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Symposium

Carla Sieburgh* – Balázs Fekete**

Guest Editorial Preface: Symposium of The *Ius Commune* Casebook on European Law and Private Law

The *Ius Commune* Casebook on European Law and Private Law – edited by Arthur Hartkamp, Carla Sieburgh and Wouter Devroe – was published in March 2017 as a volume of the well-known *Ius Commune* Casebook series started by the highly respected Walter van Gerven. These casebooks are all the fruits of sound cooperation among European legal scholars and they all try to attract attention to the common components of the European legal orders by bringing to surface the common or overlapping elements in various areas of private law. However, this newest *Ius Commune* Casebook has a somewhat different character from the previous ones. First, while the previous volumes were mostly devoted to the comparison of various European jurisdictions, this Casebook concentrated on both EU law, mostly on primary, but at some point on secondary EU legal sources and national private law provisions and cases. It therefore considerably broadened the room for scholarly study and analysis, as it aimed at discovering whether and to what extent EU primary law has exercised its influence on national case law in private law matters. Second, different from the former volumes that tried to present the actual state of a given private law doctrine – for instance tort law, non-discrimination law or consumer law – in a detailed comparative way, this Casebook puts a serious emphasis on analysing both the interactions between EU law as a source of supranational law and national private law, as well as the interaction between various national private law doctrines when the interpretation of a given EU law provision is at stake. As such, the vision behind the Casebook implied a broader and more dynamic approach of the legal issues discussed.

Because of this innovative character, the Casebook intends to stimulate a more profound academic exchange between EU law and private laws studies. Moreover, it aims to inspire judges, lawyers, scholars, students and other legal professionals, when they prepare a new problem or plead relevant cases in courts.

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To make the Casebook known to the potentially interested audience, three symposia were held as soon as the first months of 2017; the first one in April in The Peace Palace, The Hague, the Netherlands; while the second one was in May in the Palazzo Aldobrandini, Unidroit, Rome, Italy. Finally, the idea of promoting the Casebook in Central Europe was an important motivation for the editors and the authors, too. We were therefore very happy when the Eötvös Loránd University Law Faculty invited us to organise a similar symposium dedicated to the Casebook. This book-promotion conference, more than four hours long, was held on 19 June 2017 and it proved to be a great success from the aspect of both academic discussion and the involvement of national professionals. In the first four sections of the event, some of the editors and the authors (Arthur Hartkamp, Carla Sieburgh, Wouter Devroe and Balázs Fekete) presented the main points of their chapters and each presentation was followed by the comments of a Hungarian expert (Attila Menyhárd, Réka Somssich, Gábor Fejes and Miklós Boronkay) and an intensive discussion. The closing section of the conference was a roundtable talk on the Casebook as such, with the participation of Hungarian professionals (Róbert Dezső, attorney; Veronika Guba, judge; Anikó Kátai, head of department at the Ministry of Justice; Endre Orbán, law clerk at the Constitutional Court; and Márton Varju, EU law expert at the Hungarian Academy of Sciences), who welcomed the book and explained its utility for their respective fields. This discussion revealed important professional insights and confirmed the original intent of the editors to targeting practising professionals besides the academic community.

As a main point, the participants and the audience learnt, at the end of the conference, that Western and Central-European lawyers struggle with the same problems when dealing with the national cases in which EU law provisions are involved. And, this seems to be equally important, too, one of the conclusions was that 'we now know that we are not alone' when improving and refining the European legal community when dealing with individual and country-specific cases.

We are very pleased that some participants prepared their contributions or interventions in a written form for those who could not attend the event. We are also very grateful to the Editorial Board and the Editors of the ELTE Law Journal who made it possible to publish these pieces in this journal as a separate section. This section contains seven shorter pieces and each of them is dedicated to one specific aspect of the Casebook. However, they cannot be regarded as mechanical recapitulations of certain chapters. They all give rise to new questions, ideas or doubts. That is, they all contribute to the discourse on the common law of Europe and, thereby, they also enhance and strengthen it – in line with the original intent behind the birth of the series of *Ius Commune* Casebooks.

Arthur Hartkamp*

Introduction

During a symposium at ELTE University in Budapest in June 2017, we celebrated the launch of the Casebook on European Law and Private Law. This book has appeared with Hart Publishing, Oxford (now an imprint of Bloomsbury Publishing). It is a volume in the well-known Series *Ius Commune Casebooks for the common law of Europe,* and that is correct because it is a book on comparative law; however, it differs in some respects from other volumes in the Series.

The book has been written by an international group of some fifteen jurists covering ten legal systems of EU member states, who originate from Belgium, France, Germany, Hungary, Italy, the Netherlands, Poland, Portugal, Sweden and the UK. I may say that we have worked quickly: between 2012 and 2015 we had seven plenary meetings of two days and one meeting of a week's length on the chapters to be edited by Carla Sieburgh, Wouter Devroe and me, and the secretary of our Group, Roel van Leuken. The real work, namely the writing of the chapters, occurred between those sessions. It was a most interesting experience, in particular because we had to find our way along paths largely untrodden between the lands of European law and national private law.

The book is about the influence of European Union Law on national private law. It is based on four choices.

I. We have been concerned with the law in force, not with law in the making; with soft law, with principles of European contract law and the like. Studies in those fields are often conducted under the flag of European private law. They are a part of comparative law, based on the comparison of the different systems of private law in force in Europe and they sketch a possible future common private law across Europe. In our endeavour, we were not concerned with that type of European private law. We decided to give preference to European law in force, the law of the European Union, and the ways in which that law interacts with the private law in force in the EU member states.

II. Most private law of European origin is condensed in secondary law, in particular directives. Think of consumer law, of labour law, of company law, of copyright law. Those directives are implemented in national laws in the member States of the Union. After that implementation they may also be called European private law, but in a sense different from

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the previous one, because they are European private law in force. In principle, this Casebook does not deal with directives and implementing national laws, although subject to some features that are interesting precisely because these laws find their origin in EU law. Those interesting features belong to the realm of primary EU law, e.g. harmonious interpretation, references by national Courts to the EU Court of Justice (CJEU) and *Francovich* liability.

III. Now we hit the mark: the third and most basic choice is that this book is concerned with primary EU law and its interactions with national private law. In our view, European private law in force is not only private law governed by sources of European secondary law. Primary law must also be taken into account when studying the impact of EU law on national private law. Restricting ourselves to primary EU law is the most original choice: describing the application of primary European law to private law relationships.

The objective pursued by this book is to show the community of lawyers, especially private lawyers, what they too often omit in their analyses, the application of primary EU law in a horizontal situation. This omission is quite understandable. Primary European law is nearly exclusively public law. Its effects on private law are uncertain and obscure, as they are predominantly laid down in the case law of the CJEU. That case law is often unclear and unsystematic. And there are hardly any systematic books on the subject.

IV. And there is a fourth choice. As I mentioned, the interactions between primary EU law and private law are dealt with in the case law of the EU Court of Justice in judgments that provide answers to questions referred to the CJEU by national courts. After the CJEU has issued its answers, the case continues in the member state from where the preliminary question originated. Strange as it may seem, many of the follow-up cases in the national jurisdictions are not published, at any rate not across the EU in accessible languages, and consequently they are not studied in other member states. And what is true for the follow-up cases is even more true for other national case law, applying EU law without a reference to the CJEU. Frankly speaking, we do not know much about how EU law is applied by national courts across member states. From a recent comparative study with a limited scope – between Dutch and Belgian case law – it became clear that national courts deal with EU law in quite different manners. So the final choice was to concentrate on national case law and study the differences between civil courts applying EU law in EU member states

For that reason we choose the formula of a casebook and we were very happy to find a place in the famous Series of Casebooks on the Common Law of Europe founded by Professor Walter van Gerven, until 2015 the living example of a felicitous combination of EU law and private law scholarship. He passed away while we were making this book ready for the press. So in the end this is a book of comparative law, but not based on a comparison of national private law systems, but (starting from EU primary law as a point of reference) finding out the ways national private law courts deal with EU primary law.

Each chapter starts with a brief description of the actual state of affairs in the case law of the CJEU. Then, in order to find a common approach to deal with the national cases, we proceeded on the basis of a distinction made between a number of ways in which a rule of EU

law may impact on a national private law situation. This distinction is set out in Chapter 1 of the Casebook. We distinguish between direct horizontal effect and various types of indirect horizontal effects. By direct horizontal effect, we mean that a rule of EU law directly impacts on the content of a relationship between individuals, creating, modifying or extinguishing rights or obligations between those individuals. By indirect horizontal effects we mean several distinct types of impact, which should be carefully distinguished, e.g. interpreting concepts or rules of national private law in conformity with EU law or by assessing the compatibility of national legislative rules with rules of EU law, the result of which may affect the relationship between individuals. These concepts of direct and indirect horizontal effect are not cast in stone; everyone may categorise them according to his or her own preferences, but the message here is that there must be some kind of categorisation, otherwise it will be much more difficult to understand how the impact of EU law on private law is structured and which different types of impact exist.

After this introductory first chapter there are six chapters dealing with the major building blocks of which primary EU law is composed (from the perspective of our field of research). These chapters deal with

– competition law (art 101 ff TFEU) (Chapter 2);
– horizontal effects of the fundamental freedoms (Chapter 3);
– the Treaty rules on non-discrimination, in particular art. 18 (nationality) and 157 TFEU (equal pay for men and woman) (Chapter 4);
– the general principles of EU law (effectiveness, legal certainty, proportionality, non-discrimination, abuse of rights, unjust enrichment etc., which – insofar as they cover fundamental rights – must nowadays be viewed in relationship with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights and Fundamental Freedoms Rights ECHR) (Chapter 5);
– rules of EU primary law relating to the implementation, interpretation and effects of private law directives (Chapter 6); and
– the *ex officio* interpretation of rules of EU law by national courts (Chapter 7). Here, for systematic reasons, we deal both with primary law (art. 101 TFEU) and directives, in particular the well-known case law of the CJEU on consumer protection directives. We think that, in order to understand the phenomenon of *ex officio* interpretation, it is helpful to consider the connection between primary and secondary EU law.

What this book wants to convey is our view that it is important for private law jurists to familiarise themselves with at least part of primary EU law. That knowledge is important for lawyers working in the practice of the law as well as for judges. Any lawyer and any court dealing with private law cases may come across problems of EU law reaching out well beyond the clearly defined domains of private law directives.

I would like to add that it works also the other way round: EU lawyers would be well advised to become more acquainted with private law. On the one hand, private law arguments can contribute to the development of EU law. On the other, the effectiveness of EU law can be enhanced by using the instruments and remedies of private law.

During the symposium we have tried to elucidate these propositions in three programme parts on fundamental freedoms, competition law and *ex officio* application in relation to the implementation of directives. Each of these parts consisted of an introduction given by a member of our group, followed by a reaction from one or several experts from outside the group.

It is the intention of the editors to continue to follow the developments addressed in this book. Users of the Casebook are invited to get in contact with us, either directly or through the website of the Casebook Project (www.casebooks.eu), to share with us the developments in the case law of their national jurisdictions which might be interesting for a second edition of this book.

Attila Menyhárd*

Taking European (Private) Law Seriously

I The Flexible System of Private Law

Normally, we divide our legal systems into *public law* and *private law.* Although the public-private divide as a conceptual framework for law may be held artificial and obsolete, the structural distinction of legal relationships between individuals on the one hand and legal relationships of individuals and public authorities on the other hand is useful from a didactic point of view and also because the relationships of the individual *vis-à-vis* the legislator and administrative bodies are certainly different than those toward other individuals. Conceptualising, as the book does, legal relationships that establish rights and obligations between individuals as 'horizontal relationships', contrasted with 'vertical relationships' between individuals and public authorities avoids the difficulties emerging from the public-private divide. I find the conceptual framework of the book, distinguishing *direct* and *indirect* effects of European law in a horizontal legal relationship, as a crucial and far-reaching one, especially because it allows private law to be approached as a flexible system. As it has been described by *Walter Wilburg,* private law is a system built upon open rules,[1] which leave a wide power to the courts and allow them to establish and use their proper guidelines to adjudicate cases and adapt the practice to changing social circumstances. Private law, as a law in action, is a flexible system in which the courts apply complex criteria in the course of deciding cases. This flexible system of open rules allows the courts to assess the case by weighing the underlying and relevant social values as well. In this model, the judgements of the courts are the result of weighing the relevant evaluation factors. The values that are to be considered under the given circumstances have different weights in each case. The basic evaluation, which is provided normally (but not necessarily) by the legislator, can be overruled by the courts on the basis of other relevant values if they outweigh the basic evaluation. The abstract rules, wide concepts and general clauses of private law make it possible to apply this flexible system while maintaining consistency in the conceptual framework of written law.

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1 Walter Wilburg, *Entwicklung eines beweglichen Systems im Bürgerlichen Recht* (Rede gehalten bei der Inauguration als Rector Magnificus der Karl-Franzens-Universität in Graz am 22 November 1950) (Karl-Franzens-Universität 1950, Graz) and Walter Wilburg, 'Zusammenspiel der Kräfte im Aufbau des Schuldrechts' (1964) 163 AcP 346–379, 364ff.; B. A. Koch, 'Wilburg's Flexible System in a Nutshell' in H. Koziol, B. C. Steininger (eds), *European Tort Law 2001 – Tort and Insurance Law Yearbook* (ECTIL 2002, Wien, 545–548) 545ff.

II Legislation vs Court Practice

Scholarship mostly limits itself to analysing directives and relevant regulations while addressing the effects of European law in private law. Many times, this approach prevents the professional community not only from coming to useful conclusions regarding the impact of European law on private law but also from understanding the nature of private law and the mechanisms that shape it. Such a limited approach also would prevent us from understanding what *European* law is. Understanding the *nature of indirect effects* in horizontal relationship opens the way for mapping such effects, not only over an unusually wide range (covering such general and central elements of private law as abuse of rights or unjust enrichment, and going beyond competition law, contract law and non-discrimination) but it also opens the way for an in-depth analysis as well. Although we normally focus on what the content of law *is*, it is also important what the content isn't. The preparatory phase of the Anti-Trust Damages Directive revealed that introducing *punitive damages* was rejected by the European jurisdictions. Such a measure of enforcement is incompatible with national laws. The Commission White Paper on Damages Actions for Breach of the EC antitrust rules adopted on 2 April 2008[2] explicitly abandoned the idea of introducing multiple damages, which had been suggested in the Commission Green Paper on Damages actions for breach of the EC antitrust rules,[3] as a result of consultation because, under the consultation procedure, most of the respondents suggested that damages should be regarded as a compensatory instrument.[4]

Having regard to the model of the flexible system in private law, the private law of the European law cannot be assessed without analysing the relevant court practice of the CJEU and the national courts. That is why the impacts of the practice of the CJEU can be extremely far-reaching; for example, in Hungary, the liability for damages of the Member State for failure to implement directives, established in the *Francovich* case,[5] is the strongest argument in professional discussions for establishing the liability of the State for damages for improper legislation.[6] From this angle, the practice of the CJEU is an important factor in revisiting state immunity doctrines at national level, pointing at the substance of the rule of law and sovereignty, which is the *raison d'être* for the European Union too. As the result of the in-depth analysis attempted by the editors and the contributors, the book aims to reveal the *impacts* of European legislative measures at the *level of national law* as well. This approach is of fundamental importance as well: if one assumes that European law is the law of the European community, which definitely is how we would like to see it and which implies that Europe *is* a community, European law is not to be contrasted with national laws but national

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2 COM (2008) 165, 2.4.2008.

3 COM (2005) 672, 19.12.2005.

4 Commission Staff Working Paper SEC (2008) 404, 2.4.2008 nr. 182.

5 Case C-6 and 9/90 *Francovich and Bonifaci v Italian Republic* [1991] ECR I-5357.

6 Fülöp Györgyi, 'Az állam kártérítési felelőssége a közösségi jog megsértése esetén' (2003) 5 (5) Polgári Jogi Kodifikáció 18–23.

law and community laws are to be seen as constituting European law. In other words, national law is not outside European law but is part of it. From the internal logic of European law, it would even follow that national laws create European law.

III The Limits of Harmonisation

Harmonisation with legislative measures certainly has its limits, as is clearly presented in company law. The Company Law Directives attempt to harmonise company law without providing a normative concept of company, which results in fragmented regulation on the national level, as different rules are to apply to public limited companies (or companies limited by shares) and private limited companies (or limited liability companies), even on aspects where the differences are not justified by the legal nature of these types of company. Such inconsistency could be avoided at national level, simply by extending the harmonised rules to other company forms, too. The *Rabobank* case also shed a light upon the relationship between national court practice and European legislation. One of the primary aims of the First Company Law Directive was to adopt the German model of unrestricted power of representation of the members of the board (in Art. 9.) by making a distinction between third party relationships and the internal regime. The First Directive did not provide European regulation for the existence of the power of representation but gave protection to third parties. The Directive could not, however, cover abuse of the power of representation or similar concepts under national laws if the third party was aware of the violation of a standard applicable to the company and acted against the interest of the company. In the *Rabobank* case, the CJEU accepted that member states may provide exceptions for cases on conflicts of interest and believed that there is a lacuna concerning those situations where the third party knew or should have known of the conflict of interest (e.g. violation of an internal standard or prohibition).[7]

IV The Role of Indirect Convergence – a Method for Harmonisation?

I think that it is a very important insight that while it is basically the *CJEU that shapes private law* at European level, it however also depends on how we conceptualise 'European Law'. If we do it as a bundle of legislative instruments produced by the regulatory bodies of the European Union, including the Treaties, this is correct. However, if we take the *phenomenon of indirect convergence* into account as well, the landscape is much more complex. National courts as well as national legislators follow the answers given to the same problem in other jurisdictions in Europe and try to adjust themselves to the mainstream. A good example could be the

[7] Case C-104/96 *Coöperatieve Rabobank "Vecht en Plassengebied" BA v Erik Aarnoud Minderhoud* [1997] ECR I-7211.

change of the Hungarian court practice on *wrongful life* claims: the claims of the handicapped child vis-à-vis the doctors for failure to reveal the genetic or teratological harm were accepted in Hungary, but when the Supreme Court realised that such claims, especially after the *Loi Perruche* in France, are rejected in almost all European jurisdictions, it declared that it revised its practice and such claims are no longer accepted in Hungary.[8] Another example could be the liability for 'wrongful trading' in company law and bankruptcy law. While lifting the corporate veil referring to the general clause of prohibition of abuse of rights, the Hungarian Supreme Court explicitly pointed to the relevant practice of German courts and the German doctrine of *Durchgriffshaftung*.[9] By introducing the liability of *de facto* or 'shadow' directors for the debts of an insolvent company, the Hungarian legislator followed the European models.[10]

Sometimes it is rather difficult to establish *if results in national law are the impacts of European law or the situation is the reverse.* The content of most of the directives addressing private law is the result of compromises on the ground of solutions already established in national laws. *Harmonisation is not about innovation but it is about looking for a common denominator in the European legal systems.* The 13/1993 EEC Directive on Unfair Terms in Consumer Contracts has been adopted after the *AGB-Gesetz* in Germany (1976), the *Unfair Contract Terms Act* (1977) in the UK, the *'Scrivener' Act* in France (1978) introduced protection against abusive contract terms in the main national legal systems of the European Community. The approach of the German, the French and the British legislator were not the same: there were significant differences on whether protection was limited to consumers contracts or not, protection was extended to contract terms that were individually negotiated or restricted to standard contract terms and if the main test of unenforceability was unreasonableness or non-compliance with the principle of good faith and fair dealing *(Treu und Glauben).* The intersection of these legislations was the Unfair Contract Terms Directive (1993), except the choice of adopting the German test of good faith and fair dealing instead of the reasonableness test of the British solution. Although the reasonableness test could be seen as considerably different to that of the German 'good faith and fair dealing' one, strong arguments were formulated that this would not have brought significant changes in practice.[11]

[8] Supreme Court, Unificatory Resolution no. 1/2008, 12 March 2008.

