before the court. However, specialized laws do allow reopening of proceedings in certain areas of public administration. For example, Article 160 of the Law on Tax Administration provides for the possibility of reopening of proceedings in a tax dispute case, where the decision of the local tax administrator, central tax administrator or the Commission on Tax Disputes[1] was not appealed against within the time limit prescribed, on the grounds and subject to the procedure provided for in this law. The Law on Tax Administration sets very similar grounds for the reopening of proceedings as those provided by the Law on Administrative Proceedings.

Since Article 153 of the Law on Administrative Proceedings and other specialized laws contain no provisions expressly and specifically governing the reopening of proceedings on a reason of incompatibility of administrative decision with EC law it may be concluded that legal provisions which allow a final administrative decision to be re-examined are of general application. In this context it should be pointed out that Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union describes the norms of the European Union as a constituent part of the legal system of the Republic of Lithuania. The norms of the European Union law are to be applied directly, while in the event of collision of legal norms, they have supremacy over the laws and other legal acts of Lithuania. As a result, proceedings can be reopened if the final administrative decision turns out to be contrary to Community law (violation of Community law would be equated to the substantial violation of material law).

There have been no national cases where judicial proceedings were reopened for the reason of incompatibility of the decision with EC law in so far.

b) According to the Law on Administrative Proceedings, application for reopening the judicial proceedings is examined by the Supreme Administrative Court of Lithuania. If the decision to reopen judicial proceedings is taken, as a general rule the case for re-examination is sent to the court which

[1] Independent quasi –judicial institution hearing the tax disputes.

final decision is being contested.

In case if the special laws provide for the possibility of reopening of proceedings where the administrative decision was not appealed against to the court, the decision to reopen or not to reopen the proceedings is taken by the relevant administrative authority. For example, according to the Article 160 of the Law on Tax Administration, a request to renew the proceedings shall be filed to the central tax administrator (where its decision or that of the local tax administrator in a tax dispute was final) or the Commission on Tax Disputes where the final decision in a tax dispute case was adopted by the said institution.

2. *Do national provisions concerning the revocation of final administrative decision by administrative body:*

a) grant discretionary powers to decide the matter; or

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

National provisions concerning the reopening of proceedings, explaining them literally, grant national courts or administrative bodies discretionary powers to decide the matter ("the proceedings *may* be reopened…" – Art. 153 of the Law on Administrative Proceedings; Art. 160 of the Law on Tax Administration). However, that discretion is limited by the principle of efficiency of law and the right to judicial protection. An administrative decision which is manifestly unlawful under national and Community law can not be upheld, accordingly, the right to revoke a decision under certain conditions may be transferred into obligation.

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 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.

Article 153 of the Law on Administrative Proceedings provides that the judicial proceedings can be reopened if there is manifest evidence that there has been a *substantial breach* of material law while deciding the case. It follows that the possibility of revocation of final administrative decisions depends on the degree of breach of Community law. If the final decision was based on the misinterpretation of Community law it can be recognized as substantial breach, when the infringements of the mere technical nature could not be a ground for reopening the judicial proceedings. Moreover, following the existent judicial practice, if *normative* administrative act which provided the legal basis of a contested decision turns out to be incompatible with EC law it is not *per se* considered to be a reason for revocation of final administrative decision. One of the grounds for reopening judicial proceedings set by the Law on Administrative Proceedings - annulment of unlawful act which was the ground to decide the case, is explained in practice as speaking about *individual* administrative acts rather then administrative acts of general application (normative administrative acts).

