CONSIDERATIONS CONCERNING THE REVOCATION OF ADMINISTRATIVE ACTS WHICH ARE CONTRARY TO EUROPEAN UNION LAW

CONSTANȚA MĂTUŞESCU*

Abstract

In the process of adopting administrative acts, public authorities are obliged to respect both the national provisions legally superior and European Union law with superior legal force and also the general principles of law, including those imposed by the constant practice of the Court of Justice of the European Union.

Implementation and maintenance at the level of the Member States of inconsistent acts with EU law affect the obligation of community loyalty and ensure the full effectiveness of EU law which rests on their failure could result in an action of breaching community obligations.

Revocation is the legal transaction that the issuer has withdrawn its own body act on its own initiative or pursuant to the provisions of the superior authority. The disappearance of the illegal administrative act of domestic law doesn't necessarily involve restoring legality community as for this may be necessary the adoption of a new act.

While acknowledging the procedural autonomy of the member states, the European Union law requires that national administrative rules concerning the acts revoking to respect two of its general principles - the principle of legal certainty and legitimate expectations principle, which can cause a number of complications, constraints on public administrations. The present contribution aims at examining the various influences on which the Union right performs towards this matter.

Keywords*: administrative acts, EU law, revocation, principle of legal certainty, legitimate expectations principle.*

Introduction

The influence that the European Union law exerts on the public law of the European Union Member States is undeniable[1], and the rules and general principles of the administrative law were not excluded from any such influences, resulting a circulation of the principles established at communal level to the national administrative rights, with the consequence of achieving a certain harmonization of them. But the influence is mutual, as the European law is based on traditions and legal realities of the European Union Member States.

Instrumentalization of the administrative law, as a result of European integration, its transformation in the main mechanism of enforcement for the communal action (along with the traditional role of national instrument of exercising public power) led not only to expand its mission, but also to a considerable increase in its complexity, being forced to develop in respect with the development of the communal law in order to ensure its execution[2]. The europeanization of administrative law object necessarily entailed a profound transformation of its regime[3], and the influences of European Union law were extended to areas that are not about the communal law, being exclusively part of the national jurisdictions. It is about a "progressive influence using

* Senior Lecturer, Ph. D., Faculty of Law and Social And Political Sciences, „Valahia" University, Targoviste (email: constanta_matusescu@yahoo.com).

[1] See in this respect J. Schwarze, *Droit administratif européenne*, second edition, completed, (Bruylant, Bruxelles, 2009); S. Cassese, *Les transformations du droit administratif du XIX-e au XX-e siecle*, D.A., October 2002; J. Sirinelli, *Les transformations du droit administratif par le droit de l'Union Europeenne*, (L.G.D.J., Paris, 2011).

[2] J. B. Auby, *Ou il est question d'execution des actes communautaires*, (D.A., August-September 2004), p 3.

[3] J. Sirinelli, *op. cit*., p. 16.

persuasion and voluntary recognition by the national law of certain European legal features of the administrative law", as noted in the doctrine[4].

Developing the subjective dimension of administrative legal system by recognizing, by using the case law path, of certain existing legal principles and their realization, in order to strengthen the protective effect of the citizen, is the main feature of the recent development of the law in the European Union[5]. Identifying, in the Union law, of some certain solutions, of some waivers arising from the European requirements, which departs from traditional principles of the administrative law, threatens the coherence of the administrative regime systematization, leading to a dual legal system in which a differential treatment is applied to the administrated persons, as it lies or not within the scope of European Union law. Since such a situation can not be maintained on a long term, the predictable evolution seems to be that of extending its own rules of EU law to all administrative law. As such a situation can not be maintained on a long term, the predictable evolution seems to be that of extending to the European Union law own rules to all the administrative law[6]. From this point of view, the Court of Justice role is essential, and one of the most pressing problems faced by the Court in the recent years was that of establishing a set of standards to define clearly enough the legal consequences of inconsistent application of the national law with the European legislation, directing this way the action of the Member States as regards the elimination of inconsistencies between legal internal order and European Union law.

We will consider in present paper, to what extent the solutions identified in the European Court of Justice Jurisprudence on the principles governing administrative papers revocation[7] as a mean of restoring the communal legality find their applicability in the Romanian law system. The question being asked, as we consider, in Romania's case, is whether the current state of the domestic legal order allows to the authorities and to the jurisdictions to ensure the compatibility with European Union law.

1. The obligation of the national administrative authorities to restore the legality in relation to the European Union law

The conflict with European Union law is one of the cases that determine the illegality character of an administrative act, and the effective restoration of legality is an essential requirement arising from the commitments the Member States have assumed in relation to the European Union law.

