

**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**

Answers
to the
Questionnaire

Austria

Preliminary remark:

The court system in Austria so far comprises only one (Supreme) Administrative Court.

There are a number of independent administrative (collegiate) bodies (e.g. the Independent Administrative Panels and the Independent Finance Senate), that can be understood as a kind of first instance of the administrative judiciary; but those bodies - though independent from the administration, especially the federal government and the governments of the Länder; the members are not subject to instructions and cannot be removed from office against their will - formally are acting as all the other administrative authorities, especially issuing "Bescheide" according to the administrative procedure that is described here in the following. They are applying the same procedural law as administrative authorities (there have only been important amendments with regard to the holding of public hearings and the publication of their decisions).

The competences of those bodies, especially of the Independent Administrative Panels have been widened over the last 10 years. But there are still areas of administration where the Administrative Court is the first court to decide in a matter.

So, the importance of the administrative procedure in Austria still is very high. The legal protection of the citizen already begins within the administrative procedure, there is a remedy within the administration (the so called "Berufung"). The hierarchically higher authority has to decide on this remedy (in cases that fall into the competence of an independent body mentioned above, this decision is taken by a body that fulfils the criteria of Art. 6 ECHR and Art. 234 EC).

Thus, there are normally two (sometimes even three) administrative instances before there can be lodged an appeal before the Administrative Court.

A reform of this system has been discussed for a long time. The federal government has established an expert group earlier this year that has presented a draft amendment of the Federal Constitution to install a two-layer administrative judicature.

The result of the proposed reform should be the reduction of the administrative instances (only one instance). After the decision of the administrative authority there should be the remedy to the Administrative court of the Land (in matters of the administration of the Länder) or to the Federal Administrative Court of First instance (in matters of the Federal administration). Exceptions only can be provided for local or professional self-government. Moreover, it is thought of allowing also remedies with which a new decision of the same administrative authority could be achieved (so called "remonstrative remedy", the authority that issued the act is competent to decide again in the same matter).

According to the proposal, there will be one Administrative Court in each Land and one Federal Administrative Court of First Instance (the latter competent for the matters that at the moment are administered by federal authorities in the Länder).

The latest development, nevertheless, is a proposal for a specific Court for Asylum cases. The intention of the Federal Government is to reduce the large back log in asylum cases by creating an Asylum Court (instead the Independent Asylum Senate that is acting at the moment as one of the above mentioned

independent panels). The possibility to lodge an appeal to the Administrative Court after the decision of this Asylum Court should be restricted.

The general reform of the administrative judiciary will cause also new procedural rules for the administrative judiciary. It will cause a significant change of the relation between the administrative authorities and the judiciary. There will be also the need to restructure the whole system of administrative procedure with regard to the concept of the "binding force of decisions" (the becoming final of decisions) and the possibilities of withdrawing decisions (especially of the Administrative Courts of First Instance).

The answers given below pertain to the present legal situation.

- 1. Are there any procedural means under national law which allow a final administrative decision to be revoked, if it turns out to be contrary to Community law?**

Please describe briefly the relevant provisions and national case-law:

- a) do the legal provisions have general application or do they relate specifically to the application of EC law?**
- b) which authority (administrative body or national court) is empowered under your legal system to make use of the procedural means in question?**

a) General overview on the applicable law:

1. There is no single and uniform procedural law for the administrative authorities in Austria.

The most important procedural rules for administrative authorities are

- the **General Administrative Procedure Act** (Allgemeines Verwaltungsverfahrensgesetz)¹, that has to be applied by a large number of administrative authorities (in fact almost all administrative authorities) and therefore plays a dominant role in the administrative

¹ BGBl. 1991/51, as amended by BGBl I 2004/10.

procedure (it is applied in a large variety of administrative fields, such as in matters of the interior administration, industrial law, nature protection, construction law, protection of waters and forests) and

- the **Federal Tax Act** (Bundesabgabenordnung)² for the procedure of the tax authorities of the Federation. In the procedure of the tax authorities of the Länder there are similar procedural rules laid down in the Tax Codes of the Länder ("Landesabgabenordnungen", in the following: LAOs). The Federal Tax Act - Bundesabgabenordnung (in the following: BAO) is also applicable in certain procedures concerning the common organisation of markets.

In customs matters the Community Customs Code and the (Austrian) Customs Law Implementation Act are applicable.

2. The **General Administrative Procedure Act** is applicable in the **procedure of most of the administrative authorities**³, with some important exceptions (fields of administration), especially in tax matters, the civil service procedure and for the procedure concerning elections.

Moreover, there are also a number of authorities that do not have to apply the General Administrative Procedure Act as a whole (e.g. the authorities of Universities), but only partly, or for which there have been issued specific procedural rules only for some details, but which have to apply the General Administrative Procedure Act in all other procedural questions.

Finally, there are some specific procedural codes that are applicable in certain fields of administration (rural operations, civil service matters; the Act on the procedure in rural operations declares the General Administrative Procedure Act applicable in section 1 unless the Act provides for otherwise; the Act then contains some fifteen provisions that do so; the solution in the Civil Service Procedure Act is more or less the same). On the whole, the **possibilities for a revocation of decisions that**

² Federal Law of 28th June 1961, BGBl. 1961/194, as amended by BGBl I 2007/24.

³ Section II of the Introductory Act to the Administrative Procedure Acts 1991 (EGVG).

have become final in these codes are similar to those in the General Administrative Procedure Act . For the details see below.

The detailed description in the following therefore concentrates on the General Administrative Procedure Act and the Federal Tax Act.

3. With regard to **tax matters** the situation can be described briefly as follows:

In tax matters the Federal Tax Act (if a federal authority is competent) or the respective code of the Land (if an authority of the Land is competent) applies.⁴ The procedure in matters concerning the Common Organisation of Markets is more or less the same as in the Federal Tax Act with regard to the revoking of decisions.⁵

⁴ The Community Customs Code, Regulation (EEC) N° 2913/1992, contains provisions for the revocation of decisions favourable to the person concerned :

"Article 8

1. A decision favourable to the person concerned shall be annulled if it was issued on the basis of incorrect or incomplete information and:

- the applicant knew or should reasonably have known that the information was incorrect or incomplete, and
- such decision could not have been taken on the basis of correct or complete information.

2. The persons to whom the decision was addressed shall be notified of its annulment.

3. Annulment shall take effect from the date on which the annulled decision was taken.

Article 9

1. A decision favourable to the person concerned, shall be revoked or amended where, in cases other than those referred to in Article 8, one or more of the conditions laid down for its issue were not or are no longer fulfilled.

2. A decision favourable to the person concerned may be revoked where the person to whom it is addressed fails to fulfil an obligation imposed on him under that decision.

3. The person to whom the decision is addressed shall be notified of its revocation or amendment.

4. The revocation or amendment of the decision shall take effect from the date of notification. However, in exceptional cases where the legitimate interests of the person to whom the decision is addressed so require, the customs authorities may defer the date when revocation or amendment takes effect."

⁵ In matters of Common Organisation of Markets the authorities partly have to apply the Federal Tax Act (e.g. in matters of the allocation of milk quotas), partly the General Administrative Procedure Act; also for those procedures there was a specific provision on the revoking of final decisions that allowed the withdrawal under the same conditions as the Federal Tax Act (section 102 of the Common organisation of Markets Act 1985). This provision has

b) Short survey on the possibilities to revoke final decisions, especially following a subsequent judgment of the ECJ

1. Each of the above mentioned procedural regimes contains provisions for the becoming final of decisions of the administrative authorities and the conditions for the revocation of final administrative decisions.

2. **In general**, it can be said, that the revocation and amendment of final administrative decisions is **restricted** very much according to the **General Administrative Procedure Act**, whereas it can be carried out very **easily** according to the Federal Tax Act (**BAO**) and the LAOs (in favour of the tax payer as well as to the disadvantage of the tax payer). The same applies to decisions of the authorities competent for the administration of the common organisation of market, especially when granting subsidies in this field.⁶

The provisions in the General Administrative Procedure Act apply in Community matters as well as in (mere) domestic ones. There is **no difference** between rights derived from Community law and rights that are granted by the national legal system. There is, therefore, also no distinction

been replaced this year by a provision that allows the withdrawal (only) in the case of a conflict with Community law (section 19 paragraph 2 of the Common organisation of markets Act 2007, Federal Gazette 2007 I, N° 55, Article 1).

⁶ There are specific provisions in Community law with regard to the consequences of illegally paid subsidies. Amounts that have been paid unduly have to be recovered by national authorities, anyway, so that Community law would require the neglecting of the binding effect of a decision that granted the sum against Community law; cf. Art. 14 Regulation N° 3887/92 (Administrative Court 21. 6. 1999, 98/17/0361), now Art. 49 Commission Regulation (EC) N° 2419/2001 of 11 December 2001 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes established by Council Regulation (EEC) No 3508/92, and Art. 4 Council Regulation (EC, Euratom) N° 2988/95 of 18 December 1995 on the protection of the European Communities financial interests: "any irregularity shall involve withdrawal of the wrongly obtained advantage" (cf. also the case law with regard to State aid, ECJ 20. 3. 1997, Case C-24/95, *Alcan*, 18. 7. 2007, Case C-119/05, *Lucchini*).

between decisions that are contrary to domestic law and such that are contrary to Community law with regard to the binding force of the decision (and the possibility to revoke it).

3. The decisive point is:

There is **no general rule** in the **General Administrative Procedure Act** according to which it was possible **to revoke a final decision just because it is illegal.**⁷

Neither section 68 (on the annulment and amendment of final decisions), Nor section 69 (on the reopening of the procedure on request of the party) enable the authority to revoke or amend a final act because of its illegality alone.

