Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 5 February 2019 [1]

Case C-676/17

Oana Mădălina Călin
v
Direcția Regională a Finanțelor Publice Ploiești — Administrația Județeană a Finanțelor Publice Dâmbovița
Statul Român — Ministerul Finanțelor Publice
Administrația Fondului pentru Mediu

(Request for a preliminary ruling from the Curtea de Apel Ploiești (Court of Appeal, Ploiești, Romania))

(Reference for a preliminary ruling — Principles of sincere cooperation, legal certainty, equivalence and effectiveness — Repayment of a tax levied in breach of EU law — Request for revision of a final judicial decision rejecting repayment of such a tax — Deadline for submitting the request for revision — Initial date of that deadline)

I. Introduction

1. Ms Oana Mădălina Călin had to pay an environmental stamp duty in order to register in Romania a second-hand car imported from Germany. She believed that tax to be levied in breach of EU law. She brought an action seeking its repayment. The action was dismissed. She did not appeal. That judgment thus became final.

2. Ms Călin requested, on two occasions, the revision of that judgment. Each request was based on a new judgment of the Court finding that a tax such as the one she had to pay infringed EU law. The first request was rejected. The second one was allowed and her initial claim was granted. However, on appeal, the judgment granting that claim was set aside. Relying on an interpretation of national law that had been delivered in the interim by the Romanian High Court of Cassation and Justice, the request for revision was considered to have been submitted out of time.

3. By a new request for revision, Ms Călin now disputes that interpretation as well as, more broadly, the national procedure for revision. She considers that they are incompatible with EU law, since in practice they make it impossible to obtain repayment of a tax that was subsequently declared incompatible with EU law by a judgment of the Court of Justice. In such circumstances, the Curtea de Apel Ploiești (Court of Appeal, Ploiești, Romania) decided to ask this Court about the compatibility of that interpretation with, inter alia, the principles of legal certainty, equivalence and effectiveness.

1 Original language: English.

II. Legal framework

A. Romanian law

1. The Code of Civil Procedure

4. Article 509(1) of the Codul de procedură civilă (Code of Civil Procedure)[2] sets out grounds for revision of a judgment. In particular, in points 10 and 11 it provides that it is possible to submit a request for revision if:

'10. the European Court of Human Rights has declared that there has been an infringement of fundamental rights or freedoms as a result of a judicial decision, and the serious consequences of that infringement are still ongoing;

11. after the judgment has become final, the Curtea Constituțională [Constitutional Court] has given a ruling on the objection raised in that case, declaring the provision concerned by that objection to be unconstitutional.'

5. Article 511 of the Code of Civil Procedure sets outs different deadlines to apply for revision, as well as the initial date for the calculation of those deadlines. Both the deadlines and the initial date for their calculation vary depending on the relevant ground for revision. Paragraph 1 provides for a general deadline of one month.

6. Article 511(3) is worded as follows: 'Regarding the grounds laid down in Article 509(1)(10) and (11), the period shall be three months from the date of publication of the judgment of the European Court of Human Rights or the decision of the Curtea Constituțională [Constitutional Court] in the *Monitorul Oficial al României, Partea I*.'

2. Law No 554/2004 and national case-law regarding that law

7. Article 21 of Legea contenciosului administrativ nr. 554/2004 (Law No 554/2004 on administrative proceedings)[3] of 2 December 2004 ('Law No 554/2004') is entitled 'Extraordinary forms of action'. Paragraph 2 thereof was initially worded as follows:

'The handing down of final judgments that have the force of *res judicata* but infringe the principle of the primacy of [EU] law as imposed by Article 148(2) of the Romanian Constitution, as amended, in conjunction with Article 20(2) thereof, shall constitute grounds for revision, in addition to those provided for in the Code of Civil Procedure. A request for revision shall be submitted within 15 days of notification and shall be made, by way of derogation from the rule set out in Article 17(3), by an application giving detailed reasons by the interested parties within 15 days of the ruling. The request for revision shall be given priority and examined as a matter of urgency, within 60 days of filing at the latest.'

8. By judgment No 1609/2010 of 9 December 2010,[4] the Curtea Constituțională (Constitutional Court, Romania) declared that the second sentence of Article 21(2) of Law No 554/2004 was unconstitutional on the grounds that it was badly drafted and hence gave rise to an uncertainty capable of being an obstacle to the effective exercise of the right of access to justice.

2 *Monitorul Oficial al României*, Part I, No 485 of 15 July 2010, as subsequently amended.

3 *Monitorul Oficial al României*, Part I, No 1154 of 7 December 2004.

4 *Monitorul Oficial al României*, Part I, No 70 of 27 January 2011.

9. Subsequently, Legea nr. 299/2011 pentru abrogarea alin. (2) al art. 21 din Legea contenciosului administrativ nr. 554/2004 (Law No 299/2011 abrogating paragraph 2 of Article 21 of Law No 554/2004 on administrative proceedings)[5] ('Law No 299/2011') repealed Article 21(2) of Law No 554/2004 in its entirety.

10. However, Law No 299/2011 was in turn declared unconstitutional by judgment No 1039/2012 of 5 December 2012 of the Curtea Constituțională (Constitutional Court).[6] In that judgment, the Curtea Constituțională (Constitutional Court) held as follows: 'Article 21(2) of Law No 554/2004 will continue to have legal effect following the publication of this judgment in the *Monitorul Oficial al României*, with the exception of the provisions contained in the second sentence of that text, declared unconstitutional by Judgment No 1609 of 9 December 2010 … Those provisions have ceased to have legal effect … As regards the provisions of the first and third sentences of Article 21(2), these will continue to have legal effect.'

11. Therefore, after the publication of judgment No 1039/2012 of the Curtea Constituțională (Constitutional Court) in the *Monitorul Oficial al României*, on 29 January 2013, the first and third sentences of Article 21(2) of Law No 554/2004 again became part of the law in force. By contrast, the second sentence of that provision, setting the deadline for requests for revision and the initial date of that deadline, remained without legal effect.

12. On 12 December 2016 the Înalta Curte de Casație și Justiție – Completul pentru dezlegarea unor chestiuni de drept (High Court of Cassation and Justice — Panel for the Resolution of Points of Law) ('ICCJ') gave ruling No 45/2016,[7] rendered pursuant to a procedure for a preliminary ruling in order to resolve a question of law. In that ruling, the ICCJ held as follows:

'In the interpretation and application of the provisions of the first sentence of Article 21(2) of Law No 554/2004, as subsequently amended and supplemented, a request for revision is admissible on the basis of certain judgments of the [Court], regardless of when those judgments were handed down and of whether or not the pre-existing provisions of EU law infringed by the judgment in respect of which revision is sought were invoked in the original proceedings.

The period within which a request for revision based on Article 21(2) of Law No 554/2004 may be submitted is one month from the date of notification of the final judgment subject to revision.'

13. Therefore, by virtue of ruling No 45/2016, the ICCJ set the deadline for requests for revision based on Article 21(2) of Law No 554/2004 and the initial date of that deadline, namely one month from the date of notification of the final judgment subject to revision.