European Union membership entails, among others, the need to give a full effect to the European norms. Legal European Union order is based on a complementarity between different levels of authority – the European and the national authorities[8]. Ensuring the implementation of European Union law is - in the absence of a specific empowerment of the European institutions - the

[4] J. Schwarze, *op. cit*., pp. 1508-1509.

[5] Idem, pp. 124-125.

[6] J. Sirinelli, *op. cit*., p. 442.

[7] Given its various meanings (see, in this respect O. Podaru, *Administrative Law*, Vol I. *The administrative act*, Hamangiu Publishing House, Bucharest, 2010, pp. 280-283), the term "revocation" is here used with its general sense, of operation by which the administration withdraw from the legal internal law an act that it previously issued. Throughout this paper the reference is limited to the individual acts, meaning to decisions taken by the administration in individual cases and not to the normative acts which impose general and abstract rules and on which revocation fewer doubts remain (see in this regard A. Iorgovan, *Tratat de drept adminstrativ*, vol. II, All (Beck Publishing House, Bucharest, 2005), p. 83-90; V. Vedinaş, *Drept administrativ*, fifth edition, (Universul Juridic Publishing House, Bucharest, 2009), p. 107-111; D. Apostol Tofan, *Drept administrativ*, Vol. II, (C.H. Beck Publishing House, Bucharest, 2009), p. 59-65; O. Podaru, *op. cit.,* pp. 280-331; E. E. Ştefan, *Revocation of administrative acts - theoretical and practical considerations*, LESIJ NO. XVIII, VOL. 1/2011, p. 121-128).

[8] P. Pescatore, *L'ordre juridique des Communautés européennes. Etude des sources du droit communautaire. (*Bruxelles, Bruylant, 2006), p. 199.

competence of the administrative and judicial authorities of the Member States[9], which thus have *principle competence*[10], the Union not being able to intervene unless if a uniform regulation proves to be necessary[11]. The Court of Justice made a number of statements that converge on the idea that this competence does not represent a simple need, but a genuine obligation[12].

The communal loyalty clause involves for the states the obligation to equip themselves with the necessary means to discharge their duties under the law of the Union. However, the Court of Justice recognizes to the Member States the institutional and the procedural autonomy, which means that in the absence of some specific dispositions of communal law, when implementing the European Union law, Member States shall act, in principle, accordingly to the materials and procedural norms provided by their national law[13]. Nevertheless, the need to ensure a full effect and a uniform application of the European Union law led to the formulation, in the Court's jurisprudence, of some of the requirements of the communal law regarding the national conditions.

The Court has consistently decreed that, when the Member States foreseen, in accordance with what is called procedural autonomy, the applicable procedural rules to judicial proceedings designed to protect the rights of the parties conferred by the communal law, they must ensure that these arrangements are not less favorable than those applicable to some similar actions based on dispositions of internal law (the equivalence principle) and that they are not organized to make virtually impossible the exercise of the rights conferred by the communal law (the effectiveness principle)[14]. The states are not compelled to create other legal ways than the existing ones so that the national law may be respected[15].

A general obligation regarding the application of the European Union law by the Member States arises directly - and "objectively", in other words, even independent of the context of "invoking some communal rights by the private community" – from the supremacy principle of the

---

[9] See in this regard, for example, the Decision from 23rd of November 1995, *Nutral SpA/Commission* (C 476/93 P, Rec., p. I 4125, point 14).

[10] As reflected in article 4 paragraph 3 of the TEU (according to which: "Under the principle of sincere cooperation, the Union and the Member States shall respect themselves, assist each other in carrying out tasks which flow from the treaties. The Member States shall adopt any general or particular measure in order to ensure the fulfillment of the obligations which flow from the treaties or of those resulting from the acts of the Union institutions. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the objectives of the Union"), in conjunction with article 291 TFUE ("(1) Member States shall take all internal law measures necessary for putting into force the required acts of the Union from the judicial point of view. (2) If there are necessary unitary conditions for implementing the required acts of the Union from the judicial point of view, these acts confer to the Commission powers or, in duly justified cases and in cases provided by the articles 24 and 26 from the Treaty regarding the European Union, to the Council")

[11] A. Berramdane, J. Rossetto, *Droit de l'Union Européenne. Institutions et ordre juridique*, (Montchrestien Publishing House, Lextenso editions, 2010), p. 373.

[12] L. Guilloud, *La loi dans l'Union Européenne. Contribution a la définition des actes législatifs dans un ordre juridique d'intégration*, LGDJ, Paris, 2010, p. 119. See also for details C. Mătușescu, C. Gilia, *Aspects regarding the EU Member States competence in the enforcement of the European legislation*, CKS eBook 2011, (Pro Universitaria Publishing House, Bucureşti), p. 538-548.