Section 68:

There is the possibility to annul decisions that do not confer a right on somebody (section 68 paragraph 2 of the General Administrative Procedure Act) or in the interest of the common good or to prevent damages (wealth of the people, severe damage to the economy; section 68 paragraph 3 of the General Administrative Procedure Act), and the supervision authority has the right to annul a decision for the reasons listed exhaustively in section 68 paragraph 4 (when the decision was taken by an authority that was not competent for it, when it would lead to a result that would constitute a crime, when it could not be executed or when it was affected by an error expressly sanctioned with nullity. As the fact that an act is contrary to the law is not one of those reasons, there is no possibility to annul a decision because it is

⁷ Therefore, the starting point of the deliberations of the ECJ concerning the possibility or the necessity to revoke administrative decisions in the year 1957 in the judgment 12. 7. 1957, Joined cases 7/56 and 3 to 7/57, *Algera*, the fact, that "in all Member States" there was the possibility to revoke illegal decisions, is not true for the Austrian legal situation. With its recent case-law, starting with *Kühne*, the ECJ is giving up its early deliberations on the question. Cf. *Köhler*, 14. ÖJT I/2, 113 [138] (a copy is enclosed). An interesting aspect of the case-law discussed here, therefore, is the fact, that it is incompatible with some other – earlier – case-law of the ECJ (cf. *Köhler* in: Holoubek/Lang (ed.), *Abgabenverfahren und Gemeinschaftsrecht*, 2006, 335 und 350, a copy is enclosed). According to the reasoning of the ECJ in the judgment in the case *Ciola*, also individual acts (final decisions of administrative authorities) must not be applied when they are contrary to Community law. This opinion is not compatible with the new line of case-law.

contrary to law, unless there is a distinct provisions that declares such an error in law as an error sanctioned with nullity (section 68 paragraph 4 n° 4 of the General Administrative Procedure Act)⁸.

Section 69

Section 69 provides for the revocation of a final decision (see below). But there is no reason to revoke a decision under section 69 of the General Administrative Procedure Act merely because it is contrary to the law.

Therefore, it is not possible to revoke a decision simply because it turns out to be contrary to Community law.

With regard to those fields of administration, for which there have been issued specific procedural provisions, the following can be said briefly:

As far as rural operations are concerned, sections 68 and 69 of the General Administrative Procedure Act are applicable, so the provisions on the withdrawal of final decisions are exactly the same in this field. In the civil service procedure there is a specific provision on the withdrawal that refers to the **knowledge** of the civil servant **or** the fact the he or she "**should have known**" that the decision was against "binding legal provisions"; so the solution in the civil service procedure is similar to the tax matters, where it is of no influence, whether the tax payer knew or should have known that the decision was wrong (see the detailed answer below).

Additional remark:

The necessity to revoke final decisions that have been taken in a procedure according to the General Administrative Procedure Act would only arise when Community law would require it and therefore the domestic provisions were inapplicable; whether this is the case or under which

⁸ Such provisions exist, e.g., in the area of spatial planning: a decision of an authority that does not pay due regard to the regulations concerning the use of the land suffers from an error that is sanctioned with nullity. But there is no general provision that sanctions decisions contrary to Community law with nullity.

circumstances this might be the case, is the topic to be discussed at the Colloquium.

But - as one could draw as a conclusion from the judgment in the *Kühne* case alone - such a necessity does not exist where the "*Kühne*-conditions" fully apply (so that a revocation was only necessary if domestic law provides for). Therefore, in procedures falling under the scope of the General Administrative Procedure Act there seems to be no need at the moment to revoke decisions contrary to Community law⁹, unless there is a specific situation like in State aid matters (cf. ECJ in *Lucchini, Alcan*)¹⁰ or that might be defined in future case law of the ECJ (cf. the fact that in *i-21 Germany* the ECJ after having stated that the *Kühne* judgment was not applicable as the facts were entirely different did not conclude that therefore the national court was not obliged by Community law to assume the necessity of revocation, but went on to examine, whether there was a situation in which Community law so required; with other words: there might be situations where – although the *Kühne* judgment does not apply/the "*Kühne*-conditions" are not fulfilled – it might be necessary to revoke a final decision; although this further examination in *i-21 Germany* was caused by the necessity to interpret the national procedural rule that allowed a withdrawal under certain circumstances in accordance with the principle of *equivalence*, it seems to be possible, that there might be other situations, where the ECJ, although the "*Kühne*-conditions" are not fulfilled, would hold that the revocation should take place (that there is an obligation to withdraw a decision, no matter what the national procedural law provides for, or at least: when national procedural law allows for a withdrawal under certain circumstances). Therefore, it seems to be appropriate to speak of

⁹ *Thienel, Verwaltungsverfahrensrecht*³ (Administrative Procedure Law), 2004, 292.

¹⁰ There might also be specific provisions in EU law requiring the authorities of a Member State to act although there is a (final) administrative decision, cf. Art. 4 paragraph 3 of the Council Regulation (EC, Euratom) N° 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, that provides for that acts of beneficiaries of subsidies or other advantages "artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal".

the “*Kühne* circumstances” rather than of “*Kühne* conditions”; see also *Köhler*, Die Bindungswirkung von Verwaltungsentscheidungen, in Holoubek/Lang (ed.), Abgabenverfahrensrecht und Gemeinschaftsrecht, 2006, 325 [341]; this contribution was written before the judgments *Kapferer* and *i-21 Germany* were issued).

In this respect *i-21 Germany* seems to go beyond *Kühne* in giving up the strict link between all four of the circumstances described in *Kühne* and the necessity to withdraw a final decision.

It has to be admitted that the further examination in *i-21 Germany* was caused by the specific legal situation in Germany (§ 48 VwVfG) and the arising question, what Community law, especially the principle of equivalence, requires in such a situation. Nevertheless, the judgment *i21 Germany* and *Arcor* seems to show that one has to be careful in drawing general conclusions from *Kühne & Heitz*.

The *Kühne* circumstances maybe cannot be understood as “conditiones sine quibus non”. There might be situations in which they do not have to be met all four together to constitute the necessity to revoke a final domestic decision according to Community law. This, at least, is the case when there is a national provision that provides for a revocation under specific circumstances on grounds of a breach of domestic law. In conjunction with the principle of equivalence such a provision has to be understood in a way that in similar circumstances also the infringement of Community law has to lead to the withdrawal of the final decision.

Here, the question arises, whether the principle of equivalence requires that the solution for tax matters (see below, 4. and the detailed answers under part d), which provides for the withdrawal, has to applied also in the procedure according to the General Administrative Procedure Act. The answer should be in the negative, as the "comparable actions" with regard to procedures falling under the General Administrative Procedure Act are the procedures according to the General Administrative Procedure Act that concern (only) domestic law. It should not be necessary to compare the procedural possibilities under the Federal Tax Code with those under the General Administrative Procedure Act.

4. In **tax matters** (in the BAO) the situation is completely different to that according to the General Administrative Procedure Act.

4.1. There is the **possibility to revoke** decisions that prove to be "**wrong**" according to section **299** of the Federal Tax Act; this term also includes that a decision can be revoked or amended if it is contrary to law.

The revocation falls into the competence of the authority that issued the decision (the tax authority of first instance).

4.2. The Federal Ministry of Finance as well as the Independent Finance Senate can annul a decision that has been issued by themselves and that has been appealed against before the Constitutional Court or the Administrative Court because of its illegality (section **300** of the Federal Tax Act). One of the grounds for which such a withdrawal can be carried out is "illegality".

Decisions of the Independent Finance Senate therefore can only be withdrawn by itself.

4.3. Moreover, it is provided for **specific time limits for the above mentioned revocations** when **Community law** is at stake. The time limit for the revocation of an act that proves to be illegal according to Section 302 para 2 BAO is **longer in cases of a conflict with Community law** than in other cases (this can result in a benefit of the tax-payer, but the application of the provision could also lead to a disadvantage of the tax-payer).

It is sufficient that the application for the annulment or amendment is brought before the time-limit (i.e. the period of prescription for the tax at stake) expires. The decision on the application can also be taken after the expiry of the time-limit when the application had been submitted in time.

The time-limit for an annulment or amendment of a final decision by the Ministry of Finance is five years (no matter for which reason the decision is

annulled; there is no restriction that the annulment could only be done in favour of the tax payer).

Those provisions apply in cases where there is a subsequent decision of the ECJ as well as in cases where the conflict with Community law is detected by the authorities without such a decision. The illegality, however, has to be certain (which will normally only be the case when there is a decision of the ECJ on the question; but it could be, that this judgment had been issued before the decision of the tax authority but had not been taken into account).

See the details below.

Additional remark:

Besides this explicit distinction in the law with regard to the time limit for the revocation because of a breach of Community law there is an ongoing discussion in literature, whether the specific character of the relation between Community law and domestic law also required a distinct interpretation of the notion of a "prejudicial question" in section 303 of the Federal Tax Act. According to this section, there is the possibility to revoke a decision when it depended on the examination of a prejudicial question that afterwards is decided in a different way by the competent authority. According to settled case law of the Austrian courts (Constitutional Court, Administrative Court) a subsequent decision of a national Supreme Court in another case, in which the same question has to be decided, does not constitute such a decision on a prejudicial question that would allow to revoke the decision in another case. But there are many authors that favour a different solution in cases of a subsequent decision of the ECJ.

