

**Replies of the Administrative Law Chamber of the Supreme Court of Estonia
to the questionnaire of the Association of the Councils of State and
the Supreme Administrative Jurisdiction of the European Union
to be discussed on 17 – 18 June 2008 in Warsaw
at the colloquium**

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

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 authority 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.

In Estonian legal order an administrative act¹ can be repealed either by an administrative authority by way of administrative procedure, or by an administrative court by way of administrative court procedure (hereinafter an administrative decision shall be referred to as “administrative act”, and if the act has been declared lawful by a national court judgment which has entered into force, as a “judicially controlled administrative act”. Also, wherever possible, explanations shall be provided in regard to both – the administrative and the administrative court – procedures.) In regard to this issue the national law does not stipulate any differences concerning European Community (EC) law (hereinafter “community law”); relevant norms are universal and applicable to all administrative acts.

Firstly, an administrative act can be repealed if it is contested by an addressee of the act or by a third person. An administrative act can be contested either in an administrative court or by way of challenge proceedings (also called as objection proceeding or as internal administrative review). The latter is a special type of administrative proceedings wherein an administrative authority decides on the revocation of an administrative act on the basis of a challenge filed by a person. Formal rules have been enacted for both administrative court procedure and the challenge proceedings (the administrative court procedure is regulated by the Code of Administrative Court Procedure (hereinafter

¹ § of Estonian Administrative Procedure Act defines an administrative act as follows:

(1) An administrative act is an order, resolution, precept, directive or other legal act which is issued by an administrative authority upon performance of administrative functions in order to regulate individual cases in public law relationships and which is directed at the creation, alteration or extinguishment of the rights and obligation of persons.

(2) A general order is an administrative act which is directed at persons determined on the basis of general characteristics or at changing the public law status of things.

“CACP”), which entered into force on 1 January 2000², and the challenge proceeding is regulated by Chapter 5 of the Administrative Procedure Act (hereinafter “APA”), which entered into force on 1 February 2002³. An action to an administrative court as well as a challenge to an administrative authority may be filed within a fixed term, a person must have the right to file an action or a challenge, etc. If a person wishes to avail himself of the challenge proceeding, he must do so before having recourse to an administrative court. A challenge proceeding can not be initiated after the judicial proceedings. Yet, as a rule, the exhaustion of the challenge proceeding is not mandatory before having recourse to an administrative court.

A repeal of an administrative act by an administrative authority is a special type of administrative proceedings (regulated by §§ 65-70 of the APA). The repeal of an administrative act may be initiated by an administrative authority on its own initiative, and it may also be done on the basis of a relevant application (about resumption of administrative procedure see reply to question 3). The possibility of repealing an administrative act does not depend directly on the time of issue of the act.

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?

The general rule is, that upon repealing an administrative act an administrative body always has discretion over whether to repeal an administrative act or not.⁴ In the cases when the repeal of an administrative act would be to the detriment of one person it is of special importance to take into consideration the legitimate expectation of the person, in whose favour the administrative act is, that the administrative act remain in force. If the legitimate expectation is of special weight, the decision may be taken to leave the act in force despite of the fact that the act is unlawful. Nevertheless, special Acts (laws) may provide for cases when an administrative act must be repealed and administrative authorities have no discretion.

Within challenge proceedings and judicial proceedings an administrative act, the unlawfulness of which has been ascertained either by an administrative authority or an administrative court, is – as a rule – subject to repeal. An administrative act may remain in force by way of exception only when the unlawfulness consists in such violations of procedural requirements or requirements concerning the formal validity, which could not have affected the resolution of the matter (§ 58 of the APA).

Furthermore, a differentiation must be made between the repeal of an administrative act and an annulled administrative act. An administrative act is annulled if it does not specify

² RT (Riigi Teataja – State Gazette) I 1999, 31, 425; ... 2007, 12, 66.

³ RT I 2001, 58, 354; .. 2007, 15, 76.

⁴ Pursuant to § 64(2) of the APA an administrative authority shall resolve the repeal of an administrative act according to the right of discretion, unless repeal of the administrative act is prohibited by law or repeal of the administrative act is required by law.

the administrative authority which issued the administrative act, it does not specify the addressee of the administrative act, it has not been issued by a competent administrative authority, it requires commission of an offence or the rights and obligations are not specified therein, if obligations are contradictory or the administrative act cannot be complied with for other objective reasons. An annulled administrative act is void from inception. An authority which issued an administrative act may ascertain annulment of the administrative act at any time. A person who has legitimate interest therein may demand ascertaining of annulment of the administrative act from the administrative authority and an administrative court.

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 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 *Kemper* 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 case law.

If an administrative act is in conflict with the community law and thus unlawful, the issue of repeal thereof is resolved in the same manner as in the case of all other unlawful administrative acts.

a) For the time being there is no practice in Estonia regarding what to do when an administrative act has undergone judicial review and a national administrative court has declared it lawful, and then it appears from the subsequent case-law of the ECJ that the administrative act still had been unlawful (as in the *Kühne & Heitz*⁵ and *Kemper*⁶ cases before the ECJ). In principle, under the national law it is possible to resume administrative proceedings and revoke such administrative acts (see also replies to questions 4 and 5).⁷

⁵ ECJ judgment of 13 January 2004, case C-453/00: *Kühne & Heitz*, [2004] ECR I-837.

⁶ Case C-2/06: *Kemper*, pending before the ECJ; opinion of Advocate General Yves Bot of 24 April 2007 in the same case is available.

