

See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/307865256>

Options Arising from European Union Law to Review Final Judgments and Administrative Decisions: Implications...

Article · January 2016

CITATIONS

0

READS

22

2 authors:



Carri Ginter

University of Tartu

17 PUBLICATIONS 20 CITATIONS

SEE PROFILE



Piret Schasmin

2 PUBLICATIONS 0 CITATIONS

SEE PROFILE

Some of the authors of this publication are also working on these related projects:



Access to remedies in EU public procurement law [View project](#)



Application of principles of European Law in the supreme court of Estonia [View project](#)

OPTIONS ARISING FROM EUROPEAN UNION LAW TO REVIEW FINAL JUDGMENTS AND ADMINISTRATIVE DECISIONS: IMPLICATIONS FOR FUTURE DEVELOPMENTS?

Carri Ginter* & Piret Schasmin**

1. INTRODUCTION

The principle of legal certainty is deeply rooted in all modern legal systems. Both national and European law acknowledge the need to ensure stability of legal relations, which is supported by two essential principles related to legal certainty: the principle of *res judicata* and the finality of administrative decisions.¹ *Res judicata* establishes that a settled case cannot be re-litigated once all rights of appeal have been exhausted or all foreseen time-limits have expired, i.e. the judgement has become final.² The principle of finality of administrative decisions establishes similarly that from a certain moment on, an administrative decision becomes incontestable and legally binding.³ The European Court of Justice has in several cases reiterated the importance of legal certainty and the

* Associate professor, Tartu university, Estonia, partner SORAINEN.

** Lawyer, SORAINEN.

¹ X. Groussot, T. Minssen *Res Judicata* in the ECJ Case Law: Balancing Legal Certainty with Legality? – *European Constitutional Law Review* 2007/3, pp. 386–387; ACSC 30.09.1994, No. III-4/A-5/94. ECHR, 12.02.2014 decision in case No. 42916/04, *Varnienė v. Lithuania*, pp. 37 ff.

² See more about the essence of *res judicata* and differences in national law in: A. Kornezov. *Res Judicata* of National Judgements Incompatible with EU Law: Time For a Major Rethink? *Common Market Law Review* 51, 2014.

³ F. Becker. Application of Community Law by Member States' Public Authorities: Between Autonomy and Effectiveness – *Common Market Law Review* 2007/4, p. 1039. I. Pilving. *Haldusakti siduvus: uurimus kehtiva haldusakti õiguslikust tähendusest rõhuasetusega avalik-õiguslikel lubadel* [Bindingness of an Administrative Act: Study of the Legal Meaning of a Current Administrative Act with Emphasis on Permits in Public Law]. Tartu: Tartu Ülikooli Kirjastus, 2006, p. 14 (in Estonian). H. Maurer. *Haldusõigus. Üldosa* [Administrative Law. General Part]. 14 ed. Tallinn: Juura 2004, p. 180.).

need to respect legal force of court decisions and administrative decisions which have become final.⁴

On the other hand, the law of European Union establishes the principle of supremacy and principles of uniform and efficient application of EU law.⁵ Accordingly, all national authorities and their administrative decisions are affected by these principles.⁶ As the European Court of Justice does not revoke or change any decisions of national courts nor does it annul national administrative decisions, the essential role of national authorities and courts is not diminished. The application of European Union law lies on the shoulders of the courts and administrative bodies of Member States.⁷ As a result of these factors, several complicated legal relationships arise from the abovementioned principles, forcing the national courts and administrations to make decisions, which upon first sight do not fit nicely with the fundamental principles of law.

Judgements and administrative decisions which violate EU law are not something uncommon or exceptional. As A. Kornezov has put it: "... judges – like all human beings – are fallible creatures. Bad judgments are part of our reality".⁸ Despite academic discussions that have followed the somewhat unexpected judgments by the European Court of Justice (*Kühne & Heitz*,⁹ *Lucchini*,¹⁰ etc), there is still continuous need to review or reassess the possibilities to ensure uniform and efficient application of law and effective judicial protection.

The current trends in the practices of the Supreme Courts of some of the member states, for example Sweden and Estonia, demonstrate a need to deal with the legal hurdles surrounding the potential reopening of already terminated cases. Swedish case law seems to implicate some reluctance towards the referral for preliminary rulings, which together with superficial reasoning raises doubts about the correct application of EU law.¹¹ The Supreme Court of Estonia has

⁴ See ECJ, judgment 30.09.2003, C-224/01, *Köbler vs Republik Österreich*; ECJ, judgment 01.06.1999, C-126/97, *Eco Swiss China Time Ltd vs Benetton International NV*; ECJ, judgment 16.03.2006, C-234/04, *Rosmarie Kapferer vs Schlank & Schick GmbH*. ECJ, judgment 13.01.2004, C-453/00, *Kühne & Heitz NV vs Productschap voor Pluimvee en Eieren*. – ECR 2004, p. I-837.; ECJ, judgment 19.09.2006, joined cases C-392/04 and C-422/04, *I-21 Germany GmbH & Arcor AG & Co. KG vs Bundesrepublik Deutschland*, – ECR 2006, p. I-08559.

⁵ The task of the European Court of Justice is to interpret EU law, a national court needs to apply such interpretation to concrete cases.

⁶ ECJ, judgment 12.06.1990, C-8/88, *Federal Republic of Germany vs. Commission of the European Communities* – ECR 1990, p. I-241, para. 13.

⁷ See R. Maruste. Rahvusvahelise kohtu otsuse siseriiklikust täitmisest [About Domestic Enforcement of an International Judgment]. – *Juridica* 2003/9, p. 621 (in Estonian).

⁸ A. Kornezov (Note 2), p. 810.

⁹ ECJ, judgment *Kühne & Heitz* (Note 4).

¹⁰ ECJ, judgment 18.07.2007, C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato vs Lucchini SpA*. – ECR 2007, p. I-6199.

¹¹ U. Bernitz. Preliminary References and Swedish Courts: What Explains the Continuing Restrictive Attitude? In: *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* / ed. by P. Cardonnel, A. Rosas, N. Wahl. Bloomsbury Publishing 2013.

similarly established a practice where it applies EU law without references for preliminary rulings and without justifications for refraining from making such references. As a result, the likelihood of having to revive already closed matters has increased significantly. This raises questions about the possibility to reopen already closed court cases and administrative procedures even more.

The focus of this article is on issues that arise when a final administrative or court decision has been reached on the national level, however, by a later decision of the European Court of Justice, it is made apparent that EU law has been falsely applied. These situations underline the necessity to reassess the legal force of the earlier decisions. Therefore, this article analyses the interrelationships between national and EU law, the relevant case law of the European Court of Justice and the way it has established a balance between the aforementioned legal principles and the conditions precedent to reviving already closed national proceedings. Discussion in this article aims to contribute by more profound explanations about the impact of EU law on the legal effect of final judgments and administrative decisions taking into account the situation in the use of preliminary ruling procedure.