[9] Supreme Court, Legf. Bír. Gfv. II. 31.962/1998. sz., EBH 1999. 118.

[10] On the ground of § 33/A subs. (1)–(2) of the Bankruptcy Act, persons who actually influenced the resolutions of the company may be held liable for the company's debts towards the creditors in the event of insolvency.

[11] Elizabeth Macdonald, 'Mapping the Unfair Contract Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts' [1994] Journal of Business Law 441–462.

V Deep Impacts of European Private Law

I agree that a *shortage of knowledge* concerning European law can be an obstacle to implementing and enforcing it. A good example could be *product liability,* where national courts are obviously reluctant to draw the consequences of the *maximum harmonisation* established by the CJEU.[12] According to the CJEU, if the claim falls under the scope of product liability, the national court is prevented from applying parallel regimes of national law, even if the alternative could be more beneficial for the victim. If one takes the conclusion of the judgements handed down by the CJEU seriously, this certainly overwrites the liability regimes of all of the European jurisdictions, even if such far-reaching consequences would presumably go beyond the aims of the European legislator. Such impacts are hardly recognisable in European jurisdictions.

Another important *deep impact* on national law was the CJEU judgement in the landmark *Courage v Crehan* case.[13] The CJEU in this case established that *enforcement of European competition law* has a priority over a doctrine preventing the party from giving voluntary consent to a contract that violated *public policy.* European courts normally maintain doctrines that prevent the party from referring to the invalidity of the contract if the party was aware of the ground of invalidity at time of contracting. As it has been formulated in the famous sentence of Lord Chief Justice Wilmot in a beautiful way, 'all writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice' (*Collins v Blantern,* 1767). The CJEU, in *Courage v Crehan,* clearly established that this doctrine is called *in pari delicto* in English contract law but such doctrines are inherent parts of most European jurisdictions under the scope of application of the general clause of *'good faith and fair dealing'.* Overruling national public policy with Community public policy, the CJEU clearly established that English courts (and, consequently, the courts of other Member States) are prevented from referring to this doctrine. If the consequences of the CJEU judgement in *Courage v Crehan* were drawn consistently in Europe, it certainly would have resulted in a fundamental change to an important pillar of contract law in national laws. This did not happen and I don't think that the reason for the reluctance of national courts to implement the consequences of *Courage v Crehan* is simply a lack of awareness of the community of legal professionals. I think that the basic question here is whether the European Union *does have the authority* to introduce such fundamental changes in private law or to destroy the consistency of private law by creating *ad hoc* exceptions to fundamental doctrines of private law. That is, the boundaries of legitimacy of CJEU judgements influencing private law are unclear. The same question of legitimacy concerning compensable non-pecuniary loss was at stake in the *Leitner* case[14] but

[12] Case C-183/00 *Maria Victoria González Sánchez v Medicina Asturiana SA* [2002] ECR I-3901; Case C-52/00 *EC Commission v French Republic* [2002] ECR I-3827; and Case C-154/00 *EC Commission v Hellenic Republic* [2002] ECR I-3879.

[13] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297.

[14] Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co. KG* [2002] ECR I-2631.

the consequences of accepting *lost holiday experiences as a compensable non-pecuniary loss* were much more limited and presumably less important.

For me, one of the most important messages of the approach presented in *the book is the importance of interpretation*. I believe that *interpreting* the norm cannot be distinguished from *making* it. Interpretation is about *establishing the content* of the norm, which is the same as creating it. That is, the requirement of *interpretation* of national law in conformity with a directive can also be seen as a *direct application* and a direct effect. The *specific role of open norms* of national law in this respect, addressed by the contributors as well, is a complex issue and still open for further analyses.

If the norms of European law are of a *mandatory nature,* is a difficult issue and drives us back to the 'opening', i.e., *European law is not private law but public law.* Norms of public law are mandatory in nature. They are not default rules. *If provisions defining default rules* in national law are, however, unclear from this point of view, the internal logic does not help**,** because default rules are also created by the same legislative power as for mandatory rules. For instance, according to the relevant rule of the Hungarian Civil Code, the parties are free to establish rights and obligations in their contract within the limits of mandatory rules of contract law. We also think that a rule establishing rights and obligations between the parties is of a mandatory nature only if the law provides so. The European legislator does not provide such qualifications. That is, it is the task of the national legislator to make sure that European rules would not be interpreted as default rules but as mandatory norms.

Carla Sieburgh*

Taking the Next Step Towards More Equality

Equality goes to the heart of the law. It is a prescript that has to be observed in order to reach a level of justice that citizens indeed perceive as justice.

Many perceive non-discrimination as a 'soft', social value: discrimination is its hard-core restriction. It therefore does not come as a surprise that equality grew into a core element of EU law in general and of the decisions of the European Court of Justice in particular.

Conscious creatures like human beings[1] have a perfect intuition for equality – which goes with an intuition for discrimination. As long as they perceive a relevant difference, they accept differences in treatment. Such treatment is not perceived as being unequal. As soon as the relevance of a difference fades, the acceptance of differences in treatment equally fades. The situation becomes instable. It's the end of peaceful coexistence.

The story of equality discussed in this contribution anchors with Chapters 4 and 5.II of the Casebook. Besides, it shows the structure of the other chapters and ways to make use of their content.

The casebook presents what national judges manage to construct with the building blocks provided for by the Treaty on the Functioning of the European Union, the case law of the Court of Justice, the General Principles of EU law, the Charter, the directives, national private law, the arguments of the private parties involved and their own well-informed common sense. Case law is reported in terms of facts, the legal relationship concerned, the techniques and mechanisms of EU law and national law, the substance of rules of EU law and national law and the substantive implications for the horizontal relationships, including the available remedies.

As equality directly relates to the intuition of citizens, judges receive much help from the private parties involved. As an example, in EU law, free movement is perceived as fundamental. The awakening of freedom of movement provisions in the sphere of private law directly relates to private parties being discriminated against by other private parties.

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1 Having an intuition for equality is not confined to human beings as is shown in the experiments designed by prof. Frans de Waal. See for example <https://www.youtube.com/watch?v=meiU6TxysCghttps://www.youtube.com/watch?v=meiU6TxysCg@> and <http://www.hpdetijd.nl/2014-09-22/onderzoek-dit-is-waarom-mensen-eerlijk-zijn/>.

Regarding the free movement of workers being an essential part of EU law in general, Angonese and Köbler did not care a straw. Angonese grew angry for not being equally acknowledged as a person who was fluent in German,[2] and the Austrian citizen Köbler could not stand that his teaching experience acquired at a German university was not of similar value as the teaching experience his colleagues had acquired in Austrian universities.[3] The intuition of private parties for equality has always been a powerful motor for the development of EU private law.

I Article 18 TFEU

One of the findings presented in the Casebook is that Article 18 TFEU has practical relevance. Judges apply Article 18 TFEU, the general prohibition to discriminate on grounds of nationality, independently from provisions on free movement. They do so more often than expected. Moreover, we found that judges employ the direct horizontal effect produced by Articles 18 and 157 TFEU. In the hands of individuals and judges, these provisions serve as an excellent crowbar.

Regarding Article 18 TFEU, a basketball player from Greece came to Belgium and concluded a contract with a Belgian basketball club. Under this contract, the player was obliged to play basketball. Besides however, the regulations of the Belgian basketball federation formed part of the contract. One of its provisions excluded non-Belgian basketball players from national and provincial basketball divisions. Nevertheless, the Greek basketball player wanted to perform his contractual obligations. He managed to rely on his right provided for by Article 18 TFEU. The Belgian court applied Article 18 TFEU directly to the horizontal relationship between the Greek player and the Belgian club, as well as to the horizontal relationship between the Greek player and the Belgian federation.

The discriminatory contractual clause (flowing from the regulations of the federation) between the player and the club was set aside, so the basketball player could perform his obligations. Moreover the judge stressed the importance of the prescripts of Article 18 TFEU by granting an injunction against the Belgian basketball federation. Granting this injunction meant that the federation would act unlawfully if it maintained the provision in its regulation concerning non-Belgian citizens.[4]

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[2] Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139.

[3] Case C-224/01 *Köbler v Republik Österreich* [2003] ECR I-10239.

[4] See Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon), Case 4.6 (BE).

II Article 157 TFEU

It is well known that, disregarding the literary text of Article 157 TFEU, private parties can directly rely on Article 157 TFEU and invoke the right to be equally paid. They can enforce that right before the national judge in a dispute with another private party, their employer.

Men may equally be protected as women. If the collective agreement concluded between an employer and an employee contains a provision granting single mothers a nursery allowance, Article 157 TFEU gives a single father the right to the same nursery allowance. That such ab allowance goes against the text of the provision in the collective agreement means that this clause is violating Article 157 TFEU. The French national court, applying general private law, declared the provision null and void for that reason. The next step was to fill the gap created by the nullity. The national court substituted the invalid provision by operation of law, so that in similar situations male employees are paid the same allowance as enjoyed by female employees.[5]

III The Principle of Non-discrimination

The next observation is to be found in the field of the principle of non-discrimination as a general principle of EU law. The CJEU devised, in its *Mangold and Kücücdeveci* decisions, a way that avoids problems encountered in the event that a relationship between private parties is governed by a provision of national law while this provision is not in conformity with a directive. The CJEU consistently held that in a relationship between individuals, the national judge is not allowed to review the provision of national law against the directive. This implies that private parties in a dispute with other private parties may rely on their national law – whether it is in conformity with the directive or not. Their expectations based on current national law are protected. The other side of the coin is that they lack the protection granted by the directive.

Regarding the prohibition to discriminate on the grounds of age however, the CJEU created the possibility to review the national provision against this general principle of EU law. If the national provision is at variance with the general principle of non-discrimination on the grounds of age, the national provision has to be set aside. The first question is how national judges manage to apply the remaining provisions and to reach a result that is in conformity with the prescripts of equality. They appear to manage beautifully by applying subtle private law doctrines as partial nullity, *geltungserhaltende Reduktion,* substitution and reasonableness and fairness. I refer to the casebook for details.[6]

The second question is how they deal with protecting the legitimate expectations of the private party that faces duties under the new legal situation – for example the duty of

[5] See Hartkamp, Sieburgh, Devroe (n 4) Case 4.18 (FR).
[6] See Hartkamp, Sieburgh, Devroe (n 4), Cases in Chapter 5 II.

the employer to employ an employee five years longer than expected. National judges take the legitimate expectations into consideration but this interest outweighed the interest of upholding non-discrimination in none of the reported cases. To justify this result, judges refer to the majority in legal doctrine. Legal scholarship explained, during the national legislative process, why the designed national provision was obviously violating the principle of non-discrimination on grounds of age. Employers are therefore expected to be aware of the legal literature. Even more importantly, they are expected to anticipate national law not being in conformity with EU law and to observe EU law while entering into a horizontal relationship, for example a labour contract.[7]

IV Making Use of the Sources

There are many more interesting, enticing and amusing results to report. In almost all cases it has been a difficult job to collect them, and in many cases it was even harder to construe them. The editors and authors of the Casebook explored new ground. My final observation elaborates on the question of who may make use of the treasures hidden in this book. My answer is anyone: private parties, lawyers, judges, legislators, legal scholars and students who are interested in or obliged to deal with EU law and private law or who are looking for innovative arguments. The book presents cases followed by analyses and general observations in the fields of competition, free movement, non-discrimination, general principles of EU law and *ex officio* application. Who is looking for new arguments may start from the general observations to find steppingstones in the related cases and to apply insights in the case at hand.

V Example: Ways to Avoid Discrimination of Nationals of Other Member States

I give an example. Questions that in practice have arisen rather frequently are how to deal with national law that results in treating nationals of the own Member State more favourably than nationals of other Member States, and, the other way around, how to deal with EU law that results in treating nationals of other Member States more favourably compared to nationals of the judges' own Member State.

National law that treats its own nationals more favourably than nationals of other Member States clearly infringes EU law. That is a fact. But do national systems adjust? And, if so, how do they?

They do. The German judge, for example, was not afraid to broaden the application of Article 19 of the German Constitution, granting 'domestic legal persons' basic rights (in this

[7] See Hartkamp, Sieburgh, Devroe (n 4), Case 5.9 (GERM).

case the right of ownership). The judge relied on the technique of 'extended application' to have an Italian company protected by this provision. The concept of 'domestic legal person' in Germany thus covers legal persons from other Member States.[8] The Belgian judge faced comparable problems in relation to the term 'foreigner'. If he were to apply the provisions of national law to all foreigners then he would treat citizens of other Member States less favourably than Belgian citizens. The judge therefore excluded nationals of other Member States from the definition of 'foreigner'.[9]

Both judges explicitly referred to the requirements set by EU law and neither of them considered the EU law-friendly extended application or exclusion to be *contra legem.* Parties and lawyers may bring such findings to the attention of judges from other Member States. Judges may feel reassured if they themselves try to mould the law as it stands in conformity with the requirements set by EU law.

VI Example: Ways to Avoid Reverse Discrimination

I want to pay attention to one other possibility for national law to be developed by all legal actors on the basis of findings in this casebook. EU law does not prevent nationals of a Member State from being treated under their national laws less favourably than nationals of other Member States under EU law and national law. The problem of reverse discrimination is a matter of internal law of each Member State. In Austria, Belgium and Italy, nationals are protected against reverse discrimination by the national constitution or by the case law of the constitutional court.[10] The effect is that a private party may enjoy similar protection under national law as nationals of other Member States would derive from EU law.

These practices may be a mirror for other Member States that, until now, have kept on applying less favourable rules to purely internal situations. Readers of the *Ius Commune* Casebook on EU law and Private Law – students, individuals, practitioners and scholars – can rely on such findings to invite national legal systems to take the next step towards more equality.

[8] Hartkamp, Sieburgh, Devroe (n 4), Case 4.12 (GERM).
[9] Hartkamp, Sieburgh, Devroe (n 4), Case 4.10 (BE).
[10] Hartkamp, Sieburgh, Devroe (n 4), Case 4.14 (IT).

Réka Somssich*

The Principle of Non-discrimination in Private Law Relationships as Seen and Presented by the *Ius Commune* Casebook on European Law and Private Law[1]

I On the Outstanding Role of *Ius Commune* Casebooks in General and on Chapter 4 and Chapter 5. II. of the *Ius Commune* Casebook on European Law and Private Law in Particular

Most of the law books and academic works on EU law focus on the evolving case-law of the Court of Justice of the European Union (CJEU) and the interpretation it gives in its preliminary rulings on certain provisions of primary or secondary legislation. Less attention has been given to what happens behind the scenes, at the level of national litigation, where EU law is in fact in action and is applied and interpreted by the national jurisdictions. That is why *Ius Commune* casebooks are peculiar, because they look behind and provide a comparative view of national case-law and this particular volume does it with regard to the interpretation and application of EU provisions influencing private law relationships. This comparative approach gives a new insight into EU law because we have little knowledge of cases where national judges were confident enough to interpret EU law themselves without seeking preliminary ruling and we do not really see either what happens in follow-up cases at national level after the judgment of the CJEU was delivered. National judges are however important actors in the European judicial framework because they are fully-fledged interpreters of EU law: at the level of non-last instance courts, definitely, while at the level of last instance courts, when invoking and applying the CILFIT criteria. The publicity and availability of national court decisions interpreting EU law is however restricted, they seldom cross the country borders, although they could serve as further inspiration for other Member

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[1] Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon).

States' courts, which, instead of seizing the CJEU, would follow them if agreeing with the interpretation provided.[2]

This is why this book is of major importance because it leads us to a partly undiscovered and hidden horizon of EU law, a horizon which however is the closest to us, to our everyday legal dealings at national level.

In order to illustrate that peculiar aspect, of national case law applying EU law in private law relationships, the very first national case reported under Chapter 4 on 'Non-discrimination provisions in the TFEU' could already be raised. The reader might easily be shocked to find out that the Court of First Instance of Brussels in a decision of 1992[3] already ruled that the regulations of the Belgian basketball federation not to allow non-Belgian citizens to participate at national and provincial basketball divisions are against the principle of non-discrimination and this, three years earlier than when the Court delivered its famous judgment in the *Bosman* case,[4] triggering an overwhelming change in the world of sports based on the principle on non-discrimination. It is true that the *Dona* judgment[5] of the CJEU of 20 years earlier already found national quotas in sport federation regulations as non-conform with the Treaty provisions; that decision still left the door open for exceptions with vague and confusing wording referring to non-economic reasons. The Court of First Instance of Brussels was however quite explicit to blame national quotas. It was as explicit as the CJEU some years later.

A question therefore logically arises: was the Brussels court right not to ask the CJEU about the interpretation of the non-discrimination principle in the given case? The answer is debatable. Yes, of course it was right, because it could arrive at a correct and valid interpretation by itself, which was later even confirmed at the level of the CJEU in the *Bosman* judgment and other subsequent cases that fine-tuned the principle. On the other hand, however the reported case demonstrates that interpretations of national courts – even if correct – remain isolated until they are confirmed by the CJEU, the decisions of which are *erga omnes* with binding effect all over the EU. It means that if the Brussels court had referred its questions on the interpretation of the non-discrimination principle with regard to the national quotas to the CJEU, the clarification of the *Dona* judgment could have happened somewhat earlier.

