Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality?

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Forms of *res judicata* – Unwritten principle of EU law – National procedural autonomy v. EC supremacy – Revision of decisions v. state liability – Finality of administrative decisions v. judicial decisions – Higher respect for judicial decisions than for administrative decisions – *Res judicata* not absolute – ECJ itself under demands of legal certainty – Analogy between *res judicata* rules and rules of direct and indirect effect.

Introduction

The recent jurisprudence of the Court of Justice in *Köbler* and *Kühne & Heitz* has made clear that the Court is willing to establish legal principles that will make it possible to effectively tackle the abuse of the *acte clair* doctrine.[1] As to the former case, the Court established the possibility of engaging member state liability in a case where the national court of last instance (*in casu* the Supreme Administrative Court), using the *acte clair* doctrine, commits a manifest breach of Community law.[2] As to the latter, the Court concluded that an administrative body, in accordance with the principle of co-operation arising from Article 10 EC, is under an obligation to review a decision in order to take into account the interpretation of the relevant Community law provision given in the meantime by the Court.[3] Though of a procedural nature, this jurisprudence captures many constitutional issues related, for instance, to the scope of Articles 10 EC (duty of loyalty) and

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[1] Case C-224/01 *Köbler* [2003] *ECR* I-10139, Case C-453/00 *Kühne & Heitz* [2004] *ECR* I-10239.

[2] Ibid., *Köbler*, paras. 118-120.

[3] *Kühne & Heitz*, *supra* n. 1, para. 27. It concerned a decision regarding customs nomenclature of 'chicken legs' given by a national administrative body (Board for poultry and eggs). The decision was confirmed by the administrative for Trade and Industry, using the *acte clair* doctrine. Nevertheless, the decision appeared inconsistent with a subsequent ruling from the ECJ.

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234 EC (preliminary ruling). It is also striking that these two cases embody the same rationale for the Court, i.e., the quest for a fair balance between legal certainty and legality.

Notably, these significant rulings of the Court of Justice have touched upon the principle of *res judicata* in the context of both state liability and revision of decisions. However, the range of *res judicata* is still rather ambiguous, since the case-law is in *statu nacendi* and thus appears to be of particular complexity. It is well-known that the Court of Justice reinforces or/and clarifies a new established principle through its subsequent case-law. Cases and Opinions from 2006 and 2007, such as *Traghetti del Mediterraneo, EDF Man Sugar, Kapferer*, *i-21 and Arcor, Lucchini* and *Kempter*, that may illuminate the decisions *de principe* of 2003 (*Köbler*) *and* 2004 (*Kühne & Heitz*), therefore should be thoroughly analyzed.[4] Is there something new under the sun? Or, do those recent cases merely confirm the previous jurisprudence? The aim of this article is to determine the scope of *res judicata* in light of the recent jurisprudence of the Court. In this respect, two main lines of cases may be discerned, i.e., the cases on member state liability and the reopening of final decisions. This jurisprudence is intricately related and must be read together. Furthermore, it is argued that the *Köbler* doctrine appears subsidiary to the *Kühne & Heitz* line of case-law. If this is true, many criticisms against the *Köbler* line of cases might appear less valid.

First, it is necessary to give a definition of *res judicata*. We will scrutinize this concept in relation to the principle of legal certainty and then analyze it in the light of Community legality. Secondly, this article focuses on the line of cases concerning *res judicata* and member state liability. This section will look at the cases relating to the elaboration of the principle and then to its confirmation. Thirdly, we have assessed the scope of *res judicata* in connection with the jurisprudence dealing with the reopening of final decisions. In that respect, two areas will be analyzed: on the one hand, the reopening of final administrative decisions; on the other hand, the reopening of final judicial decisions.

Res judicata, Legal certainty and legality

Res judicata must be clearly defined in order to determine its scope and limits. To begin with, it should be recognised that this principle appears to be firmly rooted both in the laws of the member states and in the Court of Justice case-law. In that regard, it must be understood that *res judicata* is closely related to the principle of

[4] Case C-234/04 *Rosmarie Kapferer* [2006] *ECR* I-2585, Case C-274/04 *EDF Man Sugar* [2006] *ECR* I-3269, Case C-173/03 *Traghetti del Mediterraneo* [2006] *ECR* I-5177, Joined Cases C-392/04 and C-422/04 *i-21 and Arcor* [2006] *ECR* I-8859, Case C-119/05 *Lucchini Siderurgica* [2007] n.y.r., Opinion of AG Bot in Case C-2/06 *Willy Kempter* [2007] n.y.r.

legal certainty and constitutes one of its corollaries. Secondly, like the principle of legal certainty, *res judicata* is not absolute and thus must be balanced with the Community legality. But, *quid* Community legality?

Res judicata and legal certainty

Put bluntly, *res judicata* signifies that an adjudicated issue cannot be re-litigated.[5] It is also worth remarking that the legal authority of a decision (binding effect), *autorité de la chose jugée* or *Rechtskraft*, in principle, is relative or not absolute.[6] In the early sixties, AG Lagrange in *Da Costa*, in the context of preliminary rulings, already considered that 'its binding effect is only relative and exists only in so far there is identity of parties, cause and object.'[7] Many years afterwards, AG Léger in *Köbler*, lucidly characterised *res judicata pro veritate habetur* as rooted in

> Roman law … [and] recognised by all the member states and the Community legal order. It means that a judicial decision – by which a dispute has been resolved – cannot be challenged, except by way of the judicial remedies prescribed by law. It follows that, where all remedies have been exhausted, such a decision (with legal authority) can no longer be challenged by the commencement of the same type of proceedings (it thus has the force of *res judicata*).[8]

[5] lat: '*contra rem judicatam non audietur*'. Using a comparative analysis, it is worth remarking that the concept of *res judicata* in the various laws of the member states is generally divided into two sub-concepts: in France (*autorité de la chose jugée* and *force de la chose jugée*), in Germany (*materielle Rechtskraft* and *formelle Rechtskraft*) and in Sweden (*negativ rättskraft* and *positiv rättskraft*). It appears that *autorité de la chose jugée*, *materielle Rechtskraft* and *negativ rättskraft* constitute rather similar concepts. These concepts reflect the view that an adjudicated issue cannot be re-litigated. The other sub-concepts: *force de la chose jugée*, *formelle Rechtskraft and positiv rättskraft* are closer to the notion of exhaustion of remedies and the reliance of the adjudicated issue in other cases. Furthermore, in those three member states, the concept of *res judicata* can be found in civil law, criminal law and administrative law.

[6] *See* AG Léger in *Köbler*, *supra* n. 1, fn 94. The AG considered that the legal authority of a decision is in principle relative. This stance is confirmed by references to Austrian, French, German and Spanish doctrine.

[7] Joined Cases 28, 29 and 30/62 *Da Costa* [1963] *ECR* 31, at p. 41. *See also* AG Léger in *Köbler,* para. 101: '[a]ccording to the prevailing traditional definition, the legal authority of a judicial decision – and, as a consequence, *res judicata* – is applicable only in certain circumstances, where there is a threefold identity – of subject-matter, legal basis and parties – between a dispute already resolved and a subsequent dispute. The legal authority of a decision is thus in principle relative and not absolute'. It is not a surprise that the two French AGs (Lagrange and Léger) refer to the threefold identity. Indeed, those three elements: subject-matter (issue), legal remedies (cause of action, claim) and parties are expressly mentioned in Art. 1351 of the French civil code (*la chose, la cause* and *les parties*). Similar concepts can also be found in the laws of other member states. In Common law, one finds the notions of claim preclusion and issue preclusion (collateral estoppel). In Germany, the material finality of a judgment has objective, temporal and subjective limits.

[8] AG Léger in *Köbler, supra* n. 1, at para. 96 (fn 91). According to the AG that rule is also shared by the member states in the field of criminal law in the form of the *non bis in idem* principle (*see* Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] *ECR* I-1345) and also in the

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The objective of the *res judicata* principle is to strike a balance between competing interests. On one hand, it assures an efficient judicial system that renders final judgments with certainty and prevents the inequity of a defendant having to defend the same claim or issue of law repeatedly. On the other hand, it protects the plaintiff's interest in having issues and claims fully and fairly litigated. Thus, the *res judicata* principle ensures the stability of the law and legal relation by preventing the never-ending reassessment of disputes. It thus intends to serve both legal certainty and sound administration of justice.[9] As highlighted in the *Eco-Swiss* and *Köbler* cases, the importance of the principle of *res judicata* cannot be disputed.[10] This unquestionable concept is clearly part of the broader principle of legal certainty. Thus, it appears necessary to look into detail at this principle.

Arguably, the concept of legal certainty makes up the essence of the law and, in a similar vein, may be appraised as its *raison d'être*.[11] In few words, it reflects the ultimate necessity of clarity, stability and intelligibility of the law.[12] The principle of legal certainty constitutes a very wide concept that appears axiomatic to democratic societies and, consequently, common to the legal orders of the member states. In this respect, Community law does not escape from the general rule, though no provision can be found in the EC Treaty-making explicit reference to this concept.[13] Indeed, this principle forms an integral part of unwritten Community law. According to Temple Lang, the principle of legal certainty may be categorised both as a principle of administrative law and a fundamental human right.[14]

It is worth noting that the principle of revocability of administrative acts constitutes the first implicit jurisprudential appearance of legal certainty in the European legal order.[15] This principle, which perfectly reflects legal certainty, establishes

constitutional field (principle of separation of powers). *See,* in that respect, Renoux, 'Autorité de chose jugée ou autorité de la Constitution' in *L'esprit des institutions, l'équilibre des pouvoirs. Mélanges en l'honneur de Pierre Pactet* (Dalloz, 2003) p. 835.

[9] Ibid., para. 96 and followed by the Court in para. 38.

[10] Case C-126/97 *Eco Swiss* [1999] *ECR* I-3055, para. 46, *Köbler, supra* n. 1.

[11] M. Fromont, 'Le principe de sécurité juridique', *Actualité Juridique Droit Administrative* (1996) édition spéciale, p. 178 at p. 178.

[12] *See*, e.g., Case C-63/93 *Duff* [1996] *ECR* I-569, para. 20.