III. Facts, national proceedings and the question referred

14. On 12 April 2013, Ms Călin purchased a second-hand passenger car that had previously been registered in Germany.

5 *Monitorul Oficial al României*, Part I, No 916 of 22 December 2011.

6 *Monitorul Oficial al României*, Part I, No 61 of 29 January 2013.

7 *Monitorul Oficial al României*, Part I, No 386 of 23 May 2017.

15. The Serviciul Public Comunitar Regim Permise de Conducere și Înmatriculare a Vehiculelor Târgoviște (Public Service for Driving Licences and Vehicle Registration of Târgoviște, Romania) subjected the registration of Ms Călin's car to the payment of the environmental stamp duty provided for by Ordonanța de urgență nr. 9/2013 privind timbrul de mediu pentru autovehicule (Government Emergency Order No 9/2013 introducing an environmental stamp duty in respect of motor vehicles) [8] ('GEO No 9/2013'). That tax, amounting to 968 Romanian lei (RON), was paid by Ms Călin on 12 June 2013.

16. Ms Călin brought an action before the Tribunalul Dâmbovița (Regional Court, Dâmbovița, Romania; 'the first-instance court'). She sought the repayment, together with interest, of the sum paid by way of the environmental stamp duty. In support of that action, she argued that that tax was incompatible with EU law.

17. By a judgment of 15 May 2014, the first-instance court dismissed that action, holding that the provisions of GEO No 9/2013 were not incompatible with EU law. Since Ms Călin did not appeal, that judgment became final.

18. On 28 April 2015, Ms Călin submitted *a (first) request for revision* of that judgment before the first-instance court. She argued that, on the basis of the judgment of the Court of 14 April 2015, *Manea* (C-76/14, EU:C:2015:216), the environmental stamp duty was incompatible with EU law and that, therefore, it had to be repaid. By a judgment of 16 June 2015, the first-instance court rejected that request for revision, holding that the solution given in *Manea* had no impact on the solution adopted in the judgment subject to revision.

19. Ms Călin brought an appeal against that judgment before the Curtea de Apel Ploiești (Court of Appeal, Ploieşti; 'the second instance-court'), which was dismissed. Therefore, the judgment of 16 June 2015 became final.

20. On 17 August 2016, Ms Călin submitted a *(second) request for revision* of the judgment of first-instance court of 15 May 2014. That request was based on the judgment of the Court of 9 June 2016, *Budișan* (C-586/14, EU:C:2016:421). By a judgment of 11 October 2016, the first-instance court granted the request for revision. Relying in particular on *Budișan*, it held that Article 21 of Law No 554/2004, which allows for the revision of decisions that infringe the principle of primacy of EU law, was applicable in that case. The judgment of 15 May 2014 was therefore altered in its entirety and, as regards the substance, Ms Călin's initial claim was granted. Indeed, that court ruled that the tax in question was incompatible with EU law and, as a result, ordered its repayment, together with interest.

21. By a judgment of 16 January 2017, the second-instance court upheld an appeal brought by the public authority and set aside the judgment of 11 October 2016 in its entirety. That court upheld the objection that the request for revision at issue had been submitted out of time on the basis of ruling No 45/2016, given by the ICCJ on 12 December 2016, which established that the deadline to submit such a request was one month from the date of notification of the final judgment subject to revision. [9] The second-instance court observed, applying that ruling, that the judgment in respect of which revision was sought (namely the judgment of the first-instance court of 15 May 2014) had been served on 26 May 2014, while the (second) request for revision had been submitted on 17 August 2016, long after the expiry of the one-month deadline.

8 *Monitorul Oficial al României*, Part I, No 119 of 4 March 2013.

9 See above, points 12 and 13.

22. On 7 March 2017, Ms Călin submitted a *(third) request for revision* in respect of the judgment of the second-instance court of 16 January 2017. That request is the subject of the main proceedings. In that request, Ms Călin argues that the judgment of 16 January 2017 infringes, in particular, the principle of sincere cooperation provided for by Article 4(3) TEU. She considers that that judgment, to the extent that it applied ruling No 45/2016 of the ICCJ, makes it impossible to obtain repayment of a tax which the judgment of the Court in *Budișan* held to be incompatible with EU law.

23. The second-instance court, the Curtea de Apel Ploiești (Court of Appeal, Ploiești; 'the referring court') essentially shares Ms Călin's doubts as to whether Article 21(2) of Law No 554/2004, as interpreted by ruling No 45/2016 of the ICCJ, is compatible with EU law and more specifically, inter alia, with the principles of sincere cooperation, legal certainty, equivalence and effectiveness. At the same time, the referring court makes reference to the case-law of the Court pursuant to which EU law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law. Furthermore, the referring court stresses that the Court has also noted that if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the requirements of equivalence and effectiveness, so that the situation at issue is brought back into line with EU law.

24. Regarding actions brought for repayment of the environmental stamp duty which were definitively dismissed before the Court handed down its judgment in *Budișan*, the order for reference notes that the only procedural remedy currently available would be to submit a request for revision pursuant to Article 21(2) of Law No 554/2004. Hence, if the referring court were to give effect to ruling No 45/2016 of the ICCJ, Ms Călin would no longer be able to request revision of the judgment of 16 January 2017 and, as a result, she would not be able to obtain repayment of that tax.

25. In those circumstances, the Curtea de Apel Ploiești (Court of Appeal, Ploiești) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Can Article 4(3) TEU, which refers to the principle of sincere cooperation, Articles 17, 20, 21 and 47 of the Charter of Fundamental Rights, Article 110 TFEU, the principle of legal certainty and the principles of equivalence and effectiveness stemming from the principle of procedural autonomy be interpreted as precluding national legislation, namely Article 21(2) of Law No 554/2004 on administrative proceedings as interpreted by Ruling No 45/2016 of the Înalta Curte de Casație și Justiție — Completul pentru dezlegarea unor chestiuni de drept (High Court of Cassation and Justice — Panel for the Resolution of Points of Law), under which the period within which a request for revision based on Article 21(2) of Law No 554/2004 may be submitted is one month from the date of notification of the final judgment subject to revision?'

26. Written submissions were lodged by the Romanian Government and the European Commission. Both interested parties presented oral argument at the hearing held on 28 November 2018.

IV. Assessment

27. This Opinion is structured as follows: I will start by clarifying why I consider the present request for a preliminary ruling to be admissible (A). Next, after two introductory remarks (B), I will assess the question referred in the light of the principles of legal certainty, equivalence and effectiveness (C). Since, even after that assessment, I still remain somewhat puzzled as to the exact nature of the national remedy in question, I will conclude with a few observations on the alternatives that EU law provides for cases in which the repayment of a tax levied in breach of EU law is sought at a time when it is no longer possible to reopen a final judicial decision (D).

A. Admissibility of the preliminary reference

28. Is a preliminary question referring to the interpretation of Article 21(2) of Law No 554/2004 made by the ICCJ in ruling No 45/2016, which under national law was apparently not a binding interpretation when the decision on the second request for revision was made, admissible?

