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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

REPLY FOR THE SUPREME ADMINISTRATIVE COURT OF THE CZECH REPUBLIC

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Index to the abbreviations used:

ATDA	– Administration of Taxes and Duties Act
CAJ	– Code of Administrative Procedure (*)
CAP	– Code of Administrative Justice (*)
CC	– Constitutional Court of the Czech Republic
CCA	– Constitutional Court Act (*)
CCP	– Code of Civil Procedure
Coll.	– Collection of Laws
Coll. CC	– Collection of Findings and Orders of the Constitutional Court
Coll. J.D.	– Collection of Judicial Decisions (Collection of Case-Law of courts of general jurisdiction (civil, commercial and criminal), published by the Supreme Court)
Coll. SAC	– Collection of the Decisions of the Supreme Administrative Court
ECHR	– European Court of Human Rights
SAC	– Supreme Administrative Court of the Czech Republic
SC	– Supreme Court of the Czech Republic
SLA	– State Liability Act

An unofficial translation of the documents marked with asterisk () is available at the web-site of the Supreme Administrative Court at <http://www.nssoud.cz/en/> \ Full-texts of the decision of the Supreme Administrative Court referred to in this questionnaire are available (in Czech only) at www.nssoud.cz \ Full-texts of the decision of the Constitutional Court referred to in this questionnaire are available (in Czech only) at www.judikatura.cz \ Full-texts of the decision of the Supreme Court referred to in this questionnaire are available (in Czech only) at www.nssoud.cz*

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

a) do the legal provisions have general application or they relate specifically to the application of EC law?

b) which authority (administrative body or national court) is empowered under your legal system to make use of the procedural means in question?

In Czech law, a final administrative decision can be:

- (i) annulled or altered by the author of the act itself, i.e. by the respective administrative authority which issued the act;
- (ii) annulled or altered by the higher administrative authority;
- (iii) annulled by an administrative court reviewing the act (§ 65 - § 78 CAJ¹);
- (iv) annulled by the Constitutional Court, if the act is eventually challenged on constitutional complaint submitted by an individual (concrete review of constitutionality - § 72 - § 84 CCA²).

The legal framework, which is outlined below, is of general application: there are no specific provisions which would relate particularly to the application of EC law and possible revocations of administrative acts contrary to EC law (Question 1) (a)).

The authority entitled to revoke an administrative decision is the administrative authority, which issued the contested act. The higher administrative authority is also entitled to do so (Question 1) (b)). Administrative courts can only quash the administrative decision and remit the case to the administrative authority, which issued the annulled decision, for further proceedings consistent with the findings of the court (§ 78 (1) CAJ); administrative courts are not entitled to replace an administrative decision with their own.³

Two, to great extent independent codes of procedure lay down the rules of procedure before administrative authorities:

- (i) the general legal framework is set by zákon č. 500/2004 Sb., správní řád, ve znění pozdějších předpisů [*Act no. 500/2004 Coll., Code of Administrative Procedure, as amended*], hereinafter “CAP”;
- (ii) a specific framework for administration of taxes, duties and levies is provided for by zákon č. 337/1992 Sb., o správě daní a poplatků, ve znění pozdějších předpisů [*Act no. 337/1992 Coll., on Administration of Taxes and Duties, as amended*], hereinafter “ATDA”.

¹ Zákon č. 150/2002 Sb., soudní řád správní, ve znění pozdějších předpisů [*Act no. 150/2002 Coll., Code of Administrative Justice, as amended*], hereinafter „CAJ“.

² Zákon č. 182/1993 Sb., o Ústavním soudu, ve znění pozdějších předpisů [*Act no. 182/1993 Sb., on the Constitutional Court, as amended*], hereinafter „CCA“.

³ There is a limited exception to this rule in matters of administrative sentencing, where administrative courts are entitled to partially reduce the sanction imposed by the administrative authority, i.e. thus indirectly altering the content of the administrative decision (§ 78 (2) CAJ).

The revocation of a final administrative decision will be examined separately in the procedural regime of each of these codes of procedure.

The **CODE OF ADMINISTRATIVE PROCEDURE** contains three types of procedure that may lead to revocation of a final administrative decision:

- (i) revision (§ 94 – § 99 CAP);
- (ii) the issue of a new decision (§ 101 CAP); and
- (iii) reopening of proceedings (§ 100 - § 102 CAP).

The crucial differences between these three types of proceedings lie in the right of the individual, who was party to the previous proceedings, which resulted in the final administrative decision, to claim the revocation of the decision, in reasons, which are recognised in each of the procedures for revocation of the decision and in the time limits, within which the revocation can be claimed.

The **revision** is a procedure of internal administrative supervision. It is launched exclusively *ex officio*, i.e. on the basis of an internal decision by the administrative authority or the higher administrative authority. An individual, who was party to the prior administrative procedure, which resulted in the issue of the final decision, can only suggest (not claim) the launching of the revision procedure. Consequently, the administrative authority is not bound by the suggestion made by the individual (§ 94 (1) CAP). The object of the review in the revision proceeding is the legality of the final decision, i.e. the conformity of the administrative act with valid law. This conformity is judged according to the legal situation that was there in the moment of the adoption of the original act (§ 96 (2) CAP). The launching of a revision is subject to two time limits: firstly, there is a subjective time limit of 2 months, which starts running from the moment the administrative authority became aware of reasons for the revision. Secondly, there is the objective time limit of 1 year following the moment the administrative decision became final (§ 96 (1) CAP). With the lapse of either of the two time limits, the revision is time-barred.

The **reopening of proceeding** can be launched following a petition by the party to the previous proceeding (§ 100 (1) CAP) as well as by a decision of the administrative authority itself, acting in its official capacity (reopening *ex officio* - § 100 (3) CAP). The reasons for reopening are either new facts or circumstances, which were unknown at the moment of the original proceedings and which the party could not have brought to the attention of the administrative authority, or the fact that a decision, on which the final administrative decision was based, has been meanwhile annulled or altered (§ 100 (1) CAP). The subjective time limit for the reopening of proceedings is 3 months, the objective amounts to 3 years (§ 100 (2) CAP). Again, the lapse of either of the two time limits precludes the reopening of proceedings.

