Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 23 April 2015 [1]

Case C-69/14

Dragoș Constantin Târșia
v
Statul român
Serviciul Public Comunitar Regim Permise de Conducere și Inmatriculare a Autovehiculelor

(Request for a preliminary ruling from the Tribunalul Sibiu (Romania))

(Member State legislation permitting review of definitive (judicial) decisions in breach of EU law delivered in administrative proceedings but not in civil proceedings — Request for a revision of a final decision taken with respect to pollution tax on motor vehicles in civil proceedings — Res judicata — Principles of effectiveness and equivalence — Article 47 of the Charter of Fundamental Rights)

I – **Introduction**

1. In 2007 the applicant instituted proceedings before a Romanian civil court for recovery of a special tax on motor vehicles which he had paid for a car imported from another Member State. The payment was due because registration in Romania by the relevant government authority was contingent on the production of proof of payment of the special tax on motor vehicles. Later, in April 2011, the Court ruled in the judgment in *Tatu* that Article 110 TFEU precluded Romania from levying pollution tax on motor vehicles on their first registration in that Member State if the tax were arranged in such a way that it discouraged the placing in circulation in Romania of second-hand motor vehicles purchased in other Member States, without discouraging the purchase of second-hand vehicles of the same age and condition on the domestic market. [2]

2. Prior to the ruling in *Tatu*, the applicant's claim concerning the recovery of the part of the special tax corresponding with the pollution tax was rejected by a civil judgment that became final under Romanian law. The applicant therefore argues that EU law requires that he is afforded the opportunity to recover the tax, particularly given that Romanian legislation provides for an exception to *res judicata* for judgments that turn out to be incompatible with EU law, but only for judgments issued in administrative proceedings.

1 — Original language: English.

2 — Judgment in *Tatu* (C-402/09, EU:C:2011:219).

3. According to the established case-law of the Court, charges levied in breach of EU law, and amounts paid to the State or retained by it directly related to that tax, are to be repaid, and with interest, so that the situation existing prior to the levying of the amount is restored.[3] However, at the same time the Court has acknowledged that the principle of *res judicata*, which is entrenched in the legal systems of all of the Member States, and in EU law itself,[4] applies to judgments of national courts that have become final, even if they appear to be inconsistent with EU law.[5] This means that, in some circumstances, repayment of such charges can (lawfully) be refused.

4. However, due to the limitations EU law places on the procedural autonomy of the Member States, if national law provides for exceptions to the principle of *res judicata*, by allowing final judgments to be reopened in certain circumstances, then this exceptional path must also be open when the final judgment in issue is incompatible with EU law.[6]

5. The case to hand therefore affords the Court an opportunity to develop its case-law on the interplay between *res judicata* and the primacy of EU law. More particularly, it is to be considered in the light of the principle of sincere cooperation in Article 4(3) TEU, various provisions of the Charter of Fundamental Rights of the European Union, namely, the Article 47 right to an effective remedy and equality before the law as guaranteed by Article 20, along with the conventional bases on which national rules on *res judicata* have been challenged for compliance with EU law, namely the principles of effectiveness and equivalence.[7]

II – **Legal framework**

6. Article 148 of the Romanian Constitution[8] recognises the primacy of EU law, and obliges the Parliament, the President of Romania, the Government, and the judiciary to guarantee it.

7. Article 322 of the Romanian Code of Civil Procedure[9] states as follows:

‘The revision of a judgment which has become final either on appeal or because no appeal was brought, and a judgment on the substance from the appeal court, may be sought in the following cases:

…9 if the European Court of Human Rights has found an infringement of rights or fundamental freedoms as a result of a judicial decision and the serious consequences of that infringement continue to be produced, and may be remedied only by revision of the judgment;

3 — Judgment in Manea, C-76/14, EU:C:2015:216, paragraphs 46 and 50. See also judgment in *Nicula* (C-331/13, EU:C:2014:2285), paragraphs 27 and 28 and case-law cited.

4 — The Court has also confirmed that *res judicata* applies to its own rulings. See e.g. judgments in *Commission* v *Luxembourg* (C-526/08, EU:C:2010:379), paragraphs 26 and 27, and *ThyssenKrupp Nirosta* v *Commission* (C-352/09 P, EU:C:2011:191), paragraph 123.