29. The ruling of the ICCJ was rendered in the framework of a procedure for a preliminary ruling in order to resolve a question of law. On this type of procedure, the order for reference notes that Article 521(3) of the Code of Civil Procedure states that 'the solution given regarding points of law shall be binding on the court which requested that solution as from the date of delivery of the decision, and on the other courts as from the date of publication of the decision in the *Monitorul Oficial al României, Partea I*'.

30. It appears from the written submissions of the Romanian Government and of the Commission that although ruling No 45/2016 was delivered on 12 December 2016, it was not published in the *Monitorul Oficial al României* until 23 May 2017. Furthermore, that ruling was rendered in order to resolve a question of law submitted to the ICCJ by the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania). Therefore, under Article 521(3) of the Code of Civil Procedure, that ruling was binding on that court from the day it was delivered. However, it was only once that ruling was published in the *Monitorul Oficial al României*, on 23 May 2017, that it became binding on other courts, including the referring court, the Curtea de Apel Ploieşti (Court of Appeal, Ploieşti).

31. As a result, doubts may arise as to whether the referring court was bound to apply, in its judgment of 16 January 2017, when deciding on the second request for revision, the interpretation of Article 21(2) of Law No 554/2004 given by the ICCJ. It is indeed that interpretation by the ICCJ that lies at the heart of the question referred, since I understand that it was by that decision of the ICCJ that the deadline of one month from the date of the notification of the final judgment was in practice set.

32. In my view, although there are several elements of this case that might indeed raise eyebrows, the admissibility of the preliminary reference is not one of them.

33. It is settled case-law that questions on the interpretation of EU law referred by a national court enjoy a presumption of relevance.[10] It is not for this Court, in the context of the judicial cooperation established by Article 267 TFEU, to call into question or to verify the accuracy of the interpretation of national law made by the national court, as such interpretation falls within the exclusive jurisdiction of that court.[11]

34. In reply to a written question posed by the Court, the Romanian Government confirmed that ruling No 45/2016 was rendered on 12 December 2016 and made public on that day. It also confirmed that, even though ruling No 45/2016 was not formally binding on the referring court when it gave its judgment of 16 January 2017, that court — just like any other Romanian court — was already aware of the existence and the content of that judgment.

35. The complex history of Article 21(2) of Law No 554/2004 has been outlined above.[12] That provision was first brought to life by the legislature in 2004, then declared unconstitutional in part in 2010 and therefore put to rest by the legislature in 2011. It was then revived in part in 2012 by another decision of the Curtea Constituțională (Constitutional Court), though apparently without setting any applicable time limits, which later had to be established by an interpretative decision of the

10 For a recent example, see judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 16).

11 Judgment of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraph 13).

12 Above, points 7 to 13.

ICCJ. On the basis of that, it seems that from the second annulment by the Curtea Constituțională (Constitutional Court) with effect from 29 January 2013 until the delivery of ruling No 45/2016 by the ICCJ on 12 December 2016, the Romanian courts faced a situation in which there was no (clear) deadline to submit a request for revision, or perhaps even no deadline at all to submit such a request.

36. I understand that, as the Romanian Government noted, a considerable 'interpretative diversity' ensued in the practice of the Romanian courts during that period. Within such a context, it is entirely understandable that any national supreme jurisdiction would seek to unify that interpretative diversity.

37. However, what is perhaps slightly more questionable is the way in which such a deadline, which in practice limits or even deprives some parties of the right of access to a court, has been set at the national level. Limitations to fundamental rights, and similarly also conditions for access to a court, should be, among other requirements, prescribed by law. That requirement includes certain standards as to the quality of such law, including it being accessible to the persons concerned and formulated with sufficient precision and foreseeability.[13] Although those standards are not the same as, for example, the criteria for the detention of foreigners in view of their transfer to another Member State, which in effect amounts to a deprivation of liberty, and which therefore may only be set by binding provisions of general application (by written legislation, not by case-law),[14] it might indeed be questioned to what extent the walking dead history of Article 21(2) of Law No 554/2004 would meet those requirements, in particular those relating to foreseeability.

38. However, that is not the subject matter of the present case, at least not directly. There is certainly a little 'retroactive flavour' to the fact that a court applied a deadline which was, formally speaking, not yet applicable at the time it made its decision. However, it would appear that, under the reigning 'interpretative diversity' at national level, that court would, in any event, have had discretion as to what deadline to apply. Therefore, I do not see how a national court could be reproached, in such a situation, for deciding to take into account a deadline set by a decision of a higher court (issued precisely with the aim of unifying that situation), even at a time when the use of such deadline was not *yet* formally binding on that court, but would be in the near future.

39. Therefore, in view of these considerations, but also taking into account the lasting and ongoing relevance of the question for the referring court,[15] I consider that there is no reason to question the admissibility of the present request for a preliminary ruling.

B. Preliminary remarks

40. Two preliminary remarks are called for concerning, first, the provisions of EU law that are relevant for the solution of the present case and, second, the relationship between this case and the one which gave rise to the judgment in *Târșia*.[16]

41. First, in its question, the referring court mentions a number of EU law provisions and principles: Article 4(3) TEU (the principle of sincere cooperation); Articles 17, 20, 21 and 47 of the Charter of Fundamental Rights ('the Charter'); Article 110 TFEU; the principle of legal certainty and the principles of equivalence and effectiveness stemming from the principle of procedural autonomy.

13 See, for example, judgment of the ECtHR of 13 February 2003, *Refah Partisi (The Welfare Party) and Others v. Turkey*, (CE:ECHR:2003:0213JUD004134098, § 57); of 9 July 2009, *Mooren v. Germany* (CE:ECHR:2009:0709JUD001136403, § 76); or of 21 October 2013, *Del Río Prada v. Spain*, (CE:ECHR:2013:1021JUD004275009, § 125).

14 Recently, for example, judgment of 15 March 2017, *Al Chodor* (C-528/15, EU:C:2017:213, paragraphs 42 to 44).

15 Although it might be open to discussion to what extent the referring court was bound by the interpretative statement of the ICCJ when deciding on the *second* request for revision in January 2017, there is no doubt that the same court is bound by that decision when deciding now on the *third* request. The same would be true, I assume, also for all other Romanian courts at present.

16 Judgment of 6 October 2015 (C-69/14, EU:C:2015:662).

42. In order to answer the question referred, I consider that it is sufficient to examine the compatibility of legislation such as that in the main proceedings with the principles of legal certainty, equivalence and effectiveness, in the light of the overarching principle of sincere cooperation enshrined in Article 4(3) TEU.[17] Article 47 of the Charter (the right to an effective remedy and to a fair trial) may provide an additional impetus in the assessment of the requirement of effectiveness, in particular regarding the notion of an effective remedy before a court or tribunal.

43. Second, it might be recalled that the Court was already called upon to assess the compatibility of Article 21(2) of Law No 554/2004 with EU law in *Târșia*.[18]

44. The question referred in that case was similar to the one referred in the present case. It sought to ascertain the compatibility of Article 21(2) of Law No 554/2004 with almost the same provisions and principles of EU law.[19] However, the question of the compatibility of Article 21(2) of Law No 554/2004 with EU law was addressed from a rather different angle.

