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

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Introduction

The European Court of Justice (ECJ) has recently issued several judgments which concerned the influence of EC law on final administrative decisions and courts' judgments in the Member States. Therefore, the crucial question arises what are the consequences for the final decisions and judgments of their incompatibility with EC law.

The above-mentioned problem was considered in the following cases of the ECJ:

- C-224/97 Ciola, [1999] ECR I-2517,
- C-201/02 Wells, [2004] ECR I-723,
- C-453/00 Kühne&Heitz, [2004] ECR I-837,
- C-234/04 Kapferer, [2006] ECR I-2585,
- C-422/04 i-21 Germany, n.y.r.,
- C-2/06 Kempter, (pending), and
- Opinion of Advocate General in case C-119/05 Lucchini Siderurgica (pending).

However, it seems that the ECJ has not yet fully developed the ultimately concluding case law on the matter. The basic problem concerns the relationship, and sometimes the tension, between the principle of full effectiveness of EC law, on the one hand, and the principle of legal certainty and stability of administrative decisions and courts' judgments (*res iudicata*), on the other hand. The analysis of the national provisions which provide the examples of exceptions from the principle of legal certainty and stability of administrative decisions and courts' judgments is of great theoretical and practical significance. The essential question whether national law should take into consideration requirements arising from EC law remains open.

The subject of the Colloquium concerns both elements: the national provisions and their application in the Member States. Especially, it is crucial to analyse ways of solving problems of incompatibility of administrative decisions and judgments of national courts with EC law. What is the influence of the ECJ's case law on the national practice? Have the courts in the Member States already faced the issues which have not yet been addressed by the ECJ?

In order to ensure the clarity and mutual understanding, we propose the following terminological convention with regard to some of the terms used in the questionnaire:

- “an administrative decision” – a term which covers all the forms of administrative acts of administrative bodies in individual cases;
- - “a judgment” – a term which covers all the forms of decisions taken by the national court in individual cases;
- “to revoke a final administrative decision” – a term which covers several procedural means leading to the elimination of a final and binding decision by administrative body which issued a given decision, a higher administrative authority or national court, for example, its reversal, annulment, and setting aside; or declaring it null and void, invalid, etc.;
- “to reopen judicial proceedings” – a term which covers various procedural means which allow the case already decided by the court at the final instance to be re-examined (reconsidered) by the same court which delivered the judgment or by any other national court.

You are also asked to provide the terminology characteristic of the specific procedural institutions existing in your legal system.

Questionnaire

1. Are there any procedural means under your national law which allow a final administrative decision to be revoked, if it turns out to be contrary to Community law? Please describe briefly the relevant provisions and national case-law:
   do the legal provisions have general application or they relate specifically to the application of EC law?
   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.

R e p l y :

1.a), b)

The Constitution of the Slovak Republic provides that Community law is part of the legal system of the Slovak Republic.

There are no special procedural means in the legal system of the Slovak Republic that would allow the revocation of a final administrative decision if it turns out to be contrary to Community law. No such procedural means are available to courts in the Slovak Republic.

Notwithstanding, it may be concluded that an administrative body may revoke its final decision also for the above reason (i.e. for the breach of Community law) by means of an extraordinary legal remedy filed in accordance with the Code of Administrative Procedure in force. Thus, it may revoke its final decision by reopening the procedure (if new circumstances arise that it had not been possible to consider in the course of administrative procedure), or by using the institution of reviewing the decision outside of appeal proceedings (if it turned out that the decision was issued on the basis of incorrect legal consideration of the matter). Under the Code of Administrative Procedure, the use of such extraordinary legal remedies is restricted by a three-year time limit which starts to run from the date on which the decision has become final. In the Slovak Republic, a decision issued on the basis of incorrect legal assessment may be challenged also by a prosecutor's protest. However, the time limit for lodging the protest is also limited to three years from the date on which the decision has become final. If an administrative body fails to revoke its administrative decision subsequent to a prosecutor's protest, the prosecutor has the right to file a court action seeking an annulment of the decision. The bodies

empowered to hear such actions are administrative courts. The body empowered to decide on reopening judicial proceedings is the administrative body that issued the last-instance decision; the body empowered to make a decision outside of appeal proceedings is the body that is immediately superior to the one that decided on the matter in the last instance. If the administrative body issues a new decision, such new decision may be challenged by means of an action filed with an administrative court.

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?

R e p l y :

2.a) As a rule, the decision-making of administrative bodies is based on an administrative consideration of the matter. Courts may review administrative decisions, and may revoke them only if the decisions go beyond the limits of statutory discretionary powers. However, administrative bodies are obliged to abide in their decision-making by the legality principle. This means that the decision-making of administrative bodies must comply not only with the legislation of the Slovak Republic but also with EC law.

b) Regarding the obligation to revoke a decision – the immediately superior administrative body is obliged to revoke a decision which is contrary to the law and may, where appropriate, substitute its own decision. Administrative courts may revoke administrative decisions only on the basis of actions brought before them, reviewing the legality of administrative decisions within the scope of the cause of action. Administrative actions must be filed within a two-month time limit from the date of service of the decision that has become final.