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[2] On the eventual cross-border effects of national judgments see: Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013, Oxford); Sophie Robin-Oliver, 'La référence (non-imposée) à d'autres droits par les juges des États membres de l'Union européenne' in Sophie Robin-Oliver, Daniel Fasquelle (dir.), *Les échanges entre les droits, l'expérience communautaire – une lecture de phénomènes de régionalisation et de mondialisation de droit* (Bruylant 2008, Bruxelles, 141–160); Martin Gelter, Mathias Siems, 'Networks, Dialogue or One-Way Trafic? An Empirical Analysis of Cross Citations between Ten of Europe's Highest Courts' (2012) 8 Utrecht Law Review 88–99.

[3] Court of First Instance of Brussels 14 September 1992 Pas 1992 III 103 C. Markakis v Fédération Royale des Sociétés de Basketball (see p. 237 of the book).

[4] Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-04921.

[5] Case 13/76 *Gaetano Donà v Mario Mantero* [1976] ECR 01333.

The importance of national cases cannot and should not therefore be underestimated. As the relevant chapters of the book clearly demonstrate, they show the national courts' general attitude in the application of EU law: they might echo CJEU interpretations in a faithful manner, with a confident interpretation, they might advance later decisions of the CJEU and in some cases they broaden or tighten the limits of EU law.

The way the cases are presented in the book helps a lot in discovering this attitude: the targeted summary of the national cases reported is accompanied by the notes of the author, giving a focused analysis on the national courts' reasoning and findings, underlined why the decision influenced the private law relationship at hand. Cross references in the notes showing parallelism or even contradiction between national case-law further contributes to seeing the interrelations and interactions at the level of the Member States' jurisdictions. Each case has a short but very targeted 'nickname' which not only brings the cases closer to the reader but also makes recalling them easier. Reading through the cases is even more interesting, because they embrace several decades, from the late 70s until the most recent judgments delivered in the 2010s.

It is self-evident that the principle of non-discrimination – being one of the major guiding principles of EU law – has an important role in the structure of the Book. It is analysed in two different chapters, both written by Professor Carla Sieburgh. Chapter 4 is devoted entirely to the application of the explicit non-discrimination principles enshrined in the Treaty, in Article 18 TFEU (the general prohibition clause on any discrimination based on nationality) and Article 157 TFEU (on equal pay for men and women). While part II of Chapter 5 deals with the non-discrimination as a general principle of EU law and as a provision of the Charter of Fundamental Rights.

This deliberate choice of the author, of treating the different incarnations of the principle in distinct places helps a lot in understanding the real nature and complexity of non-discrimination as it appears under EU law and will be of great help to university lecturers when teaching about the principle.

II The Structure, Approach and Conclusions of Chapter 4

Right at the very beginning of Chapter 4, the author makes it clear what the chapter is about and what it does not cover, and why the non-discrimination principle matters in private law relationships. This very lucid and targeted approach of the author is of great help to the reader in understanding the logic of the different non-discrimination provisions and in following the national cases, which are split into four categories depending on the mechanism used by the national judge concerning the given horizontal relationship.[6] The national decisions

[6] The first category embraces those cases where the direct effect of the given EU provision was invoked; the second category covers those cases in which the national judge interpreted the national rules in conformity with the non-discrimination provision; to the third category belong decisions imposing positive obligations on Member States while the fourth group include all other miscellaneous cases (*Frankovich* type liability cases included).

analysed in the chapter are cases where the non-discrimination principle had a considerable influence on private law relationships but without the support of any other EU law provision, whether on a free movement provision or a directive. In order to understand the real nature of the TFEU articles concerned, the Chapter starts with a focused presentation of Article 18 TFEU, Article 157 TEFU (and, to the extent necessary, Article 19 TFEU) by citing the relevant legal literature and outlining the CJEU case-law.

The different legal effect of the non-discrimination provisions is underlined throughout the chapters. While Article 18 and 157 TFEU do have a horizontal direct effect, i.e. they can have a direct impact on private law relationships between individuals, the principle of non-discrimination, as a general principle of EU law, does not have such an effect but in no way it does mean that it cannot have an impact on private law relationships: if national law is found in conflict with the principle and is disapplied by the national court then it may alter horizontal relationships too: contractual clauses can be set aside, injunctions can be ordered, damages might be awarded or employment contracts of a fixed period should be turned into contracts of indefinite period and employees must be allowed to continue working.

In fact, the analysis of national case-law very much focuses on the different types of consequences resulting from the application of the non-discrimination principle in a private law context. That is because it is at the level of legal consequences where national case-law really matters, as the sanctions to be imposed or the remedies to be applied in the event of violating the non-discrimination principle are always in the hands of national courts. The CJEU provides an interpretation and it is the national judge who is in charge of giving full effect to the norm as interpreted by the CJEU within the limits of its own legal system. The question of whether the consequences and remedies are adequate and effective from an EU law perspective and whether they pass the filter of EU law can be the subject of subsequent appeals at national level or even of new preliminary references.

The analysis and evaluation of the legal consequences applied by national courts is without any doubt the most unique and exciting aspect of the chapter. The author approaches these sanctions, remedies and consequences from this specific perspective. The mere non-application of contractual terms or collective agreements violating EU law does not always amount to appropriate remedies at the level of individuals. In certain cases they are not effective. When analysing a decision of 2007 by the *Cour de cassation,*[7] which found that denying male workers who were in a similar situation as single women raising a child from taking up permanent employment was against EU law, the author herself questions whether disapplying the rule should be seen as an effective remedy in the absence of a vacancy for posts that a male employee could fill. In such cases, awarding damages should be seen as an effective complementary remedy at the level of individuals.[8]

[7] French Court of Cassation 18 December 2007 no 06-45132 Bulletin 2007 V no 215 Société Région autonome des transports parisiens (RATP) v M Somazzi (see p. 262 of the book).

[8] Hartkamp, Sieburgh, Devroe (n 1) 264.

Another interesting example of this kind outlined in the chapter is the follow-up of the *Angonese* case.[9] Who would have thought that the decision of the CJEU had been followed by two appeals bringing the case up to the *Corte di Cassazione* in Italy and these appeals were about the adequate consequences? In the original case, the CJEU stated that proof of the linguistic skills required for a job should also be accepted by other means than a certificate from a specific language centre and thus the recruitment requirement of an Italian bank that accepted only certificates from a single centre had to be assessed in the light of this judgment. In the follow-up cases reported in the book, the issue was the appropriateness of the legal consequences of CJEU's judgment. Should the employer's recruitment term on the specific language diploma be declared null and void and should at the same time Mr. Angonese be awarded damages for the loss of opportunity and, if yes, how much? The *Corte di Cassazione* of Italy upheld both remedies[10] seeing nullity as a logical consequence of non-conformity with absolute effect and awarding damages – even if the amount was mitigated compared to what had been decided by the first instance court – as an effective remedy for losses resulting from the infringement of EU law at the level of the individual concerned, that is Mr. Angonese. Without awarding damages, the remedies would not have been fully effective.[11]

The national case law presented is classified in the chapter into four different categories, depending on the mechanism used by the judge to give effect to EU rules.

The first category embraces cases where the direct effect of the Treaty provision was invoked. Four cases are reported concerning Article 18 TFEU. The number is somewhat higher (six) with regard to Article 157 TFEU, where most cases reported concern unlawful discrimination against men and unjustified benefits for women.

The second category is broader than the first one: it identifies cases where conformity with EU law was achieved through interpretation, either by the harmonious interpretation of national law or by the review (often accompanied by non-application) of the national rule in conflict with EU legislation.

The author of course refers to the limits and difficulties of harmonious interpretation in the case of non-conform provisions, underlining that they can in no way lead to a *contra legem* interpretation of the national provision concerned. A positive example is a decision of 2007 of the Court of Appeal of Antwerp,[12] in which it excluded from the concept of 'foreigners' – from whom a surety for legal costs in judicial proceedings could be required – any EU citizen or company.

Where the limit of *contra legem* interpretation is reached, other techniques are to be used. The counterpart of the above Belgian case is a judgment by the German *Verfassungsgerichtshof,*

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9 Case 281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA*. ECR [2000] I-04139.

10 Cass it 11 October 2004 no 20116 Roman Angonese v Cassa di Risparimio di Bolzano SpA. (see p. 255 of the book).

11 Hartkamp, Sieburgh, Devroe (n 1) 258.

12 Court of Appeal of Antwerp 5 March 2007 Eur Vervoerr 2007 vol 6., 739 Scarade NV v Bonyad Shipping Line Europe Ltd and BV/BA Van Doosselaere & Achen (see p. 244 of the book).

where protection granted to 'domestic' legal persons should have to be extended to any legal person domiciled in other Member State. As the scope of the term 'domestic' could not be altered by harmonious interpretation in the strict sense of the word, the German Constitutional Court referred to the positive obligation of the Member State to comply with EU law under the principle of sincere cooperation and extended the scope of the provision.[13] The author sees this kind of case as belonging to the third category of cases.

The parallelism drawn between the two cases is remarkable, because it shows how different Member States' courts could arrive, in very similar cases, at an EU-conform interpretation using somewhat different techniques in order not to pass the borders of *contra legem* interpretation.

And finally, reading cases in which already existing or pre-existing national provisions were interpreted in line with EU law and seeing the ease with which the British courts had already invoked the supremacy of EU law to reinterpret their Equal Pay Act to give effect to Article 157 TFEU in the 70s[14] we cannot but realise again and again how much we will miss the UK and its courts from the Union.

Other cases presented in the Chapter demonstrate the flexible interpretation of the principle at national level. As is emphasised by the author, Article 18 TFEU progressively became a self-standing provision, independent from the articles on free movement, not only at the level of CJEU but even at national level. Of course, it can only be applied if the subject-matter concerned falls within the scope of EU law. Some of the judgements strictly scrutinise these preconditions (e.g. judgment of the *Cour de Cassation* of 2008).[15] However, national case law demonstrates in certain cases a sort of spill-over effect of Article 18 TFEU: courts are in general willing to apply Article 18, even if in situations where it is difficult to see why they believe that EU law can come into the picture. The same can witnessed in the case of non-discrimination as a general principle of EU law, as presented later in Chapter 5: in a 2012 decision, the *Tribunale di Roma* invoked the principle of equality in a situation lacking any cross-border element.[16]

Another interesting aspect of the analysis is how national courts handled cases of reverse discrimination, i.e. cases where national legislation resulted in treating non-nationals in a more favourable manner than nationals. Here the problem is that EU law evidently does not provide protection against reverse discrimination and therefore national courts must either accept and confirm this lack of protection – as did the Supreme Court of the Netherlands[17] – or find a hint in their own legislation or constitution in order to have a way-

[13] Federal Constitutional Court of Germany 19 July 2011 NZG 2011, 1262 SL v MX. (see p. 248 of the book).

[14] Shields v E Coomes Holdings Ltd [1978] 1 WLR 1408.

[15] French Court of Cassation 17 April 2008 Bulletin 2008 V no 95 Wattecamps v Sté European Synchrotron (see p. 241 of the book).

[16] Court of First Instance of Rome 12 June 2012 Foro it 2013 I 1674 FIOM and CGIL Nazionale v Fabbrica Italiana Pomigliano Spa. (see p. 300 of the book).

[17] HR 11 May 2001 NJ 2002, 55 ECLI:NL:HR:2001:AB1558 Vredestein Fietsbanden BV v Stichting Ring 65. (246).

out.[18] It is stated that in some cases these interpretations by national courts result in erroneous decisions.[19]

It is worth noting that, from the judgments analysed in Chapter 4, the majority (10 out of 17) were taken by national supreme courts (six by the French *Cour de Cassation,* two by the Dutch *Hoge Raad,* one by the Italian *Corte di Cassazione* and one by the German *Bundesverfassungsgerichtshof*) without demonstrating the need for a preliminary reference and sometimes even without invoking the exceptions from the obligation to refer. We can only second guess whether the CJEU's approach would have been different if the questions had been referred to it, at least in some of these cases. It is for instance not beyond doubt that the CJEU would have found similarly in the *Zamolo* case,[20] in which a French citizen invoked in France the provisions of a collective agreement favouring German citizens falling within the scope of EU law.

III Non-discrimination as a General Principle of EU Law as Analysed Under Chapter 5

Chapter 5 is devoted to the general principles of EU law. They are grouped – according to their nature – into four subchapters: general principles of public law nature, the principle of non-discrimination, abuse of rights and the principle of unjust enrichment. Non-discrimination is thus examined in second place in subchapter II. Again, at the very beginning of the subchapter the reader is well instructed by the author on how to conceive the principle of equality as enshrined in EU law and why it behaves differently in an EU context than at national level. The specific nature of general principles in EU law also matters: their main purpose is to fill in the existing gaps in national legislation and their meaning is determined on the basis of the Charter.[21]

Although non-discrimination as a general principle cannot be invoked directly in horizontal relationships, it played a major role in the recent case-law of the CJEU in the leading *Mangold*[22] and *Kücükdeveci*[23] cases, where the Court ruled that national legislation in conflict with the principle must be disapplied or, as in the judgment *Test-Achats*[24] where an EU directive was annulled by the Court for being in breach of the principle of non-discrimination.

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[18] The author makes reference to some recent constitutional, legislative or jurisprudential changes in Italy, Belgium or Austria [Hartkamp, Sieburgh, Devroe (n 1) 277.].

[19] Hartkamp, Sieburgh, Devroe (n 1) 247.

[20] French Court of Cassation 10 December 2002, Bulletin 2002 V no 373, 368 Goethe Institut Association for the Promotion of the German Language Abroad and Cultural Exchanges v Bataille Zamolo (see p. 238 of the book).

[21] Hartkamp, Sieburgh, Devroe (n 1) 289.

[22] Case C-144/04, *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981.

[23] Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG.* [2010] ECR I-00365.

[24] Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECR I-007733.

The national cases are grouped into the same four categories as is found in Chapter 4, although the first category this time remains unfilled due to the absence of the principle's horizontal direct effect. The author underlines however that, in Chapter 5 she gives a rather broad meaning to the second category of cases, where the technique of harmonious interpretation is used by involving all those national decisions in which the open norms of private law (such as fairness, reasonableness, generally accepted conduct etc.) have been reconstrued through the prism of the general principle of non-discrimination.[25]

The cases analysed under this subchapter are mainly hybrid cases of *Mangold* and *Kücükdeveci* and emanate primarily from German courts. What do these follow-up cases tell us? The systematic presentation of the cases, as carried out in this book, actually tells us a lot. It must be underlined that both *Mangold* and *Kücükdeveci* concerned labour law and employment or termination terms not respecting the non-discrimination principle based on age. On the one hand, they demonstrate that a new, pioneer interpretation of the CJEU in sensitive areas such as labour law will trigger subsequent new cases at national level that might be seen as subcategories of an already decided case (whether the interpretation also applies to agreements entered into prior to the judgment of the CJEU[26] or how the interpretation should be applied in certain sensitive sectors where age discrimination is in principle justified by the nature of the work, as in the case of flight attendants and pilots[27]). National courts are able to cope with some of these new aspects but are not always completely sure and convinced. If they are not, they refer further questions to the CJEU. On the other hand, pioneer judgments might bring those who do not agree with them to their national constitutional court, asking it to scrutinise the eventual *ultra vires* effect of the pioneer CJEU judgment. Such an effect was denied by the German Constitutional Court performing the *ultra vires* test in a European-friendly and cooperative way,[28] but it cannot be ruled out that it would be recognised by some others, as was shown in the Czech Constitutional Court finding the ruling of the Court in the *Landtova* case to be *ultra vires.*[29]

The conclusions of the subchapter confirm the thesis that non-discrimination as a general principle might indeed have a considerable impact on private law relationships. This is clearly demonstrated by the various legal consequences national courts applied in different contexts. The author identifies eight different categories of these consequences,[30] based on the case-law analysed but these are of course not exclusive and there could be other specific cases where the horizontal relationship is altered in a different way. All in all, the main conclusion of the author is that national courts were able to find suitable remedies in cases of infringement of EU law, sometimes even using inventive and creative ways.[31]

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[25] Hartkamp, Sieburgh, Devroe (n 1) 291.
[26] German Federal Labour Court 26 April NZA 2006, 1162 X v Y (see p. 305 of the book).
[27] Federal Labour Court of Appeal of Germany NZA 2012, 866 Z v X (see p. 315 of the book).
[28] Federal Constitutional Court of Germany 6 July 2010 *NJW* 2010, 3422, *Honeywell v X* (see p. 302 of the book).
[29] Czech Constitutional Court 31 January 2012 PI. ÚS 5/12. *Holubec.*
[30] Hartkamp, Sieburgh, Devroe (n 1) 323.
[31] Hartkamp, Sieburgh, Devroe (n 1) 323.

IV On the Importance of the Casebook Again

Reading through the two chapters, it can be clearly stated that the rich national case-law analysed by them brings us to the very heart of EU law, to the national level, which is not covered in the literature unless thorough research of this kind is conducted. The cases, summarised in a very precise and focused manner and accompanied by short but entirely relevant notes, are not only of great value for academics and scholars but can and should be integrated into the teaching material in order to illustrate how EU law can be interpreted in a uniform but still legal system-specific way throughout the Union and how classical horizontal private law relationships are altered by national judges as a consequence of applying EU norms or principles.

Moreover, as the author of the Chapters herself underlines, the description of national cases in areas where there is insufficient case-law available yet – such as the invocation of non-discrimination as a general principle in private law relationships – may assist students, scholars, judges and lawyers in structuring their arguments in future cases.[32] The book is therefore not only informative but at the same time inspiring.

I also hope that the invitation of Prof. Sieburgh, addressed to the readers to report national cases where the principle of non-discrimination was applied, will find echoes, and that this extraordinary work of collecting national cases will continue and will progressively extend to other Member States' jurisprudence as well.

[32] Hartkamp, Sieburgh, Devroe (n 1) 288.

Balázs Fekete*

The Issue of Directives and *Ex Officio* Application of Primary EU Law Through the Prism of the *Ius Commune* Casebook on European Law and Private Law**

I The *Raison d'Être* of Chapter 6 and 7

This brief paper is dedicated to Chapter 6[1] and Chapter 7[2] of the *Ius Commune* Casebook on European Law and Private Law. They provide an in-depth discussion of both the impact of directives and the effect of *ex officio* application of EU law provisions on national private laws; that is, on private relationships. As the Casebook is prominently devoted to the discussion and assessment of the impact of primary EU law on national private law regimes, the inclusion of these fields is certainly not self-evident, and so the reasons for this editorial decision have to be explained first.

With regard to directives, a main source of secondary EU law, the key question of their application in the Member States is the problem of effectiveness. As for effectiveness, the opportunities of national courts to comply with the directives' provisions – if difficulties may have occurred in the process of implementation they are always handled by the Member States – have a crucial relevance. Needless to say, the various legal techniques developed by national courts in order to handle these deficiencies of implementation have a decisive impact on private legal disputes, as they may enable the parties to invoke provisions of EU law that are contrary to the inappropriate national law implementation of a given directive. From

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** This article is based on my presentations that I gave in the Hague and in Budapest in 2017 on Chapter 6 and 7 of the *Ius Commune* Casebook on European Law and Private Law. [Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon)].