5 — See notably judgments in *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067); *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506); *Kempter* (C-2/06, EU:C:2008:78); *Lucchini* (C-119/05, EU:C:2007:434); *i-21 Germany and Arcor* (C-392/04 and C-422/04, EU:C:2006:586); *Kapferer* (C-234/04, EU:C:2006:178); and *Kühne & Heitz* (C-453/00, EU:C:2004:17). On *res judicata* and arbitral proceedings see judgments in *Eco Swiss* (C-126/97, EU:C:1999:269), and *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615). See also discussion of the pertinence of *res judicata* to the development of rules on damages for breach of EU law by Member State judicial authorities that occurred in the judgment in *Köbler* (C-224/01, EU:C:2003:513).

6 — E.g. judgments in *Kapferer* (C-234/04, EU:C:2006:178), paragraph 22 and case-law cited, and *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067), paragraph 62.

7 — See most recently judgment in *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067).

8 — Constitution of 21 November 1991, modified and completed by Law No 429/2003, republished in *Monitorul Oficial al României* No 767 of 31 October 2003.

9 — Codul de procedură civilă promulgated by Decree of 9 September 1869, republished in *Monitorul Oficial al României*, Part 1, No 45 of 24 February 1948, as amended and completed, in force till 15 February 2013.

10 if, after a judgment becomes final, the Curtea Constituțională (Constitutional Court) rules on the plea [of unconstitutionality] raised in the case, declaring unconstitutional the law, the decree or a specific provision of the law or decree which is the subject of the plea or other provisions of the contested measures, that can clearly not be separated from the provisions referred to in the referral to the Curtea Constituțională.'

8. Article 21(1) of Law No 554/2004 on administrative proceedings [10] states that 'the forms of action provided for by the Code of Civil Procedure can be exercised against irrevocable and definitive decisions made by organs of administrative proceedings'.

9. Article 21(2) of Law No 554/2004 [11] provides that 'in addition to those provided for by the Code of Civil Procedure, judgments that have become final and binding and that infringe the primacy of Community law governed by Article 148(2) read in combination with Article 20(2) of the Romanian Constitution, as amended, shall constitute grounds for revision'.

10. In accordance with Article 175(1) of the Romanian Code of Fiscal Procedure, [12] an objection can be brought against any tax claim and also against all fiscal administrative acts. Such objection being a means of internal administrative appeal does not preclude those harmed by a fiscal administrative act, or the absence of one, from having recourse to judicial proceedings in accordance with law. A decision taken by the competent authority because of an objection to a tax claim can according to Article 188(2) of the Code of Fiscal Procedure be attacked before a competent organ of administrative proceedings.

11. Ordonanța de urgență a Guvernului ('OUG') No 50/2008 introduced a tax (termed a 'pollution tax') for motor vehicles in categories M1 to M3 and N1 to N3. [13]

III – **Facts, the main proceedings, the question referred and the proceedings before the Court**

12. On 3 May 2007 Mr Târșia, the applicant in the main proceedings, purchased a car that had previously been registered in France. As mentioned above, registration in Romania was contingent at the time on the production of proof of payment of a special tax on motor vehicles. The motor vehicle was registered on 6 June 2007, after the applicant had paid on 5 June 2007 the sum of RON 6899.51 by way of special motor vehicle tax.

13. The applicant sought repayment of the tax before a civil court on the grounds that the tax levied was inconsistent with Article 90 EC [now Article 110 TFEU] inasmuch as it introduced a discriminatory fiscal measure of internal taxation on goods from other Member States that was far greater than taxes levied on similar goods and sold in the national market. By civil judgment No 6553/2007 of 13 December 2007 the Judecătoria Sibiu (Court of First Instance, Sibiu) granted the application and ordered the Romanian State to reimburse the tax.

10 — Legea contenciosului administrative No 554 of 2 December 2004, published in *Monitorul Oficial al României* No 1154 of 7 December 2004, as amended and completed.

11 — Adopted by Article 1, point 30, of Law No 262/2007, published in *Monitorul Oficial al României* No 510 of 30 July 2007, and repealed by Law No 299/2011, published in *Monitorul Oficial al României* No 916 of 22 December 2011. By judgment No 1039/2012 of the Curtea Constituțională the latter law was declared to be unconstitutional.

12 — Adopted by Government decree No 92 of 24 December 2003. It was republished in the *Monitorul Oficial al României* No 513 of 31 July 2007, modified and later completed.