In all types of revocation of final decisions, the administrative authority is obliged to respect rights of individuals acquired in good faith (§ 94 (5) in connection with § 100 (5))

CAP). The administrative authority shall also balance the interests of legality of final administrative decisions, which would lead to their revocation, with protected rights of third persons (§ 94 (4) CAP).

The **ADMINISTRATION OF TAXES AND DUTIES ACT** provides for 3 types of revocation of final administrative decisions:

- (i) reopening of proceedings (§ 54 - § 55 ATDA);
- (ii) revision of tax decisions (§ 55b ATDA); and
- (iii) remission of tax (§ 55a ATDA).

The reopening of proceedings and the revision of tax decisions in the ATDA are conceived similarly to the CAP. Their aims and scope are similar.

As far as the **reopening of proceedings** is concerned, there is a difference in time limits, within which the reopening can be launched: the subjective limit, i.e. the time limit running from the moment the individual taxpayer acquired the knowledge of the facts or circumstances giving rise to a reopening, is 3 months (§ 54 (3) ATDA). The outer objective time limit, i.e. the maximum limit within which a reopening can be effectuated, is 3 years following the end of the tax period for which reopening is sought (§ 47 (1) ATDA). The reopening under ATDA may also be initiated either by the petition of the party or by a decision of the tax authority issued *ex officio*.

The **revision of tax decisions** is, similarly to the CAP, a tool of administrative supervision. It is launched *ex officio*. A taxpayer, although she may again suggest to the tax authority to review a final decision, has no right to initiate the revision: it remains in the realm of discretion of the tax authority.⁴ A revision may only be initiated within 2 years following the year in which the tax decision in question became final (§ 55b (2) ATDA).

A special procedure, which has no parallel in the CAP, is the **remission of tax** under § 55a ATDA. This procedure may perhaps not fall within the broadly defined “revocation” of an administrative decision – the decision will not be “eliminated”, annulled etc. The tax authority’s decision remains valid; it will only not be enforced. The remission of tax should, however, be mentioned here, as its consequences for the taxpayer are in reality very similar to that one of a successful reopening or revision – the tax will not have to be paid.

The reasons for the remission of tax are typically inconsistencies or discrepancies in the application of tax laws. The tax may be remitted to an individual taxpayer or to a plurality of taxpayers by one decision (§ 55a (4) ATDA). The taxpayer has again no right to the tax remission; the decision of the tax authority on the remission of tax or duty can be,

⁴ As confirmed by the jurisprudence of the SAC – cf. e.g. order of 29. 4. 2003, case no. 6 A 153/2002-18, no. 14/2003 Coll. SAC or judgment of the SAC of 19. 12. 2006, case no. 1 Afs 56/2004-114, no. 1113/2007 Coll. SAC.

however, reviewed before administrative courts.⁵ It should be mentioned that the procedure for remission of tax or duties might become significant in the future, in particular as one of the tools for remedying incorrect application of EC tax or customs rules by the Czech tax authorities.

For the issues examined in this questionnaire, § 56a (2) ATDA is of importance: it states that the use of extraordinary remedies (i.e. the reopening of the proceedings and the revision of tax decisions, but not the remission of tax) is excluded in cases where the decision of a tax authority has been reviewed by a court. It also prohibits the use of extraordinary remedies once the judicial review started. This means, as will be discussed in detail below, in reply to the question 3, that the ATDA expressly excludes the revocation of a final administrative decision similar to the *Kühne & Heitz* or *Kempter* scenarios, i.e. it does not allow the administrative authority to revoke a final administrative decision once it was made subject to judicial review. The CAP contains no similar barrier to the revocation of administrative decisions, which were subsequently made subject to judicial review.

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?

In answering this question, two issues should be distinguished:

- (i) the discretion of the administrative authority whether or not it will *initiate proceedings* leading eventually to the revocation of a final administrative decision;
- (ii) the discretion with which the administrative authority has been entrusted *when deciding* the issue of revocation *on merits*, i.e. when deciding whether or not the reviewed decision should be set aside.

The *discretion in matters of launching* one of the proceedings eventually leading to the revocation of a final decision is determined by the fact whether the administrative authority acts of its own motion (*ex officio*) or following a petition by a party. If there is a petition (motion) for proceedings to be reopened, i.e. the individual has the right to claim reopening, the administrative authority is obliged to examine the petition and issue either a positive or a negative decision. Conversely, a suggestion by the individual to make a final decision subject to administrative revision or the suggestion to remit taxes, where the individual has no right to initiate the proceedings, is not binding upon the authority. In these cases, the authority's discretion is much wider.

The dividing line between the two type of extraordinary remedies (the first one being a matter of right, the other one a matter of discretion) is, however, not so neat in the case-law of the Supreme Administrative Court and the Constitutional Court, especially as far as the possibility of judicial review of a decision not to initiate a revision is concerned.

⁵ Judgment of the SAC of 30. 11. 2005, case no. 6 A 69/2000-55, www.nssoud.cz.

