

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
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Introduction

The European Court of Justice (ECJ) has recently issued several judgments 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.,
- C-2/06 Kempfer, (pending), and
- Opinion of Advocate General in case C-119/05 Lucchini Siderurgica (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 national 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:

- "an administrative decision" – a term which covers all the forms of administrative acts of administrative bodies in individual cases;
- "a judgment" – a term which covers all the forms of decisions taken by the national court in individual cases;
- "to revoke a final administrative decision" – a term which covers several procedural means leading to the elimination of a final and binding decision by administrative

body which issued a given decision, a higher administrative authority or national court, 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 (reconsidered) by the same court which delivered the judgment or by any other national court.

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 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.

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?
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.
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).
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)?
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?
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?
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?
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?
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.
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?

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.)
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 above mentioned 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.

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.