Even though there have been no national cases where the judicial proceedings were reopened on the reason of incompatibility of the decision with the EC law, the Supreme Administrative Court of Lithuania takes Community law into consideration while hearing the cases on appeal. Examples can be provided:

- The Supreme Administrative Court of Lithuania in a ruling of 16 October 2006, in the administrative case No. A4 – 1209 – 2006 annulled decision of a regional administrative court as it wrongly followed Commission Decision of 11 June 1992 (92/353/EEC) laying down the criteria for the approval or recognition of organizations and associations which maintain or establish stud-books for registered equidae and did not apply Council Directive of 25 July 1977 (77/504/EEC) on pure-bred breeding animals of the bovine specines.
- The Supreme Administrative Court of Lithuania in a ruling of 10 June 2005, in the administrative case No. A6 – 16 – 2005 annulled decision of a regional administrative court as the decision was based on the misinterpretation of EC law (rules of SAPARD)
- The Supreme Administrative Court of Lithuania in a ruling of 12 July 2005 in the administrative case No. A11 – 790 – 2005 annulled decision of regional administrative court which was issued without giving due consideration to Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code.

Above mentioned examples let us to presume that if the matter rises in the procedure of reopening of

judicial proceedings, national courts would make a decision with considerable regard to Community 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.)?

The Law on Administrative Proceedings sets the following prerequisites for reopening the judicial proceedings:

- the administrative decision in question has become final as a result of a judgment either of national court of first instance or appellate court;
- there is a ground set by the Law on Administrative Proceedings to reopen the judicial proceedings;
- the motion to reopen the procedure is submitted within the time limits;
- the motion to reopen the judicial proceedings is filed by the parties or their representatives by law, persons excluded from the process if the process violates their legal rights and interests, as well as prosecutor and other administrative bodies in order to protect the public interest. The right to initiate reopening of the judicial proceedings belongs to the President of the Supreme Administrative Court too.

If the mentioned formal requirements are met, the proceedings will be reopened.

Special laws contain very similar provisions on the subject. According to the Law on Tax Administration, if the request to reopen proceedings is submitted within statutory time limits and substantiated on statutory grounds for the renewal of proceedings, the central tax administrator or the Commission on Tax Disputes shall adopt a decision on the renewal of proceedings.

Under national law there are no other preconditions for the reopening of proceedings.

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).*

The party (a person concerned) is free to present new legal arguments to demonstrate that the rights he/she deprives from Community law has been infringed in both the course of administrative procedure and the proceedings before the national court. The legal argumentation of the parties involved is not binding to the court and the court may apply a different legal ground to the presented factual circumstances. In addition, prohibition of abuse of rights shall be ensured.
In that context, it should be noted that precluding the examination of matters which could have been raised in earlier proceedings but were not would frustrate the application of national and Community law in so far as it would make it impossible to solve problems of incompatibility of administrative decisions and judgments of national law with EC.

6. *Does pursuant to national law 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)?

National court reviewing the legality of administrative decisions takes into consideration the provisions of Community law on request of the parties as well as on its own motion (*ex officio*). The applicants are free to introduce new legal arguments related to Community law and ECJ's case law. The legal argumentation of the parties involved is not obligatory to the court and the court may apply a different legal ground to the presented factual circumstances. Under general rule, judges of national courts are required to take an active role while examining the case and ensure that administrative decision is carried out within the limits of the national and EC law, i.e. judges have to evaluate all circumstances related to contested decisions and apply relevant legal norms either of national or Community law.

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?*

There is no difference in the powers described in Question 6 if the case is examined by the court against whose judgments there is no judicial remedy under national law. Provisions of Community law have to be taken into consideration on request of parties and the national court's motion (*ex officio*).

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?

The answer is b. National law does not provide for the possibility to revoke the administrative decision which has become final as a result of a judgment of a national court in other way than reopening of 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?*

The European Court of Justice in the Kapferer case underlines the importance of the principle of *res judicata* in relation to judicial decisions. The Court only assumed that principles laid down in the judgment of Kühne & Heitz could be transposed into a context of Kapferer case. However, even though the case concerned matters of civil law it should not be an obstacle to apply position of the ECJ *mutatis mutandis* by the national administrative courts. The decision in the Kapferer case was adopted bearing in mind Kühne & Heitz, Köbler and other cases relevant for both matters of administrative and civil law. To make a mention of national law, Article 1 of the Law on Administrative Proceedings provides that in the cases directly indicated by this law an administrative court while deciding a case follows the rules of aforementioned law as well as the rules set in a Code of Civil Procedure. In conclusion, whilst leaving open in Kapferer case whether the rules of the judgments which concerned administrative decisions can be followed, the Court emphasised that the obligation under Article 10 EC to review a final decision incompatible with Community law is subject to strict conditions.