There is a reasonable degree of clarity in the case law as far as the revision under the CAP⁶ is concerned: the SAC generally held that the action for review of a decision which denies revision is not admissible.⁷

The issue of admissibility of an action against a decision denying the revision under the § 55a ATDA is less clear. The majority of decisions of the SAC perceive the denial of a revision under the ATDA similarly to the CAP: the denial of the tax authority to launch revision is not a decision, which could be reviewed before administrative courts.⁸ There are, however, also decisions that reject this approach arguing that “[...] *even a decision, which is wholly dependent upon the discretion of the administrative authority, can be reviewed at administrative justice. If there was no such a possibility, the court could not review, if the administrative authority has not exceeded the limits of its discretion (discretion must have its limits, otherwise it is arbitrariness) or if it has not misused the discretion accorded to it by law [...]*”⁹

Far from clear is also the case-law of the Constitutional Court on the same issue: in its older case-law, the CC held that an administrative action against a decision of a tax authority denying a revision is admissible.¹⁰ This line of case-law was subsequently rejected by a plenary opinion of the CC.¹¹ This opinion was, however, not followed by all the posterior chamber decisions: some of them followed¹² it and declared actions against decisions denying revision inadmissible while others,¹³ referring themselves to the older case-law, allowed the actions.

As far as the degree of discretion in *deciding on the revocation itself* is concerned, the situation is again different for reopening of proceedings on the one hand and the revision (remission of tax) on the other.

If proceedings are reopened, the decision-making in the new proceedings is still bound by the factual and legal circumstances which were there at the moment of the adoption of the original decision (§ 96 (2) CAP as well as § 56a (1) ATDA). The reference to the facts

⁶ More precisely, under the old Code of Administrative Procedure (Act no. 71/1967 Coll.). This was, however, as of 1. 1. 2006, replaced with Act no. 500/2004 Coll., the (new) Code of Administrative Procedure. The revision procedure is, however, conceived of similarly in both codifications.

⁷ Cf., e.g., order of the SAC of 8. 4. 2003, case no. 5 A 170/2002-15, no. 197/2004 Coll. SAC; judgment of the SAC of 14. 7. 2004, case no. 7 As 20/2004-87, www.nssoud.cz; judgment of the SAC of 20. 10. 2004, case no. 3 As 14/2004-40, no. 985/2006 Coll. SAC.

⁸ E.g. order of the SAC of 29. 4. 2003, case no. 6 A 153/2002-18, no. 14/2003 Coll. SAC; order of the SAC of 25. 6. 2003, case no. 5 A 143/2002-9, www.nssoud.cz or, most recently, judgment of the SAC of 19. 12. 2006, case no. 1 Afs 56/2004-114, no. 1113/2007 Coll. SAC.

⁹ Judgment of the SAC of 30. 11. 2005, case no. 6 A 69/2000-55, www.nssoud.cz.

¹⁰ Finding of the CC of 1. 10. 1997, case no. II. ÚS 94/96, Coll. CC, vol. 9, no. 118, p. 97 or finding of the CC of 12. 11. 1997, case no. II. ÚS 271/96, Coll. CC, vol. 9, no. 140, p. 253.

¹¹ Opinion of the CC (full court) of 19. 12. 2000, case no. Pl. ÚS-st 12/2000, Coll. CC, vol. 21, p. 486.

¹² See e.g. finding of the CC of 9. 6. 2004, case no. IV. ÚS 516/03, Coll. CC, vol. 33, no. 37, p. 575.

¹³ E. g. finding of the CC of 13. 11. 2001, case no. II. ÚS 660/2000, Coll. CC, vol. 24, no. 171, p. 275.

and the law as they stood at the moment of the adoption of the original decision also limits the degree of discretion of the administrative authority.

The conditions for the revocation of a decision in case of a revision (remission of tax) are laid down by broad legal notions, such as:

- the decision was issued in conflict with the law (revision under § 97 CAP);
- the decision is in conflict with the law or it is vitiated by fundamental faults in procedure and the circumstances imply that the tax was assessed improperly (revision under § 97 ATDA);
- inconsistencies in the application of tax legislation occur (remission of tax under § 55 ATDA).

Equivocal as they are, these notions still limit the discretion of the administration as to when a decision is to be revoked. As the CC observed (here in the context of reopening of proceedings) if the circumstances, foreseen by the law are met (e.g., there is a clearly discernable illegality), and the administrative authority has re-opened the proceedings, the authority is under a legal obligation to annul or alter the decision under review.¹⁴

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);

The revocation of final administrative decisions, which were subsequently reviewed and “confirmed” at administrative justice, i.e. the scenario foreseen in the cases *Kühne & Heitz* and *Kempter*, would be, under Czech law, highly problematic at least for two reasons:

Firstly, as was already mentioned in reply to question 1, the ATDA expressly excludes the use of extraordinary remedies (i.e. the reopening of proceedings and the revision) in cases where the final administrative decision was reviewed before administrative courts (§ 56 (2) ADTA). The logic of this prohibition is to accord “higher status” and priority to decisions at administrative justice, which should not be subsequently called into question by one of the parties to the dispute. This prohibition was narrowed by the case-law of the SAC, which held that the prohibition only applies to cases when the reasons put forward for the use of extraordinary remedies are the same to reasons which were put forward before administrative courts.¹⁵ This would, however, still exclude the *Kühne & Heitz* scenario, i.e. the possibility to revoke a decision on the basis of its incompatibility with EC law, which was also made valid before administrative courts in previous proceedings. As was also mentioned above, the CAP does not contain any such prohibition.

Secondly, the more general problem posed by the *Kühne & Heitz* scenario is the fact that in Czech law, subsequent case-law of higher courts is not a sufficient reason for

¹⁴ See finding of the CC of 29. 9. 1999, case no. II. ÚS 231/96, Coll. CC, vol. 15, no. 130, p. 235.

¹⁵ Judgment of the SAC of 20. 9. 2006, case no. 2 Afs 221/2005-64, www.nssoud.cz; order of the grand chamber of the SAC of 17. 7. 2007, case no. 2 Afs 51/2006-58, n. y. p.

revocation of administrative decisions. Domestic codes of procedure typically allow for the use of extraordinary remedies and the revocation of final decisions only if new circumstances appear which were existent but not known at the moment of the original decision-making. Other reasons for revocation of final decisions is the existence of fundamental irregularity in the procedure leading to the issue of the decision (fraud, criminal behaviour etc) or that there was a change in another decision which was the basis for the decision in question.

