

The Stability of Administrative Decisions in the Light of EC Law: Refining the Case Law

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Abstract

This case analysis highlights the follow-up case law to ECJ, Case C-453/00 Kühne & Heitz v. Produktschap voor Pluimvee en Eieren [2004] ECR I-837 in ECJ, Case C-2/06, judgment of 12 February 2008, not yet reported, Willy Kempter KG v. Hauptzollamt Hamburg-Jonas. It demonstrates that in this field, the Court's case law is advancing towards integrating Community law requirements into Member States' legal systems in a differentiated and flexible way.

I Introduction

The withdrawal of unlawful administrative decisions has been a core issue of European Administrative law for a considerable time. However, an important change of perspective has taken place. For a long time, the discussion focussed on whether a decision beneficial to an individual or a company (in particular, the grant of a subsidy) could be withdrawn in light of the principle of respecting legitimate expectations.¹ The situation discussed since 2004 is different. It concentrates on whether an administrative decision that is detrimental for an individual or company must be withdrawn if it turns out to be in breach of EC law.

As it is well known, the leading case is *Kühne & Heitz v. Produktschap voor Pluimvee en Eieren*. In that case, the ECJ had made clear (and repeated) that legal certainty was a general principle of Community law,² so that the reopening of administrative proceedings that had been ended by a final decision was not an obligation upon national authorities as a matter of principle. However, as under the relevant national (Dutch) law, administrative proceedings could generally be reopened under certain circumstances, the ECJ formulated a four-tier test which laid down the conditions under which the administrative body would be obliged under Article 10 EC Treaty to recon-

¹ Cf. M. Ruffert, 'Stability and Flexibility in Administrative Decision Making: The Community Law Influence on Discretion with Respect to Administrative Decisions in German Law', in: S. Prechal & B. van Roermund, *The Coherence of EU Law*, 2008, p. 255 (261 *et seq.*).

² Case C-453/00 *Kühne & Heitz v. Produktschap voor Pluimvee en Eieren* [2004] ECR I-837, para. 24.

sider its formerly final decision taking account of the relevant Community law findings:³

‘26 As is clear from the case-file, the circumstances of the main case are the following. First, national law confers on the administrative body competence to reopen the decision in question in the main proceedings, which has become final. Second, that decision became final only as a result of a judgment of a national court against whose decisions there is no judicial remedy. Third, that judgment was based on an interpretation of Community law which, in the light of a subsequent judgment of the Court, was incorrect and which was adopted without a question being referred to the Court for a preliminary ruling in accordance with the conditions provided for in the third paragraph of Article 234 EC. Fourth, the person concerned complained to the administrative body immediately after becoming aware of that judgment of the Court.’

2 Criteria Revisited

In *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas* the criteria from *Kühne & Heitz* are further explained and given greater precision. The judgment from February 2008 concerns the third and fourth criterion.⁴ As in *Kühne & Heitz*, the facts revolve around export refunds on agricultural products,⁵ but this time, what is at stake is not the correct classification in the common customs tariff, but the point in time until which conditions could be raised against an applicant for refund.⁶ The competent authority had raised such conditions after the refund had been paid to *Kempter*, as it had claimed that the agricultural products to be exported had not reached their country of destination outside the EC. *Kempter* had exported cattle to Yugoslavia, and it was submitted that the animals had never arrived there as some of them had died or been slaughtered out of necessity during transport or in quarantine. The action brought by *Kempter* against the decision of repayment was rejected at final instance by the *Bundesfinanzhof* (Federal Finance Court) in May 2000. Community law issues had not been raised by *Kempter* in these proceedings, and they were not discussed at all before the competent courts. A few months later, the ECJ decided that such conditions as were relevant in the case at hand could be raised against the recipient of

³ Case C-453/00 *Kühne & Heitz v. Produktschap voor Pluimvee en Eieren* [2004] ECR I-837, paras. 25 *et seq.*

⁴ Case C-2/06, judgment of 12 February 2008, not yet reported, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*.

