

# Retrial in the Member States on the Ground of Violation of EU Law

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## I Introduction

In an article published in the previous volume of this journal, I presented the legislative rules and the jurisprudence in the Member States concerning state liability for violation of EU law by national supreme courts.<sup>1</sup> I arrived at the conclusion that even in Member States where *Köbler* liability<sup>2</sup> is accepted theoretically, it is neither a frequently used nor an efficient method of making good the damages caused to individuals by a final judgment of a national supreme court.<sup>3</sup>

In view of these conclusions, I find it interesting to examine whether other remedies exist in the national legal systems available to individuals in cases of violation of EU law by the national supreme court.<sup>4</sup> This article focuses on the remedy of retrial.<sup>5</sup>

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<sup>1</sup> See Varga Zsófia, 'The Application of the Köbler Doctrine by Member State Courts' (2016) 4 (2) ELTE Law Journal.

<sup>2</sup> (CJEU) Case C-224/01 *Köbler* ECLI:EU:C:2003:513 [2003] ECR I-10239. In *Köbler*, the CJEU held, for the first time, that the principle of state liability for breaches of EU law also applies when a breach is attributable to a Member State court. The *Köbler* judgment was therefore an extension of the already established state liability doctrine to violations of EU law by Member State supreme courts. See (CJEU) Joint cases C-6/90 and C-9/90 *Francovich and others* ECLI:EU:C:1991:428 [1991] ECR I-05357.

<sup>3</sup> According to the research conducted, there have been about thirty-five reported cases based on the *Köbler* principle for violation of EU law by national courts since the pronouncement of the CJEU judgment in 2003. Of them, damages have been awarded only in four occasions so far. For further analysis on this matter see Varga Zsófia, 'Why the Köbler liability is not Applied in Practice' (2016) 23 Maastricht Journal of European and Comparative Law 984–1008.

<sup>4</sup> Besides the remedy of retrial, the constitutional complaint for alleged violation of the right to a lawful judge can also be taken into account, introduced on the ground that the supreme court breached its obligation to make a preliminary reference to the CJEU. For further analysis on this matter see Varga Zsófia, 'National Remedies in the Case of Violation of EU Law by Member State Courts' (2017) 54 Common Market Law Review 51–80.

<sup>5</sup> For the sake of unified terminology and mutual understanding, the use of several terms been harmonised in this paper. The term 'retrial' covers procedural means that allow for a case already decided by the court of final instance to be 'reopened', and for a final judicial decision that has acquired *res judicata* to be 'revised'. The term 'revocation' refers to public authorities' powers to revoke their own acts, whether confirmed or not by the administrative court.

It is noteworthy that, during the codification of the new Hungarian Act on Civil Procedure (*Pp.*),<sup>6</sup> the question emerged whether retrial should be granted on the ground of violation of EU law by a final judgment.<sup>7</sup> In the end, the idea was rejected; and this possibility does not appear in the new act which entered into force on 1 January 2018.<sup>8</sup> Hence, the new *Pp.* did not amend the provisions of the previous act, and does not grant retrial based on violation of EU law by a final judgment.<sup>9</sup>

Nevertheless, in several Member States, there is a possibility for an individual whose rights have been infringed by a final judgment to invoke the violation of EU law as a ground for retrial. It is usually a subsequent CJEU judgment on the same question of law which reveals the inconsistency of the national judgment with the EU norm.<sup>10</sup>

In this article, I present and analyse the national rules and cases concerning retrial based on violation of EU law. As for the national judicial practice, the research is based on published case-law on retrial cases before Member State courts for violation of EU law by national courts.<sup>11</sup> Before analysing the national case-law, a brief presentation of the CJEU judgments and the ECtHR jurisprudence regarding retrial on the ground of violation of EU law by Member State courts is offered. Then, at the end of the paper, I present my conclusions

<sup>6</sup> The Concept of the new Hungarian Civil Procedure Act (approved by the Government on 14 January 2015), available on the Internet site of the Government <<http://www.kormany.hu>> accessed 1 January 2017.

<sup>7</sup> The Concept of the New Hungarian Civil Procedure Act, annex VI, point VII.

<sup>8</sup> *A polgári perrendtartásról szóló 2016. évi CXXX. törvény* (New Act on Civil Procedure Code) s 394.

<sup>9</sup> *A polgári perrendtartásról szóló 1952. évi III. törvény* (Act on Civil Procedure Code) s 260 on *perújítás* (retrial).

<sup>10</sup> Nevertheless, it may also be a CJEU judgment anterior to the contested decision which makes the infringement evident. In this case, the question arises to what extent the erroneous judgment is attributable to the national court who have not considered the CJEU case or to the party at the proceedings who have not invoked it.

<sup>11</sup> The main sources for the identification of national cases are the following:

– ACA Europe. National reports, 'Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States' 21st colloquium, Warsaw, 15 June 2008 <<http://www.aca-europe.eu/index.php/en/colloquies-top-en/244-21st-colloquium-in-warsaw-from-15-to-16-june-2008>> accessed 1 January 2017;

– the Commission's Annual Reports to the European Parliament on Monitoring the Application of EU Law (Annex VI: Application of Community law by national courts: a survey) <[http://ec.europa.eu/atwork/applying-eu-law/index\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/index_en.htm)> accessed 1 January 2017;

– bulletin Reflets: Informations rapides sur les développements juridiques présentant un intérêt communautaire <[http://curia.europa.eu/jcms/jcms/Jo2\\_7063/](http://curia.europa.eu/jcms/jcms/Jo2_7063/)> accessed 1 January 2017; translation in English of the issues published after 2008 are available at <<http://www.aca-europe.eu/index.php/en/reflets-en>> accessed 1 January 2017;

– the Internet site of the Associations of the Councils of State and Supreme Administrative Jurisdictions of the European Union, especially the databases Jurifast <<http://www.aca-europe.eu/index.php/en/jurifast-en>> accessed 1 January 2017 and Dec.Nat <<http://www.aca-europe.eu/index.php/en/dec-nat-en>> accessed 1 January 2017;

– the Internet site of the Network of the Presidents of the Supreme Judicial Court of the European Union <<http://www.network-presidents.eu/>> accessed 1 January 2017.

See also the cases referred to in Laurent Coutron and Jean-Claude Bonichot, *L'obligation de renvoi préjudiciel à la Cour de justice: une obligation sanctionnée?* (Bruylant 2014, Bruxelles).

An obvious limitation of this study is that it is based on cases that have been made publicly accessible either through databases or in other forms such as collections and digests of case-law. This means that there may be a limited number of judgments which were never reported and therefore were not considered.

regarding the role and the place of retrial in the system of remedies against violation of EU law by Member State courts.

## II Retrial on the Ground of Violation of EU Law

### 1 The CJEU Case-law

The EU law does not require a mandatory reopening of domestic procedures following CJEU judgments. According to the CJEU, such a general possibility would endanger the corollary principles of *res judicata* and legal certainty. Hence, under EU law, retrial is exceptional and conditional upon the special circumstances of the case. It holds true, even for cases where reopening would make it possible to remedy an infringement of EU law by the judgment in question.<sup>12</sup>

Referring to *Kornezov*, *res judicata* and retrial are considered as two sides of the same coin for the purposes of the present analysis. The main connection between them is that if a previously adjudged issue is contrary to EU law and comes within the scope of *res judicata*, it can be remedied only through retrial.<sup>13</sup> Therefore, retrial is an exceptional measure, with the result of setting aside the effects of *res judicata* of final judgments under special circumstances. Due to this connection between the two concepts, CJEU case-law regarding *res judicata* is briefly presented here.

The judgment in *Kühne & Heitz*<sup>14</sup> concerned the infringement of EU law by an administrative decision, which was confirmed by the administrative court with the result of attaching *res judicata* to the matter under dispute.<sup>15</sup> The CJEU declared that the revocation of

<sup>12</sup> See (CJEU) Case C-234/04 *Kapferer* ECLI:EU:C:2006:17 [2006] ECR I-2585, paras 20–22; Case C-2/08 *Fallimento Olimpiclub* ECLI:EU:C:2009:506 [2009] ECR I-7501, paras 22–23; Case C-507/08 *Commission v Slovakia* ECLI:EU:C:2010:802 [2010] ECR I-13489, paras 59–60; Case C-213/13 *Impresa Pizzarotti* ECLI:EU:C:2014:2067 ECR, paras 54, 59, 62, 64; Case C-69/14 *Tărşia* ECLI:EU:C:2015:662 ECR, paras 28–29; and Case C-505/14 *Klausner Holz Niedersachsen* ECLI:EU:C:2015:742 ECR, paras 38–39.

For further analysis on this matter see Xavier Groussot and Timo Minssen, 'Res judicata in the Court of Justice case-law: balancing legal certainty with legality?' (2007) 3 *European Constitutional Law Review* 385–417; Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU procedural law* (Janek Tomasz edn, Oxford University Press 2014, Oxford) 148–150; Guglielmo Maisto, 'The Principle of Effectiveness' in Céline Brokelind (ed), *Principles of Law: Function, Status and Impact in EU Tax Law* (IBDF 2014, Amsterdam) 163–182; Takis Tridimas, *The General Principles of EU law* (2nd edn, Oxford University Press 2006, Oxford) 164–171, 423–427.

<sup>13</sup> On a more detailed presentation of differences between the two concepts see Alexander Kornezov, 'Res Judicata of National Judgments Incompatible with EU Law: Time for a Major Rethink?' (2014) 51 *Common Market Law Review* 812–814.

<sup>14</sup> (CJEU) Case C-453/00 *Kühne & Heitz* ECLI:EU:C:2004:17 [2004] ECR I-837.

<sup>15</sup> As Hofstötter points out, even if the judgment in *Kühne & Heitz* concerned in the first place a mistake of an administrative authority, the case dealt, however, with a violation of EU law by the administrative court which confirmed the administrative decision. See Bernard Hofstötter, *Non-Compliance of National Courts: Remedies in European Community Law and Beyond* (TMC Asser Press 2005, The Hague) 179–180.

such a decision by the administrative authority is required only if several conditions are fulfilled. First, the national court of last instance reached the wrong decision without having submitted a request for preliminary ruling to the CJEU. Moreover, the national administrative authority had the power, under national law, to revoke its own decisions. Furthermore, a subsequent CJEU judgment revealed the inconsistency of the decision with EU law. Finally, the aggrieved party complained to the administrative authority immediately after becoming aware of that decision of the CJEU.<sup>16</sup> This principle has been confirmed in the order in *i-21 Germany and Arcor*.<sup>17</sup>

The above two cases concerned the revocation by the administrative authority of a previous administrative decision, confirmed by the administrative court. As such, these judgments concerned erroneous final judicial decisions only indirectly. However, several CJEU judgments have directly dealt with the issue of reopening judicial proceedings by the court.

In the judgment in *Lucchini*<sup>18</sup> the CJEU concluded, albeit in a highly specific situation, that the principle of *res judicata* had to be set aside, ensuring that the case would be reopened by the court itself. The judgment concerned the recovery of state aid granted in breach of EU law.<sup>19</sup> The national court that handed down the final judgment manifestly lacked jurisdiction as to the substance of the case, as the Commission has exclusive competence to assess a national state aid measure's compatibility with EU law. According to some legal commentators, due to this circumstance, the national judgment should have been considered null and therefore lacking the authority of *res judicata*.<sup>20</sup>

The *Klausner Holz Niedersachsen* case concerned the application of EU rules on state aid as well.<sup>21</sup> The national rules on *res judicata* prevented the national court from drawing all consequence of a breach of EU rules on state aid because of a previous, final judicial decision. Specifically, this previous decision had been given in a dispute which did not have the same subject

<sup>16</sup> (CJEU) *Kühme & Heitz* (n 14), para 28.

<sup>17</sup> (CJEU) Joint Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* ECLI:EU:C:2004:836 [2006] ECRI-8559. However, contrary to the undertaking *Kühme & Heitz*, which had exhausted all legal remedies available to it, *i-21* and *Arcor* did not avail themselves of their right to appeal against the fee assessments issued to them. Accordingly, the judgment in *Kühme & Heitz* has not finally been relevant for the purposes of determining whether, in the situation of *i-21* and *Arcor*, an administrative body is under an obligation to review decisions which have become final. (See order, paras 53–54).

<sup>18</sup> (CJEU) Case C-119/05 *Lucchini* ECLI:EU:C:2007:434 [2007] ECRI-6199.

<sup>19</sup> The facts at the origin of the judgment are as follows. *Lucchini* hoped to benefit from state aid in Italy. Before the Commission could decide on the compatibility of the aid with the internal market, *Lucchini* brought an action before an Italian civil court in order to establish its right to the payment of aid. In the meantime, the Commission declared the aid incompatible with the internal market. The national court held, nonetheless, that *Lucchini* was entitled to the aid in question and ordered the competent authorities to pay the amounts claimed. The judgment was confirmed on appeal and was not challenged any further. It thus acquired the authority of *res judicata* under Italian law. Consequently, aid was disbursed to *Lucchini*. Upon the Commission's protest, the Italian authorities ordered *Lucchini* to reimburse the aid. The matter was brought before the *Consiglio di Stato*, which found the question was *res judicata*, but conceded that this would breach the primacy of EU law. It thus decided to refer the question to Luxembourg. See also Kornezov (n 13) 820–821.

<sup>20</sup> For further analysis see Kornezov (n 13) 821–822. He points out that, although the CJEU has made no explicit reference to the concept of void judgments, the latter seems to transpire throughout its reasoning. See also the CJEU's own interpretation of *Lucchini* in *Fallimento Olimpclub* (n 12), para 25; and in *Impresa Pizzarotti* (n 12), para 61.

<sup>21</sup> (CJEU) *Klausner Holz Niedersachsen* (n 12).

matter and which did not concern, either principally or incidentally, the state aid characteristics of the contracts at issue. The CJEU found these rules incompatible with the principle of effectiveness; and emphasised that a principle as fundamental as that of the control of state aid cannot be justified either by the principle of *res judicata* or by the principle of legal certainty.<sup>22</sup>

In the judgment in *Fallimento Olimpiclub*,<sup>23</sup> the CJEU found the application of the principle *res judicata* incompatible with the effectiveness of EU law once again, in the scope and with the effect at issue in the specific case.<sup>24</sup> As the CJEU pointed out, the way the *res judicata* was construed under Italian law<sup>25</sup> not only prevented a final judicial decision from being reopened, but also prevented judicial scrutiny in the context of a different tax year of any finding on a fundamental issue contained in a final judicial decision. This resulted in a recurring violation of EU law, without the possibility to remedy the breach.

As Kornezov concludes, the CJEU favours a narrow concept of *res judicata*, which, on the one hand, requires the identity of the subject-matter and, on the other hand, only covers the operative part of a judgment.<sup>26</sup> National rules on *res judicata* appear to infringe EU law only where they have a wider scope of application.

The judgment in *Kapferer*<sup>27</sup> is sometimes cited as an example of leaving the authority of a final judgment's *res judicata* unfettered, despite its alleged inconsistency with EU law. The case concerned pending appeal proceedings, in which one of the issues – the lower court's jurisdiction – was not appealed before the appellate court. The question was whether the principle of loyal cooperation required the appellate court to examine *ex officio* the lower court's jurisdiction.<sup>28</sup> The CJEU held that the principle of cooperation does not require a national court to set aside its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to EU law.<sup>29</sup> The same principle was confirmed by the CJEU in its judgment in *Commission v Slovakia*.<sup>30</sup>

It is however noteworthy that, according to Kornezov, in *Kapferer* the core issue was more the scope of review in appeal proceedings in a pending case than the retrial. He concludes that even if the judgment in *Kapferer* could admittedly be relevant in the context of retrial, the CJEU has clearly left the question of whether the applicable national rules were compatible

<sup>22</sup> (CJEU) *Klausner Holz Niedersachsen* (n 12), paras 45–46.

<sup>23</sup> (CJEU) *Fallimento Olimpiclub* (n 12).

<sup>24</sup> This case concerned a tax dispute, where *res judicata* attached also to findings made in previous final judgments, notwithstanding the fact that they had been made in relation to a different tax period. The wide scope of application of the principle of *res judicata* prevented the national court to take into consideration EU rules concerning abusive practice in the field of VAT, even if they relate to a tax year for which no final judgment has yet been delivered.

<sup>25</sup> (IT) Codice Civile (Civil Code), Art. 2909 on *Cosa giudicata* (*res judicata*).

<sup>26</sup> Kornezov (n 12) 823–824, 826.

<sup>27</sup> (CJEU) *Kapferer* (n 12).

<sup>28</sup> See also Kornezov (n 13) 833.

<sup>29</sup> (CJEU) *Kapferer* (n 12) para 20.

<sup>30</sup> (CJEU) *Commission v Slovakia* (n 12), paras 59–60. This case concerned measures chosen by the Member State to ensure the recovery of unlawfully allocated state aid. See further analysis see Maciej Taborowski, 'Infringement proceedings and non-compliant national courts' (2012) 49 *Common Market Law Review* 1881–1914.

with the principles of equivalence and effectiveness unanswered, since this was not raised in the main proceedings. It could therefore be inferred that national rules on retrial must, in any event, be in conformity with these principles.<sup>31</sup>

In *Impresa Pizzarotti*, concerning rules on a public works contract, the CJEU confirmed the above principle again,<sup>32</sup> and supplemented it with a new point. As a result, if the applicable domestic rules provide the possibility for a national court to go back on its decision in order to render the situation compatible with national law, there must also be the possibility for the situation at issue to be brought back into line with EU legislation.<sup>33</sup> Accordingly, to the extent that it is authorised to do so, a national court which has given a ruling at last instance, without a reference having first been made to the CJEU under Article 267 TFEU, must either supplement or go back on that definitive ruling to take into account any interpretation of that legislation provided by the CJEU subsequently.<sup>34</sup> This duty is the result of the principles of equivalence and effectiveness.