This article begins with a short overview of the relevant case law and legal principles used by the European Court of Justice. Then the discussion aims to explain the problems and reasons behind the positions of the European Court of Justice concerning reopening administrative decisions. Estonian case law is used to illustrate the relevance and possible effects of EU case law. The next part of this article concentrates on the reasons behind the *Lucchini* case and its impact on other possible *ultra vires* decisions, such as cases where the national court has not made a reference for a preliminary ruling. The last part of the article aims to demonstrate that not referring a case to the European Court of Justice is becoming a more distressful practice.

2. THE IMPACT OF EU LAW ON THE FINALITY OF ADMINISTRATIVE DECISIONS AND THE PRINCIPLE OF RES JUDICATA

The European Court of Justice has in several cases taken the stance that even if administrative decisions are contrary to EU law, the EU law does not require, in principle, that administrative bodies should reopen administrative decisions which have become final.¹² However, cases like *Kühne & Heitz* C-453/00,¹³ followed by judgments in *I-21 & Arcor* joined cases C-392/04 and C-422/04¹⁴

¹² ECJ, judgment *Kühne & Heitz* (Note 4), para. 24; ECJ, judgment *I-21 & Arcor* (Note 3), para. 51.

¹³ ECJ, judgment *Kühne & Heitz* (Note 4).

¹⁴ ECJ, judgment *I-21 & Arcor* (Note 4).

and in *Kempton C-2/06*¹⁵ imply that this obligation may arise in conjunction with EU and national law. Similar trends can be seen in the *res judicata* of court judgements. Until a case called *Lucchini*,¹⁶ the European Court of Justice had been reiterating that EU law does not oblige a national court to dismiss such domestic procedural rules that give a court decision the power of *res judicata* in order to review a final court judgment and annul it if it is in contradiction with EU law.¹⁷ Following that judgement, there have been the cases *Fallimento Olimpiclub C-2/08*¹⁸ and *Asturcom C-40/08*,¹⁹ which have set additional possibilities to set aside *res judicata*.

The cases mentioned above imply that sources of EU law for setting aside the finality of administrative decisions and *res judicata* are far from being cohesive or aligned. For administrative decisions, the reasons for opening administrative proceedings seem to come from three sources. First, the obligation to reopen administrative proceedings might arise from the principle of loyal cooperation, if certain circumstances or criteria are fulfilled (as set in *Kühne & Heitz*, for further details see below). This basis however seems to be disputable, as will be discussed below in this article.

The second and the third possibilities come from the principles of effectiveness and equivalence, which restrict the national procedural autonomy (as

¹⁵ ECJ, judgment 12.02.2008, C-2/06, *Willy Kempton KG vs Hauptzollamt Hamburg-Jonas*. – ECR 2008, p. I-411.

¹⁶ ECJ, judgment *Lucchini* (Note 10).

¹⁷ ECJ, judgment *Eco Swiss* (Note 4), p. 48. “[i]n order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that regard can no longer be called into question”. (ECJ, judgment *Köbler* (Note 4), para. 38). In judgment *Köbler* (Note 4) the court explained that where a court decision applies European Union law wrongly, when implementing State liability, the compensation for the damage caused by such court decision does not invalidate *res judicata* (p. 39). See also ECJ, judgement *Kapferer* (Note 4).

¹⁸ ECJ, judgment 03.09.2009, C-2/08, *Amministrazione dell'economia e delle Finanze, Agenzia delle Entrate vs Fallimento Olimpiclub*, – ECR 2009, p. I-7501. This case dealt with the application of the *res judicata* principle in a dispute that concerned VAT. The roots of the problem were in an interpretation applied in Italian courts to the effect that where one of two cases with identical parties and legal relations has been closed with a final judgment, then it is prohibited to reinvestigate the conclusions made in that judgment regarding the legal situation or facts (a resolved legal issue) even when the objectives of a later process differ from the subject matter and claims of the first case. In *Fallimento Olimpiclub* such interpretation essentially meant that the conclusions of a court decision regarding a taxation period were binding on another court case that concerned a different, subsequent tax period (paras 2, 13, 14). Therefore, this case concerned not so much the re-opening or validity of the judgment but its bindingness on subsequent court cases.

¹⁹ ECJ, judgment 06.10.2009, C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*. – EKL 2009, p. I-9579. This court case concerned the *res judicata* of a decision of an arbitration regarding consumer contracts. The issue arose in the process of compulsory execution of the arbitration court decision where a national court of Spain had questions regarding assessment of the terms and conditions of a consumer contract and cancel the decision that had already entered into force.

explained in cases *I-21 & Arcor*²⁰ and *Kempter*). The principle of effectiveness means that national procedural rules should not render it excessively difficult or impossible to exercise the rights conferred by EU law.²¹ The principle of equivalence obliges that all claims that arise from EU law enjoy at least as favourable procedures as the ones applied to claims arising out of national law.²² The principles of effectiveness and equivalence may provide additional grounds to reopen administrative proceedings in a situation where *Kühme & Heitz* cannot be relied on, because some of the preconditions are not met. Such proceedings could be reopened on the basis that the existing procedural rules regarding the protection of rights arising from EU law are incompatible with the principle of effectiveness or that of equivalence.

The exceptions for *res judicata* of court cases seem to derive also from three sources. Although *res judicata* of court decisions and the finality of administrative decisions are not considered as equivalent in academic writings nor in the judgments of the European Court of Justice, the principles of first, effectiveness and second, equivalence can also be the basis for questioning *res judicata*.²³ The third situation where there is an obligation to set aside *res judicata* in a court case is when a national court has made a decision which violates the competence of an EU institution assigned to it by the Treaties, as was the case in *Lucchini*. This is directly related to the principle of supremacy, as referred to in the decision by the Court.²⁴ The exact reasons and implications from this case will be analysed below.

The aforementioned judgments of the European Court of Justice show that the European Court of Justice has relied on different principles when trying to solve a specific matter. The principles of supremacy, procedural autonomy, effectiveness and equivalence have been used. Arguably, in order to ensure the uniform and efficient application of EU law, the principle of supremacy could be most effective. However it comes with an inherent risk that, “[p]rimacy may thus create systemic problems by potentially nullifying *res judicata* in all EU-related cases”.²⁵ Thus the principle of procedural autonomy could be considered a more balanced alternative. The underlying reasons for these two choices may lie in the directness or indirectness of the conflict.²⁶ The principle of supremacy is most relevant where there is a direct conflict. That is where national law and European Union law create directly incompatible outcomes for identical factual

²⁰ ECJ, judgement *I-21 & Arcor* (Note 4), para. 69, 72.

²¹ ECJ, judgement *I-21 & Arcor* (Note 4), para. 57.

²² ECJ, judgement *I-21 & Arcor* (Note 4), para. 62.

²³ As set in ECJ, judgement *Fallimento Olimpiclub* (Note 18) and ECJ, judgement *Asturcom* (Note 19).

²⁴ ECJ, judgment *Lucchini* (Note 10), para. 62.