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?

Article 10 EC sets the principle of cooperation. However, this principle should be applied in harmony with other substantial principles of EC, namely the European Court of Justice equally underlines the importance of the principle of *res judicata* in relation to judicial decisions. In the light of this principle the Court indicated that a national court is not required to disapply its internal rules of procedure in order to review a final decision if that decision should be contrary to Community law (Kapferer case). ECJ supported its position by calling up principles of stability of the law and legal relations and the sound administrative of justice. The argumentation was strengthened by pointing out that the contested issue could not be equated to the case of Kühne & Heitz as it was missing the first prerequisite for reopening the procedure - administrative body should be empowered under national law to reopen the decision. In addition, case of i-21 Germany points out that 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 provided that they do not contradict principles of effectiveness and equivalence. However, the principle of procedural autonomy of Member States and principle of res judicata are not absolute and the Court indicates general limits. In the case of Kühne & Heitz the Court imposes an obligation to review the final administrative decision incompatible with EC law under certain conditions. It should be noted that the decision in Kühne & Heitz case does not contradict the decisions made in Kapferer and i-21 Germany cases. In the case of Kühne & Heitz the Court imposes an obligation to review the final decision incompatible with Community law to the authority which is empowered to reopen the procedure while Kapferer case is concerned with the matters where national authority does not have a right to review final decisions under national law, i.e. it does not satisfy the first prerequisites set in Kühne & Heitz case. Moreover, in a i-21 Germany case parties didn’t exhaust all legal remedies which meant it didn’t correspond to the second condition set in Kühne case. In the final analysis, current case law seems to be a result of efforts to balance the principle of procedural autonomy of Member States with the principle of full effectiveness of EC law.

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.

In the absence of relevant Community rules, the detailed procedural rules governed by national law and designed to ensure the protection of the rights which individuals acquire under Community law are not less favourable than those governing similar domestic situations (principle of equivalence). According to Article 153 of the Law on Administrative Proceedings, one of the grounds for reopening the final decision is a substantial breach of material law. This provision has general application and both breach of material law connected to Community legal rules as well as infringement of national law fall into this category. Moreover, in both cases the procedural rules, e.g. right to submit the motion for reopening the procedure, general deadline of 3 months, revocation of contested decision if it turns out to be incompatible with law etc., are applied equally.

Similarly national law ensures the principle of effectiveness as the rules of national law governing the procedure do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness as it is set in i-21 Germany case). Article 153 of the Law on Administrative Proceedings provides even right of review without distinction if appeals are submitted on the ground of infringement of Community law or on the ground of disregard of national law. Moreover, an effective court decision, ruling or an order has a binding effect on all state institutions, officers and public servants, enterprises, agencies, organizations, other natural and legal persons and must be executed within the entire territory of the Republic of Lithuania (Art. 14 of the Law on Administrative Proceedings).

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?

The norms of Community law is a constituent part of the legal system of the Republic of Lithuania. The norms of European Union law are applied directly, while in the event of collision of legal norms, they have supremacy over the laws and other legal acts of the Republic of Lithuania. Accordingly, when the case under consideration concerns the revocation of a final administrative decision, it is necessary to interpret the national law in compliance with Community law and ECJ's case law. In relation to the principle of effectiveness the grounds set for revocation of decision is applied without distinction whether Community law or national law were infringed. Followed by the rules of national law, an administrative body is required to annul a final administrative decision which is incompatible with domestic law; the same obligation exists if the decision is incompatible with Community law.
There have been no national cases where the judicial proceedings were reopened and national courts had to interpret national law in compliance with EC law in so far.