In short, the CJEU accepts the procedural limitations to reopening a finally adjudicated case in national laws, notwithstanding its violation of EU law. However, it requires reopening if such a possibility exists in national laws, or if the scope of application of *res judicata* under the national legal order is wider than the meaning of *res judicata* under EU law.

## 2 Judgment of the ECHR in the *Dangeville* Case

It is noteworthy that the ECtHR found in its judgment of 16 April 2002, rendered in the case of *Dangeville SA*, that the principle of *res judicata* cannot jeopardise the right to the recovery of unduly paid taxes.<sup>35</sup>

This case concerned a company which, after having paid VAT under French law, invoked an exemption granted in the VAT Directive. Relying on its rights conferred by EU law, the company sought reimbursement of the overpaid VAT. However, the French authorities, including the *Conseil d'État*, denied such exemption. They argued that the directive, having not yet been implemented into national law, could not be relied on before the national courts.<sup>36</sup> At that time, the *Conseil d'État* had not yet recognised the direct effect of EU directives. After the refusal, the company made a further claim, seeking compensation on the ground that the French State was liable for VAT unduly paid.<sup>37</sup> Although by then the *Conseil*

<sup>31</sup> Kornezov (n 13) 833.

<sup>32</sup> (CJEU) *Impresa Pizzarotti* (n 12) para 60.

<sup>33</sup> (CJEU) *Impresa Pizzarotti* (n 12) para 62.

<sup>34</sup> (CJEU) *Impresa Pizzarotti* (n 12) para 64.

<sup>35</sup> (ECtHR) *S.A. Dangeville v France* judgment of 16 April 2002, no. 36677/97, ECHR 2002-III § 71.

<sup>36</sup> (FR) Conseil d'État, Assemblée, arrêt, 30/10/1996, *S.A. Cabinet Revert et Badelon*, 45126, publié au recueil Lebon.

<sup>37</sup> The *Cour administrative d'appel de Paris* in first instance held the state liable for the non-implementation of the Directive. However, this judgment was quashed in second instance by the *Conseil d'État*, which dismissed the claimant's action. See (FR) Cour administrative d'appel de Paris, Section plénière, arrêt, 01/07/1992, *SA Cabinet Jacques Dangeville*, A.J.D.A. 1992, at 768. See also Georgios Anagnostaras, 'The Allocation of Responsibility in State Liability Actions for Breach of Community Law: A Modern Gordian Knot?' (2001) 26 *European Law Review* 148.



*d'État* had recognised the principle of direct effect, it refused to revise its original judgment because of the principle of *res judicata*.<sup>38</sup> The *Conseil d'État* argued that the matter constituted a *res judicata*, since the recovery claim had already been rejected at last instance.<sup>39</sup>

Having been refused the recovery of the overpaid tax by the French courts, the company claimed to the ECtHR that it had been deprived of its possessions within the meaning of Article 1 of Protocol I of the ECHR. The company argued that it was a creditor of the state but had been definitively deprived of the possibility of enforcing its debt because of the decisions of the *Conseil d'État* dismissing its claims.<sup>40</sup>

In its judgment, the ECtHR qualified the right to restitution of the unduly paid tax as a possession within the meaning of the ECHR. Hence, it concluded unanimously that the refusal of such restitution constituted an infringement of the property right, despite the principle of *res judicata*. The applicant was therefore awarded the pecuniary damage claimed.<sup>41</sup>

### 3 Member States' Position

#### a) Overview of the legislative provisions

In several Member States it is indeed possible to reopen final judgments because of their incompatibility with EU law. Three groups of states can be distinguished in this regard.

First, finally adjudicated cases can be reopened<sup>42</sup> by reason of a manifest breach of law in six Member States (Denmark,<sup>43</sup> Malta,<sup>44</sup> Finland,<sup>45</sup> Sweden,<sup>46</sup> the UK,<sup>47</sup> and, in

<sup>38</sup> However, in a judgment of the same date concerning an application brought by another company, the business activity and claims of which were initially identical to those of the applicant, the *Conseil d'État* departed from its earlier decision and upheld that company's claim for a refund by the state of sums wrongly paid.

<sup>39</sup> (FR) *Conseil d'État, Assemblée*, arrêt 30/10/1996, *Ministre du Budget/SA Jacques Dangeville*.

<sup>40</sup> It also complained of a breach of Article 14 (prohibition of discrimination) of the ECHR, combined with Article 1 of Protocol No. 1, on the ground that companies which had not paid VAT had been in an advantageous position compared to taxpayers who had spontaneously filed their VAT returns and that another company had benefited from a departure from the earlier decision and obtained a VAT refund despite the fact that their situations were identical.

<sup>41</sup> It is noteworthy that this judgment is a good illustration of a situation where the recovery of unduly paid tax and the compensation of damage suffered lead to the same result.

<sup>42</sup> It is noteworthy that detailed procedural rules on retrial may differ in each Member State. As such, the exact expressions used in national laws may also vary. For the sake of a unified terminology and mutual understanding, the use of these terms has been harmonised in this paper, according to the rules presented under n 5.

<sup>43</sup> (DN) *Retsplejefloven* (Administration of Justice Act), § 399 on *ekstraordinær genoptagelse og anke* (revision and appeal). See also ACA (n 11), National report of Denmark, Question 8b.

<sup>44</sup> (MT) Code of Organization and Civil Procedure, Cap. 12 of the Laws of Malta, Art. 811 (e) on grounds for *new trial*.

<sup>45</sup> (FI) *Hallintolainkäyttölaki* (Administrative Judicial Procedure Act), 11 luku, 63 § (1) (2) on *Purku* (annulment); and *Oikeudenkäymiskaari* (Code of Judicial Procedure), 31 luku, 7–10 § on *Lainvoiman saaneen tuomion purkaminen* (reversal of final judgments).

<sup>46</sup> (SE) *Förvaltningsprocesslag* (Administrative Court Procedure Act), 37b § on *Resning* (relief for a substantive defect in the judgment); and *Rättegångsbalken* (Civil Court Procedure Act), 58. kap, § 1 on *resning* (relief for a substantive defect in the judgment).

<sup>47</sup> (UK) Civil Procedure Rules, Part 52.17.

administrative matters in Lithuania<sup>48</sup>). In these Member States, retrial can theoretically be granted regardless of whether the violation concerns EU or national law – however, the breach must be manifest. This latter requirement sets a similar condition to the ‘manifest breach’ in terms of the *Köbler* judgment.

Second, retrial is possible in three Member States<sup>49</sup> (Latvia,<sup>50</sup> Portugal<sup>51</sup> and, in administrative matters, in Poland<sup>52</sup>) on the ground that an international agreement or the inconsistency of the national judgment with the decision of an international court requires it. It is not obvious, however, whether retrial is restricted to the case in which the international jurisdiction has delivered its judgment, or it can also be applied to other national judgments concerned with the same matter of law.<sup>53</sup>

Third, legislative provisions have been introduced to procedural codes in order to recognise the violation of EU law as a specific ground for retrial in three Member States (Croatia,<sup>54</sup> Romania<sup>55</sup> and Slovakia<sup>56</sup>). However, in Croatia, such a revision is not possible concerning final judgments rendered by the supreme court.<sup>57</sup> On the contrary, in Romanian administrative and Slovakian civil procedural law, a single violation of law is sufficient to reopen finally adjudicated cases, and the identity of the parties is not required either. Therefore, even if the scope of application of these two latter provisions is narrow, they provide generous protection.<sup>58</sup>

<sup>48</sup> (LT) *Lietuvos Respublikos Administracinių Bylių Teisenos Įstatymo Pakeitimo Įstatymas* (Law of the Republic of Lithuania on Administrative Proceedings), 153 *straipsnis* on *Proceso atnaujinimas* (reopening of proceedings).

<sup>49</sup> In fact, there is a similar provision in Czech law, which provides for the possibility to ask for the case to be reopened before the Constitutional Court on the ground of a judgment of an international court delivered in the same case. However, this remedy seems to apply primarily to ECtHR judgments. See (CZ) *Zákon o Ústavním soudu* (Act on the Constitutional Court), § 119, on *obnova řízení* (retrial).

<sup>50</sup> (LV) *Administratīvā procesa likums* (Administrative Procedure Law), 353. pants 6) on *lietas jauna izskatīšana* (rehearing); and *Civīlprocesa likums* (Civil Procedure Law), 479. pants 6), on *Lietas jauna izskatīšana sakarā ar jaunatklātiem apstākļiem – Jaunatklātie apstākļi* (rehearing of cases due to newly discovered circumstances – newly discovered facts).

<sup>51</sup> (PT) *Código de Processo Civil* (Civil Procedure Code), Artigo 696.º f), on *Revisão* (review); and *Código de Processos nos Tribunais Administrativos* (Administrative Court Procedure Code), Artigo 154.º, with reference to the disposition of the Civil Procedure Code.

<sup>52</sup> (PL) *Prawo o postępowaniu przed sądami administracyjnymi* (Regulations of Proceedings in Administrative Court), Art. 270–274, 279 on *Wznowienie postępowania* (retrial); and *Kodeks postępowania karnego* (Code of Criminal Procedure), Art. 540, § 3 on *Wznowienie postępowania* (retrial).

<sup>53</sup> In Latvia, the jurisprudence interprets the provision as requiring that the CJEU judgment be made in the same case that is concerned by the motion of retrial. The position of the Portuguese and Polish courts is not known in the absence of any relevant case-law. See (LV) Latvijas Republikas Augstākās tiesas, Senāta Administratīvo lietu departamenta, spriedums, 14/11/2011, n° SJA – 35/2011.

<sup>54</sup> (HR) *Zakon o parničnom postupku* (Civil procedure Act), članak 382 (2) (3) on *Revizija*.

<sup>55</sup> (RO) *Constituția României* (Constitution of Romania), Art. 20 (2), and 148 (2); and *Legea Nr. 554/2004 contenciosului administrative* (Law on Administrative Disputes), Art. 21 (2) on *Revizuirea* (retrial).

<sup>56</sup> (SK) *Občiansky súdny poriadok* (Code of Civil Procedures), § 228 (1) e) on *Obnova konania* (retrial).

<sup>57</sup> (HR) *Zakon o parničnom postupku* (n 54), članak 382.a (1).

<sup>58</sup> It is true irrespectively to the uncertainty in Slovakia regarding the application of the time limit to introduce a motion for retrial.



However, there is no clear position on the issue at hand in two Member States (Bulgaria and Cyprus). As for Bulgarian law, both procedural codes and case-law have until today remained silent on whether a CJEU judgment may offer a ground for retrial. The legal scholarship, however, does not exclude the possibility that new CJEU case-law could eventually be considered as a new fact, and could serve as a ground for a retrial.<sup>59</sup> In Cyprus, the Supreme Constitutional Court holds the right to adjudicate finally on a recourse made to it on a complaint that a decision of an organ of the state is contrary to law. There is no case-law available on how to interpret this rule in the context of violation of EU law.<sup>60</sup>

In addition, administrative authorities in two Member States (Estonia and Poland) hold the right to revoke their own decisions if contrary to EU law. In Poland, this possibility is granted regardless of whether the administrative decision has become final following the approval of the administrative court.<sup>61</sup> This possibility appears to be given to Estonian administrative authorities under the general rules,<sup>62</sup> even if there is no available case-law from the field of EU law.

On the contrary, in five Member States, available case-law has explicitly excluded retrial on the ground of inconsistency between the final decision and a prior or later CJEU judgment (Italy,<sup>63</sup> Hungary,<sup>64</sup> Netherlands<sup>65</sup> and Austria,<sup>66</sup> as well as in civil matters in

<sup>59</sup> See the analysis by Fartunova of the two following cases rendered on the basis of the relevant provisions of the Civil and Administrative Procedure Codes on *Otmiana* (retrial): First, (BG) Varhoven kasationsien sad, Reshenie, 09/02/2012, n° 1155/2011, rendered on the basis of *Grazhdanski protsesualen kodeks* (Code of Civil Procedure), Art. 303 on *Otmiana* (retrial). Second, Varhoven administrativen sad, Reshenie, 03/07/2012, n° 9588, rendered on the basis of *Aministrativen protsesualen kodeks* (Administrative Procedure Code), Art. 239 on *Otmiana* (retrial). Both cases have been reported by Maria Fartunova, 'Rapport bulgare' in Coutroun and Bonichot (n 11) 159–160, and 161.

<sup>60</sup> (CY) Constitution of the Republic of Cyprus, Art. 146.6.

<sup>61</sup> In Poland, the reopening of the proceedings before the administrative judge on the ground of infringement of an international agreement is also accepted. See (PL) *Prawo o postepowaniu przed sądami administracyjnymi* (n 52), Art. 270–274, 279.

<sup>62</sup> (EE) *Haldusmenetluse seadus* (Administrative Procedure Act), §§ 64–70 on *Haldusakti muutmine ja kehtetuks tunnistamine* (administrative amendment and repeal) and §§ 71–74 on *Vaidemenetus* (internal review).

<sup>63</sup> (IT) *Codice Civile* (n 25), Art. 2909; *Codice di procedura civile* (Civil Procedure Code), Art. 395 on *Revocazione* (retrial); and Tribunale di Roma, Seconda sezione civile, Sentenza, 23/03/2011, n° 639, *Lucchini spa/Ministero Attività produttive*, reported by Bruno Gencarelli, 'Rapport italien' in Coutroun and Bonichot (n 11) 273.

<sup>64</sup> (HU) Alkotmánybíróság, végzés, 07/07/2014, n° 3203/2014. (VII. 14.), reported in Reflets n° 3/2014 27. See also *A polgári perrendtartásról szóló 2016. évi CXXX. törvény* (n 8), 394. § on *perújítás* (retrial).

<sup>65</sup> (NL) Hoge Raad, Uitspraak, 24/06/2011, ECLI:NL:HR:2011:BM9272, reported by Tony P Marguery and Herman van Harten, 'Rapport néerlandais' in Coutroun and Bonichot (n 11) 348 regarding *Herroeping or herziening van vonnissen* (revocation or review of decisions); Centrale Raad van Beroep, 17/11/2006, AB 2007, 7, reported in ACA (n 11), National report of the Netherlands, Question 8; Afdeling bestuursrechtspraak van de Raad van State, 27/10/2004, AB 2004, 427, reported in ACA (n 11), National report of the Netherlands, Question 8. See *Algemene wet bestuursrecht* (General Administrative Law Act), Artikel 8:119 on *Herziening* (retrial); and *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedure), Artikel 382.

<sup>66</sup> For the exclusion of the reopening of a final administrative judgment on these grounds, see (AT) Verwaltungsgerichtshof, Erkenntnis, 21/09/2009, 2008/16/0148, VwSlg 8471 F/2009, reported by Alexander Pelzl, 'Rapport autrichien' in Coutroun and Bonichot (n 11) 97, rendered on the interpretation of *Allgemeines Verwaltungs-*

Poland).<sup>67</sup> In terms of these decisions, a subsequent CJEU judgment on the interpretation of the EU norm is not a reason under national laws to reopen finally adjudicated cases.

Similarly, the inconsistency of the final judgment with EU law is not a basis for reopening the case under the legislation of ten Member States (Belgium,<sup>68</sup> Czech Republic,<sup>69</sup> Germany,<sup>70</sup> Ireland,<sup>71</sup> Greece,<sup>72</sup> Spain,<sup>73</sup> France,<sup>74</sup> Luxembourg<sup>75</sup> and Slovenia,<sup>76</sup> as well as in civil cases in Lithuania).

Under the last fifteen regimes, retrial is considered as an extraordinary remedy, the use of which is exhaustively listed in national legislations. According to Kornezov, the conditions for retrial may vary between civil, administrative, and criminal law, but could be loosely fitted

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*verfahrensgesetz* (General Administrative Procedure Act), § 69 on *Wiederaufnahme des Verfahrens* (reopening of proceedings). As for civil matters, see OGH, Beschluss, 12/06/2012, 4Ob83/12b, RS0127996, ECLI:AT:OGH0002:2012:0040OB00083.12B.0612.000, reported by Pelzl (n 67) 100, rendered on the basis of *Zivilprozessordnung* (Code of Civil Procedure), Art. 530–531 on *Wiederaufnahme des Verfahrens* (reopening of proceedings). For fiscal matters, see *Bundesabgabenordnung* (Federal Tax Act), § 303 on *Wiederaufnahme des Verfahrens* (reopening of proceedings).

<sup>67</sup> (PL) Sąd Najwyższy, Postanowienie, 22/10/2009, I UZ 64/09, reported by Przemysław Mikłaszewicz, 'Rapport polonais' in Coutron and Bonichot (n 11) 377, on the interpretation of the ground for reopening a final civil judgment. See also *Kodeks postępowania cywilnego* (Code of Civil Procedure), Art. 403 on *wznowienie postępowania* (retrial).

<sup>68</sup> (BE) Arrêté du Régent déterminant la procédure devant la section du contentieux administratif du Conseil d'État, Art. 50bis à 50sexies on *recours en révision* (revision); and *Code judiciaire* (Judicial Code), Art. 2, 015, version applicable à partir du 01/11/2015, Art. 23.

<sup>69</sup> (CZ) Nejvyšší správní soud, rozsudek, 27/10/2010, 7 Afs 79/2010-94, reported by David Petrlik, 'Rapport tchèque' in Coutron and Bonichot (n 11) 420, 425; and *Občanský soudní řád* (Code of Civil Justice), § 159a (4) on the principle *res judicata*.

<sup>70</sup> (DE) *Verwaltungsgerichtsordnung* (VwGO) (Code of Administrative Court Procedure), § 153 on *Restitutionsklage* (action for retrial); *Zivilprozessordnung* (ZPO) (Code of Civil Procedure), § 580 on *Restitutionsklage* (action for retrial); and Oberlandesgericht Köln, 6 U 158/03, NJOZ 2004, p. 2764.