45. Mr Târșia paid a tax on motor cars that he believed to be incompatible with Article 110 TFEU. He initiated civil proceedings in order to secure repayment of the tax. The request was upheld at first instance in 2007 but, on appeal, it was rejected in part in 2008. In 2011, following the judgment of 7 April 2011, *Tatu* (C-402/09, EU:C:2011:219), Mr Târșia requested the revision of the judgment on appeal, because he considered that the tax should be repaid to him in its entirety. Although the judgment in respect of which he sought revision had been made in the course in *civil proceedings*, he submitted the request for revision on the basis of Article 21(2) of Law No 554/2004, that is to say the law on *administrative proceedings*. The reason was that the procedural rules applicable to civil proceedings did not offer any opportunity to bring an action for revision of a final judgment for a breach of EU law.

46. It was against this procedural context that the referring court in *Târșia* sought to ascertain whether the fact that Article 21(2) of Law No 554/2004 allowed for revision of final judgments infringing EU law exclusively in administrative proceedings, but not in civil proceedings, was compatible with EU law. The Court concluded that EU law, and in particular the requirements of equivalence and effectiveness, did not preclude such a situation.[20]

47. By contrast, the present case concerns only the conditions in which a request for revision submitted on the basis of Article 21(2) of Law No 554/2004 can be brought with regard to a decision made in the course of administrative proceedings. Therefore, even though the judgment in *Târșia* offers some guidance for this case on the general formulation of the requirements of equivalence and effectiveness, it does not provide an answer to the exact question posed by the referring court.

17 The principle of sincere cooperation indeed seems to be an overarching principle, of which the requirements of equivalence and effectiveness are more specific expressions: see, to that effect, judgments of 27 June 2013, *Agrokonsulting-04* (C-93/12, EU:C:2013:432, paragraph 36); of 19 October 2017, *Raimund* (C-425/16, EU:C:2017:776, paragraph 41); and of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 22).

18 Judgment of 6 October 2015 (C-69/14, EU:C:2015:662).

19 Namely Articles 17, 20, 21 and 47 of the Charter, Article 6 TEU, Article 110 TFEU and the principle of legal certainty.

20 Judgment of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraph 41).

C. The obligation to repay taxes unduly levied: legal certainty and effectiveness of EU law

48. It is settled case-law that the right to a refund of taxes levied by a Member State in breach of rules of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law prohibiting such taxes. The Member States are therefore in principle required to repay taxes levied in breach of EU law, with interest.[21] It is for each Member State, in accordance with the principle of procedural autonomy, to lay down detailed procedural rules governing actions for the repayment of those taxes, while respecting the requirements of equivalence and effectiveness.[22]

49. As regards the interplay between these requirements and the principle of legal certainty, of which the principle of *res judicata* is an expression,[23] the Court has also held that 'the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, but must be consistent with the principles of equivalence and effectiveness'.[24]

50. The Court has repeatedly stressed the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. It has held that in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law.[25]

51. Thus, as a matter of EU law, Member States *are not required* to reopen a final judgment in order to take into account the interpretation of a relevant provision of EU law adopted by the Court after delivery of that judgment.[26]

52. However, in *Impresa Pizzarotti* and *Târșia* the Court also pointed out that if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to go back on a final judicial decision in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue is brought back into line with EU law.[27]

53. In sum, EU law did not require that Romania enact Article 21(2) of Law No 554/2004, a provision that allows the reopening of a final judicial decision. However, as Romania decided to do so, that provision must comply with the requirements of equivalence and effectiveness. I thus turn to the examination of those requirements in the context of the present case.

21 Judgment of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraphs 24 and 25 and the case-law cited).

22 Judgment of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraphs 26 and 27 and the case-law cited).

23 Judgment of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 46).

24 Judgments of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 54), and of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 21).

25 Judgment of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraphs 28 and 29). See also judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 38); of 16 March 2006, *Kapferer* (C-234/04, EU:C:2006:178, paragraphs 20 and 21); and of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraphs 58 and 59).

26 Judgments of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 60), and of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraph 38).

27 Judgments of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 62), and of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraph 30).

1. Equivalence

54. The requirement of equivalence prohibits a Member State from laying down less favourable procedural rules for claims for repayment of a tax based on a breach of EU law than those applicable to similar proceedings based on a breach of national law.[28] In order to ascertain whether a domestic action may be regarded as *similar* to an action brought to safeguard EU law, it is necessary to take into consideration the purpose, cause of action and essential characteristics of those actions.[29]

55. In the present case, the referring court mentions the requirement of equivalence as one of the possible yardsticks in the assessment of the compatibility of Article 21(2) of Law No 554/2004 with EU law. However, it does not point to any similar domestic action which could be used for the assessment of the requirement of equivalence.

56. According to the Romanian Government, there is no ground for revision based on an infringement of national law which is similar to the (specific) ground for revision provided for by Article 21(2) of Law No 554/2004. That government notes that this provision allows a request for revision to be submitted on the basis of an infringement of any provision of EU law and irrespective of whether or not that provision was invoked in the original proceedings. By contrast, the Code of Civil Procedure, which contains the general rules on revision, would only allow the submission of a request for revision based on an infringement of one the grounds set out in Article 509(1) thereof, which essentially refer to new circumstances that the court was unaware of when handing down its ruling.

57. Conversely, the Commission considers that there is a ground for revision based on infringements of national law which is similar to Article 21(2) of Law No 554/2004. It is the ground for revision set out in Article 509(1)(11) of the Code of Civil Procedure, according to which it is possible to submit a request for revision of a judgment where 'after the judgment has become final, the Curtea Constituțională [Constitutional Court] has given a ruling on the objection raised in that case, declaring the provision concerned by that objection to be unconstitutional'. For the Commission, the different deadlines (one month for requests under Law No 554/2004 and three months under Article 511(3) of the Code of Civil Procedure) and the different starting dates (in the first case, the date of notification of the final judgment subject to revision; in the second case, the date of publication of the decision of the Curtea Constituțională (Constitutional Court) in the *Monitorul Oficial al României*) are incompatible with the requirement of equivalence.

(a) Revision under Article 21(2) of Law No 554/2004 and revision under Article 509 of the Code of Civil Procedure

58. Article 21(2) of Law No 554/2004 lays down a very specific remedy which allows the revision of a final judgment. That remedy is circumscribed to a specific area, namely administrative proceedings, and can be invoked only on the grounds that a final judgment has infringed EU law. From the title of Article 21, as well as from the fact that it allows for the reopening of a final decision, it would indeed appear that it is an extraordinary remedy.