²⁵ A. Kornezov (Note 2), p. 825.

²⁶ R. Ortlep, M. Verhoeven. The principle of primacy versus the principle of national procedural autonomy. – Netherlands Administrative Law Library, 2012.

situations. The implementation of the principle of procedural autonomy can be used where there is no EU norm capable of direct application. That is where the rules of national law (in particular, procedural rules) hinder the effective implementation of EU law within the state.²⁷

2.1 Obligation to reopen administrative proceedings²⁸

As mentioned before, *Kühne & Heitz* was the first case to lay down the obligation to review final administrative decisions. This case concerned a company exporting poultry meat parts that had been granted export refunds. After having carried out checks, the administrative body granting export funds (*Producschap*) reclassified the goods under another subheading of the customs tariff. As a result of this reclassification, the administrative body made a new decision ordering *Kühne & Heitz* to repay export refunds. Although *Kühne & Heitz* brought an action for the annulment of that decision, the court dismissed the claim without referring the question regarding correct classification of poultry meat to the European Court of Justice. Years later, in a case between third parties, the European Court of Justice interpreted EU law as regards the classification of poultry meat differently. This revealed the misinterpretation of EU law by a domestic administrative body and national court. From that moment it became evident that the company was actually entitled to export refunds, but it had been deprived of this right due to a breach of EU law by the national administration.

The cases *I-21 & Arcor* and *Kempter* again dealt with the question of final administrative decisions contrary to EU law. However, the circumstances of these cases were somewhat different. The dispute of *I-21 & Arcor* concerned two companies who paid licence fees for an individual telecommunication licence. It appeared later that those licence fees were contrary to the German constitution and also to the act that transposed the telecommunications services directive 97/13/EC.²⁹ The difference from *Kühne & Heitz* was that the interested parties did not resort to legal remedies and did not challenge the administrative decision in due time.³⁰

²⁷ R. Ortley, M. Verhoeven (Note 26).

²⁸ This article focuses only on the option to resume administrative proceedings, but there are cases of the European Court of Justice with a different approach dealing with administrative decisions that contradict EU law, for further information see *Ciola* C-224/97 (ECJ, judgment 29.04.1999, C-224/97, *Ciola vs Land Vorarlberg*). See also M. Bobek for different interpretations of the case law of the European Court of Justice. On the Application of European Law in (Not Only) the Courts of the New Member States: "Don't Do as I Say"? – Cambridge Yearbook of European Legal Studies, 2008/10.

²⁹ Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences.

³⁰ ECJ, judgment *I-21 & Arcor* (Note 4), para. 9.

Kempter concerned the repayment of the export refunds granted for exporting cattle. The plaintiff brought an action against the repayment decision, going as far up as the *Bundesfinanzhof* but did not rely on a contradiction with EU law.³¹ Five years later, the European Court of Justice decided in the case of *Emsland-Stärke* C-110/99³² that the condition according to which products must be exported to a third country in order to receive grants provided for in the Community regulation may be relied on against a recipient of grants only prior to the grant of the refund. The *Bundesfinanzhof* relied on the same decision in the spring 2002 in another court case. *Kempter* claimed that they became aware of the case in July 2002. The company applied for the reopening of the administrative proceeding 21 months after the publication of the new interpretation by the European Court of Justice. At the same time, the national law provided the possibility to reopen administrative proceedings if the factual and legal situation on which the act was based changed in favour of the person concerned.

Kühne & Heitz, supported by *I-21 & Arcor* and *Kempter*, prescribe that an administrative body must reopen administrative proceedings if four preconditions are met.³³ Firstly, the law of the Member State must confer on the administrative body competence to reopen administrative decisions. The national law does not necessarily need to contain an obligation to reopen administrative decisions for such cases. It is sufficient if the law permits the review of administrative decisions in general. The court added that an administrative body is required to make a decision only on the basis of the outcome of that review to what extent it must annul the administrative decision without affecting the interests of third parties.³⁴ Where the national law confers a competent administrative body the power to annul an administrative decision that has become final, that body must annul that decision if, after review, it emerges that the decision is contrary to the interpretation of EU law given meanwhile by the European Court of Justice.³⁵

Secondly, reopening of administrative proceedings requires that the administrative decision has become final as a result of a final judgment of a national

³¹ ECJ, judgment *Kempter* (Note 15), paras 8–15.

³² ECJ, judgement 14.12.2000, C-110/99, *Emsland-Stärke GmbH versus Hauptzollamt Hamburg-Jonas*. – I-11569, para. 48.

³³ ECJ, judgment *Kühne & Heitz* (Note 4), para. 28.

³⁴ *Ibid*, para. 27. Where the criteria of *Kühne & Heitz* are met, then the only restriction on the resumption of administrative proceedings arising from the court judgment is a negative impact for third parties. However, according to M. Taborowski it is not clear whether and to which extent the resumption of administrative proceedings may be restricted on the basis of domestic law (M. Taborowski. Joined cases C-392/04 & C-422/04, *i-21 Germany GmbH* (C-392/04), *Arcor AG & Co. KG* (C-422/04), formerly *ISIS Multimedia Net GmbH & Co. KG v. Bundesrepublik Deutschland*. – Common Market Law Review 2007/44.5, 1473).

³⁵ ECJ, judgment 12.02.2008, C-2/06, *Willy Kempter KG vs Hauptzollamt Hamburg-Jonas*, proposal of Advocate-General Y. Bot, para. 51, 52.

court against whose decisions there is no judicial remedy (the decision of the court at final instance has been enforced). In other words, the opportunity to reopen proceedings is available only to those that have used all available legal remedies. In a situation where a person has turned to a court, the court system can, in principle, make the right decision making use of the preliminary ruling procedure where necessary. If the court violates the obligation to apply for a preliminary ruling, the European Court of Justice cannot be deprived of its privilege to provide a guideline on the proper interpretation of EU law. According to case law as it stands, it seems that a person who has not challenged an administrative decision as far up as to the court of the highest instance cannot rely on the criteria of *Kühne & Heitz*.³⁶ This is supported also by the standpoint of the European Court of Justice in *I-21 & Arcor*, where the court reasoned its decision by the fact that the plaintiff had not challenged the licence fee notices in a court of law. However, the court referred to a possibility to rely on a domestic law provision that required the administrative body to withdraw from its administrative decision “in the case of manifest unlawfulness” (based on the principle of equivalence).³⁷

The third precondition set forth by the European Court of Justice assumed that a domestic decision was based on an interpretation of EU law, which turned out to be incorrect in the light of a subsequent interpretation, and no question was referred to the European Court of Justice for a preliminary ruling. In other words, it is vital for the obligation to review a final administrative decision that the provision relevant to the case was interpreted differently from subsequent interpretation by the European Court of Justice.

The European Court of Justice did not address a situation where an administrative body ignores already existing interpretations of EU law. In addition, current case law does not give an answer to what happens, if a court decides to ignore the interpretation given in the same case. If one would use grammatical interpretation of the decision, one could come to a conclusion that in cases where a preliminary ruling was obtained but not followed there is no obligation to review the decisions. Such an interpretation would however not serve the goal of uniform application of EU law.

