Answers of the Supreme Court of Spain to the questionnaire issued by the Supreme Administrative Court of Poland, concerning the consequences of incompatibility with EC law for administrative decisions and final judgments

Question 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?

Under Spanish Law, a general procedure, named *revisión de oficio*, is provided by Law 30/1992, of the Legal Regime of Public Administrations and the Common Administrative Procedure, granting national administrative authorities the power to revoke administrative decisions contrary to Law. This general procedure applies to all administrative decisions, disregarding the nature of the infringed provision and adding no particular exceptions when the decision is revoked in the application of EC Law.

Spanish Public Administrations may, at any time, with a previous favorable opinion of the Council of State or its equivalent in the Comunidades Autónomas, declare the nullity of an administrative act, provided the causes of nullity are under the ones enumerated in article 62.1 of Law 30/1992 (article 102 Law 30/1992). Such causes of nullity refer to particularly substantial infractions of the Law, such as the breach of fundamental rights, manifest lack of powers, absolute disregard of procedural provisions or the infringement of criminal laws, among others. Under these causes, the power to revoke may be exercised by a Public Administration under its own authority (*de oficio*) or under the application of an individual (*a solicitud del interesado*).

However, when the breach of the Law cannot be brought under the causes enumerated in article 62.1, the power to revoke may only be exercised by a Public Administration under its own authority, and within the time limit of four years since the date the administrative act became final, if it confers rigths, or in any time if the act is unfavourable to the indiviuals

Also, when an administrative act confers rights or faculties upon an individual, the power to revoke may only be exercised after a "declaration of *lesividad*", a formal statement stating the grounds on which the Administration balances the negative consequences upon the general interest and the benefits for the individual concerned. The "declaration of *lesividad*" must be followed by a judicial decision confirming the Administration's appraisal, after which the administrative decision may be revoked by the Administration. It must be noted, once again, that such procedure is only required

when the administrative act has breached the Law under circumstances different to those enumerated in article 62.1 of Law 30/1992.

The competent authority to order the revocation under a *revision de oficio* is the administrative organ that originally issued the revoked act. However, in the procedures pursuant to a "declaration of *lesividad*", the Administration may not revoke the decision without a judicial decision, as previously mentioned.

Question 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?

At first glance, Law 30/1992 establishes two separate degrees of discretion when the time comes for a Public Administration to initiate the revocation of a final administrative decision.

First, article 102.1, when regulating the revocation of final administrative acts pursuant to article 62.1 (where substantial causes of nullity are enumerated; *nulidad de pleno Derecho*), states that "Public Administrations, at any time […] *shall declare* ex officio the nullity of final administrative acts […]". According to the said provision, the causes of nullity enumerated in article 62.1 impose a positive obligation on Public Administrations to undergo the revision of acts contrary to this clause.

Second, article 103, in contrast with the positive obligation stated in article 102.1, establishes that "Public Administrations may declare harmful to the public interest all favourable acts that are annullable according to article 63 of the present Law". This procedure, designed to revoke final administrative acts not included in any of the causes of nullity stated in article 62.1, confers an ample discretion to all Public Administrations when time comes to initiate the revision.

However, the case law has confirmed that Public Administrations, as in the procedure established in article 102.1, have a wide margin of discretion when it comes to initiate the *revision de oficio* of administrative acts for the causes enumerated in article 62.1. In practice there is, therefore, hardly any difference between both procedures in terms of discretion granted to Public Administrations.

The powers of revocation (revision) won't be exercise when by the prescription of the actions, by the space of time or by any other circumstance, its exercise will result against equity, good faith, particular's rights or the law.

Question *3* Does the possibility (or obligation) of revocation of final administrative decisions depend on the reason of its incompatibility with EC law? Please consider the following cases: a) in the light of the ECJ's subsequent judgment, an administrative decision turned out to be incompatible with EC law or based on the misinterpretation of EC law (as in the Kühne&Heitz and Kempter case); b) the provisions of national law which provided the legal basis of a contested decision were incompatible with EC law (as in the i-21 Germany case); c)

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

In Spanish Law, no particular relevance is given to the reasons of incompatibility with EC Law. As said, the only relevant reasons regarding the revocation of final administrative acts depend on the causes of nullity enumerated in article 62.1 of Law 30/1992. Therefore,

a) In the Kühne & Heitz context, the revision of the final administrative decision would only be possible if the breach of EC would also amount to a breach of article 62.1 of the said Law (for example, a breach of fundamental rights, as recognized in articles 14 to 29 of the Spanish Constitution).
b) In the i-21 context, the same solution would apply.
c) When an administrative decision infringed EC Law, the same solution would also apply.