This discussion (now) has to be seen in the light of the recent development in the case-law of the ECJ that is to be discussed at the Colloquium. As the ECJ does not require the national authorities and courts to revoke final decisions unless **national procedural law** provides for such a

revocation¹¹, there is no need to assume, that in cases with Community influence the relevant national provision had to be interpreted "in favour" of Community law. Therefore, the arguments of those, that pleaded for the assumption of a "prejudicial question" in such cases, prove to be outdated by the recent case-law of the ECJ.

c) The relevant provisions in the General Administrative Procedure Act:

The relevant provisions are section 68 and section 69 of the General Administrative Procedure Act.

Section 68 provides for the binding character of decisions that cannot be appealed against any more and requests authorities to dismiss new applications concerning the same matter that already has been decided finally. Thus, section 68 of the General Administrative Procedure Act can be seen as the legal basis of the principle of **ne bis in idem** in the procedure of the administrative authorities that have to apply the General Administrative Procedure Act. Only in the exceptional cases (already described above) that are listed (exhaustively) in paragraphs 2 to 4 of the section it is possible to annul an act or to amend it. Those possibilities are made use of very seldom (examples, though, can be found in cases, where an authority realises that it had committed a mistake and the act is one that only imposes obligations upon somebody, e.g. requires something that has been established to be removed, and there are no parties to the case, or where a supervising authority is made aware of an error sanctioned with nullity by law in a decision of a local authority).

Section 69 of the General Administrative Procedure Act provides for the conditions under which a procedure might be reopened.

There are three grounds for the **reopening of the procedure**:

¹¹ Perhaps it would be more appropriate to say: "does not seem to require", as the arguing in i-21 Germany could well lead to the assumption, that the ECJ does not want to be taken literally in *Kühne*.

- when the decision at stake was fraudulently obtained
- when new facts or evidence comes up after the decision has been taken which the party without its fault was not able to bring up during the proceedings
- when the decision at stake depended on the solving of a prejudicial question (precondition-issues) and this question has been solved by the authority itself but later on the competent authority (or the competent court) decided differently.¹²

Besides those two provisions there are no other clauses that would allow to decide in a case that once has been settled definitively.

Therefore it can be said that the principle of ne bis in idem is observed very **strictly** in the General Administrative Procedure Act and there are very narrow exceptions.

A change in the opinion of the Administrative Court or the Constitutional Court (a change in the case-law of those courts) does not constitute a reason for a new decision in a case that has been decided definitively.

In the same way, a decision of the ECJ cannot serve as the basis of a new decision in a case that has been decided finally.

Therefore, also a change in the case-law of the Administrative Court or the Constitutional court that has been caused by a judgment of the ECJ would not constitute ground for revoking a definite administrative decision.

¹² A "prejudicial question" in this sense is a question that is decisive for the result in a pending case and can be decided upon as a "main question" by another authority. Administrative authorities according to section 38 of the General Administrative Procedure Act are entitled to decide such a question themselves or stay the proceedings and wait until the question has been decided by the competent authority, that has to decide on that question as a "main question", if the relevant procedure is pending or started at the same time. Therefore, such questions often are decided by the authorities for which they are "only" a "prejudicial question", but not a "main question".

There is no possibility comparable to section 299 of the Federal Tax Act that enables the authorities to withdraw or amend a decision, if the first decision proves to be unlawful (see below, d).

d) The relevant provisions for the tax procedure (BAO and LAOs)

There are mainly two instruments to be mentioned in the context of the question of possibilities to set aside final administrative decisions:

- According to **section 299 para 1 BAO** the tax authority (of first instance) can revoke a **decision** if it "**proves to be wrong**".

An act is "wrong" either when there has occurred an error concerning the facts or an error in law.

This could also be the case when it is found that Community law was not applied correctly; this could, of course, be especially the case when there is a subsequent decision of the ECJ in a case that can be compared with the case decided by the Austrian tax authority.

But the application is not restricted to this situation; the illegality with respect to Community law could also be detected without such a subsequent judgment of the ECJ (be it, that there was an earlier one, that had not been taken into account, or that there are decisions of authorities of other Member States or the question is dealt with in literature and the authority accepts that the question was solved in the wrong way).

The revocation can be carried out ex officio or on application of the party.

As has been already indicated above, the time limit for the setting aside of an administrative decision according to section 299 BAO is longer when the reason for the illegality of the act lies in a conflict with

Community law.¹³ In those cases the quashing of the act at stake can be done within the period of prescription (usually five years); in other cases (with no Community law impact) the quashing is only possible within one year after the serving of the act.

This provision is also applicable in many cases concerning the Common organisation of markets, namely in those cases where the authority has to decide on the granting of subsidies (in other cases concerning the Common organisation of markets the General Administrative Procedure Act is applicable).

In a similar way the Federal Ministry of Finance or the Independent Finance Senate can annul an act that they have issued themselves that has been appealed against before the Constitutional Court or the Administrative Court (section **300** of the Federal Tax Act).

Section 299 and section 300 of the Federal Tax Act also allow a new decision when according to a judgment of the ECJ a decision of a finance authority proves to be wrong (with regard to Community law).

- According to section 303 BAO the **reopening of the procedure** ("Wiederaufnahme") is possible under certain conditions.

Those conditions are **the same** as those that are listed in section 69 of the **General Administrative Procedure Act** (the act was fraudulently obtained, new facts being available or subsequent decision on a prejudicial question that deviates substantially from the opinion upon which the decision originally had been based)

The **difference** between those two possibilities lies in the **discretionary power** the authority has in the case of **section 299 BAO** (and section 300). The reopening of the procedure has to be granted if the conditions of section 303 are met. In the case of section 299 BAO the authority has to decide on the application (by "Bescheid"), but it is not obliged to quash the

¹³ The same applies when there is a conflict with a bilateral agreement.

act and decide once again. It has discretionary power. According to the case-law of the Administrative Court the authority has **to give reasons** for its decision to annul the decision and issue a new decision. The guiding principle for the exercise of the discretionary power is the "uniformity of the taxation" and the legality prevails over legal certainty according to the Administrative Court in this respect (this view is shared in literature, cf. *Ritz*, Bundesabgabenordnung - BAO (Federal Tax Act), Commentary, 3rd ed., 2005, section 299 BAO, paragraph 54). The authority should not annul the act when the breach of law is of minor importance ("the illegality is of little importance") or when the result would be more or less the same if the tax is fixed correctly in taking into account what the authority had not taken into account when deciding (be it with regard to factual circumstances or with regard to questions of law).

In the case of the reopening of the procedure according to section 303 Federal Tax Act the competence lies with the tax authority of first instance, even when the decision was taken by the Independent Finance Senate (sections 305 and 307 Federal Tax Act).

- Moreover, it has to be mentioned, that according to section 295 of the Federal Tax Act a modification of an act of the tax authorities is also possible when the act was based on another decision and this ("basic") decision has been annulled or amended afterwards.

This possibility, however, cannot be applied in the case of decisions of the ECJ, as those do not annul decisions that formed the basis of an act of the tax authority. It could, however, be made use of, if a final decision has been withdrawn after a judgment of the ECJ and there is another (final) decision that has been based on the "basic" decision that has been withdrawn. So, as a consequence of a withdrawal according to section 299 after a judgment of the ECJ there could be the further need to change other (final) decisions according to section 295 BAO.

- Finally, as a consequence of severe problems in specific cases, e.g. where subsequent measures of the authority (a new opinion of the tax authority with regard to the taxation in former years) led to

disadvantages for the tax payer¹⁴, section 295a Federal Tax Act provides that a decision of the tax authority can also be modified as far as there arise new facts which produce effect for the past. Such a situation can also arise when the tax payer declares on the basis of a certain (possible) treatment in another country but this treatment is not granted by the tax authorities of the other country (and therefore e.g. the deduction of losses should be possible in Austria, but the decision for the relevant year has already been taken without taking into account those losses). Similarly, when taxes paid abroad could be taken into account in Austria, but this depends on the fact that the taxes have been paid already, it is not possible to take them into account when the decision on those taxes in the other State has not yet been issued. By the time, when this decision is issued and the taxes are paid, the domestic decision might have become final. In such a case, this again would constitute a fact with retroactive effect that could be taken into account under section 295a Federal Tax Act.

This instrument might be of importance with regard to Community law and the cases discussed here (the revoking or amending of final decisions) under the following circumstances:

Decisions of authorities of a Member State can also depend on decisions of Community organs (e.g. in State aid matters; decisions of the Commission in the procedure according to Regulation (EC) n° 659/1999).

[Cf. ECJ 14. 12. 2000, case C-344/98, *Masterfoods*, paragraph 59:

"In this case it appears from the order for reference that the maintenance in force of the permanent injunction granted by the High Court restraining Masterfoods from inducing retailers to store its products in freezers belonging to HB depends on the validity of Decision 98/531".]

¹⁴ Cf. also the judgment of the Austrian Constitutional Court 6. 12. 1990, B 783/89, Rep. 12.566/1990 (a copy is enclosed).

If a party in such a case pleads the nullity of a decision of a Community organ and the domestic authority does not share the view of the party, it might apply the act of the Community organ. If the decision of the Community organ is declared invalid by the Court of First Instance later, the facts on which the domestic authority based its decision turn out to have been perceived wrongly (the court's judgment has retroactive effect¹⁵).

Therefore, it could be argued, that section 295a of the Federal Tax Act was applicable in such a case.

Another possibility to enforce Community law in such a situation could be seen in section 303 Federal Tax Act on the reopening of the procedure. The annulment of the decision of the Community organ could be seen as a decision on a prejudicial question (although this is not the case in the strict sense of the notion of a "prejudicial question": the domestic authority did not decide on the validity of the act of the Community organ, it just applied it, as it belonged to the legal order at the time the authority had to decide; the later annulment just means, that a decision, that had appeared to be there at the time of the decision of the national authority has been declared as invalid; I therefore, in the Austrian legal system, would prefer the application of section 295a Federal Tax Act in such a case¹⁶).