However in proceedings based on the principle *iura novit curia*, it is the task of the court to raise an issue of EU law. There is no obligation of the person to

³⁶ ECJ, judgment *I-21 & Arcor* (Note 4), paras 53–54, M. Taborowski (Note 34), p. 1469. This option is available only to persons who, according to M. Taborowski and P. J. Wattel, are in the so-called *Emmott trap* (from case ECJ C-208/90, *Theresa Emmott*, ECR I-4269.), which means that persons have used all procedural options to contest an administrative act, incl. up to the highest court instance, to no avail. (P. J. Wattel. Köbler, CILFIT and Welthgrove: We can't go on meeting like this. – Common Market Law Review 2004/41, p. 189).

³⁷ ECJ, judgement *I-21 & Arcor* (Note 4), p. 69, 72.

raise a point of EU law in domestic proceedings.³⁸ Accordingly, the obligation arising from Article 267 of the TFEU to ask for a preliminary ruling is independent of the submissions of the parties to the court.³⁹ The Supreme Court of Estonia⁴⁰ has confirmed that a submission by a party for the court to make a reference for a preliminary ruling is in essence a request for the court to apply the law correctly, which in accordance with the principle of *iura novit curia*, is not binding for the court.

The fourth precondition prescribed that the person should have applied for the review of the administrative proceedings immediately after becoming aware of the relevant case law. The European Court of Justice explained in the *Kempter case* that the EU law does not impose any time-limit for making an application for review of an administrative decision that has become final.⁴¹ At the same time, it does not mean that there are no time-limits. According to the principle of procedural autonomy, these time-limits may arise from national law. It arises from the principle of procedural autonomy that in the absence of common rules, each Member State must lay down in their domestic legal order detailed procedural rules to safeguard the individuals' rights which they derive from EU law.⁴² Although the exercise of procedural autonomy is within the mandate of the Member States, the lack of relevant time-limits in domestic law must not damage the rights of claimants. Therefore, the procedural autonomy is limited by the principles of equality and effectiveness.

Although the court claimed that the obligation to reopen administrative proceedings *was not a requirement of EU law*, such an obligation may arise from the principle of loyal cooperation set in Article 4 (3) EU (formerly Article 10 of the TEC).⁴³ In essence the practice leads to a conclusion that where the national law and judicial proceedings failed to secure a correct application of EU law, the administrative bodies may be under an obligation to review their earlier decisions. Such intervention in legal certainty is based on two elements: a) an administrative body was originally under an obligation to apply EU law correctly, and b) a preliminary ruling procedure, which is one of the most impor-

³⁸ ECJ, judgment 14.12.1995, C-430/93 and C-431/93, *Jeroen van Schijndel*, I-4705; ECJ *Kempter* (Note 15), paras 43–45.

³⁹ ECJ, judgment *Kempter* (Note 15), paras 41, 42.

⁴⁰ ACSC, decision 30.03.2006, 3-2-1-4-06, para. 56.

⁴¹ ECJ, judgment *Kempter* (Note 15), para. 60.

⁴² *Ibid*, para. 57.

⁴³ ECJ, judgment *Kühne & Heitz* (Note 4), para. 27. Article 4 (3) of the European Union Treaty (OJ C 326, 26.10.2012): "The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives." [European Union Treaty. Available: [http://eur-lex.europa.eu/legal-content/ET/TXT/?uri=uriserv:OJ.C_.2012.326.01.0001.01.EST#C_2012326ET.01001301\(21.09.2014\)](http://eur-lex.europa.eu/legal-content/ET/TXT/?uri=uriserv:OJ.C_.2012.326.01.0001.01.EST#C_2012326ET.01001301(21.09.2014))].

tant tools ensuring the rule of law in the European Union, was omitted. Thus the European Court of Justice was prevented from guaranteeing the uniform interpretation of EU law.

The European Court of Justice implied in its decision that the obligation to reopen administrative proceedings arises only if all four preconditions are met. According to X. Groussot and T. Minssen,⁴⁴ a reopening of a final administrative decision is therefore rather an exception than a rule. It is also argued by R. Caranta that the conditions are rather restrictive since procedural autonomy seems to have more weight than the supremacy of EU law.⁴⁵ Irrespective of that, one can no longer exclude the reopening of administrative decisions *per se*.

But what were the principles that formed the foundation of the abovementioned decisions? Some argue that “even though the Court referred only to the principle of loyal cooperation, the principle of equivalence seems to transpire between the lines”.⁴⁶ However, the reasons why the Court decided to rely on the principles of equivalence and procedural autonomy are not obvious. According to A. Biondi, *Kühne & Heitz*, the decision is very carefully drafted so as to prevent excessive intervention into domestic law.⁴⁷ In contrast, R. Caranta believes that the European Court of Justice was not cautious in its decision, but the court believed that effective judicial protection does not always require abandoning domestic procedural rules.⁴⁸ Indeed, effective judicial protection does not always require disregarding procedural rules but if there are no such rules, uniform implementation of the EU law is at risk.

The advocate-general had a completely different view on how this case should be solved. In his opinion, Advocate-General Leger⁴⁹ considered vital the supremacy of EU law and its effective application.⁵⁰ Based on *Simmenthal*, *Factortame* et al. and *Francoovich* et al., the Advocate-General argued that a national court had to disregard domestic norms and apply EU law to achieve its full force.⁵¹ The Advocate-General also considered relevant the conclusions made in *Lary* and argued that based on the principle of supremacy, an administrative body had to disregard the principle of *res judicata* to ensure the full effect of EU law.⁵² The differences in the approaches of the European Court of Justice and

⁴⁴ X. Groussot, T. Minssen (Note 1), pp. 400–401.

⁴⁵ R. Caranta. Case C-453/00, *Kühne & Heinz NV v. Produktschap voor Pluimvee en Eieren*. – Common Market Law Review 2005/1.

⁴⁶ A. Kornezov (Note 2), p. 832.

⁴⁷ A. Biondi. How to Go Ahead as an EU Law National Judge. – European Public Law 2009/2, p. 233.

⁴⁸ R. Caranta (Note 45), p. 188.

⁴⁹ ECJ, judgment 17.06.2003, C-453/00, *Kühne & Heitz NV vs Produktschap voor Pluimvee en Eieren*, proposal of Advocate-General Leger.

⁵⁰ X. Groussot, T. Minssen (Note 1); Advocate-General Leger (Note 49); R. Caranta (Note 45).

⁵¹ Advocate General Leger (Note 49), paras 49–54.

⁵² *Ibid*, para. 66.

Advocate-General Leger have also been pointed out in the academic literature,⁵³ which implies that there is actually no agreement as to how these kind of situations should be solved, i.e. whether to rely on the principle of supremacy or on the procedural autonomy.