⁵ For an explanation cf. G. Thiele, in: C. Calliess & M. Ruffert (eds.), *EUV/EGV Kommentar*, 3rd ed. 2007, Article 34, para. 31.

⁶ On the following facts see Case C-2/06, judgment of 12 February 2008, not yet reported, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*, paras. 8 *et seq.*

refunds only *before* their grant.⁷ Consequently, the decision of repayment against *Kempter* turned out to be unlawful. It was only in mid 2002 that *Kempter* became aware of the ECJ judgment. Shortly afterwards, the company asked for a fresh repayment of the refunds it had repaid itself. The competent *Finanzgericht* Hamburg (Finance Court) stayed proceedings and referred the following questions to the ECJ:

‘(1) Are the review and amendment of a final administrative decision in order to take account of the interpretation of the relevant Community law carried out in the meantime by the Court of Justice of the European Communities subject to the requirement that the party concerned relied on Community law when contesting the administrative decision before the national courts?’

(2) Is an application for the review and amendment of a final administrative decision which is contrary to Community law subject to a limit in time for overriding reasons of Community law, apart from the conditions set out in [*Kühne & Heitz*]?’

3 The Function of Preliminary Rulings

The Court first of all confirmed its *Kühne & Heitz* case law and turned to its third criterion, i.e. that the initial judgment was based on an EC law interpretation which later turned out to be incorrect and was adopted without a preliminary reference under Article 234(3) EC Treaty. The ECJ rejected the question whether the claimant in the initial administrative and court proceedings – which lead to the administrative decision to be withdrawn – has to rely explicitly on Community law to create, in those proceedings, a duty to refer the case to the ECJ and thus the breach of such a duty according to the third criterion.⁸ It starts by explaining the purpose of preliminary references:

‘41 In this connection, it is to be noted that the system established by Article 234 EC with a view to ensuring that Community law is interpreted uniformly in the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties (see, to this effect, Joined Cases 28/62, 29/62 and 30/62 *Da Costa and Others* [1963] ECR 31, at 38; Case 62/72 *Bollmann* [1973] ECR 269, paragraph 4; and Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 31).

⁷ Case C-110/00 *Emsland Stärke GmbH v. Hauptzollamt Hamburg-Jonas* [2000] ECR I-11569, para. 48.

⁸ On the following Case C-2/06, judgment of 12 February 2008, not yet reported, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*, paras. 40 *et seq.*

42 As the Advocate General explains in points 100 to 104 of his Opinion, the system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary (see, to this effect, Case 126/80 *Salonia* [1981] ECR 1563, paragraph 7).'

Advocate-General Bot prepares this point of view:

'100 On the other hand, it does not follow from that case-law that a national court against whose decisions there is no judicial remedy under national law might be exempt from the obligation to seek a preliminary ruling on a question of interpretation where the parties to the main proceedings have not raised before it a plea based on Community law. On the contrary, it is clear from the case-law relating to the conditions for applying Article 234 EC that the making of any reference for a preliminary ruling depends entirely on that court's assessment as to whether a reference is appropriate and necessary and that it in no way depends on the nature of the pleas relied on before it by the parties to the main proceedings.

101 Establishing a procedure for direct cooperation between the Court of Justice and the national courts, the system of references for a preliminary ruling is based on a dialogue between one court and another. In the course of that procedure, the parties to the main proceedings are merely invited to submit observations within the legal framework set out by the court making the reference. According to the Court of Justice, "within the limits established by Article [234 EC], it is thus for the national courts alone to decide on the principle and purpose of any reference to the Court of Justice and it is also for those courts alone to judge whether they have obtained sufficient guidance from the preliminary ruling delivered in response to their reference or whether it appears to them necessary to refer the matter once more to the Court".

102 It is also to be observed that, in *Cilfit and Others*, the Court explained the meaning of the phrase "where [such a/any such] question is raised" for the purposes of the second and third paragraphs of Article 234 EC, in order to determine the circumstances in which a national court against whose decisions there is no judicial remedy under national law is required to bring the matter before the Court of Justice.

