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

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

The Supreme Administrative Court of Poland

Warsaw 2008

NATIONAL REPORT OF SLOVENIJA

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.

a) The Community law is considered in Slovenia as the law in force. It does not have any specific legal position compared to the position of the law which is purely Slovenian by its origin.

In the administrative proceedings and in the proceedings before an administrative court the European law is in the same position as the Slovenian law. There are no specific legal remedies which would apply only if the European law is violated.

The Community law in use is mostly substantive law. The public authorities and the courts have to apply the substantive law ex officio.

This general rule applies even in the case of the legal remedies before the public authorities and the courts. Both (i. e. the public authorities and the courts) have to examine the decision ex officio if it is in accordance with the substantive law. The effect is that even if the party does not assert in the legal remedy that the decision runs contrary to the substantive Community law, the public authority or the court have to examine this ex officio.

b) The administrative procedure in Slovenia is regulated by the General Administrative Proceure Act (GAPA), which empowers national adminstrative bodies to revoke administrative decisions in case of their illegality.

The only legal remedy applicable that allows a final administrative decision to be revoked is »Annulment or revocation of administrative decisions using suprervisory powers.«. It can apply if the material law was obviously infringed. The infringements of the Community law or of the Slovenian law (Slovenian law) alike may be corrected by this remedy (see supra).

The use of supervisory powers is regulated in the articles 274 – 277 GAPA. The supervisory powers can be used only by the higher administrative body responsible for the supervision of the administrative body that issued the disputed decision (regardless of its competence to decide in appeal proceedings). It can be used ex officio or following a demand by a party affected by the decision.

The revocation (ex nunc effect) of a final administrative act contrary to material law can be used only if the following conditions are met:

- time limit of 1 year after the administrative act has been issued and delivered to the parties

and

- the violation of material law is obvious (manifest unlawfulness).

The term “obvious violation of material law” is relatively strict, meaning that the violation has to be recognised as such prima facie, not based on relatively complex judicial reasoning or change in jurisprudence. This legal remedy is not specifically intended to resolve the issues of conflict with EU Law, but the administrative and judicial practice will take the application of EU Law into consideration in the same way as national legal acts.

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?

In this case no discretion is given to administrative bodies; if there is an obvious violation of EU or national material law, the supervisory powers have to be used to revoke the final administrative act in question. This decision can be subjected to subsequent judicial review.

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) administrative decision infringed EC law was issued without giving due consideration to the ECJ's case law.

Revocation of administrative decisions using supervisory powers of higher administrative bodies (legal remedy under Art. 274 GAPA) can be used in all of the given cases (subsequent judgment of ECJ showing misinterpretation of EC law used in the case, incompatibility of national law with EC law and infringement of EC law by the administrative decision), but it has to fulfil the conditions of the law: that the infringement of the material law is obvious and that the timeframe of one year after issuing the administrative decision is observed. All these cases of incompatibility of administrative acts with the EC law can fall under the category of »obvious« (manifest) violations: it is open for the national judicial practice to determine whether all infringements of EC law established by the ECJ are to be deemed to be »obvious« regardless if they are based on long and complex reasoning of the ECJ or only those where the ECJ itself finds the infringement to be obvious (e.g. »acte claire« or »acte eclairee« situations); it is also possible that a third approach will be taken.

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 party is not obliged to contest the decision after its finality since the supervisory powers described above can also be used ex officio by the administrative body itself and previous use of other legal remedies or judicial review proceedings is not a prerequisite.

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).

No, it does not. See answer to question 1 a).

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)!

Courts on all levels of administrative dispute proceedings consider the provisions of EC law ex officio. See also the answer to question 1 a).

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?

No, the obligation remains the same.

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 Kuehne case); or

b) to reopen the judicial proceedings?

If the conditions are met there is only the possibility of revocation of administrative decision in question through the use of supervisory powers of higher administrative bodies.

