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National *Res Judicata* in the European Union: Revisiting the Tension Between the Temptation of Effectiveness and the Acknowledgement of Domestic Procedural Law

Abstract: This paper presents an overview of recent ECJ case law concerning *res judicata*, with a focus on the way in which EU law affects national rules related to this principle. A series of recent judgments has confirmed the importance of the issue in the broader context of the impact of EU law on national judicial systems and the circulation of judgments. The ECJ mostly confirms trends visible in earlier case law, signalling an awareness of the importance of this rule for national judicial systems and restricting exceptions to what appears strictly necessary in order to ensure the effectiveness of EU law. However, the case law also presents interesting new developments, including a challenge of cross-jurisdictional national *res judicata* whose consequences are as yet unclear and a more in-depth engagement with national procedural systems on the basis of the principles of equivalence and effectiveness. The overall impression is one of maturation of the case law although some progress still needs to be made, in particular with regard to the clarity of the Court's discourse on EU and national principles of *res judicata*.

Keywords: *res judicata* – procedural autonomy – effectiveness – legal certainty

1. Introduction

Res judicata has long been recognised by the Court of Justice (ECJ) as a component of European Union procedural law¹ as well as an important feature of the judicial systems of the Member States.² This recognition was unsurprising. *Res judicata* is one of the essential characteristics of judicial institutions in the modern State³ as a *sine qua non* condition of the trust placed by parties in the authority of the courts. The ability to put an end to a dispute by making a final decision which none of the parties, and no other court, can challenge protects judicial institutions against attempts to challenge the legitimacy of their decisions and ensures the proper functioning of judicial systems by preventing never-ending litigation. The establishment of operative judicial bodies in the European Communities therefore required

¹ The first mentions of *res judicata* in EEC procedural law appear in Joined Cases 22 & 23/60, *Raymond Elz v. High Authority of the E.C.S.C.*, EU:C:1961:17; and Joined Cases 2 to 10/63, *Società Industriale Acciaierie San Michele and Others v. High Authority of the E.C.S.C.*, EU:C:1963:59.

² Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*, EU:C:1999:269, para. 46.

³ Waline, "Le critère des actes juridictionnels", (1933) RDP, t. 50, 565-572, at 571.

the introduction of *res judicata* in this legal order.⁴ The exact consequences of the introduction were more uncertain. Among the more complex issues related to it in the EU is the question of the role it should play in the interactions between the Court of Justice of the European Union (CJEU) and the judicial systems of the Member States.⁵ The case law states that EU law respects *res judicata* at both levels of the judicial system established in Article 19(1) TEU, *i.e.* both as a principle of EU law applicable in EU procedural law and as a principle of national law with its varied manifestations in the judicial systems of the Member States. These statements must not be taken too literally, however, since EU law does impose limits on the effects of such national rules on the basis of the usual restrictions to procedural autonomy: equivalence and, more importantly, effectiveness.

In a series of recent rulings, the ECJ has made a series of valuable additions to its existing case law on *res judicata*, in particular on EU law's apprehension of national rules related to the principle. While this topic had not returned to the spotlight since the rulings of the early 2000s such as *Köbler*⁶ or *Lucchini*⁷ which led to heated arguments over the ECJ's intrusion into national procedural law,⁸ this recent case law reminds us that the issue retains its importance in the interactions between the two levels of the judicial system of the Union.

A number of these judgments confirm the pertinence of the ECJ's choice to link its own understanding of *res judicata* as an essential feature of EU procedural law and its respect for national rules regarding the same norm, through the now well-established phrase '*attention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of res judicata*'.⁹ Although this phrase can be criticised

⁴ Tizzano, "Commento all'art. 187", in Quadri, Monaco & Trabucchi (dir.), *Trattato istitutivo della Comunità Economica Europea : Commentario* (Giuffrè, 1965), 1373-1378, at 1373.

⁵ Despite the long-standing case law affirming the importance of *res judicata* in EU law, the topic remains largely unexplored and conspicuously absent from works of reference and some only provide a thorough analysis of the authority of preliminary rulings, e.g. Jacqué, *Droit institutionnel de l'Union européenne*, 8e éd. (Daloz, 2015), at 770-771 ; Lenaerts, Maselis, Gutman & Nowak, *EU Procedural Law* (3rd ed.) (Oxford University Press, 2014), at 243.

⁶ Case C-224/01, *Gerhard Köbler v. Austria*, EU:C:2003:513.