103 On that occasion the Court observed that a reference for a preliminary ruling does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. According to the Court, "therefore the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article [234 EC]. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion".

104 Also, in another judgment the Court pointed out, first, that “the fact that the parties to the main action failed to raise a point of Community law before the national court does not preclude the latter from bringing the matter before the Court of Justice” and, second, that “in providing that reference for a preliminary ruling may be submitted to the Court where a question is raised before any court or tribunal of a Member State”, the second and third paragraphs of Article [234 EC] are not intended to restrict this procedure exclusively to cases where one or other of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of Community law, but also extend to cases where a question of this kind is raised by the national court or tribunal itself which considers that a decision thereon by the Court of Justice is “necessary to enable it to give judgment”.’

A further argument for denying the first question raised is the interpretation of *Kühne & Heitz*. From that decision and the concrete wording of its reasons, a requirement of raising Community law points in the initial legal action cannot be inferred.

Besides this second point on the interpretation of *Kühne & Heitz*, the ECJ mainly argues on the basis of the function that is commonly – and rightly so – ascribed to the procedure under Article 234 EC Treaty. That provision establishes a dialogue between the national courts and the ECJ which is basically an objective procedure independent of the procedural activities of the parties. The parties of a lawsuit, however, may not be removed of the capacity to plead or dispose of their rights according to their intentions. Consequently, the Court states:

‘45 It is to be noted that, while Community law does not require national courts to raise of their own motion a plea alleging infringement of Community provisions where examination of that plea would oblige them to go beyond the ambit of the dispute as defined by the parties, they are obliged to raise of their own motion points of law based on binding Community rules where, under national law, they must or may do so in relation to a binding rule of national law (see, to this effect, Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraphs 13, 14 and 22, and Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraphs 57, 58 and 60).’

As can be seen, in this context, the principle of equivalence needs to be applied.⁹ If under national law a court is capable of raising a legal point on its own motion, it must do so with respect to Community law. This depends on national procedural law. In German administrative courts (and tax courts such as in the case at hand), the answer is generally positive, given the

⁹ Cf. on that principle M. Ruffert, ‘Rechtsquellen und Rechtsschichten des Verwaltungsrechts’, in: W. Hoffmann-Riem, E. Schmidt-Aßmann & A. Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts*, Vol. I, 2006, § 17/124.

duty of such courts to detect all relevant facts of a case (*'Amtsermittlungsgrundsatz'*), and it may even be so to a certain extent in civil law courts and lawsuits in that country under the principle *iura novit curia* (the court knows the law of its own motion – the law does not have to be pleaded). However, the situation in other Member States may be different, given the ambivalent position of administrative court proceedings between objective control of legality and protection of individual rights. This applies to France and the Netherlands,¹⁰ and with regard to that particular State, there is indeed some case law of the Court accepting that under Dutch administrative law not every point can be raised by a court on its own motion – and neither should EC law under the auspices of the principle of equivalence.¹¹

4 Flexibility of Withdrawal or Strict Deadlines?

According to the fourth *Kühne & Heitz*-criterion, the person (or company) concerned must complain 'immediately after becoming aware of the judgment of the Court', i.e. the subsequent proceedings may not be brought belatedly. It is obvious that this should have been checked in *Kempter*, as it took about 19 months for that company to address the authority for a change in its decision after the ECJ decision showing its unlawfulness had been issued.¹² There is indeed some insecurity about the starting point of any deadline as well as about its actual length. What is immediate? What is the point in time when the deadline begins? Is it the *delivery* of the ECJ decision, i.e. a moment to be assessed objectively, or is it the actual awareness or the point in time when one should have been aware of the decision as a diligent person (subjective view)? Due to these uncertainties, the Advocate General proposed to abolish the fourth *Kühne & Heitz*-criterion right away.¹³ Being aware of the various deadline provisions in the Member States, the Court gives a differentiated ruling:

'57 It should nevertheless be pointed out that, in accordance with settled case-law, in the absence of Community rules in the field it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do

¹⁰ Cf. the detailed analysis by J.H. Jans/R. de Lange/S. Prechal/R.J.G.M. Widdershoven, *Europeanisation of Public Law*, 2007, pp. 312 *et seq.*

¹¹ Cf. e.g. Joined Cases C-222 to C-225/05, judgment of 7 June 2007, nyr.