However, the change in case-law does not constitute such a fundamental irregularity or fault as to justify the revocation of an administrative decision. The Czech Constitutional Court¹⁶ as well as the Czech Supreme Court¹⁷ have on several occasions held that subsequent change in their case-law is not a sufficient reason for reopening of proceedings, be it in the context of civil or criminal justice. According to the CC, *“New circumstances can be only circumstances unknown to the court in the original proceedings, but existent at the moment of the issue of the original decision, which became known only later. A new interpretation of the substantive provisions of criminal law, even if contained in the findings of the Constitutional Court, cannot be, for the same reason, a new circumstance, if it did not exist in the moment of the issue of the original decision.”*¹⁸

The reopening of the administrative proceedings, foreseen by the decision of the Court of Justice in the *Kühne & Heitz* decision, is thus according to the Czech law impossible. It should be stressed, however, that denying possibility to review final decision only on the basis of change in the case-law of superior courts is not uncommon to other systems: the German Code of Administrative Procedure (*Verwaltungsverfahrensgesetz*), for instance, which can generally be said to be quite open to possibility of reopening final decisions,¹⁹ does not recognise the change in the case-law of superior courts as a sufficient reason for reopening final decisions either.²⁰

In conclusion, taking into account the fact that the first condition in *Kühne & Heitz* makes the possibility of reopening final decision contrary to EC law subject to the condition that the national authority has the same power in comparable situations under national law (principle of equivalence) and that the Czech administrative authorities have

¹⁶ See, e.g., the finding of the CC of 1. 3. 2004, case no. IV. ÚS 792/02, Coll. CC, vol. 32, no. 31, p. 281; finding of the CC of 15. 4. 2004, case no. IV. ÚS 178/03, Coll. CC, vol. 33, no. 20, p. 417; finding of the CC of 15. 4. 2004, case no. IV. ÚS 190/03, Coll. CC, vol. 33, no. 21, p. 429.

¹⁷ E.g. judgment of the SC of 15. 8. 1996, case no. 2 Cdo 133/96, [1997] Soudní judikatura, issue 4, no. 33; order of the SC of 28. 1. 1999, case no. 20 Cdo 322/98, Coll. J. D., year 2000, issue 7, no. 48; and also a number of unpublished decisions of the SC, accessible online at the websites of the Supreme Court (www.nsoud.cz), e.g. order of 25. 9. 2000, case no. 20 Cdo 540/2000; judgment of 25. 1. 2001, case no. 20 Cdo 2948/2000; order of 15. 12. 2006, case no. 33 Odo 83/2006.

¹⁸ Finding of the CC of 15. 4. 2004, case no. IV. ÚS 178/03, Coll. CC, vol. 33, no. 20, p. 417.

¹⁹ It expressly recognises, for instance, that the subsequent change in facts or in legal situation as one of the reasons for reopening [§ 51 odst. 1 (1) VwVfG], situation which is, under Czech law, not possible.

²⁰ Cf. *Stelkens, P. et al.*, *Verwaltungsverfahrensgesetz: Kommentar* (5. Auflage). C. H. Beck : München, 1998, pp. 1520 - 1521 and the case law cited therein.

no such power under national law, the revocation of a final decision which proves to be contrary to subsequent judgments of the Court of Justice is, in the current state of the Czech law, not possible.

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);

The incompatibility of Czech law with EC law and the effects such incompatibility would have for administrative decisions issued on the basis of Czech law could be, for the purpose of this question, compared with the effects of administrative decisions issued on the basis of a law which is later found unconstitutional. This purpose of this parallel (incompatibility with EC law \approx unconstitutionality) is not to pass any judgment on the effects of EC law in the domestic legal order.²¹ The only purpose is to find, absent any specific case-law on this particular issue by the Czech courts due to the recent accession of the Czech Republic to the European Union, a suitable parallel as far as consequences of the incompatibility between two levels of norms are concerned.

In addressing this question, two possible scenarios should be distinguished:

- (i) the incompatibility of a provision of the Czech law with Community law was ascertained already at the moment of the issue of the contested decision;
- (ii) the incompatibility of a provision of the Czech law with Community law was established only after the issue of the (now final) decision.

If the incompatibility was established already at the moment of the issue of the administrative decision, the decision is illegal. Illegality of the decision is a sufficient reason for the use and the well-founding of all ordinary (appeal) as well as extraordinary (revision - § 94 (1) CAP; § 55b (1) ATDA, remission - § 55a (1) ATDA) remedies. In all these cases, however, the use of extraordinary remedies is subject to the general time limits set out above (reply to question 1).

A subsequent finding of incompatibility of the legal basis with EC law presents, however, a different situation. It is in these cases where the parallel with consequences of finding of unconstitutionality might be instructive: the situation could be treated similarly to the consequences the subsequent finding of unconstitutionality of a law has for administrative decision issued on its basis. Again, two scenarios should be distinguished:

- (i) the unconstitutionality of the legal basis for the final administrative decision has been ascertained in the course of judicial review of the contested administrative act before administrative courts;

²¹ Cf. the finding of the CC of 8. 3. 2006, case no. Pl. ÚS 50/04, no. 154/2006 Coll., where the CC observed that after the Czech accession to the European Union, Community law became part of the Czech legal order and applies under the conditions foreseen by EC law itself.

(ii) the unconstitutionality of the legal basis of the final administrative decisions has only been established after the review at administrative justice has been finished, i.e. the decision is final and no further proceedings challenging the decision are running. The administrative decision as well as judicial decision reviewing it became final.