<sup>71</sup> (IR) *Blackhall v Grehan* [1995] 3 IR 208 and L.P. v M.P. [2002] 1 IR 219, reported by Marie-Luce Paris, 'Rapport irlandais' in Coutron and Bonichot (n 11) 260.

<sup>72</sup> (EL) Άρειος Πάγος (Areios Pagos), 16/03/2011, 484/2011, NOMOS on επανάληψη της διαδικασίας (demande de repetition de procedure or revision); Άρειος Πάγος (Areios Pagos), 14/12/2004, 1845/2005, NOMOS; Άρειος Πάγος, 24/02/2012 353/2012, NOMOS; *Κώδικας Πολιτικής Δικονομίας* (Code of Civil Procedure), Art. 538-551 on Αναψηλάφηση (retrial); and *Κώδικας Διοικητικής Δικονομίας* (Code of Administrative Procedure), on Δεδικασμένο (*res judicata*).

<sup>73</sup> (ES) *Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa* (Law on administrative judicial procedures), Art. 102, on *Revisión de sentencias* (retrial); *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil* (Civil Procedure Code), Art. 509 on *Revisión de sentencias firmes* (retrial of final judgments); and *Real decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal* (Criminal procedure code), Art. 954 on *Recurso de revisión* (action for retrial).

<sup>74</sup> Under French law, it is not possible either to compromise the *res judicata* of a final judgment by reason of an erroneous interpretation of law. Therefore, retrial is not possible on the ground of breach of EU law, neither in administrative, nor in civil matters. See also Olivier Dubos, David Katz, and Philippe Mollard, 'Rapport français' in Coutron and Bonichot (n 11) 210–217.

<sup>75</sup> (LU) *Nouveau Code de Procédure Civile* (New Civil Procedure Code), Art. 617 on *rétractation*.

<sup>76</sup> (SI) *Zakon o upravnem sporu* (Administrative Dispute Act), 96. člen on *obnova postopka* (reopened proceedings).

into four main groups: discovery of fresh evidence or of the fact that the evidence had been falsified or involved fraud; default judgments; contradictory judgments; or grave legal errors.<sup>77</sup> Erroneous interpretation of the law is therefore not a reason to make use of this extraordinary remedy.

Nevertheless, as already mentioned, in several Member States a judgment by the ECtHR is a ground in its own right to reopen cases.<sup>78</sup> In this regard, the Council of Europe has even published a recommendation on the re-examination or reopening of certain cases at domestic level following judgments of the ECtHR.<sup>79</sup> In this document, the panel invites the Contracting Parties to ensure that there exist, at national level, adequate possibilities to achieve, as far as possible, *restitutio in integrum*; for example by way of reopening cases. Such provisions can be found in the criminal procedural code of most Member States of the EU, and in the civil or administrative procedure in Bulgaria,<sup>80</sup> Germany,<sup>81</sup> Estonia,<sup>82</sup> Lithuania,<sup>83</sup> Netherlands<sup>84</sup> and Romania,<sup>85</sup> for example. It is noteworthy, however, that the possibility of retrial based on breach of the ECHR is usually limited to specific cases in which the ECtHR has rendered its judgment.

## b) Application of the regime to violations of EU law

### Austria

#### *National rules on retrial*

There are two judgments reported from Austria confirming that, under this regime, a subsequent CJEU judgment on the interpretation of the EU norm is not a reason for reopening proceedings.

<sup>77</sup> Kornezov (n 13) 829.

<sup>78</sup> It is noteworthy that, in the event of reopening of the final judgment on the ground of breach of the ECHR, the breach must usually be established by the ECtHR in the same case, and the reopening concerns only the main proceedings at issue.

<sup>79</sup> (ECHR) Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights (Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies).

<sup>80</sup> (BG) *Grazhdanski protsesualen kodeks* (n 59), Art. 303, § 1, 7); and *Aministrativen protsesualen kodeks* (n 59), Art. 239.

<sup>81</sup> (DE) *Zivilprozessordnung* (n 70), § 580, Nr. 8. Even if it was debated before the legislation whether to extend the scope of retrial to situations of inconsistency with the CJEU judgments, this proposal was eventually rejected. See (DE) Bundestag-Drucksache, 13/3594, 29/01/1996.

<sup>82</sup> (EE) *Halduskohtumenetluse seadustik* (Code of Administrative Court Procedure), § 240(2) 8) on *Teistmine* (retrial); and *Tsiviilkohtumenetluse seadustik* (Code of Civil Procedure), § 702(2) 8) on *Teistmine* (retrial). See also ACA (n 11), National report of Estonia, Question 14.

<sup>83</sup> (LT) *Civilinio proceso kodeksas* (Civil Procedure Code), XVIII Skyrius, 366 straipsnis 1. 1.) on *Proceso atnaujinimas* (reopening of proceedings); and *Lietuvos Respublikos Administracinių Bylių Teisenos Įstatymo Pakeitimo Įstatymas* (n 48) 153 straipsnis 2.1.

<sup>84</sup> (NL) *Wetboek van Burgerlijke Rechtsvordering* (n 65), Artikel 382 on *Herroeping van vonnissen* (revocation of judgments).

<sup>85</sup> (RO) *Codul de procedură civilă* (Civil Procedure Code), Art. 509 (1) 10. This provision is applicable in administrative matters as well; and *Legea Nr. 554/2004 contenciosului administrative* (n 55), Art. 21, § 1.

### *Judgment of the Verwaltungsgerichtshof of 2009*

In this regard, according to the judgment of the VwGH rendered on 21 September 2009, there is no provision in the General Administrative Procedure Act to allow retrial on this ground.<sup>86</sup>

### *Judgment of the Oberster Gerichtshof of 2012*

As for civil matters, the OGH rendered a similar decision regarding the interpretation of the Code of Civil Procedure on 12 June 2012.<sup>87</sup> Moreover, the same rule applies equally to fiscal matters.<sup>88</sup>

## **Belgium**

Under Belgian procedural laws, misinterpretation of law in a final judgment cannot serve as a ground for retrial, regardless of whether the breach concerns national or EU rules.<sup>89</sup>

## **Bulgaria**

### *National rules on retrial*

As for Bulgarian law, both procedural codes and case-law have remained silent on whether a CJEU judgment may offer a ground for retrial.<sup>90</sup> Retrial is granted, *inter alia*, where a subsequent judgment by the ECtHR makes it necessary,<sup>91</sup> and where new facts that could have had an influence on the final decision have been discovered.<sup>92</sup>

The legal literature does not exclude the possibility that a new CJEU case-law could eventually be considered as a new fact, and could serve as a ground for retrial. In this respect, Fartunova relies on two decisions of the Bulgarian highest courts to conclude that such reopening might eventually be possible in the event of violation of EU law, under certain conditions.<sup>93</sup>

### *Decision of the Varhoven kasatsionen sad of 2012*

In the first decision, rendered on 9 February 2012, the *Varhoven kasatsionen sad* (Supreme Court of Cassation, Bulgaria) refused the motion for retrial as it had not found any connection between the underlying case and EU law.

<sup>86</sup> For the exclusion of the reopening of a final administrative judgment on these grounds, see (AT) Verwaltungsgerichtshof, Erkenntnis, 21/09/2009, 2008/16/0148, VwSlg 8471 F/2009, declaring that there is no applicable provision for retrial in the *Allgemeines Verwaltungsverfahrensgesetz* (n 67), § 69. For fiscal matters, see also *Bundesabgabenordnung* (n 67), § 303, and Pelzl (n 67) 98–104.

<sup>87</sup> For the exclusion of the reopening of a final civil judgment see (AT) OGH, Beschluss, 12/06/2012 (n 67), rendered on the basis of *Zivilprozessordnung* (n 67), Art. 530–531.

<sup>88</sup> (AT) *Bundesabgabenordnung* (n 67), § 303, and Pelzl (n 67) 98–104.

<sup>89</sup> (BE) Arrêté du Régent déterminant la procédure devant la section du contentieux administratif du Conseil d'État (n 68) Art. 50bis à 50sexies; and *Code judiciaire* (n 68), Art. 23. In Belgium, the revocation of the final decision by the administration is not possible if the administrative court has already confirmed the decision. See also Yves Houyet, 'Rapport belge' in Coutron and Bonichot (n 11) 123, 126–127.

<sup>90</sup> (BG) *Grazhdanski protsesualen kodeks* (n 59), Art. 303; and *Aministrativen protsesualen kodeks* (n 59), Art. 239.

<sup>91</sup> (BG) *Grazhdanski protsesualen kodeks* (n 59), Art. 303, § 1, 7; and *Aministrativen protsesualen kodeks* (n 59), Art. 99, § 1, 7) and 239 § (6).

<sup>92</sup> (BG) *Grazhdanski protsesualen kodeks* (n 59), Art. 303, § 1, 5; and *Aministrativen protsesualen kodeks* (n 59), Art. 239.

<sup>93</sup> Fartunova (n 59) 161.

In fact, the applicant argued that the supreme court had infringed its obligation to submit a request for preliminary ruling to the CJEU in the preliminary proceedings. However, for the *Varhoven kasatsionen sad*, the questions proposed by the applicant did not concern the interpretation of EU law, and therefore the request for retrial was dismissed.

According to Fartunova's interpretation of this judgment, the situation would have been different had the case concerned EU law. In such a hypothetical situation, the infringement of the obligation to refer a question to the CJEU would have had the result of preventing the discovery of new facts having a potential influence on the final judgment.<sup>94</sup>

#### *Decision of the Varhoven administrativen sad of 3 July 2012*

In the second case, the *Varhoven administrativen sad* (Supreme Administrative Court, Bulgaria) pronounced on the relationship between the violation of EU law and the national rules on retrial concerning an administrative dispute. In its decision of 3 July 2012, it found that the conditions for retrial had not been met in the case.<sup>95</sup>

The applicant introduced a request for retrial because, in the preliminary proceedings, the *Varhoven administrativen sad* had not considered a judgment of the CJEU, and rendered a decision contrary to EU law. In this regard, he referred to a case before the CJEU in which he had also been party, and in which the judgment had been pronounced after the contested national decision was made. Under these circumstances, the *Varhoven administrativen sad* found that the judgment of the CJEU could not be considered as a new fact or new circumstance in terms of the rules on retrial. That is because the applicant had already known about the proceedings before the CJEU at the time of the primary proceedings.

Fartunova considers that a judgment of the CJEU can, however, constitute a new fact or circumstance justifying the reopening of the case if the applicant had only received knowledge of it after the contested decision was made.<sup>96</sup>

#### *Assessment*

In short, even if the opinion of legal scholarship is in favour of an interpretation of national rules allowing retrial on the ground of infringement of EU law in Bulgaria, it remains to be seen whether the courts will follow this reasoning.

#### **Croatia**

In Croatia, although the civil procedure act provides for a revision against a second instance decision when necessary in the light of the jurisprudence of the CJEU,<sup>97</sup> revision is excluded against the second instance decisions of the national supreme court.<sup>98</sup>

<sup>94</sup> (BG) *Varhoven kasatsionen sad, Reshenie*, 09/02/2012 (n 59).

<sup>95</sup> (BG) *Varhoven administrativen sad, Reshenie*, 03/07/2012 (n 59).

<sup>96</sup> Fartunova (n 59) 161.

<sup>97</sup> (HR) *Zakon o parničnom postupku* (n 54), članak 382 (2) (3) on *Revizija*.

<sup>98</sup> (HR) *Zakon o parničnom postupku* (n 54), članak 382.a (1).

## Cyprus

In Cyprus, the Supreme Constitutional Court has the final decision on a complaint that a decision of a state body is contrary to the law. There is, however, no case-law available on the application of this rule to violations of EU law.<sup>99</sup>

## Czech Republic

### *National rules on retrial*

The Czech civil procedure code does not allow for the reopening of cases on the ground of breach of national or EU rules, because of the principle of *res judicata*.<sup>100</sup>

However, it is possible to ask for the reopening of the case before the *Ústavní soud* (Czech Constitutional Court), if an international court has subsequently delivered a judgment in the same case, which contradicts the national decision. Nevertheless, this remedy appears to apply to ECtHR judgments, and not to CJEU decisions.<sup>101</sup> Moreover, such an application for retrial is inadmissible if the consequences of the violation of human rights have been sufficiently remedied, e.g. by providing just satisfaction via compensation.<sup>102</sup>

### *Judgment of the Nejvyšší správní soud of 2010*

In addition, in terms of a judgment of the *Nejvyšší správní soud* (Czech Supreme Administrative Court) of 27 October 2010, a subsequent CJEU judgment on the interpretation of the EU norm is not a reason to revoke administrative decisions already confirmed by the administrative court.<sup>103</sup>

This judgment concerned a *Kühne & Heitz* situation, i.e. a review of an administrative decision which acquired *res judicata*. However, as the *Nejvyšší správní soud* found that as this extraordinary remedy serves to correct factual mistakes and not the erroneous interpretation of law, it dismissed the claim.<sup>104</sup>

## Denmark

In Denmark, cases can be reopened in extraordinary situations.<sup>105</sup> Due to the general scope of application of this provision, it appears suitable for providing remedy for violation of EU law as well. However, there is no case-law available to confirm this assumption.

<sup>99</sup> (CY) ACA (n 11), National report of Cyprus, Question 14.

<sup>100</sup> Petrlík (n 69) 427. See also (CZ) *Občanský soudní řád* (n 69), § 159a (4).

<sup>101</sup> (CZ) *Zákon o Ústavním soudu* (n 49), § 119.

<sup>102</sup> (CZ) *Zákon o Ústavním soudu* (n 49), § 119.

<sup>103</sup> (CZ) *Nejvyšší správní soud, rozsudek, 27/10/2010* (n 69).

<sup>104</sup> (CZ) *Zákon správní řád* (Code of Administrative Procedure), §§ 100–102 on *obnova řízení* (review of proceedings); and *Zákon daňový řád* (Code of Fiscal Procedure), §§ 117–120 on *obnova řízení*.

Moreover, another procedure under Czech law, e.g. the revision (*přezkumné řízení*) is not suitable either, for different reasons, to revoke erroneous administrative decisions on the basis of the *Kühne* doctrine. See (CZ) *Zákon správní řád*, §§ 94–99 on *přezkumné řízení* (revision); and (CZ) *Zákon daňový řád*, §§ 121–124a on *přezkumné řízení*; as well as Petrlík (n 69) 421–424.

<sup>105</sup> (DN) *Retsplejeloven* (n 43), § 399. See also ACA (n 11), National report of Denmark, Question 8b.



## Estonia

Concerning the remedial system of Estonia, legislative provisions stating the grounds for retrial only refer to ECtHR judgments, and not to CJEU decisions.<sup>106</sup> As such, there appears to be no provision applicable for EU law violations.

Moreover, Estonian courts held that reopening cases is only possible if compensation for damages is not available, since Estonian laws give priority to liability claim over retrial.<sup>107</sup>

However, as for the revocation of a final administrative decision, the authority has the right to revoke its decision, contrary to the EU law, even if it has become final following the approval of the administrative court. This possibility appears to be given to Estonian administrative authorities under the general rules,<sup>108</sup> even if there is no specific case-law available in the field of EU law.<sup>109</sup>

## Finland

### *National rules on retrial*

In Finland, reopening a case – in the terms of the Finnish law, the ‘annulment’ of a final judgment – is possible on the ground of a manifest breach of law.<sup>110</sup> Specifically, in terms of the civil and administrative procedure codes, a case can be reopened<sup>111</sup> ‘if the final judgment is based on manifestly erroneous application of the law or on an error which may have had an essential effect on the decision.’

This exceptional remedy is therefore available for both national and EU law violations, but the breach must be qualified, and the reopening must be justified by reasons of individual or general interest.

The jurisprudence has already provided some examples for the application of these rules in cases regarding EU law violations. Mention will therefore be made of six judgments, four rendered by the *Korkein hallinto-oikeus* (Finnish Supreme Administrative Court), and two delivered by the *Korkein oikeus* (Supreme Court of Finland).

### *Judgment of the Korkein hallinto-oikeus of 2009*

In the first judgment of 7 December 2009, the *Korkein hallinto-oikeus* declared that an administrative case can be reopened by the court on the ground of manifestly erroneous application

<sup>106</sup> (EE) *Halduskohtumenetluse seadustik* (n 82), § 240(2) 8); *Tsiviilkohtumenetluse seadustik* (n 82), § 702(2) 8). See also ACA (n 11), National report of Estonia, Question 14.

<sup>107</sup> (EE) *Riigivastutuse seadus* (State Liability Act), § 15(1).

<sup>108</sup> (EE) *Haldusmenetluse seadus* (n 62), §§ 64–70 and §§ 71–74.

<sup>109</sup> ACA (n 11), National report of Estonia, Questions 1–4, 8.

<sup>110</sup> (FI) *Hallintolainkäyttölaki* (n 45), 11 luku, 63 § (1) (2): ‘63 (1) A decision may be annulled: [...] (2) if the decision is based on manifestly erroneous application of the law or on an error which may have had an essential effect on the decision [...]’

(FI) *Oikeudenkäymiskaari* (n 45), 31 luku, 7–10 §: ‘7 § (1) A final judgment in a civil case may be reversed: [...] (4) if the judgment is manifestly based on misapplication of the law.’

<sup>111</sup> Even if it is not the equivalent term of the Finnish law, for the sake of terminological unity, the general term of ‘reopening’ will be used instead of ‘annulment’ of ‘revocation’.

of EU law by the administrative authority.<sup>112</sup> However, the *Korkein hallinto-oikeus* dismissed the request, since it concluded that reopening was not necessary in the case.

The case concerned taxes paid by the applicant for a period between 1999 and 2004, relating to foreign trade. Without having exhausted the administrative remedies available to him, the applicant submitted a claim for reopening the decision of the fiscal authority.