[13] See in this regard: CJCE, 16th December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, Cauza 33/76, *Rec*. p. 1989, point. 5; CJCE, 14th of December 1995, *Peterbroeck*, Cause C-312/93, *Rec*. I-4599, point 12; CJCE, 13th of March 2007, *Unibet*, Cause C-432/05, *Rec*. p. I-2271, point 39 and CJCE, 12th of February 2008, *Kempter*, Cause C-2/06, *Rec*. p. I-411, point 57.

[14] See the Decision from 6th of October 2005, *MyTravel*, C‑291/03, Rec., p. I‑8477, point 17, the Decision from 15th of March 2007, *Reemtsma Cigarettenfabriken*, C‑35/05, Rep., p. I‑2425, point 37, the Decision from 19th of September 2006, *i-21 Germany and Arcor*, C-392/04 and C-422/04, Rec., p. I-8559, point 62 or the Decision from 20.10.2011, *Danfoss and Sauer-Danfoss,* C-94/10, not published.

[15] Making thus the implementation of the European law not to entail "the unsettlement of the national legal system", but just a series of adjustments - C. Blumann, L. Dubouis, *Droit institutionnel de l'Union Européenne*, Paris, Litec, 2ème éd., 2007, p. 578.

communal law and from the obligation to ensure its full application[16], the Court stating that the obligation is both of the national administrative institutes and of all courts to ensure the compliance of the communal norms in their respective fields and, if necessary, to refuse appliance of a national norm which precludes the full effectiveness of the communal law[17].

The incompatibility between an administrative act and the European Union law can take different forms. It may result either from failure or improper application of European standards benefiting from a direct effect, either from the conflict with European Union law of the norm of internal law on which the administrative act is based.

The task of restoring the legality belongs both to the government itself and to the courts. We will especially refer below to the case in which the restoration of legality is ensured by the administration through its traditional power to revoke the illegal administrative acts, which can also be exercised to remove a violation of the European legislation through an administrative act. In general, neither in legislation nor in case laws of the Member States no distinction is made regarding the illegal administrative acts, between acts contrary to the European legislation and acts contrary to another source of law, all administrative acts being treated the same way regarding their revocation.

2. Conditions of exercising the right to revoke administrative acts contrary to European Union law developed in the European Court of Justice jurisprudence

Essential institution of the general law, the revocation theory of the administrative acts enjoys a special characterization of the European Court of Justice Jurisprudence. Starting from its early case law, the Court has tried (having as the ultimate prohibition argument the interdiction, for a judge, of the justice disclaiming[18]) to fill the absence of this subject from treaties and even, with few certain exceptions, from the secondary law, and to develop, based on a comparative study of the Member States' judicial orders, a series of *principles concerning the revocation of the administrative acts*. Thus, using the traditional distinction of administrative law between legally adopted acts and illegal decisions, the Court determined as the main rule, recognized today as true general principles of the communal law[19], the irrevocability of the legal administrative acts that create rights[20], on one hand, and the revocability of the illegal administrative acts, on the other hand[21].

With regard to the legal acts, the Court considers that "the retroactive revocation of a legal act which gave subjective rights or similar benefits is contrary to the general principles of law[22]" and that a legal document giving subjective rights to the concerned person can not be, in principle, withdrawn, "in this case the subjective right being gained, the need to preserve the confidence in the

[16] The conclusions of the General Lawyer Ján Mazák presented at 24th of March 2009 in Cause C 2/08 *Amministrazione dell'Economia e delle Finanze şi Agenzia delle Entrate împotriva Fallimento Olimpiclub Srl*

[17] Regarding this aspect, emblematic are the Decision from 9th of March 1978, *Simmenthal* (106/77, Rec., p. 629, points 21-24), the Decision from 19th of June 1990, *Factortame and others* (C 213/89, Rec., p. I 2433, points 19-21), the *Larsy* Decision, (C 118/00, Rec., p. I 5063, points 51 and 52), *Kühne & Heitz*, (C-453/00, Rec., p. I-837, point 20) and *Lucchini*, (C-119/05, Rep., p. I-6199, point 61).

[18] J. Schwarze, *op. cit*., p. 1030-1031.

[19] Idem, p. 1038.

[20] CJCE, 22nd of March 1961, *SNUPAT/High Authority*, The Connected Causes 42/59 and 49/59, Rec. 1961. Other decisions have subsequently confirmed this principle: CJCE, 22nd of September 1983, *Verli-Wallace/ Commission*, Cause 159/82, Rec. P. 2711; TPI, 5th of March 2003, *Ineichen/ Commission*, Cause T 293/01, Rec. p. FP-I-A-83, II-441, point 91.

