KÖBLER, CILFIT AND WELTHGROVE: WE CAN’T GO ON MEETING LIKE THIS

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1. Köbler

In the recent Köbler case, the Court of Justice of the EC extended its Francovich and Brasserie case law to the judiciary of the Member States, holding that Member States are liable for damages of individuals caused by “manifest infringements” of EC law by their highest Courts. Although the ECJ pays lip service to the principle of res judicata (“the importance of the principle ... cannot be disputed;” para 38), and although it postulates not to hurt that principle (“State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as res judicata;” para 39), it essentially ignores that principle. Lower national Courts will now have to hear claims of individuals that a final decision of the highest national Court encroached on their EC rights, or at least that this Court wrongly refrained from referring the case to the ECJ for a preliminary ruling on the matter. The ECJ held in Köbler:

“The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest....”

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1. Case C-224/01, Köbler v. Austria, Judgment of 30 Sept. 2003, nyr. A full annotation of this case will follow in a forthcoming issue of this Review.
2. **CILFIT**

But the ECJ never reconsidered or modified its *CILFIT* case,\(^4\) in which it held that Article 234 EC requires the highest national Court (also *ex officio*) to refer a case for a preliminary ruling if any question of EC Law could be relevant for the case to be decided and the answer to that question is not evident (*acte clair*) or already provided by the ECJ (*acte éclairé*). The ECJ defined an *acte clair* as follows:

> “16 ... the correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the court of justice and take upon itself the responsibility for resolving it.”

> “Only if those conditions are satisfied” is the national highest Court at liberty to decide the case without first sending it to Luxembourg. In the Kölber case, the ECJ explicitly referred to *CILFIT*, and one of the criteria it listed to determine whether an infringement of EC Law by a highest national Court is “manifest” is the national Court’s “non-compliance ... with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC” (para 55).

In Kölber, the ECJ held that the Austrian *Verwaltungsgerichtshof* had violated its referral obligation as regards questions of free movement of workers, but – sighs of relief in Europe’s capitals – not “manifestly” enough to cause liability for damages for the Austrian Republic.

3. **Kölber + CILFIT**

The combination of the two cases leads to the conclusion that if a national highest Court wants to avoid the real risk of making its government liable, it had better ask for a preliminary ruling – also *ex officio* – in basically every case involving a question of EC law possibly conferring rights on individuals which has not yet been addressed by the ECJ. After all, quite some Community legislation is – let us say – not overpleasing as regards readability and intelligibility (I invite you to try to understand – for instance – Regulation 1408/71 on the social security of migrant workers), language versions tend

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to vary, and unconsolidated versions of Directives which have been changed numerous times are even totally inaccessible. For which Finnish judge is it “obvious” what his Portuguese or Greek colleague would consider “obvious,” or vice versa? Moreover, given the sometimes surprising and varying case law of the ECJ, who dares to uphold that something is “manifest” or would have been “obvious” to the ECJ, had it been consulted? The ECJ has a habit of regularly, but seldom overtly reconsidering its policies. Examples: cases like Steenhorst-Neerings (C-338/91), Fantask (C-188/95), Spac (C-260/96), Edis (C-231/96), etc. materially reversed the earlier Emmott case (C-208/90); cases like Brasserie du pêcheur II/Factortame III (C-46 and 48/93), Dilenkofer (C-178 etc./94) and British Telecom (C-392/93) materially reversed the earlier Francovich/Bonifaci case (C-6 and 9/90); the Bosal case (C-168/01) reversed the Futura case (C-250/95) on the territoriality principle; the Baars (C-251/98) and Verkooijen (C-35/98) cases made the Court’s earlier Bachmann case law (C-402/90 and C-300/90) utterly useless; nevertheless, the ECJ reiterated its Bachmann rule in its still later Danner case (C-136/00), although it consistently denies every Member State, in every case, recourse to its Bachmann justification! I fully understand that the Court sometimes regrets previous case law, but then it should be clear about such regret instead of impelling Member States and individuals to take account of the possibility that the previous case law is not obsolete but may still cause arbitrary budgetary effects at any inappropriate moment. If the ECJ wants to maintain both CILFIT and Köbler, it must itself make very clear its new policies, the progression in its views, and its regrets or abandonment of earlier cases. One cannot have one’s cake and eat it. The ECJ should do as it once did – but rather late – in its Keck and Mithouard cases (joined cases C-267 and 268/91): after years of enigmatic case law on non-discriminatory restrictions on the free movement of goods (notably the Sunday trading cases), which pre-empted the possibility for Member States to develop consistent EC-proof policies, the ECJ finally overtly explained that it had decided to limit its Dassonville case law, and that indiscriminate modes of sale are not affected by the free movement of goods provisions.