The *Korkein hallinto-oikeus* reviewed the decisions and found that they were in conformity with Finnish law. As for EU law, the *Korkein hallinto-oikeus* stated that their compatibility with the EU rules can be called into question, since Finnish law imposed a higher rate of tax for merchant vessels engaged in foreign trade than for those engaged in domestic trade services. However, the *Korkein hallinto-oikeus* attributed importance to two circumstances when evaluating the necessity to reopen the case. In this regard, it concluded that the applicant had not lodged an appeal against the administrative decisions, and he could have passed the taxes on to his clients. Therefore, after taking all circumstances into account, the *Korkein hallinto-oikeus* decided that there were not sufficient reasons to reopen the case.

In the above decision, the *Korkein hallinto-oikeus* revised an administrative decision which had not been the subject of an ordinary appeal before the administrative court. However, under Finnish law, the same rules apply concerning the reopening of final administrative decisions having or not been subject to appeal before the administrative court.<sup>113</sup>

#### *Judgment of the Korkein hallinto-oikeus of 2010*

In the second judgment of 30 June 2010, the *Korkein hallinto-oikeus* examined the possibility of reopening a case, in which it had delivered a final judgment itself, on the ground of breach of EU law. As in the above case, the court concluded that there was no specific individual or general interest which justified such reopening,<sup>114</sup> and so it dismissed the action.

At the origin of the case was a request for a preliminary ruling submitted by the *Korkein hallinto-oikeus* in 2002, which concerned the Finnish tax on imported vehicles.

Following the judgment by the CJEU,<sup>115</sup> another case emerged before the *Korkein hallinto-oikeus* regarding the application of the same national tax rules in 2006.<sup>116</sup> In these proceedings, the *Korkein hallinto-oikeus* refused to make a new preliminary reference, despite the request of the claimant. Finally, the court handed down its judgment, giving an interpretation to the previous CJEU judgment that did not favour the applicant's claim. In

<sup>112</sup> (FI) *Korkein hallinto-oikeus*, 07/12/2009, 2806, KHO:2009:99, Diaarinumero: 4221/2/08, reported by Heikki Kanninen, 'Rapport finnois' in Coutron and Bonichot (n 11) 195–196.

<sup>113</sup> (FI) *Hallintolainkäyttölaki* (n 45), 11 luku, 63 § (1) (2). As Kanninen explains, under Finnish rules, if an administrative decision has already been subject to an appeal before the administrative court, it can only be revised on the ground of rules governing the reopening of a final judgment. Moreover, the relevant provisions of the Procedural Administrative Code apply also, under certain circumstances, to the re-examination of administrative decisions which have not been the subject of appeal before the administrative court. See Kanninen (n 112) 195.

<sup>114</sup> (FI) *Korkein hallinto-oikeus*, 30/06/2010, 1561, KHO:2010:44, Diaarinumero: 1043/2/09, reported by Kanninen (n 112) 196–197.

<sup>115</sup> (CJEU) Case C-101/00 *Tulliasiamies and Siilin* ECLI:EU:C:2002:505 [2002] ECR I-7487.

<sup>116</sup> In the case at hand, the applicant sought the annulment of the final judgment rendered in this case.

fact, the *Korkein hallinto-oikeus* concluded that the Finnish rules were compatible with EU law, and consequently dismissed the request of the applicant to overturn the tax decision.

Later, in 2009, the CJEU declared in an infringement procedure that the Finnish tax was contrary to the EU law.<sup>117</sup> It thus became clear that the judgment of the *Korkein hallinto-oikeus* in 2006 infringed EU law.

Invoking this new CJEU judgment, the applicant submitted a motion for retrial before the *Korkein hallinto-oikeus*. As for the breach of the referral duty, the court found that the refusal to request a new preliminary ruling had been justified. The court argued that the CJEU had already handed down a judgment in 2002, following a request submitted by the same Finnish court. Therefore, the court had all reason to think in 2006 that a new request was not necessary. As for the infringement of the substantive EU law, the *Korkein hallinto-oikeus* argued that, even if the breach could be established, neither individual nor general interest justified the retrial.<sup>118</sup>

#### *Judgment of the Korkein hallinto-oikeus of 2011*

In the third judgment delivered on 11 April 2011, the *Korkein hallinto-oikeus* reopened the case and annulled, for the first time, one of its former final judgments on the ground of infringement of EU law.<sup>119</sup>

The contested judgment concerned the taxation of controlled foreign companies and the inclusion of the profits of controlled foreign companies in the tax base of the parent company. Despite the request of the applicant, the *Korkein hallinto-oikeus* refused to make a preliminary reference and handed down its judgment in 2002, giving an interpretation to the EU law which did not favour the claim.

Following a judgment by the CJEU in 2006,<sup>120</sup> it became clear that the interpretation of the rules by the *Korkein hallinto-oikeus* had been incorrect. The applicant therefore requested the reopening of the final judgment of 2002.

Examining the motion for retrial, the *Korkein hallinto-oikeus* stated that the breach of the referral duty justified the reopening of the case. In fact, the CJEU case-law had not been sufficiently clear at the time of the main proceedings, which means that a request for preliminary ruling should have been submitted by the court in 2002.

#### *Judgment of the Korkein hallinto-oikeus of 2013*

In the fourth judgment, delivered on 27 December 2013, the *Korkein hallinto-oikeus* dismissed a motion for retrial concerning a case in which it had delivered a final judgment.<sup>121</sup>

<sup>117</sup> (CJEU) Case C-10/08 *Commission v Finland* ECLI:EU:C:2009:171 [2009] ECR I-39\*.

<sup>118</sup> Presented by Kanninen (n 112) 196–197.

<sup>119</sup> (FI) *Korkein hallinto-oikeus*, 11/04/2011, 1018, KHO:2011:38, Diaarinumero: 3059/2/06 reported by Kanninen (n 112) 197.

<sup>120</sup> (CJEU) Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* ECLI:EU:C:2006:544 [2006] ECR I-10423.

<sup>121</sup> (FI) *Korkein hallinto-oikeus*, 27/12/2013, 4057, KHO:2013:199, Diaarinumero 2356/2/13, reported in database JuriFast.

It reached this decision after having concluded that there had been no specific reasons justifying the reopening of the case, also because the applicant had already been given compensation in a liability action for the damages suffered.

The facts at the basis of the dispute can be summarised as follows. The Finnish tax administration had ordered vehicle tax and value added tax to be collected on a used car imported by the applicant from Belgium into Finland in 2003. After exhausting all ordinary appeals against the decision, the Supreme Administrative Court, the *Korkein hallinto-oikeus* had dismissed the taxpayer's claim that the VAT on the car be removed.

After this final administrative judgment, the CJEU declared that the Finnish rules were contrary to EU law.<sup>122</sup>

Afterwards, in a first course of action, the taxpayer applied before the civil court for compensation for the prejudice caused by the assessment decision. The *Korkein oikeus* relied on the subsequent CJEU judgment and stated that the Finnish rules were discriminatory and contrary to EU law. Consequently, the *Korkein oikeus* concluded that the infringement of Article 110 TFEU was sufficiently demonstrated to make Finland liable, so it ordered the state to pay compensation for the prejudice suffered.<sup>123</sup>

Notwithstanding the fact that he had already been compensated for his monetary loss, the taxpayer initiated a second course of action. That time, he asked the revision of the unlawful final administrative judgment before the *Korkein hallinto-oikeus*. The applicant referred to the CJEU decision declaring the Finnish system contrary to EU law and to the judgment of the *Korkein oikeus* in the liability action.

In this regard, the *Korkein hallinto-oikeus* pointed out that the possibility to ask for compensation from the state for the tax unduly paid had to be kept separate from the reopening of the case. The latter is subject to the provisions of the administrative procedural code.<sup>124</sup> As, with hindsight, the administrative judgment's inconsistency with EU law was established, the main condition for retrial was fulfilled. However, it was also necessary to consider that a case can only be reopened for very significant reasons if five years have already elapsed since the date the final judgment became final.<sup>125</sup>

The *Korkein hallinto-oikeus* concluded that the reopening of the case was not necessary, even though the final judgment proved to infringe EU law. It reached this conclusion by referring to the *Köbler* judgment and to the contested Finnish fiscal rules, which had in the meantime been modified without retroactive effect.

<sup>122</sup> (CJEU) *Tulliasiamies and Siilin* (n 115); and in *Commission v Finland* (n 117).

<sup>123</sup> It is interesting to note that to be able to follow up the claimant's application, the supreme court had to set aside the application of a legal rule concerning compensation for prejudice that limited the liability of public entities. See (FI) *Korkein oikeus*, 05/07/2013, *A Oy*, KKO:2013:58, Diaarinumero S2012/143.

<sup>124</sup> (FI) *Hallintolainkäyttölaki* (n 45), 11 luku, 63 § (1) (2).

<sup>125</sup> (FI) *Hallintolainkäyttölaki* (n 45), 11 luku, 64 § (2).

*Judgment of the Korkein oikeus of 2007*

As for civil matters, in the fifth judgment rendered on 2 April 2007, the *Korkein oikeus* reopened the case and annulled a final judgment of a first instance court, due to the manifestly erroneous application of EU law.<sup>126</sup>

The contested judgment concerned a liability claim regarding motor vehicle insurance.<sup>127</sup> After the first instance court's decision was pronounced, the CJEU handed down a judgment which interpreted the relevant provisions of the EU directive.<sup>128</sup> Following this judgment, the *Korkein oikeus* itself changed its case-law concerning the interpretation of the EU provision at issue.

Relying on the new case-law, the *Korkein oikeus* found in the retrial proceedings that the final judgment had applied the EU provisions in a manifestly erroneous way. Hence, as the conditions to reopen the case were satisfied, the *Korkein oikeus* declared the applicant's claim well founded.<sup>129</sup>

*Judgment of the Korkein oikeus of 2007*

In the sixth judgment, pronounced also on 2 April 2007, the *Korkein oikeus* declared inadmissible a motion for retrial, because of the expiry of the time limit to submit such a request.<sup>130</sup>

In that case, after the delivery of the final judgment on motor vehicle insurance, the *Korkein oikeus* changed the way it interpreted the EU provision at issue in the contested judgment. Moreover, the CJEU handed down a judgment<sup>131</sup> which interpreted the provisions of the EU directive in a way that was favourable to the applicant.<sup>132</sup>

However, as the motion was submitted later than one year after the contested judgment acquired *res judicata*, the request was dismissed.<sup>133</sup>

*Assessment*

In summary, reopening a case – in terms of the Finnish rules, the ‘annulment’ of the final judgment – by reason of violation of EU law is possible and subject to the evaluation of a case's specific circumstances under Finnish administrative and civil law.<sup>134</sup> As such, the necessity to set aside the *res judicata* is evaluated on a case-by-case basis.

<sup>126</sup> (FI) *Korkein oikeus*, 02/04/2007, 626, KKO:2007:34, Diaarinumero: H2006/18, reported by Kanninen (n 112) 193–194.

<sup>127</sup> (EU) Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1984] OJ 8/17.

<sup>128</sup> (CJEU) Case C-537/03 *Candolin and Others* ECLI:EU:C:2005:417 [2005] ECR I-5745.

<sup>129</sup> The presentation of the case is provided after Kanninen (n 112) 194.

<sup>130</sup> (FI) *Korkein oikeus*, 02/04/2007, 627, KKO:2007:35, Diaarinumero: H2006/166, reported by Kanninen (n 112) 194.

<sup>131</sup> (CJEU) Judgment in *Candolin and Others* (n 128).

<sup>132</sup> Presentation after Kanninen (n 112) 194.

<sup>133</sup> (FI) *Oikeudenkäymiskaari* (n 45), 31 luku, 10 §

<sup>134</sup> (FI) *Hallintolainkäyttölaki* (n 45), 11 luku, 63 § (1) (2); and *Oikeudenkäymiskaari* (n 45), 31 luku, 7–10 §.

The time limit to submit a motion for retrial differs in administrative and civil matters. As for the former, they must be presented within five years following the judgment acquired *res judicata*;<sup>135</sup> as for the latter, the time limit is only one year.<sup>136</sup>

To conclude, Finnish law does not seem to attribute importance to the distinction whether the CJEU judgment was rendered before or after the national decision. In fact, under Finnish rules, the mere breach of law may be sufficient to justify retrial. The question whether the violation became apparent due to a CJEU judgment delivered before or after the decision seems to be irrelevant.

### France

Under the French law, it is not possible to compromise the *res judicata* of a final judgment invoking an erroneous interpretation of law. Retrial is therefore not possible on grounds of misinterpretation of national or EU law, neither in administrative, nor in civil matters.<sup>137</sup>

### Germany

Similarly to most Member States, the inconsistency of a final judgment with national or EU law is not a ground for retrial in terms of the German procedural rules.<sup>138</sup>

### Greece

The same holds true for Greek law, which does not provide a ground for retrial in cases of violation of national or EU rules by the final judgment.<sup>139</sup>

Even so, the Areios Pagos (Greek Supreme Court of Cassation) has ruled that an ECtHR judgment can serve as a reason to reopen final judgments only in criminal cases.<sup>140</sup> As for civil

<sup>135</sup> (FI) *Hallintolainkäyttölaki* (n 45), 11 luku, 64 § (2).

<sup>136</sup> (FI) *Oikeudenkäymiskaari* (n 45), 31 luku, 10 §.

<sup>137</sup> See also Dubos, Katz and Mollard (n 74) 210–217. As for the revocation of final administrative decision by the administrative authority or the administrative court, it is possible under certain circumstances defined by the code de procédure administrative. It should however be mentioned, that the *Conseil d'État* adopted a special solution for the revision of final individual administrative decisions which has conferred rights to individuals. Despite the general prohibition to revoke a decision favourable to the individual, this is exceptionally possible even beyond the four-month time limit if the decision concern a state aid which had been allocated in violation of EU law. See (FR) Code de justice administrative (Code of Administrative Justice), Art. R. 421-1 for the revision of final individual administrative decisions by the administrative court; Conseil d'État, Assemblée, décision, 26/10/2001, *Ternon*, n° 197018, ECLI:FR:CEASS:2001:197018.20011026, Publié au recueil Lebon, regarding the revision by the administrative court itself; and Conseil d'État, 29/03/2006, Centre d'exportation du livre français et Ministre de la culture et de la communication, n° 274923, Rec. p. 173, reported by Dubos, Katz and Mollard (n 74) 200–210.

<sup>138</sup> (DE) *Verwaltungsgerichtsordnung* (n 70), § 153; and *Zivilprozessordnung* (n 70), § 580. See also Daniel Dittert, 'Rapport allemande' in Coutron and Bonichot (n 11) 66; and Oberlandesgericht Köln, 6 U 158/03 (n 70).

<sup>139</sup> Retrial is not possible in civil matters and administrative matters. See (EL) *Κώδικας Πολιτικής Δικονομίας* (n 72), Art. 538-551, 544; *Κώδικας Διοικητικής Δικονομίας* (n 72), Αρθρο: 197; and Αρειος Πάγος, 16/03/2011 (n 72). See also Vassili Christianos, 'Rapport hellénique' in Coutron and Bonichot (n 11) 235–236.

<sup>140</sup> (EL) *Κώδικας Ποινικής Δικονομίας* (Code of Criminal Procedure), on Επανάληψη της Διαδικασίας (retrial). See also Christianos (n 139) 235–236.



or administrative disputes, an ECtHR judgment can only give rise to compensation, but cannot provide ground to reopen a final judgment.<sup>141</sup>

## Hungary

### *National rules on retrial*

Hungarian courts have repeatedly held that a breach of law in a final judgment is not a ground for retrial according to the procedural rules.<sup>142</sup>

### *Decision of the Alkotmánybíróság of 2014*

The judgment by the *Fővárosi Törvényszék* (Budapest Municipal Court, Hungary) applying the above principle in an EU-related case,<sup>143</sup> was confirmed by the *Alkotmánybíróság* (Constitutional Court) on 7 July 2014.<sup>144</sup> In this regard, the *Fővárosi Törvényszék* explained that a subsequent judgment by the CJEU, rendered in a distinct procedure, cannot be considered as a new fact, and, therefore, cannot justify reopening the case. The *Alkotmánybíróság* emphasised in this regard that the CJEU judgment has only *ex nunc* effect.

## Italy

### *National rules on retrial*

In the Italian legal system, the *res judicata* principle is of paramount importance,<sup>145</sup> hence retrial is not an accepted method for remedying misinterpretations of law.

### *Judgment of the Tribunale di Roma of 2011*

In the national follow-up of the *Lucchini* judgment,<sup>146</sup> the *Tribunale di Roma* denied retrial, even following the CJEU decision rendered in the same case.<sup>147</sup> The court decided, the principle of *res judicata* did not allow the reopening of the case, despite the preliminary ruling by the CJEU.

### *Judgment of the Corte di Cassazione of 2008*

On the other hand, in a judgment of 12 May 2008, the *Corte Suprema di Cassazione* accepted, as a consequence of the *Lucchini* judgment, that *res judicata* can be set aside in very exceptional circumstances.<sup>148</sup>

<sup>141</sup> (EL) Αρειος Πάγος, 14/12/2004 (n 72); and Αρειος Πάγος, 24/02/2012 (n 72).

<sup>142</sup> (HU) See judgments below, rendered on the basis of *A polgári perrendtartásról szóló 1952. évi III. törvény* (n 9), 260. § which contain a similar provision that the *A polgári perrendtartásról szóló 2016. évi CXXX. törvény* (n 8), 394. §.

<sup>143</sup> (HU) Fővárosi Törvényszék, végzés, 3.Kf.650.165/2013/3.

<sup>144</sup> (HU) Alkotmánybíróság, végzés, 07/07/2014 (n 64).