[21] CJCE, Decision on July 12, 1957, *Algera and others/Assembly*, 7/56, 3/57-7/57, Rec., p. 81, p 116

[22] The Court decision in the *SNUPAT/Commission* causes, prequoted. From the Court wording stands out that, theoretically, it would be possible a revocation with *ex nunc* effects of such an act, but from the Decision given in the *Algera* causes is stated that the *ex nunc* revocation is also inadmissible in these acts cases.

stability of the situation thus created has priority over the interest of administration that wants to reconsider its decision[23]".

In respect with the illegal administrative acts, they can be, in principle, abrogated, "the absence of a legal objective basis of the act affecting the subjective right of the interested person"[24]. However, the administration has no discretionary power to revoke the illegal administrative communal acts, but this possibility is conditioned on the fulfillment of two requirements: to interfere in *a reasonable time* (expression of the legal security principle) and the institution making the request takes into account sufficiently the measure in which the recipient of the act could possibly trust in its legality (to meet his legitimate expectations)[25].

Retaining the principle of legal security[26] under the form of the protection principle of concerned person's legitimate interests, the European Court of Justice did not give an abstract interpretation for the two requirements of revoking the illegal administrative acts, but was pleased to determine, from case to case, to what extent they are fulfilled. The Court's solutions reflects, in fact, the balance to be achieved under the specific circumstances of the cause, between the requirements of communal legality, which requires it to restore the legal position in relation to the European Union law, and the legal security. Thus, the Court considered that the principle of legal security is not absolute, since its application must be accompanied by the principle of legality, this principle and the concrete situation of the parties can sometimes prevail over the principle of legal security[27]. The balance between public interest, of restoring the communal legality and private interest (good faith of the beneficiary, his legitimate expectations) will be found in each case according to the actual circumstances of the cause[28].

A particular series of case law developed in the recent years by the European Court of Justice in conjunction with the principle of judicial security follows the problem *reexamining the administrative decisions that have become final and prove to be contrary to the communal law, as was after interpreted by the Court*[29]. In this series of causes, the judicial security is used as a interpretation tool regarding national administrative decisions within the scope of the communal law, an approach that reflects, as noted in doctrine, the ambivalent nature of this principle that encourages and restricts in the same time the effective application of the communal law[30] in so far as it seeks to ensure both the quality and the integrity of the norm and also the stability of legal situations[31].

In the Kühne & Heitz case[32], the problem that arose was, in essence, if the obligation of a national authority to apply a norm of communal law, as it was interpreted by the Court, even the

---

[23] The court Decision in *Algera* causes, prequoted.

[24] Ibidem.

[25] CJCE, 13th of July iulie 1965, *Lemmerz Werke/ High Authority*, Cause 111/63, Rec. p. 853; CJCE, 3rd of March 1982, Alpha *Steel/Comisia,* Cauza 14/81, Rec. p. 749, point 10; CJCE, 26th of February 1987, *Consorzio cooperative d'Abruzo/ Commission*, Cause 15/85, Rec. p. 1005, point 12; CJCE, 20th of June 1991, *Cargill/ Commission*, Cause 248/89, Rec. p. I-2987, point 20; CJCE, 17th of April 1997, *De Compte/ European Parliament*, Cause C-90/95 P, Rec. p. I-1999, point 35.

[26] In the predictability and stability sense of the judicial reports. For a detailed analysis, see also I. Brad, *Revocarea actelor administrative*, Universul Juridic Publishing House, Bucharest, 2009.

[27] X. Groussot, T. Minssen, *Autoritatea de lucru judecat în jurisprudența Curții de justiție: ponderarea securității juridice cu legalitatea?,* in (RRDE no. 6/2010), p. 88

[28] *SNUPAT*, supra, p. 87; CJCE, 12th of July 1962, *Hoogovens/ High Authority,* Cause 14/61, Rec. 1962, point 5.

[29] The Decision from 13th of January 2004 in cause C-453/00, *Kühne & Heitz*, Rec. p. I-837; the Decision from 19th of September 2006, *i-21 și Arcor*, the connected causes C-392/04 and C-422/04, Rec., p. I-8859, pct. 50-52; the Decision from 12th of February 2008, *Kempter*, C-2/06, Rec., p. I-411

[30] X. Groussot, T. Minssen, *op. cit*., p. 97.

[31] R. Mehdi, *Variations sur le principe de sécurité juridique,* Liber Amicorum Jean Raux, Apogée, Rennes, 2006, pp. 177- 178.

[32] That was about the decision of a national administrative institution regarding the customs nomenclature, became final on appeal and which seemed inconsistent with a subsequent decision of the Court. The reopening request of the administrative procedure therefore resulted in a preliminary procedure reference.

legal relationships aroused and established before the notifying of the Court's decision on the request of interpretation, may be imposed, despite the final character of the administrative decision acquired before its requested review, in order to take into account this decision of the Court. Kühne & Heitz decision allowed the Court to show how it intended to reconcile the requirements that leave from the supremacy principle of the communal law, and also from the retroactive effect of preliminary decisions with requirements that leave from the legal security principle in conjunction with the authority principle of judged thing[33].