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

R e p l y :

3.) Article 7 paragraph 2 of the Constitution of the Slovak Republic provides that legally binding acts of the European Communities and of the European Union have precedence over the laws of the Slovak Republic.

Where, 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, or where an administrative decision infringed EC law or was issued without giving due consideration to the ECJ's case law, redress may be sought by means of regular or extraordinary legal remedies or by bringing an administrative action within statutory time limits and under statutory conditions, as stated in the replies to the questions above. However, because of the disposition principle, it is not possible to open ex officio judicial proceedings on revoking an administrative decision merely on account of finding a breach of Community law.

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.)?

R e p l y :

4. a) In principle, in order to revoke a final administrative decision which is contrary to Community law, there is not a precondition that a party (a person concerned) contests (challenges) the decision, or contests (challenges) the decision in the course of the administrative procedure. We refer hereby to a situation where a legal remedy has been filed to challenge a decision issued in the first-instance administrative procedure. According to Section 59 of the Code of Administrative Procedure, a second-instance administrative body reviews the challenged administrative decision in its entirety; where necessary, it complements the procedure and/or removes the deficiencies of the decision. The first-instance administrative body is bound by the legal opinion of the appellate administrative body where the latter revokes the former's decision and refers the matter back to the first-instance body for a new consideration and decision.

If a second-instance administrative body finds that a first-instance administrative body has provided an incorrect legal

consideration of the matter or has considered the matter in contravention of Community law, it may – irrespective of the substance and grounds of appeal filed by a party – remedy this deficiency by issuing its own decision or by requesting the first-instance administrative body to issue a new decision.

This, however, does not apply to tax proceedings where the appellate administrative body is bound by the grounds of appeal. Unless the party concerned contests the decision because of its incompatibility with Community law, the applicable law does not oblige an appellate administrative (tax) authority to establish the incompatibility of a first-instance decision with Community law.

b) The wording of the question seems to suggest that its aim is to find out whether it is possible to revoke a final administrative decision by filing a court action against a final decision of an administrative body even if the party concerned did not use a regular legal remedy in the administrative procedure. If a decision of an administrative body becomes final without the party concerned having exercised his/her right to challenge it in the administrative procedure, the party is not entitled to have the legality of that decision reviewed by court. However, the party does not have the obligation to use other types of legal remedies (the so-called extraordinary legal remedies).

c) A final administrative decision that is contrary to Community law may be also revoked by means of a prosecutor's protest. An administrative body may revoke its final decision on the basis of a prosecutor's protest. The prosecutor may file a protest either ex officio or on the basis of a petition filed by a party to the proceedings. The administrative body is obliged to decide the prosecutor's protest; if it fails to do so within the statutory time limit, the protest is deemed not to have been granted.

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).

R e p l y :

5.) In the Slovak legal system, in particular according to Section 244 of the Code of Civil Procedure, judicial review of the decisions of administrative bodies consists in the examination of whether the factual circumstances have been properly <u>determined</u> in the administrative procedure (i.e. not only as regards the legality of the procedure used to determine the factual circumstances, but also as regards the completeness of the determination of the factual circumstances), and in the examination of correct application of law by the administrative body acting on the matter. However, the court conducting this

consideration must always remain ("dominus litis" principle) within the scope of the cause of action proposed by the party (pleading points); only in exceptional cases may the court use the "ex officio" procedure to determine serious irregularities concerning non-competence or breaches of the Constitution. In accordance with Section 121 of the Code of Civil Procedure, Community law is perceived in the Slovak Republic as that part of the legal system about which the judge has adequate knowledge in keeping with the principle "iura novit curia". Consequently, in the judicial review, the acting judge should also consider ex officio the objection of a party – even if the objection was raised only after the opening of judicial proceedings – claiming that the final administrative decision is contrary to the procedural or substantive law of the European Communities. However, if a party proposes no such objection in his/her action, the court would obviously have no right to consider the matter beyond the scope of pleading points (cause of action).

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)*?

R e p l y :

6.a), b)

Similarly to civil judiciary, administrative judiciary in the Slovak Republic is governed by the disposition principle. Administrative courts review the legality of administrative decisions and procedures, the scope of that review being limited to the cause of action (the so-called pleading points).

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?

R e p l y :

7.) Same as in point 6 above. However, the last-instance court should consider referring the question for a preliminary ruling if it is of the opinion that the legal act on the basis of which the administrative body made its decision is not in conformity with Community law.

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?

R e p l y :

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, it is not possible to reopen the judicial proceedings. The redress is possible only through administrative procedure in which an administrative body revokes its administrative decision concerned either by reopening the procedure or outside of appeal proceedings. Only in these cases is it possible to revoke an administrative decision that has became final also as a result of a judgment given by a national court. To our knowledge, no change in the legislation in force is envisaged at this point.

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?