13 — Article 3 of Government Emergency Order No 50/2008 introducing a pollution tax for motor vehicles (Ordonanță de urgență a Guvernului nr. 50/2008 pentru instituirea taxei pe poluare pentru autovehicule) of 21 April 2008 (*Monitorul Oficial al României*, Partea I, No 327, 25 April 2008; 'OUG No 50/2008'), which entered into force on 1 July 2008, introduces a pollution tax on motor vehicles in categories M1 to M3 and N1 to N3. Category 'M' comprises 'motor vehicles with at least four wheels designed and constructed for the carriage of passengers'. Category 'N' comprises 'motor vehicles with at least four wheels designed and constructed for the carriage of goods'. See also Annex II to Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1).

14. However, the Romanian State brought an appeal against that judgment, which was upheld by civil Decision No 401/2008 of the Tribunalul Sibiu (District Court, Sibiu), which ordered the Romanian State to repay only part of the tax levied; namely the difference between that paid on 5 June 2007, in respect of the special motor vehicle tax, and the amount resulting from the application of OUG No 50/2008 and its pollution tax on motor vehicles. [14]

15. On 29 September 2011 Mr Târșia sought revision of civil Decision No 401/2008 before the Tribunalul Sibiu, based on the provisions of Article 21(2) of Law No 554/2004, and the ruling of the Court of 7 April 2011 in the aforementioned case of *Tatu* (C-402/09, EU:C:2011:219), where the Court held that Article 110 TFEU rendered a tax such as the pollution tax on motor vehicles put in place by OUG No 50/2008 incompatible with EU law. Mr Târșia argued that he was entitled to recovery of all the taxes paid due to the primacy of EU law and the findings of the Court in *Tatu*.

16. According to the order for reference it was not possible, at that stage of the proceedings, to challenge civil Decision No 401/2008 through the ordinary courts. There is no procedural remedy in civil procedure similar to Article 21(2) of Law No 554/2004 concerning final judgments that infringe the primacy of EU law. The Tribunalul Sibiu thus considered that it was obliged to refer the following question to the Court under Article 267 TFEU.

'Can Articles 17, 20, 21 and 47 of the Charter of Fundamental Rights of the European Union, Article 6 of the Treaty on the European Union, Article 110 of the Treaty of the Functioning of the European Union, and the principle of legal certainty laid down in EU law and in the case-law of the Court of Justice, be interpreted as precluding a rule such as that found in Article 21(2) of Law No 554/2004 which allows for revision of national judicial decisions when there is an infringement of the principle of primacy of [European Union] law exclusively in administrative proceedings and which does not allow for revision of national judicial decisions delivered in proceedings other than administrative proceedings (civil or criminal proceedings) when there is an infringement of the same principle of primacy of [European Union] law at issue in those decisions?'

17. Written observations have been made by Mr Târșia, the Romanian and Polish Governments and the Commission. All of them participated at the hearing that took place on 27 January 2015.

IV – **Admissibility**

18. In my opinion the question referred is inadmissible to the extent to which it seeks guidance on whether preclusion of revision of national judicial decisions delivered in criminal proceedings, when there is an infringement of the primacy of EU law, is incompatible with EU law. [15]

19. As pointed out in the written observations of Poland, this part of the question is purely hypothetical, given that the application of *res judicata* to criminal judgments has no link with the object of the main proceedings. It is settled case-law that the Court may refuse to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation

14 — According to a passage in the written observations of Romania, which has been uncontested by Mr Tarsia, on 13 June 2008 he lodged an extraordinary application for annulment of civil Decision No 401/2008, but this was withdrawn on 24 September 2008.

15 — The national court also refers to Articles 17 (on right to property) and 21 (on non-discrimination) of the Charter. These provisions relate only remotely to the issues at stake in the sense that a tax claim relating to recovery of unduly levied tax seems to constitute a property right in Romanian law pursuant to Article 21(1) and (4) of the Code of Fiscal Procedure and the illegality of the pollution tax relates to discrimination against imported second-hand cars. However, these provisions are not very helpful for the legal analysis of the present case, and I do not intend to discuss them any further.

of EU law that is sought bears no relation to the actual facts of the main action or its purpose and where the problem is hypothetical.[16] Given that the main proceedings do not concern a judgment delivered in criminal proceedings, the question referred is inadmissible in so far as it seeks clarification of the compatibility of Romanian law on criminal procedure with EU law.

