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

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

The Supreme Administrative Court of Poland

Warsaw 2008

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Questionnaire

Q.1 Are there any procedural means under your national law which allow a final administrative decision to be revoked, if it turns out to be contrary to Community law? Please describe briefly the relevant provisions and national case-law:
a) do the legal provisions have general application or they relate specifically to the application of EC law?
b) which authority (administrative body or national court) is empowered under your legal system to make use of the procedural means in question?

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

A. It is within the discretionary powers of the administrative organs to revoke a final administrative decision if it turns out to be contrary to Community law. As a general rule an administrative act can be revoked within limits described below, so long as such an act does not possess the strength of *res judicata.*

Jurisdiction to try recourses is vested in the Supreme Court by virtue of Article 146.1 of our Constitution which reads as follows:

"1. The Supreme Constitutional Court shall have "exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in an abuse of powers vested in such organ or authority or person."

Article 146 therefore may be invoked by a party whose existing legitimate interest has been adversely and directly affected by an act of revocation. Under

recourse each act of revocation is judged on its own merits with reference to general principles of administrative law governing revocation.
It should be noted here that a recourse under Article 146 of our Constitution must be filed within 75 days as prescribed by paragraph 3 of such Article otherwise it will be time – barred

General principles of administrative Law such as those of lawfulness, disregard of the rules of natural justice, misconception of law or facts , non discrimination etc belong to the core of principles in our administrative law. These general principles are constitutionally guaranteed and they are also laid down in the Law 158(I) of 1999 (General Principles of Administrative Law) .

It is a cardinal principle of administrative law that an administrative act validly made generally cannot be revoked. However there are exceptions to this principle.

For instance, revocation of an earlier administrative act, may be provided by legislation. (There are certain laws with explicit provision expressly governing and regulating the question of revocation.)

In cases where there is no explicit provision governing and regulating the question of revocation, the power to revoke will depend primarily on the nature of the act whether it is a lawful or an unlawful administrative act.

Where lawful administrative acts have given rights to a subject, these rights cannot be revoked.

However, unlawful administrative acts, through which a favourable situation has been created for the subject, may be revoked only if the revocation takes place within reasonable time.

In other words the revocation of an unlawful administrative act is not permissible after the lapse of a reasonable time unless the unlawful administrative act has been caused by fraudulent or deceptive conduct of the person concerned.

Should the invalidity of an administrative action be of such nature however as to require revocation on the grounds of public interest, such action can be revoked at any time. (***Zittis v. Republic (2000) 3 C.L.R. 198 and G.C.C. Laundries Ltd v. Republic (2002) 3 C.L.R. 849***). However the duty of the revoking authority is to state clearly the reasons which justify the public interest with reference to the relevant facts, so that the Administrative Court be in a position to review the decision. The matter is also regulated by law (Section 54 of the General Principles of Administrative Law of 1999, (Law 158(1)/99).

As stated above, Article 146.5 of the Constitution imposes a specific duty upon authorities of the State to comply with judgments and orders of the Court in the exercise of their administrative activity.
The constitutional duty under Article 146.5 is an obligation by the administrative authority to restore the situation which existed prior to a judicially annulled decision.

The aforesaid general provisions of revocation apply also where the act of the administration is contrary to European Law.

Q.2 Do national provisions concerning the revocation of final administrative decision by administrative body:
a) grant discretionary powers to decide the matter; or
b)provide the obligation to revoke a decision under certain conditions?

A. Public administrave authorities are vested with discretionary powers to decide matters within their administrative sphere of activity. Thus they may provide or refuse certain benefits to citizens but also they may impose restrictions or interfere with certain private rights that normally enjoy legal protection such as property or privacy.

However administrative activity is governed by the rule of law. Public authorities must act in accordance with the law, including respect of fundamental rights of individuals both substantive and procedural.

Expectation in general requires protection where the party whose position will be affected by an act of revocation, has used the benefits granted or has made some disposition of them affecting his resources which he either cannot reverse or can reverse only by incurring unreasonable disadvantages. However there can be no reliance on expectation where he, she

- has secured the administrative measure by intentional deception, threats or corrupt practices;
- has secured the administrative measure by giving information which was incorrect or incomplete in a material respect;
- knew, or did not know as a result of gross negligence, that the administrative measure was unlawful.

In the circumstances referred to above, the administrative measure **shall** in general be revoked with retroactive effect.

Although the Community legal order cannot preclude national legislation which provides that the principles of the protection of legitimate expectations and legal certainty are to be observed with regard to the administrative decisions including matters of revocation and recovery, nevertheless, in view of the mandatory nature of the supervision of State aid by the Commission under ex-Article 93 of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that Article.