1 Sander van Loock, Ilse Samoy, Jerzy Pisuliński, 'Directives' in Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon) 349–420.

2 Balázs Fekete, Anna Maria Mancaleoni, 'Application of Primary and Secondary EU Law on the National Courts' Own Motion' in Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon) 421–461.

another perspective, deficiencies in the national legislation with respect to the implementation of EU law provisions may be overcome by some judicial techniques to provide a more perfect judicial protection for the citizens of the Union.[3]

On the other hand, the national courts' opportunities to invoke EU law, even if the parties did not refer to them in their claims, may also have a decisive relevance for private law relationships. First, these options may have a key role in the direct effect of EU law being realised, as these judicial techniques may give power to EU law to influence or alter private legal relationships directly, by overriding potentially conflicting national provisions. Second, the *ex officio* application of EU law norms may also lead to the unenforceability or invalidity of private agreements and thus may again seriously affect private contractual relations.[4]

In sum, Chapter 6 and 7 definitely have their role when mapping the impact of EU law in the development of national private laws. Both the judicial techniques of applying directives in the event of deficient implementation and the possibilities of national courts to refer *ex officio* to EU law provisions instead of the parties are to be regarded as two essential channels of EU law that have a direct and perceptible impact on the everyday life of European citizens.

II The Backbones of Chapter 6 and 7

As a second step, this paper would draft an overview of these chapters, being slightly longer than 100 pages. Chapter 6 was prepared by Sander van Look, and Professor Ilse Samoy, both of whom are members of the Katholieke Universiteit Leuven academic community, and Professor Jerzy Pizuliński, the Dean of the Faculty of Law and Administration at the Jagellonian University in Cracow. The authors of Chapter 7 are from Italy – Anna Maria Mancaleoni, associate professor at the University of Cagiari – and Hungary – Balázs Fekete, research fellow of the Hungarian Academy of Sciences Centre for Social Sciences and senior lecturer at the ELTE Faculty of Law.

In general, as for structure, Chapter 6 is composed of eight subchapters and Chapter 7 has four major subsections. In addition, in line with the general attitude of the *Ius Commune* casebooks, both chapters contain numerous excerpts from primary EU law sources, the case law of European Court of Justice, national judicial decisions, and leading EU law manuals besides the original scholarly contribution of the authors. This alloy of authoritative sources – either of a legal or a scholarly nature – and scholarly discussion helps the reader to gain insight into the various and sometimes divergent views on the issues presented. Overall, these chapters are a good presentation of the discursive and diverse reality of EU law.

[3] Cf. Case C-152/84 *MH Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-00723.

[4] Cf. Case C-8/08 *T-Mobile Netherlands BV, KNP Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529.

Chapter 6 begins with (i) a brief introduction to set the scene and it contains some general remarks on the scope and the terminology used. Then, it analyses in detail the (ii) Member States' obligation to implement directives. This subchapter put an emphasis on the vital question of how to interpret the concept of Member State, which may be a decisive point in a horizontal legal dispute on many occasions. The next (iii) subchapter focuses on the duty of national courts to interpret national law provisions in harmony with the provisions of directives, if necessary, and both the scope of this duty and its inherent limits – with special regard to the prohibition of *contra legem* interpretation – are analysed. As a next step, (iv) subchapter four focuses on those delicate cases when national courts go further than indicated by EU law. These are the special cases when a harmonious interpretation is not imposed by EU law but national courts decide to rely on certain provisions in a directive at their own discretion. Thereafter, (v) subchapter five is about the so-called *ultima ratio* option of national courts if they want to refer to a directive provision: the review of national law provisions against EU law directives. A classic problem of the application of directives is set forth in (vi) subchapter six, as the liability of Member States for the non-implementation of directives is also analysed. Perhaps the most relevant part of this chapter is (vii) subchapter seven, where the authors identify those cases when a directive is implemented more broadly than was originally requested by the EU legislative. Needless to say, the so-called spill-over effect of directives having a considerable impact on a national legal system originates from this phenomenon of voluntary broader implementation. Last, as (viii) a conclusion, the authors emphasise that improperly implemented directives still cannot be invoked in pure horizontal relationships;[5] however, a broad interpretation of the concept of Member State and the duty of harmonious interpretation may be able to bridge, at least partly, this lacuna in the judicial protection of EU citizens.

Compared to Chapter 6 Chapter 7 has a simpler structure. The (i) introduction discusses the issue of national procedural autonomy with respect the general requirements of the EU legal order (the principles of equivalence and effectiveness). The EU law background of *ex officio* application of EU law provisions is presented in the (ii) next subchapter. It drafts the legal basis of EU law with special regard to the so-called Van Schijndel line of case law;[6] to the impact of Article 101 TFEU and its public policy nature, as argued in the famous Manfredi decision;[7] and, finally, to the key role of the consumer contract directive on unfair terms (93/13/EEC). It is widely known that article 6 and 7 of this directive paved the way for national courts to intervene on their own motion and assess contractual clauses in consumer law cases. To illustrate these (iii) the third subchapter is dedicated to the comparative analysis of national case laws and three major patterns by which national courts try to manage the issue of the intervention of certain EU law provisions in the cases at hand are identified. Finally, some (iv)

[5] Van Loock, Samoy, Pisuliński (n 1) 416.

[6] Joined Cases C-430/93–C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-04705.

[7] ECJ Joined Cases C-295/04–C-298/04 *Manfredi et al v Lloyd Adriatico Assicurazioni SpA et al* [2006] ECR I-06619.

conclusive thoughts close the chapter: these argue that direct *ex officio* references to EU law, even though these are only used as illustrative points in the courts' reasoning in many cases, have begun to become an increasingly settled practice in some fields of law in Europe (for instance in the field of consumer protection).

III The Main Findings

The first main output of Chapter 6 is the analysis of national courts' practice with respect to directives. The rule, as developed by the European Court of Justice, on the prohibition of the horizontal effect of directives, namely that directives cannot have a horizontal effect even though the requirements of effective judicial protection of citizens' interests may legitimately justify setting aside this provision, is still in force. However, the European Court of Justice has a certain set of exceptions, indicating that it has an empathetic view of this vital issue. Due to this, it is easy to argue that this lack of horizontal effect of directives is a key question in the protection of private law relationships, as it prohibits relying on some directive provisions if a directive is either not implemented properly in time or in affairs in which government actors are not involved.

However, there are three potent ways to cope with this problem, at least to a limited extent. The first one is the unusually broad interpretation of the concept of Member State. The European Court of Justice confirmed that the concept of Member State cannot be limited to the body or bodies having public authority, and it can also be invoked if it acts as a public employer.[8] In practice, it means that some purely horizontal private relationships, mostly labour or similar contracts, are transformed into quasi-vertical relationships in a legal sense, and an improperly implemented directive might have some relevance in these cases. Second, certainly the most powerful tool of national courts to apply directive provisions in horizontal disputes is that they are empowered by the European Court of Justice to interpret national law provisions in harmony with the directives' provisions if it is needed due to some deficiencies in implementation. As a result, as early as 1984, a German court submitted that the conventional ways of interpretation, such as a systematic and historic approach, were trumped by this obligation to interpret national law in harmony with the provisions of a directive.[9] Finally and as a last resort, national courts have the opportunity to set aside national law provisions if they conflict with a directive, and, exceptionally, it may even occur in horizontal relationships if legal liability is at stake.

Another important channel where directives may have an impact on national private laws is if they are intentionally applied outside their scope to other – non-harmonised – areas of law. This is the so-called spill-over effect of directives, and the extent of this impact on national private laws cannot be underestimated. This effect may occur through a voluntary broader

[8] Van Loock, Samoy, Pisuliński (n 1) 357–360.
[9] Arbeitsgericht Hamm 6 September 1984, ZIP 1984, 1525 *Von Colson and Kamann v Land Nordrhein-Westfalen*.

implementation by the legislator, and this form of spontaneous harmonisation might be regarded as typical in Germany. For instance, the doorstep selling directive's provisions were implemented with a broader scope, as the implementing German law was also applicable to types of contracts that were not made in a doorstep situation but this kind of situation played a role in making the agreement. This practice was also reinforced by the case-law of German courts. One may be fairly sure that similar developments have occurred in many other Member States – as for instance, when the new Hungarian Civil Code was drafted – too. As such, directives may have had a certain impact on areas of law that were not strictly under their scope. This so-called spill-over effect may also have a key role in the formation of a real *ius commune europaeum,* which may take a final shape in the very near future.

As for *ex officio* application of EU law provisions by the national courts, one must point out that several, sometimes even divergent, solutions exist for the national courts to do so, even when a national procedural provision may impede this in general. In this way the veil of national civil procedural regimes is definitely pierced by EU law and so exhaustive national procedural autonomy is nothing more than a simple illusion in Europe (although the approximation of civil procedures has not been in the focus of the legal harmonisation activities of the European Union thus far). However, the degree of this supranational intervention varies from an area of law to another one, as for instance when consumer contracts – that is, the protection of consumers in a broader sense – are at stake, the Member States' national procedural autonomy is remarkably limited. This is due to the attitude of the European Court of Justice, which puts the principle of effectiveness in first place when assessing provisions of national civil procedure that may impede the application of EU consumer protection rules, with special regard to the unfair terms clause. Furthermore, the principle of equivalence is also applied to override those national procedural provisions that are part of other procedures, as for instance with the enforcement of arbitration awards or appeal procedures.[10] Moreover, if an EU law provision is interpreted by the European Court of Justice as having a public policy character, as is the case in Article 101 TFEU, this also establishes a strong constraint on national procedural regimes. In sum, national procedural autonomy has been considerably eroded in general by the developments in the field of *ex-officio* application of certain EU law provisions.

Finally, one may conclude – based on Arthur Hartkamp's summary – that six general grounds can be identified when an EU law provision has to be applied by the national courts, irrespective of whether or not the parties invoked them in their submissions.

– If there is an express legal provision that requires the national courts to apply a given EU law norm – either in EU law or in national law.

– If the European Court of Justice interprets that an EU law provision must be applied automatically.

– If an article from EU law is interpreted by the European Court of Justice as having a public policy character.

[10] Fekete, Mancaleoni (n 2) 426–433.

– If the application of the principle of effectiveness requires it when assessing a national law provision.
– If the application of the principle of equivalence requires it when assessing a national law provision.
– And the so-called 'may is must' rule also applies, if national courts may apply a rule of national law on their own motion, they must apply on their own motion the corresponding rule of EU law, too.[11]

As is obvious from this extensive list, both the European Court of Justice and national courts are to be regarded as key actors when shaping – or, from another angle, when narrowing – the borders of national procedural autonomy. And, undoubtedly, national procedural autonomy is under a heavy siege in those areas of law where the EU has a great bulk of substantive rules, as for instance with consumer protection or competition law.

IV Future Perspectives

As for directives, Chapter 6 seems to be perfect and exhaustive. However, there is one issue really worthy of an even more detailed study. This is the spill-over effect of the directives. I would add here that a more extended study would be needed with special regard to the post-transitory private law legislation of the Central European EU Member States. It should not be forgotten that these countries had to reconstruct their private laws almost completely following the political transition in 1989, and I'm deeply convinced that they used up and relied on many EU law patterns when doing so, even 'long' before their accession to the European Union. This may be a very exciting comparative law exercise with respect to the problem of legal transplants and transfers,[12] on the one hand, and it may also be able to reveal a lot on the integration of EU law provisions into legal cultures with a partly divergent socio-historical and cultural background.[13]

Secondly, as for the *ex officio* application of EU law provisions, the perspective of the discussion on national procedural autonomy should be reversed. It would also be an interesting topic for a scholarly analysis of those ways and solutions whereby national courts and legislators try to preserve certain segments of national procedural autonomy – as it is a logical effort in order to preserve some specificities of national legal orders. Future research in this field should therefore also be interested in the 'self-defence' of national procedural regimes that may stem from either the acts of the legislature or the actions of the judiciary.

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11 Fekete, Mancaleoni (n 2) 459.
12 Cf. Mathias Siems, *Comparative Law* (Cambridge University Press 2014, Cambridge) 191–221.
13 Cf. Balázs Fekete, 'Public Sentiments in Central European Constitutionalism' (2016) 57 Jahrbuch für Ostrecht 243–255.

Miklós Boronkay*

Directives and *Ex Officio* Application of EU Law

The book devotes a complete chapter to directives (Chapter 6) and another one to the question of *ex officio* application of EU law (Chapter 7). The two chapters overlap to the extent that there are directives which Courts of Member States have to apply on their own initiative. The most important of these is Directive no. 93/13/EEC on unfair terms in consumer contracts (hereinafter the 'Unfair Contract Terms Directive'), which may easily be one of the most frequently applied pieces of EU legislation in Hungary, at least as far as private law disputes are concerned. What follows are a few remarks related to these two chapters from the point of view of a Hungarian lawyer.

One of the topics discussed in Chapter 6, which any Hungarian may find interesting and useful, is the so-called *'spillover effect'* of directives. According to the definition given by the book, 'spillover effects of directives [occur] where directive provisions are applied outside the directive's scope, in other (non-harmonised) areas of national law. Most common is the situation where a national legislature adjusts its national law beyond what is required by the directive.'[1] While the expression *'spillover effect'* may not sound familiar to all Hungarian lawyers (in fact there is not even a generally understood Hungarian translation for it), the phenomenon itself is immediately recognisable. There are many instances where the Hungarian legislator opted to implement directives in a broader manner than was strictly necessary. The reason is almost always that the legislator's aim was to create a coherent system of general norms, rather than a fragmented collection of specific ones.

To mention only a few examples, the Consumer Sales Directive (1999/44/EC) applies to the sale of consumer goods and contains provisions protecting the consumer. Nevertheless, when the Hungarian legislator transposed the rules of the directive, it made a double generalisation. First, the transposing rules apply not only with regard to consumer contracts but also in B2B relations. Second, they apply to all kinds of contracts, not only to sale and purchase agreements. In this way, the Consumer Sales Directive in effect created general Hungarian contract law rules.[2] Another example would be the Unfair Contract Terms

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1 Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon) 403.

2 E.g. Section 206 of the Civil Code of 1959 (Act IV of 1959 on the Civil Code), Section 6:159 of the currently effective (new) Civil Code of 2013 (Act V of 2013 on the Civil Code).

Directive, certain provisions of which (e.g. the definition of unfairness) are also applicable to B2B contracts.[3] Finally and most interestingly, when the Hungarian legislator adopted the new Civil Code in 2013, it introduced direct producers' liability.[4] The important rules of this new legal institution (e.g. the grounds of exemption for the producer) were simply copied from the Product Liability Directive (85/374/EEC).[5]

While creating a concept to describe a certain phenomenon may be satisfying for theoretical thinking and reading the relevant chapter of the book may result in a 'eureka moment' for the reader, the practical implications are equally significant. The spillover effect raises the following difficult question: how should the national rule transposing the directive be interpreted outside the scope of the directive? Should the national judge follow the interpretation given by the Court of Justice of the European Union ('CJEU') for cases falling within the directive's scope or may it (or even should it) adopt a different interpretation? EU law does not provide any answer, as the Member States are free to determine their legal norms in cases not covered by a given directive. Consequently, this question must be answered by the national courts. It is therefore a great virtue of the book that it reports national case-law and demonstrates what kind of different approaches national courts adopted to handle this problem. Without going into the details of this complicated question, it is enlightening to read that the German Federal Supreme Court (BGH) took the liberty of departing from a CJEU ruling by basically saying that it disagrees with it (the doctrine of *'gespaltene Auslegung'*).[6] My personal takeaway from the two German cases reported in the book is that the more unlikely or surprising the CJEU's interpretation is, the less likely it is that courts will also apply it in cases not covered by the given directive. It is doubtful whether such an interpretation ought to be applied in the case of B2B contracts, especially if the CJ mainly bases its interpretation on the need to protect consumers.

The other topic which I would like to briefly touch upon is the *ex officio* application of the Unfair Contract Terms Directive. This issue is highly relevant for Hungarian lawyers, as consumers often invoke the provisions of this directive (and/or the transposing national rules) to challenge the contracts they concluded. Such references are extremely frequent in lawsuits between consumers and banks, which constitute a considerable portion of the lawsuits involving EU law. It is perhaps more than a coincidence that two of the CJEU judgements referred to in the book were given in Hungarian cases,[7] and that a preliminary reference procedure is currently before the CJEU which also concerns the *ex officio* application of the Unfair Contract Terms Directive.[8]

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[3] E.g. Section 209(1) of the Civil Code of 1959, Section 6:102(1) of the Civil Code of 2013.

[4] Sections 6:168 – 6:170 of the Civil Code of 2013.

[5] Section 6:168(3) of the Civil Code of 2013.

[6] Hartkamp, Sieburgh, Devroe (n 1) 405–411.

[7] Case C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* [2009] ECR I-4713; Case C-137/08 *VB Pénzügyi Lízing Zrt. v Ferenc Schneider* [2010] ECR I-10847.

[8] Case C-51/17 – Request for a preliminary ruling from the Fővárosi Ítélőtábla (Hungary) lodged on 1 February 2017 – *Teréz Ilyés, Emil Kiss v OTP Bank Nyrt., OTP Faktoring Követeléskezelő Zrt.* (pending). The Hungarian Court referred the following question to the CJ in connection with the *ex officio* application of the Unfair Contract

Under Hungarian law, one of the main problems associated with this topic is that the provisions of Hungarian law originally transposing the Unfair Contract Terms Directive did not allow for an *ex officio* application. Hungarian private law differentiates between two types of invalidity: nullity *('semmisség')* and contestability (*'megtámadhatóság,'* similar to the German *'Anfechtbarkeit'*). Nullity means that anybody may invoke the invalidity without time limit, and Courts may also raise the invalidity *ex officio*.[9] On the other hand, contestability means that the contract becomes invalid only if the aggrieved party challenges it. This may be done within a one year time limit, which generally starts from the conclusion of the contract. Courts may not raise such invalidity *ex officio* because it is only the aggrieved party who is entitled to challenge the contract.[10]

The original implementation of the Unfair Contract Terms Directive took place by way of Act CXLIX of 1997, which modified Section 209(1) of the Old Civil Code as follows: 'If a general term is unfair, the aggrieved party may challenge such a provision.' Hence, courts were not allowed to investigate *ex officio* whether a particular general term was unfair, if the aggrieved party did not raise this point in court. However, the Old Civil Code was amended as of March 1 2006 by way of Act III of 2006. The amendment introduced the following new Section 209/A(2): 'In the case of consumer contracts, unfair general terms which become part of the contract, as well as unfair terms that the other party determines unilaterally before concluding the contract, and which have not been individually negotiated with the consumer, are null and void. This nullity may only be invoked for the consumer's benefit.' As of this date, the nullity sanction applies with regard to unfair general terms. The new Civil Code (Act V of 2013), which entered into force on March 15, 2014, did not change these rules.[11]

It is clear that, for consumer contracts concluded after March 1, 2006, courts may find *ex officio* that a certain general contract term is unfair. However, the question arises as to the situation of contracts concluded between May 1, 2004 (when Hungary became a member of the EU) and March 1, 2006 (the date of the amendment to the Old Civil Code). Theoretically,

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Terms Directive: 'If the national court declares that the contractual term which places the exchange rate risk on the consumer is unfair, is it required, when determining the legal effects in accordance with the rules of national law, also to take into account of its own motion, while respecting the right of the parties to present argument in *inter partes* proceedings, the unfairness of other contractual terms which have not been relied on by the applicants in their action? Does the principle that the court should act of its own motion in accordance with the case-law of the Court of Justice also apply if the applicant is a consumer or, having regard to the position occupied by the principle of the autonomy of the parties in the whole proceedings and to the particular features of the proceedings, does the principle that the parties have the right to delimit the subject matter of an action, in that case, preclude examination by the court of its own motion?'