V – **Analysis**

A – *On the Court's case-law on res judicata*

20. EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision even if such disapplication would enable the national court to remedy an infringement of EU law by the decision in issue.[17] Thus, as a matter of EU law, applicants are precluded from relying on a ruling of the Court produced after the expiry of Member State limitation periods in order to right a wrong that might have been challenged within the appropriate time-frame. Under EU law *res judicata* protects the wrong.[18]

21. The position changes, however, if a norm of *Member State law* provides for an exception to the principle of *res judicata*. If it does, then it must be applicable to decisions concerning EU law that are analogous to the claims of a purely domestic nature to which the exception applies. Further, the Member State exception to *res judicata* must not be framed in such a way as to render it impossible in practice or excessively difficult to exercise rights conferred by EU law.[19]

22. So, for example, the Court has held that the exceptions to *res judicata* operative under Member State law may be subject to reasonable time limits for bringing proceedings in the interests of legal certainty. However, such time limits are not liable to render practically impossible or excessively difficult the exercise of rights conferred by EU law.[20]

23. Conversely, when a dispute has not concerned a national exception to *res judicata* that an applicant relies on to enforce EU rights, as is the case in the main proceedings, but rather a plea for broad interpretation of Member State rules on *res judicata* to protect *national* judgments that may be inconsistent with EU law, it is fair to say that the Court has favoured the primacy of EU law over *res judicata*.[21]

24. Before going further I would call attention to two other leading judgments, namely *Kühne & Heitz* (C-453/00, EU:C:2004:17) and *Köbler* (C-224/01, EU:C:2003:513). *Kühne & Heitz* concerned the conditions under which an administrative authority was obliged to review one of its final decisions which was in conflict with a later judgment of the Court. *Kühne & Heitz* therefore related to a lower

16 — Judgment in *Érsekcsanádi Mezőgazdasági* (C-56/13, EU:C:2014:352), paragraph 36 and case-law cited.

17 — Judgment in *Kapferer* (C-234/04, EU:C:2006:178), paragraph 21. This rule is closely linked to the obligation on applicants seeking to enforce EU law rights to comply with reasonable time limits for bringing proceedings set by Member State law. In other words, the fact that the Court may have ruled that a breach of EU law has occurred generally does not affect the starting point of the limitation period. This obligation can only be attenuated when the wrongdoer has discouraged the applicant from bringing proceedings in good time. See judgment in *Iaia and Others* (C-452/09, EU:C:2011:323), paragraphs 17, 18, 21, 22 and case-law cited.

18 — See similarly Opinion of Advocate General Geelhoed in *Lucchini* (C-119/05, EU:C:2006:576), point 46.

19 — Judgments in *Kapferer* (C-234/04, EU:C:2006:178), paragraph 22 and case-law cited, and *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067), paragraph 62.

20 — Judgment in *Kempter* (C-2/06, EU:C:2008:78), paragraphs 58 and 59. See similarly judgments in *Eco Swiss* (C-126/97, EU:C:1999:269) and *Asturcom Telecomunicaciones* (C-40/08, EU:C:2009:615).

21 — See judgments in *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067); *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506); and *Lucchini* (C-119/05, EU:C:2007:434). For example, in *Lucchini* the Court held at paragraph 62 that 'the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Community courts. That rule applies within the national legal order as a result of the principle of the primacy of Community law'. The Court noted at paragraph 61 of the judgment in *Impresa Pizzarotti* that Lucchini concerned a 'a highly specific situation, in which the matters at issue were principles governing the division of powers between the Member States and the European Union in the area of State aid'.

level of decision-making than the problem in the main proceedings, and concerned more specifically the question of whether a Dutch tax authority had to review a final administrative decision because of a later judgment of the Court. Moreover, it can be distinguished from the case to hand on grounds similar to those invoked by the Court in *Kapferer*.[22]

25. The *Köbler* ruling was about the obligation of Member States to compensate damages caused by the highest court in the national judicial hierarchy, in that case the Austrian, because the ruling concerned was incompatible with EU law. *Köbler* therefore relates only to a situation that may arise *after* the main proceedings; that is, an eventual damages action against the Romanian state by the applicant, if recovery of the pollution tax turns out to be impossible.[23]

26. As can be seen from the above analysis, there is no prior Court ruling which addresses a situation identical to that confronted by Mr Târșia. While the legal issues arising in the main proceedings need to be resolved against the backdrop of the Court's established case-law on *res judicata*, they fall for consideration primarily by reference to principles of EU law concerning the right to an effective judicial remedy. It is to these issues to which I will now turn.

B – *Assessment of the contested national rules for compatibility with EU law*

1. Does Romanian procedural law enable effective judicial protection of the EU law rights in issue?

27. I recall that, in the case to hand, Romanian law provides a designated avenue for the setting aside of final judgments which, on the basis of subsequent case-law of the Court, appear to be inconsistent with EU law. However, it is limited to judgments issued in administrative proceedings. It cannot be used to overturn judgments issued in civil proceedings. And this is so even though Romanian law further provides that civil judgments that are subsequently found to be in breach of Romanian constitutional law, due to a (subsequent) ruling of the Romanian Constitutional court, can also be set aside.

