Association des Conseils d'Etat et des Juridictions administratives suprêmes de l'Union européenne a.i.s.b.l.

Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.

XXI COLLOQUIUM

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

Warsaw, 16 June 2008

GENERAL REPORT

Prepared by:
prof. Stanisław Biernat
judge of the Supreme Administrative Court of Poland
General Rapporteur

Co-operation: judicial assistants Marta Piłaszewicz-Kulikowska, Agnieszka Wilk, Przemysław Florjanowicz-Błachut, Piotr Wróbel

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

GENERAL REPORT

1. Introduction to the Report

1.1. The basis for drafting the General Report is provided by national reports prepared by the Councils of State, the Supreme Courts and the Supreme Administrative Courts in Europe. The organisers of the colloquium received 27 national reports from the court-members of the Association, and a report from Turkey, all in response to the questionnaire send out in May 2007, as well as the European Court of Justice (ECJ) Report. The national reports were of diverse length (from 2 to 64 pages). As a rule, the reports included answers to all questions, although in some reports the replies to certain of the questions were left unanswered.

The starting point in choosing the topic for the Colloquium was the ECJ case law[1], which has developed in the last couple of years. It has been extensively discussed in the report of the Court, as well as commented upon in some national reports. It is assumed that the case law is known and as such does not require separate analysis in this general report. It should only be added that after the national reports and the ECJ report were received, new judgments were pronounced

[1] ECJ's judgments: of 29 April 1999 C-224/97 *Ciola*, [1999] ECR I-2517; of 7 January 2004 C-201/02 *Wells*, [2004] ECR I-723; of 13 January 2004 C-453/00 *Kühne & Heitz*, [2004] ECR I-837; of 16 March 2006 C-234/04 *Kapferer*, [2006] ECR I-2585; of 19 September 2006 in joined cases C-392/04 & C-422/04 *i-21 Germany & Arcor*, [2006] ECR I-8559.

concerning the topic of the colloquium.[2] This fact testifies to the currency of the discussed matters, as well as prompting the question as to whether the case law of the Court has been fully developed.

In the most general terms, the objective of the colloquium is to investigate the consequences that may stem from the fact that a final administrative decision or a final judgment of a national court in a Member State, turns out to be contrary to Community law. Such a situation may occur, *inter alia,* although not exclusively, as a result of later judgments of the ECJ based on different interpretations of EC law. The pivotal issue is thus, whether in such a case it is possible or even necessary to revoke a final administrative decision or to reopen court proceedings.

As was mentioned in the introduction to the questionnaire, 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 the stability of administrative decisions and courts' judgments (*res judicata*), on the other.

1.2. An essential legal issue that called for a solution as a starting point for detailed analyses is, whether Member States are obligated under EC law to introduce special procedural means in order to revoke a final administrative decision or reopen court proceedings.

It should be assumed that there is no such obligation. This conclusion results from an analysis of the ECJ case law and is also confirmed by the ECJ report. The legal certainty and stability of administrative decisions and the courts' judgments having the force of *res judicata,* are values protected in national law and in Community law. All national reports interpret the ECJ case law as an expression of respect for the procedural autonomy of Member States. It is only in a special situation when Community law requires the revoking of final decisions and courts' judgments that are incompatible with EC law. This is the case in matters reserved for the exclusive competence of the Community, and particularly in area of state aid. The ECJ report draws attention to this point when referring to the judgment in the *Lucchini* case, the ECJ report, as well as the reports of Cyprus, France, Spain, and Italy.

Except for the abovementioned situation, the principle of procedural autonomy results in the possibility of revocation of a final administrative decision in the event of

[2] ECJ's judgment of 18 July 2007 C-119/05 *Lucchini*, [2005] ECR I-6199; of 11 December 2007 C-161/06 *Skoma-Lux*, n.y.r.; of 12 February 2008 C-2/06 *Kempter*, n.y.r.

its incompatibility with EC law being possible (or required), but only if so envisaged in national law.

1.3. The reports prepared in response to the questions of the survey contain analysis of national procedural rules. It turned out that the great majority of Member States did not introduce special solutions designed for the 'Community' cases. In most cases therefore, the national reports presented general rules. The authors of the questionnaire were interested whether, and which of these procedural rules may be applied in order to challenge administrative decisions or court judgments that are incompatible with EC law. Not all national reports indicated, which of the generally applicable procedural rules could be applied in the 'European' context concerned. Nevertheless some of the respondents have pointed to such a situation, sometimes stressing that their deliberations are of a hypothetical nature. Many of the reports have included reservations saying that to date, there has been no practice concerning the revocation of decisions or reopening of court proceedings for reasons of their incompatibility with Community law.

As a consequence of accepting the procedural autonomy principle in the sphere covered in this report, one may conclude that it is required to observe two principles that have been established in ECJ case law: the principle of equivalence and the principle of effectiveness.

It is worthwhile reminding ourselves of the content of these two principles:

Domestic procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult, the exercise of rights conferred by the Community legal order (principle of effectiveness).[3]

In the opinion of the respondents, the legal orders in their respective states meet the requirements resulting from the above cited principles.

It should be noted that in some states, special legal provisions concerning cases of incompatibility with Community law have been adopted. Some reports also provided information about how the law has been applied in the matters under discussion, although practice in the matters concerned in this report has so far been limited.

[3] See ECJ's judgment in *i-21 Germany*, para. 57.

1.4. The analysis of the national reports has proven to be a complicated task because of, among other things, the abundance of material, the necessity to understand the specifics of particular legal orders, and different terminology. Despite the diligence applied, the authors of the general report are not sure if they if they were able to avoid distortions resulting from the generalizations made. Whenever possible, the authors of the general report have consulted other sources apart from the national reports.

The intention which guided the authors of the questionnaire was to analyse the extraordinary procedural measures concerning the final administrative decisions and final court judgments. The scope of the analysis intentionally excluded the ordinary means of appeal in administrative procedure, plus the ordinary judicial review. It is not certain whether this intent has been properly interpreted by all of the national respondents.

It is hoped, that the comparison of legal solutions and practices in particular states will contribute to the sharing of experience, which may prove useful in terms of both law-making and law-application. More detailed observations could then be made on this basis, pertaining to the methods needed to ensure the effectiveness of EC law in the European Union as a whole as well as in particular states. The authors of the general report do not intend, however, to put forward postulates designed to harmonise domestic laws in this domain, because it is neither required nor purposeful.

1.5. It is worthwhile reminding ourselves again that, in order to facilitate the understanding and comparability of the contents of national reports, the following terminological convention was suggested:

- “an administrative decision” – a term which covers all forms of administrative acts issued by administrative bodies in individual cases;
- “a judgment” – a term which covers all 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 an administrative body which issued a given decision, a higher administrative authority or national court. This includes for example, the reversal of a

decision, its annulment, or being set aside or its being declared null and void, invalid, etc.