9 Section 234 of the Civil Code of 1959, Sections 6:88 and 6:108 of the Civil Code of 2013.

10 Sections 235-236 of Civil Code of 1959, Section 6:89 of the Civil Code of 2013.

11 Section 6:103(3) of the Civil Code of 2013 provides as follows: *'Unfair contractual terms in contracts between a consumer and an undertaking are null and void. This nullity may only be invoked for the consumer's benefit.'* The definition of unfair contractual terms is also included in the same provision. The concept of nullity and contestability have not changed.

the original wording of Section 209(1) of the Old Civil Code applies to these matters, which does not allow courts to raise the unfairness of a general term *ex officio.*

However the Hungarian court practice came to a different conclusion, as demonstrated by the recent judgement of the Court of Appeal of Pécs *(Pécsi Ítélőtábla)* no. Pf.VI.20.147/2016/4., published under no. BDT 2017. 3680. This judgement concerns a mortgage contract concluded in 2005, i.e. during the period where Hungary was already an EU Member State, thus Directive 93/13/EEC had to be applied. However, the relevant provision of domestic law (the Old Civil Code) had not yet been amended to allow *ex officio* application of the rules of that directive. It was also a fact of the particular case that the consumer challenged certain general terms of the mortgage contract after the one year deadline. As such, the relevant question for the court was whether to apply the Old Civil Code and reject the claim, since the one year deadline for challenging the contract had expired, or to interpret the Old Civil Code in line with the directive and allow the claim.

The court chose the latter option. It summarised the CJEU's case-law on the *ex officio* application of the Unfair Contract Terms Directive and harmonious interpretation, and concluded as follows: 'In Case Y-000/98 O,[12] the Court of Justice of the European Union expressly stated that national courts shall interpret national law provisions "in conformity with the directive". Accordingly, the provisions of the Civil Code of 1959 applicable in a particular case must be interpreted in light of the purpose and wording of Directive 93/13/EEC in a way to meet the requirements of the effective enforcement of consumer interests. It follows from all the above that unfair general terms, or contractual terms which have not been individually negotiated shall be regarded as null and void in the case of contracts concluded not only after March 1 2006 but also between May 1 2004 and February 28 2006.'[13] The court's decision followed the general guidance given by the Hungarian Supreme Court on this particular issue.[14]

While this approach ensures the effectiveness of the Unfair Contract Terms Directive's provisions (*i.e.* it enables their *ex officio* application), it is doubtful whether the court's approach remained within the legitimate limits of interpretation. In effect, the court held that the unfairness of a general term is a ground for nullity, even though the legal provision applicable in the case expressly qualified unfairness as a ground for challenge. When dealing with the requirement of harmonious interpretation, the book emphasises that this requirement cannot go so far so to contradict a clear provision of domestic law.[15] Re-characterising a ground for invalidity seems to be a *contra legem* interpretation of Hungarian law.

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[12] While the exact case number has been redacted from the published version of the judgement, it clearly refers to Case C-240/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941.

[13] Judgement in case no. BDT 2017. 3680. para 15.

[14] Supreme Court Opinion no. 3/2011 PK. Supreme Court Opinions are non-binding legal instruments by way of which the Supreme Court exercises its constitutional right and obligation to unify the court practice in Hungary.

[15] Hartkamp, Sieburgh, Devroe (n 1) 362.

Endre Orbán*

Horizontal Effect: Internal Market and Human Rights – a Short Comment on Cases, Materials and Text on European Law and Private Law

As law clerk of the Constitutional Court of Hungary, I have found the book entitled *Cases, Materials and Text on European Law and Private Law*[1] very inspiring for at least two reasons. The first one can be labelled as 'institutional': the Constitutional Court faces the very same challenges today which are the key expressions of the book.[2] (I) Furthermore, the second reason is a more 'dogmatic' aspect, namely the nature and accordingly the relationship between the fundamental freedoms of the European internal market on the one hand, and human rights on the other hand. (II) In addition, this paper aims to present how the Constitutional Court of Hungary dealt with a similar issue.

I.

When someone thinks about European law, they generally refer to public law questions. The engine of strengthening the European legal order has been the Court of Justice of the European Union which has developed many important concepts, such as supremacy,[3] direct effect,[4] the vertical direct effect of directives[5] and the concept of indirect effect.[6] However, even if public European law might have a huge influence on private relations, the novelty of this book

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1 Arthur Hartkamp, Carla Sieburgh, Wouter Devroe (eds), *Cases, Materials and Text on European Law and Private Law* (Hart 2017, Oxford and Portland Oregon).

2 '– If an individual may rely on a rule (including a general principle) of EU law in order to assert a subjective right against another individual, the rule is conceived as producing 'direct horizontal effect.'
– If an individual may, as against another individual, rely on a rule (including a general principle) of EU law in order to have a national statutory provision or administrative practice reviewed for its compatibility with EU law, that rule is conceived as having 'indirect horizontal effect' Arthur Hartkamp, 'Introduction. Effects of EU Law on Relationships between Individuals' in Hartkamp, Sieburgh, Devroe (n 1) 18.

3 Case C-6/64 *Costa v ENEL* [1964] ECR. 585.

4 Case C-26/62 *Van Gend en Loos NV v Nederlandse Administratie der Belastingen* [1963] ECR. 1.

5 Case C-9/90 *Francovich v Italy* [1991] ECR I-5357, Case C-14/83 *Van Colson vs Land Nordrhein Westfalen* [1984] ECR 1891.

6 Case C-105/03 *Pupino* [2005] E.C.R. I-5309.

is that it focuses purely on private relationships and proves the importance of the EU law corpus in this sphere.

Coming to the field of constitutional law, one might think analogically to the nature of human rights. The classical view of them states that they can solely be interpreted vertically, between the State and the individual.[7] Nevertheless, if we take a glance at the (not that) recent development of human rights law, we may discover similar 'horizontal effect' issues – maybe under some other labels, such as third-party effect or *Drittwirkung*[8] – as those raised in the book.

And, in the field of constitutional law, not only the issue of direct horizontal effect might appear but also its indirect counterpart, the so-called 'harmonious interpretation' or the claim of interpretation conform to EU law appears similarly in the reasonings of the decisions of the constitutional courts, namely the requirement of interpretation conform to the constitution which is formulated toward the ordinary courts.[9] The latter question brings us further to the enforcement of the EU law and of the constitutional law, which can be detected solely through the examination of follow-up cases from various countries, which are also presented in this book.[10]

Both forms of horizontal effect have come into focus in Hungary, especially after the entry into force of the new Fundamental Law of Hungary and the new Act on the Constitutional Court. The reform regarding the competences of the Constitutional Court shifted the powers of the Court toward the individual protection of human rights. The new provisions ruled out the so-called *actio popularis* procedure and kept a more limited scope for abstract judicial review. Instead, constitutional complaint procedures became the main competences of the Court, which brings closer the Constitutional Court of Hungary to its Spanish and German counterparts. These procedures are complaints against the legal provisions applied in a judicial decision, complaints against legal norms which are directly applicable and, last but not least, complaints against judicial decisions. The last type of complaint is called, just like in Germany, the 'real' or 'genuine' constitutional complaint and it is the most relevant complaint regarding the topic of horizontal effect. This procedure enables persons or organisations affected by judicial decisions to submit a constitutional complaint to the Constitutional Court if the decision made regarding the merits of the case or another decision terminating the judicial proceedings violates their rights laid down in the

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7 Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 I.CON 79–98, 79.

8 Renáta Uitz, 'Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Not? – An Introduction' in András Sajó, Renáta Uitz (eds), *The Constitution in Private Relations* (Eleven 2005, Utrecht, 1–20).

9 This is expressly formulated in the Fundamental Law of Hungary, Article 28.

10 In contrast, this field of research has not produced many articles in the field of constitutional law up to now. See: Lawrence Baum, 'The Implementation of United State Supreme Court Decision' in Ralf Rogowski, Joachim Wieland (eds), *Constitutional Courts in Comparison* (Berghahn 2002, New York – Oxford, 219–238); Thomas Gawron, Ralf Rogowski, 'Implementation of German Federal Constitutional Court Decisions' in Ralf Rogowski, Joachim Wieland (eds), *Constitutional Courts in Comparison* (Berghahn 2002, New York – Oxford, 239–256).

Fundamental Law. This means that even a lawsuit between private parties might end up at the Constitutional Court, which will ultimately decide the case through human rights law argumentation, even if it is not willing to acknowledge *expressis verbis* the horizontal effect of human rights.

Until now, none of the judgments of the Constitutional Court of Hungary has mentioned expressly the concept of the horizontal effect of human rights but it has appeared in the wording of concurring and dissenting opinions.[11] Nevertheless, many cases where the Court had to face the issue of applying human rights between private parties can be mentioned.[12] As typical examples, we can mention cases on defamation and the enforcement of freedom of speech[13] or cases on the freedom of assembly, where the Court detected its collision with the right to privacy.[14] The reason for this phenomena is quite clear: as regards the different human rights, the State does not only have a so-called 'negative' obligation to refrain from infringing the citizens' fundamental rights, but also a 'positive' obligation to safeguard the exercise of those rights, both towards the State and other citizens. This can be achieved through law-making but this might be the task of the ordinary courts as well, when they are interpreting the law in the light of the constitution. The latter type of indirect horizontal effect has been appraised in a recent decision as the duty of the ordinary courts to reconcile or to balance the human rights positions of the private parties.[15]

II.

Creating the internal market with the free movement of goods, people, services and capital is one of the biggest achievements of the European Union. Nevertheless, all results have their problematic concerns and such an aspect has come up, namely the possible conflict between the four basic freedoms and the human rights of European citizens. Or, to put it another way, even if the EU has been created for economic reasons, the question is how human rights can be protected in its larger and larger legal order.[16] Accordingly, besides the so-called institutional and sociological democratic deficit[17] a human rights deficit has also come into existence.[18]

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[11] Concurring opinion of Tamás Sulyok in Decision no. 34/2014 CC and Decision no. 5/2016 CC; Dissenting opinion of László Kiss in Decision no. 3046/2016 CC; and see also Dissenting opinion of Béla Pokol who rejects the horizontal effect of human rights in Decision no. 3/2015 CC.

[12] As regards the earlier Hungarian approach, see: Gábor Halmai, 'The Third Party Effect in Hungarian Constitutional Adjudication' in Sajó, Uitz (n 8) 104–114.

[13] Decision no. 13/2014 CC, Decision no. 5/2015 CC.

[14] Decision no. 13/2016 CC, Decision no. 14/2016 CC.

[15] Decision no. 3192/2017 CC.

[16] Harmathy Attila, 'Az EU tagállamok közös alkotmányos hagyományai és a nemzeti polgári jog' in Sajó András (ed), *Alkotmányosság a magánjogban* (Complex 2006, Budapest, 17–41) 27.

[17] Győri Enikő, *A nemzeti parlamentek szerepe az európai integrációban,* (PhD-értekezés, Budapest 1999). <http://phd.lib.uni-corvinus.hu/112/> 34–52.

[18] Chronowski Nóra, Zeller Judit, 'Luxemburg – Strasbourg – alapjogvédelem' (2006) 6 (5) Európai Jog 14–23, 14.

The question already emerged before realizing the unified market and the Court of Justice of the European Union (CJEU) solved the issue with the invention of the concept of human rights as general principles of EU law and later as 'constitutional traditions common to the Member States'.[19] As regards the case law the Nold,[20] the Hauer[21] and the International Handelsgesellschaft[22] decisions have to be outlined, the last of which led to the famous Solange decisions in Germany. Finally, the concept entered into the wording of the Lisbon Treaty as well, together with a reference to the European Convention of Human Rights,[23] and the Charter of Fundamental Rights has also entered into force.[24]

As regards the free movement of goods, people, services and capital, the Treaty contains the declaration of the freedoms and also a couple of exemptions. For example, Article 28 TFEU rules the free movement of goods, while Article 36 enables the justification of prohibitions or restrictions on the grounds of public morality, public policy, public security, the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property. Similarly, Article 45 declares the free movement of workers, together with the exemption of public services, while paragraph (3) enables limitations justified on grounds of public policy, public security or public health.

Nevertheless, if one steps a bit closer to the case law of the CJEU the picture is not as simple. On the one hand, the CJEU (with the help of the test of proportionality) examines from case to case on whether to accept the references to the exemptions of the Treaty. On the other hand, the usage of the test of proportionality has been introduced as well for other limitations named as 'mandatory requirements,' which are not listed in the Treaty.[25] As

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[19] Fekete Balázs, 'Jogösszehasonlítás az Európai Bíróság gyakorlatában' in Paksy Máté (ed), *Európai jog és jogfilozófia* (Szent István Társulat 2008, Budapest) 365–371; Paul Craig, Gráinne de Búrca, *EU law: Text, cases and materials* (Oxford University Press 2008, Oxford) 381–383, 386–389; Josephine Steiner, Lorna Woods, Christian Twigg-Flesner, *EU law* (Oxford University Press 2008, Oxford – New York) 117–118.

[20] Case C-4/73 *J. Nold v Commission* [1974] ECR 491.

[21] Case C-44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

[22] Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

[23] Article 6 paragraph (3) TEU.

[24] *'Contrary to the prevailing opinion in a number of Member States regarding provisions of national Constitutions, it is clear that provisions of the Charter may have direct horizontal effect. This is true in particular for Article 15(2) of the Charter, which repeats three fundamental freedoms (freedoms of movement, establishment and services) that have been accorded such effect by the CJ, and for Articles 16 (freedom to conduct a business) and 17 (right to property), which in recent cases seem to have been recognised as grounds on which a claim or a defence in litigation between private parties may be based. It may be equally true for other provisions. In this respect, there would seem to be no difference between the Charter and those general provisions of EU law that have been transposed into Charter provisions.'* Hartkamp, Sieburgh, Devroe (n 1) 13.

[25] The concept of 'mandatory requirements' has been developed in the *Cassis de Dijon* case where the CJ mentioned as examples the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the protection of consumers. See: Case C-120/78 *Rewe-Zentral* (Cassis de Dijon) [1979] ECR 649. Later, the list has been broadened with other elements such as the protection of the environment (Case C-302/86 *Commission v Denmark* [1988] ECR.460.), road safety (Case C-54/05 *Commission v Finland* [2007] ECR I-2473), press diversity (Case C-368/95 *Familiapress* [1997] ECR I-3689) and so on.

a consequence, the restriction of the fundamental freedoms is possible in two different categories, those provided as exemptions in the wording of the Treaty, and the ones that were accepted as justified limitations in the case law of the CJEU.

The question now is what happens if fundamental freedoms 'meet' in a case with human rights. Theoretically, three different outcomes can exist. First of all, the human right might go hand in hand with the fundamental freedom and they strengthen each other (Type1). Second, it might be possible that the human right could serve as a ground limiting the fundamental freedom, and so a fundamental right might become a 'mandatory requirement', or an 'overriding reason relating to the public interest' (Type2). And finally, the CJEU could try to balance between them without giving priority to either of them (Type3). Lately, the Court had to face similar cases many times, which led to various judgments. The aim of this chapter is to present the different outcomes of these horizontal issues.

There are examples of all three theoretical outcomes. A case where fundamental freedoms and human rights are in line with each other would be the Carpenter case.[26] Mrs. Carpenter was originally from the Republic of the Philippines and she was the spouse of a United Kingdom national who ran a business selling advertising space in medical and scientific periodicals in other Member States too. The Secretary of State decided to make a deportation order against her because she had overstayed her original leave to enter. Mrs. Carpenter appealed against the decision, arguing that her husband's business required him to travel around other Member States and he could do so more easily as she was looking after his children from his first marriage. The CJEU pointed out that the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty, and stated that the separation of Mr. and Mrs. Carpenter by her deportation would be detrimental to their family life and to the conditions under which Mr. Carpenter exercised his fundamental freedom to provide services as well. Therefore, the CJ concluded that 'Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.'

In other cases, human rights serve as grounds for the justification of restricting fundamental freedoms. This would be the case of Schmidberger.[27] Schmidberger ran a trucking company and claimed damages for losses caused by an environmental protest group who had prevented the company from taking goods to Austria by lorry, as the group carried out a 30-hour-long anti-traffic protest blocking a major motorway in Austria. The CJEU delineated the case from the 'Spanish Strawberries' case:[28] 'By comparison with the

[26] Case C-60/00 *Carpenter* [2002] ECR I-06279.
[27] Case C-112/00 *Schmidberger* [2003] ECR I-5659.
[28] Case C-265/95 *Commission v France* [1997] ECR I-6959.

points of fact referred to by the Court at paragraphs 38 to 53 of the judgment in Commission v France, cited above, it should be noted, first, that the demonstration at issue in the main proceedings took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it. Second, because of the presence of demonstrators on the Brenner motorway, traffic by road was obstructed on a single route, on a single occasion and during a period of almost 30 hours. Furthermore, the obstacle to the free movement of goods resulting from that demonstration was limited by comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in the case giving rise to the judgment in Commission v France, cited above.' [29] As a result, the CJEU accepted the temporary restriction of the fundamental freedom on the grounds of freedom of assembly.