28 Judgment of 6 October 2015, *Târșia* (C-69/14, EU:C:2015:662, paragraph 32 and the case-law cited).

29 See, recently, judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 27).

59. The order for reference suggests that this is not the only provision in Romanian law that allows the revision of a final judgment to be requested. Article 509 of the Code of Civil Procedure contains the general rules on revision. Those rules set out a number of cases in which it is possible to request the revision of a final judgment. Those rules apply generally to all areas of law, including administrative proceedings. [30]

60. The Romanian Government states in its written submissions that the grounds for revision set out by Article 509 of the Code of Civil Procedure are based on the emergence of new circumstances that were unknown to the national court when it rendered the judgment subject to revision. I note, in that regard, that the deadlines laid down by Article 511 of the Code of Civil Procedure regarding each of those grounds for revision start running, as a general rule, from the moment that the relevant new circumstance arose, or from the moment that the concerned party was aware, or should have been aware, of the existence of that new circumstance.

61. In the light of these provisions, and also of the submissions on these provisions made by the interested parties in writing and at the hearing, I must admit that I do not see an exact correspondence between the revision provided by Article 21(2) of Law No 554/2004 and the main characteristics of the revision regulated by the Code of Civil Procedure. This is because Article 21(2) of Law No 554/2004 does not seem to be triggered by the emergence of a new circumstance that was unknown to the parties and the national court when it rendered its judgment.

62. Indeed, already in the original version of Article 21(2) of Law No 554/2004, [31] the deadline to submit a request for revision started to run from the date of the delivery of the judgment subject to revision. The same is in fact true following ruling No 45/2016 of the ICCJ, although that deadline would be calculated differently.

(b) The nature of revision under Article 509(1)(11) of the Code of Civil Procedure

63. Within the general provision on revision contained in Article 509 of the Code of Civil Procedure, two specific grounds of revision are worth mentioning. The submissions of the Commission highlight one of them in particular: the revision of a final judgment following a decision of the Curtea Constituțională (Constitutional Court) provided for by Article 509(1)(11) of the Code of Civil Procedure. That ground is framed in similar terms to Article 509(1)(10) of the Code of Civil Procedure, which provides for revision of final judgments following the finding of an infringement by the European Court of Human Rights ('ECtHR').

64. Article 509(1)(11) allows for the reopening of final judgments on the basis of a decision of the Curtea Constituțională (Constitutional Court). There, however, the trigger for the deadline is the issuance of a decision of that court subsequent to the judicial decision becoming final. The reason for such a procedure is, as confirmed by the Romanian Government at the hearing, that under national law, the Curtea Constituțională (Constitutional Court) itself cannot annul or modify the final judgment of (ordinary) courts which triggered the constitutional review. Therefore, the purpose of that type of revision is to provide for a mechanism permitting the revision, in the light of a decision of the Curtea Constituțională (Constitutional Court), of the final judgment on the basis of which the procedure before that court was launched.

30 It appears from the written submissions of the Romanian Government that, pursuant to Article 28(1) of Law No 554/2004, the provisions of that law are completed, inter alia, by the provisions of the Code of Civil Procedure. Moreover, I note that the very text of Article 21(2) of Law No 554/2004 provides that the ground for revision laid down therein applies 'in addition to those provided for in the Codul de procedură civilă (Code of Civil Procedure)'.

31 See above, point 7.

65. It might be added that it would appear that such a system shares the logic of its neighbouring provision, namely Article 509(1)(10) of the Code of Civil Procedure. In case of a decision of the ECtHR which declares that a signatory party has infringed the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') by a judicial decision, the only way in which that statement might be reflected in the individual case that gave rise to that individual complaint is via the reopening of the original national judicial proceedings. There too, the deadline for requesting that reopening will start running from the moment that the ECtHR decision in question was issued.

(c) The assessment of equivalence: purpose, cause and essential characteristics

66. It will ultimately be for the referring court, which has direct knowledge of the national procedural rules, to examine whether there is any domestic action similar to the action provided for by Article 21(2) of Law No 554/2004.

67. However, on the facts and elements of national law as presented to this Court, and in view both of the framework of analysis recently restated by the Court in *XC and Others*[32] and of the result reached in that case, the grounds for revision under Article 509(1)(11) of the Code of Civil Procedure and the type of revision provided for by Article 21(2) of Law No 554/2004 seem to me, as to their *purpose, cause of action, and essential characteristics*, to be rather different.

68. Certainly, as will be discussed in further detail below,[33] what exactly the national legislature wished to provide for by enacting Article 21(2) of Law No 554/2004 might be open to debate. But it would still appear that both types of revision seem to be catering for rather different systemic needs.

69. First, the *purpose* of Article 509(1)(11) of the Code of Civil Procedure (as well as Article 509(1)(10) thereof) is to remedy an infringement of the national constitution (or of the ECHR) in the individual cases in which such an infringement was established by a decision that will always be, by definition, subsequent to the final decision of the (ordinary) court. By contrast, the purpose of Article 21(2) of Law No 554/2004 appears to be the ongoing correction of an incorrect application of EU law by a national court, without however requiring the existence of a link between the judgment subject to revision and a specific decision of this Court.[34] The decision of the Court, where there is one, could be either prior, or subsequent, to the judgment subject to revision. However, in view of the relatively short deadline, the judgment of this Court, in the vast majority of cases, is likely to be rendered before the national decision subject to revision was issued.

70. Second, the *cause of action* in the sense of the event that triggers the applicability of such a remedy is, in the case of Article 509(1)(11) of the Code of Civil Procedure, the fact that the Curtea Constituțională (Constitutional Court) issues a decision finding that a certain national provision is unconstitutional. By contrast, as far as Article 21(2) of Law No 554/2004 is concerned, the triggering event seems to be an alleged infringement of EU law already embedded in the judgment whose review is requested.

32 See judgment of 24 October 2018 (C-234/17, EU:C:2018:853, paragraph 27).

33 Below, points 85 to 95.

34 With the question remaining open, at least to me, whether there actually has to be a judgment of the Court referred to (as in practice required by the interpretation of the second sentence of Article 21(2) of Law No 554/2004 made by the ICCJ) or whether it is sufficient to invoke an infringement of the primacy of EU law as imposed by Article 148(2) of the Romanian Constitution (as required by the first sentence of the same provision). At face value, it would seem that the triggering of the revision under Article 21(2) would not be limited to a judgment of the Court. On the basis of its first sentence, other grounds could also be invoked (such as the infringement of a directive or regulation that has not yet been interpreted by the Court but with which the national decision subject to revision is allegedly incompatible).

71. Third, the *essential characteristics* of a remedy are not only the elements relating to the overall way in which that procedure is carried out, but also the outcome of that procedure. There again, the outcome of both procedures differs substantially, certainly as far their impact on individual cases is concerned. Thus, while Article 509(1)(11) of the Code of Civil Procedure will in principle only lead to the reopening of the individual judgment on the basis of which the constitutional review was carried out, Article 21(2) of Law No 554/2004 can in principle justify the reopening of any judgment infringing a rule of EU law.

72. In my view, the last point leads to the key question in this regard: how exactly are, *on the one hand*, individual decisions of the Court rendered on preliminary rulings and, *on the other hand*, individual decisions of the national constitutional court in systems in which those courts do not have the power of individual constitutional complaint (that is to say, the power to annul the decisions of ordinary courts in individual cases), as well as in this regard the functionally similar decisions of the ECtHR (that can only find a violation by the contracting party in the individual case), to be taken into account in the specific pending cases that gave rise to the decision of those jurisdictions (essentially *inter partes* consequences)?