28. At the outset it is important to be mindful of the outer limits of the duty of sincere cooperation set out in Article 4(3) TEU that is incumbent on Member States, including their courts. It requires them to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties' and to 'refrain from any measure which could jeopardise the attainment of the Union's objectives'. This obligation is to be read in conjunction with the second paragraph of Article 19(1) TEU. It states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

22 — The Court observed in the judgment in *Kapferer* (C-234/04, EU:C:2006:178), paragraph 23, that '[e]ven assuming that the principles laid down in [*Kühne & Heitz*] could be transposed into a context which, like that of the main proceedings, relates to a final judicial decision, it should be recalled that that judgment makes the obligation of the body concerned to review a final decision, which would appear to have been adopted in breach of Community law subject, in accordance with Article 10 EC, to the condition, inter alia, that that body should be empowered under national law to reopen that decision (see paragraphs 26 and 28 of that judgment). In this case it is sufficient to note that it is apparent from the reference for a preliminary ruling that that condition has not been satisfied.'

23 — It is useful to mention here two examples of Finnish case-law. The Supreme Administrative Court decided in 2013 that actions for recovery of VAT levied on motor vehicle tax, in conflict with the interpretation adopted by the Court in *Commission* v *Finland* (C-10/08, EU:C:2009:171), could not be raised after the time limit of five years applicable in tax matters in general had expired (see KHO 2013:199). In contrast, the Supreme Court considered that such taxation established State liability for damages in accordance with the *Francovich* line of case-law (see KKO 2013:58).

29. The Court has held that as 'regards the remedies which Member States must provide … neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of EU law other than those already laid down by national law'.[24] The Court has added that the 'position would be otherwise only if the *structure* of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from EU law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully'[25] (my emphasis).

30. The right to an effective remedy is also guaranteed by Article 47(1) of the Charter to everyone whose rights guaranteed by EU law are violated. It is beyond doubt that the Romanian authorities were implementing EU law, in the sense of Article 51(1) of the EU Charter, when recovery of the part of the special vehicle tax corresponding to the pollution tax was denied in breach of Article 110 TFEU. The requisite subject matter connection between the Member State measures impugned and substantive EU rules[26] necessarily exists when a Member State levies a tax in breach of primary, and indeed secondary, EU law. The Court's case-law further confirms that, whenever an individual seeks a judicial remedy to correct a breach of EU law concerning Member State implementation thereof, the Member State courts are bound by all of the requirements of Article 47 of the Charter.[27]

31. I recall that in the absence of EU rules on the recovery of national taxes unduly levied, it is for the domestic legal system of each Member State, in accordance with the principle of the procedural autonomy of the Member States, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions at law for safeguarding the rights which taxpayers derive from EU law. The Member States none the less have responsibility for ensuring that those rights are effectively protected in each case. The detailed procedural rules governing actions for safeguarding a taxpayer's rights under EU law must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law.[28]

32. In this respect Romanian legislation, and more specifically the Code of Fiscal Procedure, provides access to administrative and fiscal tribunals or to administrative and fiscal chambers of appellate courts as the case may be,[29] in situations where decisions of tax authorities are challenged, including claims pertaining to restitution of illegally levied taxes.[30] These avenues of redress seem to apply also in situations in which tax decisions are challenged by reference to EU law rights. Thus, Romanian legislation *prima facie* ensures effective judicial protection with respect of these rights.

33. Moreover, Article 21(2) of Law No 554/2004 on administrative proceedings enables final decisions of organs of administrative proceedings to be set aside when they appear incompatible with EU law because of a later judgment of the Court. In the light of the Court's above described case-law relating to the specific question of *res judicata*, this goes further than is required by EU law.[31]

24 — Judgment in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625), paragraph 103, citing judgment in Unibet (C-432/05, EU:C:2007:163), paragraph 40.

25 — Judgment in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625), paragraph 104.

26 — Judgment in *Åkerberg Fransson* (C-617/10, EU:C:2013:105), paragraph 24.

27 — Judgment in *DEB* (C-279/09, EU:C:2010:811).

28 — Judgment in *Test Claimants in the Franked Investment Income Group Litigation* (C-362/12, EU:C:2013:834), paragraph 31 and 32.

29 — The division of competences between administrative and fiscal tribunals and administrative and fiscal chambers of appellate courts deciding at first instance is set out in Article 10 of Law No 554/2004 on administrative proceedings.