As far as the first possibility is concerned, the SAC held that the principle of legitimate expectation requires the court reviewing an administrative decision, which is based on a legal provision which has been, in the meantime, annulled for its unconstitutionality, to take this fact into account and annul the administrative decision.²² This means that if, in the moment of the declaration of unconstitutionality, i.e. in the moment of the decision of the Constitutional Court, the judicial review of the administrative decision is still taking place, the deciding court will take the intervening decision of the Constitutional Court into account when deciding on the legality of the contested administrative decision.²³

The second scenario, i.e. if a legal provision is annulled for its unconstitutionality only after the judicial review has finished and the judicial decision became final, then the possibility to revoke a final judicial decision by the means of reopening proceedings is possible only in criminal cases and only if the sentence has not yet been carried out (§ 71 (1) CCA). Other final decisions (including administrative decisions), issued on the basis of the unconstitutional legal provision, remain unaffected. However, rights and duties arising from such decisions may not be enforced (§ 71 (2) CCA), provided this did not yet happen.²⁴

The above highlighted parallel with the unconstitutionality scenario would lead us to the conclusion that the sanction that the Czech law foresees for a similar type of conflict as is the conflict between EC law and national law, i.e. for a conflict between “mere” law (statutes) on the one hand and the constitutional law on the other, is unenforceability of the administrative decisions adopted on the basis of unconstitutional statutes. The solution adopted by the Czech legal system for this type of conflicts is quite similar to the older case-law of the Court of Justice itself, typically the decision in the *Erich Ciola* case: the consequence of the conflict between EC law and the national administrative decision was not the duty to reopen proceedings or revoke administrative decision, but mere inapplicability (non-enforceability) of the national administrative decision.

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

²² Judgment of the SAC of 13. 5. 2003, case no. 7 A 146/2001–29, no. 2/2003 Coll. SAC and the judgment of the SAC of 30. 6. 2004, case no. 7 A 48/2002-98, no. 1041/2007 Coll. SAC.

²³ Similar solution has been adopted also by the civil courts – cf. e.g. judgment of the SC of 27. 10. 1998, case no. 2 Cdon 1343/96, [1999] Coll. J. D., no. 59 or the judgment of the Regional Court in Ústí nad Labem of 6. 12. 2001, case no. 15 Ca 218/2001, [2002] Soudní judikatura ve věcech správních no. 921.

²⁴ Cf. from the case law of the civil courts, e.g. judgment of the SC of 23. 11. 2005, case no. 21 Cdo 27/2005, [2006] Soudní judikatura no. 31.

An administrative decision, which was issued in violation of primary or secondary EC law, is illegal. Steps to be taken in such case are the same as in the scenario described above, reply to question 3 (b).

An administrative decision, which was issued without giving due consideration to the Court of Justice's case law, is, at least theoretically, also illegal. Some caveats should be, however, added to this statement.

Firstly, there is no clear opinion on the importance and the binding force of the jurisprudence (established case law) of the Court of Justice in the Czech legal system. Some believe that the case law of the Court of Justice (as well as the case law of superior Czech courts) has no binding force and its legal significance is limited only to the parties of the respective dispute, i.e. its legal effect are limited *inter partes*. Others would claim that the case law of the Court of justice is generally binding on national courts and authorities and is a *de facto* source of law, with legal effects *erga omnes*.²⁵

Secondly, even if there was a shared consensus on the legal status of the judgments of the Court of Justice for national courts and other authorities, it should be mentioned that the genuine knowledge of this case law is rather limited. However, as far as the principle of equivalence is concerned, one might (somewhat cynically perhaps) notice that this principle is preserved: the general knowledge of the case law of superior domestic courts (CC, SAC, SC) by public authorities leaves also considerable space for improvement.

4) In order to revoke a final administrative decision which is contrary to Community law, is it a precondition that a party (a person concerned):

a) contests (challenges) the decision in the course of the administrative procedure?

No, there is no such precondition. Neither the CAP, nor the ATDA make the use of ordinary remedies (administrative appeal) a precondition for the use of extraordinary remedies (i.e. reopening or revision).

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?

No, quite to the contrary: as was mentioned above in reply to questions 1 and 3, the fact that the administrative decision was reviewed by administrative courts, where it was "upheld", could actually act as a later barrier to the use of extraordinary remedies under the ATDA.

²⁵ On this account, the SAC held, in a recent judgment (judgment of 29. 8. 2007, case no. 1 As 3/2007, n. y. p.) that „*In the assessment of factual situations, which occurred following the Czech Republic's accession to the European Union, the law of the European Communities and the case law of the Court of Justice represent mandatory guidelines for interpretation of Czech law, which was adopted in order to implement provisions of EC law.*” Generally on the status of decisions of the Court of Justice rendered in the preliminary rulings procedure see Bobek, M., Komárek, J. Koho vážou rozhodnutí ESD o předběžných otázkách? Úvahy o úloze evropské judikatury v českém právním řádu [Who is Bound by the Court of Justice's Decisions on Preliminary Rulings? Some Reflections on the Role of the European Case Law in the Czech Legal System]. Právní rozhledy 19/2004 (pp. 697 - 706) and 20/2004 (pp. 752 - 757).

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

No.

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).

No. A key principle of Czech law of administrative as well as other procedures is that the courts as well as the administrative authorities do know the law (*iura novit curia*). They are obliged to apply national law as well as EC law of their own motion, i.e. irrespective of the fact whether or not a party raises the issue.

The duty of the administrative authority to know the law follows from the principle of legality, which is a cornerstone of the administrative procedure (§ 2 (1) CAP and also § 4 (2) CAP). The duty of the administrative courts to know the applicable law is laid down in § 64 CAJ in connection with § 121 CCP. The provision of § 121 CCP provides for the obligation of the court to know the law which has been officially published in the Czech Collection of Laws. This provision must be interpreted, taking into account not only the case law of the Court of Justice,²⁶ but also the case law of the Czech Constitutional Court, which perceives EC law as an integral part of the Czech legal system,²⁷ as including also the law published in the Official Journal of the European Union.

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)?