¹⁵ *Lasok & Millett*, *Judicial Control in the EU* (2004), § 116, ECJ Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris and Others v Commission* [1988] ECR 2181, paragraphs 30 and 32, and 15 February 2005, C-13/03 P, *Tetra Laval*, paragraph 9.

¹⁶ Cf. the reasoning of the Commission in case C-13/03 P, *Tetra Laval*, with regard to the effect of a possible annulment of a judgment of the CFI for another procedure concerning a judgment of the CFI depending on the first one: "... the fact that, if that judgment is set aside, this will invalidate the legal basis for the judgment under appeal. As it would be based on a measure which is manifestly invalid, the judgment under appeal would be vitiated by an error in law as to the validity and applicability of that measure."

There is no case-law on this question so far in Austria (with respect to the applicability of either section 295a or 303 Federal Tax Act in the situations described above).

According to the ECJ the national court seems to be obliged to stay its proceedings if the case was already pending before the CFI:

ECJ 14. 12. 2000, case C-344/98, *Masterfoods*, paragraph 59:

"It therefore follows from the obligation of sincere cooperation that the national court should stay proceedings pending final judgment in the action for annulment by the Community Courts unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted."

There arise the following questions in this context:

Is the *Masterfoods*-case law of the ECJ¹⁷ applicable in any case in such situations? Or can it be assumed that in cases where the national procedural law provides for the (later) annulment or amendment of a decision of the national authority or court when the Community act subsequently should be declared void there is no obligation to stay the proceedings?

What is the consequence of the annulment of an act of a Community organ by the Court of First Instance or the ECJ for final decisions of national authorities or courts that have been based on the annulled decision (maybe against the obligation arising from the *Masterfood*-case-law, and maybe when there is no possibility of annulment or amendment of the judgment of the domestic court according to national law; would the ECJ in such situations apply the reasoning in the judgment *Ciola*?¹⁸ is it decisive,

¹⁷ ECJ 14. 12. 2000, case C-344/98, *Masterfoods*, [2000] ECR I-11369.

¹⁸ Maybe the answer has to be that the harmonisation of the *Ciola*-case law and the case-law discussed here (*Kühne, Kapferer, i-21 Germany*) could be seen in the application of the *Ciola*-argument only in cases of subsequent procedures concerning administrative penalties

whether the decision has been taken by an administrative authority or a court of lower instance or by a court against whose decisions there is no remedy?)?)

The interpretation of section 295a of the Federal Tax Act given above (or alternatively the possibility to apply section 303 Federal Tax Act in such a case in the Austrian legal system) demonstrates that the domestic procedural law might contain possibilities to cope with such problems (to react, if the Community courts have declared the Community act on which a domestic decision was based void after the domestic decision has been taken). In the Austrian legal system there is, therefore, a solution for the problem that leads to the implementation of the opinion of the CFI (or the ECJ).

So the assumption of the ECJ in the *Masterfoods*-case-law, that legal certainty would require the suspending of the procedure until the CFI or the

against the person that is the addressee of the final act that proved to be contrary to Community law (cf. ECJ 6. 3. 2007, case C-338/04, *Placanica*, § 63: "the lack of a licence cannot be a ground for the application of sanctions to such operators"; in the same way the ECJ maybe would not hold it possible to impose sanctions although there is an administrative decision requiring a certain activity or forbidding a certain activity, e.g. a development consent or a licence that restricts the scope of activities of an enterprise; if this restriction is not in line with Community law, it cannot be taken as the basis of a sanction; it is difficult, to draw the line; should only penal measures be comprised, not other sanctions like those in the Common organisation of markets?; how do differentiate between sanctions and other measures taken on the basis of the act?). It will be interesting to see, how the ECJ in different situations will solve this conflict. The new approach of the ECJ, that everybody has to care for defending his rights and make use of possible remedies even in the *Ciola* case would have enabled to come to another solution: the binding force of the administrative act issued before the accession to the EU ended with the accession. There was no obstacle to a new application for the licence. The problem of legal certainty also arises in respect to provisions governing business activities the breach of which could result in sanctions; it is difficult to decide, under which conditions the binding force of a decision (e.g. on a licence regulating the activities of a credit institute, on the labelling of goods etc) can or has to be neglected and when legal certainty affords to base also future decisions on the act, although it might be in conflict with Community law.

ECJ have decided, need not necessarily be the only possible solution to achieve a result that secures the primacy of Community law and due account to the principle of legal certainty.

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

a) grant discretionary powers to decide the matter

As can be seen from the answer to question 1 it has to be distinguished between

- the revocation of a final decision after the **reopening of the procedure** in the form of the "Wiederaufnahme" (section 69 AVG and section 303 BAO and respective provisions in the LAOs) and
- **other remedies** that enable the authority to quash an act and decide once again (e.g. section 299 BAO).

The reopening of the procedure ("Wiederaufnahme") *has* to be granted when the conditions for it are met (esp. new facts available or subsequent decision of the competent authority or court on a prejudicial question).

In other cases, where remedies like the one according to section 299 BAO are provided for, the authority has *discretionary power*.

or

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

The reopening of the procedure ("Wiederaufnahme") *has* to be granted when the conditions for it are met (esp. new facts available or subsequent decision of the competent authority or court on a prejudicial question).

3. Does the possibility (or obligation) of revocation of final administrative decisions depend on the reason of its incompatibility with EC-law?

No.

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.

1. Community law

The **distinction** drawn in the questionnaire (cases a) to c) gives rise to the following observation:

There is no difference (**from the point of view of Community law**) [to be precise: there should be no difference; we shall see what the ECJ rules on this question] between cases a) and b).

Whether the error occurred only at the executive level or whether it has been caused by a general rule (act of parliament; regulation of an authority): in both cases the result is that there is an individual act that is contrary to Community law.

The primacy of Community law has not only to be observed by the courts, but also by administrative authorities.¹⁹ National law contrary to Community law must not be applied.²⁰

So, if the situation is one like in the *i-21 Germany* case, the national authority must not apply the general rule.²¹ If it does apply the domestic rule, the administrative act is contrary to Community law. The consequences in such a case should be the same as in group "a)".

I do not really see the difference between a situation described in c), compared to a) and b). In each case falling under a) or b) an authority infringes EC-law or does not give due consideration to the ECJ's case law.

The fact, that the reason of the incompatibility of an administrative decision with Community law lies in the **incompatibility of the applied domestic provision (group b)** (as the administrative authority failed to set aside the provision not in line with Community law), whereas in other cases the reason might lie in an **error in the implementation of a provision (group a and c)** that might be interpreted in conformity with Community law, is no sufficient reason to distinguish between those cases: according to the case law of the ECJ the national authorities and courts have to **set aside the domestic provision** that is in conflict with Community law. So, from the point of view of Community law, there is **no difference** between cases, where the administrative authority applied a general provision that is not in line with Community law, and cases, where the conflict with Community law only arises at the administrative level, as the authority applies the general provisions not in conformity with Community law.

¹⁹ ECJ case 103/88, *Fratelli Costanzo*, [1989] ECR 1839, § 30.

²⁰ ECJ case 106/77, *Simmenthal II*, [1978] ECR 629, § 17.

²¹ In *i-21 Germany* the question of Community law was not discussed in the administrative procedure, but was raised only in the proceedings before the Bundesverwaltungsgericht, moreover on its own motion. This fact, however, is of no specific influence, it does not matter, what caused the error in law.

Therefore, the situation described under b) does not require a specific solution from the point of view of the Community law.

Finally, there is no difference, whether the fact, that the final decision is not compatible with Community law, can be seen from a subsequent decision of the ECJ or it can be seen as there is an acte claire or éclairé (the administrative authority might not have given sufficient consideration to an earlier judgment of the ECJ, "group c)" in the questionnaire).

2. Domestic law

If one understands the question as aiming at the domestic legal system (at possible differences between the cases a to c in the domestic legal system), the answer for Austria would be:

There is no such distinction.

In particular, section **299 BAO**, that allows a new decision when the administrative decision is "wrong" (see the answers to question 1.), does not distinguish whether the conflict with Community law becomes evident because the ECJ subsequently decides in a similar case (on the "same" or "substantially the same" question, cf. the judgment ECJ 4 November 1997, case C-337/95, *Christian Dior*, ECR I-06013, paragraph 29) or the illegality turns out otherwise.

There is also no difference between cases in which the error occurred in the implementation of a general provision compatible with Community law and cases where the general provision that is the basis for the administrative act is incompatible with Community law (but not set aside by the administrative authority although it should have done so). In both cases section 299 BAO was applicable.

- 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?

No.

1.1. Decisions taken after a procedure according the **General Administrative Procedure Act:**

First of all it has to be recalled that the General Administrative Procedure Act so far does not explicitly provide for a revocation of a final decision in case that the decision proves to be contrary to Community law.

So there is no possibility to reopen the procedure even if it becomes clear that a question of Community law has been solved in the wrong way, unless the case-law of the ECJ requires otherwise. But as this is not the case so far (unless there is a specific situation like in State aid matters), there is no possibility at the moment to revoke decisions that have been taken in a procedure according to the General Administrative Procedure Act.