<sup>145</sup> (IT) *Codice Civile* (n 25), Art. 2909; and *Codice di procedura civile* (n 63), Art. 395. Moreover, the rules on the power of the administrative authority to revoke its former decisions (*autotutela*) do not seem to permit to review the erroneous decisions either. See *Legge sul procedimento amministrativo* (Code of the Administrative Procedure), Art. 21-nonies on *Autotutela*. See also Gencarelli (n 63) 275–278.

<sup>146</sup> (IT) Tribunale di Roma, Seconda sezione civile, Sentenza, 23/03/2011 (n 63).

<sup>147</sup> See (CJEU) *Lucchini* (n 18).

<sup>148</sup> (IT) Corte Suprema di cassazione, Cassazione civile, Sezione unite, Sentenza, 19/05/2008, n° 12641, reported by Gencarelli (n 63) 273.

### Assessment

As in Italy retrial can be granted in very exceptional, state aid-related cases only, it cannot be considered as a generally available remedy for violation of EU law.

### Ireland

The reopening of cases in which the High Court or the Supreme Court has delivered a final judgment is not possible in Ireland either.<sup>149</sup>

### Latvia

In Latvia, the judgment of the ECtHR or other international or supranational courts can serve as a ground for retrial – in terms of the Latvian rules, *‘adjudication of matters de novo’* – in connection with newly discovered facts.<sup>150</sup> The CJEU is considered to be one such international court. However, for the application of this provision, the jurisprudence appears to require that the judgment of the international court be made in the same case as is concerned by the motion for retrial.<sup>151</sup>

### Lithuania

#### *National rules on retrial*

Under Lithuanian law, cases before administrative courts can be reopened on condition that the applicant submits clear evidence showing a fundamental violation of a substantive provision of law that led to the illegality of the judgment.<sup>152</sup> According to the case-law of the *Vyriausiasis administracinis teismas* (Supreme Administrative Court, Lithuania), the infringement is considered to be obvious when there are no reasonable doubts regarding the erroneous interpretation of the norms.<sup>153</sup>

The above rules have general application, and both breach of substantive law connected to EU legal rules and infringement of national law fall into this category. Administrative proceedings can therefore be reopened where the administrative court of last instance commits a manifest infringement of substantive EU law.<sup>154</sup> In fact, the *Vyriausiasis administracinis teismas* has already reopened cases on these grounds.

<sup>149</sup> (IE) *Blackhall v Grehan* [1995] (n 71).

<sup>150</sup> (LV) *Administratīvā procesa likums* (n 50), 353. pants 6); and *Civilprocesa likums* (n 50), 479. pants 6).

<sup>151</sup> (LV) Latvijas Republikas Augstākās tiesas, Senāta Administratīvo lietu departamenta, spriedums, 14/11/2011 (n 53).

<sup>152</sup> (LT) *Lietuvos Respublikos Administracinių Bylių Teisenos Įstatymo Pakeitimo Įstatymas* (n 48), 153 straipsnis: ‘2. The proceedings may be resumed on the following grounds: 1) if the European Court of Human Rights rules that a decision of the court of the Republic of Lithuania is not in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; [...] 10) in case of submission of clear evidence of the commission of a material violation of the norms of substantive law in the application of the norms which could have affected the adopting of the illegal decision, ruling or order; [...] 12) when it is necessary to ensure the formation of uniform practice of administrative courts.’ See also ACA (n 11), National report of Lithuania, Questions 1–4, 11; and Regina Valutyté, ‘Lithuanian report’ in Coutron and Bonichot (n 11) 301. The deadline to submit the motion for retrial is three months.

<sup>153</sup> Valutyté (n 152) 301–302.

<sup>154</sup> Valutyté (n 152) 301. See also ACA (n 11), National report of Lithuania, Question 3.

However, as for civil matters, retrial based on violation of law is possible on more limited grounds. As such, only judgments of inferior courts, which became final in the absence of appeal against them, can be revised for this reason in retrial proceedings.<sup>155</sup> Reopening of cases where the judgments have been rendered by superior courts is not provided on the ground of erroneous interpretation of law.

Moreover, both civil and administrative procedure codes provide explicit grounds for retrial where a judgment by the ECtHR establishes the violation of the fundamental rights by a final national decision. However, these provisions only refer to the ECtHR judgments, and not to CJEU decisions.<sup>156</sup>

As already mentioned, the *Vyriausiasis administracinis teismas* has already applied the domestic rules on retrial in EU-related cases. Two judgments are worth being mentioned in this regard.

#### *Decision of the Vyriausiasis administracinis teismas of 2008*

In the first case, the *Vyriausiasis administracinis teismas* decided on 10 April 2008 to reopen a case due to the violation of a substantive EU provision in the primary proceedings.<sup>157</sup>

The main facts at the origin of the primary proceedings are as follows. The administrative authority had imposed a fine on a student for failing to produce a document, when requested, to certify his entitlement to reduced-rate public transport. In fact, the applicant, a university student in France, had in his possession a certificate from a French university, but the Lithuanian administrative body refused to accept the foreign document. The student, contesting the refusal because of the violation of several fundamental freedoms protected by the TFEU, asked the administrative court to overturn the administrative decision. The first instance court accepted the complaint, but then the *Vyriausiasis administracinis teismas* dismissed the claim without discussing the question of the application of the EU law.

Dissatisfied with the final judgment, the student asked for the reopening of the case. He contested, in particular, that the *Vyriausiasis administracinis teismas* had refused to bring the matter before the CJEU, and had failed to apply the relevant international and EU provisions correctly.<sup>158</sup>

The *Vyriausiasis administracinis teismas*, deciding on the motion for retrial, concluded that the EU provisions should have been applied in the underlying proceedings and could have had an impact on the outcome of the case. It therefore decided that there were sufficient grounds to establish a fundamental infringement of substantive legal provisions in the main proceedings, which could have affected the contested decision, and so it decided to reopen the case.

<sup>155</sup> (LT) *Civilinio proceso kodeksas* (n 83), XVIII *Skyrius*, 366 *straipsnis* 1. 9).

<sup>156</sup> (LT) *Civilinio proceso kodeksas* (n 83), XVIII *Skyrius*, 366 *straipsnis* 1. 1); and *Lietuvos Respublikos Administracinių Bylų Teisenos Įstatymo Pakeitimo Įstatymas* (n 48), 153 *straipsnis* 2.1.).

<sup>157</sup> (LT) Lietuvos vyriausiojo administracinio teismo, 10/04/2008, *nutartis administracinėje byloje* Nr. P444-129/2008.

<sup>158</sup> The claimant had also introduced a request for compensation for the damages suffered. However, as the proceedings were reopened, the damages claim was refused.

*Decision of the Vyriausiasis administracinis teismas of 2009*

In the second judgment of 31 July 2009, the *Vyriausiasis administracinis teismas* even established the infringement of EU law by the *Konstitucinis Teismas* (Constitutional Court, Lithuania). However, the claim was finally rejected, as the applicant had not asked for a review of the decision or compensation for damages but for the case to be reopened.<sup>159</sup>

In the case at hand, the applicant lodged a complaint before the *Vyriausiasis administracinis teismas* against a ruling of the *Konstitucinis Teismas*. The applicant contested that the ruling had been adopted without applying EU law and interpreting the Constitution in the light of the EU rules. The applicant maintained that there was a double violation from the part of the Constitutional Court; first, because it had not considered at all the application of EU law; and second, it had not referred a question for a preliminary ruling to the CJEU. The applicant therefore asked for it to be declared that the state, as a legal person acting through the Constitutional Court, infringed the EU law. Moreover, he asked the *Vyriausiasis administracinis teismas* to order the *Konstitucinis Teismas* to reopen proceedings and to make a preliminary reference to the CJEU.

Discussing the obligation of the *Konstitucinis Teismas* as a body of public administration, the *Vyriausiasis administracinis teismas* stressed that the latter should interpret the Constitution in the light of EU law. Moreover, the *Konstitucinis Teismas* also has the obligation to submit a preliminary question if the interpretation of EU law arises before it. According to the *Vyriausiasis administracinis teismas*, the *Konstitucinis Teismas* does not have any discretion to refuse to apply EU law and its actions may be challenged in the same way as the actions of other subjects of public administration.<sup>160</sup> Nevertheless, as the *Vyriausiasis administracinis teismas* could not satisfy the applicant's claim to order the *Konstitucinis Teismas* to reopen the case, the claim was dismissed in the end.

*Assessment*

In conclusion, retrial on the ground of manifest breach of EU law has been accepted and applied by the *Vyriausiasis administracinis teismas* in administrative cases.<sup>161</sup>

Based on the above information, we can draw two conclusions. First, due to the objective condition regarding the infringement, situations where the violation became apparent, either due to a prior or subsequent judgment of the CJEU, can provide sufficient grounds to reopen and re-examine a final judgment. However, as the violation of EU law must be sufficiently serious, a final judgment based on the misinterpretation of EU law can only be reopened in the event of a serious breach of substantive law.<sup>162</sup>

<sup>159</sup> (LT) Lietuvos vyriausiojo administracinio teismo, 31/07/2009, nutartis administracinėje byloje S. T. v Lietuvos Respublika, atstovaujama Lietuvos Respublikos Konstitucinio Teismo, bylos Nr. AS502-363/2009, reported by Valutyté (n 152) 293–295.

<sup>160</sup> Valutyté (n 152) 293–295.

<sup>161</sup> (LT) Lietuvos vyriausiojo administracinio teismo, 10/04/2008, nutartis administracinėje byloje Nr. P444-129/2008 (n 157).

<sup>162</sup> ACA (n 11), National report of Lithuania, Question 3.

Second, in Lithuanian administrative law, the conditions for retrial and finding liability appear to be similar. Moreover, it seems that the two types of proceedings can be undertaken concurrently, as there is no formal link between these two remedies. In this regard, on the one hand, the modification or the overturning of the decision in the retrial procedure can give rise to posterior liability proceedings instituted by the party having suffered damages caused by the illegal final judgment. On the other hand, the retrial procedure is not a precondition for a liability claim. Apparently, it is for the applicant to decide which remedy to seek and the *Vyriausiasis administracinis teismas* will decide accordingly.<sup>163</sup>

It should be emphasised that retrial on the ground of breach of EU law has yet only been accepted by the case-law in administrative matters<sup>164</sup> but not in civil cases.<sup>165</sup>

### Luxembourg

In terms of the Luxembourgish procedural rules, the misinterpretation of national or EU law by a final judgment is not a reason for retrial.<sup>166</sup>

### Malta

#### *National rules on retrial*

In Malta, cases can be reopened because of a wrong application of the law.<sup>167</sup> Even if there is no case-law on the application of this rule for violation of EU law, it seems plausible to initiate retrial proceedings on these grounds.

#### *Judgment of the ECtHR in the San Leonard Band Club v Malta case*

It may be interesting to mention in this context the judgment by the ECtHR in the case of *San Leonard Band Club v Malta* from 29 July 2004 that concerned the ground for retrial relating to a ‘wrong application of the law’. In fact, the ECtHR stated that this was similar to an appeal on points of law, and, therefore, Article 6 ECHR had been held to be applicable to it. As, under Maltese rules, retrial proceedings are filed before the same judge who decided the contested case,<sup>168</sup> courts are in fact called upon to decide whether they themselves have committed an

<sup>163</sup> This assumption is reinforced by another judgment of the *Vyriausiasis administracinis teismas*. In this case, even though the infringement of the EU law by the ruling of the Constitutional Court had been established, neither damages nor retrial were awarded as the applicant had not presented any requests in these regards. See (LT) Lietuvos vyriausiojo administracinio teismo, 31/07/2009 (n 159). See also ACA (n 11), National report of Lithuania, Question 14.

<sup>164</sup> (LT) Lietuvos Respublikos Administracinių Bylų Teisenos Įstatymo Pakeitimo Įstatymas (n 48). See also Valutyté (n 152) 301–302.

<sup>165</sup> (LT) *Civilinio proceso kodeksas* (n 83), XVIII Skyrius, 366 straipsnis. See also Valutyté (n 152) 302–303.

<sup>166</sup> (LU) *Nouveau Code de Procédure Civile* (n 75), Art. 617.

<sup>167</sup> (MT) Code of Organization and Civil Procedure (n 44), Art. 811 (e): ‘811. A new trial of a cause decided by a judgment given in second instance or by the Civil Court, First Hall in its Constitutional Jurisdiction, may be demanded by any of the parties concerned, such judgment being first set aside, in any of the following cases: (e) where the judgment contains a wrong application of the law’. See also ACA (n 11), National report of Malta, Question 8.

<sup>168</sup> (MT) Constitutional Court, judgment, 10/10/1991, *Frank Cachia v the Honourable Prime Minister*.

error of legal interpretation or application in their previous decision. For that reason, the ECtHR concluded that there had been a violation of the right to fair trial.<sup>169</sup>

## Netherlands

### *National rules on retrial*

Dutch procedural rules do not provide a legal basis for retrial on the ground of misinterpretation of law.<sup>170</sup>

National case-law has also confirmed that, in the application of Dutch procedural rules, a subsequent CJEU judgment on the interpretation of the EU norm is not a reason to reopen cases.<sup>171</sup> Two judgments can be cited as examples in this regard.

### *Judgment of the Hoge Raad of 2011*

The first judgment was delivered by the *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands) on 24 June 2011. In that decision, the court concluded that a subsequent CJEU judgment cannot be considered as a fact or circumstance which occurred before, and was unknown at the time when the contested judgment was made.<sup>172</sup> Moreover, the *Hoge Raad* emphasised the importance of legal certainty and *res judicata*, referring to CJEU judgments on this matter.<sup>173</sup>

### *Judgment of the Raad van State of 2004*

The second judgment was delivered by the *Raad van State* (Council of State) on 27 October 2004, which contains a similar reasoning as the above decision.<sup>174</sup>

### *Assessment*

There is no legal basis for retrial in the event of violation of EU law by a final judgment in the Netherlands. Consequently, Netherlands' courts refuse motions for retrial submitted on these grounds. Moreover, the *Tweede Camer* (Lower House) argued that there was no reason to adopt legislative amendments allowing the reopening of cases following CJEU and ECtHR judgments. In this regard, the panel pointed out that state liability for judicial errors has already been recognised and it was sufficient to remedy these violations.<sup>175</sup>

<sup>169</sup> (ECtHR) *San Leonard Band Club v Malta*, Judgment of 29 July 2004, no. 77562/01, ECHR 2004-IX, §§ 43 and 64.

<sup>170</sup> (NL) *Algemene wet bestuursrecht* (n 65), Artikel 8:119: '1. At the request of a party, the district court may review a final judgment on the grounds of facts or circumstances: (a) which took place before the judgment, (b) of which the one who asked for a review had no knowledge, and could not reasonably have had any knowledge, before the judgment, and (c) which, had they been known to the district court previously, might have led to a different judgment'; *Wetboek van Burgerlijke Rechtsvordering* (n 65), Artikel 382. See also ACA (n 11), National report of the Netherlands, introduction.

<sup>171</sup> (NL) Centrale Raad van Beroep, 17/11/2006 (n 65).

<sup>172</sup> (NL) Hoge Raad, Uitspraak, 24/06/2011 (n 65) on *Herroeping van vonnissen* (revocation of decisions).

<sup>173</sup> (CJEU) *Köbler* (n 2), para 38; *Külme & Heitz* (n 14), para 24; *Kapferer* (n 12), para 24.

<sup>174</sup> (NL) Afdeling bestuursrechtspraak van de Raad van State, 27/10/2004 (n 65).

<sup>175</sup> (NL) Tweede kamer (Lower House), 12/08/2005, 2004–2005, 29279, no. 28. The Parliament of the Netherlands has asked the Government to consider amending article 8:88 of the General Administrative Law Act in order to create the possibility of reviewing the judgment of an administrative court, if it follows from judgments of the



## Poland

### *National rules on retrial*

Misinterpretation of law is not a ground for retrial in the Polish procedural codes either.<sup>176</sup> The *Sąd Najwyższy* (Supreme Court, Poland) already decided, in a civil judgment rendered on 22 October 2009, that the inconsistency of a final judgment with EU law is not a reason to reopen cases.<sup>177</sup>

As for administrative matters, retrial can be granted wherever an obligation under an international agreement requires it.<sup>178</sup> According to the legal literature, this rule can eventually serve as a legal basis for retrial on account of a subsequent CJEU judgment.<sup>179</sup> However, it is not possible to be aware of how this rule is applied in practice, in the absence of a relevant case-law.

### *National rules on the revocation of final administrative decisions*

Nevertheless, in Poland, fiscal authorities hold the right to revoke their previous decisions which prove to be inconsistent with EU law in the light of a subsequent CJEU judgment.<sup>180</sup> Authorities have this competence, even if the final decision has already been confirmed by the administrative court.<sup>181</sup> As such, this procedure can be considered as a method to remedy a violation of EU law by the administrative court, confirming an erroneous administrative decision.<sup>182</sup>

However, this *Kühne & Heitz* remedy is only accepted in fiscal matters. The possibility for the administrative authority to revoke its final decision because of a subsequent CJEU judgment that has revealed the inconsistency of national judgments with EU law in administrative matters in general is subject to doctrinal debates.<sup>183</sup>

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ECHR or the CJEU that the national judgment is contrary to ECHR or EU law. The Cabinet held that there was no reason for such a provision, in view of [...] the right to sue the state for errors made by the highest administrative courts. See also ACA (n 11), National report of the Netherlands, Question 8.

<sup>176</sup> (PL) *Kodeks postępowania cywilnego* (n 67), Art. 403.

<sup>177</sup> (PL) *Sąd Najwyższy*, Postanowienie, 22/10/2009 (n 67).

<sup>178</sup> (PL) *Prawo o postępowaniu przed sądami administracyjnymi* (n 52), Art. 273, § 3. See also Mikłaszewicz (n 67) 376.