⁷ There are several theoretical possibilities of approaching such options, and due to the lack of specific provisions of law (there is only the general rule of resumption of administrative proceedings) and practice these are but possible solutions. Namely, such a judicially controlled administrative act could be regarded as a) a lawful administrative act for the purposes of the APA (as a national court has, at one point, declared it lawful) and then the regulation concerning the repeal of lawful administrative acts would be adhered to; or it could be regarded as b) an unlawful act for the purposes of the APA (as in the light of subsequent judicial practice of the ECJ such act must not have been issued) and the rules regarding the repeal of unlawful administrative acts could be observed (bearing in mind the ECJ case-law the latter possibility is the most probable). Depending on whether the administrative act is in favour or to the detriment of a person, the possibilities of repealing lawful and unlawful administrative acts, established by §§ 65-66 of the APA, are of different levels. The third possibility would be to proceed from the guidelines given in the *Kühne & Heitz* case and resolve such cases on the basis of these guidelines. Different symbioses of these variants are also possible.

b) When an administrative act, which is in conformity with the national law but in conflict with the community law, is contested in an administrative court, the practice of the Administrative Law Chamber of the Supreme Court shows that such acts have been repealed (e.g. Administrative Law Chamber of the Supreme Court judgment of 5 October 2006 in matter no 3-3-1-33-06, where the Chamber did not apply the national law, which had served as the legal basis for the issue of an administrative act and which was in conflict with the community law, because it could not be interpreted in the community law conforming manner; see also reply to question 12).⁸ If the conflict of an administrative act with the community law appears after the terms for contesting the act have expired, the application for repeal of the administrative act can be filed with an administrative authority, who shall then resolve the matter pursuant to general regulation (§§ 64-73 of the APA).

An administrative authority shall resume administrative proceedings at the request of a person if (§ 44 of the APA):

- 1) the circumstances or legislative or procedural provisions which are the basis for issue of the administrative act which imposes permanent restrictions on the rights of the person who submits the application cease to exist;
- 2) new significant evidence in the matter becomes evident and the person was not aware of the evidence during the administrative proceedings;
- 3) a court judgment which has entered into force establishes that the administrative act was issued or measure was taken as a result of deceit, threat or exercise of any other unlawful influence on the administrative authority, or that the person acting on behalf of the administrative authority committed a criminal offence during the administrative proceedings;
- 4) a court judgment which has entered into force annuls the court judgment on which the administrative act is based.

It has to be pointed out in this context that in paragraph 18 of its judgment of 15 March 2004 in administrative case no 3-3-1-6-04⁹ the Administrative Law Chamber of the Supreme Court held that the changes in administrative practice or in the interpretation of a legal acts could not serve as grounds for resumption of administrative proceedings by an administrative authority (consequently, in the cases analogous to the *Kühne & Heitz* case of ECJ, the subsequent judicial practice/interpretation of the European Court of Justice can not be used as a basis for resumption of proceedings in Estonia, in such cases an administrative authority can, on its own initiative, find that an administrative act can be repealed because it is unlawful due to conflict with the community law).

⁸ Judgment in Estonian in RT III 2006, 35, 301; the English and French language abstracts available in the Jurifast database at the homepage of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, and also on the Supreme Court homepage at: <http://www.riigikohus.ee/?id=719>.

⁹ RT III 2004, 9, 102. Not published in English or French.

On the other hand it is important to bear in mind that Estonian judicial practice differs somewhat from the German judicial practice (see the ECJ case *i-21 Germany*¹⁰), underlying on the basis of the principle of legal certainty that after the expiry of legal remedies an administrative authority always has discretion whether to repeal an administrative act on the basis of an application filed by a person, or not (e.g. Administrative Law Chamber of the Supreme Court judgment of 10 November 2004 in administrative case no 3-3-1-36-04¹¹, para 11), and Estonian judicial practice does not recognise the criteria of “absolute intolerance” or “manifest unlawfulness”. Consequently, in Estonia, under the principle of equal treatment (equivalence) of national law and community law, an administrative authority should have discretion even when a proceeding is resumed due to the conflict of an administrative act with the community law.

c) If an administrative act infringed upon the community law or if it had been issued in disregard of the ECJ practice, this would mean that the administrative act is unlawful and it could be repealed under the same procedure as any other unlawful administrative act.

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.)?

In the administrative procedure:

An administrative act which has not been subjected to administrative court review and in regard to which the term for having recourse to the courts, established by law, has expired, can in principle be repealed by an administrative authority. As a rule, and as already mentioned, the administrative authority repeals administrative acts on the basis of discretion. A person can request that an administrative authority exercise the right of discretion lawfully; yet, under the valid law there is no *expressis verbis* right to demand that an administrative act be repealed because it is in conflict with the community law.

In principle it should be possible to resume administrative proceedings also in the cases when a judicially controlled administrative act has been declared lawful by a national administrative court, and yet it becomes evident after a subsequent judgment of the European Court of Justice that the administrative act still had been unlawful. The Administrative Law Chamber of the Supreme Court has argued that it is not prohibited for an administrative authority to repeal an administrative act on the basis that the same act had previously been contested in an administrative court and the court had dismissed the appeal. If later on facts motifs become evident which had not been the object of

¹⁰ ECJ judgment of 19 September 2006, case C-422/04: *i-21 Germany GmbH, Arcor*, not yet published in ECR.

¹¹ RT III 2004, 34, 351. Not published in English or French.

judicial review¹² and which, in the opinion of the administrative authority, require the repeal of an administrative act, the repeal on the basis of new grounds is not prohibited. In addition, the Administrative Procedure Act allows for the repeal of a lawful administrative act – i.e. an administrative act declared lawful in judicial proceedings – if there exist the preconditions necessary for the repeal of an administrative act, provided by the Administrative Procedure Act.¹³ (See also replies to questions 3, 5 and 8).

In the administrative court procedure:

In regard to judgments which have entered into force the law provides for the possibility of revision, also in regard to judgments rendered in administrative cases. Revision takes place when a judgment is in force and all ordinary channels of appeal have been exhausted. The law establishes the grounds and terms on the basis of and during which a judgment, which has entered into force, can be appealed against in a higher court by filing an application for review. The Supreme Court is entitled to review any judgment, which has entered into force, rendered by any court instance. For the acceptance of the appeals for review a system of granting leave to appeals has been established in the Supreme Court.¹⁴

If the Supreme Court finds that a petition for review is justified, the Supreme Court shall annul the decision and refer the matter for a new hearing to the lower court which made the decision. The grounds for review of judgments rendered in administrative court procedure are the same as the grounds for review established in civil court procedure; review on the basis of the grounds under discussion in the questionnaire – on the basis of ECJ judgments – is not *expressis verbis* possible; the possibility that the ground could be derived from the existing grounds for review, can not be excluded, although this would be very difficult.¹⁵ If the facts are obvious, the Supreme Court shall amend the decision

¹² Like e.g. in the *Kemper* case in the ECJ, where the conflict with the community law became evident later and had not been an object of judicial review in a national court.

