

Questionnaire

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

Comment: *This question focuses on the revocation of a final administrative decision in cases with Community element. However, if possible, the answer to this question should contain also the short description of all means, which allow the revocation of final administrative decisions in purely internal cases.*

The procedural mean, relief for a substantive defect in the judgement (resning), allows The Supreme Administrative Court to reconsider a final administrative decision and has general application. Section 37 b in the Administrative Court Procedure Act (1971:291) provides that relief for substantive defects may be granted in cases or matters if there are extraordinary reasons for reconsidering the matter owing to special circumstances.

According to Section 11 chapter 11 the Instrument of Government (constitutional law) reopening of closed cases are granted by the Supreme Administrative Court or, inasmuch this has been laid down in law, by an inferior administrative court if the case concerns a matter in respect of which the Government, an administrative court or an administrative authority is the highest instance. In all other cases, reopening of a closed case is granted by The Supreme Court or, inasmuch this has been laid down in law, by another court of law which is not an administrative court. More detailed rules concerning the retrial of closed cases may and is laid down in law.

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?*

Section 37 b in the Administrative Court Procedure Act, mentioned above, prescribes under which circumstances relief for substantive defects may be granted. Whether these conditions are fulfilled or not is a matter of judgement in individual cases before the national court. The prerequisites provided by Section 37 b in the Administrative Court Procedure Act allow space for discretionary powers to decide the matter.

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 Kempfer 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.*

Relief for a substantive defect may inter alia be granted due to misapplication of the law. In case of a statute, adopted by the Swedish Parliament, should be considered as not complying with EC-law or any other national law, the statute itself can not be subject to relief for a substantive defect in the judgement. On the other hand the application of the statute in a particular case can be subject to relief for a substantive defect.

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 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.)?*

- a) No
- b) No, an administrative decision can be subject to relief for a substantive defect when the decision is final. It is not necessary to exhaust all means of judicial review to file an application according to section 37 b in the Administrative Court Procedure Act. If an application for relief for substantive defect is handed in prior to the decision is considered as final the application will be rejected.
- c) 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 Kempfer case).*

No, as a principal rule it does not matter if the person concerned raises the question of infringement of Community law in the course of the administrative procedure or in the proceedings before the national court.

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 is responsible for analysing the applicability of acts and rules including Community law which can be of interest (*jura novit curia*). When it comes to the proceedings of relief of substantive defects it is of importance that the party states the reasons for his application.

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

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?*

Relief for substantive defect in the judgement provides a possibility to at new trial. The consequence of granting relief of substantive defect in a judgement is that the administrative decision concerned is revoked and that the judicial proceedings are reopened. Due to the principle of court hierarchy the judicial proceedings relating to the reopened case may take place in another national court than the one granting the relief of substantive defect in the judgement. Otherwise the judicial proceedings relating to the reopened case will take place in the same court which granted the relief of substantive defect in the judgement.

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?'*

Yes.

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?*

In the Kühne case the ECJ states (paragraph 24) that *legal certainty is one of a number of general principles recognised by Community law. Finality of an administrative decision, which is acquired upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies, contributes to such legal certainty and it follows that Community law does not require that administrative bodies be placed under an obligation, in*

principle, to reopen an administrative decision which has become final in that way. In the following paragraph (nr 25) the ECJ states that the aim of the national court ' s question is to ascertain whether, in circumstances such as those of the main case, there is an obligation to reopen a final administrative decision under Community law. These statements in the light of the summary taken in paragraph 28 (Kühne case) indicate that it is only under these circumstances the EC law maintain the obligation of an administrative authority or court to review a final decision. An interpretation meaning 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 can not be done on grounds of the above mentioned judgements.

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.*

Yes, the procedural mean, relief of substantive defect in the judgement, comply with the above mentioned principles.

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?

The procedural mean, relief of substantive defect in the judgement, may inter alia be granted due to misapplication of the law. Whether the misapplication of the law is due to national law or EC law shouldn't make any difference.

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.)*

The Administrative Court Procedure act does not prescribe any time limit for submitting a motion to revoke and reopen a final administrative decision. Furthermore there is no limit for how many times such a motion can be submitted. Whenever a party has new reasons he can submit a new motion. 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

not have general application (paragraph 135 and 136 in Opinion of Advocate General in case C-2/06) .

14. *What is the relationship (if any) under your national law and practice between the procedure for revocation of final administrative decisions and/or reopening of the court's proceedings analysed above, on the one hand, and the proceedings concerning the state liability for damages in case of the infringement of Community law, on the other hand (cases: C-46/93 and C-48/93 Brasserie, [1996] ECR I-1029 and C-224/01 Köbler, [2003] ECR I-10239)?*

Especially:

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

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

c) what are the main factors influencing the choice of the person concerned between the two abovementioned types of proceedings? (e.g.: time limit, costs, burden of proof)?

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

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

a) no

b) In Sweden the Chancellor of Justice is empowered to decide on financial compensation for such damages. The Chancellor of Justice is a government official charged with representing the Swedish government in various legal matters as the government's ombudsman. He performs his duties from a strictly legal point of view.

c) =

d) yes

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.*