The national court takes EC law into consideration of its own motion (*ex officio*) – see also the reply to question 5. It should be, however, mentioned that at administrative justice, it is the claimant who defines the scope of judicial review by her action: the administrative court is generally bound by the grounds of review put forward by the claimant (or reasons for illegality for which the administrative is being challenged - § 71 (1) (d) CAJ and § 109 (3) CAJ). However, in certain cases, such as nullity, gross illegality or faults in procedure, the administrative court is entitled to go beyond the grounds of action put forward by the claimant.

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?

²⁶ C-430 a 431/93 *Jeroen Van Schijndel a Johannes Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705; C-312/93 *Peterbroeck, Van Campenhout & Cie v. Belgique* [1995] ECR I-4599

²⁷ See above, note n. 21.

No. The knowledge of the law (including EC law) should be the same at all levels of the judicial hierarchy.

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?*

Taking into account the legal situation described in detail above (reply to question 3 (a)), i.e. that according to the Czech law, subsequent case law of superior courts is not a sufficient reason for the reopening of proceedings, the option which remains open would be a revision or remission of duties, i.e. an extraordinary remedy which may be granted *ex officio* only. As was also outlined above, the ATDA excludes the use of extraordinary remedies in cases where the tax decision has been reviewed at administrative justice. The only option which remains open is thus the revision under the CAP, i.e. the revocation of the decision *ex officio* and in the time limits described above (reply to question 1).

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?

There is no reason to believe that the holding of the Court of Justice in paragraph 24 of the *Kapferer* judgment would be limited to the decisions of national courts in matters of civil law. It is true that the particular case was concerned with a civil law decision; the conclusions the Court of Justice made in *Kapferer* are, however, general conclusions: they refer to “a national court”, not to a “national court deciding in matters of civil law”. Moreover, this interpretation might be supported by references to other decisions of the Court of Justice, where general conclusions similar to those contained in the paragraph 24 of the *Kapferer* decision are made.²⁸

10) What is your interpretation of the above mentioned judgments of the ECJ (Kühne, i-21 Germany):

- a) the ECJ accepts the principle of procedural autonomy of the Member States; or*
- b) it means the imposition of an obligation on the Member States to introduce, if necessary, procedural means to ascertain that the principle of full effectiveness of EC law is respected?*

The first condition of the “test” laid down by the Court of Justice in the *Kühne* decision (paragraph 28) makes a cross-reference to the national law: the reopening of final administrative proceedings is made subject to the fact that the administrative authority has the power to reopen final decisions under national law. This condition has not been called into question by subsequent case law, not even by the quite radical decision in the *Lucchini* case.²⁹

²⁸ Case C-224/04, *Köbler* [2003] ECR I-10239, paras 14 and 15; Case C-126/97, *Eco Swiss* [1999] ECR I-3055, paras 46 and 47.

²⁹ Judgment of the Court of Justice of 18. 7. 2007, Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigiano v. Lucchini SpA*, n. y. p.

The principle of the procedural autonomy of the Member States has two limitations: the dual requirements of equivalence and effectiveness. The general requirement is one of equivalence: the individual shall have the possibility to invoke her Community rights under the same conditions as are laid down for the enforcement of comparable rights derived from national law. The general requirement of equivalence is sometimes “corrected” by the requirement of effectiveness: the enforcement of Community rights on the national level should not be made excessively difficult or even impossible. The latter requirement provides for situations where equivalence requirement would be of no avail: this happens, for instance, when there is no functional equivalence of a Community right in the legal order of the respective Member State, e. g. the law of the Member State does not know or protect a given type of rights which individuals derive from Community law. The reliance of the sole principle of equivalence could, in the particular case, mean “equally bad” treatment or no possibility of enforcement at all.³⁰

It would appear that the requirements of the Court of Justice as far as the duty of national authorities to reopen final decisions contrary to EC law are so far limited to the observance of the principle of equivalence. However, if this principle was to be applied, it could happen, as it would be indeed the case in Czech law, that even while observing the principle of equivalence, individuals will not be able to invoke their Community rights on the national level. There is no duty to reopen final decisions which are contrary to the case law of the Court of Justice, because there is no such duty in comparable situations on the national level. It is precisely in these settings that, in the case law of the Court of Justice, the requirement of effectiveness emerges: irrespective of the fact that there is no such possibility under national law, the “*effet utile*” requires it. The problem with a similar type of reasoning is that if such line of reasoning is followed, one can hardly talk of any procedural autonomy of Member States: the Member States are asked to introduce new remedies, be it via new legislation or via the change of established case law, which go beyond the procedural regime applicable to national law.

The duty of the Member States to introduce, in the name of full effectiveness of EC law, new procedural means, has no internal limits: it can be introduced in any area, especially if based on an extensive reading of Art. 10 ECT. An express requirement in this respect cannot, however, be inferred from the up-to-date case law of the Court of Justice as far as the duty to revoke final decisions is concerned. The standard appears to be the one of equivalence.

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

The compliance of the Czech law with either of the principles in the area discussed in this questionnaire cannot be truly assessed: as of now, there are no national decisions which would deal with this issue.

³⁰ Famous illustration of this scenario is the decision of the Court of Justice in the Factortame litigation – Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame*, [1990] ECR 2433.

The compliance with the *principle of equivalence* might not pose any problem: the conflict between EC law and an administrative decision would be treated in the same way as the conflict of an administrative decision with a statute (illegality) or with the Constitution (unconstitutionality).

Whether the *principle of effectiveness* would be observed is a speculative value judgment, which depends on a variety of factors. First of all, the question is whose interest and whose “effectiveness” is at stake: the interest of the Community, the interest of the Member State or the interest of the individual? Should the third interest, i.e. the often invoked effective protection of the rights of the individual be the yardstick for effectiveness, one may wonder whether the possibility to reopen decisions, which became final years ago, actually is an effective way of protecting anyone’s rights at all.

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)?