<sup>179</sup> Mikłaszewicz (n 67) 376–378.

<sup>180</sup> (PL) *Ordynacja podatkowa* (Tax Code), Art. 240, § 1, pts 9 and 11 on *Wznowienie postępowania* (review of tax proceedings). See also ACA (n 11), National report of Poland, Questions 1 and 4, Mikłaszewicz (n 67) 374, Nina Półtorak, 'Changes in the Level of the National Judicial Protection Under the EU Influence on the Example of the Polish Legal System' in Michał Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Hart Publishing 2015, Oxford – Portland) 231.

<sup>181</sup> (PL) Naczelny Sąd Administracyjny, Wyrok, 04/12/2008, I FSK 1655/07, reported by Mikłaszewicz (n 67) 374.

<sup>182</sup> This can therefore be considered as a *Kühne & Heitz* situation.

<sup>183</sup> The legal basis for such a revocation could eventually be art. 145 of the Code of Administrative Procedure, or, as an alternative solution, art. 154 of the same code, which allows the annulment or modification of a final administrative decision under certain circumstances. Apparently, such a possibility has not been confirmed yet, nor excluded by the case-law. See (PL) *Kodeks postępowania administracyjnego* (Code of Administrative Procedure), Art. 145 on *Wznowienie postępowania administracyjnego* (reopening of administrative proceedings) and Art. 154 on *Uchylenie lub zmiana decyzji administracyjnej* (repeal or amend an administrative decision). See also ACA (n 11), National report of Poland and Mikłaszewicz (n 67) 373 and 375, for further references.

### *Judgments of the Naczelny Sąd Administracyjny of 2010 to 2014*

Through several judgments, the *Naczelny Sąd Administracyjny* (Supreme Administrative Court, Poland) has clarified a few points regarding the application of this special remedy.

First, the identity of the parties before the national court and the CJEU is not a condition for revoking the decision confirmed by the court.<sup>184</sup> However, appellants are required to specify the CJEU decision on which they rely in their action.<sup>185</sup> Moreover, the CJEU case-law must be new, in the sense that it should differ from previous case-law on the same question.<sup>186</sup> Finally, the time limit for a motion to declare a final judgment unlawful is one month after the publication of the CJEU judgment in the official journal.<sup>187</sup>

### *Assessment*

As a conclusion, the most suitable method to remedy violation of EU law by national administrative bodies is the revocation of the contested decision by the administrative authority in Poland. As this remedy is available where the administrative court has already confirmed the decision, it can be considered as a method to remedy erroneous application of EU law by the national courts as well. Moreover, this remedy seems to be an effectively used method to provide substantive relief for violation of EU law – however, it can only be applied in fiscal matters.

### **Portugal**

Since 2008, Portuguese legal provisions provide a ground for reopening a case where the final judgment is contrary to a decision of an international court. The international court must have jurisdiction *vis-à-vis* Portugal<sup>188</sup> – the CJEU qualifies as one such court. However, it is not obvious whether the judgment of the international court must be made in the same case, or only regarding the same matter of law. The position of Portuguese courts is not known, in the absence of relevant case-law.

<sup>184</sup> (PL) Wojewódzki Sąd Administracyjny w Olsztynie, Wyrok, 19/09/2013, I SA/OI 486/13, LEX nr 1389573; Wojewódzki Sąd Administracyjny w Łodzi, Wyrok z 13/02/2014, I SA/Ld 1300/13, LEX nr 1510263; Wojewódzki Sąd Administracyjny w Łodzi, Wyrok z 05/03/2014, I SA/Ld 1357/13, LEX nr 1443319; Wojewódzki Sąd Administracyjny w Łodzi, Wyrok z 05/03/2014, I SA/Ld 1357/13, LEX nr 1443319; and Naczelny Sąd Administracyjny, Wyrok, 05/08/2010, I FSK 1355/2009, Lexis.pl nr 2374744.

<sup>185</sup> (PL) Naczelny Sąd Administracyjny, Wyrok, 18/03/2011, I FSK 398/2010, Lex Polonica nr 2537725.

<sup>186</sup> (PL) Naczelny Sąd Administracyjny, Wyrok, 24/03/2010, I FSK 242/09, reported by Mikłaszewicz (n 67) 375. However, the breach could give rise to an action for annulment for flagrant breach of law according to Mikłaszewicz (n 67) 375. See *Ordynacja podatkowa* (n 180), Art. 247, § 1, pt. 3.

<sup>187</sup> (PL) Wojewódzki Sąd Administracyjny w Rzeszowie, Wyrok, 03/12/2009, I SA/Rz 619/09, reported by Mikłaszewicz (n 67) 375.

<sup>188</sup> (PT) *Código de Processo Civil* (n 51), Artigo 696.º f); and *Código de Processo nos Tribunais Administrativos* (n 51), Artigo 154.º, with reference to the disposition of the Civil Procedure Code. See ACA (n 11), National report of Portugal, Questions 1 and 9.

## Romania

### National rules

In Romania, legislative provisions have been introduced to the administrative procedural code to recognise the violation of EU law as a specific ground for retrial.<sup>189</sup> Apparently, the sole violation of law is sufficient to reopen final judgments, and the identity of the parties is not required either. Therefore, even if the scope of application *rationae materiae* of this remedy is narrow, it provides generous protection in administrative cases. Moreover, this rule has already been applied on several occasions by the courts.

### *Judgments of the Curtea de Apel Timișoara of 2012*

In one such judgment, dated 6 October 2012, the *Curtea de Apel Timișoara* (Court of Appeal, Timișoara) reopened the case and overturned its previous final judgment. The court held that the final judgment infringed the primacy of EU law, since it had not applied the directly effective provisions of the VAT Directive.<sup>190</sup>

In terms of the contested judgment, the applicant company was liable to pay VAT. The tax had been calculated without taking the company's right to deduction into consideration. This right was granted by the VAT Directive,<sup>191</sup> but the *Curtea de Apel Timișoara* had not recognised its direct effect at the time of this first course of action.

However, CJEU judgments made it clear that the provision of the directive, having direct effect, should have been applied in the case.<sup>192</sup> Therefore, the company asked for the reopening of the case based on the Romanian procedural rules on retrial.

In this second course of action, the *Curtea de Apel Timișoara* pointed out that Romanian law provides a specific procedural path for the reopening of administrative cases. Final judgments contradicting EU law can be revised because of their non-observance of the primacy of EU law.<sup>193</sup> Then, it went on to examine EU rules and relevant CJEU case-law and concluded that Member States are obliged to implement directives into national law. In the event of failure to transpose the directive, individuals have the right to rely on provisions that have direct effect before the national courts. As the CJEU had already established the direct effect of the relevant provision of the directive, the final judgment infringed the primacy of EU law. The *Curtea de Apel Timișoara* therefore overturned the final judgment and the applicant company became entitled to the reimbursement of its unduly paid VAT.

<sup>189</sup> (RO) *Constituția României* (n 55), Art. 20 (2), and 148 (2); and *Legea Nr. 554/2004 contenciosului administrative* (n 55), Art. 21 (2).

<sup>190</sup> (RO) Curtea de Apel Timișoara, Secția contencios administrativ și fiscal, 06/10/2012, Decizia civilă nr. 1851.

<sup>191</sup> (EU) Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ 347/1.

<sup>192</sup> (CJEU) Case C-392/09 *Uszodaépítő* ECLI:EU:C:2010:569 [2010] ECR I-8791, paras 34–35; Case C-368/09 *Pannon Gép Centrum* ECLI:EU:C:2010:441 [2010] ECR I-7467, para 37.

<sup>193</sup> (RO) *Constituția României* (n 55), Art. 20 (2), and 148 (2); and *Legea Nr. 554/2004 contenciosului administrative* (n 55), Art. 21 (2).

### *Other cases*

Several final judgments, mainly in fiscal matters, have also been reopened and overturned because of their inconsistency with EU law. More judgments were reopened following the CJEU judgment finding Romanian rules on motor vehicle tax contrary to EU law.<sup>194</sup> As final judgments made on such payment obligations proved to be contrary to EU law in hindsight, they were subject to retrial. Claims of taxpayers for retrial have been successful in a few cases before the *Tribunalul Suceava* (Superior Court of Suceava, Romania).<sup>195</sup>

### *Assessment*

Considering the CJEU case-law on state liability and on the principle of *res judicata*, it appears that Romanian retrial rules grant broader protection of EU rights than it is required under EU law. Finally adjudicated administrative cases can be reopened by relying on CJEU judgments and there is no condition on the gravity of the breach. The mere violation of the principle of primacy of EU law, i.e. the non- or misapplication of EU rules, is sufficient to overturn a final administrative judgment. Moreover, there is no time limit for a motion for retrial, and the identity of the parties in the national proceedings and in the proceedings before the CJEU is not a precondition for relying on the CJEU's subsequent judgment. However, retrial based on EU law violation is limited to administrative matters – it cannot be used to reopen civil cases.<sup>196</sup>

As for the CJEU judgment providing a legal basis for retrial, it seems irrelevant whether it had been rendered before or after the contested national judgment is made. The procedural rules on retrial for violation of EU law do not exclude the possibility of relying on a previous CJEU judgment. Moreover, Romanian law justifies retrial because of the principle of primacy of EU law.<sup>197</sup> This may suggest that the violation of the EU norm is considered to have been made with the delivery of the judgment. Subsequent CJEU case-law only makes the violation apparent.

## **Slovakia**

### *Legislative provisions*

Under the Slovakian rules, retrial on the ground of infringement of EU law is possible only in civil matters. In the application of the civil procedure code, if a final civil judgment proves contrary to CJEU case-law, this inconsistency is a special ground for retrial.<sup>198</sup> This provision was introduced into Slovakian law in 2008 in order to ensure coherence between the CJEU

<sup>194</sup> (CJEU) Case C-402/09 *Tatu*, ECLI:EU:C:2011:219 [2011] ECR I-2711.

<sup>195</sup> (RO) *Tribunalul Suceava*, Secția de contencios administrativ și fiscal, 19/05/2011, Număr dosar 4671/86/2011, confirmed in appeal by Curtea de Apel Suceava, Secția a II-a civilă, 10/11/2011, Număr dosar 4671/86/2011; and *Tribunalul Suceava*, Secția de contencios administrativ și fiscal, 19/05/2011, Număr dosar 4674/86/2011, confirmed in appeal by Curtea de Apel Suceava, Secția a II-a civilă, 13/10/2011, Număr dosar 4674/86/2011.

<sup>196</sup> According to Advocate General Jääskinen, the non-identical grounds for deviating from the principle of *res judicata* are reasonable with regard to final civil, criminal and administrative judgments. See (CJEU) opinion of Advocate General Jääskinen in *Târșia* ECLI:EU:C:2015:269 ECR, paras 49–51; and *Târșia* (n 12), para 34.

<sup>197</sup> (RO) *Constituția României* (n 55) Art. 20 (2), and 148 (2).

<sup>198</sup> (SK) *Občiansky súdny poriadok* (n 56), § 228 (1) e). The amendments entered into force on 15 October 2008.

and national case-law in EU law matters.<sup>199</sup> The identity of the parties in the national procedure and before the CJEU is not relevant. It is only the subject-matter of the two cases that needs to concern the same question of law. As there is no condition regarding the gravity of the infringement, the mere inconsistency with CJEU case-law is sufficient for a review of the final judgment. In that regard, national law has a wide scope of application.

However, the time limit set out by national law restricts the practical use of this remedy. Theoretically, no problem arises if the CJEU renders a judgment on the interpretation of the EU norm in question after the national judgment is delivered. In such a scenario, the applicant can ask for the reopening of the case for twenty days after the date on which they have official knowledge of the new CJEU case-law. However, if the applicant alludes to a CJEU judgment prior to the contested national decision, the date from which the time limit starts to run is not obvious, since national case-law is divergent in this regard.

This remedy has already been applied in several cases by various courts, mainly in consumer law matters. As these judgements are highly similar, only the most representative will be presented in more detail.

#### *Decision of the Krajský súd v Banskej Bystrici of 2013*

In a decision of 27 June 2013, the *Krajský súd v Banskej Bystrici* (Regional Court in Banská Bystrica) dismissed a motion for retrial in a civil case, as the time limit to ask for retrial had already expired.<sup>200</sup>

The applicant asked for a re-examination of the final judgment delivered in his case, claiming the inconsistency of the decision with CJEU case-law. The *Krajský súd v Banskej Bystrici* found, however, that the time limit for such a motion had already expired. The regional court stated that the applicant has only twenty days after becoming aware of a CJEU decision to introduce a request for retrial. Since the CJEU judgment concerned had already been published before the contested national decision was delivered, the time limit had already expired. According to the *Krajský súd v Banskej Bystrici*, the time limit starts on the day when the CJEU judgment referred to is published.

Contrary to the above decision, the motion for retrial was accepted by several courts, notwithstanding the fact that the CJEU judgment preceded the national decision.<sup>201</sup>

#### *Assessment*

In summary, the mere violation of EU law is sufficient to reopen a civil case in Slovakia, and the identity of the parties is not required either. Therefore, even if the scope of application of this provision is narrow, it provides generous protection.

<sup>199</sup> The project of the law refers to the (CJEU) *Lucchini* (n 18).

<sup>200</sup> (SK) Krajský súd Banská Bystrica, Uznesenie, 18/12/2012, n° 15Co/259/2012, 6612206417, ECLI:SK:KSBB:2012:6612206417.2; Krajský súd Banská Bystrica, Uznesenie, 27/06/2013, n° 41Cob/9/2013, 6211200027, ECLI:SK:KSBB:2013:6211200027.4; and Krajský súd Trnava, Uznesenie, 09/07/2013, n° 24Co/196/2013, 2209209082, ECLI:SK:KSTT:2013:2209209082.1.

<sup>201</sup> (SK) Okresný súd Prešov, Rozsudok, 08/10/2013, n° 8C/420/2012, 8112240798, ECLI:SK:OSPO:2013:8112240798.2; and Okresný súd Rožňava, Uznesenie, 20/12/2013, n° 10C/581/2012.

Moreover, considering the exceptional nature of retrial under EU law, conditions under Slovakian civil law even exceed the requirements established by the CJEU. This holds true even regarding the time limits. In fact, referring to an already established CJEU case-law as a ground for retrial could also be evaluated in the light of the obligation of the parties to invoke EU law in the main proceedings.<sup>202</sup>

## Slovenia

### *Legislative provisions*

In Slovenia, the reopening of the case is possible on limited grounds – linked e.g. to the existence of new facts or a false statement by a witness – once a final judgment has been given in the dispute. As such, the inconsistency with EU law of a final judgment is not a reason for retrial under Slovenian procedural rules.<sup>203</sup>

As for the revocation of a final administrative decision, no act provides a legal basis for a review of a final administrative decision based on a misinterpretation of EU law. However, a judgment by the *Upravno sodišče* (Slovenian Administrative Court) of 2008 deals with this possibility.

### *Judgment of the Upravno sodišče of 2008*

The judgment of 17 June 2008 by the *Upravno sodišče* seems to suggest that administrative authorities can revoke a final administrative decision which acquired *res judicata* as a result of a judgment based on a misinterpretation of EU law.<sup>204</sup> However, as Trstenjak and Plaustajner warn, this conclusion must be treated with caution.

Following these authors,<sup>205</sup> the facts at the origin of the dispute can be summarised as follows. The case concerned agricultural export funds for the export of goods, which was permitted by an administrative act in partial violation of the EU law. When the respective export funds were not paid to the applicant following a subsequent administrative decision, the applicant claimed that the administrative authority is bound by the first administrative decision, i.e. the export permit. In this context, the *Upravno sodišče* referred to the principle of primacy, which imposes on Member States an obligation to act so that an efficient implementation of EU law is guaranteed. It further stressed that this can even lead to setting aside an administrative act, the legality of which has been confirmed in the administrative judicial procedure. In this regard, it made reference to the conditions set out by the CJEU in the *Kühne & Heitz* judgment. The *Upravno sodišče* thus declared unfounded the allegations

<sup>202</sup> It is, however, a distinct question whether these conditions assure at least equivalent protection to the one required under the *Köbler* doctrine, and, therefore, whether the Slovak retrial rules can be considered an effective alternative to *Köbler* liability.

<sup>203</sup> (SI) *Zakon o upravnem sporu* (n 76), 96. člen. See also Verica Trstenjak and Katja Plaustajner, 'Slovenian Rapport' in Coutron and Bonichot (n 11) 463, 473.

<sup>204</sup> (SI) *Upravno sodišče Republike Slovenije, Odločba, 17/06/2008, U 14/2007*, reported by Trstenjak and Plaustajner (n 203) 470–480.

<sup>205</sup> Trstenjak and Plaustajner (n 203) 470–480.



by the applicant relating to the binding nature of an export permit which was issued contrary to EU law.

This means that the *Upravno sodišče* used the rationale of the *Kühne & Heitz* judgment to support the independence of one administrative decision from another, previous one.

In summary, the decision by the *Upravno sodišče* seems to suggest that a review of an administrative decision that has become final as a result of judgment of a national court based on a misinterpretation of EU law is recognised by the Slovenian courts. However, the *Upravno sodišče* did not refer to a national legal provision in this regard, but to the judgment of the CJEU alone. Even so, as Trstenjak and Plaustajner point out, the national court has to interpret the national legislation consistent with the CJEU judgment only insofar as possible; however, it is not obliged to interpret it *contra legem* when faced with a situation like the one in the *Kühne & Heitz* judgment. In this regard, neither the legislation applicable within the administrative procedure, nor the legislation applicable within the administrative dispute provides an obvious legal basis for a review of a final administrative decision based on a misinterpretation of EU law.<sup>206</sup>

#### Assessment

In conclusion, Slovenian rules do not provide a ground for retrial in the event of violation of EU law by a final judgment.