- "to reopen judicial proceedings" – a term which covers various procedural means, which allow a 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.

The structure of the general report will not follow the structure of the questionnaire.

2. General information on revoking decisions and court judgments (including the reopening of administrative or court proceedings)

2.1. Introductory remarks

2.1.1. In all the domestic legal orders analysed, the stability of final administrative decisions or court judgments approving administrative decisions is not absolute. Domestic law allows for the revoking of final decisions and/or the reopening of court proceedings, after a final judgment (res judicata) has been delivered.

As mentioned above, in most cases, the incompatibility with Community law has not been listed among the premises for revoking a decision or for reopening judicial proceedings under domestic law. The premises most often stated are various forms of incompatibility with law, without detailing which law in particular, as well as meeting further requirements. It is interesting to know, within the context of this report, whether these premises may also concern those cases that infringe on Community law.

2.1.2. Legal constructions found in particular states vary greatly. Despite this, it is possible to find certain similarities and single out several categories of procedural means:

1) Declaring a final decision invalid (invalidation). A number of legal systems distinguish those decisions which are declared invalid. These have defects which constitute qualified forms of infringement of the law;

2) Reversal or amending a final decision. The powers to do this are usually held by the administrative body which issued the contested decision, or a higher authority;

3) Reopening of administrative proceedings. Proceedings can be carried out anew or case re-examined, e.g. when a final decision was issued in breach of procedural provisions.

4) Reopening of court proceedings.

2.1.3. In particular legal systems, the admissibility of revoking administrative decisions is made conditional upon further accounts that sometimes overlap with one another; for instance:

- in some states, apart from laws regulating general administrative proceedings, there are also laws covering specific areas, such as proceedings concerning the decision in tax matters (Austria, Belgium, the Czech Republic, Germany, the Netherlands, Poland, the United Kingdom);
- in some states a distinction is made between revoking administrative decisions which are incompatible with the law, and lawful decisions;
- some reports indicate the distinction made between revoking decisions, with *ex tunc*, or *ex nunc* effect;
- the content of the decision is a frequent criterion for diversifying the admissibility of revocation. Major restrictions on revoking decisions pertain particularly to the final decisions, pursuant to which parties (individuals) acquired rights. Such decisions may be namely revoked only in the advent of special circumstances (Belgium, France, Greece, Italy, the Netherlands, Poland, Portugal, Turkey). Specific premises are diverse, depending on the particular country.

In Poland, for example, a final decision by which a party has acquired a right, may be at any time set aside or reversed, with the consent of that party, by the authority that issued the decision, unless any special provisions disallow it, and when it is in public interest or the party has an equitable interest. The criterion of public interest plays a similar role in the legal systems of other states, e.g. Greece, and Italy. In the case of Austria the public interest has only to be examined when the authority wants to withdraw an act *ex officio.* The withdrawal of a decision is only possible if there is a “qualified public interest” which requires the withdrawal.

- the authorities that decide to revoke a final decision are often obligated under national law to take into account the interest of the party and/or the public interest (Austria, the Czech Republic, Denmark, France, Greece, Poland, Portugal, Italy, Spain);

- because of the principle of legal certainty, the revoking of final decisions is only allowed within the deadlines provided in law;[4]
- the possibility of revoking administrative decisions declared lawful by final judgment of a court is often excluded, as is implied by reports from Cyprus, the Czech Republic, Greece, Latvia, Lithuania, Luxembourg, Portugal and Slovakia.

In these states the *res judicata* rule excludes, in principle, the possibility of revoking a final administrative decision. The revocation of the decision is either impossible (Cyprus, Ireland, Luxembourg, Malta) or subject to significant restrictions. Thus, in such a case in Latvia and Lithuania – the only possibility would be to revoke the court judgment. However, in Slovakia – such a decision may be revoked only in an administrative proceedings. In the Czech Republic, Greece, Poland, and Romania, revoking the decision which has been declared lawful, is possible only for reasons which have not previously been the subject of a judicial review.

2.2. Declaring final decisions null and void/invalidating final decisions

2.2.1. Invalid decisions are eliminated from the system of law. The decisions with the most serious defects involving a qualified infringement of law, are treated as invalid.

A number of reports list a legal construction for declaring a decision null and void or for its invalidation (Austria, Belgium, Denmark, Estonia, Finland, Lithuania, Malta, Poland, Slovenia, Spain, Sweden, Turkey).

Although the rapporteurs from the Czech Republic, Germany, and Latvia have not indicated as such in their reports, the „declaring null and void" of a decision as an legal institution in administrative proceedings, serves as a means to revoke decisions in the event of circumstances related to the infringements on Community law, the authors of the general reports have found that the laws on administrative procedure of each of respective states, include such an institution: the Czech Republic [§ 77-78 of the Czech Code of Administrative Procedure], Germany [*Nichtigkeit des Verwaltungsaktes* - § 44 of the German Administrative Procedural Act *Verwaltungsverfahrensgesetz*], Latvia [Article 74 of the Latvian Administrative Procedure Law]. The premises envisaged in these provisions are chiefly limited to

[4] Such restrictions are indicated in this general report where particular measures which allow revoking the administrative decision and later discussed further in Chapter 5.

the infringements of procedural provisions, including those related to the competence of the authority in question, the form of decision, public morals (Germany) or inadmissibility of decisions which would impose on the authority an obligation to commit torts punishable with a penal sanction or fine (Germany, Latvia).

2.2.2. In the context of this general report it is interesting to learn whether a qualified infringement of EC law could be also considered grounds for invalidity. The national reports do not provide an unambiguous answer to this question.

The invalidity of a decision may be caused by a number of various defects. Considered from the viewpoint of potential infringements of EC law, the following defects may be of significance:

- a decision issued without legal grounds (Denmark, Poland, Spain).
- a decision issued with a manifest breach of substantive law or law of procedure (Austria, Belgium, Denmark, Estonia, Finland, Spain, Lithuania, Malta, Poland, Slovenia, Sweden, Turkey) .Declaring a decision null and void more often involves decisions described as: „*manifestly unlawful*" (Turkey), „*voidable*" (Denmark) or issued with a „*manifestly erroneous application of law*" (Finland), or „*substantial breach of material law*" (Lithuania) *"substantial infractions of the Law"*, (Spain) an *„obvious violation of material law"* (Slovenia). The Swedish report stresses that „*extraordinary reasons for reconsidering the matter owing to special circumstances*" must be present.
- a decision issued as a result of a misapplication of legal provisions (Denmark).
- a decision issued on the grounds of a law which has been declared null and void by the Constitutional Court (Belgium).
- decision has a defect which results in its being declared it null and void by virtue of law (Austria, Poland, Spain).

2.2.3. In particular states, there are differences as to who has competences to declare final decisions null and void (invalidating it). In some states it is an administrative authority which issued a given decision (Denmark, Estonia, Poland, Spain, Turkey), or a superior authority (Austria, the Czech Republic, Denmark, Poland, Slovenia, Turkey).