4. More backlog; more procedural clogging; “effective protection”?

The Köbler judgment, therefore, is a source of legal uncertainty, procedural entanglements and even more arrears in the decision of cases, both at the national level and at the ECJ level. All of this in order, as the Court puts it, to serve effective protection of the rights of individuals (para 33), although the queueing time in Luxembourg (more than two years) is already unacceptable, as it is in many Member States. And what is the upside of Köbler? Did
the discipline in EC terms of the national highest Courts leave so much to be desired? Is it useful or efficient or desirable to sollicit an avalanche of (attempts at) claims, going back who knows how many years, in fifteen Member States whose judiciaries were already not bored?

As to the question of which national Court should consider Köbler claims made by individuals against (the highest Courts of the) Member States, the ECJ considered that application of the principle of State liability “cannot be compromised by the absence of a competent court”

and that, provided the Rewe and Comet rules of effectiveness of EC Law are observed,

“it is not for the Court to become involved in resolving questions of jurisdiction ....”

We must assume that legal protection cannot be considered “effective” if the decisions of the competent claims Court are subject to review and quashing by the highest national Court whose “manifest infringements” of EC Law that same claims Court is called upon to judge. We can hardly have someone judging his own “manifest infringements.” Therefore, the Member States will be obliged to create special procedures. For instance, in France, claims based on wrongful decisions of the Conseil d'État will have to be considered in the judicial column that ends with the Cour de Cassation adjudicating at last instance, and claims based on wrongful decisions of the Cour de Cassation will have to be considered in the judicial column which ends with the Conseil d'État adjudicating at last instance. I submit we would have been very happy without this further procedural clogging. Moreover: which Court is going to consider claims based on alleged “manifest infringements” by the designated special EC claims Court? And claims against decisions of that Court? The grapevine has it that in Italy a special procedure has already been created for establishing that other procedures exceed the reasonable time limit of Article 6 of the European Convention of Human Rights.

Furthermore, the claims Court to be created will have to refer many preliminary questions to the ECJ, for instance because it will have to decide on the causal link: what would have happened, had the question been referred to the ECJ? The only way to be certain about that is to refer the question to the ECJ, given its varying case law. If the claims Court does not refer, it will – in case of EC Law conferring rights on individuals – again expose its Member State to Köbler liability on the basis of a manifest infringement of its CILFIT obligation to refer questions, in combination with the infringement of the EC

right invoked by the individual. This is illustrated by the Köbler case itself: the Landesgericht für Zivilrechtssachen in Vienna, which had to consider Mr Köbler’s claim against Austria for alleged violation of the free movement of workers by the Austrian Verwaltungsgerichtshof, submitted five preliminary questions to the ECJ on the possible liability of Austria, especially on the matter whether there was an infringement, and if so, whether it was serious enough.

It will be interesting to see how Köbler will be understood by the highest Courts of the ten new Member States. How many questions will they refer to the ECJ?

Conclusion: more preliminary referrals, by both national highest Courts and national special EC claims Courts; more procedure; and more procedural intricacies; all of it to the detriment of the proceeding of other ECJ cases having to wait already for too long, and to the detriment of the proceeding of national cases pushed aside by these new procedures. Subsequent claims may then further be made against the Member States for the resulting lack of adjudication within a reasonable time of many of these procedures under Article 6 of the ECHR with the European Court of Human Rights in Strasbourg, which – I hear – is not bored either, except with cases on undue delay.