¹³ The aforesaid is a quotation from the Administrative Law Chamber of the Supreme Court judgment of 10 November 2004 in administrative case no 3-3-1-36-04, para 21. – RT III 2004, 34, 351. Not published in English or French.

¹⁴ The leave to appeal system or prior selection of cases to be accepted is applicable also to the review of administrative matters by way of cassation in the Supreme Court. Pursuant to § 60 of the CACP the Supreme Court shall accept an appeal if: 1) the appeal contests the correctness of application of a provision of substantive law or requests annulment of a court decision due to material violation of a provision of court procedure which has or may have resulted in an incorrect court decision; 2) the adjudication of an appeal in cassation is of principal importance for the guaranteeing of legal certainty, for the shaping of uniform judicial practice or development of law. Pursuant to § 60(2) of the CACP an appeal shall not be accepted if the Supreme Court is convinced that the appeal is manifestly ill-founded.

¹⁵ Pursuant to the Code of Civil Procedure (§ 702(2) of the CCP) the grounds for review are the following: 1) the decision was made by a panel of court containing a judge who should have removed himself or herself; 2) failure to inform a participant in the proceeding of the proceeding pursuant to the requirements of law, including failure to serve the statement of claim on the participant in the proceeding or failure to summon the participant in the proceeding to court pursuant to the requirements of law although the decision was made with regard to the participant in the proceeding; 3) a party was not represented in the proceeding by a person entitled to do so although the judgment was made with regard to the party, unless the party had approved of such representation in the proceeding;

of a lower court or annul the decision of a lower court and make a new judgment or ruling. (§ 710(1) of the Code of Civil Procedure, hereinafter the “CCP”). When the matter is referred to a lower court for a new hearing, the judgment rendered upon new hearing can be appealed against pursuant to the general rules provided by the Code of Administrative Court Procedure, i.e. the matter can again go through all court instances.

In the Estonian legal system there is the institution of the Chancellor of Justice, who has some functions of an ombudsman, yet he can not be addressed to have an administrative act, contradicting the community law, repealed. The Chancellor of Justice is in his or her activities an independent official who reviews the legislation of general application of the legislative and executive powers and of local governments for conformity with the Constitution of the Republic of Estonia and the Acts of the Republic of Estonia, and he does not review administrative acts, whereas even within his sphere of competence he has not been *expressis verbis* empowered to review the conformity of legislation of general application with the community law. (See footnote under reply to question number 15). In addition, everyone has the right of recourse to the Chancellor of Justice in order to have his or her rights protected by way of filing a petition to request verification whether or not a state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties adheres to the principles of observance of the fundamental rights and freedoms and to the principles of sound administration.

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 Kemper case).

In the administrative procedure:

4) the unlawfulness or unfoundedness of a court decision arising from the false testimony of a witness, knowingly wrong opinion of an expert, knowingly false interpretation or translation, or falsification of documents, or fabrication of evidence which is established by another court judgment which has entered into force in a criminal matter;

5) a criminal offence which is committed by a judge or a representative of a judge in the hearing of the case subject to review and which is established by a court judgment which has entered in force in a criminal matter;

6) the court decision is based on an earlier court decision, decision of an arbitral tribunal or administrative act which has been annulled or amended;

7) the Supreme Court declares, by way of constitutional review proceedings, the legislation of general application or a provision thereof on which the court decision in the civil matter subject to review was based to be in conflict with the Constitution;

8) the European Court of Human Rights has established a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, or Additional Protocols belonging thereto in the making of the court judgment, and the violation cannot be reasonably eliminated or compensated in any other manner than by review;

9) another fact or evidence relevant to the case existed at the time of making the court decision but was not known and could not have been known to the party at that time, and submission or relying of such fact or evidence in the proceeding would have evidently resulted in a different court decision.

For the repeal of an administrative act by way of administrative procedure the proceedings shall be resumed on the basis of an application by a person or on the initiative of the administrative authority itself. Pursuant to § 14(3)2) of the APA a written application of a person shall set out the clearly worded content of the application. This provision does not require that a clear reference be made to the legal basis or the violation of the community law.

In the administrative court procedure:

Proceeding from § 76 of the CACP and § 707(1) of the CCP the person filing an application for the review of a judgment which has already entered into force, shall set out in the application the grounds for the petition and legal basis for review and the evidence in proof of the grounds for review.

Pursuant to Estonian law the decision on resumption of administrative proceedings is a discretionary decision of an administrative authority, and thus it is not of decisive importance whether previously, upon contesting the administrative act, reference was or was not made to the community law.¹⁶ If later on facts or motifs become evident which had not been the object of judicial review and which, in the opinion of the administrative authority, require the repeal of an administrative act, the repeal on the basis of new grounds is not prohibited (see also reply to questions 4 and 12).

The same can not be alleged with the same certainty in regard to review of court judgments, because the valid law provides a prerequisite for the existence of grounds for review that another fact or evidence relevant to the case, which existed at the time of making the court decision and submission of or relying on such fact or evidence in the proceeding would have evidently resulted in a different court decision, must not have been known to the party at that time. This means that if the community law aspect existed at the time of making the judgment and was known, in essence, to the participants in the proceeding, although it was not invoked (the ignorance of legislation, including the community law, can not be excused; this was confirmed by the Administrative Law Chamber of the Supreme Court in its judgment of 10 May 2005 in administrative case no 3-3-1-66-05¹⁷, concerning the Community Customs Code), there is no ground for review. Neither has the Supreme Court considered subsequent changes in the judicial practice or interpretation of legislation to constitute another essential fact (a new fact) (see also reply to question 3).

6. Does pursuant to national law the national court reviewing the legality of administrative decisions take into consideration the provisions of Community law:

¹⁶ Nevertheless, it has to be outlined that on the basis of an application of a participant in the proceeding the administrative authority shall resume administrative proceedings when new significant evidence in the matter becomes evident and the person was not aware of the evidence during the administrative proceedings; see also reply to question no 3.