30 — Articles 21(4), 113, 175 and 188 of the Code of Fiscal Procedure.

31 — See paragraph 20 above .

2. EU law issues arising from the lack of clarity in relevant Romanian procedural law

34. Yet, as I have already noted, *all* national procedural rules that are relevant to the enforcement of EU law, including exceptions to *res judicata*, must comply with the right to an effective remedy, and the principles of effectiveness and equivalence. The difficulty arises, in the case to hand, with respect to the lack of clarity that appeared to be inherent in Romanian procedural law at the material time when proceedings were first instituted by Mr Târșia to recover special motor tax paid in June 2007 before a civil court. [32]

35. In my opinion, it is arguable that the lack of clarity in Romanian procedural law was inconsistent with Article 47 of the Charter, EU law requirements pertaining to legal certainty, and may have rendered the recovery of the car pollution tax that was incompatible with EU law impossible in practice or excessively difficult to enforce.

36. It is to be recalled that the judicial decision forming an obstacle to restitution of the pollution tax, and that was issued prior to the Court's ruling in the judgment in *Tatu* (C-402/09, EU:C:2011:219), was given by a civil appellate court (Tribunalul Sibiu) in civil proceedings as a result of an appeal of the Romanian State against the first instance civil judgment delivered by the Judecătoria Sibiu. The main proceedings also take place in the same civil appellate court, i.e. Tribunalul Sibiu.

37. The Commission points out in its written observations that such actions have been raised in Romania both before administrative courts and civil courts. In view of this, it is perplexing that, at the hearing, the Romanian Government claimed that *civil courts are absolutely incompetent to hear such cases*, and that any civil Romanian court so seized is empowered or even obliged to raise the issue of its competence of its own motion.

38. Thus there has clearly been a measure of confusion on the correct judicial procedure applicable to recovery of the tax in issue in this case. [33] Whatever the correct procedure may be now, the fact remains that the final (Romanian) civil judgment (decision No 401/2008 of the Tribunalul Sibiu) refusing recovery of the part of the special motor vehicle tax corresponding to the pollution tax is *res judicata*. This is what has created the legal problem to hand.

39. There is room for doubt, therefore, on which Romanian courts are (or were) empowered to hear claims for recovery of unlawfully levied car pollution tax at the pertinent time. I conclude that Romanian law has been unclear in this respect. Therein lies the problem, particularly with respect to Article 47 of the Charter.

3. Article 47 of the Charter and the right to an effective remedy

40. Article 47(1) of the Charter states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions set down by that article. [34] According to the explanations accompanying Article 47, the first paragraph, encapsulating the right to an effective remedy, is based on, but goes beyond, the protection

32 — The case file does not provide the date on which proceedings were instituted.

33 — At the hearing Mr Târșia contended that this uncertainty was clarified by a decision of the Romanian High Court of Cassation in Decision 24/2011 before he instituted the second proceedings seeking to rely on the exception to *res judicata*, but after the initial action brought on the basis of payment of the special tax on motor vehicles.

34 — Article 47 of the Charter adds more specific remedial protection, such as a requirement that hearings be fair, public, conducted within a reasonable time by an independent and impartial tribunal established by law, that the rights of the defence are respected, and that legal aid is available.

afforded under Article 13 of the European Convention on Human Rights (ECHR).[35] I further note that, pursuant to Article 52(3) of the Charter, in so far as the rights contained therein correspond with the rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down in the ECHR, although the EU is not to be prevented from providing more extensive protection.

41. Under the case-law of the European Court of Human Rights concerning Article 6(1) ECHR, systems of judicial review must be 'sufficiently coherent and clear' so as to afford a 'practical, effective right of access' to a court.[36] If the rules are of 'such complexity' that they generate 'legal uncertainty' then infraction of Article 6(1) results.[37] The Court of Human Rights has also held that judicial remedies must be 'sufficiently attended by safeguards to prevent a misunderstanding as to the procedures for making use of the available remedies'.[38] Further, an unreasonable construction of a procedural requirement can result in breach of right of access to a court.[39] The European Court of Human Rights has recently reiterated that 'the authorities should respect and apply domestic legislation in a foreseeable and consistent manner' and 'the prescribed elements should be sufficiently developed and transparent in practice in order to provide for legal and procedural certainty'.[40] Procedural rules are to serve the aims of legal certainty and the proper administration of justice. They are not to 'form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court'.[41]