The extent of the intervention of the European Court of Justice in the domestic legal orders should not be underestimated. It is true that the court relied on the principle of procedural autonomy, which should indicate a mere extension of already existing remedies to the rights arising out of EU law. However, going beyond mere equal treatment, the court in essence stated that if an option to renew the proceedings exists, a later decision by the European Court of Justice giving a different interpretation to the law from that given by the national authority, triggers *an obligation* to renew the administrative proceedings.⁵⁴

As noted before, the European Court of Justice referred to the fact that such an obligation does not arise autonomously from EU law but concluded that it may arise from the principle of loyal co-operation. Between the lines, the court confirmed the importance of procedural autonomy (one of the essential pre-conditions was that national law had to provide the competence or the possibility to reopen administrative proceedings). Looking closer at *Kühne & Heitz*, the European Court of Justice seems to have gone beyond procedural autonomy and equivalence. The principle of equivalence demands the extension of remedies available internally to similar rights arising out of EU law. The facts of the case⁵⁵ reveal that according to the Dutch law, reopening of an administrative proceeding was permitted only if the applicant demonstrates new facts or a change of circumstances. It would be dubious to consider a new interpretation of law by judiciary, be it the European Court of Justice, as a new fact or circumstance. It has been the position of the European Court of Justice that it only interprets the law as it is from the entry into force. Although the national law did not, at least expressly, foresee an obligation to renew the proceedings upon change of interpretation of law, the European Court of Justice concluded that such an obligation exists if the conditions of *Kühne & Heitz* are met.

Thus the leap from the right to reopen administrative proceedings to an obligation to do so must arise from a symbiosis of national and EU law, the foundations of which will need further clarification in the future case law of the court. Currently one is left with the impression that more favourable remedies are to be granted to cases under EU law than those governed purely by national law.

Such rights are historically known to have arisen for example in *Factortame*. Although the rationale behind the cases stays ambiguous, as a result, a domestic

⁵³ E.g. R. Caranta (Note 45), p. 183.

⁵⁴ Lack of clarity has also been brought out by J. H. Jans, and A. Marseille in *Competence Remains Competence? Reopening Decisions that Violate Community Law. – Review of European and Administrative Law*, Vol. 0, No. 1, 2007, p. 78–79.

⁵⁵ ECJ, judgement *Kühne & Heitz* (Note 4), p. 4.

legal order cannot exclude the obligation to reopen administrative decisions referring to the existence of different preconditions than those listed in the cases of the European Court of Justice. Accordingly, the intervention in the national legal system should not be underestimated.

It is quite likely that in practice, situations such as those behind *Kühne & Heitz* will arise. Many legal systems have provided administrative bodies with the competence to review their own decisions.⁵⁶ For example, the preconditions of *Kühne & Heitz* could in principle be met in several Estonian cases.⁵⁷ Both the Estonian Administrative Proceedings Act (APA)⁵⁸ as well as the Taxation Act⁵⁹ (TA) allow administrative proceedings be reopened in principle. The fulfilment of the second and third preconditions depends on the circumstances of a particular case, i.e. whether all remedies have been used and whether the decision was based on an incorrect interpretation of EU law which was upheld by the courts without a reference for a preliminary ruling. With regard to the fourth criterion, this can also be fulfilled.⁶⁰

There are several cases in Estonia where a later interpretation by the European Court of Justice has raised an issue about reopening administrative decisions. A practical example is the interpretation given to the EU rules dealing with surplus stocks by the European Court of Justice in an EU enlargement related case: *Pimix* C-146/11⁶¹ (main proceedings ACSC, ruling 3-3-1-55-10⁶²). In *Pimix*, the European Court of Justice held that the provisions of a directly applicable regulation of the European Union, (in this case Regulation (EC) No 1972/2003 of 10 November 2003⁶³), that had not been published in Estonian

⁵⁶ In order to fulfil the first criteria of *Kühne & Heitz* it is necessary that the administrative body has the competence to reopen administrative proceedings, i.e., the administrative body has been granted by law the option to review administrative decisions and annul them.

⁵⁷ It is important to keep in mind that the obligation to resume administrative proceedings does not mean the obligation to amend or repeal an administrative act. Pursuant to the APA, an administrative authority shall decide on the repeal of an administrative act on the basis of discretion right (if law does not prohibit to repeal an administrative act or does not require repeal of an administrative act), taking into account the rules prescribed in the APA.

⁵⁸ Administrative Procedure Act. – RT I 2001, 58, 354; RT I 23.02.2011, 8.

⁵⁹ Taxation Act. – RT I 2002, 26, 150; RT I 23.12.2014, 20.

⁶⁰ Pursuant to the APA an application for reopening an administrative proceeding shall be submitted to an administrative body conducting the administrative proceeding within one month from the moment the person became aware of the circumstances constituting the basis for reopening the administrative proceeding. Probably there will be some problems with the definition of “became aware” as it would be difficult to demonstrate the time when a person relying on a judgment of the European Court of Justice actually became aware of it. However, there are no grounds to believe that the one-month time-limit for the submission of an application would be contrary to the principle of effectiveness. The circumstances of a particular case may, however, provide a basis to change this position.

⁶¹ ECJ, judgment 12.07.2012, C-146/11, *AS Pimix versus Maksu- ja Tolliameti Lõuna maksu- ja tollikeskus ja Põllumajandusministeerium*.

⁶² ACSC, ruling 18.10.2012, 3-3-1-55-10.

⁶³ Commission Regulation (EC) No 1972/2003 of 10 November 2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the

in the Official Journal of the European Union and that had not been transposed into the national law of the Member State, cannot be applied to individuals. Accordingly, national administrative acts imposing charges on individuals on the basis of the regulation were proven to be contrary to EU law.

As a side-note, the Supreme Court of Estonia did in fact have an opportunity to approach the ECJ vis a vis the surplus stock regulations before the *Pimix* case, in case 3-3-1-33-06.⁶⁴ In the referred case, the national court relied on the doctrine of *acte clair*⁶⁵ and disapplied the national law. The validity of relying on *acte clair* in the particular matter was more than questionable.⁶⁶ Had the Supreme Court followed its obligation arising out of Article 267 TFEU, the European Court of Justice could have addressed the issue of the inapplicability of the unpublished regulations earlier. This in turn would have saved substantial procedural resources. Ironically, at the same time, the Czech courts made a reference in the legendary *Skoma-Lux* C-161/06⁶⁷ case, which confirmed that the EU acts not properly published in the official language could not be relied upon against individuals. The very same case became the determining factor for the above discussed Estonian “sugar saga” several years, and hundreds of billed hours, later.

Thus the *Skoma-Lux* decision itself is an example of an interpretation of EU law which could have led to the renewal of national administrative proceedings. In a tax case (in its 13 October 2008 decision No. 3-3-1-36-08⁶⁸), the Supreme Court expressly referred to the need to change the interpretation of law it had adopted in its earlier decisions in customs duties cases (those of the Administrative Chamber of 10 May 2006 in cases 3-3-1-65-05⁶⁹ and 3-3-1-66-05⁷⁰). Where in prior practice the Supreme Court had considered that everyone is to be informed of EU law independent of it having been published in Estonian, in the latter case the court referred to *Skoma-Lux* and the central importance of EU law having been properly published in the Estonian Language.