In other states it is the courts which are competent in this matter (Belgium, the Czech Republic, Denmark, Finland, Lithuania, Malta, Sweden, Turkey).

More often, declaring a decision null and void may occur either *ex officio* or upon a request from a party (Estonia, Malta, Poland, Slovenia, Spain, Turkey), and more rarely only *ex officio* (Austria). The possibility of declaring a decision null and void is usually restricted by a time limit (Belgium, Poland, Slovenia, Turkey). Only in a few cases, has the lapse of time after the decision has been issued had no effect on the possibility of its being declared a null and void decision (in Estonia, Germany and in Spain).

2.3. Revocation of final administrative decision in other cases

Apart from declaring a decision null and void, the national reports have presented the means of procedure involving the revocation of a decision (setting aside or reversing it).

2.3.1. In a majority of states there is a possibility of revoking a decision for reasons of its incompatibility with the law, referred to generally as an: „*unlawful decision*", „*acte illégal*", without detailing the scope of the breach of law.

This type of measure, as the only institution enabling the revocation of a decision, has been described in reports from Cyprus, France, Greece, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Slovakia, the United Kingdom and – so it seems – from Romania.

In some states, this measure occurs along the legal institution declaring a decision null and void (Austria – only in tax matters, the Czech Republic, Estonia, Germany, Latvia, Poland, Portugal, Slovenia, Spain, Turkey and – as it seems – Belgium).

The authority competent to revoke a decision under the procedure in question is most often the authority which has issued it (Austria, Belgium, the Czech Republic, Estonia, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Romania, Spain, Turkey, the United Kingdom) or a higher authority (the Czech Republic, Hungary, Poland, Portugal, Slovenia), or, more rarely, a court (Ireland, Italy, Romania, the United Kingdom).

The proceedings on the reversal or setting aside of a decision may be instituted *ex officio* (Austria, the Czech Republic, Germany, Luxembourg, Portugal, Slovakia, Turkey) or either *ex officio* or upon a request from a party (Belgium, Estonia, Hungary, Latvia, Poland, Romania, Spain).

More often than not, the national laws identify the deadlines which limit the possibility of decisions being revoked (all or some of them), and the time limits under this procedure (Austria, Belgium, the Czech Republic, Estonia, France, Germany, Latvia, Poland, Portugal, Slovakia, Spain, Turkey, the United Kingdom). Greece and Italy – use the expression: *reasonable time limit*.

However, an authority in Luxembourg and in Cyprus can set aside its own decision at any time.

The admissibility of revoking a final administrative decision as unlawful may potentially be applicable also in cases of the incompatibility of a decision with Community law.

2.3.2. The national reports imply also that it is possible to revoke lawful decisions (Belgium, Cyprus, Denmark, Estonia, Germany, Latvia, Poland). It is a matter for discussion whether the above procedural solutions would be suitable in the case of decisions infringing on Community law. It seems that such a possibility may not be discarded in the case, when the legal system of a given country lacks more suitable legal grounds for revoking such decisions.

2.4. The reopening of administrative or judicial proceedings

The reopening of proceedings constitutes a special category. Within the context covered in this report, a distinction should be made between the reopening of administrative proceedings concluded with a final decision and the reopening of the proceedings in a court exercising a judicial review and issuing a final judgment (*res judicata*).

In order to generalize the various solutions applied in particular states, it should be stated that the cases essential from the perspective of this report include those where reopening is due to certain procedural defects, or to the emergence of new circumstances.

2.4.1. The legal institution of reopening administrative proceedings have been indicated in a number of national reports (Austria, Bulgaria, the Czech Republic, Estonia, Germany, Greece, Latvia, the Netherlands, Poland, Slovakia). It should be noted, in the context of the subject matter of the colloquium, in some states, in the event that after a final administrative decision is issued, or an ECJ judgment is pronounced with a different interpretation of EC law, such a circumstance could be

treated as grounds for the reopening of proceedings. Also in other states, the basic premise for reopening administrative proceedings is the surfacing of new factual circumstances or evidence not known earlier to a party (but which existed at the time of issuing the decision), or that which could not be used in the earlier proceedings by a party, without being detrimental to it, but having an crucial impact on the outcome (Austria, Bulgaria, the Czech Republic, Estonia, Finland, Germany, the Netherlands, Poland, Slovakia). In these states to-date, no practice has developed that indicates whether a new act of EC law or a judgment by the ECJ would constitute grounds for reopening proceedings. However, in opinion of Austrian rapporteur, later decision of the ECJ clarifying a question of Community law cannot be regarded as a premise of "new evidence" allowing the reopening of the proceedings.

A similar premise, present in the laws of some states is a change in the facts or in the law used as a basis for the decision issued, in favour of a party (Latvia, Germany).

On the basis of national reports, other premises for the reopening of proceedings, which could have potential significance in the context of decisions infringing upon Community law, can be listed as follows:

- the factual or legal state which formed the basis for the decision placing a permanent restriction on an addressee has ceased to exist (Estonia);
- one of the requirements for lawfulness of the administrative act has been significantly breached [substantially violated] (Bulgaria);
- a decision issued based on another decision or a court judgment which was then set aside or reversed (Bulgaria, Estonia, Poland);
- a decision had been issued by an authority upon its own provisional assessment of certain legal question which was later decided in a different way by a competent authority or court (Austria, Poland);
- the European Court of Human Rights (ECHR) or other international or supranational court has issued judgment in the given case (Bulgaria, Latvia).

The administrative proceedings are usually reopened upon a request from a party (interested entity) (Austria, Bulgaria, the Czech Republic, Estonia, Germany, Latvia, the Netherlands, Poland). In some states, the reopening of such proceedings is also possible *ex officio* (Austria, Bulgaria, the Czech Republic, Poland).

As a principle, the reopening of administrative proceedings is subject to a time limit (Austria, Bulgaria, the Czech Republic, Estonia, Germany, Latvia, Poland, Slovakia).

2.4.2. According to the reports, in some states (Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Latvia, the Netherlands, Poland, Portugal, Romania, Spain, Turkey, the United Kingdom) it is also possible to reopen court proceedings concluded with a final court judgment. In the context under discussion it concerns a judgment approving an administrative decision.

The majority of the premises for the reopening of judicial proceedings listed in the national reports, are not related to the infringements of EC law. Some of the premises may, nevertheless, be of potential significance in situations discussed in this report.