73. A preliminary ruling of this Court will always be rendered *before* the decision of the national court in the case for which the preliminary reference was made and must be taken into account in that *pending* procedure. If a decision of the Court is delivered after the national decision becomes final, EU law, with a few minor exceptions,[35] does not require the final national decision to be revisited and the case to be reopened.

74. By contrast, as already indicated, the operation of the system of the ECtHR as well as, for that matter, those national constitutional courts that do not have the power to review and annul individual judicial decisions on grounds relating to their constitutionality, is different. With regard to the individual case that gave rise to the review in question, the decision of the ECtHR or the constitutional court will always be rendered *ex post*, once that original judicial decision became *final*. If the decision of such a jurisdiction is to be reflected in that individual case, that case must be *reopened*.[36]

75. From these objectively disparate needs, different and barely comparable procedures in terms of their purpose, cause of action and essential characteristics are put into operation.

76. I wish to add one additional element: the assessment of similarity with regard to procedures for reopening judicial decisions must be carried out with regard to the *inter partes* consequences of a specific decision that has been rendered. Because that is what those procedures are for. Stating that, with regard to that purpose, the procedures are not comparable because they cater for different structural and systemic needs is quite different from stating that the judgments and guidance issued by constitutional or European Courts could not have the same normative force *erga omnes*, in all pending and future cases. That is simply a different matter.

77. It might be useful to emphasise that specific element in conclusion, because it appears to have been the subject of some confusion in the arguments advanced by the Commission, pleading in favour of the equivalence between the revision under Article 509(1)(11) of the Code of Civil Procedure and that under Article 21(2) of Law No 554/2004. Those procedures are systemically different because they aim at a different type of binding force of judgments: reopening of an individual case following

35 Above, point 51 and also below, points 80 to 83.

36 See, by analogy, judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 46) which concerned a domestic action permitting the rehearing of criminal proceedings closed by a legal decision having the force of *res judicata* on the basis of the subsequent finding of an infringement of the ECHR.

the annulment of the normative basis on which a judgment was issued by the constitutional court (*inter partes* binding effects), as opposed to revision on the grounds that EU law, as interpreted by a judgment of the Court that was however rendered in a different procedure, was not properly taken into account (*erga omnes* binding effects).

78. However, this difference with regard to such a specific revision remedy naturally does not mean that the judgments of those constitutional or European jurisdictions should not, in all pending and future cases before national courts, be properly taken into account. From that point of view, subject to national constitutional rules, there might indeed be no difference between the judgments of this Court and the judgments of a national constitutional court or those of the ECtHR. All of them can indeed have prospective, normative *erga omnes* effects.

79. For the reasons stated in this section, in my view Article 21(2) of Law No 554/2004 and Article 509(1)(11) of the Code of Civil Procedure do not share the same purpose, cause of action and essential characteristics. Thus, they cannot be regarded as similar actions and, consequently, the different procedural regimes of both actions, in particular concerning deadlines, do not amount to an infringement of the requirement of equivalence.

2. Effectiveness

(a) No duty to reopen final judicial decisions

80. Save in exceptional circumstances, the Court has never required the setting aside, in the name of effectiveness, of the force of *res judicata* of final decisions. There is thus no *general* duty to reopen final judgments in order to achieve an effective enforcement of EU law or, more specifically, of the decisions of the Court.[37]

81. The case-law of the Court has nevertheless established two exceptional scenarios in which that general principle has somehow been nuanced.

82. The first scenario follows from *Kühne & Heitz*. It relates to the obligation, imposed on administrative bodies, to review final administrative decisions in order to take account of an interpretation subsequently given by the Court, where several conditions are met.[38] However, that exception only entails an obligation to reopen final administrative decisions, not judicial decisions.

83. The second exceptional scenario was established in *Lucchini*. In that case, the Court held that EU law precluded the application of a provision of national law which laid down the principle of *res judicata*. The reason was that the application of that provision prevented the recovery of State aid granted in breach of EU law which had been found to be incompatible with the common market in a previous decision of the Commission which had become final.[39] The underlying rationale of that exception was that, since the national decision had been adopted in breach of the division of powers between the Member States and the European Union, it was clearly illegal and hence could have never acquired the force of *res judicata*.[40]

37 Judgment of 6 October 2015, *Târşia* (C-69/14, EU:C:2015:662, paragraph 38). See also judgment of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 60).

38 Judgment of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraph 28).

39 Judgment of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 63).

40 Judgments of 3 September 2009, *Fallimento Olimpiclub* (C-2/08, EU:C:2009:506, paragraph 25), and of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 61).

84. Neither of these exceptions appears to be relevant to the present case. The default rule with regard to the balance between the requirement of effectiveness qua limit to national procedural autonomy and the duty to reopen final judicial decisions thus remains that EU law does not impose, as a general rule, an obligation for Member States to create new remedies,[41] especially if that implies having to disregard national rules on *res judicata*. However, if national law does provide for such a possibility, then that legislation must comply not only with the requirement of equivalence, but also with the requirement of effectiveness.[42]

(b) Revision under Article 21(2) of Law No 554/2004: an appeal or a retrial?

85. The assessment of Article 21(2) of Law No 554/2004 in the light of the requirement of effectiveness is rather challenging. It is only possible to assess the effectiveness of a remedy if one understands what that remedy was supposed to achieve. The same is true when assessing the effectiveness of a remedy having regard to its deadline (one month) and the moment when it starts running (when the judgment subject to revision was rendered). Effective with regard to what? What was that remedy supposed to achieve?

86. The key question in this regard is whether Article 21(2) of Law No 554/2004 was supposed to operate as another revision of a judgment, similar to other extraordinary remedies such as second appeals (or appeals in cassation), or whether it was supposed to be a retrial. The models for each differ.

87. On the one hand, *second appeals* tend to be brought on points of law, that is to say, based on an alleged infringement of rules of law and with only very limited possibilities to review the findings and assessment of facts. They are usually brought before a court which is hierarchically higher than the court that rendered the decision subject to the second appeal, although they might sometimes also be brought before the court that issued that last-instance decision being challenged (as a way of a preliminary 'auto-remedy'). Importantly, the deadline for bringing a second appeal normally starts running from the moment of delivery or notification of the appealed decision. Finally, second appeals are by definition not brought against final or definitive decisions in the sense of the case-law of the Court, according to which decisions become definitive 'after *all rights of appeal* have been exhausted or after expiry of the time limits provided for in that connection'.[43]

88. On the other hand, *retrials* are normally based on the emergence of new facts or new evidence that were unknown to the parties and the court when the original decision was rendered, where those facts or that evidence are likely to have an impact on the decision. Where a request for retrial is granted it will usually mean that the retrial or reopening of the original decision must be carried out by the court that decided at first instance, because facts are likely to be reassessed. Concerning deadlines, in so far as a retrial is based on the emergence of a new fact, the deadline to apply for a retrial normally starts running at the moment the interested party becomes aware of that new fact. Sometimes, in addition, that subjective deadline is combined with a more objective one, by which requests for retrial can only be submitted within a certain number of years from when the original decision was rendered. Finally, requests for retrial are also by definition brought against final or definitive decisions in the sense of the case-law of the Court cited in the previous point of this Opinion.