1.2. But if, for whatever reason, the ECJ in the future should come to the conclusion that there are situations in which the national authority is obliged to revoke a decision even if domestic law does not provide for it (a first hint in that direction can be seen in the judgment in case *i-21 Germany*), the question would have to be examined again. At present, according to the case-law of the Administrative Court the “*Kühne*-conditions” have to be met, if a party asks for a new decision. So, the party particularly would be obliged of having appealed against the decision. This can be seen from two judgments of the Administrative Court²² in which it repeats the *Kühne* conditions (or *Kühne* circumstances) and comes to the conclusion that “also Community law does not require to revoke the decision” as the applicant in both cases had not appealed against the decision at stake (interestingly, the Administrative Court in both judgments does not refer to the fact that according to the *Kühne* conditions the

²² Administrative Court 12. 9. 2006, 2003/03/0279, and 27. 3. 2007, 2007/21/0019.

revocation also depends on the domestic procedural law and did not examine, whether there was a possibility of revocation according to the applicable procedural law at all!).

Those judgments of the Administrative Court demonstrate that it is of the opinion that the different aspects of the facts in *Kühne* that are stressed by the ECJ as decisive really are “*conditions*”. As has been mentioned above (see the “Additional remark” in part b) of the answer to question 1), it could be derived from the judgment *i-21 Germany* that this might be a misunderstanding and there might be situations in which, although one of the “*conditions*” is not met, the national authority or court nevertheless could be obliged to revoke a final decision. So, the question seems to be open, but the judgment in *i-21 Germany* can be read as opening up the described possibility.

The judgments, moreover, indicate that the Administrative Court would be ready to apply Community law (as it has to be understood according to the case-law of the ECJ) directly, no matter what the applicable procedural law provides for, if the ECJ should change its case-law in *Kühne* and come to the conclusion, that there are situations in which the revocation is necessary even when domestic law does not provide for it (such a situation, indeed, exists in cases like the *Alcan* or *Lucchini* cases, where the recovery of illegally paid subsidies is at stake!).

2. Decisions taken in a procedure according the **Federal Tax Act**:

2.1. In the Federal Tax Act sections 299 and 300 provide for such a possibility. But they can be made use of irrespective the seizing of judicial remedies against the decision that became final.

3. So, as a result, one can say:

3.1. It is only possible to revoke a final decision contrary to Community law in procedures in which the Federal Tax Act or comparable provisions, esp. the LAOs of the Länder, are applicable.²³

3.2. Neither according to the Federal Tax Act nor according to the respective acts of the Länder (the LAOs) it is necessary to have launched an appeal against the decision that is to be revoked.

The reopening of the procedure and a new decision is – if it is possible at all - also possible with regard to **decisions of the first instance** that have become final (that had not been appealed against).

3.3. If, on the other hand, it should be necessary in the future - because of a modification of the case-law of the ECJ – to revoke decisions contrary to Community law that have been taken in a procedure where it is not provided for a withdrawal because of illegality at present in specific situations, it depended on this case-law whether the exhaustion of remedies is a prerequisite for the revocation (at the moment according to the "*Kühne*-conditions" this would be the case; but if the ECJ changes the conditions for specific situations, this could well also lead to the giving up of the exhaustion-of-remedies-condition; cf. the deliberations above, "Additional remark" under part b) of the answers to question 1).

4. There is also no distinction between cases where the applicant lodged an appeal against a last instance decision of the administrative authorities before the Independent Finance Senate or the Independent Administrative Panel of the Land (both can be roughly compared with administrative courts of first instance as they fulfil the criteria for a tribunal according to Art. 6 of the European Convention on Human Rights and Art. 234 EC; cf. the preliminary remark) or before the **Administrative Court** and such cases where the applicant did not do so.

²³ The same applies to the common organisation of markets; cf. the above mentioned section 103 of the Common organisation of markets Act 1985, now section 19 of the Common organisation of markets Act 2007.

Additional remark:

It has to be stressed, that – if one understands *Kühne* in the way that it defines “conditions” that have to be fulfilled that a national authority or court is obliged to revoke a decision that has become final - it is an important weakness of the case-law of the ECJ, that it might produce a considerable amount of pressure on national legislators to introduce such a precondition (at the moment the legal situation in Austria is more favourable to the tax payers as it had to be if one takes the "*Kühne*-conditions" literally; this might be the same in other Member States²⁴).

On the other hand, even without changes in the procedural law of the Member States the case-law of the ECJ will lead to a number of **unnecessary appeals** that would increase the **workload** of the courts in the Member States.

The ECJ at the moment forces the parties to exhaust all domestic remedies (up to the courts of last instance in the sense of Art. 234 paragraph 3 EC), no matter whether the appeals are well founded (according to national case-law) or not.

If there is a **settled case-law** in a Member State with respect to a specific question, there is **no point in appealing against decisions that are in line with this case-law**. This especially applies when the Supreme Administrative Court or the Constitutional Court of a Member State already has been involved and did not find it necessary to refer a question of interpretation of Community law to the ECJ (be it, that it did not see such a question or that it solved the question on its own as being an *acte claire* or *éclairé*). But the *Kühne*-conditions would require to appeal anyway. This could lead to a large number of appeals that otherwise would not be lodged.

²⁴ *Bauer*, Die Wiederaufnahme als Instrument der Durchsetzung des Gemeinschaftsrechts, in: Holoubek/Lang, Abgabenverfahrensrecht und Gemeinschaftsrecht, 2006, 273 (288).

So it should be thought of modifying the “*Kühne*-conditions” to some extent to prevent an avalanche of “cautious appeals” with a view to the possibility of future revocation of an administrative decision.

The requirement of appealing against a decision should not be seen as a necessary precondition for a revocation in cases where there is settled case-law in a Member State on a specific question. This would not lead to a different result in cases like in *i-21 Germany* and *Arcor*, as obviously those were the first cases – or at least one of the first cases - of their kind in the Member State; so there was no settled case law on the question; moreover, the reason for the subsequent success of the competitor of *i-21 Germany* and *Arcor* was not the incompatibility with Community law, but the incompatibility with domestic constitutional law; so, the Community law question was not at stake in the administrative proceedings of *i-21 Germany* and *Arcor*; but it has to be admitted, that this aspect leads to another tricky question, that is rightly addressed in the present Questionnaire under question 5: the “*Kempter*-question”, whether the applicant is obliged to have raised the question of Community law in the procedure that is to be reopened.

b) appeals against the decision to the court? Is it sufficient to appeal to the nation court of the first (lower) instance or is it necessary to exhaust all means of judicial review?

The answer again is: No.

See in detail the answer to a), especially item 4.

c) makes use of any other available legal means provided under national law? What kind of means (ombudsman, etc)?

It is not necessary to make use of such other means provided for by national law.

Additional remark:

Bearing in mind the case-law of the ECJ concerning the becoming final of decisions of *Community institutions* (the so called “*TWD-case-law*”²⁵) it has to be added that the same effect that was described in the additional remark under a) is provoked by this case law with regard to decisions of the Community institutions; if e.g. the Commission decides in a case concerning (possible) State aid, the parties of the case are obliged to appeal against the decision to prevent the binding effect of the decision in subsequent domestic proceedings.

5. As far as the admissibility of revocation of final administrative decisions contrary to Community law is concerned, does it matter whether a party (a person concerned) raises the question of the infringement of Community law in the course of administrative procedure or the proceedings before the national court? (issue raised in the Kempter case)

1. The answer is "no" with regard to the raising of the question of Community law **in the procedure that should be reopened.**

2. As has been demonstrated above, the revocation of final decisions because of a conflict with Community law more or less is only possible in matters where the **Federal Tax Act** or comparable provisions are applicable. For other procedures see below, 5.

For the application of those provisions it does not matter, whether the question of interpretation of Community law that has not been solved correctly has been brought up during the proceedings by the party or not. So it is also of no importance, whether a question of Community law has been raised by the party during the administrative procedure (that should be reopened or in which the decision is to be withdrawn).

3. The question of raising a plea with regard to Community law, nevertheless, might also arise in the **revocation procedure** (as can also

²⁵ Case C-188/92, *TWD Textilwerke Deggendorf GmbH*, [1994] ECR I-833, 30. 1. 1997, case C-178/95, *Wiljo*, [1997] ECR I-00585, and 8. 3. 2007, C-441/05, *Roquette Frères*.

be seen from the facts in *i-21 Germany*). Here the answer is not so easy, as there is no case-law of the Administrative Court on this question so far.

There can be distinguished the following different possibilities (in the Austrian legal system, where in tax matters the party first has to appeal to the Independent Finance Senate; for the present purpose for reasons of simplification it is always assumed that the Independent Finance Senate in each case shares the view of the administrative authority and therefore the Administrative Court more or less has to decide on the legal opinion of the administrative authority, it is clear, that the number of different groups rises, when one takes into account, that in the procedure before the Independent Finance Senate the applicant in one case can rely on Community law, in another he could rely only on domestic law):

Group 1) ("administrative level")

- a) The applicant has not relied on Community law in the procedure that ended in the issuing of a final decision.
- b) He applies for a revocation, again relying only on domestic law (this seems to have been the case also in the main proceedings of the case *i-21 Germany*).

Group 2) (appeal to the Independent Finance Senate and the Administrative Court)

- a) The applicant has not relied on Community law in the procedure that ended in the issuing of a final decision.
- b) He applies for a revocation, now relying also (or only) on Community law. The administrative authority rejects the application.
- c) The Independent Finance Senate rejects the appeal of the tax payer; the tax payer lodges an appeal before the Administrative Court.
- d) In the appeal before the Administrative Court the applicant does not rely on Community law.

Group 3) (appeal to the Independent Finance Senate and the Administrative Court)

- a) The applicant has not relied on Community law in the procedure that ended in the issuing of a final decision.
- b) He applies for a revocation, again relying only on domestic law. The administrative authority rejects the application.
- c) The Independent Finance Senate rejects the appeal of the tax payer; the tax payer lodges an appeal before the Administrative Court.
- d) In his appeal before the Administrative Court the applicant raises only issues of domestic law.