It must be noted that in the year 2003, Law 38/2003, of State Aid (*Subvenciones*), established a special procedure for the devolution of illegally granted State aid. Articles 36 to 43 of the said Law regulate a special procedure empowering administrative authorities to order the devolution of financial aid contrary to EC Law. Under these provisions, a formal declaration of the European Commission will amount to a declaration of illegality, and enable the Administrative authority that granted the said aid to issue a repayment order. It must be noted that under this procedure the nullity of the administrative act granting the aid is not formally declared by the Spanish authority, but by the European Commission.

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

In order to revoke a final administrative decision contrary to EC Law, two situations must be distinguished.

First, when the decision must be revoked due to a cause of nullity as enumerated in article 62.1 of Law 30/1992, no preconditions must be met by the persons concerned. However, a party must meet the standing requirements established by the common procedural rules of Administrative Law when the revocation is the consequence of an application by an individual.

Second, as said before, the revocation of final decisions contrary to the Laws, in different causes to the ones provided by article 62.1, must be preceded by a "declaration of lesividad" ordered by the administrative authority and followed by a judicial decision confirming the former declaration. Once these procedural conditions have been met, the final administrative decision may be revoked.

Question 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).

Regarding the admissibility of revocation of final administrative decisions, it does not matter whether a party raises the question of the infringement of EC Law in the course of administrative procedures or the proceedings before the national court. It must be noted that the revocation (revision de oficio) as a consequence of an application by an individual, is a decission of the administrative authority. Therefore, the relevant reasons that may justify the Administrations refusal to initiate the procedure pursuant to the revocation, do not necessarily regard the party's previous acts.

Question 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*)?

Spanish national courts are enabled to implement EC Law *ex officio*, according to the principle *iura novit curia*. The only limits to the courts' powers of decision are established by the reviewed act (which limits the object of the procedures) and the plaintiff's claim (which may be the mere annulment of an act, the request that an obligation must be imposed upon the Administration, a claim of damages, or a combination of the three). Within these margins, and with the previous hearing of the parties, the courts are free to choose the grounds on which an administrative action is contrary to national or EC Law, despite the allegations on points of law made by the parties to the case.

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

No. But when the case is examined by a court against whose judgements there is no judicial remedy under national law, the obligation of article 234.3 TEC must be upheld. Therefore, the court must comply with the *Da Costa* and *CILFIT* conditions, as established by the European Court of Justice.

Question 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 administrative decision (as in the Kühne case); or b) to reopen the judicial proceedings?

Spanish Law precludes the revocation of administrative acts that have been confirmed by final judicial decisions. In such cases, the only legal course of action

established by Spanish procedural rules is the reopening of the judicial proceedings, through a extrrordinary *recurso de revision* (as regulated by article 102 of Law 29/1998 of the Administrative Jurisdiction).

However, this course is only available under extraordinary circumstances, such as the appearance of "crucial documents" withheld by the party who had benefited of their disappearance, or the delivery of false testimony followed by a conviction on the grounds of perjury.

Under these circumstances, when the conditions for the *recurso the revision* are not met, the only course of action for a private party is a claim of damages for the breach of EC Law, according to the terms of the *Francovich* and *Brasserie* case law established by the European Court of Justice. Such case law is fully complied with by the Spanish legislation and case law on State liability.

Question 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?

The ECJ's judgement in the *Kapferer* case concerned indeed matters of civil law, and the question would be whether it applies also to public/administrative law cases. It should be noted first that Community law does not regard the public/private divide as national jurisdictions do. There is no requirement to establish a specific set of courts to deal with administrative law issues, nor is there a specific "code" or group of norms designed to be applied when dealing with cases related to typical administrative law action. The use of national internal terminology and theoretical categories is therefore rare, as the ECJ has developed a language in its own.