[13] J. Usher, *General Principles of EC Law* (Longman, 1998) p. 52.

[14] J. Temple Lang, 'Legal Certainty and Legitimate Expectation as General Principles of Community Law', in U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (Kluwer, 2000) p. 163 at p. 163.

[15] They are often associated, in the early case-law, with the principle of revocation of administrative acts (unlawful/ favourable administrative acts). For unlawful administrative acts, *see* Joined Cases 7/56 and 3/57, 4/57, 5/57, 6/57 and 7/57 *Algera* v. *Common Assembly* [1957] *ECR* 39, Joined Cases 42/59 and 49/59 *SNUPAT* v. *High Authority* [1961] *ECR* 53. *See also* Case 14/61 *Hoogovens* v. *High authority* [1962] *ECR* 253, Case 111/63 *Lemmerz-Werke* v. *High Authority* [1965] *ECR* 677, Case 14/81 *Alpha Steel* v. *Commission* [1982] *ECR* 749, Case 15/85 *Consorzio Cooperative d'Abruzzo* v. *Commission* [1987] *ECR* 1005, Case C-248/89 *Cargill* v. *Commission* [1991] *ECR* I-2987, Case

the irrevocability of legal acts that create substantive rights. In other words, these administrative acts cannot, in principle, be retroactively withdrawn. An illegal measure, however, may be withdrawn with retroactive effect if the revocation happens within a reasonable time and if it respects the legitimate expectations of the beneficiary of the measure.[16]

Also, one can recall in this respect, the important comparative analysis undertaken in the *Algera* case, both by AG Lagrange and the Court.[17] Going further, in *SNUPAT*, the Court made the first explicit reference to legal certainty.[18] Interestingly, the Court considered that the principle of legal certainty is not absolute, since its application must be combined with the principle of legality.[19] Furthermore, it considered that the prevalence of one of the interests depends on the circumstances of the case in comparing the private interest (good faith of the beneficiary) with the public interest (interest of the Community).[20] In a similar vein, the Court held in *Hoogovens* that,

> in weighing up the conflicting interest on which the choice between the *ex nunc* and *ex tunc* revocation of an illegal decision is to depend, it is important to bear in mind the actual situation of the parties concerned.[21]

C-365/89 *Cargill* [1991] *ECR* I-3045. For lawful administrative acts, *see* Case 54/77 *Herpels* v. *Commission* [1978] *ECR* 585, Case C-90/95 P *Henri de Compte* v. *European Parliament* [1997] *ECR* I-1999. For favourable acts that creates an acquired right that cannot be revoked in principle, *see Herpels,* para. 38, *De Compte*, para. 35.

[16] Ibid., *Alpha Steel, Consorzio Cooperative d'Abruzzo, Cargill*, *Henri de Compte*.

[17] *Algera, supra* n. 15.

[18] *SNUPAT*, *supra* n. 15.

[19] J. Dutheil de la Rochère, 'Le principe de légalité', *Actualité Juridique Droit Administrative* (1996) édition spéciale, p. 161. *See supra* n. 15*, De Compte*, para. 35. The court used the terminology of legitimate expectations in relation to the withdrawal of a favourable administrative act. In principle, the administrative act cannot be revoked. *See also, supra* n. 15, *Algera,* at p. 56, *Hoogovens* para. 5, *Alpha Steel* paras. 10-12, *Consorzio Cooperative d'Abruzzo* paras. 12-17, *Cargill I* para. 20, *Cargill II* para. 18. *See also* Case T-118/00 *Conserve Italia* [2003] *ECR* II-719, para. 77. A closer look on the national legal systems reveals that the actual situation of the parties involved and the principle of legality may sometimes prevail over the principle of legal certainty. In German Law, e.g., a wrongful judgment that has become *res judicata* can be challenged under exceptional circumstances, such as serious procedural failures, fraud or in cases where the time limit for legal remedies has expired and there was no failure of the parties involved. It is further possible to file a constitutional complaint ('*Verfassungbeschwerde*') in order to challenge a specific final judicial decision. Pursuant to §§ 90, 93 et seq. BverfGG, this can be done when basic rights ('Grundrechte') have been violated and there was no other means of legal redress available. In the past years, the German Constitutional Court has developed a variety of procedural basic rights ('prozessuale Grundrechte'), such as the right to be heard (Art. 103 GG), the right to be heard by a competent judge/court (Art. 101 I S. 2 GG – interesting in combination with Art. 234 EC), non-discrimination (Art. 3 I GG) and fair trial (Art. 2 I, 20 III GG).

[20] *SNUPAT*, *supra* n. 15, at p. 87.

[21] *Hoogovens, supra* n. 15*,* para. 5.

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Finally, it appears that the principle of legal certainty is relative. The same holds true in connection with *res judicata*, which also must be balanced with Community legality.

Res judicata and legality

As said before, *res judicata* must be balanced with Community legality. However, what is the scope of Community legality? It appears that the Court of Justice has developed two distinct lines of case-law in order to assess the Community legality of national procedural law. The first line is traditionalist since it is strongly based on the respect of national procedural autonomy. By contrast, the second line is mainly founded on the principle of supremacy and leads to the elaboration of a very progressive approach bolstering the full effectiveness of Community law.

In order to define properly the paradigm of national procedural autonomy and its limits, it is worth recalling the standard case-law (*Rewe* line). Since the *Rewe* case (1976), the Court has referred extensively to its standard formula. Accordingly,

> in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each member state, under the principle of the procedural autonomy of the member states, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).[22]

To summarise, the Court has recourse to two principles (equivalence and effectiveness) to assess the Community legality of national procedural law and give guidelines to the national courts. Indeed, it is important to keep in mind that it is, in principle, for the domestic courts to establish whether the procedural rules, which are intended to guarantee that the rights obtained by individuals from Community law are safeguarded under national law, comply with the two *Rewe* principles, i.e., equivalence and effectiveness. As rightly put by AG Léger,

> the national courts are in the best position to make such an appraisal since it requires a relatively detailed knowledge of national procedural rules. None the less,

[22] *See* Case 33/76 *Rewe* [1976] *ECR* 1989, para. 5, Case 45/76 *Comet* [1976] *ECR* 2043, paras. 13 and 16, Case C-231/96 *Edis* [1998] *ECR* I-4951, paras. 19 and 34, Case C-343/96 *Dilexport* [1999] *ECR* I-579, para. 25, Case C-78/98 *Preston and Others* [2000] *ECR* I-3201, para. 31, Case C-201/02 *Wells* [2004] *ECR* I-723, para. 67, Case C-168/05 *Mostaza Claro* [2006] *ECR* 10421, para. 24, Case C-446/04 *Test Claimants* [2006] *ECR* I-11753, para. 203, and *i-21 and Arcor*, *supra* n. 4, para. 57.

> the Court generally takes the trouble to make some observations on that point in order to guide the national courts in their task.[23]

The case-law on procedural autonomy of the member states is of a Byzantine nature, mainly for two reasons. First, it may overlap with cases dealing with breach of general principles of Community law in national procedural law. This assertion is verified by the *Cowan* and *Data Delecta* cases (non-discrimination) and by the *Johnston* case (effective judicial protection).[24] At the end, it appears that this jurisprudence can be related to the principles of equivalence (for non-discrimination) and effectiveness (for effective judicial protection). Second, another line of case-law may be used, and has been used, by the Court in order to assess domestic procedural law. Cases like *Simmenthal*, *Factortame* or *Larsy,* closely linked to the principles of supremacy and effectiveness, reflect this line.[25] Such an approach has notably been advocated by AG Léger in *Kühne & Heitz* and AG Ruiz-Jarabo Colomer in *i-21 and Arcor.*[26]

In that respect, it is worth remarking that the principle of supremacy entails different types of obligations. One of them, perhaps the most important, is the obligation for the national courts to set aside conflicting national law. In *Simmenthal,* the Court established obligations for both the member states (legislature) and the national courts, which are justified by the need to ensure the effectiveness of Community law. [27] As to the former, the Court established the pre-emptive effect of Community law, which precludes the adoption of national legislative measures that would be incompatible with Community provisions. Arguably, pre-emption precedes supremacy. As to the latter, the Court considered that the principle of precedence (supremacy) renders automatically inapplicable any provision of national law conflicting with Community law.[28] In other words, the national courts, which must apply Community law in its entirety and protect rights conferred on individuals, are under an obligation to set aside the domestic legislation (prior or subsequent to the Community rule) contrary to Community law.[29] It is not only for the constitutional courts to set aside, but also the ordinary courts must fulfil this obligation resulting from the principle of supremacy.[30]

[23] AG Léger in *Köbler*, *supra* n. 1, para. 98.
[24] Case 186/87 *Cowan* [1989] *ECR* 195, Case C-43/95 *Data Delecta* [1996] *ECR* I-4661, and Case 222/84 *Johnston* [1986] *ECR* 165.
[25] *Infra.*
[26] *Supra* n. 1 and 4.
[27] Case 106/77 *Simmenthal II* [1978] *ECR* 629.
[28] Ibid., paras. 17-18.
[29] Ibid., paras. 20-21.
[30] F. Jacobs, 'The Evolution of the European Legal Order', *CMLRev.* (2004) p. 303 at p. 315.

Importantly, the obligation to set aside conflicting national norms does not necessarily lead to the abrogation of the national legislation.[31] This interpretation is confirmed by the *IN.CO.GE* case, where the Court favoured the inapplicability of the national measure.[32] By contrast, in *Factortame,* the Court was confronted with the question of whether it should set aside a procedural rule preventing a national court seized of a dispute falling within the scope of Community law from granting interim relief. The Court, referring to the *Simmenthal* judgment, stated that,

> [a]ny provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions…are incompatible.[33]

The Court found an obligation for the national court to set aside obstructive national rules prohibiting the conferral of a suitable remedy. Accordingly, this obligation stems not only from the principle of effectiveness, but also from the application of the principle of loyalty (Article 10 EC) in order to ensure the legal protection, which derives from the direct effect of Community law.[34] At the end, the House of Lords abrogated the national rule prohibiting the granting of interim injunctions against the Crown.