Kühne & Heitz decision allowed the Court to show how they intend to reconcile the requirements that ensue from the supremacy principle of the communal law, as well as from the retroactive effect of the preliminary decisions with the requirements that ensue from the legal security principle in conjunction with the judged issue principle[34]. Thus, in the consideration of the task that is for all of the Member States' authorities, that to ensure compliance communal law norms within their jurisdiction, and since the interpretation that the Court, in exercising the competence which is conferred the article 234 EC, gives to a communal law norm, it clarifies and defines, if necessary, the meaning and scope of this norm as it should or ought to be understood and applied from the moment of its entry into force, the Court considers that the communal law norm interpreted as such must be applied by an administrative institution within its powers, *even to legal relationships created and established before the Court gave its decision regarding the request for interpretation*[35]. Stating that legal certainty is between the general principles recognized by the communal law and the final character of an administrative decision, acquired at reasonable deadlines for lodging appeals, or by the exhaustion of those procedures, contribute to this conviction, the Court considers that *the communal law does not require that an administrative institution to be, in principle, obliged to reopen an administrative decision which has acquired such a final character*[36]. In respect with the context proper to the case, *as an exception, the administrative authorities are required to review their final decision*, as a consequence of a preliminary decision, if there are met four "circumstances" that characterizes the main proceeding and that, cumulatively, will have to be delivered, in terms of article 10 EC, an obligation of reviewing in the administrative institution's task that received a request for this review: 1) the national law has to recognize for the administrative institution the possibility to return to that final decision; 2) the decision has become final as a consequence of a court of last instance decision; 3) the respective judgment is, in light of subsequent case-law of the Court, based on a misinterpretation of the communal law, adopted without being brought before the Court with a preliminary title in the conditions foreseen by the article 234 paragraph (3) EC[37]; 4) the concerned person addressed to the administrative institution immediately after becoming aware of mentioned jurisprudence. In such circumstances, the Court concluded that it is the administrative institution obligation, in accordance with the principle of cooperation which follows from Article 10 EC[38], to *re-examine the decision* in order to take into consideration the interpretation of the relevant disposition of the communal law upheld in the meantime by the Court. In addition, "the administrative institution should set, according to the results of this review, whether it is obliged to reconsider the decision in question without affecting the third parties' interests"[39].

Although designed to solve a specific situation, this decision (issued by the Grand Chamber) has become of a paramount importance, acquiring the character of a principle decision, the solution

---

[33] The conclusions of the General Lawyer Yves Bot presented at 24th of April 2007, Cause C 2/06 *Willy Kempter* KG against Hauptzollamt Hamburg Jonas

[34] Conclusions of Yves Bot General Lawyer, presented at 24th of April 2007, Cause C 2/06 *Willy Kempter* KG against Hauptzollamt Hamburg Jonas

[35] Points 20-22 from Kühne & Heitz Decision.

[36] Ibidem , point 24

[37] Article 267 paragraph (3) TFUE after the Treaty from Lisabona.

[38] Currently, article 4 paragraph 3 from TUE

[39] *Kühne & Heitz* Decision, point 27.

pronounced in this case being subsequently confirmed in similar cases (like *i-21 şi Arcor* and *Kempter*[40]). However, it suffers a certain lack of clarity because its not concise enough character of motivation[41], which gave rise to some questions. If it is mainly clear that the review obligation must be interpreted restrictively, as derogation from the legal security principle, a matter on which there were differences of opinion concerns the length of the obligation of the administrative institution. Following the the distinction made by the Court between *the review* and *the revocation* of the final administrative decision[42], the question arises whether the requirement established in the decision of the administrative institution regards only the obligation to review that specific decision (to reopen the proceedings) or also the obligation to revoke the decision, following this examination, that interpretation is contrary to the communal law interpretation further emphasized by the Court. The European Commission opinion[43] and that subsequently results from the case law of the Court[44] is that that this decision must be interpreted as the competent administrative institution, when the communal law allows it to revoke a final administrative decision and in the circumstances explicitly described in the mentioned decision, is also required, under article 10 EC, to revoke this decision, if from its review shows that it has become incompatible with the interpretation of the communal law given by the Court in the meantime.