The following can be listed at this point:

- the unconstitutionality of the provision on which the court judgment was based (Belgium, Estonia, Greece, Hungary, Poland);
- the subsequent discovery of such factual circumstances or evidence which could have affected the outcome of a case but which a party was unable to use in the previous proceedings (Belgium, Bulgaria, Estonia, Poland, Spain);
- a situation in which the court judgment was issued in breach of the European Convention of Human Rights and Fundamental Freedoms, declared by a final judgment of the ECtHR (Bulgaria, Estonia, Turkey). The issue which cannot be decided at this point because of the absence of relevant material is whether, by way of analogy, such a provision could be applied in the event of a judgment issued by the ECJ;
- a situation in which a final judgment of a national court is incompatible with a final judgment of an international court (Portugal);
- reopening of an appeal is necessary in order to avoid real injustice; the circumstances are exceptional and there is no alternative effective remedy (the United Kingdom).

2.5. Incompatibility of a decision with EC law as a potential premise for its revocation

As has been mentioned above, the general assumption adopted in Member States is that incompatibility with Community law is treated in the same way as incompatibility with national law.

It should be noted, however, that the incompatibility with Community law may assume various forms. In particular:

a) after the final decision had been issued by a national administrative authority, the ECJ may deliver judgment implying that the decision is incompatible with Community law.

b) the national law providing grounds for a final decision is incompatible with Community law.

The revocation of a decision, irrespective of the reason for its incompatibility with Community law is possible in Austria (only in tax matters), Estonia, France, Greece, Ireland, Poland, Portugal, Romania, Slovakia, Spain, Sweden and in the United Kingdom.

It means that such a decision may be revoked as illegal, irrespective of the infringement occurring at the stage of applying or creating law.

In Belgium, the Czech Republic Germany and Malta, the revocation of the decision will not be possible in the situation referred to above under subparagraph a).

The Czech rapporteur has noted that the incompatibility of decision with Community law has consequences identical to those arising from incompatibility with the Constitution. However, if the incompatibility with Community law, of the provision of national law used as the grounds for an administrative decision was found, after the conclusion of court proceedings on the judicial review of the decision, the latter could not be revoked.

3. Special procedural solutions in particular states concerning Community law

3.1. Modifying national legal provisions

As mentioned above, national legal systems do not principally contain particular provisions concerning incompatibility with Community law.

Nevertheless, special solutions adopted in several states should be noted. They consist of adopting modifications to procedural measures in the cases of

infringements of EC law. The modifications concern revocation of a final administrative decision or a court judgment.

a) In 2004, new grounds for reopening administrative proceedings were adopted in Latvian law. It concerns the situation where the European Court of Human Rights or another international or supranational court has issued a judgment, in the light of which proceedings in a case concluded with a final decision should be reopened. In such a case, the authority issuing the decision in the re-examined case has the obligation, to base its considerations on the findings and legal appraisal of the international or supranational court concerned. In the opinion of the Latvian rapporteur, the ECJ represents a supranational court and is therefore covered by the scope of application of this provision.

b) A similar solution was adopted in Poland. The Act on taxes was amended in 2005 by adding new grounds for reopening proceedings concluded with a final decision. A case may now only be re-opened if an ECJ judgment affects the content of a final decision issued. Yet, this legal rule is applicable only to decisions on tax matters and not to all administrative decisions.

c) In Austria, the time limit provided for revoking a tax decision in the case of its incompatibility with EC law or bilateral international agreements is extended. This limit is currently five years from the date of the decision, whereas in the case of a decision incompatible with national law this term is one year.

d) In Romania, a 2007 amendment to the Law on Administrative Disputes no. 554/2004 adopted new grounds for appeals against final court judgments, namely those that contravene the principle of primacy of Community law. This solution envisages the possibility of appealing a final judgment, when Community law was not taken into account in taking the decision or in the course of proceedings before the administrative court.

3.1.5. As implied by the Portuguese report, the decree of 2007 extended the procedure of „exceptional remedy of review" previously applied in common courts of law, to cover administrative courts. This procedure enables court proceedings to be reopened in cases where the final judgment is incompatible with the decision taken by the international (judicial) instance of appeal, and binding on Portugal. It seems that owing to this, a Portuguese court will be able to issue a new judgment

compatible with the ECJ's judgment, and as a consequence, invalidate the administrative decision deemed incompatible with EC law.

3.2. Modification of national procedural solutions through administrative practice and judicial decisions

The ECJ judgments of the *Kühne* line, referred to in the introduction to this report have a certain impact on the judicial decisions of national courts. As a result, the administrative decisions incompatible with Community law are treated somewhat differently, even though the language of the national law has not changed.

This phenomenon can be noted in the case law of French courts. In some areas regulated by the Community law, the necessity to ensure the enforcement of the decisions issued by the European Commission and the judgments delivered by the ECJ, justifies the revoking of final administrative decisions incompatible with EC law, even though national law does not provide grounds for revocation of the decision. This special solution was adopted by Conseil d'Etat (the Council of State) in two domains. Firstly, it concerned the setting aside of a decision to grant state aid, which was declared by the European Commission to be incompatible with the common market. Secondly, it pertained to the sphere of public procurement. Special provisions of national law allow the candidates to obtain public procurement contracts in order to appeal, any time till up to the signing of the relevant agreement, against any acts undertaken during the public procurement procedure, for reasons related to breaches of the obligation to announce and carry out tender process. It is possible to do this even when these acts, in view of their nature, are principally not subject to complaint for abuse of power, or when such a request from the applicant would normally be dismissed, because of the lapse of the time limit for appeals.

It implies that the admissibility of revoking decisions incompatible with Community law is more extended than that concerning decisions incompatible with national law. It is worth noting that this special treatment by the Council of State, regarding decisions that infringe on the Community law concerning state aid, corresponds to the position taken by the ECJ in the judgment in the *Lucchini* case.

Then, in the opinion of the Italian rapporteur, the ECJ's case law pertaining to the revocation of final administrative decisions incompatible with EC law (the *Kühne & Heitz*, and *i-21* cases) will, in practice, bring about an obligation on the body which

issued such a decision, to set this aside, on its own initiative, even if it is a final decision with a status of *res judicata,* that turns out to be incompatible with EC law in the light of a later judgment issued by the ECJ.

Also in the Netherlands, the judgment in the *Kühne & Heitz* case had a great impact on the judgments of administrative courts, concerning the competence of the administrative authorities to revoke final administrative decisions. Prior to that judgment, pursuant to general rules in Dutch law, the administrative authorities were obligated to re-examine the decision only when a party indicated new facts. As a result of the ECJ judgment in the *Kühne & Heitz* case, the administrative authorities have a duty to re-examine the case, also when all four criteria indicated by the ECJ are cumulatively met.

4. Applying the law concerning the revocation of administrative decisions and the reopening of judicial proceedings

4.1. Procedural autonomy of Member States

4.1.1. Most of the national rapporteurs are of the opinion, that in the Kühne judgment as well as in subsequent judgments, the ECJ accepts the principle of procedural autonomy of the Member States (Austria, Belgium, Cyprus, the Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovenia, Spain, Sweden Turkey and the United Kingdom).