The ECJ did not set any time limit for Köbler liability, so one must assume that the national time limits of usually three to six years are decisive (provided, of course, the Rewe and Comet conditions for procedural effectiveness are met). This means that an extra heat arises for everyone within the EC who in the last 3 to 6 years did not get what he wanted in a procedure before a national Court adjudicating at last instance in a case in which EC Law possibly conferring rights on individuals was possibly relevant. It is unclear what chances this extra heat offers. The ECJ provides us with only the following criteria:

“54. ..., the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it.

55. Those factors include, in particular, 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 under the third paragraph of Article 234 EC.

56. In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case law of the Court in the matter ....”
Does this mean that the Community instead of the Member States is responsible for damages caused by the excusable misreading or misunderstanding of illegible EC rules, or of enigmatic or simply erroneous ECJ answers – especially answers to questions which were reframed by the ECJ, or answers not given? Is, for instance, the recent decision of a British Court to ignore the preliminary answers of the ECJ in the Arsenal case a “manifest breach” of the case law of the ECJ? If the ECJ’s answers are based on presumptions of fact or of (national) law which do not occur in the case referred, it seems correct that the national Court ignores the supposed answer: it should apply the correct law to reality, not fiction. Should the Court of Appeals then have re-submitted questions to the ECJ, thus keeping the patient in agony for at least two more years? In general, I would say no; the ECJ had a chance to give a helpful answer. A mismatch between the questions asked and the answers given is statistically probably the responsibility of the national Court for only half of the incidence. And the responsibility for erroneous answers is mainly the ECJ’s.

If the pecuniary stakes are high enough, disappointed litigants will try to re-open their lost cases via the Köbler liability, especially if their lawyers and tax advisers (if only to avoid claims of professional negligence) send mailings to their disappointed litigation clients of the last five years to draw their attention to posterior case law of the ECJ and to possible Köbler-liability of the Member State involved.

If things are to be taken rather more lightly, i.e. if the ECJ will only hold Member States liable in very, very exceptional cases (such as the Dangeville case before the ECHR; see section 9 infra), then the Köbler judgment is still undesirable, because in that case (i) the judgment is mere token jurisprudence, and (ii) it is going to take years of unnecessary legal uncertainty, procedural clogging and queueing in Luxembourg to find that out, after which everything will be like it was before, apart from the costs made and the arrears suffered.

5. Welthgrove; we can’t go on meeting like this

The Köbler case seems reassuring enough. Although the Court found a breach of EC law by the Verwaltungsgerichtshof, that breach was held to be

6. For instance, in Case C-168/01, Bosal, judgment of 18 Sept. 2003, nyr, the ECJ did not answer the second preliminary question.


insufficiently “manifest” to lead to liability of the Republic of Austria. In my view, it would have been a chutzpah if Austria had been held liable in the Köbler case. The case concerned a university professor who was refused a special length-of-service increment because during the requisite 15-year period he had performed his services not exclusively at Austrian universities, but partly at universities of other Member States. The Verwaltungsgerichtshof had asked for a preliminary ruling on the matter, as a good highest national Court should, and fully by the CILFIT book. While the case was pending in Luxembourg, the ECJ decided another case (C-15/96, Schöning-Kougebetopoulou), after which the ECJ asked the Verwaltungsgerichtshof whether it might want to consider to withdraw its questions in the Köbler case, as the answers might possibly be found in the Schöning-Kougebetopoulou case. A word is enough to the wise. The Verwaltungsgerichtshof withdrew its questions.