Proving to be protective towards the procedural autonomy of the Member States, the national authorities following to appreciate each particular situation in light of their internal legislation, the Court's decision proves to be incomplete regarding the extent of the effects of any review of that decision, if they occur with retroactive character, or, in the future, following therefore that this thing to be considered in the light of all the provisions of the national law. As noted in the doctrine[45], both the disparate solutions that can be provided by the national legislation to this question, and also the fact that it is possible that the national law of some states can not provide for the administrative institutions to reopen a final decision make that the application of Kühne & Heitz jurisprudence in different European Union member states to determine discrepancies in the protection of the individuals' rights. The subsequent Court's case - law has allowed, in some degree, the clarification of some questions raised about Kühne & Heitz decision. Thus, in the first place, the four circumstances hold in this case are qualified as "conditions" by the Court[46], but they do not apply in the situation in which the one who request the revocation of a final administrative decision did not make use of the right to lodge an appeal against the mentioned decision (i-21 decision Germany and Arcor[47]). Principles in the light of which it is judged the i-21 Germany and Arcor cause are those of

---

[40] According to Yves Bot General Lawyer decisions, "Kühne & Heitz Decision, previously quoted, has established under the existent conditions that exists, no matter of the situation, a reviewing obligation. However, the communal law does not oppose to another review in other circumstances when the national procedural dispositions allow" – point 83.

[41] The very argument based on the importance of the procedural autonomy of the Member States and not on the priority principle of the Union law being considered questionable - X. Groussot, T. Minssen, *op. cit*., p. 97.

[42] The widely used terms which leave a window for the procedural diversity of the Member States (revocation / review / recurrence/ etc.).

[43] Observations presented by the Commission in *Kempter case*, point 40.

[44] The conclusions of the Yves Bot General Lawyer in *Willy Kempter* Cause, point 53:" We believe that formulating in such way the point 27 from the decision, the Court sought to clarify that if, under the article 10 EC and in the mentioned circumstances the review becomes compulsory for the competent administrative institution, in turn the revocation of the final administrative decision has, however, an automatic character, since it depends on the re-examination result itself". … in such a situation, article 10 EC requires to the administrative institution the administrative decision's revocation to the extent necessary to take into account the outcome of the re-examination (point 55).

[45] X. Groussot, T. Minssen, *op. cit*., p. 98.

[46] *Kapferer* Decision, point 23 (regarding a courts) and *i-21 Germany şi Arcor* Decision, point 52.

[47] Cause having as object a preliminary question where the remittance court asked the Court to express its view on whether article 10 EC and article 11 paragraph (1) of Directive 97/13 of the European Parliament and of the Council from 10th of April 1997 regarding a common framework for general authorizations and individual licenses in the field

the effectiveness and equivalence used to the appreciation of the national procedural law, applied in regard with the obligation of revoking a decision that rests with the administration and with the right to appeal, that must exist both in relation with internal matters and with the communal law. According to the Court, "if the applicable national norms to the appeals require the obligation to revoke an unlawful administrative act in respect with the internal law, although this act has remained final, if the specification of this act would be <simply unacceptable>, the same obligation of revocation must exist in equivalent conditions, in the case of an administrative act which is not according with the communal law"[48]. The Court is asked to verify if the criteria derived from the German jurisprudence, which allow evaluating the concept of "purely and simply intolerable", are not applied differently, as it is considered or not the national or the communal law.

The decision of the Court in Willy Kempter Case offered the solution of clarifying the last two criteria retained in Kühne & Heitz decision. Regarding the third condition, the Court stated that, if appropriate, the revocation of a final administrative decision with the scope to consider the interpretation of a communal law disposition upheld in the meantime by the Court *do not require that the applicant to invoke the communal law in the appeal brought under internal law against such decisions*[49]. Regarding the last criterion concerning the interpretation of Kühne & Heitz, when asked by the national court whether there is a term to require the review and the revocation of a final administrative decision contrary to the communal law, the Court also made reference to the effectiveness and equivalence principles. Bearing in mind that in order to ensure legal compliance of the judicial security, the Member States may require that a request for review and revocation of an administrative decision remained final and contrary to the communal law, as it was subsequently interpreted by the Court, to be submitted to the competent administration in a *reasonable time* after finding out of the Court of Justice decision[50], the Court stated that it is for the national law to determine such terms.

As a conclusion of the two series of the Court jurisprudence, it may be noticed the effort that the Court of Justice has put in time to find a balance between the requirements of a full insurance applicability of the communal law, on one hand, and the establishment of the legal reports with the meaning of protecting the legitimate interests of individuals, on the other hand.