41 Judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 51).

42 Judgments of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 62), and of 6 October 2015, *Târşia* (C-69/14, EU:C:2015:662, paragraph 30).

43 Judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 38); of 16 March 2006, *Kapferer* (C-234/04, EU:C:2006:178, paragraph 20); of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 58); or of 6 October 2015, *Târşia* (C-69/14, EU:C:2015:662, paragraph 28). Emphasis added.

(c) Effective as what exactly?

89. If I compare the revision mechanism of Article 21(2) of Law No 554/2004 with the two ideal models of extraordinary remedies that I have just outlined, it is not clear to me which one of those models that mechanism was supposed to follow. In so far as the request for revision is brought against final decisions, revision initially appears to be something closer to a retrial procedure. However, to the extent that it is based on the infringement of (most likely already existing) legal rules, and the deadline, which is relatively short, starts running at the moment when the original decision is rendered, the revision mechanism appears to be an extraordinary appeal. But then again, in that case, it is rather surprising that the revision under Article 21(2) of Law No 554/2004 must be submitted before the same court that rendered that original decision, especially considering that that court will be asked to re-examine a decision it gave only a few days or weeks before and on the basis of EU rules which already existed and, in all likelihood, were already considered by that court when giving that decision.

90. Under the principle of procedural autonomy, Member States have a significant margin of discretion in designing their system of legal remedies. The choice between models then also logically entails the freedom to breed hybrids and procedural mutants, if Member States wish to do so.

91. However, those hybrids must be effective. They must be able to provide the protection which they are intended to secure, while not unduly interfering with or encroaching upon other values of equal importance. As has been stressed several times in the previous points of this Opinion,[44] another key value, recognised and underlined by the Court, is legal certainty and the importance of *res judicata*. The balancing and weighing of those values at the EU level led the Court to state clearly that the importance of legal certainty of final judgments and legal stability is so high that the requirement of effectiveness of EU law cannot override it, even if mistakes in the national application of EU law could thereby be corrected. Final judgments are not final because they are necessarily flawless. They are final because, at a certain stage, a case must end.

92. It will ultimately be for the national court to assess, in the framework of such considerations, the effectiveness of the revision mechanism instituted by Article 21(2) of Law No 554/2004. However, from my limited understanding of the relevant national law and procedural context, as presented in the proceedings before this Court, it would appear that that mechanism simply falls between two stools.

93. On the one hand, it is questionable as an appeal. It seeks redress from the same court that rendered the judgment subject to revision only a few days or weeks earlier, most likely in view, and potentially in breach, of the same EU rules and judgments of the Court, because not many new developments are likely to arise within a month after the rendering of that judgment.[45]

94. On the other hand, it is also questionable as a retrial. The deadline for requesting the revision is calculated from the date of the initial decision, and not from the date of the emergence of the new element permitting the revision to be requested, namely a new judgment of the Court. Indeed, the requirement of effectiveness should be interpreted as imposing an obligation to provide for a reasonable deadline,[46] which has a bearing not only on the duration of the deadline, but also on the time from which it starts running. Moreover, the fact that Article 21(2) of Law No 554/2004 initially

44 Above, points 49, 50 and 80.

45 It ought to be stressed that in general, a first round of 'auto-remedy' is certainly possible if, in case of a negative decision, that case moves up to a different court, or at least laterally to a different judge. However, if all of the elements of the previous trial remain in practice the same, one cannot but repeat the quip already used in a different context: 'Insanity is doing the same thing over and over again and expecting different results' (see my Opinion in *El Hassani* (C-403/16, EU:C:2017:659, point 66 and footnote 17)).

46 See, for example, judgment of 12 February 2008, *Kempter* (C-2/06, EU:C:2008:78, paragraphs 58 and 59), or of 19 September 2006, *i-21 Germany and Arcor* (C-392/04 and C-422/04, EU:C:2006:586, paragraphs 58 and 59).

contained rules on deadlines that were incomprehensible [47] and subsequently (until the ICCJ rendered ruling No 45/2016) apparently had no deadline at all, simply adds to the confusion. [48] The right to effective judicial protection requires that limitations on the right of access to a court, such as those due to time limits, be clear and foreseeable. [49]

95. Therefore, it seems that Article 21(2) of Law No 554/2004 might present some obstacles to compliance with the requirements of effectiveness, which in the context of judicial remedies are also embodied in the first paragraph of Article 47, of the Charter. That provision is explicit in requiring that there must be an 'effective remedy before a tribunal'. Therefore, Article 47 comprises not only the right of access to a tribunal [50] (in the strict sense of access, that is to say, being allowed to bring the case), but also the requirement that that access results in an effective remedy [51] (in the sense that there will in fact be some review), in this latter sense overlapping with the overall principle of effective judicial protection, also present in Article 47. [52]

96. Finally, the questionable nature of the remedy provided by Article 21(2) of Law No 554/2004 is also rather vividly demonstrated by the facts of the present case. Even after having submitted three requests for revision based on that provision, Ms Călin has not managed to secure repayment of the environmental stamp duty. It is worth emphasising that this is not because the merits of her case were not favourable to her. The only substantive decision ever rendered on revision in her case did find in her favour. She was precluded from the benefit of that finding by the (non-)operation of the time limit of the action for revision. At the same time, this case also demonstrates that that remedy encroaches significantly upon the principles of legal certainty and of stability of the law and legal relations, the importance of which has also been clearly stated by the case-law of the Court. [53]

D. The alternatives

97. It is often said that the road to hell is paved with good intentions. The apparent intention of the national legislature to provide for effective enforcement of EU law at national level cannot but be praised. However, it is indeed open to discussion whether the means chosen for the realisation of that aim are optimal ones. The effectiveness of EU law will hardly be served by never-ending judicial disputes running in endless loops of retrials.

98. If the national court, with its full knowledge of national law and procedure, comes to the conclusion that the revision procedure under Article 21(2) of Law No 554/2004 does not meet the requirement of effectiveness as outlined in the previous section, then the issue of the alternative options to obtain repayment of taxes and duties levied in infringement of EU law arises with renewed importance. In the interest of assisting the national court, I wish to add the following closing remarks.

47 See above, point 8.

48 Above, points 35 and 37.

49 See, to that effect, also the order of 16 November 2010, *Internationale Fruchtimport Gesellschaft Weichert* v *Commission* (C-73/10 P, EU:C:2010:684, paragraph 56).

50 See judgment of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraph 48).

51 Judgment of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 48.)

52 Judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 54).

53 Judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 38); of 16 March 2006, *Kapferer* (C-234/04, EU:C:2006:178, paragraph 20); of 10 July 2014, *Impresa Pizzarotti* (C-213/13, EU:C:2014:2067, paragraph 58); or of 6 October 2015, *Târşia* (C-69/14, EU:C:2015:662, paragraph 28).