If we accept that the requirements of the Court of Justice in matters of revocation of final administrative decisions incompatible with EC law limit themselves to the requirement of equivalence with national law, it is not clear how would any sort of indirect effect (the duty of consistent interpretation) influence the scope of discretion of administrative authorities. In the *i-21 Germany* case, the Court of Justice limited itself with regard to the possible limitation of the discretion of administrative bodies to the requirement of equivalence and sent the case back to the *Bundesverwaltungsgericht* (paras 69 and 71 of the decision).³¹

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?

Yes. The SAC³² as well as the CC³³ have repeatedly held that Czech courts have the duty to interpret Czech law consistently with EC law. However, this question has not yet been raised in the context of the issues examined in this questionnaire.

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

³¹ It should be highlighted that the *Bundesverwaltungsgericht*, when deciding on the case after having received the reply from the Court of Justice in the *i-21 Germany* case, held that there is no duty to reopen the proceedings in the particular case and that both principles, i.e. equivalence as well as effectiveness, were observed – cf. BVerwG, 6 C 32.06 vom 17. Januar 2007, <http://www.bundesverwaltungsgericht.de>.

³² Cf. e.g. judgment of the SAC of 29. 9. 2005, case no. 2 Afs 92/2005-45, no. 741/2006 Coll. SAC; judgment of the SAC of 18. 7. 2006, case no. 1 Ao 1/2006-74, no. 968/2006 Coll. SAC.

³³ See e.g. order of the CC of 21. 2. 2006, case no. Pl. ÚS 19/04, [2006] Soudní rozhledy, issue 5, pp. 171 – 175; finding of the CC of 16. 1. 2007, case no. Pl ÚS 36/05, no. 57/2007 Coll.

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.)

Both of the codes of administrative procedure introduced above (reply to question 1), i.e. the Code of Administrative Procedure as well as the Administration of Tax and Duties Act, but also the Code of Administrative Justice³⁴ as well as the Code of Civil Procedure,³⁵ provide for time limits for the use of extraordinary remedies. For instance, the reopening of proceedings is typically limited by the combination of two time limits: a subjective and an objective one. The subjective time limit (typically shorter, limited to months) starts running from the moment the party acquires the knowledge of the facts or circumstance which may justify the reopening. The objective time limit (longer, normally set in terms of years) begins to run with the legal validity (finality) of the decision in question. The objective time limit forms the outer limit within which a final decision can be revoked.

The fourth condition, laid down in paragraph 28 of the *Kühne* judgment, requires the individual concerned to complain to the administrative authority immediately after becoming aware of the decision of the Court of Justice. The possibility to request the reopening of administrative proceedings is made subject, similarly to the situation at the national level, to the acquisition of the knowledge by the individual about a circumstance (here the decision of the Court of Justice) constituting grounds for reopening. Unfortunately, the subjective time limit, set by the Court of Justice, is very vague: what is “immediately after” is of course open to debate. Is “immediately after” 3 months, as was the case in *Kühne*, or is it perhaps 19 months, as was the case in *Kempter*?

Advocate General Y. Bot suggests that the decision what is “immediately after” should be left to the laws of the Member States.³⁶ This would mean, in the context of the Czech law, that subjective as well as objective time limits would be determined by the provisions of the current codes. In the interest of legal certainty, the general application of the fourth condition of the *Kühne* decision would be advisable.

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)?

In Czech law, the procedure for revocation of administrative decisions and proceedings concerning state liability for damages caused by the infringement of EC law are two distinct types of proceedings. These two types of proceedings are not only governed by different codes of procedure (revocation/annulment of an administrative decision by the CAP and CAJ, state liability by the CCP), they are also adjudicated upon within a different

³⁴ § 111 - § 119 CAJ, the provision on time limits is in § 115 (three months subjective time limit, three years objective one).

³⁵ § 228 - § 235i CCP, the provision on time limits is in § 233 (three months subjective, three years objective).

³⁶ Opinion of the AG Bot in Case *Kempter*, paragraph 136.

jurisdiction: the annulment of an administrative act is in the competence of administrative courts, claims for damages, even against the state or any other public authority, fall within the jurisdiction of civil courts.

Potential claims for damages caused to the individual by an infringement of Community law, attributable to an administrative decision, are provided for in a special law - zák. č. 82/1998 Sb., o odpovědnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem, ve znění pozdějších předpisů [*Act no. 82/1998 Coll., on the state liability for damage caused in the exercise of public power by a decision or by incorrect official procedure, as amended*], hereinafter “SLA”. The provision of § 5 SLA limits the state liability to two cases: to liability for unlawful decisions and to liability for damages caused by incorrect official procedure.

So far, there has been no case in which a Czech court would award damages for damage caused to an individual by infringement of EC law.

Especially:

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

As far as the state liability for **unlawful decision** is concerned, the necessary condition for any claim for state liability is the annulment (or revocation) of the unlawful decision, i.e. there must be a subsequent decision which declared the previous one unlawful.³⁷ The revocation of the unlawful decision may be done either by the issuing administrative authority itself, a higher administrative authority or by a court. However, the revocation and the finding of the unlawfulness of the decision is a necessary condition for any later claims for damages.

The situation is different as far as the state liability for **incorrect official procedure** is concerned. No separate finding of unlawfulness before administrative courts or authorities is necessary; the civil court is entitled to resolve the question of correctness (i.e. legality) of the official procedure independently, i.e. on its own, typically as a preliminary question within the proceedings dealing with the action for damages. If there is any previous decision of an administrative authority or a court, which would declare that the official procedure for which damages are claimed was incorrect, the civil court will take this previous decision into consideration. However, according to the CCP, such decision of an administrative authority or a court is not binding on a civil court when adjudicating on the issue of state liability (§ 135 (2) CCP).

b) which national court is empowered to decide on state liability cases (above all, is it an administrative court)?

See above, reply to question 14.