Between the public interest (communal) and the private one, the Court has chosen, in principle, for a conditioned remediation rather than for a restoration with any price of the prior position to the violation of the communal legal order through an administrative act. Through the last series of jurisprudence can be considered to occur, in a certain extent, an erosion of the legal security on national level (regarding the stability of the administrative decisions), which is sometimes sacrificed for achieving the compliance of the European Union legal order. The Casuistic character of the Court's rules and the reference to the procedural autonomy of the Member States moderate thou this effect. The principle of cooperation, often invoked by the Court in these cases, requires, among others, that the obligation to ensure the compliance of the communal law is incumbent for all the Member State's authorities within their jurisdiction[51]. In these conditions, although the organization

---

of telecommunications services had as effect, in light of the Court's decision in Kühne & Heitz Cause, to limit the discretionary competence of the national authority responsible for regulation in the revocation of charging decisions, taking into consideration, especially, the Court's decision for Kühne & Heitz

[48] i-21 Germany şi Arcor Decision*,* previously quoted, point 63.

[49] *Kempter* Decision*,* points 40-46. According to the general lawyer (point 94 from his conclusions), what is important is the fact that considered court's decision is based on an incorrect interpretation of the communal law and confirms, as a consequence, its misapplication.

[50]Idem, point 12. Although it was suggested that the term "to be aware of the Court's jurisprudence" to refer to the time when the applicant was actually informed of this jurisprudence, and not at the date on which the Court pronounced its decision, this solution was not retained.

[51] See also the Decision from 12th of June 1990, *Germania/ Commission*, C-8/88, Rec., p. I-2321, point 13, and also *Kempter* şi *Kühne & Heitz* Decisions, previously quoted.

and the powers of the public administration represent a national prerogative, by using the European court rules upon this principle it is produced a growth of the revocation power of the administrative acts of which the public administration benefits, when this concerns an act contrary to the communal law. Article 10 EC requires, in this case, involving all instruments which may exist in national procedural law to achieve, if the latter enables it, a review and, where appropriate, a revocation of the final administrative decision contrary to communal law[52].

3. The relevance of the Court's solutions in national context

Without proposing a development of administrative revocation theory as it appears in the internal law [53] (action that might be, in fact, quite complicated given that this area is the subject of much controversy in Romanian doctrine [54]), closely related to the principles and rules identified above in the jurisprudence of the European Court of Justice, we can raise a few issues regarding the way in which the revocation of administrative acts (in this case the illegal ones) may represent, in the Romanian legal system, an effective tool for restoring the legality in compliance with European Union law. Thus, in terms of general principles of the revocation of illegal found administrative acts by the European instance, if the juridical security, in reasonably meaning is fully respected, the current law allowing the revocation of an administrative act only within the general term of exercising the action in administrative Court, not the same can be said about the principle to respect the legitimate expectations of the beneficiary of the act (in the sense that the institution that issued to take into account in a sufficient extent that the addressee could eventually to trust its). The legal regime of administrative acts revocation in Romanian law is an objective one, based mainly on the nature of the act and the establishment of an objective time at which it becomes irrevocable, and not on the subjective attitude of the addressee of the act. There are no, therefore, premises to customize the solutions to specific cases, specific solution to European law, which may put the administration in the situation that could not always meet European. However, this guidance does not benefit of using the revocation procedure as an effective means of restoring legality in relation to European Union law.

In the context of principles mentioned above, a provision of Romanian law of the administrative Court shows the disadvantage in which find the administration in relation to our courts, as regards to the possibility to withdraw their own acts. Under Article 1 (6) of Law 554/2004, "public authority issuing an unlawful administrative act may apply to the court its nullity, in case the act can not be revoked, as he entered the civil circuit and produced legal effects. In case of admission the action, the court will decide, on request, also on the legality of civil concluded acts under the unlawful administrative act and also on the occurred civil effects ". Administration, therefore, deprived of the opportunity to cancel its act, may still invest with such a task the Court, which undoubtedly is not justified in relation to the principles of juridical security and to the principles of legitimate trust of the beneficiary of the act, considering that the act would need to be "untouchable" in the sense that it can not be revoked by any government, or canceled by the Court[55].

---

[52] The conclusions of Yves Bot General Lawyer in *Willy Kempter* Cause, point 79.

[53] In the absence of administrative procedure's code, still in draft phase, the administrative court's law (Law no. 554/2004), which represents the common law in the administrative procedure matter, establishes in article 7 paragraph (1) that "Before apply to the competent administrative court, the person who considers himself injured in one of his rights or in a legitimate interest through an individual administrative act *must* require to the emitting public authority or the higher authority, if it exists, within 30 days from the date of the document notification, its revocation, in whole or in part thereof.

[54] For a largely consideration of this matter, see also I. Brad, *op. cit.*

[55] For such a conclusion, see also O. Podaru, *op. cit.,* p. 294.