The case-law of the Court of Justice (*Peterbroeck*, *Océano Groupo*, *Cofidis*) concerning the obligation for national courts to raise questions of Community law *ex officio* provides also another illustration of the use of effectiveness.[35] More recently, the Court used a similar methodology in the *Larsy* case.[36] This case concerned the allowance by the Belgian administrative authorities of a retirement pension to a self-employed worker. The Court ruled that domestic rules on the

[31] A. Dashwood, 'The Relationship between the Member states and the European Union/Community', *CMLRev.* (2004) p. 335 at p. 378, '[i] always read the Simmenthal judgment as authority for the further point that the principle of primacy of Community law does not render a national provision, which is in conflict with Community law, automatically null and void: it merely requires a national judge to refrain from applying the national provision and to give the Community provisions full intended effect.'

[32] Joined Cases 10 and 22/97 *IN.CO.GE* [1998] *ECR* I-6307. *See also*, Case C-198/01 *Consorzio Industrie Fiammiferi* (CIF) [2003] *ECR* I-8055, para. 53 and Case C-119/05 *Lucchini Siderurgica* [2007] n.y.r., para. 61.

[33] Case C-213/89 *Factortame* [1990] *ECR* I-2433, para. 20.

[34] Ibid., para. 19.

[35] Case C-312/93 *Peterbroeck* [1995] *ECR* I-4599, Joined Cases C-240 to C-244/98 *Océano Grupo* [2000] *ECR* I-4941, and Case C-473/00 *Cofidis* [2002] *ECR* I-10875. *See,* AG Ruiz-Jarabo Colomer in *i-21 and Arcor, supra* n. 4, para. 120.

[36] Case C-118/00 *Larsy* [2001] *ECR* I-5063.

authority of *res judicata* should be eliminated since they hamper the effective protection of rights derived from Community law. Also, the Court, in *Mangold,* newly established an obligation for the national courts to set aside a national legislation conflicting with a non-implemented directive of which the time limit for implementation had not expired. This dynamic interpretation was based both on the general principle of discrimination and the necessity to ensure full effectiveness of Community law.[37] To conclude, it appears that the existence of two lines of case-law is rather problematic and encroaches, to a certain extent, on the principle of legal certainty. Though it is true that the Court has used in the past, from time to time, the most dynamic line of case-law (*Simmenthal*) in relation to national procedural law, it seems that the Court tends towards pusillanimity in its recent case-law on finality of administrative and judicial decisions. However, this judicial self-restraint is not so visible in the context of members' state liability.

Res judicata and member state liability

In 2003, the Court of Justice, for the first time, established the possibility to engage a member state's liability for breach of Community law by one of its supreme courts. The famous *Köbler* case has led to many comments and criticisms by the doctrine. Quite recently, this case has been confirmed and specified by *Traghetti del Mediterraneo*.

Establishing liability

The concept of *res judicata* is closely related to the *Köbler* case. Indeed, one of the main questions at issue was whether member states are entitled to rely on the principle of *res judicata* in order to oppose an action for damages against the state on the basis of a decision of a supreme court in breach of Community law. At first blush, it appears that the non-absolute nature of this principle points towards a negative answer.[38]

It is therefore important to analyse in more detail the *Köbler* case. Before engaging in a discussion of this case, it is worth recalling the facts. Mr Köbler had been employed as an ordinary university professor in Austria and applied for the special length-of-service increment for university professors. According to Austrian law, this type of benefit is granted exclusively after 15 years of services in domestic universities. Though he had completed the requisite length of service, the duration of his service in universities of other member states was also taken

[37] Case C-144/04 *Mangold* [2005] *ECR* I-9981.

[38] *See* AG Léger in *Köbler, supra* n. 1, paras. 102-103. The AG undertook an analysis of *res judicata* in light of the principle of equivalence. He concluded that *res judicata* was relative in national law, and thus there was no breach of principle of equivalence.

into consideration. His application was rejected and, consequently, he brought proceedings before the Austrian courts arguing that such a requirement constituted indirect discrimination contrary to Community law. The Supreme Administrative Court in 1998, applying the *acte clair* doctrine, found that the special length-of-service increment was a loyalty bonus, which justified a derogation from the provisions on freedom of movement for workers. Consequently, *Köbler* brought an action for damages before the Regional Court on the ground that the judgment of the Supreme Administrative Court was contrary to Community law.

The Court found that the national court was not entitled to take the view that resolution of the point of law at issue was clear from the settled case-law of the Court or left no room for any reasonable doubt. It was therefore obliged under the third paragraph of Article 177 (234 EC) of the Treaty to maintain its request for a preliminary ruling. Then the Court established that the national court infringed Community law by its judgment of 1998. Going further, it examined whether that infringement of Community law was manifest in character having regard in particular to the factors to be taken into consideration regarding the specificity of the judicial function.[39] Finally, the Court did not find that the infringement constituted a manifest breach of Community law. [40] At the end of the day, it seems difficult to establish whether a breach is manifest or not. In light of the circumstances of the case, it is argued that the Court could have a found a manifest breach of Community law (obligation to refer under Article 234(3) EC).[41] In that sense, it may be said that the *Köbler* case constitutes a warning from the Court of Justice to the supreme courts of the member states abusing the *acte clair* doctrine.

This ruling has been criticised. Notably, Wattel pointed out that this case-law would result in 'an avalanche of claims'.[42] Furthermore, some would also probably argue that the *Köbler* case infringed a constitutional principle relating to the independence of the judiciary *vis-à-vis* the executive since the *Francovich* action was directed towards the member states. At first blush, it appears to be a well-built argument. However, one may disagree with it. Suffice it to recall here that the European Court of Human Rights may sanction (and has sanctioned for a long time now) member states for breach of fundamental rights by their national courts.[43] As far as we know, this practice has never been criticised. Moreover,

[39] Ibid., paras. 53-55.

[40] Ibid., paras. 118-124.

[41] Ibid., AG Léger in *Köbler*, para. 170. The AG considered that the national court had committed an inexcusable error.

[42] P. Wattel, 'Köbler, CILFIT and Welthgrove: We can't go on meeting like this', *CMLRev.* (2004) p. 177.

[43] *See* Art. 50 ECHR (Case *Zullo* v. *Italy*, 10 Nov. 2004).

looking at national law, it is possible in the member states of the EU to assign the responsibility to the state for mistakes committed by a national court.[44]

In a rather similar vein, it could be argued that the decision disturbs the hierarchy and impartiality of the domestic judicial orders. As to hierarchy, it clearly boosts the powers/competences of lower national courts.[45] Once again, the lower national courts appear as the closest allies of the Court of Justice.[46] As to impartiality, it may even lead to question the independence of the highest national courts since they might be in a position to deal with an action in damages against their own previous decisions. Finally, it could be questioned whether the *Köbler* doctrine reduces legal certainty. In other words, is there an erosion of the finality of judgments and *res judicata*? As rightly put by Tridimas,

> The real issue is not whether those principles are undermined but whether such undermining effect is outweighed by the need to ensure respect for the rule of law and the effectiveness of EC law which liability for judicial acts is intended to serve.[47]

Indeed, one should always keep in mind that it is the primary task of the Court to ensure respect of Community legality.

In our view, the *Köbler* case should be welcome. Indeed, though it reflects a failure of the rigid *CILFIT* criteria, it constitutes another step towards a more effective enforcement of Community law. In that respect, it is interesting to note that the Commission has seized the Court on the basis of Article 226 EC.[48] At the end, *Köbler* allows a right of reparation but no right of revision of the domestic decision. In that sense, it appears essential to read the *Köbler* case together with *Kühne & Heitz* (2004), given in its wake. It could be argued that this last judgment may minimise many of the above-mentioned negative effects of the *Köbler* jurisprudence. Before analysing the linkage between *Köbler* and *Kühne & Heitz*

[44] *Köbler*, *supra* n. 1, para. 48 and AG Léger in *Köbler*, paras. 77-82. According to the Court, 'application of the principle of state liability to judicial decisions has been accepted in one form or another by most of the Member States … even if subject only to restrictive and varying conditions.'

[45] H. Scott and N. Barber, 'State Liability under Francovich for Decisions of National Courts', *Law Quarterly Review* (2004) p. 404 at p. 404-405.

[46] Going further, it may be said that one witnesses an empowering of the national courts (more powers for the lower national courts and also more responsibilities for the national courts of last resort). Does this mean the end of the judicial dialogue? Not at all. It means, in our view, a better enforcement of EU law, which is necessary in the context of the recent enlargement and the subsequent increased number of national courts.

[47] T. Tridimas, *General Principles of EU Law* (Oxford University Press, 2006) p. 528.

[48] *See* Case C-129/00 *Commission* v. *Italy* [2003] *ECR* I-14637. That case requires the Court to analyze questions equivalent to those raised in these proceedings, i.e., whether member states should be answerable, and to what extent, for the acts adopted by its courts, *in casu* the *Corte suprema di cassazione* (Supreme Court of Cassation in Italy).

(2004), it is necessary to look at the recent cases following the establishment of the possibility to engage a member state's liability for breach of Community law by its supreme court.