Presumably, most national Courts do not particularly care for having their preliminary referrals dealt with by Order of the ECJ under Article 104(3) of the ECJ’s Rules of Procedure, as happened to, for instance, the Netherlands’ Hoge Raad in the Welthgrove case.9 The Hoge Raad too was asked by the ECJ whether it would care to consider withdrawing its questions after the publication of posterior ECJ case law. It withdrew one, but maintained its second question. Subsequently, the ECJ held, by Order ex Article 104(3), that “the answer to that question is clear from the case law ....” I submit that the ECJ sometimes entertains a very optimistic view on the clarity of its case law. The case concerned the right to deduct input-VAT of holding companies which also engage in the management of their subsidiaries. This is a particularly murky area of application of the sixth VAT Directive, and this murky-ness is mostly a product of the case law of the ECJ. VAT commentators were of the opinion that – according to the ECJ’s CILFIT criteria – the Hoge Raad had correctly maintained its question and (therefore) that the ECJ’s answer – citing old cases – was of very little use to decide the case at hand. It was even suggested to send the case back to Luxembourg. The same was suggested very recently10 as regards the Bosal case, since apparently the ECJ did not sufficiently understand the national tax system to be assessed.

In the Köbler case, the ECJ was of the opinion that after having withdrawn its questions, the Verwaltungsgerichtshof had changed its characterization of Professor Köbler’s length-of-service-increment as compared to the characterization in its initial referral for a preliminary ruling. According to

the ECJ, its invitation to the Verwaltungsgerichtshof to consider withdrawal was based on this initial characterization, on which the Schöning-Kougebetopoulou case shed light. The Verwaltungsgerichtshof should have realized this and should therefore have maintained its questions. Mercifully, the ECJ recognized that all this might possibly not have been all too “manifest” to the Verwaltungsgerichtshof.

I submit that more elegant and constructive ways of judicial co-operation are conceivable than the combination of CILFIT, Welthgrove and Köbler, especially given the sometimes manifest mistakes made by the ECJ itself.

6. Those who live in glass houses should not throw stones

If it is a requirement of justice that legally irreversible but erroneous judgments of highest national Courts are reversed if they “manifestly infringe” EC Law, then it is equally a requirement of justice that erroneous judgments of the ECJ are reversed if they manifestly infringe EC Law, e.g. by manifestly overstepping competence limitations. The Community should therefore be held liable under the same Köbler criteria for damages, not only of individuals, but also for damages of the collectivity of citizens/taxpayers caused by manifest errors of the ECJ. Such manifest errors are not as rare as one would consider desirable.

In the cases Schumacker,11 Gilly,12 Gschwind13 and De Groot14 the ECJ manifestly infringed the free movement of workers and the limitations of its competence by (i) allowing the Member State of employment to refuse national treatment to non-resident workers and (ii) without any Treaty basis, subordinating the Home State to the Job State’s sovereign but discriminatory policy, thereby manifestly infringing the tax sovereignty of the Home State. In the last-mentioned case, the Court further ruled that the Home State of the employee should prevent international double taxation of the wages paid, however without any legal basis, as regrettable, there is no rule of EC Law a migrant employee may rely on for prevention of international double taxation,15 let alone that such rule would regulate which of the two (or three, or four) States should do what about international double taxation.

15. Art. 293 EC calls for bilateral negotiations, but has no direct effect, according to the ECJ in Case C-336/96, Gilly, [1998] ECR I-2793, and anyway does not tell us which of the two (or three, or four) States should do what about international double taxation.
gladly agree with the Court that there ought to be such a rule, but that is another matter.

In cases like *Wielockx*,16 *X & Y v. Riksskatteverket*17 and *Océ van der Grinten v. Commissioners of Inland Revenue*,18 the ECJ embarked upon the interpretation of bilateral tax treaties and/or national tax law. I submit that on the basis of Articles 5 and 220 EC, the Court is manifestly not competent to do so. Moreover, the Court’s *ultra vires* interpretations of national and bilateral law in these cases are almost invariably erroneous.19 Those taxpayers not unjustly benefiting from such mistakes are paying for the budgetary consequences. I used to consider the sometimes heavy criticism (“flimsiest of arguments”)20 of the ECJ’s case law in direct tax cases exaggerated, but I must admit that I am starting to worry. I must also admit, though, that however toe-curling some of the ECJ’s errors are in these cases, it often succeeds in arriving at a correct decision. But definitely not always.