In the opinion of the German rapporteur, the ECJ does not absolutely require national law to contain legal measures for reopening proceedings concerning final administrative decisions. If such measures are provided, the ECJ leaves it to national law, to balance the observation of the principle of certainty of legal transactions and stability of administrative decisions, and the principle of legality. In practice, the judgment in *Kühne* may, however, contribute to a wider application of such types of national provisions.

According to the Slovenian rapporteur, the procedural autonomy requires the courts to take EC law into account and, when such a need arises, to apply national procedural rules in a modified form („in a different way").

Several respondents presented a different stand on the issue of procedural autonomy. According to the rapporteurs from Estonia, France, Portugal, and

Slovakia, it can be inferred from the ECJ's case law invoked above, that the Court actually imposes an obligation on the Member States to adopt special measures ensuring full effectiveness of the Community law.

4.1.2. In the opinion of the majority of respondents, the laws in their respective states meet the requirements of equivalence and effectiveness as interpreted by the ECJ (Belgium, Bulgaria, Cyprus the Czech Republic Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom). Some of the new Member States have added that it is difficult to evaluate compliance of national law, with the requirements of the above principles due to the absence of relevant case law.

The Austrian rapporteur has indicated, that the Austrian tax regulations provided for longer time limits in which to revoke final decisions incompatible with Community law, compared with the decision incompatible with national law (a five-year term compared with a one-year limit, respectively, also to the detriment of the tax-payer). The principle of equivalence requires uniform provisions concerning time limits for revoking final administrative decisions. Hence, the rapporteur has concluded that the relevant Austrian provisions do not comply with the above principle.

4.2. Evoking Community law in administrative and judicial proceedings

4.2.1. In the majority of the states concerned, the possibility of revoking a final administrative decision is not affected, by the fact of whether a party has submitted a plea alleging a breach of Community law in the proceedings which led to the given decision. Such a situation occurs in: Austria, the Czech Republic, Denmark, Estonia, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Spain, Sweden and – as it seems – Cyprus, Slovakia, and Turkey.

In the majority of the states concerned, the court adjudicating on the legality of an administrative decision examines *ex officio* its compatibility with law, including Community law. Such a situation occurs in: Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Spain and Turkey.

A different solution prevails in France Ireland and Malta where the courts examine the complaints within the limits of pleas raised therein. Thus, in the event that the applicant has not raised the plea of incompatibility with Community law, the court will not examine *ex officio* this issue.

In the Netherlands the courts adjudicate within the limits of the appeal. Within these limits they are competent and obliged to supplement *ex officio* legal grounds of the appeal, including grounds founded in EC law. Only with respect of rules of public order, including provisions of EC law with a public order character, the courts are competent and obliged to go beyond the limits of the appeal.

As shown by the analysis of the Swedish Administrative Court Procedure Act (1971:291) conducted by the authors of this general report, the court in Sweden adjudicates within the limits of the complaint, but may go beyond these limits in delivering the judgment in favour of an individual without prejudice to other colliding private interests.

In some states, the legal solutions are more complex and thus it is not possible to give an unambiguous answer, regarding the obligation to evoke *ex officio* EC law.

As indicated by the Irish rapporteur, the court may *ex officio* take into account Community law, if its breach in a case under consideration is obvious.

It seems that in Slovakia, the court is principally bound by the limits of complaints but if a party, after the commencement of the court proceedings raises a plea in law concerning Community law, the court will *ex officio* take them into account.

In the Czech Republic, the complaint launched determines the limits of a judicial review of public administration. In principle, the administrative court is bound by the grounds of the complaint or by the pleas of breach of law by the administrative decision. Nevertheless, if the premises of invalidity of the decision, or of its issue with a manifest breach of law or rules of procedure, the administrative court is empowered to go beyond the limits of the complaint and to take *ex officio,* these defects into account.

In Austria, the Administrative Court (the only administrative court in Austria) takes into account EC law *ex officio*. Under the effect of the ECJ's judgment in the

case C-312/93 *Peterbroek*[5]*,* it is now accepted that with respect to the infringment of EC law, the provisions of national law do not apply, because it is accepted law that 'the Administrative Court has to decide only on the breach of those rights in which the applicant claims to be infringed". In the opinion of the rapporteur, this approach may change after the ECJ's judgment in the *Van der Weerd* case.[6] Perhaps the Administrative Court will begin to rigorously apply the Law on the Administrative Court, in such a way that the principle of allowing the court to adjudicate solely within the limits of the complaint (the so-called *Beschwerdepunkt*), will pertain also to Community law and not exclusively to national law, as has been the case to date.

4.2.2. In the majority of the states concerned, the competences to *ex officio* take into account, the fact that breaches of Community law are not differentiated depending on the instance in which the court was adjudicating (Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, Turkey, and – so it seems – Romania).

A particular solution occurs in Poland. The scope of review of the court depends on which instance is concerned. The administrative court of the first instance examines the complaint within the limits of the case, without being bound by the charges and demands of the complaint nor by the legal grounds invoked in it. The court is thus under obligation to consider *ex officio,* all infringements of law as well as all legal provisions including the provisions of Community law. The Supreme Administrative Court (the court of second and last instance) examines, however, the case within the limits of cassation taking ex officio into account only the invalidity of the judicial proceedings. It should be noted that the reasons of invalidity are not related to the breach of Community law. The similar solution exists in Bulgaria.

In Ireland, the court of last instance *(Supreme Court)* does not examine charges which have not been raised before the court of the first instance.

Within the aforementioned context, some reports remind one of the special position of the courts against whose decisions there is no judicial remedy under

[5] ECJ's judgment of 14 December 1995 C-312/93 *Peterbroek* [1995] ECR I-4599.
[6] ECJ's judgment of 7 June 2007 C-222/05 toC-225/05 *van der Weerd* [2007] ECR, I-04233

national law and who are obliged to raise the matter before the Court of Justice under Article 234 III EC.

4.2.3. In a great majority of Member States (Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Spain, Sweden, Turkey, and – as it may seem – Latvia and Malta) the earlier challenge of decision in the course of administrative or judicial proceedings, before a decision or judgment become final, is not a necessary condition for later revocation of the decision or judgment.

In some states, the revocation of the decision may be conditional on earlier exhaustion of ordinary measures of appeal.

In Lithuania, the only measure for revocation of a final administrative decision is the reopening judicial proceedings, which means that the revocation may only concern these decisions, which have been earlier appealed in an administrative court.

In Germany, the prerequisite for using the institution of the reopening of administrative proceedings concluded with a final decision, is for a party (the applicant) to show that it had no opportunity to invoke, in earlier administrative or judicial proceedings, the circumstances which justify the reopening of the proceedings. This requirement does not stand, of course, when the decision is being revoked *ex officio* by an administrative authority.

It seems that Romanian law does not contain the premise of mandatory declaration by an authority or a court of invalidity of decision or of reopening proceedings before the authority. In view of the above, in order to obtain later effective revocation of a final decision, the party has to exhaust all available measures under the mandatory preliminary administrative procedure. A similar requirement of the exhaustion of appeal measures in the administrative proceedings is binding, when final administrative decisions are revoked in Hungary.