In addition in a few cases, the CJEU recognised the importance of human rights but tried to establish a fair balance between them and the fundamental freedoms. An example would be the Viking case[30] where the principle of proportionality was employed to reconcile the freedom of establishment and trade unions' collective right to strike. Viking Line, a Finnish shipping company, gave notice to the Finnish Seamen's Union of its intention to reflag its ferry called Rosella by registering it in Estonia in order to be able to enter into a new collective agreement with a trade union established in that State and to employ an Estonian crew, whose wages were lower than those paid in Finland. Following this, the International Transport Workers' Federation asked its members to refrain from entering into negotiations with Viking Line, while the Finnish Seamen's Union announced its intention to strike, demanding that Viking Line continue to comply with Finnish employment law and not lay off the crew. The CJ acknowledged that 'the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions.' [31] However, '[t]hat restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.' [32]

As it can be seen, there is no uniform solution to the relationship structure of fundamental freedoms and human rights and it seems that the CJEU solves these legal issues on a case by case basis, in which the test of proportionality will continue to be the rule to follow.

Such a 'meeting' between fundamental freedoms of the internal market and human rights might arise also before the Constitutional Court of Hungary. However, it should be noted

[29] Case C-112/00 *Schmidberger* [2003] ECR I-5659, paras 83–84.
[30] Case C-438/05 *Viking Line* [2007] ECR I-10779. A connecting case is: Case C-341/05 *Laval* [2007] ECR I-11767.
[31] Para 44.
[32] Para 90.

that the Constitutional Court generally refrains from applying EU law and therefore different techniques can be detected as the Court circumvents the real EU law-related issues.[33]

However, as an example of a Type1 correlation the case of university student scholarships can be cited.[34] A government decree claimed that those students who received at least a partial waiver of their tuition fee must work in Hungary for twice the duration of the length of the scholarship within twenty years of obtaining their diplomas, otherwise the students had to pay back the sum of the scholarship. The Constitutional Court detected the EU law relevance of the case[35] but disregarded it and applied a formalistic solution: the Court annulled the decree because such an issue should have been regulated in an Act of Parliament. While this solution – the usage of formal analysis as a first step – is compatible with the case law of the Constitutional Court, it is unclear why EU law relevance[36] was even mentioned, if it remained at only a decorative level.

Nevertheless, new cases might occur also in the future, where fundamental freedoms 'meet' human rights. At this point a new decision of the Constitutional Court[37] has to be emphasised, which interpreted Article E) paragraph (2) of the Fundamental Law of Hungary and which states that the Constitutional Court may examine – upon a relevant petition – in the course of exercising its competences – whether the joint exercise of powers under Article E) (2) of the Fundamental Law would violate human dignity, another fundamental right, the sovereignty of Hungary or its identity based on the country's historical constitution.[38] The judgment itself does not say anything about the potential legal consequences;[39] however, it emphasises several times the importance of constitutional dialogue, which might mean that the Constitutional Court would solve emerging similar legal issues by initiating a preliminary ruling procedure, as other Constitutional Courts in Europe have done so far.[40]

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33 Vincze Attila, 'Odahull az eszme és a valóság közé az árnyék' (2014) 3 MTA Law Working Papers 4. Vincze shows that the Constitutional Court takes into consideration the EU law only when it does not have any impact on the final decision.

34 Decision no. 32/2012 CC.

35 Paras [41]-[44].

36 Láncos Petra Lea, 'A kötelező hallgatói szerződések értékelése az uniós jog szemszögéből' (2011) 39 Pazmany Law Working Papers.

37 Decision no. 22/2016 CC.

38 The decision received many criticism: Chronowski Nóra, Vincze Attila, 'Önazonosság és európai integráció – az Alkotmánybíróság az identitáskeresés útján' (2017) 72 Jogtudományi Közlöny 117–132; Drinóczi Tímea, 'A 22/2016. (XII. 5.) AB határozat: mit (nem) tartalmaz, és mi következik belőle. Az identitásvizsgálat és az ultra vires közös hatáskörgyakorlás összehasonlító elemzésben' (2017) 1 MTA Law Working Papers; Kéri Veronika, Pozsár-Szentmiklósy Zoltán, 'Az Alkotmánybíróság határozata az Alaptörvény E) cikkének értelmezéséről' (2017) 8 JEMA 5–15.

39 Drinóczi (n 38) 12, 18.

40 Sulyok Tamás, Orbán Endre, 'Az európai alkotmányos tér és az alkotmányos párbeszéd forgatókönyve' in Chronowski Nóra, Pozsár-Szentmiklósy Zoltán, Smuk Péter, Szabó Zsolt (eds), *A szabadságszerető embernek. Liber Amicorum István Kukorelli* (Gondolat 2017, Budapest, 116–125) 122.

Articles

Zsófia Varga*

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

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.[1] I arrived at the conclusion that even in Member States where *Köbler* liability[2] 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.[3]

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.[4] This article focuses on the remedy of retrial.[5]

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

2 (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.

3 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.

4 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.

5 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.),*[6] the question emerged whether retrial should be granted on the ground of violation of EU law by a final judgment.[7] 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.[8] 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.[9]

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.[10]

In this article, I present and analyse the national rules and cases concering 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.[11] 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

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6 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.

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

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

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

10 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.

11 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> accessed 1 January 2017;
– bulletin Reflets: Informations rapides sur les développements juridiques présentant un intérêt communautaire <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.[12]

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 though retrial.[13] 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*[14] 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.[15] The CJEU declared that the revocation of

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12 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 *Târşia* 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.

13 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.

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

15 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.[16] This principle has been confirmed in the order in *i-21 Germany and Arcor*.[17]

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*[18] 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.[19] 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*.[20]

The *Klausner Holz Niedersachsen* case concerned the application of EU rules on state aid as well.[21] 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

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16 (CJEU) *Kühne & Heitz* (n 14), para 28.

17 (CJEU) Joint Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* ECLI:EU:C:2004:836 [2006] ECR I-8559. However, contrary to the undertaking *Kühne & 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 *Kühne & 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).

18 (CJEU) Case C-119/05 *Lucchini* ECLI:EU:C:2007:434 [2007] ECR I-6199.

19 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.

20 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 Olimpiclub* (n 12), para 25; and in *Impresa Pizzarotti* (n 12), para 61.

21 (CJEU) *Klausner Holz Niedersachsen* (n 12).

matter and which did not concern, either principally or incidentally, the state aide 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.[22]

In the judgment in *Fallimento Olimpiclub,*[23] 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.[24] As the CJEU pointed out, the way the *res judicata* was construed under Italian law[25] 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.[26] National rules on *res judicata* appear to infringe EU law only where they have a wider scope of application.

The judgment in *Kapferer*[27] 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.[28] 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.[29] The same principle was confirmed by the CJEU in its judgment in *Commission v Slovakia.*[30]

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

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

23 (CJEU) *Fallimento Olimpiclub* (n 12).

24 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.

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

26 Kornezov (n 12) 823–824, 826.

27 (CJEU) *Kapferer* (n 12).

28 See also Kornezov (n 13) 833.

29 (CJEU) *Kapferer* (n 12) para 20.

30 (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.[31]

In *Impresa Pizzarotti*, concerning rules on a public works contract, the CJEU confirmed the above principle again;[32] 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.[33] 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.[34] 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.[35]

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.[36] 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.[37] Although by then the *Conseil*

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31 Kornezov (n 13) 833.

32 (CJEU) *Impresa Pizzarotti* (n 12) para 60.

33 (CJEU) *Impresa Pizzarotti* (n 12) para 62.

34 (CJEU) *Impresa Pizzarotti* (n 12) para 64.

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

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

37 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*.[38] The *Conseil d'État* argued that the matter constituted a *res judicata,* since the recovery claim had already been rejected at last instance.[39]

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.[40]

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.[41]

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[42] by reason of a manifest breach of law in six Member States (Denmark,[43] Malta,[44] Finland,[45] Sweden,[46] the UK,[47] and, in

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38 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.

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

40 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.

41 It it 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.

42 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.

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

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

45 (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).

46 (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).

47 (UK) Civil Procedure Rules, Part 52.17.

administrative matters in Lithuania[48]). 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[49] (Latvia,[50] Portugal[51] and, in administrative matters, in Poland[52]) 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.[53]

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,[54] Romania[55] and Slovakia[56]). However, in Croatia, such a revision is not possible concerning final judgments rendered by the supreme court.[57] 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.[58]

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

49 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).

50 (LV) *Administratīvā procesa likums* (Administrative Procedure Law), 353. pants 6) on *lietas jauna izskatīšana* (rehearing); and *Civilprocesa 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).

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

52 (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).

53 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.

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

55 (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).

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

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

58 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.[59] 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.[60]

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.[61] This possibility appears to be given to Estonian administrative authorities under the general rules,[62] 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,[63] Hungary,[64] Netherlands[65] and Austria,[66] as well as in civil matters in

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[59] 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 kasatsionen 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 Coutron and Bonichot (n 11) 159–160, and 161.

[60] (CY) Constitution of the Republic of Cyprus, Art. 146.6.

[61] 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 postępowaniu przed sądami administracyjnymi* (n 52), Art. 270–274, 279.

[62] (EE) *Haldusmenetluse seadus* (Administrative Procedure Act), §§ 64–70 on *Haldusakti muutmine ja kehtetuks tunnistamine* (administrative amendment and repeal) and §§ 71–74 on *Vaidemenetlus* (internal review).

[63] (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 Coutron and Bonichot (n 11) 273.

[64] (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).

[65] (NL) Hoge Raad, Uitspraak, 24/06/2011, ECLI:NL:HR:2011:BM9272, reported by Tony P Marguery and Herman van Harten, 'Rapport néerlandais' in Coutron 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.

[66] 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 Coutron and Bonichot (n 11) 97, rendered on the interpretation of *Allgemeines Verwaltungs-*

Poland).[67] 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,[68] Czech Republic,[69] Germany,[70] Ireland,[71] Greece,[72] Spain,[73] France,[74] Luxembourg[75] and Slovenia,[76] 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

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).

67 (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).

68 (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.

69 (CZ) Nejvyšší správní soud, rozsudek, 27/10/2010, 7 Afs 79/2010-94, reported by David Petrlík, '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.*

70 (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.

71 (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.

72 (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*).

73 (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).

74 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 francais' in Coutron and Bonichot (n 11) 210–217.

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

76 (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.[77] 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.[78] 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.[79] 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,[80] Germany,[81] Estonia,[82] Lithuania,[83] Netherlands[84] and Romania,[85] 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.

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77 Kornezov (n 13) 829.

78 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.

79 (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).

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

81 (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.

82 (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.

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

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

85 (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.[86]

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.[87] Moreover, the same rule applies equally to fiscal matters.[88]

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.[89]

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.[90] Retrial is granted, *inter alia,* where a subsequent judgment by the ECtHR makes it necessary,[91] and where new facts that could have had an influence on the final decision have been discovered.[92]

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.[93]

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.

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86 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.

87 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.

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

89 (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.

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

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

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

93 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.[94]

Decision of the Varhoven administrativen sad of 3 July 2012

In the second case, the *Varhoven administrativen sad* (Supreme Administative 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.[95]

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.[96]

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,[97] revision is excluded against the second instance decisions of the national supreme court.[98]

94 (BG) *Varhoven kasatsionen sad, Reshenie,* 09/02/2012 (n 59).
95 (BG) *Varhoven administrativen sad, Reshenie,* 03/07/2012 (n 59).
96 Fartunova (n 59) 161.
97 (HR) *Zakon o parničnom postupku* (n 54), *članak* 382 (2) (3) on *Revizija.*
98 (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.[99]

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*.[100]

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.[101] 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.[102]

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.[103]

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.[104]

Denmark

In Denmark, cases can be reopened in extraordinary situations.[105] 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.

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99 (CY) ACA (n 11), National report of Cyprus, Question 14.

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

101 (CZ) *Zákon o Ústavním soudu* (n 49), § 119.

102 (CZ) *Zákon o Ústavním soudu* (n 49), § 119.

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

104 (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 *přezkummé řízení* (revision); and (CZ) *Zákon daňový řád,* §§ 121–124a on *přezkummé řízení*; as well as Petrlík (n 69) 421–424.

105 (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.[106] 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.[107]

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,[108] even if there is no specific case-law available in the field of EU law.[109]

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.[110] Specifically, in terms of the civil and administrative procedure codes, a case can be reopened[111] '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

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106 (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.

107 (EE) *Riigivastutuse seadus* (State Liability Act), § 15(1).

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

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

110 (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.'

111 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.[112] 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.[113]

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,[114] 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,[115] another case emerged before the *Korkein hallinto-oikeus* regarding the application of the same national tax rules in 2006.[116] 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

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112 (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.

113 (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.

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

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

116 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.[117] 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.[118]

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.[119]

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,[120] 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.[121]

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

118 Presented by Kanninen (n 112) 196–197.

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

120 (CJEU) Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* ECLI:EU:C:2006:544 [2005] ECR I-10423.

121 (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.[122]

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.[123]

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.[124] 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.[125]

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.

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

123 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.

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

125 (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.[126]

The contested judgment concerned a liability claim regarding motor vehicle insurance.[127] After the first instance court's decision was pronounced, the CJEU handed down a judgment which interpreted the relevant provisions of the EU directive.[128] 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.[129]

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.[130]

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[131] which interpreted the provisions of the EU directive in a way that was favourable to the applicant.[132]

However, as the motion was submitted later than one year after the contested judgment acquired *res judicata,* the request was dismissed.[133]

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.[134] As such, the necessity to set aside the *res judicata* is evaluated on a case-by-case basis.

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

127 (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.

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

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

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

131 (CJEU) Judgment in *Candolin and Others* (n 128).

132 Presentation after Kanninen (n 112) 194.

133 (FI) *Oikeudenkäymiskaari* (n 45), 31 luku, 10 §

134 (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*;[135] as for the latter, the time limit is only one year.[136]

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.[137]

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.[138]

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.[139]

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.[140] As for civil

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135 (FI) *Hallintolainkäyttölaki* (n 45), 11 luku, 64 § (2).

136 (FI) *Oikeudenkäymiskaari* (n 45), 31 luku, 10 §.

137 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, Assemblé, 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.

138 (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).

139 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 Άρειος Πάγος, 16/03/2011 (n 72). See also Vassili Christianos, 'Rapport hellénique' in Coutron and Bonichot (n 11) 235–236.

140 (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.[141]

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.[142]

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,[143] was confirmed by the *Alkotmánybíróság* (Constitutional Court) on 7 July 2014.[144] 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,[145] 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,[146] the *Tribunale di Roma* denied retrial, even following the CJEU decision rendered in the same case.[147] 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.[148]

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141 (EL) Άρειος Πάγος, 14/12/2004 (n 72); and Άρειος Πάγος, 24/02/2012 (n 72).

142 (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. §.

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

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

145 (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.

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

147 See (CJEU) *Lucchini* (n 18).

148 (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.[149]

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.[150] 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.[151]

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.[152] 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.[153]

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.[154] In fact, the *Vyriausiasis administracinis teismas* has already reopened cases on these grounds.

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149 (IE) *Blackhall v Grehan* [1995] (n 71).

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

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

152 (LT) *Lietuvos Respublikos Administracinių Bylų 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 Valutytė, 'Lithuanian report' in Coutron and Bonichot (n 11) 301. The deadline to submit the motion for retrial is three months.

153 Valutytė (n 152) 301–302.

154 Valutytė (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.[155] 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.[156]

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.[157]

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.[158]

The *Vyriausiasis administracinis teismas,* deciding on the motion for retrial, concluded that the EU provisions should have been applied in the underlyingproceedings 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.

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

156 (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.).

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

158 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.[159]

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 prelimi- nary 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.[160] 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.[161]

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.[162]

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159 (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.

160 Valutyté (n 152) 293–295.

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

162 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.[163]

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[164] but not in civil cases.[165]

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.[166]

Malta

National rules on retrial

In Malta, cases can be reopened because of a wrong application of the law.[167] 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,[168] courts are in fact called upon to decide whether they themselves have committed an

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163 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.

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

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

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

167 (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.

168 (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.[169]

Netherlands

National rules on retrial

Dutch procedural rules do not provide a legal basis for retrial on the ground of misinterpretation of law.[170]

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.[171] 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.[172] Moreover, the *Hoge Raad* emphasised the importance of legal certainty and *res judicata,* referring to CJEU judgments on this matter.[173]

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.[174]

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.[175]

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

170 (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.

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

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

173 (CJEU) *Köbler* (n 2), para 38; *Kühne & Heitz* (n 14), para 24; *Kapferer* (n 12), para 24.

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

175 (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.[176] 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.[177]

As for administrative matters, retrial can be granted wherever an obligation under an international agreement requires it.[178] According to the legal literature, this rule can eventually serve as a legal basis for retrial on account of a subsequent CJEU judgment.[179] 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.[180] Authorities have this competence, even if the final decision has already been confirmed by the administrative court.[181] 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.[182]

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.[183]

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.

176 (PL) *Kodeks postępowania cywilnego* (n 67), Art. 403.

177 (PL) Sąd Najwyższy, Postanowienie, 22/10/2009 (n 67).

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

179 Mikłaszewicz (n 67) 376–378.

180 (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 Michal Bobek (ed), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Hart Publishing 2015, Oxford – Portland) 231.

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

182 This can therefore be considered as a *Kühne & Heitz* situation.

183 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 adminstrative 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.[184] However, appellants are required to specify the CJEU decision on which they rely in their action.[185] Moreover, the CJEU case-law must be new, in the sense that it should differ from previous case-law on the same question.[186] 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.[187]

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[188] – 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.

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184 (PL) Wojewódzki Sąd Administracyjny w Olsztynie, Wyrok, 19/09/2013, I SA/Ol 486/13, LEX nr 1389573; Wojewódzki Sąd Administracyjny w Łodzi, Wyrok z 13/02/2014, I SA/Łd 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.

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

186 (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.

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

188 (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.[189] 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.[190]

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,[191] 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.[192] 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.[193] 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.

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

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

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

192 (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.

193 (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.[194] 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).[195]

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.[196]

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.[197] This may suggest that the violation of the EU norm is considered to be 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.[198] This provision was introduced into Slovakian law in 2008 in order to ensure coherence between the CJEU

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

195 (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.

196 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.

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

198 (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.[199] 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.[200]

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.[201]

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.

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

200 (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.

201 (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.[202]

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.[203]

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.[204] However, as Trstenjak and Plaustajner warn, this conclusion must be treated with caution.

Following these authors,[205] 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

[202] 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.

[203] (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.

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

[205] 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.[206]

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.[207]

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[206] 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.

[207] (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.[208] This remedy can eventually be applied to misinterpretation of EU law by a final judgment.[209] 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.[210] 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.[211]

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.[212]

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

209 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.

210 (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.

211 (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.

212 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.[213] 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[214] 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.[215] Following the CJEU judgment, the *Supreme Court* determined the amount that the applicant had to pay as the respondent's costs.[216]

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.[217] 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,[218] of the legislation under which their convictions were secured. The position would only have been different if the conduct of the

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.

213 This power extends to decision of the House of Lords prior to the creation of the Supreme Court.

214 (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.