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 a 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.)

As a general rule, motion for reopening of the court's proceedings must be filed within a deadline of 3 months since a person becomes aware or had to become aware of the circumstances which are the ground for reopening the judicial proceedings. However, the time limit may be renewed if a person provides relevant reasons for missing the time limit and the motion was filed at the latest of 1 year since the day the decision became effective. Moreover, the motion for reopening of the court's proceedings can not be submitted if 5 years passed since the date the decision became effective.
Similar time limits are set by special laws regulating the reopening of proceedings when final administrative decisions were not appealed against before the court. For example, Article 160 of the Law on Tax Administration sets common deadlines of 3 months, 1 year for renewal of time limits and the general limitation period of 5 years.
The fourth prerequisite for the revocation of final administrative decisions set in the Kühne and Heitz case is closely connected with substantial principles of stability of the law and legal relations as well as

the sound administration of justice (as set in Köbler case). An effective decision of administrative body can be called into question under certain circumstances which by necessity should be set in balance of legal stability and administration of justice. First of all, the requirement of immediate actions does not deprive any interested persons of their right for legal protection as they still may renew the procedure. Second, the right for protection is granted only to persons with the genuine interest to defend their rights and precludes the possibility of abuses of rights. Moreover, the requirement of prompt actions after a person becomes aware of the decision leaves no scope for endless procedures when the decision becomes effective and needs to be executed and constitutes a guarantee of certainty. Finally, absence of time limit can cause unwelcome outcome as it might be impossible to restore the previous situation or it can become excessively difficult to execute re-examined decision. Following the above mentioned reasons the requirement for the person concerned to complain to the administrative authority immediately after becoming aware of that decision of the Court should have general application.

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 undertaken concurrently?

Comment: *For the purposes of this question it is not necessary to analyse problems of the State liability for breach of EC Law in detail. That issue is only called upon in order to identify possible links with the subject of the Colloquium.*

The decision made after re-examination of the case caused by reopening the judicial proceedings might

give a rise to the proceedings concerning the state liability for damages in case of infringement of Community law. According to the Law on Administrative Proceedings since the process has been reopened courts re-examine a case and give one of the decisions:

- dismiss the motion and leave the decision unaltered;
- change the contested decision;
- annul the contested decision and issue a new one.

In cases of changing the decision or annulment of the decision on a ground of misinterpretation of Community law, party which suffers damage caused by illegal actions of administrative authorities may institute the proceedings concerning the state responsibility. Under general rule, according to Article 86 of the Law on Administrative Proceedings national courts have to decide on all basic requirements of the party, presumably, all questions including an action of damages against state, should be decided in a single process. However, proceedings concerning the state liability may be started separately. One of the main factors influencing the choice of the person concerned is time limits. Even though both proceedings should be carried out in administrative courts time limits for reopening the judicial proceedings may be recognized as considerably short (3 months) while proceedings concerning the state liability for damages can be started within 3 years. National law contains no provision expressly and specifically governing the consequences of breach of Community law, however, it is for administrative courts to rule on question of state liability in accordance with EC law if the damage was caused in the field of public administration.

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.

Special consideration should be given to the first prerequisite set in Kühne & Heitz case. Leaving the issue of granting the administrative body the power to reopen the procedure to national law of Member States seems to give primacy to the principle of autonomy of procedure of Member States. However, the principle that Community law should be applied uniformly and the principle of equality should be taken into account. Principle of procedural autonomy of Member States makes the existence of the right to reopen judicial proceedings conditional and precludes the ways of solving problems of incompatibility of final administrative decisions and judgments of national courts with EC law. In other

words, the principle of equality would be infringed if a person in one of the Member States is entitled to reopen the procedure while the procedural norms of other Member State disclaims the right to review final decision which may be incompatible with EC law.