Confirming liability

When the Court decided Case C-173/03, *Traghetti del Mediterraneo SpA, in liquidation* v. *Repubblica italiana* in June 2006, it took the opportunity to specify some of the principles that were established by *Köbler*.[49] As in *Köbler*, this case was primarily concerned with finding a fair balance between the need to preserve the independence of the judiciary and the essential requirements of legal certainty, on the one hand, and the requirement of effective judicial protection of individuals in the most flagrant cases of infringement of Community law attributable to the judiciary, on the other hand. This case was, however, different from *Köbler* in the sense that it had to be decided to what extent national legislation may actually preclude or limit state liability with regard to the general principles and restrictions that were laid down in *Köbler*.[50]

In this case, the applicant, *Traghetti del Mediterraneo SpA* (hereinafter: '*Traghetti*'), had been a maritime transport undertaking which, in the 1970s, ran regular ferry services between mainland Italy and Sardinia and Sicily. In 1981, *Traghetti* brought proceedings against a rival undertaking, *Tirrenia di Navigazione* (herinafter: '*Tirrenia*'), seeking compensation for the damage that it claimed to have suffered during the preceding years as a result of the low-fare policy operated by *Tirrenia*. *Traghetti* also submitted that *Tirrenia* had failed to comply with the Italian law relating to unfair competition and that it had infringed the EEC Treaty. The action was dismissed by the Italian courts on the ground that subsidies granted to *Tirrenia* by the state had been legal since they had reflected public interest objectives. Having taken the view that that decision was based on an incorrect interpretation of the Community rules of state aid and thereby influenced by errors of law, the applicant appealed and requested the court to submit the relevant questions of interpretation of Community law to the Court for a preliminary ruling. However, the Italian Supreme Court refused to grant that request. Thereafter, the applicant instituted proceedings before the regional district court against the Italian state for compensation for damage suffered as a result of the errors of interpretation committed by the Supreme Court and of the breach of its obligation to make a reference for a preliminary ruling. As the court was unsure how to decide the dispute before it, it stayed the proceedings and referred two questions to the Court for a preliminary ruling. Following the delivery of the judgment in the case

[49] *See supra* n. 4, *Traghetti del Mediterraneo SpA* v. *Repubblica italiana.*
[50] For recent developments, *see* Case C-470/03 *A.G.M.-COS.MET* [2007] n.y.r.

of *Köbler*,[51] the regional district court decided to withdraw its first question, since an affirmative answer had been given to it in the *Köbler* judgment, but to retain the second question. In view of the principles set out in *Köbler,* it now essentially only remained to be ascertained in the amended reference for a preliminary ruling whether national legislation of state liability for judicial errors hampers confirmation of that liability in a manner incompatible with EC law, where it, on the one hand, precluded liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions and, on the other hand, limited state liability solely to cases of intentional fault and serious misconduct on the part of the court.

In its judgment, the Court of Justice first acknowledged that, on the one hand, the interpretation of provisions of law forms part of the very essence of judicial activity since a court faced with divergent or conflicting arguments must normally interpret the relevant legal rules – of national and/or Community law – in order to resolve the dispute brought before it. On the other hand, the Court also stressed that it is not inconceivable that a manifest infringement of Community law might be committed precisely in the exercise of such work of interpretation if, for example, the court gives a substantive or procedural rule of Community law a manifestly incorrect meaning, or where it interprets national law in such a way that in practice it leads to an infringement of the applicable Community law.[52] However, restating the principles set out in *Köbler,* the Court also highlighted that having regard to the specific nature of the judicial function and to the legitimate requirements of legal certainty, state liability in cases concerning the infringement of EC law by courts adjudicating at last instance is not unlimited and can be incurred only in exceptional cases where there has been a manifest infringement of the applicable law.[53] In that context, the Court reiterated that equivalent considerations linked to the need to guarantee effective judicial protection to individuals of the rights conferred on them by Community law preclude state liability not being incurred solely because an infringement of Community law attributable to a national court adjudicating at last instance arises from the interpretation of provisions of law made by that court[54] or, analogously, from its assessment of the facts and evidence.[55] Balancing these conflicting values, i.e., requirements of legal certainty and effective judicial protection to individuals, the Court then held that the exclusion of any possibility that state liability might be incurred, where the infringement allegedly committed by the national court related to the assess-

[51] *See supra* n. 1.
[52] *Supra* n. 4, *Traghetti del Mediterraneo SpA* v. *Repubblica italiana*, paras. 34-35.
[53] Ibid., para. 32.
[54] Ibid., para. 33.
[55] Ibid., para. 37.

ment which it made of facts or evidence, would amount to depriving the principle set out in the *Köbler* judgment of all practical effect with regard to manifest infringements of Community law for which courts adjudicating at last instance were responsible.[56] This was also the Opinion of AG Léger who, referring to the *Köbler* judgment, particularly underlined that neither the principle of the independence of the judiciary, nor that of *res judicata*, can justify general exclusion of any state liability for an infringement of Community law attributable to such a court.[57] For the above-mentioned reasons, the Court finally ruled that Community law precludes national legislation which excludes state liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question resulted from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court.[58] Correspondingly, the Court decided that Community law also precludes national legislation which limited such liability solely to cases of intentional fault and serious misconduct on the part of the court,[59] if such a limitation were to lead to exclusion of the liability of the member state concerned in other cases where a manifest infringement of the applicable law was committed, as set out in the paragraphs 53 to 56 in Case C-224/01 *Köbler*.[60]

In consequence, this case confirmed and elaborated the principles that were previously established in the *Köbler* judgment. It demonstrated that the limitations that were drawn up for state liability in the case of EC law infringements by courts of last resort with respect to the principle of *res judicata*, could not be

[56] Ibid., para. 36 (referring to the Opinion of AG Léger, para. 52).

[57] Ibid., Opinion of AG Léger in *TDM*, para. 50.

[58] *Supra* n. 4, *Traghetti del Mediterraneo SpA* v. *Repubblica italiana*, paras. 46 and 47.

[59] In that context, the ECJ specifically highlighted in para. 32, that liability for manifest infringement of Community law has to be assessed in the light of the existing situation, including the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling. An individual's right to obtain redress arises where it had been established that the rule of law infringed was intended to confer rights on individuals and there was a direct causal link between the breach of the obligation incumbent on the state and the loss or damage sustained by the injured parties.

[60] *Supra* n. 4, *Traghetti del Mediterraneo SpA* v. *Repubblica italiana*, paras. 46 and 47. Unsurprisingly, AG Léger delivered a similar opinion on this issue in para. 104 of his opinion. However, the AG used quite different wording, which may confuse some readers. In his opinion, he concluded that the principle of state liability for infringement of Community law attributable to a supreme court does not preclude such liability being made subject to the existence of intentional fault or serious misconduct on the part of the supreme court concerned, provided that that condition does not go beyond manifest disregard of the applicable law (compare also para. 102 of his Opinion).

interpreted in such a manner that state liability would become virtually impossible to achieve. This is especially so where national legislation restricts state liability in such a radical way as the Italian legislation did. In our view, it could be said that the *Traghetti* judgment defines the 'limitations of the limitations of state liability' with regard to *res judicata*. Thus, this judgment makes the principles set out in *Köbler* a powerful tool for the individual against wrongful decisions by courts of last resort that are constantly or manifestly infringing Community law.

Res judicata and finality of decisions

The Court has developed two lines of case-law in relation to *res judicata* and the finality of decisions on the national level. The first line concerns the possibility of re-opening administrative decisions which have become final in the national system. The second line of case-law deals with such a possibility in relation to judicial decisions. Though intricately related, these two lines possess particular characteristics reflecting the differentiation between administrative and judicial decisions.

Finality of administrative decisions

In the quite recent decisions in *Kühne & Heitz* and *Arcor,* many important principles with regard to this specific line of case-law were established by the Court. In the following, we will therefore summarise and analyse these cases.

Kühne & Heitz (2004) offers an illustration of the recourse to legal certainty as a tool of interpretation regarding national administrative decisions falling within the scope of EC law.[61] It concerned a decision regarding customs nomenclature given by a national administrative body (Board for poultry and eggs). The decision was confirmed by the administrative board for Trade and Industry, using the *acte clair* doctrine. Nevertheless, the decision appeared inconsistent with a subsequent ruling from the Court. By consequence, the plaintiff asked for the re-opening of the administrative procedure, which resulted in a preliminary reference procedure. The Court stated that legal certainty is one of a number of general principles recognised by Community law and that the finality of an administrative decision contributes to such legal certainty. Therefore, Community law does not require that administrative bodies be placed under an obligation to in principle re-open administrative decisions which have become final upon the expiry of reasonable time-limits for legal remedies or by exhaustion of those remedies.[62] However, the Court resorted to four circumstantial arguments in order to counter the primacy of legal certainty:

[61] *Supra* n. 1, *Kühne & Heitz*.
[62] Ibid., para. 24.

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1) Dutch law confers on the administrative body the power to re-open its final decision.
2) The administrative decision became final only as a result of a national judgment against whose decision there was no legal remedy.
3) That national judgment was based on an interpretation of Community law which, in the light of a subsequent judgment of the Court of Justice, was incorrect and which had been adopted without a question being referred to the Court of Justice for a preliminary ruling.
4) The person concerned complained to the administrative body immediately after becoming aware of the judgment of the Court of Justice.[63]

In such circumstances, the Court concluded that the administrative body concerned is, in accordance with the principle of co-operation arising from Article 10 EC, under an obligation to review the decision in order to take into account the interpretation of the relevant Community law provision given in the meantime by the Court.[64] Arguably, the principle of legal certainty conflicts with Article 10 EC. It thus appears as a limitation of the effective application of Community law. At the end, these various examples reflect the ambivalence of the principle of legal certainty, as a rule of interpretation that may both foster and restrict the effective application of Community law.

Though of crucial significance, this judgment (given in Grand Chamber) lacks sufficient motivations. Indeed, the reasoning is both terse and cryptic and has shades of judicial reasoning *à la française*. Also, the obligation to reopen is clearly seen as an exception to the principle of legal certainty and thus must be interpreted restrictively. Going further, it may be said the Court uses a hybrid analysis. On the one hand, the Court mainly bases the obligation to reopen the final administrative decision on Article 10 EC (paras. 27-28). On the other hand, it puts great emphasis on national law (paras. 24-46). As seen before in *Simmenthal* and *Factortame*, the use of Article 10 EC, in general, is associated with the principle of supremacy and the full effectiveness of Community law. This is clearly not the situation in the case at issue. By contrast, through wide references to national law, the Court stresses the importance of the procedural autonomy of the member states in this context. In other words, the obligation of re-examination must be

[63] Ibid., para. 26.

[64] Ibid., para. 27, '[i]n such circumstances, the administrative body concerned is, in accordance with the principle of cooperation arising from Article 10 EC, under an obligation to review that decision in order to take account of the interpretation of the relevant provision of Community law given in the meantime by the Court. The administrative body will have to determine on the basis of the outcome of that review to what extent it is under an obligation to reopen, without adversely affecting the interests of third parties, the decision in question.'

found within domestic law. This line of reasoning clearly contrasts with the Opinion of AG Léger and is thus of a very traditionalist nature despite the fact that it might, at first blush, appear quite progressive with reference to the principle of loyalty (Article 10 EC).[65] Another curiosity worth remarking is that the Court does not mention the '*Rewe*' line of case-law. Such an assertion exemplifies the crossbred nature of this judgment.