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

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

217 (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.

218 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.[219]

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,[220] 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.[221]

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.[222]

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.[223] Moreover, an applicant in judicial review proceedings must obtain the permission of the court for the case to proceed

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

220 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).

221 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.

222 Kornezov (n 13) 830.

223 (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.[224]

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,[225] in Romania (in administrative matters)[226] and in Slovakia (in civil matters).[227] It has also been accepted in Lithuania (in administrative cases),[228] 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.[229]

Without criticising the politico-legislative choise of the national legislators, the Romanian and Slovak solutions appear particularily 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.

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

225 ACA (n 11), National report of Finland.

226 (RO) Curtea de Apel Timişoara, Secţia contencios administrativ şi fiscal, 06/10/2012 (n 190).

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

228 (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 Valutytė (n 152) 301.

229 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'.[230] 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.[231] Furthermore, in the absence of common EU procedural

[230] 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.

[231] 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,[232] the application of these norms is ensured through the national procedural framework.[233] This rule, called the principle of national procedural autonomy,[234] is only limited by the principles of equivalence and effectiveness.[235] Nevertheless, as far as effectiveness is concerned, the procedural rule of reason[236] may even prevail over this principle.[237]

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.[238]

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 europanization of the administrative procedural law and the judicial protection of individual rights.

232 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.

233 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.

234 (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.

235 (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.

236 (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.

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

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

be called into question.[239] 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.[240]

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.[241] The CJEU has not addressed this issue yet.[242] 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.[243]

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.

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239 (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.

240 (CJEU) *Kapferer* (n 12) para 21, *Fallimento Olimpiclub* (n 12) para 23.

241 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).

242 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.

243 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.[244] 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,[245] and a final administrative decision should be reviewed[246] if proves to be contrary to EU law.[247]

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 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 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 infringment'. 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.[248]

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 conlusion that the cumulative use of them is not necessary seems to be uniform.[249]

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244 Kornezov (n 13) 834.

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

246 (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.

247 Kornezov (n 12) 835, 836.

248 See also Varga (n 4).

249 I will not address here the issue when damages action in 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.[250]

To conclude, the cumulative use of the two remedies seems unnecessary. As the Romanian government in the *Târșia*[251] 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.[252] 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.

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[250] 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.

[251] (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.

[252] 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.[253]

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.[254] 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';[255] Similarly, Estonian law gives priority to a liability claim over retrial.[256] The *Riigikohus* (Supreme Court) stated, concerning ECHR violations, that reopening cases is only possible if compensation by damages is not available.[257] In Greece, the *Areios Pagos* pointed out that a judgment of the ECtHR can only give rise to compensation, but not to retrial.[258] 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.[259] The Spanish *Tribunal Supremo* pronounced on 1 September 1991 that even if retrial was not possible, a liability claim could be lodged.[260]

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.

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253 (CJEU) *Kapferer* (n 12) paras 20–21; *Fallimento Olimpiclub* (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.

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

255 (CZ) *Zákon o Ústavním soudu* (n 49), § 119.

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

257 (EE) Riigikohtu halduskolleegiumi, 22/02/2010, n° 3-3-2-1-10; and Riigikohtu üldkogu, 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.

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

259 (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.

260 (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.[261] 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.[262]

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.[263] 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 authonomy.[264] 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.

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

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

263 This seems to be the situation in the following Member States: Estonia, Ireland, Greece, Cyrus, 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.

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

Emese Pásztor*

Secret Intelligence Gathering – a Low Threshold Still Too High to Reach**

The Gap Between the Level of Privacy Protection in Europe and in Hungary After the Case of *Szabó and Vissy v Hungary*[1]

Security society, safety state,[2] garrison state[3] and even illiberal state[4] are terms referring to phenomena that were unavoidable in the last few years all over the globe, especially after 9/11. Even if these terms capture different aspects of a possible outcome to which the world is getting closer, the tendency to trivialise and under-estimate the importance of liberty seems to be the link connecting them. As Glenn Greenwald summarised Foucault's hypothesis in his TED talk[5] 'surveillance creates a prison in the mind that is a much more subtle though much more effective means of fostering compliance with social norms or with social orthodoxy, much more effective than brute force could ever be.'

But why would Hungary, a country never really concerned by terrorism, be important for understanding this tendency? From this very angle, Hungary seems to be a country particularly worth dealing with as – the former happiest barrack in the socialist camp,[6] the wunderkind of the democratic transition of Soviet satellites,[7] and later, the pioneer of unorthodox economic policies and illiberalism – was always gifted at keeping up with the zeitgeist quicker than the others. The pattern of democratic backsliding was already successfully implemented by Poland and one can never know who will be the next.

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1 *Szabó and Vissy v Hungary,* no. 37138/14, 12 January 2016.

2 Charles D. Raab, 'Governing the Safety State' (Inaugural Speech, University of Edinburgh, 7 June 2005).

3 Harold D. Lasswell, 'The Garrison State' (1941) 46 (4) American Journal of Sociology 455–468.

4 Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 (6) Foreign Affairs 22–43 <http://www.seep.ceu.hu/alpsa/articles/zakaria.pdf> accessed 2 May 2018.

5 <https://www.ted.com/talks/glenn_greenwald_why_privacy_matters/transcript?language=hu> accessed 2 May 2018.

6 <https://en.wikipedia.org/wiki/Goulash_Communism> accessed 2 May 2018.

7 Miszlivetz Ferenc, 'The Tunnel at the end of the light: The crisis of transition in Hungary' [2009] <http://www.kx.hu/ kepek/ises/anyagok/Tunnel_at_the_End_of_the_Light.pdf> accessed 2 May 2018.

Whether Hungary slides self- or even unconsciously on this slippery slope of anti-democratisation, from now on – in particular cases – there is definitely a difference between the level of protection provided by the European standard and the domestic institutions responsible for fundamental rights protection in Hungary, and not in favour of the latter. Presuming that Europe is not founded on the idea of division but of unity, to avoid such gaps widening further in any sense is crucial for maintaining this entity we now know as Europe.[8]

Driven by this idea, the following short case study compares the different standards of the Constitutional Court[9] of Hungary and the European Court of Human Rights[10] concerning secret intelligence gathering – a core issue of personal liberty and security, providing an excellent opportunity to mind (and measure) this gap.

I Privacy vs Security – the End of a Paradigm?

Balancing privacy and security, or generally speaking, the 'balancing paradigm'[11] is a widespread approach in the field of privacy protection, especially in the context of the emerging intensity of the threat of terrorism. The trade-off – an expression widely used in professional literature but also in infotainment media – presents privacy and security as competing values, which might be only realised at the expense of each other, as a kind of virtual zero-sum game.[12] In other words, the concept refers to the necessity of giving up our privacy in the hope of being protected by the state from the danger around us, threatening our security. In a wider sense, the trade-off not only balances privacy and security, but rather these two values as the symbols of the best interest of the individual and society, presenting security as the incarnation of community well-being, and privacy as the obstacle of state actions which aim to support the community. Everyday political discourse tempted by populism refers to this relation – the opposition of privacy and security, the individual and the community – so naturally, as if it would be an unquestionable triviality.

The critics of trade-off are a mixed bunch, but the reasons behind rejecting the idea are mainly fed by two different types of arguments. The main difference between them might be captured in that they are challenging the trade-off within the logical structure of the model, without questioning the opposition of privacy and security, or they contest the opposition itself.

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8 A reference to Brexit, initiated by the United Kingdom European Union membership referendum on 23 June, 2016 shall suffice.

9 Hereinafter referred to as Constitutional Court or CC.

10 Hereinafter referred to as ECtHR or the Court.

11 Charles D. Raab, 'From balancing to steering: new directions for data protection' in C. J. Bennett, R. Grant, (eds), *Visions of Privacy: Policy Choices for the Digital Age* (University of Toronto Press 1999, 68–93).

12 Bernadette Somody, Máté Szabó, Iván Székely, 'Moving away from the security-privacy trade-off: The use of the test of proportionality in decision support' in M. Friedewald, P. Burgess, J. Cas and R. Bellanova, W. Peissl (eds), *Surveillance, Privacy and Security: Citizens' Perspectives* (PRIO New Security Studies 2017, Routledge) 155.

The first approach – criticizing the trade-off *within the trade-off* – usually covers attempts to show how the balancing paradigm relativises the importance of privacy compared to security. Such attempts make us feel that taking a stand for the sake of privacy reflects egoism and selfishness opposed to the noble objective of the public good. Moore[13] challenges three rival arguments undermining the importance of privacy, all of which support security when balancing comes about. The first argument, 'just trust us,' tries to convince us about letting those exercising public power decide on how to strike the balance. The second, 'nothing to hide,' as referred to by Moore, claims that only those who are engaged in immoral and illegal activities should worry about being monitored; and finally 'security trumps' holds that security interests are weightier than privacy claims simply by their character. By presenting historical examples and experiences of the abuses related to, for example, the USA Patriot Act, Moore concludes that we have no reason to trust the decision makers, claiming that states would definitely not crave the blind trust of citizens in their surveillance politics if the decision makers really would have 'nothing to hide'.[14] As Moore is not a constitutional lawyer, it would be unfair to criticise him for the lack of arguments rooted deeply in constitutional law; however, he definitely would not argue if we say that trust in the state is completely alien from the essential nature of protecting fundamental rights. Fundamental rights – ultimately and using all means – are rights which have to be protected *from* the state, even if the protection is provided *by* the state itself. Later on, Moore makes a clear distinction between sensitive personal information and information which points towards criminal activity, and claims that sexual or medical history, for example, are simply out of the domain in which others might have right to access information.[15] As an illustration of how the two different arguments are blended into each other, Moore's objective is to 'strike an appropriate balance'[16] between privacy and security, which he desires to provide by introducing new safeguards, boosting the accountability of the surveillance power. In his struggle to reach the equilibrium, he argues that legal guarantees may promote privacy and security simultaneously, without realising that this means, of necessity, that privacy and security are certainly not positioned on the opposite sides of the seesaw.

Referring back to the presentation cited in the introduction of this paper, Greenwald points out that even people who say that they have nothing to hide put passwords on their email accounts and locks on their bathroom doors, proving with their actions that, in reality, they instinctively understand the primal importance of privacy. Greenwald stresses that when we are being monitored our behaviour changes dramatically. In this sense, it seems that surveillance is not only capable of revealing past actions we would like to hide, but also deters

[13] Adam D. Moore, 'Privacy, security, and government surveillance: Wikileaks and the new accountability' (2011) 25 (2) Public Affairs Quarterly 141–156.
[14] Moore (n 13) 142–145.
[15] Moore (n 13) 146.
[16] Moore (n 13) 148.

us from future choices, limiting our freedom of making decisions on our own (even non-criminal) actions. The same approach comes up in Westin's *Privacy and Freedom,*[17] when the author identifies the four different states of privacy, and argues that, beyond solitude, we can behave honestly only in the state of intimacy. This honesty doesn't refer to the readiness to commit terrorist attacks and engage in activities against the state, but the ability to be who we are, without the slightest urge to pretend anything.

Adding more volume to the first group of critics, Bárd[18] draws the attention to the fact that giving up fundamental rights (in our case, privacy), is always a slippery slope, which makes it almost impossible later to regain rights we have abandoned before. According to her, this slippery nature is reflected in the tendency for measures interfering into privacy to be increasingly intrusive, constantly widening the scope, time-frame and intensity of application. In Bárd's interpretation, actual rights are given up for the sake of perceived, future dangers, which subjects law-making to feelings and 'emotional demands'.[19]

Both groups of critics are convinced that the trade-off is false or at least grievously misleading, but the ones who doubt that privacy and security should be balanced against each other attack the bases of the model and definitely go farther than pointing out the disproportionalities within the paradigm itself. Among those who question the model in its entirety, it is widely recognized that the trade-off oversimplifies the relation between privacy and security. Somody, Szabó, Székely[20] and earlier, Regan[21] pointed out that there is a dynamic complexity between privacy and security, and a simple opposition cannot describe the multiple connections between the interests of these values. Borrowing a classic example, if the safety of our homes might be achieved by installing locks on the doors, enhancing security and privacy at the same time, who would opt for more CCTV cameras?[22] As Somody, Szabó and Székely emphasise, this tendency to trust in the false plainness of relations leads to the risk of eroding not just privacy, but even the values the trade-off is intended to protect, including democracy as well.

Even though that putting the trade-off into context would be hard to bypass in any professional discussion, the idea is surprisingly not reflected in the thinking of the general public. People do not consider privacy and security as competing values. Analysing the acceptance of surveillance-oriented security technologies, researchers found that, in the minds of citizens, privacy and security are not thought to be exchangeable goods that could be traded.[23]

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17 Alan Westin, *Privacy and Freedom (*Atheneum 1967, New York).

18 Petra Bárd, 'Foreword' in Petra Bárd (ed), *The Rule of Law and Terrorism* (HVG-ORAC 2015, Budapest) 7–21.

19 Bárd (n 18) 7–8.

20 Somody, Szabó, Székely (n 12) 155.

21 Priscilla M. Regan, *Legislating Privacy. Technology, Social Values, and Public Policy* (University of North Carolina Press 2017, Chapel Hill – London).

22 Somody, Szabó, Székely (n 12) 156.

23 Vincenzo Pavone, Sarah Degli-Esposti, 'Public assessment of new surveillance-oriented security technologies: Beyond the trade-off between privacy and security' (2012) 21 Public Understanding of Science 556. And see also: Bernadette Somody, Máté Szabó, and Iván Székely 'Biztonság és magánélet – Az alkumodell megkérdőjelezése és meghaladása' (2017) 103 (3) Replika 31.

Probably it is Raab[24] who turns the trade-off upside down in the most ingenious way, when he argues that privacy and security are not just far from being opposing values, but they are essentially the same. According to Raab, privacy is a security value, and by necessity, a community value as, if we consider the public interest in a broader sense, without privacy, the public spheres and policies of democratic societies could not even function. Without individual participation, no public issues may exist.[25] On the other hand, Raab cites Neocleous[26] to illustrate that, from the end of the eighteenth century, freedom and safety were somewhat synonymous, where safety traditionally referred to the freedom of the individual to follow their own interests.

Raab has got the point, but his approach is still slightly instrumental, as he argues that privacy is important because of its usefulness in the process of democratic decision making. Privacy has an immanent value, which – according to some voices – must be treated as the cornerstone of the diverse structure of fundamental rights. Wachter[27] goes so far as to argue that privacy must be considered 'as a precondition for self-development, personal fulfilment and the free enjoyment of fundamental human rights', which warns us to remain alert in case there is any interference. Among other magic spells, balancing can easily serve as an ideology for legitimising unreasonable restrictions of privacy.[28]

As we saw above, fresh winds blow around the relationship between privacy and security within the academic literature. This short summary is intended to give a context for the standards to be compared below.

Studying the case of *Szabó and Vissy v Hungary*, one can get the impression that the motivations of the effective legal regulation of secret intelligence gathering in Hungary are rooted in the trade-off. To unveil my original hypothesis, my primal suspicion was that the relevant domestic legislation and the approach of the Hungarian Constitutional Court deserved to be criticised from this viewpoint. However, if we have a closer look at the European standard shaped mainly by the Strasbourg Court, we see that the Court basically stands on the same ground. Even if the demise of the trade-off is increasingly obvious in professional discussions, the ECtHR still balances privacy and security against each other, as reflections of individual and community interests. Judge Pinto de Albuquerque seemed to detect this obsolescence, when in his concurring opinion to *Szabó and Vissy*[29] he stressed

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[24] Charles D. Raab, 'A magánszféra mint biztonsági érték' (2017) 103 (3) Replika 81–95. Translated to Hungarian by Viktor Berger from 'Privacy as a Security Value' in Jon Bing, Dag Wiese Schartum et al. (eds), *En Hyllest / A Tribute* (Gyldendal 2014, Oslo) 39–58.

[25] Raab (n 24) 86–87.

[26] Mark Neocleous, 'Security, Liberty and the Myth of Balance. Towards a Critique of Security Politics' (2007) 6 (2) Contemporary Political Theory 141–142.

[27] Sandra Wachter, 'Privacy: Primus Inter Pares – Privacy as a precondition for self-development, personal fulfilment and the free enjoyment of fundamental human rights' (2017) <https://ssrn.com/abstract=2903514> accessed 2 May 2018.

[28] Somody, Szabó, Székely (n 12) 156.

[29] *Szabó and Vissy v Hungary,* Concurring opinion of Judge Pinto De Albuquerque, Section 20.

that presuming 'global surveillance is the *deus ex machina* capable of combating the scourge of global terrorism' is nothing more than an illusory conviction.

We definitely will have to wait until the views of Albuquerque will become the mainstream of the European standard. However, even if the theoretical context of the Court is not the most up-to-date, it is still better to ensure respect for privacy through balancing, than knowingly reproducing the fear of terrorism and bypassing debates on the basis of a single, but unfounded reference to the trade-off.

II *Szabó and Vissy* – the Facts Behind

To protect democratic institutions from the threat of terrorism, states may use extraordinary measures for surveillance. Surveillance always poses a threat for privacy rights, but the degree of this threat depends on the nature of the exact measure taken. When we talk about surveillance for the sake of combatting terrorism, the character and volume of surveillance cannot be compared to when surveillance is used to foster the investigation of certain crimes. The attempt at 'combating terrorism' means far more than investigating specific terrorist activities. While in criminal investigation, data acquisition is always closely linked to the particular case, national security-driven secret intelligence gathering aims at storing data, acquired due its very nature and with a purpose considerably more difficult to grasp. This problem is aggravated by the fact that the technical possibilities barely limit the use of surveillance measures.

The effective Hungarian legal background, in the frameworks of secret intelligence gathering driven by national security, authorises the Counter Terrorism Centre,[30] the SWAT state agency of Hungary specialised in counter-terrorism, for almost every action we can imagine when we think about surveillance. To exercise these powers, no judicial authorisation is needed – surveillance might be conducted based on ministerial approval, which means that the state interference in question is not just carried out, but even granted by the executive power.

Both the Constitutional Court and the ECtHR decided upon the issue, examining similar implications of the same case based on the application of Szabó Máté and Vissy Beatrix, former researchers of a Hungarian policy institute.[31] The judgment of the ECtHR created a new situation, by pointing out the weaknesses of the effective domestic regulation, and establishing that Article 8 of the Convention has been violated. This case provides an excellent

[30] Terrorelhárítási Központ (TEK).

[31] The Eötvös Károly Policy Institute (EKINT) is a think tank that was created in 2003 in order to establish a novel, unconventional institutional framework for shaping democratic public affairs in Hungary. The Institute wishes to contribute to raising professional and general public awareness and to shaping the political agenda in issues with an impact on the quality of relations between citizens and public power. The author is also engaged in a working relationship with the Institute as a researcher.

opportunity to evaluate the Hungarian standard assessed by the relevant decision of the Constitutional Court, and to summarise the expectations drawn up by the case-law of the ECtHR.