Group 4)

- a) The applicant has not relied on Community law in the procedure that ended in the issuing of a final decision.
- b) He applies for a revocation, again relying only on domestic law. The administrative authority rejects the application.
- c) The Independent Finance Senate rejects the appeal of the tax payer; the tax payer lodges an appeal before the Administrative Court.
- d) In his appeal before the Administrative Court the applicant raises not only issues of domestic law, but also of Community law.

Moreover, there can be different situations with regard to the "application of Community law": it might be possible, that there was a "completely different" issue (based on Community law), that would also require to revoke the decision, but this "issue" has got nothing to do with the submission of the tax payer.

Example:

The tax payer relies on a domestic provision on the deduction of expenditures; the authority denies the deduction for a "mere domestic reason". The tax payer later on is of the opinion, that the solution of the authority was wrong as could be seen by some judgments of the Administrative court. The interpretation of the tax payer, though, is based on a misinterpretation of the judgments; they pertain to cases that are not comparable with his situation.

But there is another legal question with regard to the fixing of the tax in his case, he has not thought of so far, that has nothing to do with the question of deduction of expenditures.

Or, on the other hand, there could be a problem of Community law linked to the domestic provision, the tax payer is relying on:

Example:

The tax payer relies on a domestic provision on the deduction of expenditures; the authority denies the deduction for a "mere domestic reason" (e.g.: there is an exemption clause for the deduction applicable in the case of the very tax-payer).

Later on it turns out that the Administrative court does not share the opinion of the tax authority completely. The tax payer applies for a revocation (section 299 BAO). The authority still is of the opinion, that in his case the exemption rule is applicable and the case law of the Administrative court only pertains to other circumstances.

Moreover, there - now - arise doubts whether the application of the provision is in line with Community law as the facts have cross-border aspects and the freedom to provide services could be infringed when the deduction is not granted.

Here, the Community aspect is closely linked to the (originally "merely domestic") question of the application of a deduction provision or the exemption of it. From the point of view of Community law, there might be no difference in the solution. From the point of view of domestic law there could be a difference with regard to the "Beschwerdepunkt", which has to be explained in the following and in the answer to question 6.

So, there could also be construed "sub-groups"; in the following it is only distinguished between "has relied on Community law" or "has not relied on Community law", without the sub-division mentioned.

ad group 1):

If somebody applies for a revocation, but does not rely on Community law, there arises the question whether the (tax) **authority** has to apply Community law ex officio. If the withdrawal of a final decision according to section 299 Federal Tax Code is at stake, there is no problem at the level of the administrative procedure (the tax procedure), as the tax authority on the one hand was entitled to apply Community law ex officio, but it is, on the other hand, not obliged to apply it on its own motion (in a court procedure on the decision on the application the Administrative Court will not be able to qualify the decision as being illegal because the authority had not applied Community law, when the party did not rely on it).

ad groups 2) and 3):

The situation, however, is different in the procedure before the **Administrative Court**: the Administrative Court has to decide only on the breach of those rights in *which the applicant claims* to be infringed (Section 41 of the Code on the Administrative Court, concept of the "Beschwerdepunkt"; the "Beschwerdepunkt" is the right that the applicant claims to be infringed in). See the answer to question 6: so far it was assumed, that Community law required to set aside the relevant domestic provision; the judgment in the case *van der Weerd* could lead to a new approach.

According to the opinion the Administrative Court followed so far, it would take into account Community law anyway, no matter whether the applicant relied on it in the appeal or not. It would not matter, moreover, whether the applicant had relied on Community law in the administrative proceedings.

But this, as is also described in the answer to question 6, maybe can be seen differently after the judgment in case *van der Weerd*.

Following such a new approach the solution could be the following:

If the concept of the "Beschwerdepunkt" could also be applied with regard to Community law, in a case like the one described under "2)" it was a matter of interpretation of the "right" that according to the applicant has been infringed, whether the Administrative Court in a procedure concerning the denial of a withdrawal of a decision has to apply Community law on its own motion.

If the applicant in a procedure before the Austrian Administrative Court did not rely on Community law although he had raised an issue of Community law before the administrative authority, the Administrative Court strictly speaking neither according to domestic law, nor according to Community law was obliged to examine, whether the revocation would have been necessary with regard to the Community law issue (ECJ 6. July 2007, joined cases C-222/05 to C-225/05, *van der Weerd* and others; see the answer to Question 6 a). But it has to be added, that the concept of the "Beschwerdepunkt" has its weaknesses insofar, as it indeed is open to different interpretations and especially to the "inventiveness" or "skill" of the parties: in the situation discussed here it would be sufficient, that the applicant claims to be infringed in the "right of revocation when the legal conditions for it are met"; in this case the Administrative Court was obliged to examine all grounds for the revocation, especially such derived from Community law. In a case, where the Community issue has been raised (already) in the administrative procedure (this would be the case in group 3), the Court will be in the situation to take into account also this issue. But there might, of course, be situations, where the Administrative Court is not aware of the fact, that there might be problems also with regard to Community law.

So, also in group 3 the situation can be seen as following: It will depend on the skill to describe the "Beschwerdepunkt", whether the Administrative court is obliged to take into account also Community law.

Moreover, it has to be assumed, that in general it would not matter, that the applicant had not relied on Community law in the procedure before the tax authority. But, as has been pointed out in the answer ad 1) (answer to group 1), it is doubtful whether the decision of the tax authority could be

qualified as being illegal because the authority had not applied Community law, when the party did not rely on it: the examination of the exercise of the discretionary power by the authority normally will not lead to the result, that the authority has exercised its discretionary power against the law, when it sufficiently considered all the submissions of the applicant, not being aware of an issue of Community law. As the case *van der Weerd* shows, such an interpretation would also be in line with the opinion of the ECJ.

ad group 4)

The answer has to be the same as in group 2). The exercise of the discretionary power is not illegal, when the authority dealt with the submissions of the party and gave reasons, why it is not necessary to revoke the decision on the grounds given by the party. It cannot be seen as being obliged to take into account further aspects of the case, especially such that would lead to questions of Community law.

4. In general (not specifically for the Austrian legal system), one could say:

As the ECJ in its judgment 6. July 2007, joined cases C-222/05 to C-225/05, *van der Weerd* and others, has decided, that an administrative court need not necessarily apply Community law ex officio (if the principle of equivalence is observed), it would not be necessary to revoke a final decision on the ground of a breach of Community law although the applicant had not raised the question of Community law in its appeal for revocation.

5. Moreover, for the Austrian legal system for procedures not governed by the Federal Tax Act there has to be added the following:

In the procedure according to the **General Administrative Procedure Act** there is an obligation for the parties that are opposing the application (e.g. the neighbours of a plant for which a licence is to be issued) to present their pleas before or in the oral hearing (if such a hearing is held). Parties that did not present their objections in time are precluded from relying on those rights they did not claim in time in the later proceedings (they even

lose their capacity as parties to the case when they did not submit any objection).

At the moment, there is no possibility to revoke final decisions that have been taken in a procedure according to the General Administrative Procedure Act just because the decision proves to be illegal (esp. as being contrary to Community law).

But should the case-law of the ECJ in future so require (when the case-law should develop beyond *Kühne*), there would arise the necessity to revoke decisions even in the case where the national procedural law did not provide for such a possibility (in direct application of Community law). Then in the Austrian legal system **would also arise the question**, whether the described procedural consequences (the "preclusion" in case the party did not submit objections) were still applicable (in the sense, that a party to the case, that was precluded, later on could not rely on the fact, that according to a judgment of the ECJ the licence was granted illegally).

In other words: whether the applicant for the revocation could plead for the revocation, although he had not submitted objections with regard to Community law in time (in the procedure that ended with the decision that should be revoked).

There could be good reasons to apply the institute of preclusion also in such cases, as well as good reasons that this was not the case: if the fact, that a party to the case could have relied on a Community provision is only revealed by the judgment of the ECJ, then it was practically impossible for the party to raise the plea at the time the oral hearing was held; on the other hand, strictly speaking, a judgment of the ECJ only clarifies the legal situation as it always had been from the beginning of the entering into force of the relevant Community law provision; so the judgment of the ECJ only clarifies the legal situation as it had been at the time when the oral hearing was held. So, according to the domestic law one could argue, that this party (that was precluded) is also precluded with respect to rights derived from Community law (even when it became clear that these rights exist only from a subsequent decision of the ECJ).

Perhaps it would be necessary to distinguish between cases where there already was a case-law of the Administrative Court or not. If there was such case-law according to which the claim would have been rejected, one could argue, that it was not necessary to raise an objection and afterwards lodge an appeal (as one could foresee that the objection and the appeal would be rejected).

In other cases, it could be seen as necessary to raise the plea on which there had not been a decision of the Administrative Court so far, to avoid being precluded.

This distinction, however, has not yet been drawn in the case-law of the ECJ (in *Kühne*, the ECJ stresses the fact, that the applicant had appealed against the decision, in *i-21 Germany* the ECJ had to examine a case, in which the applicant had not appealed against the decision and answered the question, whether the German provision on the revocation should be applied according to Community law, as the German law provided for such a revocation under specific circumstances, no matter whether the applicant had appealed against the decision or not; so, the problem of the distinction between the seizing of remedies in cases where it is hopeless according to the case-law of the domestic courts and the seizing of remedies in questions, where the chances cannot be judged in advance (as there is no case-law on the question or the decisions of the courts are not uniform), has not been brought before the ECJ so far).

To come back to the question of preclusion in the Austrian law:

As domestic law alone will not be decisive in the cases discussed here (the necessity of the revocation depends on the giving up of the Kühne-conditions; when the ECJ gives up the strict "*Kühne*-conditions" at least with respect to the necessity of a procedural rule in domestic law that provides for the revocation), it will depend on the opinion of the ECJ - whether it indicates, how far the obligation to set aside a final decision goes -, whether the preclusion in such cases will be applicable or not.