¹⁷ See especially para 12 of the judgment. – RT III 2006, 19, 180; the English and French language abstracts available in the Jurifast database at the homepage of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, and also on the Supreme Court homepage at: <http://www.riigikohus.ee/?id=719>.

- a) on request of the parties only?
- b) on its own motion (*ex officio*)?

§ 25(3) of the CACP establishes, that upon making a judgment the court must decide, inter alia, which legal acts to apply. Consequently, a national court, when evaluating the lawfulness of an administrative decision, can and must ascertain the law applicable for the resolution of the concrete case, thus, the court must decide on the necessity of applying the community law provisions, if necessary, on its own motion (*ex officio*).

As a rule, the administrative courts do this in practice, because they have become aware of their role as the European Union courts since Estonia's accession to the European Union on 1 May 2004. Furthermore, the Administrative Law Chamber of the Supreme Court has been trying to give guidelines to the courts as to how to take into account the community law, e.g. in its ruling of 25 April 2006 in administrative case no 3-3-1-74-05 where in paragraph 13 the Chamber explains that if an Estonian court has to adjudicate a dispute which may be related to the implementation of an EU regulation, a judge must decide, first, whether the EU regulation is relevant to the case, and that in regard to Estonian legislation implementing an EU regulation an Estonian judge must ascertain, in case of doubt, whether the implementing legislation is in conformity with the European Union regulation.¹⁸

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?

The highest court instance in Estonian court system, the decisions of who can not be appealed against, is the Supreme Court. The Supreme Court (the Administrative Law Chamber thereof) is also the supreme administrative court of Estonia (§ 2 of the CACP). In procedural matters the possibilities of appeal may be confined to appeal before the circuit (appellate) courts.

Pursuant to § 64(1) of the CACP the Supreme Court shall verify on the basis of an appeal in cassation whether the lower level courts have observed the provisions of court procedure and applied the law correctly. The review of correct application of law includes the review of whether the relevant norms, including community law provisions, have been applied.

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) reopen the judicial proceedings?

In administrative procedure:

¹⁸ RT III 2006, 17, 154; the English and French language abstracts available in the Jurifast database at the homepage of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, and also on the Supreme Court homepage at: <http://www.riigikohus.ee/?id=719>.

In the first place it would be appropriate to resume administrative proceedings. During these the administrative authority itself shall decide, whether to amend or repeal the administrative act which it had issued, which had been declared lawful in a national administrative court proceeding, and which subsequently turned out to be in conflict with the community law. Under the valid law an administrative authority does not have an obligation to resume the proceeding (there is no such ground in § 44(1) of the APA), nevertheless, pursuant to § 65(1) of the APA an administrative authority has the right, on its own motion (the addressee's right of claim is restricted by § 68(1) of the APA, which does not mean that a person may not file a relevant application with an administrative authority), to repeal an administrative act, which was unlawful at the moment of issue (as already explained before, inconformity with the community law is also unlawful, see also reply to question 3), in favour of a person both proactively and retroactively. An administrative authority has discretion upon deciding on resumption of such administrative proceedings (in more detail see reply to question no 2). Pursuant to the same procedure an administrative authority is entitled to decide on amendment of administrative acts and suspension of administrative acts by administrative authorities (pursuant to § 64(1) of the APA).

In administrative court procedure:

The annulment of a judgment of a national court (which upheld the administrative act which, as it turned out later, was in conflict with the community law) does not render the initial administrative act nonexistent, the act would still remain in force. That is why the mere annulment of a judgment could not be appropriate.

What is inevitable, though, is that when judicial proceedings are reopened the judgment must be annulled (i.e. the earlier judgments are annulled and the judicial proceedings are commenced from the beginning). The reopening of judicial proceedings would probably give the desired result (i.e. the repeal of the initial administrative decision due to conflict with the community law), but would be more resource-consuming than resumption of administrative proceeding. Besides, the valid court procedure codes do not recognise such a ground for review (see in more detail reply to question 4).

Consequently, it would be appropriate to repeal the administrative act instead of reopening judicial proceedings. At the same time the possibility of certain differences between proceedings in administrative courts and in courts of general jurisdiction can not be excluded.

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

The opinion of the ECJ expressed in paragraph 24 of the *Kapferer* case¹⁹ is probably applicable to the judgments of national administrative courts. The European Court of Justice held that that the duty of loyalty (principle of cooperation) under Article 10 EC

¹⁹ ECJ judgment of 16 March 2006, Case C-234/04: *Kapferer*, [2006] ECR I-2585.

did not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law. From this it could be concluded that if court procedure laws do not provide for a possibility of reviewing court decisions in relation to the fact that the European Court of Justice has subsequently explained a community law norm and the earlier final judgment of a national court proves to be in conflict with the referred interpretation, the court of a Member State is under no obligation to disapply procedural law and reopen the case despite of all (cf. interpretation of national procedural law in conformity with the community law, and taking into account the requirements of equal treatment and effectiveness upon proceedings concerning national issues and issues relating to the community law).

Proceeding from the ECJ judgment in *Kühne* case a similar principle applies in regard to decisions of administrative authorities, i.e. the decision made (administrative act) must be reviewed only if national law allows for this (i.e. only if national rules of administrative procedure provide for the possibility of resumption of administrative proceedings and even when national grounds for resumption of administrative proceedings do not *expressis verbis* provide for such a ground as conflict with the community law).

10. What is your interpretation of the above mentioned judgments of the ACJ (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?*