#### Spain

In Spain, misinterpretation of law is not grounds to reopen cases where a final judgment has already been delivered. The inconsistency of a final judgment with EU law is therefore, not a reason for retrial either.<sup>207</sup>

<sup>206</sup> The procedural law applicable within the administrative procedure provides limited possibilities of reviewing a final administrative decision; a new or a different administrative act may be issued within the so-called reopened procedure (*obnova postopka*) only on grounds explicitly provided by the legislation, the misapplication or misinterpretation of a certain legal provision not being one of these grounds. See (SI) *Zakon o splošnem upravnem postopku* (General Administrative Procedure Act), 260. člen on *obnova postopka* (reopened proceedings – in the meaning of review of proceedings); as well as Trstenjak and Plaustajner (n 203) 463.

Another administrative remedy provided in the same law, the annulment or revocation of administrative decisions by the higher administrative organ (*razveljavitev odločbe po nadzorstveni pravici*) cannot be used if the administrative decision was confirmed by the administrative court. See *Zakon o splošnem upravnem postopku* (n 206) 274–277. člen on *razveljavitev odločbe po nadzorstveni pravica* (annulment or revocation of administrative decisions by the higher administrative organ); as well as Trstenjak and Plaustajner (n 203) 472.

<sup>207</sup> (ES) *Ley 29/1998 reguladora de la Jurisdicción Contencioso-administrativa* (n 73), Art. 102; *Ley 1/2000 Enjuiciamiento Civil* (n 73), Art. 509; and *Ley de Enjuiciamiento Criminal* (n 73), Art. 954. The only exception comes from the field of state aid, where violation of EU rules is a ground for reimbursement of the illegal aide. See *Ley 38/2003, de 17 de noviembre, General de Subvenciones* (Law on subventions), Art. 36–42 on *Del reintegro* (refund); as well as ACA (n 11), National report of Spain; and Daniel Sarmiento, 'Rapport espagnol' in Coutron and Bonichot (n 11) 175.

## Sweden

Swedish procedural laws provide a general possibility for the courts to remedy a substantive defect in the final judgment.<sup>208</sup> This remedy can eventually be applied to misinterpretation of EU law by a final judgment.<sup>209</sup> However, there is no available case-law regarding the application of this remedy to violations of EU law.

## United Kingdom

### *National rules on retrial*

In the UK, cases can be reopened on discretionary grounds, on condition that the party has suffered substantive injustice as a result of unfair proceedings.<sup>210</sup> Two judgments delivered in cases based on an alleged violation of EU law are worth being mentioned in this regard.

### *Judgment of the Supreme Court of England of 2011*

In the first judgment, rendered in the *Edwards* case on 15 December 2010, the *Supreme Court* of England admitted the theoretical possibility of reopening cases due to the inconsistency of the final judgment with the CJEU case-law. However, it denied retrial in the case at hand, since it found that the applicant had not suffered injustice as a result of unfair proceedings.<sup>211</sup>

At the origin of the proceedings was the decision of the Environment Agency, which approved the operation of a cement works, including waste incineration. The applicant contested the decision in the light of environmental law, claiming that the project had not been the subject of an environmental impact assessment. After the request was dismissed, the applicant applied for a protective cost order in advance of her appeal. The *House of Lords* rejected the application, as the panel had found that the information provided by the applicant was insufficient to conclude that proceedings would be ‘prohibitively expensive’ for her. Nevertheless, the applicant proceeded with her appeal. When it was dismissed, the *House of Lords* ordered the applicant to pay the respondent’s costs. She contested this decision and argued that it was contrary to the EU directives, since it rendered the litigation ‘prohibitively expensive’ for her.<sup>212</sup>

<sup>208</sup> (SE) *Förvaltningsprocesslag* (n 46), 37b §; and *Rättegångsbalken* (n 46), 58. kap, § 1.

<sup>209</sup> ACA (n 11), National report of Sweden, Questions 1, 4. However, concerning the remedy of revision of fiscal authorities’ decisions confirmed by administrative courts, it seems that the subsequent CJEU judgment, giving a new interpretation to the relevant EU provision, is not sufficient grounds for this remedy. Moreover, as a new interpretation by the *Regeringsrätten* could result in reopening the case, the compatibility of this rule with the principle of equivalence is not obvious. See Frida-Louise Göransson, ‘Rapport suédois’ in *Coutron and Bonichot* (n 11) 495. (SE) *Skattebetalningslag* (Tax Law), 21 kap, § 3, Göransson (n 209) 493. The fiscal and criminal dispositions in this regard will probably be subject to amendment following the recent judgment of the CJEU in the case *Akerberg Fransson*. See (CJEU) Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 ECR.

<sup>210</sup> (UK) Civil Procedure Rules (n 47), Part 52.17. See also ACA (n 11), National report of the United Kingdom, Questions 8 and 14; and Kornezov (n 13) 830.

<sup>211</sup> (UK) Supreme Court, judgment, 15/12/2010, R (on the application of *Edwards*) v Environment Agency [2010] UKSC 57 [2011] 1 WLR 79, paras 34–36.

<sup>212</sup> In the meantime, the jurisdiction of the *House of Lords* was transferred to the newly-established *Supreme Court* of the United Kingdom. In accordance with the Supreme Court Rules 2009, the detailed assessment of the costs

The newly-established *Supreme Court* – to which the jurisdiction of the *House of Lords* had been transferred – pointed out that it has the power to reopen its prior decision, if it is necessary to correct any injustice.<sup>213</sup> The decision to order the applicant to pay the respondent's costs should be reopened if it had been based on a purely subjective approach to the question of whether litigation was 'prohibitively expensive' within the meaning of the directives<sup>214</sup> The panel also stated that the question whether the order to pay the respondents' costs was contrary to EU law had not been examined by the *House of Lords* when it considered the application for a protective costs order. In those circumstances, the *Supreme Court* referred several questions on the interpretation of the term 'prohibitively expensive' to the CJEU for a preliminary ruling.<sup>215</sup> Following the CJEU judgment, the *Supreme Court* determined the amount that the applicant had to pay as the respondent's costs.<sup>216</sup>

### *Judgment of the Court of Appeal of 2010*

In the second judgment, delivered on 29 June 2010, the *Court of Appeal* concluded that the principle of effectiveness does not require setting aside national rules on the conditions of retrial.<sup>217</sup> In this regard, the *Court of Appeal* specifically held that the principle of effectiveness did not require reopening criminal convictions in order to allow the appellants to invoke the unenforceability, by reason of violation of EU law,<sup>218</sup> of the legislation under which their convictions were secured. The position would only have been different if the conduct of the

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was carried out by two costs officers appointed by the President of the Supreme Court. In that context, the applicant relied on Directives 85/337 and 96/61 to challenge the costs order that had been made against her. The Supreme Court costs officers accepted that they had power to give effect to Article 10a of the Directive by moderating the amount of costs payable to the respondents. The respondents appealed to a panel of five Supreme Court judges. The *Supreme Court* accepted the respondent's claim that the costs officers had acted outside their jurisdiction. That panel delivered its decision on 15 December 2010. It found that the costs officers ought to have confined themselves to the jurisdiction which the Supreme Court Rules 2009 conferred on them and thus to have limited themselves to quantifying the costs. The panel took the view that the question whether the procedure was prohibitively expensive, within the meaning of Directives 85/337 and 96/61, was within the sole jurisdiction of the court adjudicating on the substance of the case, which may adjudicate either at the outset of the proceedings, when determining the request for a protective costs order, or in its decision on the substance.

<sup>213</sup> This power extends to decision of the House of Lords prior to the creation of the Supreme Court.

<sup>214</sup> (EU) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ 175/40; Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [1996] OJ 257/26.

<sup>215</sup> See (CJEU) Case C-260/11 *Edwards and Pallikaropoulos* ECLI:EU:C:2013:221 ECR.

<sup>216</sup> (UK) Supreme Court, judgment, 11/12/2013, *R (on the application of Edwards) v Environment Agency*, [2013] UKSC 78.

<sup>217</sup> (UK) Court of Appeal, judgment, 29/06/2010, *R v Budimir (Nikolas)*, [2011] 2 WLR 396, paras 58–72, reported by Laure Clément-Wiltz, 'Rapport britannique' in Coutron and Bonichot (n 11) 450–451.

<sup>218</sup> In particular, the national legislation would be unenforceable as a consequence of its non-notification by the government under the EU directive. See (EU) Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations [1983] OJ 109/8.

national authorities, in conjunction with the domestic limitation period, would have had the effect of depriving the appellants of any opportunity of enforcing their EU law rights.<sup>219</sup>

In the case at hand, the appellants had been convicted under national legislation that was subsequently found to be contrary to EU law. In fact, the government had failed to notify the Commission, in violation of the EU directive, of the act adopted in 1984. To remedy the defect, that act was declared unenforceable and Parliament adopted a new act in 2010. However, the question of how to remedy the convictions under the 1984 act was left open.

The appellants, arguing that the convictions had been based on an unenforceable law, therefore sought permission to reopen the final decisions pronouncing their conviction. The question arose whether the failure by the government to give appropriate notification under the EU directive had created an injustice which it was not otherwise possible to remedy.

The *Court of Appeal* dismissed the claims. Referring to constitutional law literature and to CJEU and ECtHR case law, the court concluded that the convictions in these cases had not given rise to any substantial injustice and therefore there were no grounds to set aside the convictions. The court emphasised that, in terms of the *Kapferer* judgment,<sup>220</sup> there was no obligation under EU law to set aside the convictions. The position would only be different if the appellants had been deprived of any opportunity of enforcing their EU law rights. However, in the case at hand, as the appellants could have raised the argument at trial, the principle of the effectiveness of EU law was therefore not infringed.<sup>221</sup>

It is noteworthy that the *Court of Appeal* arrived at this conclusion on the basis of EU law, and its argumentation is in line with the requirements set by the CJEU.

### Assessment

In conclusion, under UK law, retrial is possible but subject to the condition that the applicant suffered injustice as a result of unfair proceedings. This conclusion is in line with Kornezov's statement, according to which in England and Wales, while the bar created by cause of action estoppel is, in principle, absolute, issues previously decided may be reopened where 'special circumstances' make it unjust not to do so.<sup>222</sup>

In UK law, the discretionary nature of judicial review is an important factor. In the terms of the procedural rules, the reopening of a final decision must be necessary to avoid real injustice, and there must be no alternative effective remedy.<sup>223</sup> Moreover, an applicant in judicial review proceedings must obtain the permission of the court for the case to proceed

<sup>219</sup> Jonathan Auburn, Jonathan Moffett and Andrew Sharland, *Judicial Review: Principles and Procedure* (Oxford University Press 2013) § 4.82.

<sup>220</sup> The judgment in *Kapferer* is sometimes cited as an example of leaving the authority of a final judgment's *res judicata* unfettered, despite its alleged inconsistency with EU law. See (CJEU) *Kapferer* (n 12).

<sup>221</sup> See also Auburn, Moffett and Sharland (n 219) § 4.82; and David Ormerod and Karl Laird, *Smith and Hogan's Text, Cases, and Materials on Criminal Law* (Oxford University Press 2014) 6–7.

<sup>222</sup> Kornezov (n 13) 830.

<sup>223</sup> (UK) Civil Procedure Rules (n 47), Part 52.17. See also ACA (n 11), National report of the United Kingdom, Questions 8 and 14.

to a full hearing, and permission will only be granted if the claim is arguable, i.e. it has a real prospect of success. However, the process of judicial review is less formalised and is intended to provide a speedy remedy.<sup>224</sup>

### III Conclusion

#### 1 Comparative Analysis of National Rules

Retrial on the ground of breach of EU law appears to be an effectively used remedy in Finland,<sup>225</sup> in Romania (in administrative matters)<sup>226</sup> and in Slovakia (in civil matters).<sup>227</sup> It has also been accepted in Lithuania (in administrative cases),<sup>228</sup> and under special circumstances in the UK. Moreover, in Lithuania, Finland, Romania and Slovakia, cases have been reopened due to violation of EU law in the final judgment.

In two national laws, explicit legislative provisions had been introduced into the procedural codes in 2008 in order to recognise the violation of EU law as a specific ground for retrial. It has been the case in Romania, where amendments concerned the administrative procedural code, and in Slovakia, where the civil procedural code was amended.

In Lithuania, Finland, and the UK, the application of retrial to breaches of EU law is possible due to the broad scope of application of this remedy. In these legal systems, retrial is granted in the event of manifest, substantive or extraordinary breach of law. In this regard, legal rules in Denmark, Malta and Sweden are also similar and, therefore, also seem capable of offering adequate protection.

Moreover, in Poland, fiscal authorities hold and exercise the right to revoke their previous decisions on the ground of infringement of EU law themselves.<sup>229</sup>

Without criticising the politico-legislative choice of the national legislators, the Romanian and Slovak solutions appear particularly courageous. This is mainly because the identity of parties in the national procedure and before the ECJ is not relevant, and the only criterion is that the subject-matter of the two cases concern the same matter of law. Moreover, the sole violation of EU law is sufficient to reopen final judgments, and the gravity of the infringement does not need to be considered.

<sup>224</sup> ACA (n 11), National report of the United Kingdom, Question 14.

<sup>225</sup> ACA (n 11), National report of Finland.

<sup>226</sup> (RO) Curtea de Apel Timișoara, Secția contencios administrativ și fiscal, 06/10/2012 (n 190).

<sup>227</sup> (SK) *Občiansky súdny poriadok* (n 56), § 228 (1) e).

<sup>228</sup> (LT) Lietuvos vyriausiojo administracinio teismo, 10/04/2008, nutartis administracinėje byloje Nr. P444-129/2008 (n 157); *Lietuvos Respublikos Administracinių Bylų Teisenos Įstatymo Pakeitimo Įstatymas* (n 48), 153 straipsnis. See also ACA (n 11), National report of Lithuania, Questions 1–4, 11; and Valutyté (n 152) 301.

<sup>229</sup> In Poland, the reopening of the administrative procedure on the ground of breach of an international agreement does also exist. See (PL) *Prawo o postępowaniu przed sądami administracyjnymi* (n 52); as well as ACA (n 11), National report of Poland, Question 1 and 4; and Mikłaszewicz (n 67) 373–375.

This solution may probably be attributed to the willingness of the national legislator to apply EU law correctly before the national courts – taking into account the reality that, for external reasons, which are completely independent from their professional competencies, judges of the new member states are often not specialists in this matter of law. In fact, this new ground for retrial might be assimilated to the widely used criterion of ‘discovery of new facts.’<sup>230</sup> In addition, the fact that this new ground for retrial is applicable only in civil matters in Slovakia, and only in administrative matters in Romania may suggest that the legislative amendments aimed to address specific inconsistencies that had been discovered, and were not part of a strategic vision regarding national remedies in the event of a violation of EU law. Consequently, the specific scope of application of this remedy may cause discrepancies within the same national legal order regarding the remedies provided in different matters of law (administrative and civil), or with regard to violating rules which have a different origin (national, EU, international).

The other group of member states allowing retrial based on violation of EU law appear to use a more coherent framework. In these member states, retrial is possible in cases of manifest, substantive or extraordinary breach of law. These criteria seem particularly suitable to embrace violations of EU law in situations where it is necessary, because of, for example, the gravity of violation or the extent of the prejudice suffered. It also gives the magistrates to necessary flexibility to assess the particularities and the circumstances of the case at hand. However, the use of such a general criterion is governed by legal traditions of the member states.

Nevertheless, the conclusion remains that in most member states retrial is not possible based on a violation of EU law.

## 2 National Procedural Autonomy and the Procedural Rule of Reason

As it has been demonstrated, the CJEU does not require Member States to allow retrial based on violation of EU law, except for specific situations.

This position corresponds to the main rule according to which, in the decentralised system of enforcement of EU law, substantive EU rules are applied and enforced by national courts and authorities.<sup>231</sup> Furthermore, in the absence of common EU procedural

<sup>230</sup> Nevertheless, in general, legal doctrine and the case-law seem to agree on the conclusion that an CJEU judgment giving interpretation of an EU provision is neither a new law nor a new fact.

<sup>231</sup> Georgios Anagnostaras, ‘State Liability v Retroactive Application of Belated Implementing Measures: Seeking the Optimum Means in Terms of Effectiveness of EC Law’ (2000) 1 *Journal of Current Legal Issues*; Georgios Anagnostaras, ‘Not as Unproblematic as You Might Think: The Establishment of Causation in Governmental Liability Actions’ (2002) 27 *European Law Review* 665; Florian Becker, ‘Application of Community Law by Member States’ Public Authorities: Between Autonomy and Effectiveness’ (2007) 44 *Common Market Law Review* 1036; Nial Fennelly, ‘The National Judge as Judge of the European Union’ in Allan Rosas, Egils Levits and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years*



rules,<sup>232</sup> the application of these norms is ensured through the national procedural framework.<sup>233</sup> This rule, called the principle of national procedural autonomy,<sup>234</sup> is only limited by the principles of equivalence and effectiveness.<sup>235</sup> Nevertheless, as far as effectiveness is concerned, the procedural rule of reason<sup>236</sup> may even prevail over this principle.<sup>237</sup>

In terms of the procedural rule of reason, every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.<sup>238</sup>

As for the principle of *res judicata*, the CJEU acknowledged that, in order to ensure both the 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

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*of Case-Law – La Cour de Justice et La Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (Springer 2013) 63; John Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institution under Article 10 EC' (2007) 31 *Fordham Int'l LJ* 1484; John Temple Lang, 'The Duties of National Courts under Community Constitutional Law' (1997) 22 *European Law Review* 3. From the Hungarian literature, see Szegedi László, 'Egyéni és kollektív uniós jogvédelem a közigazgatási perben. A szubjektív jogsérelemhez kötött közigazgatási bírói jogvédelem uniós átalakulása' (Thesis, Eötvös Loránd Tudományegyetem 2016, manuscript), chapter 2.2.1 on the europianization of the administrative procedural law and the judicial protection of individual rights.