Those deliberations might become practical in cases where there is granted a license without carrying out an Environmental Impact Assessment, although there should have been one, or in cases with respect to the application of the Flora-Fauna-Habitat-Directive, 92/43/EC, or the Bird Directive, 79/409/EC.

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

a) on request of the parties only?

No. So far it is common opinion that the Administrative Court also has to take into account Community law, even if the parties do not rely on it.

According to the case-law of the ECJ (especially in the case *Peterbroeck*, 14. 12. 1995, case C-312/93, [1995] ECR I-4599) it was common opinion among Austrian lawyers as well as the courts, that the relevant domestic provisions that would have allowed to take into account only those rights that had been claimed by the party were inapplicable (cf. *Steiner*, Beschwerdepunkte und Beschwerdegründe unter Berücksichtigung gemeinschaftsrechtlicher Einflüsse, in: Holoubek/Lang (ed.), *Das verwaltungsgerichtliche Verfahren in Steuersachen*, 2000, 61 [72]).

The judgment in the case *van der Weerd* will make it **necessary to re-examine** the question. There has not been an explicit decision of the Administrative Court on this question so far (after the *van der Weerd* judgment). It could be that the Administrative Court now (again) applies the restrictive provisions (especially section 41 of the Code on the Administrative Court, "Beschwerdepunkt") also with regard to Community law.

As has been already described in the answers to question 5, it depends on the interpretation of section 41 Code on the Administrative Court and the application of the concept of the "Beschwerdepunkt", whether the Administrative Court (even if the judgement in case *van der Weerd* indeed

can be seen as a turning point in the case-law of the ECJ that enables the application of section 41 Code on the Administrative Court) had to apply Community law or not. Moreover, as can be seen from the examples given in the answers to question 5, there might be different situations in which the solution has to be different (in some cases the necessity to apply Community law will arise, in others this will not be the case).

Therefore, as far as the illegality of a final decision with regard to Community law is at stake, the application of the domestic procedural law together with the *van der Weerd* criterion could lead to the dismissal of the appeal against the administrative decision on the claim; the Administrative Court according to *van der Weerd* does not seem to be obliged to take into account the possibility of a conflict with Community law as the basis of the illegality of the final decision that were to be revoked if the party in its application only relied on domestic law.

It has to be added, though, that from a practical point of view, the applicant is not precluded from lodging another application for revocation after the first attempt for revocation has failed (if he relied only on domestic law in the first procedure). There is no restriction on the lodging of a new appeal, relying on new reasons , unless there is a time limit that might have expired (this is the case in the Federal Tax Act; section 302; the application has to be lodged within the period of prescription).

b) on its own motion (ex officio)?

See answer to 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?

Cf. the preliminary remark.

In tax matters, the Independent Finance Senate as a kind of first instance of the administrative judiciary, has the possibility to withdraw a decision

that it had issued itself if this decision is appealed against before the Administrative Court (section 300 Federal Tax Act).

On the other hand, the Independent Finance Senate is competent to decide on appeals against decisions of the tax authorities on applications for revocation under section 299 of the Federal Tax Act (cf. the examples in the answer to question 5). In this context it is decisive, under which conditions the decision of the tax authority according to section 299 Federal Tax Act is legal. As has been pointed out, the authority has some discretion. But on the other hand, it has to give reasons for the exercising of the discretion. As a result, one could see the decision as a decision where the authority is bound by law (cf. the description of the German legal system according to § 48 VwVfG in *i-21 Germany*, § 14: discretion can be "reduced to such a degree that it [i.e. the authority] had no choice other than to withdraw").

But there is no great difference with regard to the application of Community law on the level of the Independent Finance Senate and in the procedure before the Administrative Court. Whereas the Administrative Court so far would have applied Community law ex officio according to the general opinion that Community law so required, the Independent Finance Senate is entitled to apply Community law by domestic law (section 289 para 2 Federal Tax Act). Both, however, can only apply Community law ex officio (when the party does not rely on it), if there are obvious hints that there might be a conflict with Community law. If - as has been indicated above - in the future the Administrative Court should be of the opinion, that it was not necessary to apply Community law ex officio, the difference therefore would not be so great (as there will not be many cases, in which the Court could detect a breach of Community law that has not been raised by the party²⁶).

²⁶ Cf., nevertheless, Administrative Court, 29. 1. 2004, case n° 99/17/0135, in which the Administrative Court quashed an administrative act because of a breach of the principle of non-discrimination. This aspect was dealt with by the Court on its own motion (cf. 1.7. in the judgment, a copy is enclosed).

On the other hand, also the Independent Finance Senate would need a hint that - beyond what the party has claimed - there was an illegality with regard to Community law. Of course, such a hint could also be the judgment of the ECJ, that is issued after the party has lodged the appeal.

So, formally, there can be seen a slight difference between the procedure before the Independent Finance Senate and the Administrative Court, if one assumes, that the Administrative Court no longer must abstain from applying section 41 Code on the Administrative Court. In this case the application of Community law in the procedure before the Administrative Court would depend on the relying on it by the party, whereas this is not the case before the Independent Finance Senate.

8. When an administrative decision, which has become final as a result of a judgment of a national court, turned out to be contrary to EC law, is it appropriate:

**a) to revoke the administrative decision (as in the *Kühne* case), or
b) to reopen the judicial proceedings?**

If the question aims at the legal situation in Austria (“appropriate” in the sense of: legally necessary) the answer is a).

If the question aims at an opinion on the proper solution in such situations in general (“appropriate” in the sense “useful” or “economical with regard to the procedure”) the question to my mind should also be a), when – as it is the case in Austria - the court has only the power to quash an act (instead of deciding on the merits of the case).

The answer depends on the relation between the courts and the administrative authorities and the different instances of the court procedure as well as the competencies of the courts. If a court can only annul the contested act, there will be no need to revoke the court decision. If a court can decide on the merits of a case and the relevant legal basis for a concrete case lies in the decision of the court, then it is necessary to revoke the court's decision.

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 [administrative] courts?**

1. Binding effect of decisions of administrative courts

If the question aims at the **binding effect of decisions of the administrative courts** the answer is "yes".

There is no hint that the ECJ distinguishes between the decisions of civil courts and administrative courts. If the first have binding effect the same has to apply for the latter.

2. Binding effect of decisions of civil courts

a) If the question – as the explanation concerning question 9 in the e-mail from 17. September 2007 indicates – aims at the **binding effect of decisions of civil courts for proceedings before the administrative courts**, then the following has to be kept in mind:

The binding effect of decisions of civil courts for administrative authorities and administrative courts might be a problem in the legal system of a member state (in the sense that it could be doubtful **whether there is such an effect at all** or whether such an effect is compatible with the Constitution).

The principle of separation of powers, however, is no reason to deny the binding effect of decisions of civil courts for administrative authorities and administrative courts (it is, in fact, a reason to assume that there has to be binding effect of such decisions as otherwise the other power could interfere with the area that falls into the realm of the civil courts).

b) With regard to the compatibility of the legal situation in a Member State concerning the a binding effect of civil court decisions for the administrative procedure with Community law the situation seems to be as following:

b.1) If, according to domestic law, there is **no such binding effect**, there is **no problem** with regard to Community law (neither in the sense as it is discussed here with regard to the *Kühne*-case-law, nor in the sense that there might be doubts as to the conformity of domestic law with the principle of effective court protection; as long as the decision of the administrative authority can be appealed against before (another) court, it would not matter that the ("first") decision of the civil court had no binding effect (moreover, even if there is binding effect, there is the problem whether the binding effect of a decision should be or can be extended to persons not having been parties to the case that has been decided by the civil court; so, Community law also in this respect should not be seen as requiring "strict" binding effect of decisions of civil courts; this does not mean, that there cannot be cases where there is no obstacle to assume, that the binding effect also comprises third parties: in cases in which the decision of the court does not interfere with the rights of third parties, like a decision between two parties quarrelling over the property rights, there is no obstacle to assume that the decision is binding also the others).

b.2) A **problem** with regard to Community law (as it is at stake here with regard to the "*Kühne*-case-law") can only arise **when the decisions of civil courts have binding effect** and such a decision is contrary to Community law.

But there is no reason to assume that the ECJ would solve the question differently if the binding effect does not pertain to (the same or another) procedure before the same or another civil court but to a procedure before an administrative authority or an administrative court.

Therefore, as a result, it seems to be **compatible with Community law**, even if there was such a **binding effect of decisions of civil courts also for administrative authorities and administrative courts** (as is the case in Austria, roughly speaking; the details with respect to the scope of the

binding effect, especially concerning the parties that are bound by a court decision, are discussed).

The principle of effective court protection in this case, however, seems to require the restriction of this binding effect to those persons, whose rights might be infringed by the decision, that had the opportunity to take part in the procedure.

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?**

The answer is: a),

if one takes *Kühne* literally; in the following judgments the condition of exhaustion of remedies sometimes was not fulfilled. As the ECJ in *i-21 Germany* did not just repeat the *Kühne*-conditions but examined, whether there was an obligation to revoke the decision although the *Kühne* conditions were not met, one cannot be sure whether it really meant, that all of them still are valid in any situation.

So, one cannot say, if the last word has already been spoken.

But it certainly does not mean b). Which exceptions to the autonomy with regard to the legal force of decisions and their binding effect there are, has to be clarified in the case-law of the ECJ to come.