So far the Administrative Law Chamber of the Supreme Court has not invoked or interpreted the ECJ judgments which are under discussion in this questionnaire, because similar disputes have not been transferred to us. That is why we can give a very general and theoretical reply in this respect. It seems that although the corrections of judicially controlled administrative acts due to the community law may be rare – considering the conditions established in the ECJ practice — , the Court has nevertheless made it clear that the procedural autonomy of Member States is not an absolute one and that the administrative procedure and administrative court procedure and practice, including judicial practice of Member States may, in exceptional cases and in the spheres related to community law, still be subject – although indirectly – to the ECJ review. In general the European Court of Justice accepts the principle of procedural autonomy of Member States, but only on the presumption that the procedural rules of Member States are in conformity with the principles of equal treatment (equivalence) of national and community law and of effectiveness of community law, as interpreted by the ECJ. Consequently, if there are drawbacks in this sphere, the Member States will have to introduce relevant procedural possibilities, if need be. Whereas the fact that national law does not provide for the resumption of administrative procedure or for the review of court judgments on the ground that an earlier administrative act/court judgment subsequently turns out to be in conflict with the community law, can not probably be considered as a

drawback. The possible deficiencies referred to by the European Court of Justice must be universal drawbacks in legal remedies, such as too short time-limits for submitting appeals (see ECJ judgment *i-21 Germany*, paragraph 59) and the like. But when the grounds for resumption of procedure /review of judgments exist in the national law, the national and community law must be treated equally, i.e. for example if – because of conflict with national law, which has become evident subsequently – there is an obligation to resume administrative proceedings and to repeal a final administrative act, the same obligation must be prescribed for the cases when an act is in conflict with the community law (see paragraph 63 of *i-21 Germany* judgment), and if the legislator has not provided for this *expressis verbis*, the administrative authorities and courts must still allow this.

On the other hand, the European Court of Justice has held that if a national court in fact lacked the competence to form an opinion on issues related to community law (to evaluate to conformity of state aid with common market), a final judgment which has acquired the effect of law could not prevent the elimination of the situation contrary to community law (final decision of the European Commission), and the national grounds for review must be interpreted – as far as possible – in conformity with the community law, or – if necessary – national (court) procedural law must be disapplied (see ECJ judgment in *Luccini* case, paragraphs 60 and 61). It needs to be explained in the subsequent case-law of the ECJ whether the decisive difference of *Luccini* judgment as compared to earlier judgments is that this case concerned a sphere within the exclusive competence of the Community (review of compatibility of state aid with common market), or whether by the *Luccini* judgment, being among the most recent ones (of 18 July 2007) the ECJ has undertaken to put more restrictions on the procedural autonomy of Member States' courts. It may be that an important role in this context is played by the fact whether the Commission decision and subsequent ECJ judgment concern the same party or not. In the former case the possibilities for review should be wider. Bearing in mind the ECJ system the probability of the same party is rather small (perhaps through direct proceedings in the First Instance Tribunal initiated by a proceeding in a national court).

In addition it is worth pointing out that Article III-285 of the Treaty on Constitution for Europe, although not yet enacted, makes a direct reference to effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union and which is regarded as a matter of common interest of the European Union. This may be regarded as a specification of the duty of loyalty. The same is included in the draft Reform Treaty, which states: "The following new Title XXIII and new Article 176d shall be inserted: "TITLE XXIII ADMINISTRATIVE COOPERATION
Article 176d

1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest."

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.

Yes, Estonian law is in conformity with the principle of equal treatment of national law and community law and with the principle of effectiveness of community law. The rules concerning resumption of administrative proceedings or review of judgments are identical irrespective of which legislation (national or community) gives rise to the rights which a person seeks to protect (§ 44(1) of the APA and § 702(2) of the CCP). Neither do the preconditions for resumption of administrative proceedings or review of judgments render the exercise of these rights impossible or excessively difficult.

In regard to time-limits for filing applications for resumption of administrative proceedings or for review of a court judgment see in more detail under question 13.

In addition the Administrative Law Chamber of the Supreme Court has stated that an administrative authority must take into account the general principles of community law and the fact that the community law must remain effective even when applying national procedural law.²⁰

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 obligation to interpret national law in compliance with the community law became binding upon Estonia's accession to the European Union, that is since 1 May 2004. The Administrative Law Chamber of the Supreme Court has reiterated this.²¹

In administrative procedure:

As already repeatedly pointed out in the previous replies administrative authorities in Estonia generally use discretion when deciding on repeal of administrative acts. Pursuant to § 54 of the APA the prerequisites for lawfulness of an administrative act are the following: it is issued by a competent administrative authority pursuant to legislation in force at the moment of the issue, is in accordance with the legislation in force, is

²⁰ See Administrative Law Chamber of the Supreme Court judgment of 19 December 2006 in administrative case no 3-3-1-80-06, para 20. – RT III 2007, 1, 10; the English and French language abstracts available in the Jurifast database at the homepage of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, and also on the Supreme Court homepage at: <http://www.riigikohus.ee/?id=719>.

²¹ See Administrative Law Chamber of the Supreme Court judgment of 23 October 2006 in administrative case no 3-3-1-57-06, para 16.—RT III 2006, 39, 335; the English and French language abstracts available in the Jurifast database at the homepage of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, and also on the Supreme Court homepage at: <http://www.riigikohus.ee/?id=719>.

proportional, does not abuse discretion, and is in compliance with the requirements for formal validity. Accordance with legislation in force also requires conformity with the community law; the national law, too, must be in conformity with the community law and it must be interpreted in the light of the objectives under the community law. On the administrative level this means an obligation on an administrative authority to take into account the community law when repealing administrative acts. Estonian law does not contain a special provision requiring that community law be taken into account when repealing acts or that national law be interpreted in compliance with the community law.

In administrative court procedure:

In the cases of possible conflicts between the community law and national law the administrative courts must first seek to neutralise the conflict by the so called conciliating interpretation (principle of conforming interpretation).

If conformity is not achieved through conforming interpretation, it may prove necessary to disapply a norm of national law in order to eliminate the collision of norms. This has already happened in Estonian judicial practice, namely when the Administrative Law Chamber of the Supreme Court in its judgment of 5 October 2006, in administrative case no 3-3-1-33-06 (the overstocks case)²², did not apply the national provisions on overstock, which were in conflict with the community law and which could not have been attributed an interpretation conforming to the community law.

