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

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

The Supreme Administrative Court of Poland

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NATIONAL REPORT OF MALTA

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Questionnaire

1. **Are there any procedural means under your national law which allow a final administrative decision to be revoked, if it turns out to be contrary to Community law? Please describe briefly the relevant provisions:**

   a) do the provisions relate specifically to the application of EC law; or

   b) do they have general application?

   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.

Section 3(1) of the European Union Act 2003[1] provides that:

[1] Chapter 460 of the Laws of Malta

"[f]rom the First day of May 2004, the Treaty and existing and future acts adopted by the European Union shall be binding on Malta and shall be part of the domestic law thereof under the conditions laid down in the Treaty"

Section 3(2) further provides that:

"[a]ny provision of any law which from the said date is incompatible with Malta's obligations under the Treaty or which derogates from any right given to any person by or under the Treaty shall to the extent that such law is incompatible with such obligations or to the extent that it derogates from such rights be without effect and unenforceable".

Section 4(1) further provides that:

"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaty, and all such remedies and procedures from time to time provided for by or under the Treaty, that in accordance with the Treaty are without further enactment to be given legal effect or used in Malta, shall be recognised and available in Law, and be enforced, allowed and followed accordingly".

Section 5 of the European Union Act also provides that:

"[f]or the purposes of any proceedings before any court or other adjudicating authority, any question as to the meaning or effect of the Treaty, or as to the validity, meaning or effect of any instruments arising therefrom or thereunder, shall be treated as a question of law and if not referred to the Court of Justice of the European Communities, be for determination as such in accordance with the principles laid down by, and any relevant decision of, the Court of Justice of the European Communities or any court attached thereto".

However, it should be stated at the outset that Maltese law does not make any distinction between the revocation of an administrative decision because it is contrary to Community law and the revocation of an administrative decision because it is contrary to any other provision of Maltese law. The same rules of procedure are applicable.

Under Maltese Law, revocation of an administrative decision can take two forms: either judicial review of the legality (as distinct from the merits) of the administrative decision undertaken by the ordinary courts of civil jurisdiction, or an appeal (which normally reviews both the legality and the merits of the case) to one of the various *ad hoc* tribunals for specialised areas. These *ad hoc* tribunals – also sometimes referred to as administrative tribunals, to be distinguished from the administrative tribunals as known in, for example, Italy or France - have varying degrees of competence and in almost all cases there is a right of appeal on a point of law from the decision of these tribunals to the Court of Appeal (normally composed of one judge).[2] Where no such right of appeal to a court is provided for, the decision of the tribunal is itself subject to judicial review of its legality before the ordinary courts.

Section 469A of the Code of Organisation and Civil Procedure,[3] dealing with judicial review of the legality of administrative decisions provides that:

> *"Saving as is otherwise provided by law, the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect only in the following cases:*
>
> *(a) where the administrative act is in violation of the Constitution;*
>
> *(b) when the administrative act is ultra vires on any of the following grounds:*
>
> *(i) when such act emanates from a public authority that is not authorised to perform it; or*
>
> *(ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon; or*

[2] But in some specified cases, the Court of Appeal can be composed of three (3) judges, when hearing such appeals.
[3] Chapter 12 of the Laws of Malta.

(iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or

(iv) when the administrative act is otherwise contrary to law".

An administrative act is defined in Section 469A(2) as including *"the issuing by a public authority of any order, licence, permit, warrant, decision, or a refusal to any demand of a claimant, but does not include any measure intended for internal organization or administration within the said authority"*. It is also provided that *"saving those cases where the law prescribes a period within which a public authority is required to make a decision, the absence of a decision of a public authority following a claimant's written demand served upon it, shall, after two months from such service, constitute a refusal for the purposes of this definition".*

There is case-law to the effect that a decision of an entity exercising a judicial or quasi-judicial function cannot be considered to be an administrative act within the meaning of Section 469A. Hence decisions of the *ad hoc* administrative tribunals, i.e. the tribunals specialised in particular areas which hear appeals in case of disputes between the administration and natural or legal persons concerning administrative decisions, seem to be excluded from review under Section 469A. However, it was held by case-law that the decisions of these judicial or quasi-judicial entities are still subject to judicial review of their legality, in virtue of the power conferred on the civil courts by ordinary law to provide a remedy where a judicial or quasi-judicial authority exceeds its jurisdiction or sanctions an illegality.[4]

There is also case-law to the effect that delegated (or subsidiary) legislation[5] cannot be considered to be an administrative act within the meaning of Section

[4] *Dr. Anthony Farrugia v. Electoral Commission* decided by the Court of Appeal on the 18th October 1996, and *Director General of the Court v. Pinu Axiaq* decided by the Court of Appeal on the 3rd. March 2006.