The competent administrative authority is in those circumstances under an obligation to revoke, in accordance with a final, binding decision of the European Commission ordering recovery, even if the administrative authority itself is responsible for the illegality of the aid decision to such a degree that revocation appears to be in a breach of good faith towards the recipient.

Undertakings receiving aid cannot have a legitimate expectation as to the lawfulness of the aid unless it has been granted in compliance with the procedure laid down in Article 88 (ex-article 93) of the Treaty.

Community law requires therefore our national authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient.

Where State aid is found to be incompatible with the common market, the role of our national authorities is, merely to give effect to the Commission's decision.

The administrative authorities do not, therefore, have any discretion as regards revocation of a decision granting state aid.

In view of a recent amendment of our Constitution by Law 127(1)/2006, is made now clear that Community Law, and Regulations, prevail to our national Laws.

Q.3 Does the possibility (or obligation) of revocation of final administrative decisions depend on the reason of its incompatibility with EC law? Please consider the following cases:
a) in the light of the ECJ's subsequent judgment, an administrative decision turned out to be incompatible with EC law or based on the misinterpretation of EC law (as in the Kühne&Heitz and Kempter case);
b) the provisions of national law which provided the legal basis of a contested decision were incompatible with EC law (as in the i-21 Germany case);
c) an administrative decision infringed EC law or was issued without giving due consideration to the ECJ's case law.

A. Administrative authorities in Cyprus are not under an obligation to revoke final administrative decisions in cases in which a measure has been subject of an action of annulment and it has been considered valid. However they may revoke a measure that has been held to be valid by a court judgement since they do have the power to come back to their previously adopted decisions.
According to case-law, the administrative authority has discretion in principle, pursuant the General Principles of Administrative Law, to withdraw any administrative act which has become final.

However when an administrative measure has been held to be null and void the administration is under an obligation to reconsider the matter in the light of the judgement of the Supreme Court and reach a new decision..This new decision itself can be the subject of judicial review on a recourse before the Supreme Court. By analogy this applies where a decision of the administration is contrary to Community Law.

The administrative body, under national law, does not have the power to reopen administrative proceedings that had been ended by a final decision.

In accordance with the principle of legal certainty, Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies (see *Kühne & Heitz*, paragraph 24). Compliance with that principle prevents administrative acts which produce legal effects from being called into question indefinitely

The ECJ has, however, acknowledged that there could be a limit to this principle in certain cases. Thus it held in paragraph 27 of the judgment in *Kühne & Heitz* that the administrative body responsible for the adoption of an

administrative decision is, in accordance with the principle of cooperation arising from Article 10 EC, under an obligation to review and possibly to reopen that decision if four conditions are fulfilled.

Cypriot authorities are not, under national law, obliged to reopen decisions on the same grounds on which there has already been a ruling and a res judicata thereon , Therefore the ECJ ruling in the Kühne&Heitz would not, normally, be applicable. Of course the matter remains open for decision by the Court when a similar case comes before it. However, there were cases in which the administration applying the principles of equivalence and proper administration satisfied the citizen in circumstances mentioned in the answer of Q. 4 below.

When 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), it seems that cypriot authorities will re examine their measures where the invalitity of the measures are allegedly based on EC law.

When an administrative decision infringed EC law or was issued without giving due consideration to the ECJ's case law **,** it will on a recourse under Article 146 be declared null and void. The judge is empowered to set aside every kind of rules of law which infringe EC Law.

It has been ruled several times by the European Court of Justice that EU law is superior to national laws.

Our Constitution has been recently amended (by law 127(1)/2006) giving superiority to the European Law. It provides, in essence, that no provision of the Constitution invalidates laws enacted, acts done or measures adopted by the Republic which are necessitated by the obligations of membership of the European Union, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the Republic. European Union Law confers rights and obligations not only on European Union institutions and member states but also on citizens and therefore it is possible for citizens to take actions concerning breaches of European Union law before national courts.

Since Cyprus´s membership of the ***European Union,*** national courts could refuse to apply legislation that contravened EU law. When the national judge draws the conclusion that a legislative provision infringes EC law , this would entail the annulment or invalidation of particular act or decision stemming from such legislation.

Where a national court is required to apply provisions of community law in a case before it, it may stay the proceedings and ask the European Court of Justice for a preliminary ruling, to secure a uniform interpretation of community law throughout the European Union.

Q. 4 In order to revoke a final administrative decision which is contrary to Community law, is it a precondition that a party (a person concerned):
a) contests (challenges) the decision in the course of the administrative procedure?
b) appeals against the decision to the court? Is it sufficient to appeal to the national court of the first (lower) instance or is it necessary to exhaust all means of judicial review?
c) makes use of any other available legal means provided under national law? What kind of means (ombudsman, etc.)?