Finally, this case might have serious repercussions for the rights of individuals. First of all, it is clear from the judgment that the obligation of re-examination (review/reopening) is not automatic since it must be founded on national law, and the national authorities will have to assess each particular situation in light of their domestic legislation. This obligation of review being based on national law can be difficult to satisfy in certain member states. In addition, one should notice that the Court merely refers to the obligation of review or reopening and does not specify if the revision of the administrative decision has an *ex tunc* (withdrawal) or *ex nunc* (abrogation) effect.[66] This lack of precision is logical since the national law of each member state may provide the (disparate?) solution. Thus, in light of the foregoing, it may be said that the application of the *Kühne & Heitz* jurisprudence in the various member states of the EU will lead to discrepancies in the protection of individual rights. This is one of the main reasons why the application of the *Simmenthal* line of reasoning would have been more judicious in the present case. *Kühne & Heitz* clearly reflects a lack of ambition and transpires, indeed, judicial self-restraint. One should not forget, however, that this case has been recently specified by the *Arcor* case. [67]

Two telecommunications companies (Arcor and i-21) were charged license fees for individual telecommunications in Germany. They paid the fees without protest and did not appeal against them within the one-month time limit. By contrast, other undertakings in the same branch challenged the assessments issued to them and, in a judgment of September 2001, the Federal Administrative Court (*Bundesverwaltungsgericht*) considered that the regulation (the TKLGebV) was contrary to higher-ranking legal rules, *inter alia*, constitutional law. Consequently, Arcor and i-21 sought reimbursement of the fees, which they had paid. However, their requests were not accepted. Therefore, they each brought proceedings before the *Verwaltungsgericht* (Administrative Court), which dismissed them on the ground that their fee notices had become final and that in the present situation there were no grounds for challenging the administrative body's refusal to withdraw those assessments. They appealed on a point of law before the Federal Administrative

[65] *See* AG Léger in *Köbler*, *supra* n. 1, paras. 65-67. The AG, referring to supremacy and full effectiveness, considered that the solution given in the *Larsy* case could be transposed here.

[66] The withdrawal ensures a better protection for individual rights.

[67] Joined Cases C-392/04 and C-422/04 *i-21 and Arcor* [2006] *ECR* I-8859.

Court. Arcor and i-21 took the view that the *Verwaltungsgericht* had erred in law regarding both national law and Community law (paras. 9-15). The main question at stake was the following:

> Are Article 10 EC and Article 11 of the Directive [97/13] to be interpreted as meaning that a fee assessment that determines fees within the meaning of Question 1 and which has not been contested, although such a possibility is afforded under national law, must be set aside where that is permissible under national law but not mandatory?

This question was of essential interest, since it provided the Court with an occasion to clarify or modify the hybrid analysis used in *Kühne & Heitz*.

Arcor and i-21 considered that the member state is required under Article 10 EC to repay the sums unlawfully charged. Notably, i-21 used the 'primacy argument' and thus the '*Simmenthal* line of case-law'. This argumentation is similar to AG Léger in *Kühne & Heitz* and AG Ruiz-Jarabo Colomer in the present case.[68] By contrast, the Commission relied on the principles of effectiveness and equivalence after emphasizing that *Kühne & Heitz* was an appropriate starting point. The line of the Commission was not progressive at all.[69] In that sense, it may be said that it pays deep respect to the paradigm of national procedural autonomy. Following the Commission, the reasoning of the Court was two-fold. First, it confirmed the *Kühne & Heitz* case by referring explicitly to the core of this ruling concerning Article 10 EC and the four conditions, i.e., paragraphs 24 and 27.[70] The Court stressed, however, that the circumstances of the case at issues were totally different from *Kühne & Heitz.* Indeed, i-21 and Arcor did not avail themselves of their right to appeal against the fee assessments issued to them.[71] Second, it reviewed the national procedural rule in the light of the principles of effectiveness and equivalence.[72]

As to effectiveness, the Court concluded that the rules governing appeal (particularly the one month time limit) in the case at issue did not make the exercise of the rights conferred by Directive 97/13 impossible or excessively difficult. The time limit was indeed appraised as reasonable. Importantly, it was emphasized that under paragraph 48(1) of the Law on Administrative Procedure, an unlawful administrative act can be withdrawn even if it has become final.[73] As to equiva-

[68] *See* AG Ruiz-Jarabo Colomer in *i-21 and Arcor*, paras. 69-70. The AG follows the same reasoning (based on supremacy) used by AG Léger in *Kühne & Heitz*. However, the Opinion appears much less powerful.

[69] Ibid., paras. 46-47.

[70] Ibid., paras. 51-52.

[71] Ibid., para. 53.

[72] Ibid., para. 57.

[73] Ibid., paras. 58-61.

lence, it appears that the principle was applied in relation to the obligation to withdraw (for the administration) and to the right to challenge the fees assessment before the national court. In other words, the administrative obligation and the judicial right must exist in connection with both internal matters and Community law. The Court concluded that the right to challenge the fees did not appear to breach the principle of equivalence.[74] By contrast, the question has also been raised as to whether the concept of manifest unlawfulness was applied in an equivalent manner. This concept means that a decision must be manifestly unlawful in order to impose an obligation of withdrawal for the administration. The Commission maintained that the legislation was manifestly unlawful with regard to the provisions of Article 11(1) of Directive 97/13 and that the principle of equivalence had therefore not been complied with. Indeed, it is argued that the national court did not or did not correctly conduct that examination with regard to Community law since the examination is realised in the light of the national rules of higher-ranking law. Interestingly, the Court merely provided guidelines on this issue before concluding that it was for the national court to ascertain whether the legislation was clearly incompatible with Community law.[75]

The Court, in *i-21 and Arcor*, was clearly more didactic than in *Kühne & Heitz* and thus its judgment contrasted a lot with the elliptical drafting that the earlier case was endowed with. Though this decision confirmed *Kühne & Heitz*, it goes a step further into the traditionalist line (procedural autonomy) of reasoning used since *Rewe*. Indeed, the Court referred expressly, by contrast to *Kühne & Heitz*, to the principles of effectiveness and equivalence, which are used to assess the national procedural law. There was no mention of the principle of supremacy (though surprisingly in the *chapeau* of the case) and the *Simmenthal* line. The reasoning is clearly imbued with judicial self-restraint. This stance was clearly confirmed by the importance given to the role of the national courts in the ruling. It is for the national court, in the light of the detailed guidelines furnished by the Court, to ascertain whether legislation is clearly incompatible with Community law. In the circumstances of the case, the domestic jurisdiction should determine whether the fee assessments constitute manifest unlawfulness in light of national law. Interestingly, the Court did not establish a breach of Community law but left this appreciation to the national court. It is strongly emphasized that it is for the national court to draw the necessary conclusions under its national law with re-

[74] Ibid., paras. 65-66. Notably, the reasoning is closely associated with the principle of equal treatment. According to the *Bundesverwaltungsgericht*, since i-21 and Arcor had not exercised their right to challenge the fee assessments, they are not, consequently, in a situation comparable to that of the undertakings having exercised that right. Such an application of the principle of equal treatment does not differ according to whether the dispute relates to a situation arising under national law or to a situation arising under Community law.

[75] Ibid., paras. 70-71.

gard to the withdrawal of those assessments.[76] This attitude differs once again from the ruling in *Kühne & Heitz*.

Finally, it is worth remarking that an Opinion has been given recently by AG Bot in Case C-2/06 *Willy Kempter*.[77] This case, a preliminary ruling, is of interest since the questions put by the national court sought clarification of the *Kühne & Heitz*'s criteria (No. 3 and No. 4).[78] Moreover, just like in *i-21 and Arcor*, it concerned paragraph 48(1) of the German Law on Administrative Procedure. In *Kempter*, a decision (August 1995) of the *Hauptzollamt* required the reimbursement of certain sums to a company exporting livestock. This decision has been confirmed, in appeal, in a ruling given on 11 May 2000. The Court on 14 December 2000 in *Emsland-Stärke* gave a ruling, which clearly contradicted the interpretation of Community law (Article 5 of Regulation No. 3665/87) made by the German courts. This ruling was applied by the *Bundesfinanzhof* in March 2002. In September 2002, 19 months after the ruling in *Emsland-Stärke*, Kempter asked for the reopening of the procedure and the withdrawal of the final administrative decision contrary to Community law. Before answering the two questions, the AG made some general comments regarding the scope of the *Kühne & Heitz* jurisprudence and, notably, assessed the distinction that may be established between re-examination (re-opening) and withdrawal. In that regard, he considered that, after the re-opening of the administrative decision, there was also a duty under Article 10 EC for an administrative body to withdraw a final decision conflicting with the Community law (interpretation given by the Court) if it was prescribed by its national law. In other words, the 'review' of the illegal administrative decision may include, depending on the national law of the case at issue, both the notions of re-opening and withdrawal.[79] As to the interpretation of criteria No. 3 of *Kühne & Heitz*, the AG considered logically that there was no obligation for the claimant in the main proceeding to invoke Community law against the challenged administrative decision in order to fulfil the third condition. Indeed, such a requirement could not be deduced from the phrasing of the third condition.[80] Moreover, to recognise such an exigency for the plaintiff would result in shaping an exception to the obligation for the national court to make a preliminary ruling under Article 234(3) EC.[81] This was clearly unacceptable. As

[76] Ibid., paras. 71-72.

[77] *Supra* n. 4.

[78] The criteria No. 3 states that a judgment should be based on an interpretation of Community law which, in the light of a subsequent judgment of the Court of Justice was incorrect and which had been adopted without a question referred to the Court of Justice for a preliminary ruling. The criteria No. 4 establishes that the person concerned should complain to the administrative body immediately after becoming aware of the judgment of the Court of Justice.