4.2.4. The majority of the rapporteurs (Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, , Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Sweden) expressed the opinion that the interpretation

of national law applied in this domain, by their respective national courts conforms with EC law.

The authors of the questionnaire have intended to establish whether the obligation to interpret national law in conformity with EC law has an effect on the scope of discretion given to an administrative body. This could, for example, operate when the authority, acting under national law *may* revoke a decision, whereas in the event of incompatibility with EC law, it *would be obliged* to revoke the decision. The rapporteurs of Hungary, Ireland, Slovakia and the United Kingdom have stated, that interpretation of national law consistent to EC law has or may have an effect on the scope of discretion possessed by an administrative body.

Other respondents have expressed the opinion, that the consistent interpretation has principally no effect on the scope of discretion granted to an administrative body. The position will be different in the case of the domains reserved for the exclusive competence of the Community (Cyprus, Italy, Spain).

The Austrian rapporteur has emphasized, that in general administrative procedure there is no need to interpret provisions of Austrian law in the area of revoking administrative decisions, as long as the ECJ does not require revocation of a final decision, irrespective of the requirements of national law.

According to the German rapporteur, Community law has a limited effect on the interpretation of the German law of procedure, whereas substantive law is interpreted in the light of community law. This may result in the refusal to apply national law if this could not be interpreted in conformity with EC law.

In the opinion of the Czech rapporteur, it is not clear how the requirement of the interpretation conforming with EC law could affect the scope of discretion of an administrative body, since requirements formulated by the ECJ, concerning the revocation of final administrative decisions are limited to the condition of equivalence with national law.

According to the Dutch report, in the case of premises formulated by the ECJ in the *Kühne & Heitz* case, the administrative authority is obligated to reopen the case.

4.4. Revoking a final administrative decision or a court judgment?

In the event that an administrative decision, later approved by the court turns out to be incompatible with EC law, the question arises as to whether the revocation should concern the decision or the court judgment.

In the opinion of the Austrian rapporteur, the answer to this question depends, *inter alia*, upon the relationship between the courts and the administrative bodies. The point is that whether the court may only uphold or set aside the challenged decision, or whether it may adjudicate on the substance in the case and reverse the decision.

The majority of the respondents are of the opinion that in the aforesaid situation, it is appropriate for a competent administrative authority to revoke the decision (Austria, Cyprus, the Czech Republic, Estonia, France, Germany, Ireland, the Netherlands, Poland, Romania, Slovakia, Turkey, the United Kingdom and – it seems – Denmark and Greece).

However, in these states where it is solely a judicial authority which decides on the revoking, because there are no extraordinary means of appeal against a final decision at the stage of the administrative proceedings (directly before an administrative body), the revoking of the decision will occur exclusively before a court (Ireland, Finland) or the revocation will concern a court judgment, or the reopening of the court proceedings will be possible (Lithuania, Romania, Sweden, Hungary, Malta).

In some states, (Denmark, Estonia, Germany, Greece, the Netherlands, Poland, Romania, and Slovakia), although – in the opinions of the rapporteurs – the possibility of revoking the court judgment which reviewed the legality of a given final decision would theoretically exist, but the premises of such reopening do not pertain to the situation when an administrative decision turns out to be incompatible with EC law.

Some of the national respondents note, that the revocation of an administrative decision is possible even after a final court judgment confirmed its legality (Belgium, the Czech Republic, Greece, Italy, Poland, and Romania).

The Czech legal provisions concerning the administrative proceedings in tax cases should be referred to here: they exclude the application of extraordinary measures for revocation in cases where the final decision was reviewed by an

administrative court. Jurisprudence of the Supreme Administrative Court of the Czech Republic adopted the position, that the extraordinary measures may also be applied in this category of cases, when a party appeals on grounds not raised in the previous judicial proceedings. The rapporteur has also indicated that the later case law of superior courts does not constitute circumstances that justify the reopening of the proceedings. Therefore, the only available measures for revocation could be: an appeal under the provision of the Czech Act on administrative proceedings, or the *ex officio* setting aside of the decision within the statutory limits, or the remission of a public levy (tax).

In the same situation, in Latvia, it is admissible both to reopen court proceedings on the legality of an administrative decision (which would finally shape the future content and legal existence of the final decision), and to revoke the administrative decision by an authority or reopening of the administrative proceedings. The respondent pointed out, however, that a final court judgment is an impediment to independently revoking the decision; which means that the appropriate solution will be to reopen the judicial proceedings.

In Spain, the only way forward in the situation described above, is to reopen court proceedings following the application of a special means *recurso de revision.* However, meeting the prerequisites for this measure would be difficult. Where a challenge to a final decision deemed incompatible with EC law through the latter measure is unsuccessful, the party should file a suit demanding compensation for a breach of Community law, following the principles set out in the ECJ case-law.

5. Time limits for revoking the final administrative decision and for reopening the proceedings.

As was repeatedly mentioned above, the general presumption for the states operating in the area covered by this report is their procedural autonomy. In principle, this also includes the diverse legal solutions concerning time limits. The points concerned are:

a) time limits for submitting a motion to revoke a final administrative decision or reopen the administrative or judicial proceedings ;

b) time limits after the lapse of which revoking the decision or reopening administrative proceedings or judicial proceedings is inadmissible.

5.1. Significance of the fourth prerequisite in the *Kühne* judgment

The authors of the questionnaire asked the national rapporteurs, whether the fourth prerequisite for the revocation of final administrative decisions set in the *Kühne* case (para. 28), where the person concerned files a complaint to a administrative body immediately after becoming aware of the decision of the ECJ, should have a general application? The great majority of the national rapporteurs have indicated that the above premise is (should be) of universal significance (Austria, Belgium, the Czech Republic, Denmark, Germany, Greece, Ireland, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania and the United Kingdom).

The next group of respondents represented the opinion that the aforementioned will not find application in their respective legal system (Estonia Italy), or that its universal application is not necessary (Hungary, Sweden) in view of the manner of setting the time limits in their internal legal systems of law i.e. because their national time limits are longer (Estonia, Hungary), the powers of the authority to revoke a final decision are not limited in terms of time after taking into consideration the principle of legal certainty (Estonia), there are no time limits in the legal area concerned (Sweden) or national legislation containing „*reasonable time*" clause (Italy).

There have been some expressions of criticism levelled at the premise in question. For instance, in the opinion of the Spanish rapporteur, this premise is inconsistent with the respect for the principle of the procedural autonomy of Member States so accentuated by the ECJ. Additionally the expression "*immediately*" is imprecise and does not conform to the principle of legal certainty. The Slovenian rapporteur indicated that limiting the deadline by a such a subjective factor may be difficult to apply in practice or even impossible.