Notwithstanding the former, it should be added that in practice there are indeed differences, and a so-called "EU Administrative Law" exists [*ad ex* see Paul P. Craig, EU Administrative Law, Oxford University Press, 2006]. This indeed *might* justify the existence of different regimes concerning the application of Article 10 EC Treaty in the above-mentioned sense.

The ECJ has developed specific rules and principles which in their own nature apply only to the public administration. Yet general rulings on the effectiveness of EC law, if not subject to an exception, are indeed general and are therefore applicable both to the (national) categories of civil law and to public/administrative law cases.

Paragraph 24 of the Kapferer judgment ["(...) the principle of cooperation under Article 10 EC does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law"] should apply both to civil and to public/administrative law cases, since no specific discrimination has been put forward by the ECJ itself.. It should be reminded that in the *Kühne* case one of the conditions to review a final judgment if the fact that the national Court has the power *under national legislation* to proceed to reopen the decision. Therefore, the *Kapferer* case is not incoherent with it, since it refers to *those cases in which the national Court has such a power.*

Question 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 principle of procedural autonomy of the Member States was established by the ECJ back in 1976 [Case 33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland]. Yet this principle was from the very beginning subject to requirements which made it difficult to apply in its pure form. Thus the principles of equivalence and of practical possibility led to the creation of a system whereby the ECJ legitimized itself to force the introduction of new remedies in the Member States in order to guarantee the full effectiveness of EC law.

On the basis of the principle of cooperation under article 10 EC Treaty, the ECJ increasingly followed this path and has developed this principle as to apply it also to judicial decisions. And precisely in the case C-234/04, *Kapferer*, the Court was asked whether article 10 EC imposed specific obligations on national judges to review and set aside a final judicial decision if that decision should infringe Community law.

In 1995 some judgments of the ECJ showed a change of approach. Cases C-312/93, *Peterbroeck*, and C-430-431/93, *Van Schijndel*, introduced an idea of balance that should guide both the ECJ and national judges in their judgments. Neither the principle of procedural autonomy nor the principle of effectiveness of EC law in its fullest meaning would prevail. Rather, in each case both principles should be balanced, in order for the best decision to be achieved. This approach was later applied in other cases, such as in Krüger, C-334/95.

This balanced approach is, in our opinion, the one that has prevailed until present and the one that *should* prevail, so that the ECJ does not invade competences of those institutions in charge of adopting the fundamental political decisions of the community. One example could be the case *Unibet* (C-432/05, March 13, 2007), where the ECJ expressly refused to oblige Member States to create a remedy. In *Unibet*, the question of interim measures was raised, and the ECJ considered that a remedy to assess the liability of administrative bodies was adequate, as long as interim protection could be conferred. Thus an autonomous remedy was not required.

According to this balanced approach, the ECJ judgments would rather imply that it accepts the procedural autonomy of the Member States. It should be reminded that in *Kühne* the review applies only as long as the national body has the power to reopen the decision *under national law*. The remedy exists; adequate *and equivalent* protection of EC law only requires that the remedy could be used *also* in cases where EC law is at stake. It is clear that the principle of full effectiveness of Community law plays an important role in this scheme. Yet the important point in order to correctly answer the question is the fact that *the ECJ does not require Member States to create new remedies where they do not exist*. In *i-21* the general *Simmenthal* doctrine applies. Thus it is for national judges to set aside national legislation, regulation or administrative practice which is contrary to Community law. The fact that the Court respect for procedural autonomy is also apparent in this case, since the consequences of the manifest unlawfulness of a national norm incompatible with Community law will be assessed according, again, *with national law*.

Question 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.

Paragraph 57 in *i-21* states that "[i]It must be borne in mind that, according to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States, provided that they 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) (see, inter alia, C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31, and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 67)."

The wide scope of Article 102.1 together with Article 62.1, both of Law 30/92, of the Legal Regime of Public Administrations and the Common Administrative Procedure, confers appropriate protection to rights recognised in EC law. Art. 62.1, which indicates when administrative decisions are void, is a compromise between the principles of legality and of legal certainty. Not all illegal administrative decisions are considered to be void, only those which meet the criteria in article 62.1 will be revised according to the procedure established in Article 102.1 [see mainly answers to questions 1 and 2 in this questionnaire]. Yet this regulation *does not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order*, i.e. it is respectful with the principle of effectiveness established in settled case law of the ECJ, namely in the abovementioned case *1-21*.