[79] AG Bot in *Willy Kempter*, *supra* n. 4, paras. 51-52

[80] Ibid., paras. 92-94, the AG considered that the importance of the third condition lies in whether the judicial decision is based on an incorrect interpretation of Community law.

[81] Ibid., paras. 95-96.

to the interpretation of criteria No. 4 of *Kühne & Heitz*, the national court asked essentially whether there was a time limit to ask for the re-examination and withdrawal of the final administrative decision contrary to Community law. The AG opined that the member states, in order to ensure the respect of legal certainty, may impose a time-limit for the re-examination and withdrawal of a final administrative decision which is contrary to Community law on the condition that it does not infringe the principles of equivalence and effectiveness. Therefore, in practice, it would be for the national court to verify whether German procedural law provided for such a time limit. If this was the case, the national court should assess the procedural rule in light of the Community principles of equivalence and effectiveness.[82]

Finality of judicial decisions

Now, that we have analysed the recent Court of Justice case-law dealing with the possibility of re-opening final and conclusive administrative decisions, it still must be assessed under what conditions this could be possible with regard to judicial decisions. Two remarkable cases which deal with this question in different fields of law were referred to the Court from Austrian and Italian courts. We will begin with the *Kapferer* case.[83]

In 2000, Ms Kapferer, an Austrian consumer, received a letter personally addressed to her from Schlank & Schick GmbH, which was a German company carrying on mail-order sales in several countries, including Austria. The letter informed Ms Kapferer that she had won a cash prize of almost €4,000. According to the participation/award conditions, participation in the distribution of the prizes was subject to a test order without obligation. Ms Kapferer followed the instructions to collect her prize, but it was not possible to establish whether she also placed an order on that occasion. Not having received the prize she believed she had won, Ms Kapferer instituted proceedings in the *Hall Bezirksgericht* (a court of first instance) claiming that prize on the basis of the Article 5j of the Austrian Consumer Protection Law (*Konsumentenschutzgesetz*),[84] seeking an order directing Schlank & Schick to pay her the sum of the cash credit plus 5% interest from 27 May 2000 onwards.

[82] Ibid., paras. 140-143. Notably, the AG does not propose to establish a time limit based on Community law. As put by the Commission (para. 123), that would encroach on the principle of procedural autonomy of the member states.

[83] *See supra* n. 4, *Rosmarie Kapferer* v. *Schlank & Schick GmbH*.

[84] BGBl. I, 1979, p. 140. Para. 5j of the KSchG was inserted in the Consumer Protection Law by para. 4 of the *Fernabsatz-Gesetz* (Austrian Law on Distance Contracts – BGBl. I, 1999, p. 185) when Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (*OJ* [1997] L 144/19) was transposed into Austrian law.

Schlank & Schick's primary objection was that the Austrian courts did not have the international jurisdiction to handle the case. In particular, it argued that the provisions of Articles 15 and 16 of Regulation No. 44/2001[85] were not applicable because they presuppose that there should be a contract for valuable consideration. Although this argument was rejected by the *Bezirksgericht* (District Court), on analysis of the merits, Ms Kapferer's case was dismissed. Consequently, Schlank & Schick took the view that the *Bezirksgericht's* decision relating to its jurisdiction did not adversely affect it because it had, in any event, succeeded on the merits. For that reason, Schlank & Schick did not challenge the decision to dismiss the defence of lack of jurisdiction.[86] The consequence of this decision was that according to certain stipulations in the Austrian Code of Civil Procedure[87] (ZPO), the judgment on international jurisdiction became essentially final and conclusive.

Ms Kapferer, however, brought an appeal before the *Landesgericht Innsbruck* (Regional Court, Innsbruck), which then expressed doubts about the international jurisdiction of the *Bezirksgericht*. In that context, the court wondered not only about the correct interpretation of Council Regulation (EC) No. 44/2001[88] but also whether it nonetheless had an obligation under Article 10 EC to review and set aside a final and conclusive judgment on international jurisdiction if that judgment is proved to be contrary to Community law. The national court envisaged the existence of such an obligation. It asked specifically whether it is possible to transpose the principles laid down in the judgment in *Kühne & Heitz*,[89] concerning the obligation imposed on an administrative body to review a final administrative decision which is contrary to Community law, as it has been interpreted in the meantime by the Court. In those circumstances, the *Landesgericht Innsbruck* decided to stay the proceedings and to refer several questions to the Court for a preliminary ruling under Article 234.[90]

[85] Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ* [2001] L 12/1; hereinafter referred to as 'Regulation No. 44/2001' or simply as 'the Regulation').

[86] The national court observed, however, that Schlank & Schick could have challenged the dismissal of the plea of lack of jurisdiction because it could have been adversely affected by that decision alone.

[87] Compare para. 530 and 534 of the Austrian Code of Civil Procedure (*Zivilprozessordnung*; 'the ZPO') on the conditions governing the revision of judgments.

[88] In particular, the *Landesgericht* asked whether a misleading promise of financial benefit calculated to induce a contract, and therefore to prepare the ground for that contract, has a connection with the consumer contract intended to result from it sufficiently close to give rise to consumer contract jurisdiction.

[89] *Supra* n. 1, *Kühne & Heitz*.

[90] Since the purpose of this article is to analyze the appliance of the *res judicata* principle in the case-law of the ECJ, we will in the following focus on the questions concerning Art. 10 EC and the principle of *res judicata*. However, it should be mentioned that the referring court also asked for an

In its judgment, the Court agreed with the Opinion of Advocate-General Tizzano.[91] Similar to Tizzano, the Court first highlighted the fundamental importance of the principle of *res judicata,* both for the Community legal order and the national legal systems.[92] In general, Community law, according to the Court, therefore does not require a national court to refrain from applying domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law.[93] As far as the national courts questions are concerned with regard to the previous findings in *Kühne & Heitz,* the Court found that the judgment in *Kühne & Heitz* could not alter these principles. In his previous analysis, Tizzano had arrived at the same conclusion. Tizzano had distinguished *Kühne & Heitz* from *Kapferer* by emphasizing that *Kühne & Heitz* was concerned merely with the reviewability of final administrative decisions, adopted in breach of Community law. *Kapferer*, however, related to a final judicial decision. Tizzano argued that this is an issue of a different nature and import than one involving the principle of *res judicata*, which is a fundamental principle unique to the decisions of courts. Thus, according to Tizzano, the conclusions reached by the Court in *Kühne & Heitz* cannot simply be transposed to the issues that are raised by *Kapferer*.

But even assuming that the principles laid down in *Kühne & Heitz* would be regarded as applicable in a context which relates to a final judicial decision, Tizzano pointed out that the facts of the case would not meet the four basic conditions,[94]

evaluation of the period given under Art. 534 ZPO and for an interpretation of the Art. 15 of Council Regulation (EC) No. 44/2001 but these questions were not answered by the ECJ and they are not the focus of this article.

[91] Opinion of AG Tizzano in Case C-234/04 *Rosmarie Kapferer* v. *Schlank & Schick GmbH* [2006] *ECR* I-2585.

[92] Referring to its judgment in *Köbler* the ECJ stressed once again that in order to ensure both stability of the law and legal relations and 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 connection can no longer be called into question. *See supra* n. 1, *Köbler*, para. 38.

[93] *Supra* n. 10, *Eco Swiss*, paras. 46 and 47. Yet, once again the ECJ stressed that one requirement would still remain: By laying down the procedural rules for proceedings designed to ensure protection of the rights which individuals acquire through the direct effect of Community law, member states would have to ensure that the domestic rules in question and their application comply with the principles of equivalence and effectiveness of Community law (*see* to that effect, Case C- 78/98 *Preston and Others* [2000] *ECR* I-3201, para. 31 and the case-law cited). However, according to the ECJ, these principles have not been called into question in the main proceedings as regards appeal proceedings.

[94] Once again: the basic four conditions laid down by *Kühne & Heitz*, which Tizzano referred to were that: (1) under national law, the administrative body has the power to reopen the decision; (2) the administrative decision has become final due to a national court judgment at final instance; (3) the judgment is, in light of a subsequent ECJ decision, founded upon a misinterpretation of EU law, adopted without a preliminary reference under Art. 234 EC; and (4) the request to reopen the decision was received by the administrative body immediately after becoming aware of the relevant ECJ judgment. *See supra* n. 1, *Kühne & Heitz*.

which according to the judgment in *Kühne & Heitz* could impose on an administrative body an obligation under Article 10 EC to review a final administrative decision in order to take account of a subsequent interpretation of relevant Community law by the Court.[95] Referring to these conditions, the AG Tizzano then underlined the following facts: First of all, the *Landesgericht Innsbruck* did not have the power to reopen a final decision on its own motion under Austrian law. Secondly, the decision on jurisdiction did not become final as a result of a judgment of a national court ruling at final instance, but as result of not having been appealed within the time limit prescribed by Austrian law. Thirdly, there was not any judgment upholding the decision at first instance to take as the basis for determining whether or not the condition is satisfied. In particular, Tizzano pointed out that at the time of reference, there was apparently not any judgment of the Court interpreting a provision of Regulation No. 44/2001 which was relevant to the case, nor had the referring court mentioned any such judgment. Finally, neither party to the main proceedings sought the review and/or setting aside of the decision at first instance. It was instead the referring court that raised the question as to whether it should reopen the decision on its own motion.

This was apparently also the opinion of the Court which, however, found it sufficient to note that it is in any case obvious from the facts in *Kapferer* that the first of the basic requirements established in *Kühne & Heitz*, i.e., that the body should be empowered under national law to reopen that decision, had not been satisfied. The Court therefore concluded, like Tizzano, that the principle of co-operation under Article 10 EC does not require a national court to refrain from applying its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law.[96]

The *Kapferer* judgment confirmed the particular importance of the *res judicata* principle in the case of final judicial decisions and went on to specify the requirements that would have to be fulfilled according to the *Kühne & Heitz* judgment. Whilst leaving open whether the principles that were developed in the latter judgment can be transposed into a context relating to a final judicial decision, the Court indicated that the threshold set by the *res judicata* principle is particularly high in the case of final judicial decision taken by a court in contrast to mere final administrative decisions. In our view, this confirms that due to the importance of the *res judicata* principle to final judicial decisions, there must exist very exceptional circumstances before the principle of co-operation under Article 10 EC

[95] Opinion of AG Tizzano in *Kapferer, supra* n. 4, para. 27.