In these cases, it is likely that all four preconditions were met and accordingly *Kühne & Heitz* case law could have been used to restore the breach of EU law.

Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (OJ L 293, p. 3; OJ special edition 03/40, p. 474).

⁶⁴ ACSC, decision 05.10.2006, 3-3-1-33-06.

⁶⁵ A legal provision is unambiguous and sufficiently clear.

⁶⁶ U. Lõhmus. Kuidas liikmesriigi kohtusüsteem tagab Euroopa Liidu õiguse tõhusa toime? [How Does the Judicial System of a Member State Ensure Effectiveness of EU Law?] – *Juridica* 2007/3, p. 151 (in Estonian). C. Ginter. Procedural Issues Relating to EU Law in the Estonian Supreme Court. – *Juridica International* XII/2007, pp. 77–78.

⁶⁷ ECJ, judgment 11.12.2007, C-161/06, *Skoma-Lux sro versus Celní ředitelství Olomouc*, – ECR 2007, I-10841.

⁶⁸ ACSC, decision 13.10.2008, 3-3-1-36-08, p. 21.

⁶⁹ ACSC, decision 10.05.2006, 3-3-1-65-05.

⁷⁰ ACSC, decision 10.05.2006, 3-3-1-66-05.

Previous discussion shows explicitly that having the possibilities to reopen final administrative decisions is essential, especially in terms of effective judicial protection. The same conclusion can be extended to court judgments which have acquired *res judicata*. One must certainly agree with A. Kornezov⁷¹ that traditional remedies, like infringement proceedings or actions for damages, are in many occasions insufficient to remedy the violations of EU law: “Otherwise, a serious structural lacuna in the judicial system of the EU will emerge, insofar as the victim of a judicial error who continues to suffer from its consequences is left with no effective EU legal remedy to his avail. It is this structural weakness of the EU judicial system that justifies the reopening of final national judgments incompatible with EU law”. By this thought, A. Kornezov referred to cases like *Byankov*,⁷² where the negative consequences continue to exist. It seems illogical and unjust that in cases where the original administrative decisions were not challenged (as the precondition number 2 of *Kühne & Heitz* prescribed), the negative consequences continue to exist without any judicial remedies. This is certainly one of the cases where the European Court of Justice should consider revising its positions and abandoning the requirements set by *Kühne & Heitz*.

2.2 The impact of *ultra vires* judgments to the principle of *res judicata*

2.2.1 *The case of law of the European Court of Justice*

While the concept of reopening administrative proceedings may seem understandable and acceptable, there are certain conditions in EU law which would also permit a deviation from the principle of *res judicata*. *Lucchini* was one of the first and the most important cases in which the European Court of Justice provided for an option to set aside a judgement that had acquired the force of *res judicata*. The following circumstances were at the heart of this fundamental and, for many, disturbing decision. The Italian State decided to grant state aid to *Lucchini Siderurgica SpA* without waiting for the approval of the European Commission, which is one of the preconditions for granting state aid. Later, the Commission declared the aid to be incompatible with the common market. Since the state delayed disbursement of the aid, the company filed an application to a national court demanding the competent authorities to pay. Despite the fact that in the time-frame between the decision granting state aid and starting a court case the Commission had already ruled that the state aid was incompatible with EU law, the national court decided that the state aid must be paid out. The decision was not challenged and became final and binding.

⁷¹ A. Kornezov (Note 2), p. 383.

⁷² ECJ, judgment 04.10.2012, C-249/11, *Hristo Byankov v Glaven sekretar na Ministerstvo na vntreshnite raboti*.

A problem arose when the Commission ordered the competent authorities to recover the illegal aid. The competent authorities and the company objected, claiming that the recovery of the aid was impossible because it would be contrary to the principle of *res judicata*. The European Court of Justice held that a provision of national law prescribing the principle of *res judicata* must not be applied if it prevents the recovery of state aid granted in breach of EU law because it was found to be incompatible with the common market by the Commission.⁷³ In other words, the European Court of Justice did not accept a solution, where issues within the competence of an EU institution would be irrevocably decided by national institutions.

Advocate-General Geelhoed noted in his opinion⁷⁴ that national courts may not deliver any judgements which set aside the clear division of tasks and jurisdiction between the EU and the Member States, as those tasks emerge from the Treaties.⁷⁵ The court explained that the jurisdiction of a national court is limited by the legal order of the EU: on the one hand due to the specific rules of granting state aid and, on the other hand, by the jurisdiction to declare EU legislation invalid.⁷⁶ Based on established case law,⁷⁷ the court referred to the fact that national courts have no jurisdiction to decide whether state aid is compatible with the common market as this belongs solely to the competence of the Commission, which in turn is subject to judicial review by the court.⁷⁸ Due to the supremacy of EU law, this rule applies also to domestic legal orders.⁷⁹

In light of the facts of this case and the previous positions of the European Court of Justice, the *Lucchini* case is remarkable. Subsequent rulings of the European Court of Justice, such as *Fallimento Olimpiclub*, emphasise the exceptional nature of *Lucchini*.⁸⁰

Opinions of legal scholars seem to vary in interpreting the core of *Lucchini*. A. Biondi has said that *Lucchini* is special because it underlines the importance of the doctrine of supremacy.⁸¹ P. Nebbia and G. Martinico believe that it is not the principle of supremacy that underlies the judgment and the opinion of the

⁷³ *Ibid*, para. 63.

⁷⁴ ECJ, judgment 14.09.2006, C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato vs Lucchini SpA*, proposal of Advocate General L. A. Geelhoed, paras 50, 53, 72–73.

⁷⁵ The Advocate-General pointed to the following judgments: ECJ, judgment 21.11.1991, C-354/90, *Fédération Nationale du Commerce extérieur des produits alimentaires en Syndicat national des négociants et transformateurs de saumon*. – ECR 1991, p. I-5505; ECJ, judgment 11.12.1973, C-120/73, *Lorenz*. – ECR 1973, p. 1471; ECJ, judgment 11.07.1996, C-39/94, *Syndicat français de l'Express international et al.* – ECR 1996, p. I-3547.

⁷⁶ ECJ, judgment *Lucchini* (Note 10), para. 49.

⁷⁷ Especially, ECJ, judgment 22.03.1977, C-78/76, *Steinike & Weinlig*. – ECR 1977, p. 595.

⁷⁸ ECJ, judgment *Lucchini* (Note 10), paras 51, 52.

⁷⁹ *Ibid*, para. 62.

⁸⁰ ECJ, judgment *Fallimento Olimpiclub* (Note 18), para. 25.

⁸¹ A. Biondi. Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, formerly *Lucchini Siderurgica SpA*, Judgment of the Court of Justice (Grand Chamber) of 18 July 2007 [ECR] I-6199. – *Common Market Law Review*, 2008/5.