If legal hygiene is considered to be enhanced by Member States being liable for manifest mistakes of their highest Courts, then EC legal hygiene is equally enhanced if an undertaking, a Member State or an individual may litigate under the same conditions against the Community, on the basis of Article 288(2) EC (non-contractual liability of the Community) *juncto* the *Köbler* case, for damages caused by manifest mistakes of the ECJ, especially

19. In *Wielockx*, the ECJ erroneously qualified an entrepreneurial old age reserve existing only in fiscal accounts under the pension provision of the Belgian-Netherlands tax treaty; it erroneously presupposed that tax treaties have bearing on the deduction of contributions for old age insurance; and it erroneously held that tax treaties imply fiscal coherence at macro level (between the States) between the tax-free old age reserve and taxation of its winding-up, thus preventing States from applying individual coherence between deduction and taxation. In *Océ van der Grinten*, the Court understands the UK-Netherlands tax treaty such that the UK withholding tax levied on the occasion of a dividend payment by a UK subsidiary to its Netherlands parent company would be creditable against the corporation tax of the Netherlands parent company receiving the dividend. This understanding, however, is erroneous, which is quite worrisome, as only a week before, the ECJ had decided the *Bosal* case (C-168/01, supra note 6). That case, with huge and questionable budgetary consequences, concerned precisely the Netherlands participation exemption for dividends paid by foreign subsidiaries, so one would expect the Court to have seen that under an exemption system there is no tax base whatsoever for crediting any foreign withholding tax. Where there is no tax base and therefore no tax, I would say it is “manifest” that nothing can be credited against that non-existent tax. The case of *X & Y v. Riksskatteverket* is too full of misconceptions to list and explain here. Readers with command of the Dutch language are referred to the annotation in BNB 2003/211.
the overstepping of its competence. If effective legal protection at national level is not secured if the same Court were to judge its own “manifest infringements,” the same holds true at EC level. The simplest solution would then be to have the Court of First Instance of the EC hear such cases, with no appeal to the ECJ.

7. The bill

Both compensation for damages caused by the ECJ and compensation for damages caused by national highest Courts will ultimately be paid by the EC taxpayer, i.e. by you and me, as both the own resources of the EC and the national budget are financed by individuals and undertakings: by the subjects whose effective legal protection the ECJ intends to guarantee with its Köbler judgment. It is clear that a State is never liable; in economic reality, it is always the (other) taxpayers who pick up the bill, unless the prevailing violation of the Stability Pact allows higher budget deficits (in that case, the future taxpayers will pay). If not, it will be another part of the citizens – in my view no less deserving of effective budgetary protection – who will pay, i.e. those who will suffer most from cutbacks on public expenditure. The extra cost and backlog caused by the further clogging of legal procedures both at national and EC level and by the obligation to create special procedures for Köbler claims will have to be paid by the taxpayer as well. This, on top of the arbitrary budgetary consequences of the ECJ’s errors especially in tax cases, which eo ipso immediately lead to either shifts in tax burden or public expenditure shifts. I consider it possible that the average (i.e. not the fortuitously benefiting) EU citizen who realizes all of this, may not be that pleased with the “effective protection” postulated by the ECJ in Köbler. No EU voter ever had an opportunity to vote on the budgetary consequences of ECJ judgments. It is therefore important that the ECJ stay meticulously within the limits of its competence, on which the EU voter may be considered to have been able to vote, once.