[96] With regard to the answer given to the first question, the ECJ held further that there would be no need to answer the subsequent questions, which essentially dealt with the interpretation of Regulation No. 44/2001. Those questions had, however, and for completeness of analysis, been considered by Tizzano, who concluded that in his opinion there was no breach of Community law in the instant case by reason of lack of jurisdiction.

does in fact require a national court to refrain from applying its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law. As *Kapferer* demonstrates, such exceptional cases will presumably be very rare and in most cases the final judicial decision of a national court will prevail.[97]

The other notable case, which had been referred to the Court by an Italian court, has been decided recently. The *Lucchini* case dealt once again with the question under what circumstances a judgment that has become final and conclusive on the national level can be challenged by European law.[98] What makes this case different from *Kapferer* and particularly remarkable is that it concerns the specific area of state aids. Therefore, and due to the fact that AG Geelhoed has presented his Opinion quite recently, we will include it in our analysis.[99] As we will see, the case has a very long and complex history, which can be briefly summarized as follows:

It concerns a state aid procedure that had been initiated in 1985 on request by the predecessor the Italian steel company Lucchini. In April 1988, the Italian state followed its obligation and notified the Commission according to Article 6(1) of the third EC code of conduct on state aid about the plan to grant Lucchini (additional) aid.[100] However, the Commission held the view that the information given was not sufficient and that therefore Italy was obliged to give further information about the aid in question. In a letter dated June 1988, the Commission informed the competent Italian authorities about its point of view. Despite this information, the Italian authorities did not react, and in November 1988 they decided to grant the aid in question. Subsequently, the Commission initiated proceedings under the applicable state aid rules since, in the view of the Commission, the missing information made it impossible to check if the aid granted complied with the EC rules on state aid. In 1990, this resulted in a Commission decision explicitly prohibiting this aid. In that context, it is important to note that this decision had never been challenged by Lucchini or the Italian government before the competent Community courts.

Instead, Lucchini had decided to initiate proceedings in the Italian courts since the aid granted had not been paid. This led to several judicial proceedings on the national level resulting in a series of conflicting decisions, but in the end the

[97] Another case where questions similar to *Kühne & Heitz* was recently decided by the ECJ is the German case *EDF Man Sugar* [2006], *see supra* n. 4.

[98] *See* Case C-119/05 *Lucchini Siderurgica* [2007] n.y.r.

[99] Ibid., Opinion of AG Geelhoed in *Lucchini*.

[100] The Italian state aid in question covered a subvention of 765 million ITL. Moreover, 367 million ITL were supposed to cover a part of the interest rates which resulted from a previously granted credit. That credit was granted in 1986 on request by the predecessor of Lucchini and its interest rate had already been previously lowered by state aid.

Italian government was ordered in 1994 by civil judgment from the *Corte d'Apello*, which was based on the interpretation of national law, to pay certain sums in state aid to Lucchini. After further disputes, the Italian authorities complied with the judgment, which in the meantime had become final and conclusive, and paid certain sums to Lucchini in 1996. However, the Italian authorities only made these payments under the reservation that these state aids might be revoked completely or partially, if this would be required by a negative EC decision.

Referring to its previous decision from 1990, the Commission subsequently addressed several orders to the Italian government seeking to recover this aid. Being aware of their obligations *vis-à-vis* the Community, the Italian authorities tried to comply with the orders of the Commission, which led to another set of proceedings. In these proceedings, Lucchini challenged the decision by the Italian authorities to revoke the state aid granted and to require its recovery. The company now argued that the Italian act by which recovery was sought was barred by the *res judicata* principle of the final civil judgments. Finally, this matter ended up in the highest Italian administrative court (*Consiglio di Stato*), which decided to stay the proceedings and to refer certain questions under Article 234 to the Court for a preliminary ruling. In essence, the *Consiglio di Stato* wanted to know if a national judicial decision that has become *res judicata,* thereby being conclusive as between the private individual and the administration, may hinder the Commission from making use of its exclusive competence and to examine if state aids comply with the common market and, if this is necessary, to demand the recovery of the unlawful state aid by the national authorities.

In his Opinion, which was delivered on 14 September 2006,[101] AG Geelhoed had to deal essentially with two different principal positions. On the one hand, Lucchini and the Czech government were referring to the Court of Justice judgments in *Eco Swiss, Köbler, Kühne & Heitz* and *Kapferer* and essentially claimed that the judgment of a national court, which had become final and conclusive, would (due to the principle of *res judicata*) outweigh the interest of the Community to recover a state aid that was granted in violation of EC law. On the other hand, there was the position of the Italian and Dutch governments, as well as the Commission who, even though they were recognising the importance of the *res judicata* principle as it was expressed in the above-mentioned case-law, contended that this principle was not applicable in the present case or that an exception from this principle had to be made.[102] Addressing these basic positions, the AG first emphasized that all national orders of jurisdiction recognise the importance of the principle of *res judicata*, since it is in the interest of legal certainty that judicial decisions, against which there is no means of legal redress available, become final

[101] *Supra* n. 99.
[102] Ibid., at '*Standpunkt der Beteiligten*', para. 17.

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and conclusive for the persons that are involved in the case. This implied that the reopening of such a decided case is impossible, if it has the same object, the same legal parties and is based on the same legal grounds.[103] However, the AG emphasized at the same time that a comparative study revealed that neither the different national legal orders nor the ECHR regarded the principle of *res judicata* as being untouchable and that – albeit under very strict conditions – exceptions from that principle are possible.[104] The AG also agreed that this principle was likewise respected in the order of Community law and that, furthermore, the importance of it was recognised with respect to the relationship between Community law and national law, as it was confirmed by the judgments in *Eco Swiss*, *Köbler*, *Kühne & Heitz* and *Kapferer*.[105]

However, the AG then distinguished the above-mentioned cases from the *Lucchini* case by pointing out that none of those cases was concerned with the exercise of a Community competence as such.[106] In particular, the AG stressed that in the present case, the judgment of the *Corte d'Apello* not only had consequences for the legal relationship between the recipient of the aid and the Italian state under Italian law, but that it also ignored the exclusive competence of the Commission to examine whether a certain state aid complies with the common market and that it was disregarding the obligations which Italy has under EC law when granting such aid.[107] According to the AG, the problem in the present case was therefore not the litigation between an administrative national authority and a private person that can only be solved within the framework of national law, but rather a legal dispute that above all should be decided in the light of Community law, wherein the demarcation of the Community legal order from the national legal order – an thereby the delineation of the obligations that result for the national Court from those two legal orders – is of special importance.[108] Developing this idea further, the AG found that the crucial question was to ascertain whether the legal force of a judgment that has come into existence under such particular circumstances as in this specific case, and which may have serious consequences on the sharing of competences between the Community and the member states, and which in addition might make it impossible for the Commission to exercise its competence in the state aid area, should be regarded as being impervious, i.e., to be final and conclusive and thereby *res judicata*.[109]

[103] Ibid., para. 36.
[104] Ibid., para. 37, mentioning the case of fraud or if a judgment, that has become final and conclusive, obviously violates fundamental rights.
[105] Ibid., para. 38.
[106] Ibid., paras. 39-46.
[107] Ibid., para. 47.
[108] Ibid., para. 48.
[109] Ibid., para. 70.

This was given a negative answer by AG Geelhoed. According to the AG, a national court which merely interprets national law may not deliver judgments that ignore the basic order of the division of competences between the Community and the member states, even if such judgments have become *res judicata*. According to Geelhoed, this is especially true when the application of Community rules based on fundamental principles of substantial Community law is concerned. The AG found that the Articles on state aid, 87 EC and 88 EC, fall under this specific category of rules. In that regard, he underlined in particular that Article 88(3) EC and the related case-law of the Court clearly define the legal obligations of the national courts.[110] In consequence, it is not surprising that the final conclusion of AG Geelhoed was that the authority of *res judicata* attached to the national judgment of the *Corte d'Apello* could not prevent the re-collection of the aid which was granted in violation of the relevant substantial Community rules and that the violation of the Community law by this judgment has to be remedied.[111]

The Court followed the Opinion of the AG. This resulted in another important limitation of the *res judicata* principle which is mandated by EC law. However, in view of the importance of the *res judicata* principle for legal certainty, the areas where such restrictions are feasible would have to be interpreted very narrowly. In that regard, it is important to understand that this case treated a very particular area of Community law. The EC rules on state aids are specific and, in a broader context, they are clearly linked to the framework of competition law. These areas are extremely important for the functioning of the common market, and therefore the EC law gives specific and clearly defined competences to the Commission. This was also plainly confirmed by the case-law of the Court. As it was pointed out by the AG, it should also be stressed that the *Lucchini* case must be distinguished from the *ECO Swiss*, *Köbler*, *Kühne & Heitz* and *Kapferer* cases. In *Köbler* and *Kühne & Heitz*, EC law was simply misinterpreted and falsely applied by national courts against whose decisions there was no remedy available. The same happened in the *Eco Swiss* and *Kapferer* judgment, where the decision became final and conclusive since the time limits of the available legal remedy was ignored. However, none of those cases concerned the exercise of Community competences as such. In the *Lucchini* case, the *Corte d'Apello* interpreted national law and subsequently adopted a final decision that was, according to the fundamental provisions in Articles 87 and 88 EC, obviously out of its jurisdiction. This should be a sufficient reason to set aside a final national decision. It is only reasonable that a *res judicata* judgment by a national court, which is based merely on the interpretation of national law and which obviously has ignored fundamental prin-

[110] Ibid., paras. 72-73.
[111] Ibid., paras. 86-87.

ciples of Community law, should not prevent the Commission from exercising its exclusive competences.[112]

Going further into the reasoning, the Court considered that Article 2909 of the Italian Civil Code precludes not only the reopening, in a second set of proceedings, of pleas in law which have already been expressly and definitively determined but also precludes the examination of matters which could have been raised in earlier proceedings but were not.[113] Accordingly, this interpretation of Article 2909, in the circumstances of the case, would make it impossible to recover state aid that was granted in breach of Community law and would, therefore, frustrate the application of Community law.[114] Then, the Court gave a set of guidelines to the national courts for applying (implementing) Community law. Though formulated in terms of guidelines, the Court, arguably, established two types of duties. First, an obligation for the national courts to interpret the provisions of national law in a way that contributes to the implementation of Community law and second – if this not possible – an obligation not to apply (or to set aside) the conflicting national provision in order to ensure the full effectiveness of Community law. In that respect, it is worth recalling this operative part of the judgment (paras. 60-61):

> In that context, it should be noted that it is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of Community law…[i]t also follows from settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation (see, inter alia, Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 to 24; Case 130/78 *Salumificio di Cornuda* [1979] ECR 867, paragraphs 23 to 27; and Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraphs 19 to 21).