The opinions presented by national rapporteurs allow for the conclusion that the above premise could be of practical significance in these states, where neither laws nor case law provide for accurate time limits for revoking a decision. In other states, the national measures shall apply.

5.2. Deadlines under a national legal system for challenge decisions or court judgments incompatible with EC law

5.2.1. The majority of the legal systems in the states covered by this analysis, clearly state the deadlines for submitting a request to revoke a final administrative decision or for the reopening of judicial proceedings for the reason of incompatibility with law (EC law included). Only in a couple of states were no such terms set out in legislation, although this does not necessarily mean it is impossible to revoke administrative decisions or courts' judgments nor the absence of time limits. The deadlines are then set out in case-law. The solutions in national laws concerning time limits are very diverse.

The role of the time limit is to restrict the state of legal uncertainty and hence to promote the protection of the following principles: legal certainty, stability of the administrative decision, and *res judicata*. Despite the widespread view concerning the universality of the fourth premise in the Kühne judgment, its practical implementation may be achieved within the observation of time limits in national law.

Below, the legal solutions are reviewed together with the patterns or common elements found.

5.2.2. Time limits for the parties requesting revocation (setting aside or reversing/declaring null and void) of a final decision.

The beginning of the time limit is the date of the decision - in Austria (in cases of a tax decision based on EC law) and Slovenia, the date on which the decision became final (Finland; Slovakia); date of publication or effective date of the judgment by the Constitutional Court (Belgium) or the Special Supreme Court (la Cour Spéciale Suprême) (Greece) on the unconstitutionality of the provision underlying the issued decision.

The length of the time limits is extremely diverse: in some states it ranges from 6 months to 5 years depending on further circumstances. In other states there are no statutory time limits.

5.2.3. Time limits for the authority moving *ex officio* to revoke (set aside or reverse/declaring null and void) a final decision:

The beginning of the time limit depends on various factors, such as the date of issue or serving of the decision: Poland, Slovenia (tax proceedings); the date on which the decision became final (the Czech Republic, Slovakia, Spain); or the date the circumstances constituting the grounds for revocation became known (the Czech Republic, Germany, Latvia).

The length of the time limits range from several months to 5 years; in some states there are no time limits laid down.

5.2.4. The lapsed time limit that excludes a declaration of a decision as null and void, or its revocation (setting aside or reversing). The length of this time limit ranges from 1 year to 5 years.

5.2.5. Time limits for a party to submit a request to reopen proceedings:
The beginning of the time limit is the date the circumstances constituting the grounds for reopening proceedings became known (Austria, Bulgaria, the Czech Republic, Estonia, Germany and Latvia). The length of this time limits ranges in various states from 1 to 6 months.

5.2.6. Time limits for the authority moving *ex officio* to reopen proceedings

The beginning of the time limit is the date the authority learnt about the circumstances constituting the grounds for reopening, or the date on which the decision became final (Bulgaria, the Czech Republic, Germany, and Slovakia).

The length of this time limit ranges in various states from 1 month to 3 years.

5.2.7. Time limits for a party to submit a request to reopen judicial proceedings

In various states, there are extremely diverse limits of time, concerning the admissibility for a party to file a request for reopening judicial proceedings. The length of the time limits ranges from 3 months to 5 years depending on further circumstances. In some states there are no statutory time limits.

On average the time limits amount to several months, starting from the date the party learns of the existence of a cause for reopening judicial proceedings.

Irrespective of the above, in many states the law envisages that, after the lapse of a certain time period after the judgment on the case has became final, it is not admissible to reopen the proceedings. These final time limits range from several to 10 years.

5.2.8. It is important to note that the time limits for revocation (setting aside or reversing), declaring the decision null and void or for the reopening of the proceedings are different in various states depending on further circumstances.

These circumstances can concern, above all, the content of the decision, e.g.

a) whether a party acquired a right under this decision (Belgium, France, Germany, Latvia), or whether the decision is in favour of the party or to its detriment (Belgium, Germany, Latvia, Spain);

b) whether the decision contravenes law or whether it complies with the law (Germany, Latvia);

c) whether the decision has been issued as a result of an offence. In such cases revoking the decision is not bound by a time limit (Belgium, Slovakia).

d) whether the decision has been issued under provisions later found to be unconstitutional (Belgium, France, Greece, Poland).

5.3. Effects of case law on setting the time limits

The time limits discussed above can result not only from the provisions of law but also be provided for in the body of case law. For example, the French Council of State, in its judgment of 2001 (*M. Ternon*) stated, that in view of the principle of legal certainty, a decision conferring a right on the addressee may not be withdrawn (with *ex tunc* effect) four or more months after the date of issue. After the lapse of this time limit, the administrative authority, receiving the request to revoke the decision, is under obligation to dismiss the request, unless the request has come from the addressee of the decision or when the decision has been issued as a result of tort.

In Greece, the State Council in its case law accepted, that in the case of an individual decision annulled by the State Council of by an administrative court because of the unconstitutionality of its legal grounds, or issuing it on the basis of a provision in a regulation issued without legal authorisation the addressee of similar decision may submit a request to revoke it, within a reasonable time calculated from the date of publication of the given judgment.

In some states there are no provisions concerning the time limits concerning the above matters (Cyprus, Denmark, the Netherlands, Luxembourg, and Sweden). It may thus be inferred from the national reports, that the revoking of a decision or reopening of the proceedings is possible at any time.

6. Revocation of the decision and liability for damages

6.1. Introductory remarks

The issue of state liability for damages caused by issuing an administrative decision or court judgment incompatible with EC law has been discussed for years,

especially after the ECJ's judgments in the *Brasserie* and *Köbler* cases.[7] In the context of the colloquium, only a fragment of the issue constitutes a point of interest.

The proceedings on the revocation of a final administrative decision or a judgment with *res judicata* status on the one hand, and liability proceedings connected with the breach of Community law on the other, have different functions. Nevertheless, there are also interesting connections between them.

The administrative decision that is incompatible with EC law may cause damage to the addressees or to third parties. Revoking such a decision may offset the damage in whole or in part. However, it may also be the case that just revoking the decision can cause damage.

As it is implied by the discussion in the previous part of the report, the possibility of revoking a final administrative decision incompatible with EC law is an exception rather than a rule. When the revocation of the decision or a court's judgment is impossible, obtaining compensation could be the only way to satisfy the interests of individuals in whole or in part.

In general, the ascertaining claims for damages from the state may be of supplementary or of an alternative nature compared with the proceedings on the revocation of an administrative decision or reopening of judicial proceedings.

6.2. Who decides on compensation?

It is interesting to establish whether the competences to adjudicate on compensation in various states have a certain relationship to the competences to revoke an administrative decision. The reports help to identify various solutions being applied.

In some states, the compensation is decided by the same administrative body which revoked its own final administrative decision, because of its incompatibility with law (Latvia, the Netherlands, Portugal, Romania, Spain). In Sweden it is decided by the Justitiekanslern (The Chancellor of Justice) representing the state in civil law disputes.