Furthermore, there are about twenty disputes like the referred overstock case pending in the lower level administrative courts at the moment, and in these cases the problem of interpretation of national law in conformity with the community law is especially topical. The cases are based on request for the repeal of a directive of the Minister of Agriculture and/or of a tax notice of the Tax and Customs Board or of a notice of assessment (i.e. administrative act), in relation to which the applicants also request that relevant provisions of the Overstock Charge Act be not applied because of conflict with the Estonian Constitution and/or with Commission Regulations No 1972/2003/EC and 60/2004/EC, as the Supreme Court had done in its judgment of 5 October 2006. With reference to the judgment of the Administrative Law Chamber of the Supreme Court the administrative courts have repeatedly underlined the principle of supremacy of community law and adhered to relevant ECJ judgments.

a) In Estonian judicial practice there are no examples of cases analogous to *i-21 Germany* case in the ECJ practice, where the change of the extent of discretion of an administrative authority in relation to community law was analysed. Yet, the Administrative Law Chamber of the Supreme Court has underlined the duty to substantiate administrative acts related to community law. The requirement that administrative acts must be reasoned applies equally to administrative acts issued in relation to EU legislation as well as acts

²² See primarily para 33 and the decision part of the judgment. – RT III 2006, 35, 301; the English and French language abstracts available in the Jurifast database at the homepage of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, and also on the Supreme Court homepage at: <http://www.riigikohus.ee/?id=719>.

issued on the basis of national law only, whereas while proceeding applications for structural aid the general principles deriving from the community law as well as from the national law and the Constitution, such as principle of sound administration, right to be heard, etc., must be taken into account.²³ As already pointed out, the Administrative Law Chamber of the Supreme Court has argued that an administrative authority must also take into account that the community law must remain effective even when applying national procedural law (see reply to question 11).

b) The interpretation of national law in compliance with the community law is widespread in Estonian judicial practice and the number of relevant cases is growing. In addition to the judgments of the Administrative Law Chamber of the Supreme Court, which have already been discussed above, the Chamber underlined in its judgment of 9 March 2005 in administrative case no 3-3-1-88-04 (so called Nõo landfill case) that the necessity of assessing alternative locations of an object of significant environmental impact arises, in addition to Estonian law, also from the requirements of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.²⁴ Moreover, the Chamber makes a reference to the landfill of waste directive: “The necessity to set up regional landfills arises from the obligation to bring waste handling into conformity with the requirements of Article 14(c) of the Council Directive 1999/31/EC (the landfill of waste directive), which is the duty of the state.”²⁵

When applying and interpreting Estonian law the Administrative Law Chamber of the Supreme Court has also taken into account the community law in several tax cases, related to the community law in the sphere of value-added tax and to relevant directives and case-law of the European Court of Justice²⁶, as well as in the sphere of customs law, wherein the Community Customs Code is anyway directly applicable.²⁷

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

²³ See Administrative Law Chamber of the Supreme Court judgment of 15 February 2005 in administrative case no 3-3-1-90-04, para 14. – RT III 2005, 7, 61; Administrative Law Chamber of the Supreme Court judgment of 19 December 2006 in administrative case no 3-3-1-80-06, para 20. – RT III 2007, 1, 10; the English and French language abstracts available in the Jurifast database at the homepage of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, and also on the Supreme Court homepage at: <http://www.riigikohus.ee/?id=719>; Administrative Law Chamber of the Supreme Court judgment of 27 February 2007 in administrative case no 3-3-1-93-06, para 14. – RT III 2007, 9, 77.

²⁴ Para 24 of the judgment. – RT III 2005, 10, 90.

²⁵ Para 21 of the judgment. – RT III 2005, 10, 90.

²⁶ See Administrative Law Chamber of the Supreme Court judgment of 7 December 2006 in case no 3-3-1-63-06 (input VAT) – RT III 2006, 46, 392; Administrative Law Chamber of the Supreme Court judgment of 12 February 2007 in case no 3-3-1-90-06 (VAT) – RT III 2007, 6, 52; earlier on in regard to value-added tax see: Administrative Law Chamber of the Supreme Court judgements of 19 April 2004 in case no 3-3-1-12-04 – RT III 2004, 11, 131, and of 19 January 2005 in case no 3-3-1-73-04 – RT III 2005, 4, 31.

²⁷ See Administrative Law Chamber of the Supreme Court judgements of 10 May 2006 in cases no 3-3-1-65-05 and no 3-3-1-66-05, respectively RT III 2006, 19, 179 and RT III 2006, 19, 180; the English and French language abstracts available in the Jurifast database at the homepage of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, and also on the Supreme Court homepage at: <http://www.riigikohus.ee/?id=719>.

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.)

In Estonian law no separate deadlines have been established for the repeal of an administrative act or reopening of a judicial proceeding when a contested administrative act or a judgment is in conflict with the community law. The general time-limits are applicable: the Administrative Procedure Act, the Code of Administrative Court Procedure and the regulation provided in specific Acts regulating the sphere.²⁸

In administrative procedure:

When an administrative authority resumes administrative proceedings at the request of a person, the application for resumption of administrative proceedings shall be submitted to an administrative authority conducting the administrative proceedings within one month as of the moment when the person became aware of the circumstances constituting basis for resumption of the administrative proceedings (§ 44(3) of the APA). The possibility of filing such applications is not limited by the period of time lapsed after the issue of relevant administrative act. For the resumption of administrative proceedings on grounds not referred to in § 44(1) of the APA, an application may be filed at any time, and an administrative authority may on its own initiative resume an administrative proceeding at any time in order to decide on the amendment or repeal of an administrative act.

In administrative court procedure:

If, concerning a judicially controlled administrative act there is a judgment, which has entered into force and which upheld the administrative act (the application for repeal was

²⁸ Pursuant to § 75 of the APA, unless otherwise provided by law, a challenge concerning an administrative act or measure shall be filed within thirty days as of the day when a person becomes or should become aware of the challenged administrative act or measure.

Pursuant to § 9(1) of the CACP an action for annulment of an administrative act may be filed with an administrative court within thirty days after the date on which the administrative act was made public, unless otherwise provided by law. Subsection (3) of the same section stipulates that After pre-trial proceedings, an action may be filed with an administrative court within thirty days after the date on which the person was notified of the judgment on the whole or partial dismissal of the application included in the action in the pre-trial proceedings.