99. It might be useful to note at the outset that the obligation not to levy taxes such as the one at stake in the main proceedings was established by the case-law of the Court quite some time ago, regarding not only Romania,[54] but also other Member States.[55] From this point of view, it might be suggested that the discussion of whether the duty to repay the tax at stake arose after the decision of the Court in *Manea* or in *Budișan*, and from which of these two judgments the duty to revisit would start running, appears to be somewhat artificial.

100. Having said that, I also wish to emphasise that the EU legal order already provides for remedies in case Member States fail to comply with the obligation not to levy such taxes, which in themselves perhaps provide for a more subtle balance between the principle of legal certainty and the requirement of effective enforcement of EU law.

101. First, there is a general duty, incumbent on administrative authorities, in particular tax authorities, as authorities of a Member State, to repay unduly levied taxes. I consider that such a possibility does not necessarily depend on the existence of a national judicial decision reviewing or annulling a prior final decision imposing the payment of such duty. National legislation can naturally provide for the repayment (in certain cases, for certain types of payments previously levied) without requiring that the judicial decision that initially established the obligation to pay the tax be previously annulled. Equally, complying with the obligation of repayment at the administrative level does not necessarily require that the administrative authorities review the original administrative decision, to the extent that under national law it is possible to simply make a fresh administrative decision recognising the right to obtain the repayment of the unduly levied tax.

102. Second, even if the national legislature were to deny itself the original power to decide on payments from the public purse, which would indeed be rather surprising, it would in any event still be possible to review the original administrative decisions issued in individual cases, according to the conditions set out by the Court in *Kühne & Heitz*.[56]

103. Third, there is also the possibility for a person in the situation of Ms Călin to bring a State liability action against the Member State that failed to make repayment of the unduly levied tax.

104. In that regard, the referring court states, in its order for reference, that the request for revision was at the material time the only procedural remedy available to Ms Călin. However, the Romanian Government, for its part, affirms in its written submissions that Ms Călin still has the possibility to bring an action for State liability.

105. The Court has recently recalled that 'the principle of *res judicata* does not preclude recognition of the principle of State liability *for the decision of a court adjudicating at last instance* … Given, inter alia, that an infringement, *by such a decision*, of rights deriving from EU law cannot normally be corrected thereafter, individuals cannot be deprived of the possibility of holding the State liable in order to obtain legal protection of their rights'.[57]

54 Starting with the judgment of 7 April 2011, *Tatu* (C-402/09, EU:C:2011:219).

55 See, for example, judgment of 5 October 2006, *Nádasdi and Németh* (C-290/05 and C-333/05, EU:C:2006:652) (concerning Hungary), or of 18 January 2007, *Brzeziński* (C-313/05, EU:C:2007:33) (concerning Poland).

56 Judgment of 13 January 2004 (C-453/00, EU:C:2004:17, paragraph 28).

57 Judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 58).

106. It is thus clear that an action for State liability does not require a national decision that officially annuls the previous final judicial decision that precludes the repayment of the unduly levied tax.[58] However, what is slightly less clear is whether a State liability action is only possible as long as that final judicial decision was taken by a court adjudicating at last instance — that is to say, a court whose decisions are not open to ordinary appeal.[59]

107. In my view, in the framework of State liability actions, there is no doubt that the requirement that the court that has allegedly infringed EU law should be the court adjudicating at last instance is fully justified when the *alleged* infringement of EU law is an *infringement of the duty*, imposed on such courts by the third paragraph of Article 267 TFEU, *to make a reference* for a preliminary ruling.[60]

108. However, I believe that the question whether the same requirement can be imposed in other cases, in particular in those where the alleged breach is a sufficiently serious infringement of a provision of EU law, remains an open question.

109. A literal reading of the case-law of the Court may seem to imply that such a requirement would indeed be imposed in cases of State liability for judicial wrongs. However, it is useful to recall that those statements were made in the context of cases that concerned the alleged infringement of the duty to make a preliminary reference under the third paragraph of Article 267 TFEU.[61] Thus, the alleged illegality (wrong) itself consisted partially[62] in not making a reference to the Court. However, would that also automatically preclude the liability of other national courts for infringements of EU law other than (or independently of) the duty to refer?[63]

110. In my view, if the alleged infringement of EU law is not, wholly or partially, a failure to make a preliminary reference by a court having that duty pursuant to the third paragraph of Article 267 TFEU, but an infringement of another provision of EU law, then the nature of the illegality may not necessarily require the exhaustion of all national remedies before an action for State liability can be brought.[64]

58 Nor does it require a prior preliminary ruling of the Court establishing the existence of a breach of EU law in that specific case: see judgment of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 38).

59 See Opinion of Advocate General Wahl in *Tomášová* (C-168/15, EU:C:2016:260, points 37 to 48), as well as the judgment of 28 July 2016, *Tomášová* (C-168/15, EU:C:2016:602, paragraphs 20 and 21).

60 Judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraphs 35 and 36).

61 See judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513); of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391); and of 6 October 2015, *Târşia* (C-69/14, EU:C:2015:662, paragraph 40).

62 Since that illegality is normally coupled with another infringement of the applicable EU rules, essentially suggesting that the national court, *by reaching* a certain interpretation of EU law *while* not making a reference to the Court *in spite of* being a court of last instance, committed a (sufficiently serious) breach of EU law.

63 It might simply be noted that a number of national systems of State liability for judicial breaches require the illegality to be of a certain gravity, but not, at the same time and by default, the exhaustion of all judicial remedies. There might be instances in which, for whatever reason, there was no such exhaustion of remedies, but the infringement of the law is still sufficiently serious as to give rise to State liability. For example, one could imagine a decision of a first-instance court that was obtained by fraud or corruption and against which the damaged party did not lodge an appeal, because at that time he or she was not aware of that circumstance. However, if that party subsequently becomes aware of the corruption, perhaps even after the objective deadline for retrial lapsed, would State liability be precluded if such a decision also infringed EU law? Similarly, what about a final administrative decision that was not challenged before a court but that was based on national legislation which was later found to be incompatible with EU law? Is a party alleging to have suffered damage as a result of that administrative decision precluded from bringing a claim for State liability on the grounds that he or she did not appeal against that decision before the courts, if the administrative decision itself was final?

64 With all the conditions for State liability of course remaining the same: see, for example, judgment of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51), or of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 51).

V. Conclusion

111. In the light of the foregoing, I suggest that the Court reply to the question raised by the Curtea de Apel Ploiești (Court of Appeal, Ploiești, Romania) as follows:

– The requirement of equivalence must be interpreted as not precluding, in circumstances such as those in the dispute in the main proceedings, national legislation, as interpreted by national case-law, according to which the deadline to submit a request for revision of a final judgment that infringes EU law is one month and runs from the date of notification of the final judgment subject to revision. By contrast, the requirement of effectiveness and the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union may preclude a remedy which, while encroaching considerably upon the principles of legal certainty and *res judicata*, does not provide an effective means of attaining the objectives it seeks to achieve. It is for the referring court to define those objectives and to establish whether the remedy at issue in the main proceedings meets those objectives.