<sup>232</sup> Two exceptions can be mentioned in this regard. First, in the language of the recently modified Article 19 (1) TEU, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. However, there is no further reference on specific remedies or procedures which must be available. Second, there are several secondary pieces of legislation which contain remedial provisions. See for further information on the secondary legislation providing for special damages remedial rules: Folkert G Wilman, *Private enforcement of EU law before national courts: the EU legislative framework* (Elgar 2015, Cheltenham) 14–19.

<sup>233</sup> Piet Eeckhout, 'Liability of Member States in Damages and the Community System of Remedies' in Jack Beatson and Takis Tridimas (eds), *New Directions in European Public Law* (Hart Publishing 1998, Oxford) 66; and Pieter Van Cleynenbreugel, 'The Confusing Constitutional Status of Positive Procedural Obligations in EU Law' (2012) 5 *Review of European Administrative Law* 91.

<sup>234</sup> (CJEU) Case 60/75 *Russo* ECLI:EU:C:1976:95 [1976] ECR I-45; Case 45/76 *Comet* ECLI:EU:C:1976:191 [1976] ECR I-2043, paras 13 and 15; Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* ECLI:EU:C:1976:188 [1976] ECR I-1989, para 15; Case 68/79 *Just* ECLI:EU:C:1980:57 [1980] ECR I-501, para 25; Case 150/83 *Rewe-Handelsgesellschaft Nord and Rewe-Markt Steffen* ECLI:EU:C:1981:163 [1981] ECR I-1805; Case 199/82 *San Giorgio*, ECLI:EU:C:1983:318 [1983] ECR I-3595, para 13.

<sup>235</sup> (CJEU) Case C-32/12 *Duarte Hueros* ECLI:EU:C:2013:637, para 31; Case C-312/93 *Peterbroeck* ECLI:EU:C:1995:437 [1995] ECR I-4599, para 12; Case C-201/02 *Wells* ECLI:EU:C:2004:12 [2004] I-723, para 67.

<sup>236</sup> (CJEU) Joined cases C-430/93 and C-431/93 *Van Schijndel and van Veen* ECLI:EU:C:1995:441 [1995] ECR I-4705, para 19; Joined cases C-222/05 to C-225/05 *Van der Weerd and Others* ECLI:EU:C:2007:318 [2007] ECR I-4233, para 33; *Peterbroeck* (n 235), para 14.

<sup>237</sup> This is clearly demonstrated by the CJEU case-law regarding the *ex officio* application of EU law.

<sup>238</sup> See, to that effect, judgments (CJEU) *Kapferer* (n 12), para 41, *Fallimento Olimpiclub* (n 12), para 27, and *Társia* (n 12), paras 36 and 37.

be called into question.<sup>239</sup> Accordingly, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of EU law on the part of the decision in question.<sup>240</sup>

One may wonder whether denying retrial in cases of breach of EU law is compatible with the principle of equivalence, if the same remedy is offered against breaches of the ECHR or the national constitution.<sup>241</sup> The CJEU has not addressed this issue yet.<sup>242</sup> As the analysis of this question extends beyond the subject of this research, it will not be addressed here in detail. Nevertheless, it is important to remember that retrial following judgments by the ECtHR or constitutional courts is, generally, only possible in the single case concerned by the posterior judgment. It means that the parties in the cases before the ECtHR or the constitutional court and before the national courts need to be identical, contrary to what is usually the situation in the event of violation of EU law. This is because of the different role and position of the ECtHR, the constitutional courts and the CJEU in the legal order. Consequently, allowing retrial based on violation of the ECHR and the national constitution while denying it in cases of violation of tEU law does not seem to be, in general, contrary to the principle of equivalence.<sup>243</sup>

Therefore, it is in the discretionary power of Member States to decide whether they wish to go beyond what is required in terms of the CJEU case-law.

<sup>239</sup> (CJEU) *Impresa Pizzarotti* (n 12), para 58; *Kapferer* (n 12), para 20; Case C-526/08 *Commission v Luxembourg* ECLI:EU:C:2010:379 [2010] ECR I-6151, para 26; and Case C-352/09 P *ThyssenKrupp Nirosta v Commission* ECLI:EU:C:2011:191 [2011] ECR I-2359, para 123.

<sup>240</sup> (CJEU) *Kapferer* (n 12) para 21, *Fallimento Olimpclub* (n 12) para 23.

<sup>241</sup> *Kornezov* (n 13) 835. A similar question was at issue in the *Târşia* case. The question in this case is whether EU law precludes national rules which allow retrial in administrative proceedings when there is an infringement of the principle of EU law primacy and which do not allow retrial on the same basis delivered in civil proceedings. The CJEU found that the principles of equivalence and effectiveness do not preclude a situation where there is no possibility for a national court to revise a final decision of a court or tribunal made in the course of civil proceedings when that decision is found to be incompatible with an interpretation of EU law upheld by the CJEU after the date on which that decision became final, even though such a possibility exists as regards final decisions of a court or tribunal incompatible with EU law made in the course of administrative proceedings. See (CJEU) *Târşia* (n 12).

<sup>242</sup> See, by analogy (CJEU) Case C-118/08 *Transportes Urbanos* ECLI:EU:C:2010:39 [2010] ECR I-635. In this judgment, the CJEU drew a parallel between actions for damages based on a breach of the national constitution and actions for damages based on a breach of EU law. However, the assimilation of the two procedures is criticised by the doctrine. According to Plaza, the EU's decentralised system of judicial control of Member States' compliance with EU law justifies a diverse treatment of state liability actions based on violation of national and on an EU law provision. See Carmen Plaza, 'Member States Liability for Legislative Injustice. National Procedural Autonomy and the Principle of Equivalence: Going Too Far in *Transportes Urbanos*?' (2010) 3 *Review of European Administrative Law* 35, 45.

<sup>243</sup> *Kornezov* seems to suggest the contrary. However, in my opinion, drawing a parallel between the application of retrial to remedy violation of rights protected under EU law, the ECHR, and the national constitutions is only justified where the violation of EU-guaranteed fundamental rights and general principles, *in the judicial proceedings at hand*, is concerned. See *Kornezov* (n 13) 835, 836.

### 3 Necessity to Allow Retrial Under EU Law

Nevertheless, in his paper published in 2014, Kornezov argues that retrial of a final judgment by virtue of EU law can no longer be excluded per se, and there is a genuine need to allow the reopening of a final judgment which has proved inconsistent with EU law.<sup>244</sup> He reaches this conclusion based on the principle of equivalence and the right to effective judicial protections, as well as on CJEU judgments affirming that a final arbitration award could be set aside,<sup>245</sup> and a final administrative decision should be reviewed<sup>246</sup> if proves to be contrary to EU law.<sup>247</sup>

Then, taking as an example the harmonisation of substantial conditions for triggering the liability of the state for breaches of EU law, he argues that the CJEU should take the same approach in relation to retrial.

According to his proposition, retrial might be made subject to the following three conditions: (i) the role of EU law infringed must be intended to confer rights on individuals; (ii) the injured party must continue to suffer serious negative consequences from the judgment that caused the infringement; and (iii) there must be a direct causal link between the breach and the continuing suffering of the injured party.

### 4 Relationship Between State Liability and Retrial

In my opinion, the key element in Kornezov's proposition is that second point, i.e. that the traditional remedies are insufficient, or they do not provide relief, leading to a situation where the 'injured party continues to suffer negative consequences from the judgment that caused the infringement'. This means that the necessity to allow retrial based on a violation of EU law needs to be assessed by taking the remedial system of the Member State into account.<sup>248</sup>

As the starting point of this paper was the aim to analyse whether there exist, in the Member States, remedies which may substitute the use of state liability, it appears useful to examine the relationship between these two remedies. Before doing so, it is noteworthy that, first, retrial appears to be even more favourable for the injured parties than liability, and, second, the conclusion that the cumulative use of them is not necessary seems to be uniform.<sup>249</sup>

<sup>244</sup> Kornezov (n 13) 834.

<sup>245</sup> (CJEU) Case C-126/97 *Eco Swiss* ECLI:EU:C:1999:269 [1999] ECR I-3055, Case C-40/08 *Asturcom Telecomunicaciones* ECLI:EU:C:2009:615 [2009] ECR I-9579.

<sup>246</sup> (CJEU) Case C-2/06 *Kempter* ECLI:EU:C:2008:78 [2008] ECR I-411; *Kühne & Heitz* (n 14); *i-21 Germany and Arcor* (n 17); Case C-249/11 *Byankov* ECLI:EU:C:2012:608 ECR.

<sup>247</sup> Kornezov (n 12) 835, 836.

<sup>248</sup> See also Varga (n 4).

<sup>249</sup> I will not address here the issue when damages action is initiated to be given additional remedy for the damages suffered (p. ex. interest).

## 5 No Hierarchy Between the Two Remedies

In the six Member States where retrial is available on the general grounds of ‘manifest infringement of substantive rules’ (Denmark, Malta, Finland, Sweden, the UK and Lithuania in administrative cases), national provisions appear to be sufficiently wide to embrace violations of EU law. The case-law of Finnish, Lithuanian, and UK courts has already confirmed this statement. Since most of these Member States accept, at least theoretically, the application of the *Köbler* principle as well, there is a possibility of double remedies. Moreover, no hierarchy appears to exist between the two courses of action in these Member States. Consequently, it is for the claimant to decide which remedy to seek; and there is no sign of clear preference for the use of one or another in this regard. This can be explained by the fact that the criteria to evaluate the gravity of the breach are very similar for the two types of remedies.

This duplication of remedies is also a theoretical possibility in the three Member States where retrial is guaranteed on the ground of inconsistency with judgments of international courts (Latvia, Poland, and Portugal). However, if these rules imply requiring the identity of parties in the national procedure and before the international court, retrial will have a much narrower and quite different scope of application than *Köbler* liability.

As for the two states where specific rules have been introduced to allow retrial on the ground of infringement of EU law (Romania, Slovakia), the duplication of remedies is not excluded either.<sup>250</sup>

To conclude, the cumulative use of the two remedies seems unnecessary. As the Romanian government in the *Târșia*<sup>251</sup> case has suggested, it is irrelevant for EU law which possibility is granted in the Member State, if the rights of the individual are effectively protected.<sup>252</sup> Therefore, where a retrial can be used to remedy a violation of the EU rights by a final judgment, a liability claim may be superfluous and unnecessary. Moreover, in cases where there is no need to prove a qualified breach of law to allow a retrial (Romanian administrative and Slovakian civil law), this remedy offers a higher standard of judicial protection than the *Köbler* liability.

<sup>250</sup> However, due to absence of available information on the position of Romanian and Slovak court about the application of *Köbler* liability, it is not possible to draw further consequences in this regard.

<sup>251</sup> (CJEU) *Târșia* (n 12) The main facts that lie at the basis of the dispute are the following: the claimant had purchased a car that had previously been registered in France. At that time, registration in Romania had been contingent on the payment of a special tax on motor vehicles. After having paid the tax and having registered the vehicle, the claimant had sought the repayment of the tax levied before the civil court, arguing the tax was inconsistent with EU law. However, the *Tribunalul Sibiu* had dismissed the claim in a civil law action and the judgment became final. In a subsequent judgment, the CJEU held that Romania’s tax on motor vehicles was incompatible with EU law. On the ground of this case-law and the Romanian rules on retrial, the claimant argued that he was entitled to recovery of the taxes paid due to the primacy of EU law. However, as the contested final judgment had been rendered in a civil action and not in an administrative procedure, the reopening of the judgment was refused to the claimant.

<sup>252</sup> The subsidiary nature of the liability claim to the retrial seems to be accepted by the CJEU as well. See (CJEU) *Târșia* (n 12) para 40.

## 6 Retrial as an Exceptional Remedy

However, in most legal systems, retrial is more exceptional than a liability claim. Even the case-law of the CJEU reflects this position.<sup>253</sup>

What is interesting for the present analysis is that several legal systems *expressis verbis* establish a hierarchy between retrial and state liability. Such explicit statements have been found in six Member States, although not necessarily in the context of EU law (Bulgaria, Czech Republic, Estonia, Greece, Spain and Netherlands).

Under Bulgarian legislative rules, retrial is only possible if it is necessary to remedy an injustice suffered.<sup>254</sup> In the Czech Republic, a motion for retrial on the ground of breach of fundamental rights is inadmissible if the consequences of the violation have already been remedied, e.g. by providing just satisfaction.<sup>255</sup> Similarly, Estonian law gives priority to a liability claim over retrial.<sup>256</sup> The *Riigikohus* (Supreme Court) stated, concerning ECHR violations, that reopening cases is only possible if compensation by damages is not available.<sup>257</sup> In Greece, the *Areios Pagos* pointed out that a judgment of the ECtHR can only give rise to compensation, but not to retrial.<sup>258</sup> In the Netherlands, the House of Representatives reasoned that there was no reason to adopt legislative amendments allowing cases to be reopened on the ground of their inconsistency with CJEU and ECtHR judgments. To arrive at that conclusion, the House of Representatives emphasised that the state is already obliged to compensate for the damages suffered.<sup>259</sup> The Spanish *Tribunal Supremo* pronounced on 1 September 1991 that even if retrial was not possible, a liability claim could be lodged.<sup>260</sup>

## 7 Liability as a Secondary Remedy

On the other hand, in several legal systems, liability claims are considered as offering only subsidiary, secondary relief in cases where primary actions have not succeeded.

<sup>253</sup> (CJEU) *Kapferer* (n 12) paras 20–21; *Fallimento Olimpclub* (n 12) paras 22–23; *Impresa Pizzarotti* (n 12) paras 54, 59, 62, 64; and *Commission v Slovakia*, paras 59–60. See also *Kornezov* (n 12) 839–840.

<sup>254</sup> (BG) *Grazhdanski protsesualen kodeks* (n 59), Art. 303; and *Aministrativen protsesualen kodeks* (n 59), Art. 239.

<sup>255</sup> (CZ) *Zákon o Ústavním soudu* (n 49), § 119.

<sup>256</sup> (EE) *Riigivastutuse seadus* (n 107), § 7(1), (2<sup>1</sup>) on § 7 on *Vastutuse alused* (basis of liability).

<sup>257</sup> (EE) *Riigikohtu halduskolleegiumi*, 22/02/2010, n° 3-3-2-1-10; and *Riigikohtu üldkog*, 10/03/2008, n° 3-3-2-1-07. However, as retrial is not guaranteed on the ground of infringement of EU law, available case-law comes from the field of fundamental and constitutional rights violations.

<sup>258</sup> (EL) *Άρειος Πάγος*, 24/02/2012; and *Άρειος Πάγος*, 14/12/2004.

<sup>259</sup> (NL) *Tweede Kamer*, 12/08/2005 (n 175). The Netherlands' Parliament has asked the Government to consider amending article 8:88 of the General Administrative Law Act to create the possibility of reviewing the judgment of an administrative court, if it follows from judgments of the ECtHR or the CJEU that the national judgment is contrary to ECHR or EU law. The Cabinet held that there was no reason for such a provision, in view of [...] the right to sue the state for errors made by the highest administrative courts. See also *ACA* (n 11), National report of the Netherlands, Question 8.

<sup>260</sup> (ES) *Tribunal Supremo*, Sentencia, 01/09/1991. See also *Sarmiento* (n 207) 170–174.

For example, the case-law of the German BGH reflects this position.<sup>261</sup> Similarly, in Poland, the declaration of unlawfulness of a final judgment – which is a procedural element of a liability claim – can only be introduced if the claimant has used all remedies available to them before lodging the liability claim. State responsibility is therefore secondary to all other remedies.<sup>262</sup>

## 8 Holistic Approach Regarding National Remedial System and the Effective Judicial Protection

Under the EU remedial rules, state liability is the only generally available remedy for violation of EU law by national supreme courts.

However, in my view, there is no reason for not accepting the use of alternative remedies by Member States, such as retrial instead of state liability. As a consequence, overly restrictive conditions concerning *Köbler* claims may cause problems with regard to the right to effective judicial protection only in Member States where the remedial structure does not provide other effective remedy either.<sup>263</sup> Or, from the point of view of retrial, the absence of a possibility to reopen finally adjudicated cases which infringe EU law is only a problem if seeking damages in a liability action is also subject to overly restrictive conditions. This means that either retrial or state liability, or another alternative remedy need to exist in the national legal order to remedy serious violations of EU law by the judiciary.

As such, it is neither possible nor necessary to evaluate whether a specific remedy, for example retrial, need to be accessible where there has been a violation of EU law by a national court.

The recent *Tomášová* judgment appears to point in this direction, as the CJEU confirmed that the relationship between a liability action and other remedies available under the national law falls within the principle of national procedural autonomy.<sup>264</sup> Therefore, whatever remedy is available under national law, it fulfils the requirements under EU law provided that it assures effective judicial protection at least equivalent to what is required in terms of the *Köbler* judgment.

<sup>261</sup> (DE) BGH, Urteil, 09/10/2003, III ZR 342/02, NJW 2004, S. 1241, reported by Dittert (n 138) 77.

<sup>262</sup> (PL) *Kodeks postępowania cywilnego* (n 67), Art. 424<sup>1</sup>, § 1. See also Mikłaszewicz (n 67) 379.

<sup>263</sup> This seems to be the situation in the following Member States: Estonia, Ireland, Greece, Cyprus, Luxembourg, and Hungary. However, identifying these Member States is a complicated task as such evaluation not only depends on the legal remedial system of the Member State but also on the specific circumstances of the case itself. Naturally, in this contribution, we can only take a general look but not evaluate case per case.

<sup>264</sup> (CJEU) Case C-168/15 *Tomášová* ECLI:EU:C:2016:604 ECR, paras 40–41.