8. Is EC law important?

There are other and possibly no less valuable interests of justice than procedurally forcing through, to five decimal places, EC law of often questionable quality. The “effectiveness” of EC law is beginning to hurt the effectiveness of the Law, also of EC law itself. There is no particular justice in backlogs, clogging and unjust budgetary shifts. The ECJ offers no justification. Apparently, the Köbler judgment is just a dogmatic consequence, drawn from the
earlier Francovich and Brasserie du pêcheur case law. But Jede Konsequenz führt zum Teufel. Why not adhere to wisdom which has proven to be just and expedient for centuries and which (therefore) forms part of the legal tradition of all Member States: litis finiri oportet? Litigation should stop at some point. Professional errors do occur, yes. As the ECJ pointed out in its Köbler judgment: malicious, biased or incompetent judges are not the issue here; we are not discussing personal liability. There is little merit in putting up another national Court behind the (until then) highest national Court, because that new judge will statistically make as many professional mistakes as the previously highest judge, and, as we saw, so will the ECJ. And who is going to hear the claims against that new judge’s decisions? I submit that Köbler liability has fewer merits than drawbacks. The ECJ points at the liability of Member States of the Council of Europe for findings of violation of human rights, also by their highest Courts, as if to say that Köbler liability is nothing new and no problem. But that comparison does not hold water, because: (i) in ECHR cases indeed very special legal interests (human rights) are at issue, whereas in the case of Köbler liability we may well be dealing with the infringement of an EC Directive on the luminosity of bicycle taillights, or with the infamous Technical standards and regulations Directive which was at issue in the equally infamous CIA Security/Securitel case.21 The Kühne & Heitz case to be discussed below, for instance, concerns the classification, for export restitution purposes, of chicken legs (or thighs? Well, whatever); (ii) in ECHR cases the Member States have actually submitted themselves, by multilateral Treaty, to the possibility of individual complaints and the possibly ensuing State liability for individual damages caused by mistakes of their highest Courts, to be established and calculated, not by any national Court, but by a special, higher, international Court which also deals at last instance with the substance of the case. The States therefore explicitly agreed, in ECHR cases, to an exception to the principle of res judicata, given the fundamental character of the human rights at issue.

9. A comparison with Emmott situations (revision of administrative decisions)

Similar to the Köbler situation is the factual setting in which the addressee of an administrative decision has appealed against that decision before his national administrative Courts on grounds of incompatibility of the decision with EC Law, but to no avail, and subsequent ECJ case law shows that he

was in the right after all. If the addressee used all of his appeals possibilities – therefore litigated up to the highest national Court (but lost) – and relied on EC Law in all instances, he is in an Emmott like\(^{22}\) situation: he was objectively unable to obtain his EC rights. The appeals Court may well have rejected the appeals on the basis of a \textit{bona fide} and very likely interpretation of EC Law as it stood at that moment, so no "manifest infringement" is at issue. Still, with the wisdom of hindsight (knowledge of posterior ECJ case law), the addressee should have obtained a revision of the decision.

In such situations, the legal force of the administrative decision and the status of \textit{res judicata} of the appeals Court’s judgment might be called into question, since here as well, the effectiveness of EC Law is in jeopardy. If the addressee requests for a revised decision, pointing at the new ECJ case law, can the administration rely on the principle of \textit{res judicata} in order to reject his request? Or should he be given access, like Mrs Emmott, to a revision of the decision and to appeals against such revised decision, despite the legal force of the initial decision and despite the status of \textit{res judicata} of the appeals against it? If within a reasonable time after the initial highest national judgment the addressee files for a revision on the basis of subsequent ECJ case law, and the administration denies him such revision, one might consider the possibility of reopening his access to Court. I hurry to point out that this possibility should only be considered for the addressee of that specific decision, who used all of his appeals possibilities and invoked his EC rights in all instances, but in vain. Other interested parties in a similar factual situation, but not having appealed their similar decisions are not in the same situation and should therefore not be granted the possibility to ride piggyback on the efforts of the addressee who did use and invoke his procedural and EC rights. \textit{Vigilantibus ius scriptum est}, and legal subjects are required to take reasonable measures to limit damages.

This matter has been put before the ECJ in the case of \textit{Kühne & Heitz NV v. Productschap voor Pluimvee en Eieren},\(^{23}\) concerning the – in hindsight – incorrect recapture of export restitutions for chicken’s legs (or thighs; that is the question). After a final decision of the competent administrative Court upholding the administration’s recapture of the export restitutions, subsequent ECJ case law showed that \textit{Kühne & Heitz} were entitled to them after all. I expect the ECJ will require the administration, as it was advised by its Advocate General Léger,\(^{24}\) to revise the administrative decisions (and require the Member State to grant the addressee renewed access to appeals against that revision, if it still does not please the addressee), despite the legal irre-


\(^{23}\) Case C-453/00, judgment of 13 Jan. 2004, nyr.