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)

As – according to the ECJ – Community law does not require to introduce a right of revocation of final decisions contrary to Community law (there is **no necessity to provide for such a right**) the domestic legal situation, **even in the case of the General Administrative Procedure Act** (that does not provide for a possibility to annul or amend acts that have become final just because they are illegal), is in accordance with Community law: there is no difference between rights derived from domestic law alone and rights derived from Community law. On the other hand, the principle of effectiveness cannot be infringed as long as there is no significant deviation from the national legal systems that had to be examined by the ECJ in the *Kühne* and the *i-21 Germany* cases. As there do not exist such differences to the aforementioned legal systems, the Austrian legal system in this respect also seems to observe the principle of effectiveness.

Interestingly, the situation could be seen otherwise in the case of the Federal Tax Act:

As has been shown above, in tax matters the conflict with Community law is treated differently as other conflicts with law.

There are different time limits (longer in the case of a conflict with Community law).

There could be raised the question, whether this is in conformity with Community law, in particular the principle of equivalence.

In this respect it has to be observed the following:

The principle of equivalence according to the ECJ "requires that all the rules applicable to appeals, including the prescribed time-limits, apply without distinction to appeals on the ground of infringement of Community law and to appeals on the ground of disregard of national law" (ECJ, C-392/04, *i21 Germany*, paragraph 62).²⁷

²⁷ In the case *i21* the ECJ concluded, that it followed from the principle that, if the national rules applicable to appeals impose an obligation to withdraw an administrative act that

In the case of a reopening of the procedure with a view to issue a new act that is not in favour of the party, there is no "application on the ground of an infringement of Community law", but there is a procedural rule that expressively distinguishes between the reopening on the ground of a breach of domestic law and on the ground of a breach of Community law. The contents of the principle of equivalence normally is described in the way that it required that the "procedural rules governing actions for safeguarding rights which individuals derive from Community law" must not be "less favourable than those governing similar domestic actions".²⁸ It therefore has to be clarified how the principle of equivalence is to be understood in a case where the authority wants to issue a new act to maintain Community law. Is it sufficient, that the time-limit is applied in cases where the reopening of the procedure results in an advantage of the applicant as well as in cases where the new decision would be detrimental to the party or is it decisive that the time-limit for the revocation on the ground of an infringement of domestic law is not the same as the time-limit for the revocation on the ground of an infringement of Community law?

*Ehrke*²⁹ is of the opinion, that the provision is compatible with Community law as it secures the issuing of an act that is in line with Community law.

But this need not necessarily be the case:

is unlawful under domestic law, even though that act has become final, where to uphold that act would be 'outright intolerable', the same obligation to withdraw must exist under equivalent conditions in the case of an administrative act which does not comply with Community law.

²⁸ ECJ 7. 6. 2007, Joined Cases C-222/04 to 225/04, *van der Weerd*, paragraph 28.

²⁹ *Ehrke-Rabel*, Äquivalenzgebot und Abgabenverfahrensrecht, in: Holoubek/Lang (ed.), *Abgabenverfahrensrecht und Gemeinschaftsrecht*, 2006, 129 [138], comes to the conclusion that the provision is in line with Community law, as it serves the implementation of Community law. As it is explained here, this view seems to lay too much stress on the fact of implementing substantive Community law. As the principle of legal certainty also belongs to Community law (moreover, it belongs to primary Community law) the view of *Ehrke* cannot be shared.

As a **consequence of the different time-limits** in the BAO, the principle of **legal certainty** is observed **more strictly in cases of an infringement of national law** than in cases of an infringement of Community law.

Although one could assume that such a provision was justified with respect to Art. 10 EC and the obligation to maintain the effectiveness of Community law, as it secures the primacy of Community law, there has to be borne in mind the following:

In *i-21 Germany* the ECJ raised the question "as to whether the concept of manifest unlawfulness was applied in an equivalent manner"

(paragraph 68). So, the main question with regard to the application of procedural rules of the Member States is, whether they are applied in an equivalent manner. **The fact, that the application of the national rule in one case might help to maintain (substantive) Community law, is not decisive.** Also in the case of § 48 VwVfG the application of the provision either leads to the fact that the final decision (that is contrary to Community law) stands as it is or that it is revoked. **Community law only requires that the solution in similar cases is the same as in cases governed by domestic law alone.**

When the principle of equivalence requires that the safeguarding of rights derived from Community law has to follow procedural rules that are not less favourable than those governing similar domestic actions it seems to be appropriate, that the possibilities of the administration to revoke decisions that have been taken only under the same circumstances as those that enable the authority to revoke a decision in a "domestic case". Moreover, if the principle of legal certainty is a principle of Community law, the principle of equivalence should also require, that the safeguarding of this principle as a principle of Community law follows the same provisions than the safeguarding of the same principle as part of the domestic law.

In the case of the time-limits according to section 302 BAO this could be seen in the following way:

Section 302 BAO leads to a **weaker legal position of the tax payer in cases of a breach of Community law** than in the case of a breach of

domestic law. Moreover, it is not necessarily so, that primacy of Community law requires the application of **substantive** Community law, no matter how the procedural situation is.³⁰ In the judgment in case *van der Weerd* the ECJ accepted that a court takes into account Community law on its own motion only in those cases that can be compared to the cases in which national law is esteemed as of such a nature as to be taken into account on the own motion of the court. In other words: it is not necessary to assume, that substantive Community law has to be taken into account anyway, no matter how the domestic procedural law provides for it. But, this being so, it cannot be assumed, that on the other hand it would be possible to issue procedural rules that would enable the authorities or courts to take into account Community law vis-à-vis the citizen more easily than it would be the case in domestic matters. This seems to apply also with regard to the time-limits discussed here.

It follows from the recent case-law of the court (*Kühne* and others as well as *TWD* and *Roquette Frères*, 8. 3. 2007, case C-441/05) that **Community law** has to be seen **as a whole**. The **principle of legal certainty is also part of Community law**. Therefore, primacy of Community law is not observed, when decisions of the authorities of the Member States are taken in breach of this principle. It follows, that the case-law discussed here, also clarifies the obligation of the authorities and Courts of the Member States under Art. 10 EC: the principle of equivalence cannot be seen differently, when the distinction made leads to the implementation of substantive Community law.

Taking into account those deliberations, the principle of equivalence in the present context seems to require a uniform rule for time-limits for the withdrawal of final decisions in tax matters that does not distinguish

³⁰ ECJ 7.6.2007, joined cases C-422 to C-425/05, *van der Weerd*, paragraph 28 et sequ.

whether the reason for the illegality of the act to be withdrawn lies in the national law or in Community law.³¹

Therefore³², it can be assumed, that section 302 BAO in this respect (with regard to the longer time limit also in cases where the withdrawal and issuing of a new decision leads to a disadvantage of the tax payer) is not compatible with Community law.

When the authority is limited to a shorted time limit in cases of a breach of domestic law, it is not an equivalent provision when the authority can revoke decisions within a longer period when Community law is at stake.

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?**

Here it has to be referred to the answers above. At the moment there seems to be no need to interpret the Austrian legal system in compliance with Community law with respect to the necessity to revoke decisions.

There is only the possible conflict with regard to the time limit in section 302 Federal Tax Act (see above, answer to question 11).

³¹ *Bauer*, in: Holoubek/Lang, Abgabenverfahrensrecht und Gemeinschaftsrecht, 289, comes to the conclusion, that Community law has precedence over domestic law, when situations governed by Community law are discriminated against.

³² Against *Ehrke*, in: Holoubek/Lang (ed.), Abgabenverfahrensrecht und Gemeinschaftsrecht, 2006, 129 [138].

There are many examples of interpretation of national law in conformity with EC law, but they do not pertain to the revocation of final decisions.

13. Do the provisions of national law prescribe any time limit for submitting a motion to revoke a final administrative decision or reopen the judicial proceedings when the contested decision or the judgment is contrary to Community law? Do you think that the fourth prerequisite for the revocation of final administrative decisions set in the Kühne case - that the person concerned files a complaint to a administrative body immediately after becoming aware of the judgment of the ECJ - should have general application? (this issue has been raised in the Kempter case).

a) See above, answer to question 1, Federal Tax Act, section 302.

b) There are no objections against such a prerequisite, if the time-limit runs from the day the party was informed of the judgment. The problem will be, how to administer this condition. Has the authority to prove, when the applicant got to know of the judgment? If it is sufficient, that the applicant indicates the date when he became aware, there are no problems from the point of view of legal protection. If there should be introduced a kind of objection criterion, there might be difficulties. But it would be reasonable, to limit the possibility to lodge appeals in cases, where it becomes obvious that decisions of national authorities were not in conformity with Community law.

14. What is the relationship (if any) under your nation 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?

Especially:

a) are there any formal links between the two types of proceedings?

No.

b) which national court is empowered to decide on state liability cases?

The Supreme Civil Court; if the damage arises from a judgment of the Supreme Civil Court or the Administrative Court it is the Constitutional 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)?

As there is the obligation to minimise the damage suffered, in many cases there is no choice, but in it will be necessary to lodge the application for revocation first, as otherwise the claim might not be accepted.

If the damage cannot be reduced by revoking the final decision, then it is not necessary to revoke it and the party will only lodge an appeal concerning state liability.

On the other hand, as there are specific conditions that have to be fulfilled for state liability that need not be fulfilled for the revocation of an administrative decision (i.a: the breach must be sufficiently serious; ECJ C-224/01, *Köbler*, § 51), there will be many cases in which there is no room for state liability, nevertheless the act could be revoked.

d) can the two types of proceedings be undertaken concurrently?

See the answer to c).

In many cases they will have to be undertaken concurrently.

- 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.**

There are no issues of interest going beyond what has been said in answering the foregoing questions, at the moment.