As far as the principle of equivalence is concerned, since the Spanish regulation does not make any distinction between Spanish and EC law, it is fully respected.

Question 12 When the case under consideration concerns the revocation of a final administrative decision, is it necessary to interpret your national law in compliance with Community law? Moreover, a) does such an interpretation have any influence on the scope of discretion of administrative bodies (the problem was discussed in the case i-21 Germany)? b) are there any examples of the interpretation of national law in compliance with EC law to be found in the practice of national courts?

Althougt there is no general obligation *under Spanish law* to interpret national law in compliance with Community law, and it is rather a Community law obligation which should be respected, national judges usually do it. Otherwise, the appropriate Community law mechanisms to implement it and make it effective will apply.

An interpretation of national law in compliance with Community law might cuold have an influence on the scope of discretion of administrative bodies in certain cases. In the answers to questions 1 and 2 to this questionnaire, two different revision procedures are mentioned and the scope of discretion in both procedures is discussed. The specific example of the Spanish Law on State Aids might be illustrative.

In the specific field of the control by the courts of the administrative powers of *revision de oficio* there are not yet examples of interpretation of national law in compliance with EC law.

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

As exposed in questions 1 and 2, there are two types of procedure under Spanish law to revoke final administrative decisions. The first type, established in Article 102.1 of Law 30/1992, does not prescribe any time limit for such revocation, whereas Article 103.2 does prescribe a time limit of four years. No specific mention to Community law is done. Therefore, breaches of Community law are to be treated as breaches of national law (as far as this procedure is concerned).

Time limits are required by the principle of legal certainty, as it has been discussed in various points in this report and also in the case law of the ECJ. Thus, it seems appropriate that a time limit is also established for cases in which a judgment of the ECJ may affect an administrative decision or judgment and justify its revision. Yet the specific procedural requirement of “filing a complaint to an administrative body immediately after becoming aware of the judgment of the EC” might not seem very respectful with the procedural autonomy of the States. First, each State should be able to establish the specific body, administrative or judicial, in charge of dealing with the revision of administrative decisions incompatible with a new judgment of the ECJ. Second, “immediately” does not seem a time limit respectful with the principle of legal certainty. Therefore, a precise time limit should be set.

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

Under Spanish law there is no direct link between revision procedures and procedures concerning State liability for damages. The latter are regulated in Articles 139*ff.* of Law 30/1992, of the Legal Regime of Public Administrations and the Common Administrative Procedure and, indeed, Article 142, paragraph 4, indicates that

administrative acts that have been declared void by administrative bodies or judges do not necessarily imply a right to claim for damages. Yet in those cases in which an administrative decision has been declared void, the time limit to claim for damages is "re-opened". The general rule according to which damages can be claimed until one year after the damage has taken place is modified here. The one-year time limit starts at the time in which the final judgment has been issued.

In Spain, it is for administrative courts to decide on state liability cases. Articles 8*ff.* of the Law 29/1998, on the Administrative Jurisdiction, indicate the specific courts and judges which in each case are competent to deal with State liability cases. The competence criteria are established according to the sum involved in the claim for damages and according to the administrative body whose activity has allegedly caused the damage.

There is no real alternative between revocation procedures and State liability procedures. Therefore, the factors that may influence the choice between them will not be discussed in this report.

As stated in paragraph 1 to this question, under Spanish law there is no direct link between revision procedures and procedures concerning State liability for damages. Since State liability might depend on the declaration of nullity by a court, a State liability procedure might be subsequent to a revocation procedure [Article 142, paragraph 4, Law 30/1992]. This situation was clearly not satisfactory, as it is contrary to the principle of procedural economy. As a consequence, Law 29/1998, on the Administrative Jurisdiction, gives the possibility for plaintiffs to lodge an action *both* to declare the administrative decision void as to claim for damages derived from that decision [see Article 31.2 Law 29/1998]. It is important to note also that this possibility exists in the judicial process, even if in the previous administrative procedures the plaintiff did not deem necessary to accumulate both actions.

Question 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.