³⁷ § 8 (1) SLA, see also judgment of the SC of 24. 6. 1999, case no. 2 Cdon 804/96, [2000] Soudní judikatura, issue 1, p. 16.

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)?

Absent any statistical data or studies on these issues, this question cannot be accurately answered. Additionally, the choice will also considerably depend on the individual litigation strategy and the goals the individual pursues by her litigation.

On a very general note, it might be observed that as far as incorrect official procedure is concerned, i.e. the second of the grounds for state liability introduced above, it might be easier for an individual to sue directly for damages before civil courts than to seek any declaration of unlawfulness of the official procedure before administrative courts. The reasons for this are twofold: firstly, as was already observed above (point 14 (a)), civil courts are entitled to evaluate the legality of the official procedure by themselves. No passage through administrative justice is thus necessary. Secondly, the *locus standi* for bringing an action against unlawful interference, i.e. the procedural avenue before administrative courts within which the illegality of some types of official procedure could be observed, before Czech administrative courts is very narrowly tailored: one of the conditions for bringing such action is that, at the moment of the decision of the administrative court, the interference continues or there is a danger of its repetition (§ 82 CAJ).³⁸ This is quite rare in practice. The individual thus has no *locus standi* for bringing an administrative action which would aim only at just establishing the unlawfulness of a past interference.

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

As far as the ***state liability for an unlawful decision*** is concerned, concurrent proceedings are not possible. As has already been mentioned above, the necessary condition for any state liability for unlawful decision is that the decision must have been because of its illegality annulled.

If the cause of liability proceedings is the ***incorrect official procedure***, concurrent proceedings are possible, as there is no condition for a preliminary declaration of illegality of the official procedure by an administrative court. The civil court is entitled to assess the correctness of the official procedure independently. A situation, in which there are submitted, at the same time, actions for state liability for incorrect official procedure before a civil court as well as an administrative action before administrative courts, is thus possible.

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.

³⁸ On the notion of the continuation of the interference, see e.g. judgment of the SAC of 17. 3. 2005, case no. 2 Aps 1/2005-65, no. 603/2005 Coll. SAC.

The Czech Republic joined the European Union on 1 May 2004. The issues explored in this questionnaire thus so far remain only theoretical constructions, because the amount of case law of the Czech courts applying Community law is still marginal.

What should be, however, mentioned is that some of the issues raised in this questionnaire in respect of the application of Community law on the national level have been addressed in the past years in connection with the domestic execution of the decisions of the European Court of Human Rights. Although it is clear that the effects of the case law of the ECHR in the legal order of the Contracting Parties are different from the effects of the case law of the Court of Justice in the Member States, the essence of the conflict is the same: how to reconcile the requirement of the effective enforcement of the obligations flowing from the state's membership in an international organisation with the finality of judicial and administrative decision?

The solution, which was adopted in the Czech legal system in respect of the domestic execution of the decision of the ECHR, was the introduction of a special type of proceedings on the national level. A new type of procedure before the Constitutional Court was established, which allows the reopening of final decisions of the Constitutional Court in cases where an international court has subsequently held that in a criminal case decided by the CC, a fundamental human rights has been infringed in violation of an international treaty (§ 117 - § 119b CCA). In such a case, the successful claimant before the international court (typically ECHR) is entitled to submit a petition for the reopening of proceedings before the CC within 6 months after the decision of the international court became valid (§ 119 (3) CCA).

The reopening of proceedings following a decision by the ECHR is, however, quite limited in its scope. Firstly, it is limited to criminal cases, in which there was a constitutional complaint: the same type of reopening does not apply to final decisions rendered by the courts of general jurisdiction, especially the criminal division of the Supreme Court. Secondly, reopening will only be possible if the consequences of the infringement of the human right or basic freedom persist and they have not been sufficiently redressed by the granting of just satisfaction pursuant to the international court's decision, or if redress was not attained in some other manner (§ 119a (1) CCA). Should the CC allow the petition for reopening, it also annuls its own decision and, if necessary, also all the decisions made in the case by criminal courts and the proceedings should start anew.

The up-to-date practice of the CC in this type of proceedings rather confirms the sceptical voices,³⁹ which doubted the usefulness of this solution: as of August 2007, the CC has received 6 petitions for the reopening of proceedings following a decision by the ECHR.

³⁹ Cf. the academic debate preceding the adoption of the amendment to the CCA, which introduced this special procedure, especially *Šimíček, V. Obnova řízení před Ústavním soudem [The Reopening of Proceedings before the Constitutional Court]*. [2001] *Právník*, issue 12, pp. 1228 – 1240 and a reply by *Malenovský, J. Obnova řízení před Ústavním soudem v důsledku rozsudku Evropského soudu pro lidská práva [The Reopening of Proceedings before the Constitutional Court as a consequence of a decision by the European Court of Human Rights]*. *Ibid*, pp. 1241 – 1257.

Four of them were rejected; the other two are still pending. The procedure itself has thus been never used.

Final, rather sceptical remark should be made in respect of the line of case law the Court of Justice has opened by the *Kühne* decision, recently culminating in the *Lucchini* judgment: the interest of the Court of Justice and of the Community institutions generally that the Community law is observed in all the Member States is fully understandable. This interest is, however, should not be perceived as a conclusive argument to anything, excluding all other considerations. It must be balanced and measured against other interests, in this particular case especially with the principles of legal certainty and the ensuing finality of the already decided. To interpret the unlimited and universal argument of full effectiveness of Community law as the reason for calling into question final decisions is highly problematic approach, in great danger of not being followed by the national courts. The reopening of final decisions and the ensuing legal uncertainty does not help anyone, not even the individuals in question. Should the Court of Justice wish to further dynamically develop the enforcement of the Community rights on the national level in cases of final administrative decisions contrary to EC law, the more acceptable way might perhaps be the action for state liability and the protection of individual rights offered thereby.