It may be said that those two paragraphs are stuffed with duties for the national courts. Indeed, one can find, in paragraph 61, a duty to conform interpretation and, in paragraph 62, a duty to give full effect to Community law, a duty to apply Community law *ex officio* and a duty not to apply conflicting domestic legisla-

[112] Ibid., para. 74.

[113] *See also* paras. 14 -16, '[a]rticle 2909 of the Italian Codice Civile (Civil Code), entitled "Final judgments", provides as follows: "Findings made in judgments which have acquired the force of *res judicata* shall be binding on the parties, their lawful successors and assignees". According to the *Consiglio di Stato* (Council of State), that provision covers not only the pleas in law actually invoked in the course of the proceedings in question but also those which could have been invoked. In procedural terms, that provision precludes all possibility of bringing before a court a dispute in respect of which another court has already delivered a final judgment.'

[114] Ibid., para. 59.

tion.[115] However, as said before, these duties are disguised in terms of guidelines. This assertion appears true if one considers that the Court does not expressly mention Article 10 EC (duty of loyalty) which is the basis of both the *Simmenthal* (full effectiveness and setting aside conflicting national law) and *Von Colson* (interpretative duty) lines of case-law. The Court concluded that since the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata* insofar as the application of that provision prevents the recovery of state aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final.[116]

In this case, it is clear that the Court gives more weight to the Community legality than to legal certainty. Here, the *Simmenthal* case and the principle of supremacy constitute powerful justifications for the non-application of the national legislation, which establishes stalwartly the principle of *res judicata* and thus reflects legal certainty. It may be said that the use of the primacy argument leads to judicial activism since it creates a kind of 'euro-exception' by allowing the national court to set aside (not to apply) Article 2909 of the Italian Civil Code, which precludes the review of final judicial decisions. In that sense, it establishes an exemption to the text of the national provision. In addition, it is worth remarking that the *Simmenthal* jurisprudence helps to avoid the disparities created by the application of the *Kühne & Heitz* and *Arcor* cases in the context of administrative decisions. As seen in those cases, the Court was not yet ready to base the reopening of a decision on a pure Community law obligation and preferred to rely, instead, on the national law. This was evidently not the case in *Lucchini.* This reasoning is justified both by the special context of exclusive competences given to the Commission in the field of state aids and the subsequent full jurisdiction of the Court in this matter.

Conclusion: Legal certainty, legality and consistency

The above analysis prompts a number of conclusions. First of all, it appears clear that *res judicata*, an emanation of the principle of legal certainty, is not absolute

[115] It is interesting to note that the duty to apply Community law *ex officio* is not backed up by any case-law since the *Simmenthal* line of case-law only concerns the duty to set aside conflicting national legislation in order to ensure the full effectiveness of Community. Moreover, it is worth remarking that the Court does not mention the expression 'to set aside' and prefers instead, the phrasing: 'refusing … to apply' (para. 61) or 'precludes the application of Community law' (para. 64).

[116] Ibid., paras. 62-63.

and must carefully be balanced with Community legality. When judging upon questions that have an impact on the validity of final and conclusive rulings by national courts, the Court of Justice must find a fair balance between the need to preserve the independence of the judiciary and the essential requirements of legal certainty, on the one hand, and the requirement of legality and effective judicial protection of individuals in the most flagrant cases of infringement of Community law, on the other hand. Although this will not be easy, one thing is clear: only if the Court balances these values properly will it be consistent with the basic principles of Community law. Exactly how the above described values are weighed against each other will presumably depend to a large extent on the factual circumstances of each case and the field of law involved.

Additionally, it should be emphasized that, since legal certainty in the national legal systems is one of the values that the Court has to balance, the Court should be equally concerned that its own judgments fulfil this essential legal principle. In that regard, it appears to be very important that the Court develops a clear and consistent case-law, which allows legal practitioners to derive precise principles from it. Then, it will not only be much easier for individuals to develop guidelines and strategies for different legal situations, but also for the national courts to deliver appropriate judgments. Therefore, with respect to the finality of administrative decisions issue, the notably didactic judgment in *i-21 and Arcor* and, as far as state liability is concerned, the confirming and clarifying decision in *Traghetti del Mediterraneo* should be regarded as the first steps into the right direction. Similarly, the recent *Lucchini* case offers precious guidelines to the national courts as to the application of the *Kapferer* line in the context of state aids. One must also keep an eye on the reasoning that the Court will use in the *Kempter* case concerning the interpretation of the *Kühne & Heitz* criteria. Clarity has been improved and thus legal certainty. However, to better it, is it possible to transpose the *Kühne & Heitz* criteria to the context of judicial decisions?

As we have seen in the *Kapferer* case, when setting aside a final and conclusive judgment, the Court will, *inter alia*, take into account the hierarchical structure of the legal system. Besides the fact that in *Kapferer,* the requirements set by *Kühne & Heitz* were not met anyhow, the judgment indicates that the Court will most likely set a higher threshold for final and conclusive judicial decisions than it will for administrative decisions. It appears that, whenever final and conclusive judicial decisions are concerned, the Court will confer more significance to the values of independence and legal certainty when balancing them with the requirement of Community legality and effective judicial protection, than in the case of mere administrative decisions that have become final. It can be assumed that a well-functioning co-operation procedure between the national courts and the Court is one of the primary goals that the Court will take into consideration when reaching such decisions.

Equally, the Court will pay special attention to the stipulations of the EC treaty that are being violated and how important they are for the goals and the functioning of the European Community. In particular, we can see in *Lucchini* that when a final and conclusive judicial decision completely disregards the clearly defined EC competences in a sensitive field of law, i.e., state aids, the Court will most likely shift the balance towards the effective legal protection of the individual due to such a flagrant violation of EC law. This attitude is, by the way, nothing new and can be detected in Court case-law concerning *locus standi* under 230 EC proceedings.[117] Moreover, it remains to be seen how the Court will treat the *res judicata* question in other sensitive areas of EC law such as competition and anti-dumping matters or areas where the Community institutions boast exclusive powers.

It is clear from this analysis that a distinction must be established between the review (re-opening) of administrative and judicial decisions. Indeed, it appears that the *Kühne & Heitz* criteria are not applicable *mutatis mutandis* to judicial decisions. This argument is tenable by looking at the cautious phrasing of the Court in *Kapferer* (para. 23). It is also confirmed by *Lucchini* that the *Kühne & Heitz* conditions (notably the first one) are not transposable to a national judicial decision conflicting with Community law in the context of exclusive competence confers to the Commission. In these circumstances, the *Simmenthal* line of case-law precludes the national court from applying a provision of domestic law that prevents the effective application of Community law. The recent jurisprudence of the Court thus demonstrates the limits of transposing the *Kühne & Heitz* criteria directly. Moreover, as seen in *i-21 and Arcor*, this assertion could be true in relation to cases dealing with the re-opening/withdrawal of administrative decisions, since the factual circumstances of each case are of crucial significance. After the rise of *Kühne & Heitz*, do we witness its fall?[118] Are the *Kühne & Heitz* criteria too rigid, too specific or too 'case-centric'?

More generally, it may be concluded that the different lines of case-law (responsibility and reopening of administrative and judicial decisions) concerning

[117] In that context, it might also be speculated to what extent the ECJ takes into account what the subject of legal protection is, and in how far this subject is involved in the legal process. The more the individual is involved in the process that might lead to an EC decision, the more weight might be given to the individual right that had been infringed and the more importance might be awarded, i.e., to the need for state liability.

[118] *See* J.H. Jans e.a., *Europeanisation of Public Law* (Europa Law Publishing, 2007) at p. 296-300. The authors describe the rise and fall of *Emmot* and consider that this decision, appraised as an exception, has been considerably limited in later case-law. Therefore, it is very doubtful that this case could still be efficiently relied on. It is also argued that, 'the story of the rise and fall of *Emmot* provides a good illustration of the ups and downs that are so characteristics of the process of europeanisation of national procedural law by the case law of the European Court of Justice.' A parallel can be drawn with the *Kühne & Heitz* jurisprudence.

res judicata are closely intertwined. It is argued that in the situation where it is impossible to reopen the judicial and administrative decision, then the *Köbler* doctrine may be applied. Thus, the *Köbler* line is subsidiary to *Kühne & Heitz* and *Kapferer.* If this reading is true, *Köbler* appears more as an ultimate weapon in the hands of the national courts and, consequently, many of the criticisms voiced against it might seem less valid. Drawing an analogy with the jurisprudence on indirect effect, the present case-law is really close to the reasoning in the *Miret* and *Faccini Dori* cases, where the Court suggests the use of member state liability when it is impossible for national courts to make use of the principle of construction and to interpret the national law in the light of Community law.[119] This reading is, to a certain extent, backed up by the *Lucchini* case (para. 60). Last but not least, let us come back to our starting point: legal certainty. Though it may be argued that the present cases on *res judicata* lead to an erosion of the principle of legal certainty at the national level, one should always keep in mind that the primary role of the Court of Justice is to ensure respect for the Community legal order.

[119] Case C-334/92 *Miret* [1993] *ECR* I-6911, para. 22, Case C-91/92 *Faccini Dori* [1994] *ECR* I-3325, para. 27.