Advocate-General but the fact that a decision made by a national court in a case that falls within the exclusive jurisdiction of the Commission is to be considered *ultra vires*.⁸² Similarly, A. Kornezov implied that what seemed to be decisive was that the national court manifestly lacked the jurisdiction.⁸³

Since the field of State aid is exclusively regulated by the EU (especially as regards the competences assigned in the Treaties), it is reasonable to ask what are the other areas of law in which the conclusions made in *Lucchini* might be applied. One of these areas might be the interpretation of European Union law in the court of last instance. According to article 267 of the TFEU, the competence to interpret EU law is distributed in a way which obligates the court of the last instance to refer the issue to the European Court of Justice for interpretation.⁸⁴ A similar obligation lies with all national courts in cases where the validity of EU law is questioned. In *Lyckeskog* C-99/00,⁸⁵ the European Court of Justice stated that the court of last instance will be under an obligation to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage. Where the European Court of Justice has given a preliminary ruling on the interpretation of European Union law, this ruling is binding on the national court in the main proceedings.⁸⁶ The European Court of Justice has exceptionally accepted situations where the Court of Justice has already provided an answer (*acte éclairé*)⁸⁷ or where the interpretation of EU law is so obvious that there is no reasonable doubt as to the way the referred question should be solved (*acte clair*).⁸⁸ In these two cases, national courts are not bound by obligation to refer a question to the European Court of Justice

Thus, where the issue of interpretation or validity of European Union law in a court of last instance is still relevant, there is an obligation to ask for a preliminary ruling. Could a failure to refer a case for a preliminary ruling by a Supreme Court be considered a major change in the distribution of compe-

⁸² P. Nebbia. Do the rules on State aids have a life of their own? National procedural autonomy and effectiveness in the *Lucchini* case. – *European Law Review* 2008/3, p. 431. G. Martinico. European Constitution and European Evolution: Why Does the ECJ Matter? – Sant’ Anna Legal Studies STALS Research Paper No. 4/2009. Available: <http://ssrn.com/abstract=1339162> (09.09.2014), p. 16.

⁸³ A. Kornezov (Note 2), p. 821.

⁸⁴ Under Article 267 TFEU, the Court has jurisdiction to give preliminary rulings on the interpretation of the Treaties and the validity and interpretation of the legislation of Union institutions, bodies, offices or agencies.

⁸⁵ ECJ, judgement 04.06.2002, C-99/00, *Criminal proceedings against Kenny Roland Lyckeskog*. – ECR I-4839, para 18.

⁸⁶ ECJ, judgment 5.03.1986, C-69/85, *Wünsche Handelsgesellschaft GmbH & Co. versus Federal Republic of Germany*. – ECR 1986, p. VIII-497, para. 13.

⁸⁷ ECJ, judgement 27.03.1963, 28–30/62, *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV versus Administration fiscale néerlandaise*. – ECR 1963.

⁸⁸ ECJ, judgment 06.10.2982, C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA versus Ministero della sanità*. – ECR 1982, p. 3415, paras 16, 21.

tences between the European Union and the Member State, and thus constitute an *ultra vires* decision?

References to such a possibility exist.⁸⁹ This principle of EU law arises from constitutional practices common to the Member States and Articles 6 and 13 of⁹⁰ the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁹¹ The first of these, i.e., Article 6 of the Convention on Human Rights, concerns the right to a fair trial, which includes, *inter alia*, the right of access to the courts.⁹² “Access to justice has a real meaning only if the court has full jurisdiction to decide the matter. This means that in deciding, the court must have jurisdiction over the factual and legal issues of a case.”⁹³ This requirement has evolved from the case law of the European Court of Human Rights where the court has clarified that a body that administers justice must have full jurisdiction to settle a matter in order to meet the requirements set out in Article 6 (1).⁹⁴

As noted above, the jurisdiction of a national court means that it has competence deciding over factual and legal matters. Interpretation of European Union law is deciding over legal matters, which in last instance is in the jurisdiction of the European Court of Justice. This line of reasoning is supported by the European Court of Human Rights. According to the European Court of Human Rights, the issue of a competent court is critical in the jurisdictional context of the EU since there can be cases where a particular field of law may be interpreted only by a particular court and hence all questions related to that field of law must be referred to that competent court.⁹⁵ This is also supported by the fact that Article 267 is applied in order to ensure uniform implementation of EU law in all Member States and to prevent inconsistencies in the case law.⁹⁶

A failure to request a preliminary ruling makes it impossible for the European Court of Justice to give its interpretation for the case. On the basis of division of competences, the Supreme Court of Estonia is prohibited from deciding on a matter of EU law without cooperating with the European Court

⁸⁹ A. van Eijdsden, J. van Dam. The Impact of European Law on Domestic Procedural Tax Law: Wrongfully Underestimated? – EC Tax Review 2010/5, p. 200.

⁹⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms – RT II 1996, 11, 34.

⁹¹ ECJ, judgment 13.03.2007, C-432/05, *Unibet vs Justitiekanslern*. – ECR 2007, p. I-2271, para. 37.

⁹² U. Lõhmus. Õigus õiglasele kohtulikule arutamisele. – Inimõigused ja nende kaitse Euroopas (Right to Fair Judicial Hearing. Human Rights and Their Protection in Europe). Tallinn: Juura, 2003, pp. 139–180 (in Estonian). Available: http://www.juridica.ee/get_doc.php?id=510, p. 149.

⁹³ *Ibid*, p. 149.

⁹⁴ ECHR, 10.02.1983, 7299/75, 7496/76, *Albert and Le Compte v. Belgium*, para. 29. ECHR, 25.11.1994, 12884/87, *Ortenberg v. Austria*, para. 31.

⁹⁵ ECHR, 20.09.2011, 3989/07, 38353/07, *Ullens de Schooten and Rezabek v. Belgium*, paras 57–58.

⁹⁶ *Ibid*, para. 58.

of Justice if the cooperation is necessary. This arises from the Constitution, EU law and the practice of the European Court of Human Rights. The jurisdiction to decide upon matters of EU law belongs with the European Court of Justice. Accordingly, where the Supreme Court of Estonia decides a matter of EU law without asking for a preliminary ruling or validly relying on an exception it would render it impossible for the European Court of Justice to exercise its powers as defined under the Treaties. Accordingly, the logic of the *Lucchini* case could be applicable. This can be supported by explanations given by A. Kornezov who stated that these judicial acts where the national court manifestly lacked the jurisdiction are generally considered as null.⁹⁷ Whether or not the European Court of Justice decides to address the attempts to limit its jurisdiction just as rigorously as the attempts to harm the competence of the European Commission remains to be seen.

2.2.2 Failure to refer a question to the European Court of Justice

Although it remains to be seen how the European Court of Justice will address the attempts to limit its jurisdiction, it is important to highlight some of the current practices that seem to show some worrying signs. Estonian case law includes several cases where the Supreme Court of Estonia has adjudicated questions of EU law without referring the matter to the European Court of Justice. Some of the cases are outlined here where the lack of reasoning by the court has raised doubts whether referring the matter to the European Court of Justice would have been necessary.