¹² Case C-2/06, judgment of 12 February 2008, not yet reported, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*, para. 15.

¹³ Conclusions of AG Bot, paras. 132 and 134.

not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, in particular, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 43, and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 28 and the case-law cited).

58 The Court has thus recognised that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty (see, to this effect, Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraphs 17 and 18; *Denkavit italiana*, paragraph 23; Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 16; *Palmisani*, paragraph 28; Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 48; and Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 34). Such time-limits are not liable to render practically impossible or excessively difficult the exercise of rights conferred by Community law (*Grundig Italiana*, paragraph 34).

59 It follows from that settled case-law that the Member States may, on the basis of the principle of legal certainty, require an application for review and withdrawal of an administrative decision that has become final and is contrary to Community law as interpreted subsequently by the Court to be made to the competent administrative authority within a reasonable period.'

The ECJ underlines that there is no general deadline for claiming the inconsistency with EC law, but that national law is applicable subject to the twofold principles of equivalence and effectiveness.¹⁴ With respect to such deadlines the Court can refer to its continuous case law.¹⁵

There may be debates in the national legal systems on the applicability of certain norms on deadlines. For example, in Germany the application of § 51 (3) *Verwaltungsverfahrensgesetz* must be discussed, which only applies to the duty to reopen proceedings but not to the withdrawal as such. Such debate would lead to a discussion on what the *Kühne & Heitz* case law is really about: procedural law (re-opening) or issues of substance (withdrawal).¹⁶ In *Kempter*, the decision must not yet be found, as the pertinent sum of money was requested within the deadline of § 51 (3) *Verwaltungsverfahrensgesetz*, i.e. three months after getting knowledge of the reason for the unlawfulness of the decision (i.e. knowledge of the judgment of the ECJ). At any rate, the Court's answer is in line with the case law as settled and leaves enough space for flexibility. At the same time, legal certainty can be strengthened

¹⁴ Following the ECJ: M. Ludwigs, 'Anmerkung', *Juristenzeitung* 2008, p. 466 at 468, and before J. Kokott, T. Henze & C. Sobotta, 'Die Pflicht zur Vorlage an den europäischen Gerichtshof und die Folgen ihrer Verletzung', *Juristenzeitung* 2006, p. 633 at 639 *et seq.*

¹⁵ Case C-2/06, judgment of 12 February 2008, nyr, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*, para. 58, with indications of the former case law.

¹⁶ The latter is correct: M. Ludwigs, 'Anmerkung', *Juristenzeitung* 2008, p. 466 at 468; J.F. Lindner, 'Anmerkung', *Bayerische Verwaltungsblätter* 2004, p. 589 at 592.

due to the application of well-established deadlines from Member States' laws.

5 Conclusion

All in all, the case law established since *Kühne & Heitz* aims for a rather smooth integration into established structures of national administrative law.¹⁷ In that respect, there is a difference to 'hard-line' cases such as *Ciola*,¹⁸ where it was held that the supremacy of Community law could be claimed also with respect to individual administrative decisions so that the supremacy became not only pertinent in conflicts of abstract norms.¹⁹ In that case, the Court had considered the conflict between Community law (the freedom of establishment) and national law (the relevant administrative decision) as one of a direct collision. The flexibility in implementing the supremacy of EC law in the *Kühne & Heitz* case law is established through applying the rules on indirect collision.²⁰ Member State law, in particular procedural law, is not considered to be in direct contravention with EC law, but remains pertinent under the conditions of (i) equivalent application with respect to Community law situations, and (ii) effective implementation of Community law. There is, however, uncertainty as to the categorisation of each particular case which depends on the questions asked by the national court²¹ and on the concrete facts²² so that uncertainties on the further development of the case law of the ECJ may remain.²³