R e p l y :

9.) Modern society of the beginning of the 21st century may develop only if a strict order is recognised and at the same time emphasised as the opposite of chaos and anarchy in human relations. The strictness of the order is not derived from its unchangeability, but from the idea of the rule of law formulated for the first time by Artistotle in his Nicomachus. We believe that the principle of stability of the legal system (not of the legal system which, on the contrary, is constantly evolving), recognised in constitutional articles of most continental law countries and expressed by the requirement formulated already in Roman law as the impediment of res iudicata, adequately answers the above question.

If, in the future, the European Court of Justice reached a conclusion that would run counter to that given in paragraph 24 of the decision in Case C-234/04 Kapferer, it would be difficult not to see the conflict between such decision and the spirit of Article 1 paragraph 1 of the Treaty on European Union, expressing respect for common principles (including the principle of the rule of law), that all member states should share.

In view of these arguments, we therefore recommend that the position of the ECJ be not only applicable to the judgments of national courts, but be obligatory for them.

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?

R e p l y :

10.) The grounds given for the aforesaid judgments, especially those referred to under No. 69 to 72 in Case C-392/04 i-21 Germany etc. No. 15, 24 and 26 in Case C-453/00 Kűhne, reveal a tendency to imposing an obligation on the member state to introduce, with immediate effect or gradually, the procedural means that would ensure at national level the respect for the principle of full effectiveness of Community law. Such intention is partly justified in the light of the objectives of the European Union outlined in Article 2 of the Treaty on European Union and supported by the subsidiarity principle within the meaning of Article 5 of the Treaty Establishing the European Communities; however, on the other hand, it is highly problematic considering the situation of national courts which, according to Article 234 of the Treaty Establishing the European Communities, continue to be in the position of a silent observer rather than an active co-player in interpreting the Community law.

In particular, a change consisting in the transition of national courts from a passive to an active position in the process of interpreting Community law would ensure a much more effective knowledge and, subsequently, protection of Community law before national courts.

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.

R e p l y :

11.) As regards the equivalence principle, all legal remedies in the administrative procedure and in the proceedings on the review of legality of a decision are applicable regardless of whether the alleged infringement concerns Community law or national law. Since the legal system of the Slovak Republic does not make a distinction between alleged infringements, the question of effectiveness of the protection of law is independent on whether the law that has been breached is Community law or national law. The effectiveness of the procedure depends solely and exclusively on specific possibilities of the court

(administrative body) to acquire the knowledge of and to apply both the national law and Community law with the same level of proficiency.

However, there may be enormous differences in the level of knowledge of Community law, which are the consequence of specific attributes, possibilities and professional erudition of the entity applying the law.

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?

R e p l y :

12.) With reference to Article 7 paragraph 2 of the Constitution of the Slovak Republic, according to which legally binding acts of European Communities and of the European Union have precedence over the laws of the Slovak Republic, the national law of the Slovak Republic must be always interpreted in conformity with Community law (i.e. including where the case in question concerns the revocation of a final administrative decision).

This interpretation has a bearing on the scope of administrative discretionary powers of administrative bodies.

In a case brought before the Supreme Court of the Slovak Republic (Administrative Division) under File Ref. 1 Sž-oKS 194/2004, the Court issued a judgment on 13 September 2005 whereby it revoked the decisions of building authorities related to the permission to build an expressway. In the judgment, the Court pointed out the need to take account of Council Directive 85/337/EEC of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment and certain existing international law instruments (Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 – Communication of the Ministry of Foreign Affairs of the Slovak Republic No. 162/2000 Coll.).

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 decision of the ECJ - should have general application? (this issue has been raised in the Kempter case.).

R e p l y :

13.) See the reply in point 1 above.

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

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

R e p l y :

14.) It cannot be said that there are any formal links in the Slovak legal system between the procedure for revocation of final administrative decisions (involving basic judicial review of the decisions of administrative bodies according to Section 244 of the Code of Civil Procedure) and/or reopening of the court's proceedings (such means of remedying an unlawful decision is absolutely ruled out in the administrative justice and may be used only by an administrative body in the administrative procedure itself), on the one hand, and the proceedings concerning the state liability for damages in the performance of public administration, on the other hand. The entitlement to compensation arises when a decision of an administrative body is revoked as unlawful; however, the compensation claim must be filed with the body that issued the unlawful decision

within the statutory time limit or, if that body does not grant the claim, it must be filed with the competent court in the framework of civil administrative proceedings.

In no case do administrative courts have the jurisdiction to decide the cases of state liability for unlawful decisions concurrently with revoking a decision as unlawful. Compensation claims are always heard and decided by courts of general jurisdiction at the level of district courts which consider the claims in the framework of their civil agenda.

There is, however, nothing that precludes opening concurrent proceedings on the revocation of an administrative decision through reopening the proceedings and on a compensation claim concerning an incorrect official procedure of a public administrative body. In fact, the correctness of an official procedure is examined within the compensation proceedings as such.

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.

R e p l y :

15.) We note that since the extent of practical experience with the issues covered by the questionnaire is still rather limited in Slovakia, no practical examples are provided.