The relevant legal background specifies two types of secret intelligence-gathering. The first one is linked to the investigation of particular crimes, while the second – secret intelligence gathering driven by national security – isn't. The distinction was made based on historical factors[32] bringing about the adoption of a system of divided authorisation, according to the following. When the aim is to detect criminal offences, secret intelligence gathering is authorised in the same way as it is regulated by Act XXXIV of 1994 on Police and Act XIX of 1998 on Criminal Proceedings. In this case, a judge, designated for this particular task, decides upon authorisation. Concerning the second type, where national security-related secret intelligence gathering belongs, surveillance shall be authorised by the Minister of Justice, and the whole process is based upon the provisions of Act CXXV of 1995 on National Security. The possible scope of the measure in question is quite opaque; the only significant guarantee applied by the act is that secret intelligence gathering may only be carried out if the data required to perform the statutory tasks cannot be obtained in any other manner. External control is provided in theory, as the Parliament's National Security Committee may exercise control over the authorisation process itself, and the Commissioner for Fundamental Rights[33] can also examine violations related to the anti-terrorist organ as well. However, as the applicants pointed out, neither the Commissioner nor the National Security Committee had ever brought up the underlying question (at least according to the data available to the general public).

By way of the latter – national security-purposed secret intelligence gathering – the Counter Terrorism Centre is entitled to conduct secret house searches, record all the data collected, open letters and parcels, and to check and record the content of electronic communication as well. As the use of these measures is secret, all this happens without the consent of the subject concerned.

[32] In January 1990, the 'Budapest Watergate' scandal broke out; this revealed that even after the democratic transition, the III/III Division of the internal security agency continued to conduct surveillance activities against the opposition. The original model of ministerial authorisation was introduced as an outcome of the events that took place during the 'Budapest Watergate' as a general approach; however, while the model was superseded for surveillance measures taken for the investigation of specific crimes, the procedure for secret intelligence gathering driven by national security remained mostly the same. I would like to express my special thanks to the anonymous reviewer for this valuable comment.

[33] <https://www.ajbh.hu/en/web/ajbh-en/> accessed 2 May 2018.

III Domestic Context

1 Procedural Background – Constitutional Complaint in the Practice of the Constitutional Court of Hungary

Pursuant to the effective provisions of Act CLI of 2011 on the Constitutional Court, constitutional complaint procedures have three different types in Hungary. As a common factor, these procedures have a concrete character, as all of them shall be used in cases where the complainant is personally concerned by the violation of fundamental rights enshrined in the Fundamental Law of Hungary.

Under Section 26 (1) a normative constitutional complaint might be launched when the violation of fundamental rights happened due to the application of a legal regulation in a particular judicial procedure in a way contrary to the Fundamental Law, targeting the legal regulation itself.

By an individual complaint regulated by Section 27, not the norm, but the interpretation of the legal regulation might be challenged, as the judicial decisions contrary to the Fundamental Law can possibly be set aside by the Constitutional Court. Both complaints governed by Section 26 (1) and 27 have an indirect nature, as the violation of the fundamental right is transmitted by a judicial procedure.

In the present case, the situation was different. As an exception, Section 26 (2), by introducing the direct normative constitutional complaint procedure, provides remedy for cases where a violation of fundamental rights happens by the mere fact of the application or the entry into force of the particular legal regulation, which means that the constitutional complaint procedure is not preceded by any judicial proceedings. Mr. Szabó and Ms. Vissy founded their argumentation on Section 26 (2) in this atypical case, with the explicit intention of testing the commitment of the Constitutional Court in Hungary to protecting the rule of law.[34]

To comply with the admissibility criteria is usually not without some trouble, though. According to Section 52 (1) of the Act on the Constitutional Court, the petition shall contain an explicit request, which – besides other factors – requires the petitioner to certify the existence of the preconditions for the proceedings. To illustrate the difficulty of the task, it might be established that the majority of complaint proceedings result in the petition being dismissed, and even complaints launched on typical issues (e.g. concerning local taxes) rarely comply with this criteria.[35] Considering the case of *Szabó and Vissy,* this rule would have obliged the petitioners to verify whether the application or the entry into force of the regulation in question had subjected them personally to a violation of their rights, which was

[34] László Majtényi, Máté Szabó. Beatrix Vissy, 'Mit keres a Terrorelhárítási Központ a paplan alatt? (Egy alkotmánybírósági beadvány értelme)' (2012) 46 (26) Élet és Irodalom.

[35] Fruzsina Gárdos-Orosz, 'The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint' (2012) 53 (4) Acta Juridica Hungarica 315.

practically impossible, as the Act on National Security explicitly prohibits notifying the subject about the surveillance conducted.[36]

Despite all the sinister omens and regardless of the fact that it was never proved if the applicants were subjects of secret intelligence gathering at all, their potential victim status was accepted by the Constitutional Court of Hungary based solely on the existence of the legislation. The petition was found admissible having regard to the 'special nature' of the measure in question, with particular reference to the case law of the ECtHR.[37]

As secret intelligence gathering not linked to the investigation of any particular crime might include any person without tangible restrictions, the Constitutional Court failed to identify the possible personal scope of application. This complicated situation, together with the circumstance that the law itself hindered the complainants from collecting information on whether they had ever been subjected to the measure in question, entailed that even the Constitutional Court agreed that to require the petitioners to justify their victim status would be deeply unfair.

2 Summary of the Decision of the Constitutional Court of Hungary

In its decision no. 32/2013. (XI. 22.) AB, the Constitutional Court of Hungary dismissed the major part of the constitutional complaint launched by the applicants, concerning the compliance of the relevant legal background of secret intelligence gathering with the Fundamental Law of Hungary. The constitutional complaint broadly aimed that surveillance activities conducted by the Counter Terrorism Centre should be secured by similar legal guarantees provided by the Act on Police, instead of the Act on National Security, which provides fewer concrete safeguards.

Within the confines of the complaint claiming the lack of safeguards during the different stages of surveillance, the Constitutional Court examined whether the authorisation of the minister is enough to provide effective guarantees to prevent violation of the right to privacy and the right to informational autonomy. The CC noted that secret intelligence gathering is state interference, a serious threat to fundamental rights, therefore that the process must be regulated under the law, the underlying legal norms must be clear and it must be subject to external control mechanisms.

According to the Constitutional Court, the relevant legal norms meet the requirement of clarity, sufficiently specifying the conditions of ordering and the circumstances of executing national security-related intelligence gathering. The most important part of the decision concerned the question of the powers provided for the minister related to authorisation. In this regard, the Constitutional Court set forth that the scope of national security-related tasks is much broader than the scope of activities attached to the investigation of particular crimes. These purposes cover combatting endeavours to commit an act of terrorism in the territory

[36] *1995. évi CXXV. törvény a nemzetbiztonsági szolgálatokról* (Act CXXV of 1995 on National Security) s 58 para (6).

[37] E.g. *Klass and Others v Germany*, no. 5029/71, 37-38, 6 September 1978, and *Hadzhiev v Bulgaria*, no. 22373/04, 38, 23 October 2012.

of Hungary and the protection of Hungarian nationals at risk in a foreign country. In a broader sense, the task is to secure the sovereignty and the lawful order of the State. The CC argued that the connected 'events of real life' are not examined for their criminal law relevance; therefore the existence of a link to a particular crime is not an utmost necessity. On the basis of this argument, the CC found that national security-related issues *cannot be compared* to secret intelligence gathering linked to investigating a particular crime. This incomparability stands for the question of authorisation as well. Without further explanation, the CC stated that the prevention and elimination of risks to national security are *decisions of a political nature* and therefore such decisions fall within the competence of the executive power, justifying the authorisation rights granted to the minister.

At this point, there was an aspect on which the CC agreed with the applicants. Finally, it has been laid down in the decision as a constitutional requirement that the decision of the minister ordering secret intelligence gathering must be supported by reasons. The underlying argument was that, in granting the authorisation, it is the minister who must weigh the interests of national security against the harm caused to the fundamental rights. Without proper reasoning then, after the decision has been made, the considerations behind balancing cannot be reviewed. This element matters from the perspective of the external control provided by the National Security Committee and the Commissioner for Fundamental Rights, as they may only evaluate the lawfulness of the authorisation activity of the minister if the decision contains a detailed statement of reasons. Evaluating the effectiveness of the powers provided within the frameworks of control for the Committee and the Commissioner, the Constitutional Court established that the scheme provided by the law is sufficient to guarantee respect for the right to privacy.

IV The ECtHR's Judgement in Light of the Court's Standard

Analysing the case law of the European Court of Human Rights in the context of secret intelligence gathering, among other judgements, *Klass and Others v Germany*, *Weber and Saravia v Germany*[38] and *Roman Zhakarov v Russia*[39] *are considered to be the main cornerstones. This selection of cases is also justified by the fact that, in Szabó and Vissy v Hungary, even the Court itself used these cases as points of orientation.*

The Court examines all the interferences into the private sphere of the contracting party's nationals on the basis of Article 8 of the European Convention on Human Rights. According to the Court, any interference can only be justified in this field if it is in accordance with the law, pursues one or more of the legitimate aims listed by the Convention and is necessary in a democratic society in order to achieve any such aim. Secret surveillance of citizens is tolerable only if strictly necessary for safeguarding democratic institutions.

[38] *Weber and Saravia v Germany*, no. 54934/00, 29 June 2006.
[39] *Roman Zhakarov v Russia* [GC], no. 47143/06, 4 December 2015.

While the ECtHR's standard definitely does not show us a clear trend, there are still some basic developments which the Court seems to follow more or less consistently. This core standard, is filtered down from the previously listed decisions, seems to be as follows:

a) Article 8 on the right to private and family life has the broadest possible personal scope of application. The Court holds that the mere fact that such intrusive measures exist is a menace to the private life of everyone who the measures might concern. No further evidence is needed to comply with the admissibility criteria, as the harm is caused by the menace itself, not the actual application of surveillance measures. This approach was echoed by the decision of the Hungarian CC as well.

b) All the limitations of rights under Article 8 shall be interpreted narrowly.

c) The legal framework in effect has to clarify at least the nature of the offences in question and provide a definition of the categories of people affected. The minimum criteria requires a limit to be set on the duration of the measure; details to be given of the procedure to be followed for examining, using and storing the data obtained; and the clarification of the precautions to be taken when transferring data and the circumstances in which the data must be destroyed.

d) The interference shall be foreseeable in an abstract sense, which means that the individual does not need to foresee when his communications are likely to be intercepted. The legal framework has to provide a possibility for being informed of the existence of such measures, which doesn't even require states to list the specific offences which may give rise to interception.

e) To justify effective necessity in a democratic society, the Court requires a substantive reasoning, but in fact it tends to accept almost any reason as a legitimate aim under the cloak of national security.

f) The effectiveness of external control mechanisms is to be evaluated as a whole. The ideal form of control is of a judicial nature, because judicial control offers the best guarantees of independence and proper procedure. Judicial control is required 'at least' as a last resort, but involving judges doesn't fulfil the criteria in itself. Judges must have sufficient powers to evaluate the reasonableness of the suspicion on which the order is based, and the proportionality and necessity of the measures taken as well. Other solutions comply with the standard if the authority holds a sufficiently independent status, their powers are effective, it has the competence to exercise effective control, and the control mechanism has a democratic character in general.

g) Notification of the subject of surveillance is desirable as soon as it can be carried out without jeopardising the purpose of the restriction, after the termination of the measure taken.

*With regard to Szabó and Vissy, R*izzo establishes[40] that the ECtHR substantially confirmed the results achieved with the existing case-law. However, he highlights that there might be

[40] Giuseppe Rizzo, 'Szabó and Vissy v Hungary: a step back?' (2016) available at Lexology: <http://www.lexology.com/library/detail.aspx?g=435b47eb-31a0-4240-b17a-27894e7fffd7> accessed 2 May 2018.

a difference in the standard set for surveillance by the Zhakarov judgement and the present case. While the Court held in *Szabó and Vissy* that the decision on the motion of surveillance measures shall be based on 'an individual suspicion regarding the target person'[41], the previous requirement of 'reasonable suspicion' introduced by the Zhakarov decision was a more advanced criteria.

Even so, in accordance with the standard, in *Szabó and Vissy* the Court assessed secret intelligence gathering as a process, distinguishing between the question of authorisation and *a posterior* control of secret surveillance activities, but requiring the effectiveness of the protection of fundamental rights on the whole. The ECtHR acknowledged the absence of judicial supervision as a central issue common to both stages of the intelligence gathering process. With respect to the broad scope of application of the measure in question, the Court made it clear that the authorisation rights provided for the minister are incapable of ensuring the requisite assessment of strict necessity, as this kind of supervision is eminently political. Such a political nature increases the risk of abusive measures. According to the case-law, involving a non-judicial institution in authorisation might also be compatible with the Convention, but it has to be ensured that such authorisation is independent from the executive power, and it needs a proper justification. The Court doesn't consider *ex ante* authorisation an absolute requirement, because extensive *post factum* judicial oversight may counterbalance any shortcomings of the authorisation. For the Court, in the particular case, oversight by a politically responsible member of the executive did not provide the necessary guarantees. The Court also established that the responsible parliamentary committee's procedure falls short of securing adequate public scrutiny, and there is no remedy granted by the existing procedures, as those who are the subjects of secret surveillance are kept unaware of it, even after the end of the surveillance itself.

According to the Court, virtually any person in Hungary might be subjected to secret surveillance. The legislation doesn't describe or specify the categories of possible targets, or the underlying situations. The Court wasn't convinced that the relevant legal regulations provide sufficiently precise, effective and comprehensive safeguards on the ordering and execution of secret intelligence gathering. In sum, the ordering happens based on the decision of the executive power, without the assessment of strict necessity, and no effective remedial measures are provided at all.

V Conclusions

According to the fragments of the case law summarised above, there are at least three factors which might be identified as anomalous, considering the required level of fundamental rights protection provided by the ECtHR's standard and the Hungarian one.

[41] *Szabó and Vissy v Hungary*, 71.

a) The required nature of control

According to the ECtHR, political control of secret surveillance activities can only be considered as a sufficient safeguard if certain requirements are met. If the control is exclusively political, with no legal control mechanisms available as counterbalance, the level of clarity required for the relevant legal norms is increased. This seems a fundamental difference between the assessment of the ECtHR and the Constitutional Court, as the CC acknowledged the political nature of authorisation as a natural consequence of the political nature of the measure itself. Moreover, it could be added that not just the authorising decision but also the *a posterior* control conducted by the parliamentary committee has a political character, despite the fact that the task is to balance fundamental rights, which has an indisputable legal nature.

b) The meaning of 'external'

As the ECtHR established, control is only external if it is provided by a body independent of the executive power. The required level of independence was not evaluated by the Constitutional Court, but the ECtHR laid down that it is the judiciary that offers the broadest spectrum of guarantees in this field.

c) What 'effectiveness' stands for in practice

In the ECtHR's interpretation, effectiveness is the question of powers provided for the body involved in control. The key factor in providing effectiveness is publicity – legal remedies might only be effective if the subject is notified of the measures taken, at least afterwards, when providing information no longer represents a risk to national security. Similarly to the required nature of control, the CC also considered the lack of notification as a natural consequence flowing from the character of secret intelligence gathering, which obviously indicates a great gap between what the CC and what the ECtHR considers as an effective legal remedy.

The different institutional and procedural considerations listed above are at least those that the legislator should keep in mind when amending the underlying provisions to move the Hungarian standard towards the majority of Europe. Unfortunately, at this point some serious doubts need to be shared.

VI Doubts

Shortly after the autumn legislative schedule[42] of the National Assembly of Hungary was published, a new draft bill came out from the Ministry of Interior, aiming to re-structure the legislative framework of national security driven secret intelligence gathering in light of

[42] <http://www.parlament.hu/documents/10181/56621/tvalkpr_2017osz.pdf/3b362b76-01b0-426b-81b8-e5d8eb2cc3b6> accessed 2 May 2018.

the Strasbourg standard.[43] Even if all the rumours and press interviews available suggest that the draft bill in its present form will not be able to gain the required two-thirds majority, it is still worth having a look at the newly developed model to examine how the standard is currently understood.

According to the draft bill, it would be still the Minister of Justice who would authorise the application of surveillance measures, but his decision would be exposed to the ex-post review of the National Authority for Data Protection and Freedom of Information[44] within about a week. After the decision made by the Minister, the decision would be sent to the Authority within 48 hours, which would examine the decision within another 72 hours and send back the result of the review to the Ministry within further 48 hours at maximum. In the event of unlawful surveillance, the Authority would be entitled to terminate the measure taken, otherwise it would approve the decision of the Minister. The draft bill makes an attempt to clarify the possible personal scope of application, and introduces a remedial action called 'surveillance complaint', which could also be filed to the Data Protection Authority.

It is clear even for the very first glance that the requirements of the Strasbourg standard are a long way from being met by the draft.

a) The nature of authorisation would still be political. Even if a legal element (the approval of the Data Protection Authority) is introduced, this legal control – as a main rule – is only an ex-post control, which means that in practice, surveillance measures could still be undisturbedly taken for a whole week without any control outside the executive power. As an undeniable stride, the draft bill made significant progression in specifying the conditions of application, which could be a factor considered to be in harmony with the requirements. However, as with all legal norms which require balancing, these provisions will gain their true meaning in the course of their interpretation. That would make it immensely important to involve the independent judiciary in the process.

b) While the approval of the Data Protection Authority is external in the sense that the Authority is an autonomous administrative organ, the level of independence is far from the guarantees offered by the judiciary. Judicial control would not be part of the mechanism at any phase of the surveillance, and no justification explains the reasons.

c) The requirement of effectiveness would still not be fulfilled, as the 'surveillance complaint' would be introduced for persons who already believed they were subjected to intelligence gathering, while the draft bill remains silent about compulsory subsequent notification.

The title referred to a 'low threshold', reminding us that the standard of the ECtHR is self-evidently a minimum standard, still far from what we could call ideal. A gap was demonstrated between the actual trends in the literature and the approach of the Strasbourg Court, and moreover, another gap seems to have opened between Europe and Hungary as well. Based on the above, it truly seems that, for Hungary, even this low threshold currently seems too high to reach.

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[43] <http://www.kormany.hu/download/8/d5/21000/Nbtv-Infotv%20m%C3%B3dos%C3%ADt%C3%A1s%20Normasz%C3%B6veg%2Bindokol%C3%A1s.pdf#!DocumentBrowse> accessed 2 May 2018.

[44] Hereinafter the Authority or the Data Protection Authority.

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