[5] Delegated (or subsidiary) legislation refers to those regulations issued by an administrative authority in virtue of the powers conferred upon it by an Act of Parliament. These regulations have the force of law equal to that given to an Act of Parliament, and they normally have a general application, and not limited to individual cases.

469A, but it is a legislative act issued by the administration in virtue of a delegation of power from Parliament. Again the courts have held that such delegated legislation is still subject to judicial review of its legality under the ordinary law in virtue of the power conferred on the ordinary civil courts to examine and decide whether a delegated legislation is within the limits of the powers conferred by law upon the competent authority and that this right to challenge the validity of a law is also guaranteed by the Constitution.[6]

As provided in Section 469A (4) judicial review by the ordinary courts under this section is not possible where the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal is provided for in any other law.

Judicial review of the legality of an administrative decision is undertaken by the ordinary superior courts of civil jurisdiction, which means that at first instance the case is decided by the First Hall of the Civil Court. This Court is composed of one judge, and any party aggrieved by a judgment of the First Hall of the Civil Court can lodge an appeal to the Court of Appeal, composed of three judges. There is no specialised division of the court for actions against the administration.

Review in the form of a full appeal on the law and the merits is sometimes granted to *ad hoc* tribunals specialised in particular areas (e.g. tax, social security, electronic communications) and with a varying degrees of competence. In almost all cases there is a right of appeal on a point of law to the Court of Appeal from the decisions of these tribunals. If there is no such right of appeal, the decisions of these tribunals are subject to judicial review of their legality by the ordinary courts.

A judgement of the court or a decision of an *ad hoc* administrative tribunal, from which no appeal has been lodged or on which no proceedings for judicial review have been instituted within the prescribed time-limit, or which is not subject to a further appeal, has the authority of a *res judicata***.**

[6] *Borg Carmelo v. Minister responsible for Justice and Home Affairs* decided by the Court of Appeal on the 8th November 2005.

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

a) grant discretionary powers to competent administrative bodies to decide the matter; or

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

As provided in Section 469A of the Code of Organisation and Civil Procedure quoted above, the courts of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect only on the grounds listed in Section 469A, namely:

(*a*) where the administrative act is in violation of the Constitution;

(*b*) when the administrative act is *ultra vires* on any of the following grounds:

(i) when such act emanates from a public authority that is not authorised to perform it; or

(ii) when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon; or

(iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or

(iv) when the administrative act is otherwise contrary to law.

In the case of judicial review by the courts of the legality of an administrative decision which relates to an individual case, outside the ambit of Section 469A, specifically in the case of decisions of *ad hoc* administrative tribunals, there is no specific provision of the law listing the grounds under which such review can take place. Nevertheless, it is established by case-law, that the jurisdiction of the court is limited to examine the legality – as distinct from the merits - of the decision of the tribunal in question – in other words whether that decision was taken within the parameters of the powers conferred by the relevant law to the

tribunal in question, that is whether the decision is *ultra vires*, including whether the principles of natural justice where adhered to.[7]

Hence, in all proceedings for judicial review of the legality of an administrative decision, the court can declare that act to be null, invalid and without effect on the specified grounds, but it cannot substitute its discretion for that of the administrative authority concerned.

In appellate proceedings before an *ad hoc* administrative tribunal, the tribunal can in most cases re-examine both the legality and the merits (facts) of the decision of the administrative authority, but it all depends on the powers granted to the particular tribunal by the relative Act of Parliament which constitutes it.

As already stated, in almost all cases there is a right of appeal to the Court of Appeal from the decisions of these *ad hoc* tribunals, but such appeal is normally limited to appeals on a point of law.

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.

[7] *Director General of the Courts v. Pinu Axiaq* decided by the Court of Appeal on the 3rd. March 2006.

Case (a)

If all remedies for revoking the administrative decision as described above have been resorted to or if the prescribed time-limits for an aggrieved person to avail himself of such remedies have expired, the administrative decision in question becomes final. As soon as an administrative decision becomes final, no further remedies for its revocation are available, irrespective of the reason. Consequently the fact that in the light of any subsequent judgment of the European Court of Justice the administrative decision turns out to be incompatible with EC law or based on a misinterpretation of EC law will not give rise to a remedy at law to revoke the decision.

Case (b)

The same considerations made in relation to Case (a) in Question 3 above are equally applicable to the hypothesis contemplated in Case (b), that is where the provisions of national law (in this case Maltese law) which provided the legal basis of a contested decision were incompatible with EC law.

Naturally, this does not prevent the Maltese Parliament, in the case of an Act of Parliament and/or the public authority which issued the delegated legislation, from amending the law in question to bring it in line with EC law, possibly even with retrospective effect.

Case (c)

The same considerations made in relation to Case (a) in Question 3 above are equally applicable to the hypothesis contemplated in Case (c), that is where an administrative decision infringed EC law or was issued without giving due consideration to the ECJ's case law.