Time limit for filing of appeal is provided by § 31(4) of the CACP, which is thirty days after the court judgment is pronounced or made public, the term for filing of appeal in cassation is stipulated in § 53(1) of the CACP, pursuant to which the parties and third persons may appeal against a judgment of a circuit court within thirty days after the court judgment is made public, or within thirty days after receipt of the judgment if the matter is adjudicated in written proceedings. Special norm in subsection (1¹) concerns an appeal in cassation against a judgment of a circuit court on extradition of a person to a foreign state and this has to be filed within ten days after the court judgment is made public, or after receipt of the judgment if the matter is adjudicated in written proceedings. In all court instances the terms may be restored if the term was allowed to expire for good reason (§§ 12(3), 32(3¹) and 53(3) of the CACP). All the referred terms are applicable also when the application for the repeal of an administrative act is based on the conflict with the community law.

not satisfied), this can be reviewed by a court at the request of a person (i.e. also contested) by way of review procedure when new facts become evident (see reply to question 4 for more details on grounds for review).

A petition for review may be returned without a hearing if more than ten years have passed from the making of the decision the review of which is requested (§ 76(2) of the CACP). In other respects the provisions of § 704 of the Code of Civil Procedure (with the exception of subsection(3) thereof) apply to applications for review in administrative court procedure. Thus, as a rule, a petition for review may be filed within two months after becoming aware of the grounds for review but not before the decision enters into force. At the same time it is stipulated that when the European Court of Human Rights has established a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, or Additional Protocols belonging thereto in the making of the court judgment, and the violation cannot be reasonably eliminated or compensated in any other manner than by review, the petition for review may be filed within six months after entry into force of the European Human Rights Court judgment. What is meant here are those judgments of the Strasbourg court which concern the Estonian state and which contain a finding of violation.

The term for filing petitions for review may not be extended or renewed.

The practice and relevant regulation concerning the fourth prerequisite for the repeal of a final administrative decision (an administrative act), which is under discussion in the ECJ in the *Kempter* case, is non-existent in Estonia. Probably, on the basis of analogy, and in order to guarantee equal treatment of national and community law, the possibility should be preferred where the national requirements concerning the general terms of respectively administrative procedure (one month after becoming aware of facts justifying resumption) and procedure for review (2 months after becoming aware of the existence of the grounds for review) are applied to petitions, which means that a petition must not be filed with an unreasonable delay after becoming aware of relevant ECJ judgment. The application of the term for review, arising from the judgments of the European Human Rights Court (6 months after the judgment of Strasbourg court enters into force) would probably not be appropriate, because this special provision is conditioned by other reasons, namely the language of the Strasbourg court judgments (foreign language, not Estonian).²⁹

In regard to the issue raised in the *Kempter* case the solution for the repeal of an administrative act can first and foremost be resumption of an administrative proceeding

²⁹ In the explanatory letter to the relevant amendment of the Code of Civil Procedure in regard to judgments of the European Court of Human Rights as a ground for review it is argued that the application of general term to such petitions for review would be clearly too restricting, because it will take a significant amount of time to thoroughly learn a foreign-language judgment of the Strasbourg court; see explanatory letter to the Code of Civil Procedure, Code of Administrative Court Procedure, State Liability Act, Code of Misdemeanour Procedure and Code of Criminal Procedure Amendment Act, available on the Internet in Estonian: <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=043490019&login=proof&pas>. It has to be pointed that the judgments of the European Court of Justice, on the other hand, are available also in Estonian, which is an official language of the European Union.

(review of judgment could prove insufficient, see reply to question 8), and thus probably it would be necessary to apply the term provided by § 44(3) of the APA, which can not be extended to other possible grounds for the resumption of proceedings (whether it could be extended in case of conflict with the community law is a question of interpretation which will probably become clear within judicial practice), not enumerated in the same section, and which is not binding on the administrative authority itself upon resuming proceedings on its own motion; there is not term for this, yet this is a discretionary decision which must take into account the principle of legal certainty. In regard to terms for appeal in cases of compensating for damage in cases of state liability see reply to question 14.

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.

There is a connection between the procedures described above and the state liability proceeding. The connection of requests regarded state liability with the petitions for the repeal of administrative acts is manifested primarily in the fact that the Estonian State Liability Act establishes a ground for the repeal of an administrative act – a violation upon the exercise of powers of public authority. There is a principle that the state is liable before individuals for the damage caused to them by violations of the community law. Thus, the liability of the state is regulated by the State Liability Act (hereinafter “SLA”)³⁰, which does not contain a separate norm concerning violations of the community law, but the regulation of which is nevertheless applicable to such cases similarly with cases where liability arises in regard to violations of national law.

Pursuant to § 2(1) of the SLA a person may request that the state, a local government, another legal person in public law or another person performing public duties on a public law basis outside of relationships of subordination (a public authority) annul an administrative act; terminate a continuing measure; refrain from issuing an administrative act or taking a measure; issue an administrative act or take a measure; compensate for

³⁰ RT I 2001, 47, 260; ... 2006, 48, 360.

damage caused; return a thing or money received without legal basis in a public law relationship.

The nature of such request requires that they be submitted to administrative courts (§ 3(4) of the SLA) and thus amount to administrative court procedure. § 3 of the SLA establishes a restriction that a person may request the annulment of an administrative act only to the extent that the rights of the person are violated, unless otherwise provided by law. An administrative act shall not be repealed if the rights of the person are restored by amendment to the administrative act. Also, a repeal of an administrative act can not be requested if the procedural requirements or requirements for formal validity which had been violated upon issue of the administrative act could not affect the resolution of the matter; the request is filed with a substantial delay after the addressee was notified of the administrative act and if the repeal would violate a legitimate expectation of a third person.

A person whose rights are violated by the unlawful activities of a public authority in a public law relationship may claim compensation for damage caused to the person if damage could not be prevented and cannot be eliminated by other means (§ 7 of the SLA).

In regard to time limits for filing applications there is a difference in comparison to the proceedings described above if a claim for damage is filed; a prerequisite for the use of this term is damage caused by an administrative act which is in conflict with the community law. Namely, application or action shall be filed within three years as of the date on which the injured party became aware or should have become aware of the damage and of the person who caused it, but not later than within ten years as of the causing of damage or the event which caused the damage regardless of whether the injured party became aware of the damage and of the person who caused it (§ 17 of the SLA).