More frequently than not it is the courts that decide on compensation. The reports imply, that in some states the cases involving state liability are within the

[7] ECJ's judgment of 5 March 1996 C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR-1029; of 30 September 2003 C-224/01 *Köbler* [2003] ECR I-10239.

competences of the administrative courts (Bulgaria, Estonia, France, Greece, Italy, Latvia, Lithuania, Portugal, Spain and Turkey). More often, however, these matters fall within the competences of the common courts of law (Belgium, Cyprus, the Czech Republic, Finland, Germany, Ireland, Luxembourg, Malta, Poland, Romania, Slovakia, Slovenia, the United Kingdom and Italy – but only in cases involving the infringement of Community law). Obviously this division is absent in the states where is no separate system of administrative courts. It is interesting to note, that in the states with a court system based on dualism, the solution applied most often is the following: the judicial review of the administrative decisions is exercised by administrative courts while the compensation is decided on by a civil court (e.g. in Austria, Belgium, Cyprus, Finland, Germany, Luxembourg and Poland).

In Germany, the proceedings on compensation are conducted before a civil court. It can be inferred from the national report, that there have been discussions on the possibility of proceeding in such matters in an administrative or financial court (in the case of tax decisions).

Dutch law allows individuals to make the choice as to whether to ascertain claims for damages before an administrative court or a civil court. If an administrative authority refuses to revoke a decision, an individual may either file a suit against this refusal with an administrative court together with a claim for damages, or bring an action before a civil court claiming damages.

In Denmark, parties may file a request with an administrative authority either for setting aside a decision or for claiming damages. The condition for it is, however, that the issue of validity of the claim is not contentious. In some cases it is necessary to bring an action to a court which may adjudicate both on the validity of the decision and on possible claims for damages.

6.3. Connections between the proceedings on claims for damages and the proceedings on the revocation of a final administrative decision incompatible with law

In the light of the reports, various links exist between the proceedings (administrative or judicial) on revoking a decision and the proceedings on claims for damages.

This link may consist of the fact, that the effective suing for damages depends upon prior conclusion of the proceedings to revoke a decision. In such a situation, the premise for damages is an administrative decision or a court judgment on revoking a decision or at least a declaration that the decision infringed the law. Such a solution has been adopted in Belgium, Bulgaria, Cyprus, Italy, Luxembourg, the Netherlands, Poland, Slovakia and Slovenia.

In Austria, when setting aside a decision does not lead to redressing damage, such a decision remains in force, and the injured party only files a claim for compensation.

In the Netherlands, in the case of the final administrative decision which contravenes Community law, the addressee of the decision should file a request to the administrative authority for revocation of a final decision or for a declaration that the decision is unlawful. Only after resolving this matter, can the claim for damages be submitted. If an individual fails to utilise this avenue, both the civil court and the administrative court refuse the granting of compensation.

As indicated by the national rapporteurs, it is also possible to resolve the revocation of the challenged decision and grant compensation within a single proceeding (Bulgaria, Estonia, Ireland, Malta, Romania, the United Kingdom).

One may also point out some states where an authority or a court adjudicates on compensation without prior procedure on revoking a decision. This is so in Denmark, Greece, Hungary, and Sweden.

In Turkey it is possible to request that a court (administrative court, tax court, the Council of State) revokes an administrative decision and awards damages. It is also possible, however, to file a request for a revocation of the decision first, and then later bring a lawsuit before a competent court for awarding damages. A similar choice is given to parties in Bulgaria, France, Lithuania, Portugal and in Spain.

In the Czech Republic and Slovakia it is possible to use two independent and parallel procedures. Under the first one, it is required that first the decision is declared null and void, or the revocation of a decision for the reason of infringement of law by an administrative authority or court is obtained. Only after the proceedings are concluded, it is admissible to conduct the proceedings for compensation. Under the second procedure, the liability for compensation is independently decided on by a

civil court. If there is an earlier judgment by an administrative court, the civil court takes it into account in the pending proceedings but is not bound by it.

6.4. Determinants of the choice of proceedings

In these cases where the choice between proceedings is possible, a question arises about the criteria for the choice in particular states.

As indicated by the Czech rapporteur, ascertaining the compensation before a civil court is simpler. The civil court evaluates on its own both the correctness of administrative proceedings and the legality of the decision.

Sometimes, the choice of one of the types of proceedings can be explained by more favourable time limits. As indicated by the Lithuanian rapporteur, the proceedings before the court can only be reopened within three months. The proceedings on the claims for damages may be initiated within three years.

The choice of possible avenues of proceedings can also be supported by the differentiation of court costs in these two procedures. In Estonia, the proceedings for damages attract 3% of the court fee and as such it can sometimes amount to high sum. In the proceedings to review the legality of an administrative decision there is only a fixed fee of 80 crowns (ca. EUR 5).

In Denmark, when there is no doubt about the legitimacy of the claim for damages, the authority may agree to an out-of-court settlement. This is a less expensive and expedite way to proceed. It may be expected that other states also have such a solution available.

6.5. Specificity of the claim for damages based on the plea of the Community law infringement

In principle, the states concerned do not have special provisions concerning the damages resulting from breach of Community law. Only a few differences can be highlighted.

The Italian provisions say, that that in a case where harm has resulted from a court judgment contravening EC law or has been based on its erroneous interpretation, the civil court has the competence in the case. When it comes to the claims based on national law, the administrative courts retain the competence.

In Germany, when the administrative court establishes in the proceedings that a decision has infringed EC law, then – in the words of the respondent - „it should be possible" to award damages without instituting separate proceedings. In the event of an unsuccessful outcome, the party could file a suit with a civil court evoking the judgment of an administrative court.

The Estonian rapporteur has pointed out the amendment in national law resulting from the ECJ's judgment in the *Brasserie* case. The individuals can now claim damages caused by an incorrect or untimely implementation of EC laws. In Estonia there is no legal solution enabling the following the ECJ case law e.g. *Köbler* and *Traghetti.*[8] Pursuant to national law, the claim for damages is only admissible when the adjudicating judge committed an offence.

In the legal system of Luxemburg there are no provisions allowing a party which has sustained harm as a result of a court judgment, to institute proceedings for damages against the state. In this respect the laws of Luxemburg show a rift with ECJ case law (*Köbler*).

The Belgian Court of Cassation has not approved the case law of common courts of law, based on the criteria for state liability for infringement of EC laws as established by the ECJ. The Court of Cassation has declared that in the light of Belgian law, it is not justified in making compensation conditional, upon finding that the infringement of Community law by an administrative authority has been sufficiently serious. It means that the Court of Cassation has adopted less stringent premises of liability than those adopted by the ECJ.

[8] ECJ's judgement of 13 June 2006 C-173/03 *Traghetti* [2006] ECR I-05177