It should be noted that there is yet no judgement delivered by the Maltese Courts on the issues raised in the hypothesis contemplated in Cases (a), (b) and (c) in this Question 3.

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.)?

Case (a)

Where the relevant law under which the final administrative decision was taken, provides for a right of appeal, normally to an *ad hoc* administrative tribunal, the aggrieved person would be expected to raise the issue of a violation of Community law before such tribunal. If he fails to do so, this could possibly be an obstacle if he wants to appeal to the Court of Appeal, where such an appeal is granted by law, or if he wants to institute proceedings before the ordinary courts for judicial review of the legality of the decision of the tribunal. However, this issue has never been decided by the courts.

Where no right of appeal is granted to an *ad hoc* administrative tribunal, the aggrieved person cannot proceed to file proceedings for judicial review of the legality of that final decision before the lapse of ten (10) days from notification of the judicial letter filed in court requesting the public authority concerned to revoke its decision because for it is for any reason illegal, including if it is in breach of Community law.

Case (b)

As already explained in the answer to Question 1 above, under Maltese law, a final administrative decision which is contrary to Community law or contrary to any other provision of Maltese law, can only be revoked in two ways: either by instituting proceedings for judicial review of the legality (as distinct from the

merits) of the administrative decision undertaken by the ordinary courts of civil jurisdiction, or by filing an appeal (which normally reviews both the legality and the merits of the case) to one of the various *ad hoc* tribunals for specialised areas.

In the case of judicial review, either party can appeal from the decision of the court of first instance to the Court of Appeal (composed of three judges).

In almost all cases there is a right of appeal on a point of law from the decision of the *ad hoc* administrative tribunals to the Court of Appeal (normally composed of one judge).[8] Where no such right of appeal to a court is provided for, the decision of the tribunal is itself subject to judicial review of its legality before the ordinary courts.

A judgement of the court or an *ad hoc* administrative tribunal, from which no appeal has been lodged or on which no proceedings for judicial review have been instituted within the prescribed time-limit, or which is not subject to a further appeal, has the authority of a *res judicata.*

Case (c)

Apart from what has been stated in answer to Case (a) and (b) of this Question 4, no other preconditions are required under Maltese law (for example recourse to the Ombudsman), before instituting any of the proceedings described above.

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 administrative court? (this issue has been raised in the Kempter case).

Please see answer to Question 4 Case (a) above.

[8] But in some specified cases, the Court of Appeal can be composed of three (3) judges, when hearing such appeals.

6. Does pursuant to national law an administrative 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)*?

As a procedural rule, in all cases where the Maltese court is reviewing the legality of an administrative decision, the court is limited by the grounds on which the applicant is claiming the decision is illegal, and cannot of its own motion (*ex officio)* take into consideration other grounds of illegality. Consequently, a Maltese court cannot of its own motion *(ex officio)* assess the legality of an administrative decision under Community law, if this issue has not been raised by the party concerned.

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?

No.

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?

When an administrative decision has become final as a result of a judgement of a national court turns out to be contrary to EC law, it would appear to be more appropriate to reopen the judicial proceedings. Having said that, it is very doubtful whether this is possible under Maltese law as it stands to-day, although there is yet no judgement of the Maltese courts on this issue.

9. The ECJ's judgment in the Kapferer case concerned the 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 administrative courts?

The answer to this question would appear to be in the affirmative.

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 position would appear to be that in these two judgements, the ECJ accepts the principle of procedural autonomy of the Member States. In both cases, the exceptions which the ECJ made to the principle of procedural autonomy were based on provisions of the domestic law of member state concerned, which provisions allowed the administration to revoke its final decisions in certain exceptional cases.

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.

The position would appear to be that in this field Maltese law complies with the principles of equivalence and effectiveness, as interpreted by the ECJ, since as it was stated at the outset, Maltese law does not make any distinction between the revocation of an administrative decision because it is contrary to Community law, and the revocation of an administrative decision because it is contrary to any other provision of Maltese law. The same rules of procedure are applicable.

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 administrative courts?

In terms of the provisions of the European Treaty Act, quoted in reply to Question 1 above, Community law is not only part of Maltese law, but also any provision of Maltese law which is contrary to Community Law is to be considered without effect and unenforceable. Hence, the position in Malta would appear to be that when considering the revocation of a final administrative decision, it is necessary to interpret Maltese law in compliance with Community law.

As a general rule, a Maltese administrative body does not have the power to revoke a final administrative decision, unless such power is expressly conferred to it by the Act of Parliament regulating that body. Nevertheless, if an administrative body is empowered by an Act of Parliament to revoke its final decision, in deciding whether to revoke or otherwise, it must take into account Community Law. Naturally *ad hoc* administrative tribunals and the ordinary courts must also take into account Community Law in reaching their judgement whether to annul an administrative decision or otherwise.