At the same time the issue of state fees may prove important upon the choice of legal remedies. The state fee upon contesting administrative acts is, as a rule, 80 kroons,³¹ also upon appeal to a second instance court; in the case of disputes concerning compensation for damage the amount of the state fee depends on the amount of claim (3% of the amount the payment of which is applied for or of the value of the property the return of which is applied for but not less than 80 kroons (ca 5 euros) and not more than the amount payable upon filing of an action with the same value of action in the course of a civil court proceeding).³² Upon having recourse to the Supreme Court the security to be paid in all administrative matters, including petitions for review, is 400 kroons (25.55 euros). In regard to other procedure expenses and burden of proof there should be no differences between the actions for the repeal of administrative acts and actions for

³¹ With the exception that upon the filing of a complaint against the action of a tax authority or other state agency in the determination of amounts of tax or of payments, in the collection of tax or payments or in the imposition of sanctions a state fee of 3 per cent of the contested amount, but not less than 80 kroons and not more than 5000 kroons, shall be paid.

³² See for more details Riigilõivuseadus [State Fees Act], § 56 – RT I 2006, 58, 439; ... 2007, 45, 320.

compensation for damage. Pursuant to § 16(2) of the CACP a person must prove the facts upon which his or her claim is based, unless otherwise provided by law. An administrative court proposes to the participants in the proceedings that they submit necessary evidence or it may collect evidence on its own initiative, if need be.

Thus, an administrative act which is in conflict with the community law and by which damage was caused may be repealed also within state liability proceedings, because under the State Liability Act the repeal of an administrative act may be requested (§ 2(1)1) and § 3(4) of the SLA), thus within one and the same procedure.

In regard to the conformity of Estonian state liability law to the community law in general it should be pointed out in brief that the State Liability Act was amended in 2004, in many regards on the basis of the community law, including the ECJ judgment in *Brasserie*³³ case, so that a person may claim compensation for damage caused by failure to issue legislation of general application, if the damage was caused by material violation of the duties of public authority, the norm serving as a basis of violated duties is directly applicable and the person belongs to the circle of persons who suffered special damage because of the failure to issue legislation of general application (§ 14 of the SLA)³⁴. To exercise his right of claim a person has to file an action with an administrative court. Thus, on the conditions described above, persons are entitled to compensation for the damage caused by the failure to transpose or by insufficient transposition of a community directive.

Still, there is one issue arising from the community law, which is not addressed in the State Liability Act, which was discussed in the case-law of ECJ in *Köbler*³⁵ and *Traghetti*³⁶ cases, and which concerns the compensation for damage caused in course of judicial proceedings, if the damage was caused by violation of the community law by a national court and the violation meets the conditions established in the case-law of the European Court of Justice. Pursuant to Estonian law the compensation for damage caused in cause of judicial proceedings can be claimed only if a judge committed a criminal offence in the course of these proceedings (§ 15 of the SLA).

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.

All Administrative Law Chamber of the Supreme Court rulings and judgments concerning this questionnaire and the analysed judgments of European Court of Justice were already referred to in the replies above. Also, the abstracts of the most important

³³ ECJ judgment of 5 March 1996, joined cases C-46/93 and C-48/93: *Brasserie* [1996] ECR I-1029.

³⁴ See The State Liability Act and Constitutional Review Court Procedure Act Amendment Act, entered into force on 25 July 2004, RT I 2004, 56, 405, and the explanatory letter to the Act, available in Estonian at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=041130026&login=proof&password=&system=ems&server=ragne11>.

³⁵ ECJ judgment of 30 September 2003, case C-224/01: *Köbler*, [2003] ECR I-10239.

³⁶ ECJ judgment of 13 June 2006, case C-173/03: *Traghetti*, [2006] ECR I-05177.

judgments of the Administrative Law Chamber, pertaining to the application of community law, are available in English and in French in the Jurifast database at the homepage of the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, as well as on the Supreme Court homepage.

For information purposes it has to be added that Estonia is planning and has already started the amendment of the Code of Administrative Court Procedure, which may – but need not – result in drafting a totally new Code, independent of the civil court procedure.

One more set of issues that could be pointed out is the possible connections between the review of conformity of national legislation, serving as the basis of an administrative act conflicting with community law, with the community law and the review of constitutionality of national law. Whether and when is it sufficient that a national court disapples a national provision which is in conflict with the community law and on which the unlawful administrative act was based, although in relevant application reference is also made to possible conflict with the Constitution; or should a constitutional review proceeding be initiated as well?

Also, the issue of what will happen to the national provision which is disapplied due to conflict with the community law: should the national legal order provide for a procedure for the repeal of national legislation conflicting with the community law, in order to guarantee legal clarity? Today the Estonian law does not contain an *expressis verbis* possibility for an individual to apply for a national norm to be declared to be in conflict with the community law.³⁷ The European Court of Justice, who speaks of the supremacy of application of the community law, does not consider this necessary, either. Nevertheless, in the light of the ECJ case-law and as the community law develops a need for an independent remedy may arise for the review of conformity of national law with the community law.

Further problems in practice are related to the question of whether and when an administrative authority may/must disapply, on its own motion, national legislation which it considers to be in conflict with the community law (see e.g. ECJ judgment on 29 April 1999 in case C-224/97: *Ciola*, ECR 1999, p I-2517).

³⁷ See also General Assembly of the Supreme Court judgment of 19 April 2005 in matter no 3-4-1-1-05 (paras 48-51), where the Chancellor of Justice had, in addition to unconstitutionality, contested legislation of general application due to its conflict with the community law, and where the General Assembly of the Supreme Court referred to the judgments of the ECJ concerning the supremacy of application of the community law and held that neither the Chancellor of Justice Act nor the Constitutional Review Court Procedure Act empower the Chancellor of Justice to petition that the Supreme Court declare legislation invalid on the basis that it is in conflict with the community law. General Assembly is of the opinion that there are different possibilities for bringing national law into conformity with the community law and that neither pursuant to the Constitution nor the community law there has to exist the constitutional review proceeding for that purpose. A dissenting opinion concerning this aspect of the judgment was supplemented to the judgment, pursuant to which the court must have heard the Chancellor of Justice's petition on the merits, because in the given case the conflict with the community law also meant - through the Constitution Amendment Act, which brought the Constitution into conformity with the community law before Estonia acceded to the European Union - a conflict with the Constitution. – RT III 2005, 13, 128; English translation of the judgment and the dissenting opinion available at <http://www.nc.ee/?id=391>.