On 7 October 2013, the Civil Chamber of Supreme Court of Estonia made a decision where it had to solve the question of who is entitled to use legal remedies in a public procurement case under the remedies directive 89/665/EEC.^{98, 99} Although the case concerned the interpretation of EU law, the court decided on the matter without asking for a preliminary ruling. In another case from 16 June 2010, the Supreme Court of Estonia had to solve a dispute on tax exemption which was based on the value added tax directive, 2006/69/EC.^{100, 101} Again no reference to the European Court of Justice was made, nor did the court rely on any exceptions.

⁹⁷ A. Kornezov (Note 2), p. 821.

⁹⁸ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33–35).

⁹⁹ ACSC, decision 07.10.2013, 3-3-1-44-13.

¹⁰⁰ Council Directive 2006/69/EC of 24 July 2006 amending Directive 77/388/EEC as regards certain measures to simplify the procedure for charging value added tax and to assist in countering tax evasion or avoidance, and repealing certain Decisions granting derogations (OJ L 221, 12.8.2006, p. 9–14).

¹⁰¹ ACSC, decision 16.06.2010, 3-3-1-36-10.

In a decision dating 5 March 2014, the court discussed the possibility to make direct awards of public service contracts for rail transport.¹⁰² The fundamental legal issues in this case were whether the exemption provided by article 5 subparagraph 6 of the regulation (EC) no 1370/2007 (on public passenger transport services by rail and by road) was applicable and therefore whether awarding a domestic passenger rail service to a state-owned rail operator without a procurement was legal. The court offered no explanations as to the clarity of EU law interpretation and again saw no need to refer the case to the European Court of Justice.

Another case of 11 March 2015 concerned trademark rights under the trade marks directive 2008/95^{103, 104}. The court had to determine who is entitled to use legal remedies in relation to revocation. Again the decision lacked justifications for the chosen interpretation of EU law and the reasoning for ignoring an obligation to consult the European Court of Justice. Similar doubts of whether or not to refer the matter to the Court of Justice arise in cases 3-2-1-117-10,¹⁰⁵ 3-3-1-84-12¹⁰⁶ and 3-3-1-80-14.¹⁰⁷

As mentioned before, the Supreme Court of Estonia is under an obligation to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage. When a question of interpretation or validity of a rule of EU law arises, the court must first refer a question to the Court of Justice. There are in fact no cases where the Supreme Court of Estonia has decided to ask for a preliminary ruling at the stage of deciding on admissibility of an appeal in cassation. Nor has the court provided any reasoning, which could refer to the application of the exceptions. Therefore, failure to request a preliminary ruling or at least to justify the chosen interpretation exists and this gives grounds for serious doubts that the courts have not followed the obligations prescribed by the TFEU. What is important for all the cases outlined before, is that the Supreme Court of Estonia did not use a preliminary ruling procedure and did not motivate these “*de facto*” cases of *acte éclairé* and *acte clair*. If the court does not give explanations for using exemptions, those court decisions will raise doubts about the correct application of EU law.

The practice of Estonian courts is not in fact exceptional. A similar example can be drawn from Swedish courts, which are considered by some as considerably reluctant towards referrals for preliminary rulings. In 2004 the Commission started infringement proceedings against Sweden based on the observation that

¹⁰² ACSC, decision 05.03.2014, 3-3-1-2-14.

¹⁰³ Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ L 299, 8.11.2008, p. 25–33).

¹⁰⁴ ACSC, decision 11.03.2015, 3-2-1-167-4.

¹⁰⁵ ACSC, decision 01.12.2010, 3-2-1-117-10.

¹⁰⁶ ACSC, decision 31.10.2013, 3-3-1-84-12.

¹⁰⁷ ACSC, decision 26.02.2015, 3-3-1-80-14.

the Swedish supreme courts (courts of last resort) were too restrictive in their application of the preliminary ruling procedure.¹⁰⁸ The Commission observed that the supreme courts decided on the admissibility of a case without stating any reasons, which made it impossible, including for the Commission, to check if the national courts had observed their obligations under TFEU.¹⁰⁹ Therefore, the Commission saw it necessary to oblige the courts to state their reasons if they do not grant leave in cases involving the application of EU law. As a result, the Swedish Parliament passed legislation requiring the courts of last resort to give reasons when deciding not to grant leave if a case involves issues of EU law that are raised by a party.¹¹⁰ However, it seems that the infringement proceedings and the amendment of law did not change much in the practice of the Swedish courts. U. Bernitz states that still very few cases are referred to the European Court of Justice and the reasons given by the supreme courts upon denial are standardised phrases which give little information whether the court has found the EU law issues raised in the case not relevant or whether the court has found the EU law issues raised to be *acte éclairé* or *acte clair*.¹¹¹

Whether or not the European Court of Justice decides to address the failure or reluctance to refer questions the European Court of Justice based on similar principles it applied in *Lucchini*, remains to be seen. What is certain, however, is that when the court of last instance ignores the obligation to ask for a preliminary ruling, this undermines the goal of securing a uniform and effective implementation of EU law.

3. CONCLUSIONS

The case law of the Court of Justice clearly indicates that the finality of administrative decisions and *res judicata* are not absolute, and there are situations in which the supremacy of EU law and the requirement of uniform and effective implementation prevail. Besides national principles, the criteria of *Kühne & Heitz* and compliance of procedural rules of the principles of effectiveness and equivalence (derived from *I-21 & Arcor* and *Kempter*) must be considered when assessing the grounds to reopen administrative proceedings. The European Court of Justice has issued clear grounds to reopen administrative proceedings in those cases where an administrative decision has become final and it is later revealed that the legal solution of the administrative decision is in conflict with European Union law. For this reason, administrative decisions may be reviewed years later. However, deriving the obligation to reopen administrative

¹⁰⁸ U. Bernitz (Note 11), p. 178.

¹⁰⁹ *Ibid.*, p. 179.

¹¹⁰ *Ibid.*, p. 179.

¹¹¹ *Ibid.*, p. 180.

proceedings from the right to do so has not been accompanied with clear legal reasoning. Therefore, the principle of supremacy might have more weight than the principle of procedural autonomy than originally perceived. Nevertheless, this is the law as it currently stands and which the courts and administrative bodies of Member States are expected to follow.

The practice of the European Court of Justice has also shown that *ultra vires* decisions may strip a court decision of the protection of *res judicata*. This could have rather interesting implications for future cases. In particular, risks may emerge in situations where the Supreme Court of Estonia disregards, when settling a dispute that calls for interpretation of EU law, the obligation to ask for a preliminary ruling or substantiate why it invoked exceptions in known case law. There are plenty of such judgments in practice. The outcome of it, however, remains to be seen. What is certain is that European Union law has supremacy and Member States must respect the competences defined in the Treaties and, if necessary, disregard the principle of legal certainty, which is one of the general principles of law.