Some might consider that the decision in *Lucchini*, delivered well before *Kempter*, was a drawback towards a more hard-line case law. It is submitted that this is not true as *Lucchini* is a case on very peculiar, if not strange facts:²⁴ The Italian Ministry of Industry was sentenced by the *Corte d'Appello di Roma* to pay a steel subsidy to a company which had already begun to

¹⁷ M. Ludwigs, 'Anmerkung', *Juristenzeitung* 2008, p. 466 at 466 and 469.

¹⁸ M. Potacs, 'Bestandskraft staatlicher Verwaltungsakte oder Effektivität des Gemeinschaftsrechts?', *Europarecht* 2004, p. 595.

¹⁹ Case C-224/97 *Erich Ciola v. Land Voralberg* [1999] ECR I-2517, para. 32, following Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.

²⁰ On this differentiation cf. H. D. Jarass & S. Beljin, 'Die Bedeutung von Vorrang und Durchführung des EG-Rechts für die Nationale Rechtsetzung und Rechtsanwendung', *Neue Zeitschrift für Verwaltungsrecht* 2004, p. 1 at 3 *et seq.* and 5.

²¹ See M. Ruffert, 'Anmerkung', *Juristenzeitung* 2004, p. 620 at 621 *et seq.*

²² Cf. Bundesverwaltungsgericht, *Die Öffentliche Verwaltung* 2005, p. 651.

²³ A critical perspective on the case-by-case approach is adopted by K.-F. Gärditz, 'Die Bestandskraft gemeinschaftswidriger Verwaltungsakte zwischen Kasuistik und Systembildung', *Nordrhein-Westfälische Verwaltungsblätter* 2006, p. 442 at 448.

²⁴ Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini* [2007] ECR I-6199.

execute the relevant judgment against the ministry (which is possible in Italy by seizing official cars etc.!) although it was obvious from several procedures that the subsidy might be contrary to Community law. The Court underlined the duty ‘... to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of Community law’ (*effet utile*) and accepted that in the proceedings for repayment of the subsidy that the principle of *res iudicata* (i.e. the judgment of the *Corte d’Appello di Roma*) was taken aside with respect to the supremacy of EC law.²⁵ It is certainly not possible to generalise such a particular factual situation.²⁶ Therefore, it is not so much *Lucchini* but more *Kempter* which is in line with the general case law of the Court.

²⁵ Case C-119/05, *Ministero dell’Industria, del Commercio e dell’Artigianato v. Lucchini* [2007] ECR I-6199, paras. 60 *et seq.*

²⁶ Different view obviously taken by A. Haratsch/C. Hensel, ‘Anmerkung’, *Juristenzeitung* 2008, p. 144. Differentiating C. Kremer, ‘Gemeinschaftsrechtliche Grenzen der Rechtskraft’, *Europarecht* 2007, p. 470; id., ‘Effektuiierung des europäischen Beihilferechts durch die Begrenzung der Rechtskraft’, *Europäische Zeitschrift für Wirtschaftsrecht* 2007, p. 726 at 729. The same position as in the text is taken by C. F. Germelmann, ‘Neue Wege in der Rechtsprechung des EuGH zu nationalen Rechtskraftregeln?’, *Europäisches Wirtschafts- und Steuerrecht* 2007, p. 392 at 398; finally A. Hatje, ‘Gemeinschaftsrechtliche Grenzen der Rechtskraft gerichtlicher Entscheidungen – zur Entscheidung des EuGH in der Rs. C-119/05 (Lucchini) vom 18. Juli 2007’, *Europarecht* 2007, p. 654. Cf. also the recent analysis by Wolfgang Weiß, ‘Bestandskraft nationaler belastender Verwaltungsakte und EG-Recht’, *DÖV* 2008, 477.