A special problem is posed by the obligation of administrative authorities, in accordance with jurisprudence Kühne & Heitz of the Court in Luxembourg, to reconsider a final decision and proves to be contrary to European Union law as interpreted by the Court later. In our opinion does not exist in internal law criteria for mandatory revocation of a decision by an administrative authority for the purposes noted in the first condition in Kühne & Heitz, that the national law to recognize the administrative bodies the possibility of revert to respective final decision. Law on Administrative Court, as amended in 2007[56], a new means of review final and irrevocable decisions: breach of the principle of precedence of Communal Law. This solution provided for the possibility of revision of a final court decision if the Communal Law was not considered during the administrative adoption of the decision or during proceedings before administrative courts. Reason for revision it is, as this provision, "pronunciation" the decision contrary to the principle of priority. Or, for our situation in the case provided by jurisprudence Kühne & Heitz, the third condition requires that the final decision is, in light of subsequent case-law of the ulterior Court, based on a misinterpretation of Communal law, adopted without noticing the Court with preliminary title[57].

Conclusions

To those presented above, it can be concluded that if in regard to the application of European law, national government has a role, not the same can be said about the role reserved for it in terms of removing the effects of possible infringements of Union. The principle of effectiveness, which requires that national law does not render virtually impossible or excessively difficult the exercise of rights conferred by Union law, justifies an extension of the power to revoke the administration when it concerns a national act contrary to European Union[58]. Although European Union law in principle does not require states to create legal means other than those for ensuring compliance with national law, with strict reference to the objective of ensuring the compatibility of national law with European law, can be taken into consideration an eventual entry into the Romanian legislation of some provisions to facilitate the revocation of the administrative organs of the acts that prove to be contrary to European Union law. For example, could be considered formal consecration on Administrative Court law and in the future administrative procedure code the possibility of review of administrative decisions if the three conditions Kühne & Heitz are met[59]. It would be also useful the introduction of the public interest criterion (of restoring of Communal legality) to allow revocation of a creative of rights act, that will allow the appreciation, from case to case, on the interest that has to be protected (obviously, with the right of the individual to compensation)[60]. Such a solution could be analyzed also in relation to the principle of State liability for breach of Communal obligations that would justify the imposition of the obligation even on the administration to revoke a final decision incompatible with European legislation and that is likely to engage state responsibility.

[56] Through Law no. 262 from 19th of July 2007, republished in the Official Gazette no. 510 from 30th of July 2007.

[24] This disposition was abrogated through Law no. 299/2011, published in the Official Gazette of Romania, part I, no. 916 from 22nd of December 2011.

[57] Given the extremely recent character of this disposition repeal, the consequences of removing the possibility reviewing a final decision on the grounds of violating the principle of priority of the European Union law and possible identification in the national law of other legal grounds have not been studied yet and anyway, not covered by this study.

[58] J. Sirinelli, *op. cit*., p. 450.

[59] For such a conclusion, see also G. L. Goga, *The Obligation of the National Administrative Organs to Reexamine their own Decisions in the Context of the Recent Jurisprudence of the Court of Justice of the European Union*, (in Acta Universitatis Danubius No. 3/2010), p. 162-169.

[60] See also in this regard O. Podaru, *op. cit.,* p. 314.

References

- D. Apostol Tofan, *Drept administrativ*, Vol. II, (C.H. Beck Publishing House, Bucharest, 2009).
- I. Brad, *Revocarea actelor administrative*, (Universul Juridic Publishing House, Bucharest, 2009).
- G. L. Goga, *The Obligation of the National Administrative Organs to Reexamine their own Decisions in the Context of the Recent Jurisprudence of the Court of Justice of the European Union*, in Acta Universitatis Danubius No. 3/2010.
- X. Groussot, T. Minssen, *Autoritatea de lucru judecat în jurisprudența Curții de justiție: ponderarea securității juridice cu legalitatea?,* in (RRDE no. 6/2010).
- A. Iorgovan, *Tratat de drept adminstrativ*, vol. II, (All Beck Publishing House, Bucharest, 2005).
- C. Mătuşescu, C. Gilia, *Aspects regarding the EU Member States competence in the enforcement of the European legislation*, CKS eBook 2011, (Pro Universitaria Publishing House, Bucureşti).
- R. Mehdi, *Variations sur le principe de sécurité juridique,* Liber Amicorum Jean Raux, Apogée, Rennes, 2006.
- O. Podaru, *Administrative Law*, Vol I. *The administrative act*, (Hamangiu Publishing House, Bucharest, 2010).
- J. Schwarze, *Droit administratif européenne*, second edition, completed, (Bruylant, Bruxelles, 2009).
- J. Sirinelli, *Les transformations du droit administratif par le droit de l'Union Europeenne*, (L.G.D.J., Paris, 2011).
- E.E. Ştefan, *Revocation of administrative acts - theoretical and practical considerations*, (LESIJ No. XVIII, VOL. 1/2011).
- V. Vedinaş, *Drept administrativ*, fifth edition, (Universul Juridic Publishing House, Bucharest, 2009).