Judicial proceedings can not be reopened based on this ground. If the judicial review against a final judgment due to extraordinary legal remedies takes place (e.g.

revision procedure by the Supreme Court), an appropriate use of EC law will be respected, based on any ECJ ruling available at the time.

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?

Yes. There is no possibility under Slovenian administrative procedural law to set aside a final judicial decision if such a remedy is not regulated by an act of parliament. This is specifically guaranteed by the Article 158 of the Constitution of the Republic of Slovenia.

10. What is your interpretation of the above mentioned judgments of the ECJ (Kuehne, 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 tries to respect the procedural autonomy of Member States but it has to observe the need for the national courts to give an appropriate consideration to EU law issues, even if that sometimes means forcing them to use existing national procedural rules in a different 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.

It does comply. The reason is that there is no difference between the national and European legal orders when applying the supervisory powers under Art. 274 GAPA and in subsequent judicial review proceedings, and this legal remedy has in practice

shown to be effective enough to protect legal rights in administrative matters when obvious violation of material law (manifest unlawfulness) is claimed by the parties or established by the administrative body itself. See also the answers to question 1.

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?

Since there is a relatively limited amount of case-law in Slovenia that deals with relevant EU legal issues, only some principles can be stated. Firstly, the interpretation of national law in compliance with EU law is an obligation, which is respected by the administrative bodies and courts, but since there is no discretion regarding the use of supervisory powers this issue (as in the i-21 case) does not directly arise under Slovenian rules of procedure.

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 Kuehne 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.)

There is a general time limit of one year after the administrative act has been issued and delivered to the parties. To impose a restriction relating to a time period with such a subjective element (becoming aware of the ECJ judgement) can in practice be very difficult, if not impossible. It is also to be considered, that the ECJ judgement

functions as a argument of law and not of fact so that after publishing of the judgement in question, the principle of ignorantia juris could be observed.

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 1-1029 and C-224/01 Kobler, [2003] ECR1-10239)?

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.

In the year 2006 a new Administrative Dispute Act was adopted and it came into force on the 1.1.2007. In this act there is a provision of Art. 67. Para. 3 that states that when deciding about damages in a civil litigation the court of general competence can not decide upon the legality of administrative acts. This article is intended to limit the competence regarding the judicial review of administrative decisions to the Administrative Court. This also means that if the legality of an administrative act is not contested and established by the Administrative Court the party can not claim damages from the State, protesting that such an act is illegal. In the current perspective this means that the infringement of Community law by an administrative decision has to be established by the Administrative Court observing the rules of the procedure to challenge such decisions and their finality if the deadlines are not observed or the challenge is unsuccessful. If the infringement of

EU law by the State has been committed through another means and not by the administrative act, the damages can be claimed in the civil litigation without these limitations.

If the damages are claimed from the State because of an illegal administrative act, this can be decided by the Administrative Court itself or in a civil litigation. In a case against the State a claimant can be awarded damages by the court only if he proves that the illegality of the administrative decision has caused the damage – meaning that he has to prove that the outcome of the administrative decision-making process is different if the established illegality is corrected - that the proper use of law changes the decision of the administrative body according to the case given. Since such a change of administrative decision can generally only be made by administrative bodies and only in certain cases by the Administrative Court itself, a party will generally have to claim damages from the State in civil litigation after the administrative procedure and judicial review proceedings are completed.

If a party considers that an administrative act was illegal because it was contrary to EU law, it has to demand the illegality to be established by the higher administrative body using its supervisory powers. This can be decided only in the time-frame of one year after the act has been issued and delivered to the parties and the illegality has to be obvious (manifest). If this demand is turned down by the administrative body the party may challenge the decision of the administrative body before the Administrative Court. The compensation may be awarded to the party concerned only if the court and/or the administrative body declare the administrative act illegal and if the subsequent reopening of the administrative procedure leads to a different result with respect to the facts of the case.

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.

Unfortunatelly we cannot provide any.