42. Furthermore, I recall that according to the established case-law of the Court 'legal certainty is a general principle of EU law which requires in particular that rules involving negative consequences for individuals should be clear and precise *and their application predictable for those subject to them*' (my emphasis).[42]

43. In my opinion, and in the light of the above, the lack of clarity on the correct judicial procedure applicable to recovery of taxes levied in breach of EU law precipitates breach of the Article 47 of the Charter, both in terms of the right to an effective remedy and access to justice. This is even more so if a *decision given by an absolutely incompetent civil court could create res judicata* in the sense that it would bar raising a further action for recovery before the competent court, be that a civil court or an administrative court. In my opinion it is for the national referring Court in the case to hand to make the assessment of Romanian procedural law as a whole in terms of effective judicial protection with regard to the recovery of unduly paid pollution taxes on motor vehicles.[43]

35 — The explanations go on to state that the second paragraph of Article 47, encapsulating, inter alia, the fairness of hearings, corresponds to Article 6(1) ECHR.

36 — *De Geouffre de la Pradelle v. France*, 16 December 1992, § 35, Series A no. 253-B.

37 — Ibid., paragraph 33. See also *Maširević v. Serbia*, no. 30671/08, § 48, 11 February 2014.

38 — *Bellet v. France*, 4 December 1995, § 37, Series A no. 333-B.

39 — *Běleš and Others v. the Czech Republic*, no. 47273/99, §§ 50 and 51, ECHR 2002-IX. *Omerović v. Croatia (no. 2)*, no. 22980/09, § 39, 5 December 2013, where the court recalled that 'a particularly strict interpretation of a procedural rule' may deprive an applicant of the right of access to a court.

40 — *Maširević v. Serbia*, no. 30671/08, § 50, 11 February 2014, and case-law cited. This case concerns interpretation by a Supreme court of a procedural rule that led to legal uncertainty, even for legal practitioners. See in particular paragraph 51.

41 — *Omerović v. Croatia (no. 2)*, no. 22980/09, § 39, 5 December 2013.

42 — Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (C-550/07 P, EU:C:2010:512), paragraph 100 and case-law cited.

43 — I recall nonetheless that in paragraph 60 of the judgment in *DEB* (C-279/09, EU:C:2010:811), the Court held that the principle of effective judicial protection is subject to reasonable limitations.

4. Do the pertinent Romanian procedural laws render recovery of pollution tax impossible in practice or excessively difficult?

44. The Court has consistently held that 'every case in which the question arises whether a national procedural provision makes the exercise of rights arising under the EU legal order impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes account must be taken of the basic principles which lie at the basis of the domestic judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct [of] procedure'. [44]

45. Here it is first necessary to point out that the national court and all the parties having presented observations seem to assume that Article 21(2) of Law No 554/2004 cannot be applied in civil proceedings. This strikes me as logical, provided that Romanian procedural law makes a sharp distinction between different forms of judicial proceedings. In such a case there would be no scope for the interpretation of provisions defining the scope of application of Law No 554/2004 in a way which would enable its application by civil courts in disputes which are *ratione materiae* of an administrative or fiscal law nature. However, if such leeway existed, then the national referring court would be obliged to interpret the relevant national provisions in a way that promoted achieving conformity with EU law. [45]

46. It is the task of the national referring court to make the assessment of whether the Romanian rules in issue render the recovery of pollution tax levied incompatibly with EU law impossible in practice or excessively difficult to enforce. It suffices to note, however, that the confusion on whether recourse should have been made to civil or administrative remedies for recovery of the car pollution tax appears to have that effect.

5. The principles of equivalence and equality before the law

47. Mr Târșia contends that, excluding application of the exception contained in Article 21(2) of Law No 554/2004 to *res judicata* from civil proceedings would be incompatible with both equality before the law, as reflected in Article 20 of the Charter, and the principle of equivalence.

48. Compliance with the principle of equivalence requires that the national rule in question apply without distinction to actions based on *infringement of EU law* and those based on *infringement of national law* having a similar purpose and cause of action. [46]

49. To my mind this means that EU law would have no objection, in the context of the principle of equivalence, to Romanian law supplying an exception to *res judicata* in administrative proceedings concerning EU law, and not civil proceedings concerning the same subject matter. The principle of equivalence requires equal treatment between comparable claims based on national law, on the one hand, and on EU law, on the other, not equivalence between different forms of procedure under national law. [47]

44 — Judgment in *Surgicare — Unidades de Saúde* (C-662/13, EU:C:2015:89), paragraph 28 and case-law cited.