\(^{24}\) Opinion of 17 June 2003.
versatility of the rejection of the initial appeals. In substance, the European Court of Human Rights already paved the way in its decision in the case of Dangeville SA. That case concerned a taxpayer who invoked an exemption on the basis of the Sixth VAT Directive in all national instances, but was denied such exemption by the French Conseil d'État because (i) at that time that national highest Court did not yet recognize direct effect of EC Directives, and (ii) it considered that Dangeville should first ask for an administrative decision of the Minister of Finance. After having obtained such (negative) decision, Dangeville again went to court. Although by now the Conseil d'État did recognize direct effect of Directives – as was shown by the fact that it granted the desired VAT exemption to one of Dangeville's competitors in the same situation, with the only difference that its case had gone to court much later – it refused to revise its original judgment because of the principle of res judicata. The ECtHR considered the right to restitution of tax wrongfully paid a possession/bien within the meaning of Article 1 of Protocol I of the European Convention on Human Rights, and the refusal of such restitution an infringement of that property right, despite the principle of res judicata: the ECtHR as the guardian of the effectiveness of direct effect and priority of EC law.

Cases like Kühne & Heitz are not about State responsibility for judicial errors. Consequently, no “manifest infringement” or “serious breach” of EC Law by any Court needs to be established. Rather, they concern neutral revision of administrative decisions which in hindsight appear to be incorrect, not on the basis of new facts, but on the basis of new case law of the ECJ, and only for addressees caught in an Emmott trap, i.e. addressees who used their procedural possibilities to appeal against the decision up to the last instance, but to no avail. Although this revision, too, is a procedural discrimination of all individuals who happen not to be in a position to invoke some technical EC right, it is less inexpedient than the Köbler doctrine, because (i) no value-judgment (“manifest infringement” or “serious breach”) of any Court decision needs to be struck, (ii) no special claim procedures need to be set up, (iii) the extra workload for the judiciary will be less significant, and (iv) the administrative decision is revised instead of damages being paid and (therefore) arbitrary budgetary effects will be less likely. It is unclear, however, within what time limit after the (initial) final decision of the national highest administrative Court addressees should still be able to apply for revision on the basis of posterior ECJ case law, and within what time limit after the publication of that posterior case law they should do so. After all, even for the individuals in Emmott type situations, the curtain should fall

at some point. Obviously, national administrative procedural law of the Member States does not provide for such time limits.

10. Conclusion

Revision of final administrative decisions which in hindsight appear to be at odds with posterior ECJ case law (à la *Dangeville*) seems less of a bad idea than liability of Member States for “manifest infringements” of EC Law by their highest Courts (à la *Köbler*), but both phenomena are legally awkward, they are procedural cloggers, and they are procedural discriminations of individuals who happen not to be in a position to invoke a technical EC right, but whose interests may well deserve no less procedural protection. Justice is not necessarily served by never closing cases. The effectiveness of EC law is beginning to get in the way of the effectiveness of Law itself. It remains unclear what is so special about especially technical rules of EC Law – apart from their regular unintelligibility; why they should be procedurally forced through even past the point of *res judicata* as if they were human rights, at the cost of everything else, including two fundamental values: *litis finiri oportet* and the parliamentary right to vote on budgetary shifts, especially in times of unstable Stability Pacts. Professional mistakes happen. The bulk of EC rules are not comparable to human rights, but rather just economic luck (or bad luck in horizontal situations) for the individual or undertaking who happens to be (not) in a position to rely on them, such as the winning (losing) party in the *CIA Security/Securitel* case. Not the Member States, but their taxpayers are paying for *Köbler* liability and for the arbitrary budgetary shifts caused by erroneous judgments of the ECJ. The ECJ has not shown that the EC discipline of highest national Courts is precarious. By postulating *CILFIT, Welthgrove* and *Köbler* simultaneously, it sets impossible standards, which it thus is not able to meet itself, as it obviously makes as many manifest errors as national highest Courts do. Given *Köbler*, the Community must, *vice versa*, be liable under the same conditions for damages caused by manifestly erroneous judgments of the ECJ. If *Köbler* is not to be taken that seriously, then it is just another source of legal uncertainty and arrears for years.