A. Normally a person must challenge an adverse administrative act or decision to the Supreme Court under Article 146 of the Constitution as aforesaid before the administration **is obliged** to revoke a decision. However the administration has a discretionary power to revoke an unfavourable for the citizen decision, even where he failed to challenge same, if another person challenged a similar decision and succeeded an annulment of the decision. Applying the principles of proper administration and equivalence, we have cases where the administration gave the same benefit to persons in similar situation, even where they failed to challenge the decision.

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

A. See our answer in Question 4 above.

Q.6 Does pursuant to national law the national court reviewing the legality of administrative decisions take into consideration the provisions of Community law:
a) on request of the parties only?
b) on its own motion (*ex officio)*?

A. An administrative act that is based on a legal provision that contravenes EU law , it can be challenged before the Supreme Court in the context of an application under Article 146, by the adversely affected individual, as aforesaid. According to our case-law the Administrative Court can examine ex-proprio motu various legal issues, such as, whether the act or decision complained of is of an executory nature or the recourse was filed within the 75 days´period provided in article 146.3 and matters of public policy such as the composition of the body that reached the decision. Although up to now it didn´t happen for the court to raise ex-proprio motu a question whether community law was infringed, in my personal view this can be done. However, the matter remains open for a court decision when the need arises.

Q.7 Are the powers described in Question 6 treated differently, if the case is examined by the court against whose decisions there is no judicial remedy under national law?

A. No. It takes into consideration the provisions of Community law not only on request of the parties but it can take EC law into consideration ex proprio motu.

Q.8 When an administrative decision, which has become final as a result of a judgment of a national court, turned out to be contrary to EC law, is it appropriate:
a) to revoke the decision (as in the Kühne case); or
b) to reopen the judicial proceedings?

A. Article 146.1 of our constitution provides that the Supreme Constitutional Court shall have exclusive jurisdiction to **adjudicate finally** on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

In the **Kühne** case there was in their legal system a provision allowing the review of a final judgment under certain circumstances. There is no such provision in our legal system for the reopening of judicial proceedings after a final judgment has been delivered. A decision given on appeal can only be set aside when there was an omission to serve an appeal notice to all the parties, which is tantamount to a denial of the right to be heard.

Therefore it is within the discretionary powers of the administrative organs to revoke such decision according with the principles set-out in Question 1 above.

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

A. The ECJ in its judgment states that the principle of cooperation under Article 10 does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to community law. The ECJ itself does not make any distinction as to the jurisdiction of the courts, ie if it is a civil or administrative jurisdiction.

Q.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?

A. In our view the Court in the **Kühne** and in the **Arcor AG** case accepts the principle of procedural autonomy of the Member States. As it is stated in the Arcor case Community law does not require that administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies. Compliance with that principle prevents administrative acts which produce legal effects from being called into question indefinitely. Furthermore in the **Kühne** case it was also stated that administrative bodies have an obligation to review a final administrative decision where under national law, it has such power to reopen the decision.

Q 11 Does your national law in the discussed field comply with the principles of equivalence and effectiveness, as interpreted by the ECJ (see e.g.: case i-21 Germany, paragraph 57)? Please state your opinion

A. In our law the principles of equivalence and effectiveness are incorporated, in compliance with the community law that prohibits discrimination between nationals of a member state and nationals of other member states.

Q 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?

A. See question 3 above

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

A. There is no provision in our legal system for the filing of an application for revocation of a final administrative decision. The matter is in the discretion of the appropriate, in each matter, authority.

Q.14 What is the relationship (if any) under your national law and practice between the procedure for revocation of final administrative

decisions and/or reopening of the court's proceedings analysed above, on the one hand, and the proceedings concerning the state liability for damages in case of the infringement of Community law, on the other hand (cases: C-46/93 and C-48/93 Brasserie, [1996] ECR I-1029 and C-224/01 Köbler, [2003] ECR I-10239)?
Especially:
a) are there any formal links between the two types of proceedings?
b) which national court is empowered to decide on state liability cases (above all, is it an administrative court)?
c) what are the main factors influencing the choice of the person concerned between the two abovementioned types of proceedings? (e.g.: time limit, costs, burden of proof)?
d) can the two types of proceedings be undertaken concurrently

A. As stated in question 13 above there is no provision in our legal system for the filing of an application for revocation or for the reopening of a final administrative decision.

According to Article 146.6 any person aggrieved by any decision declared by the court to be void shall be entitled to institute legal proceedings in a District court for the recovery of damages. The district courts are vested with the power to decide on the state liability, or the liability of some other organ or authority, for damages in such a case.

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Note
The above questionnaire was prepared by Hon. Justice Michael Fotiou assisted by Mrs. Maria Kyriacou and Mrs. Natasa Papanicolaou, Legal Assistants at the Supreme Court of Cyprus.