Although Malta has become a member of the EU in 2004, there are already a few judgements of the ordinary courts which interpret Maltese law in line with Community law. In one case, the First Hall of the Civil Court interpreted the Maltese law on trade-marks in line with the case-law of the ECJ.[9] In another case where it resulted that there was a conflict a conflict between the Maltese law on Value Added Tax and the Sixth Directive (77/388/KEE), the Court of Appeal held that the EU law should be applied since it was overriding over any provision

[9] *Martin Spiteri v. Emanuel Cachia* decided by the First Hall of the Civil Court on the 10th June 2004.

of Maltese law, and Maltese law should be interpreted in the light of the wording and the purpose of the EU directive.[10]

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

Under Section 469A(3) of the Code of Organisation and Civil Procedure, an action for judicial review of an administrative decision must be filed within a period of six (6) months from the date when the interested person becomes aware or could have become aware of such an administrative act, whichever is the earlier. The courts have held that this period is one of forfeiture, which means that this time-limit cannot be suspended or interrupted.[11]

As regards actions for judicial review of the legality of administrative acts outside the ambit of Section 469A of the Code of Organization and Civil Procedure (that is review of the legality of delegated legislation or of the decisions of administrative tribunals), there is no specific legal provision specifying a time-limit within which the action has to be instituted. The issue of the time-limit within which an action challenging the legality of delegated legislation must be filed has never been determined by the courts. However as regards the time-limit to challenge the legality of a decision of an administrative tribunal, the courts have held that where the appellant before the tribunal was claiming a sum of money, not arising from a criminal offence, the time-limit for filing the action of judicial review of the decision of the tribunal is two years from the date of the decision.[12]

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[10] *A.B. Limited v. Commissioner of Value Added Tax* decided by the Court of Appeal on the 9th May 2007.
[11] *Roberto Zamboni noe. v. Director of Contracts et* decided by the Court of Appeal on the 31st May 2002.
[12] *Emanuele Barbara et v. Salvino Bugeja noe* decided by the Court of Appeal on the 12th January 2007.

As regards appeals to *ad hoc* administrative tribunals, the time-limit to file the appeal varies according to the particular tribunal, but usually it is in the range of 15 to 30 days from the date of the decision or from the date of the notification of the decision.

It should be noted, as already stated in the reply to Question 1 above, that these time-limits apply in all cases where an administrative decision is being challenged, irrespective of whether it is being challenged on the basis that it is allegedly contrary to Community law and/or it is alleged that it is contrary to any other provision of Maltese law.

As regards the question whether the fourth pre-requisite 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 judgement of the ECJ – should have general application, this has been answered by the ECJ itself in the Kempter Case.[13] In this case the ECJ held that *"Community law does not impose any limit in time for making an application for review of an administrative decision that has become final. The Member States nevertheless remain free to set reasonable time-limits for seeking remedies, in a manner consistent with the Community principles of effectiveness and equivalence."*

Nevertheless, as already stated in reply to Question 3 above, under Maltese law, if all remedies for revoking the administrative decision as described above have been resorted to or if the prescribed the time-periods for an aggrieved person to avail oneself of such remedies have expired, the administrative decision in question becomes final. As soon as an administrative decision becomes final, no further remedies for its revocation are available, irrespective of the reason. Consequently the fact that in the light of any subsequent judgment of the European Court of Justice the administrative decision or the judgement which rendered it final turns out to be incompatible with EC law or based on a

[13] *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas* (C-2/06) decided by the ECJ on the 12th February 2008.

misinterpretation of EC law will not give rise to a remedy at law to revoke the decision or judgement.

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 taken concurrently?

Comment: For the purposes of this question it is not necessary to analyse problems of the State liability for breach of EC Law in detail. That issue is only called upon in order to identify possible links with the subject of the Colloquium.

In judicial review proceedings of the legality of administrative decisions before the ordinary courts under Section 469A of the Code of Organization and Civil Procedure, the plaintiff can include in the demands a request for the payment of damages based on the alleged responsibility of the public authority in tort or quasi tort, arising out of the administrative decision. These damages are not to be awarded by the court where notwithstanding the annulment of the administrative act, it is not proved that the public authority has acted in bad faith

or unreasonably or where the thing requested by the plaintiff could have lawfully and reasonably been refused under any other power.[14]

The issue of a claim for damages suffered where an administrative decision is declared illegal for any reason by the ordinary courts in judicial review proceedings outside the ambit of Section 469A of the Code of Organization and Civil Procedure, as explained in the reply to Question 1 above, has never been decided by the courts.

In any case, in Malta it is always the ordinary courts who decide on state liability cases.

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.

None known.

[14] Section 469A(5) of the Code of Organization and Civil Procedure