45 — E.g. judgment in *Impact* (C-268/06, EU:C:2008:223), paragraph 54.

46 — Judgment in *Surgicare — Unidades de Saúde* (C-662/13, EU:C:2015:89), paragraph 30.

47 — Judgment in *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38), paragraph 74.

50. In any event, non-identical grounds for deviating from the principle of *res judicata* are reasonable in the case of final civil, criminal and administrative judgments.[48] The effect of these judgments is different, and so are the legal policy concerns relevant to defining exceptions (if any) to *res judicata*. In the case of civil judgments, legal certainty and stability of legal relations confirmed by a judgment having become final are of the utmost importance. In contrast, the conditions for revising a criminal judgment in the interest of a wrongfully condemned person should not be too harsh. In administrative law the interest of protecting the rights of individuals and of the principle of legality may justify a more flexible stand towards revision of final judgments than in the case of civil judgments.

51. Hence, Mr Târșia's suggestion that confining the exception to *res judicata* to administrative proceedings concerning EU law is incompatible with equality before the law is unfounded. I recall that unequal treatment before the law can arise only if the relevant situations are comparable.[49] This is not the case in so far as the grounds for setting aside final civil judgments and administrative judgments are concerned. In situations where there is a later judgment of the Court rendering a national provision incompatible with EU law, setting aside a final administrative law decision to the detriment of a Member State authority may be justified, but setting aside a final civil judgment determining a private law relationship between two individuals may be inappropriate for reasons of legal certainty. Therefore, as a legislative solution of the kind in place in Romania, opening this possibility in administrative proceedings but excluding it in civil proceedings, is as such not against the principle of equality before the law.

52. However, equality before the law is a different legal rule from the principle of equivalence. As pointed out in the written observations of the Commission, if Romanian law also supplies an exception to *res judicata* in the light of subsequent case-law of the Constitutional Court challenging the correctness of prior judicial rulings (and traversing all domestic jurisdictions)[50] then the principle of equivalence might well dictate that the same is to applied to Court rulings concerning EU law.[51]

53. While I admit that this may lead the discussion outside of the scope of the preliminary reference,[52] in my opinion the principle of equivalence is not complied with if a later decision of the national Constitutional Court can lead to revision of an earlier final civil judgment, and thus enable recovery of unduly levied tax when a judgment of the Court cannot. In such a situation rights based on the national constitution would enjoy more protection than EU law rights, and thus the latter would not enjoy protection equivalent to that enjoyed by this category of national law based rights. A similar asymmetry prevails, pursuant to Article 322(9) of the Romanian Code of Civil Procedure, in respect of the effects of judgments of the European Court of Human Rights when compared to those of the judgments of the Court.

48 — It seems, according to the available sources, that most national legal orders within the EU do not provide identical grounds for exceptions to *res judicata* in civil, criminal and administrative proceedings.

49 — I recall that the principle of equal treatment, whose fundamental nature is affirmed in Article 20 of the Charter, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. See judgment in *Chatzi* (C-149/10, EU:C:2010:534), paragraphs 63 and 64 and case-law cited.

50 — I recall that this outcome follows from Article 322(10) of the Code of Civil Procedure which is, pursuant to Article 21(1) of Law No 554/2004, applicable also in administrative proceedings.

51 — The Commission refers here to judgment in *Weber's Wine World and Others* (C-147/01, EU:C:2003:533).

52 — I recall though that, according to the established case-law, the Court may, in answering a preliminary reference, take into account all relevant provisions of EU law, even if they have not been mentioned by the national referring court. See e.g. judgment in Efir (C-19/12, EU:C:2013:148), paragraph 27.

VI – **Conclusion**

54. In the light of the above analysis, I propose the following answer to the question referred by the Tribunalul Sibiu:

Article 47 of the Charter of Fundamental Rights of the European Union and the principle of effectiveness laid down in the case-law of the Court of Justice do not preclude national rules which allow for revision of national judicial decisions delivered in administrative proceedings when there is an infringement of the principle of primacy of EU law and which do not allow for revision on the same basis of national judicial decisions delivered in civil proceedings. This is subject to the proviso that there is sufficient clarity as to which is the correct procedure to remedy the infringement of EU law in question, and a final judgment of a court that should have established its incompetence of its own motion cannot bar seeking redress from a competent court.

The principle of equivalence precludes national rules which allow for revision of national judicial decisions delivered in civil proceedings because of a later judgment of the national Constitutional Court or the European Court of Human Rights, but do not allow for this with respect to a later judgment of the Court of Justice of the European Union.