⁷ Case C-119/05, *Ministerio dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, C-119/05, EU:C:2007:434.

⁸ See, *inter alia*: Wattel, "Köbler, CILFIT and Welthgrove: We Can't Go on Meeting Like This", 41 CMLRev. (2004), 177-190; Huglo, "Primauté du droit communautaire et autorité de la chose jugée par les juridictions nationales", *Gazette du Palais*, 22 Feb. 2007, no. 53, 18-24; Bříza, "Lucchini SpA-is There Anything Left of Res Judicata Principle?", 27 *Civil Justice Quarterly* (2008) 27, 40-50; Tizzano, Gencarelli, "Union Law and Final Decisions of National Courts in the Recent Case Law of the Court of Justice", in Arnulf, Barnard, Dougan & Spaventa (eds), *A Constitutional Order of States ? Essays in EU Law in Honour of Alan Dashwood* (Hart, 2011), 267-280.

⁹ This phrase first appears in Case C-234/04, *Rosmarie Kapferer v. Schlank & Schick GmbH*, EU:C:2006:178, para. 20; it is a rephrasing of one of the paragraphs in the *Köbler* judgment in which the ECJ already acknowledged the importance of *res judicata* as a norm of national law (Case C-224/01, *Köbler*, para. 38).

for drawing an unconvincing parallel there are, in fact, cases that involve questions related to *res judicata* both at the EU and the national levels. Recent case law illustrates the need to take into account the law developed on the EU procedural principle in order to understand the ECJ's attitude towards the corresponding national rules. A good understanding of the way in which *res judicata* operates at the EU level and the difference between the finality of judicial decisions and their potential normative reach as precedents – rendered particularly fuzzy in French-language scholarship by the use of the concept of '*autorité de la chose interprétée*'¹⁰ – is essential to understand the impact of a preliminary ruling on the proceedings which gave rise to it, as opposed to other proceedings, at the national level, or indeed the impact of one national ruling over other national proceedings in a matter involving EU law.

These judgments also present new and interesting challenges for the management of the integration of national and EU judicial systems and explore the extent to which this integration justifies limitations to the disputed procedural autonomy of Member States.¹¹ As an essential component of national procedural systems, *res judicata* at the national level has inevitable consequences on the implementation of EU law. The development of new mechanisms for judicial review at the national level inevitably raises the question of litigants' ability to use them – or request equivalent treatment – in order to challenge national judicial decisions incompatible with EU law. As Member States develop remedies which aim to ensure the effectiveness of constitutional review, or of the judgments of the European Court of Human Rights, the ECJ has to provide guidance on their interaction with EU law while taking into account the importance of *res judicata*.

Interestingly, this recent case law does not indicate a gradual push towards increasing limitations of national *res judicata* in order to ensure the proper application of EU law, either by taking advantage of remedies available in a procedural system or by establishing exceptions to the application of national law. On the contrary, the ECJ maintains its measured approach. The case law on national *res judicata* seems to be reaching a mature stage where the Court of Justice is more comfortable engaging with the minutiae of national procedural law and offering guidance to referring courts, while remaining mindful of the importance of *res judicata*. However, balancing the need to ensure the effective application of EU law and the finality of national judicial decisions remains a difficult task and it is sometimes unclear whether the Court is aware of the potential impact of its replies to preliminary references. Moreover, the Court's judgments are sometimes insufficiently clear or explicit. Recent case law thus provides an opportunity to present a nuanced, updated view of the status of *res judicata* in the interaction between the two levels of the EU judicial system.

¹⁰ 'Authority of the thing interpreted', a phrase constructed on the basis of '*autorité de la chose jugée*', the French concept of *res judicata*.

¹¹ For a general criticism of the concept of procedural autonomy in EU law, see *inter alia*: Bobek, "Why there is no Principle of "Procedural Autonomy" of the Member States", in Micklitz & De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012), pp. 305-323).

On the basis of this case law, this paper will first reexamine the link between the national and EU doctrines of *res judicata*. Although the ECJ is still lacking in pedagogy, its recent judgments show the usefulness of the connection between the EU standard and its national equivalents (1). Recent judgments also confirm that exceptions to national rules on *res judicata* are to remain rare, although *CRCNPAC v. Vueling Airlines*¹² seems to establish a significant departure whose reach remains uncertain (2). Last, this case law shows that the ECJ is increasingly willing to engage with the specifics of national procedural law and to provide referring courts with detailed advice, always preferring solutions that circumvent the obstacle created by national *res judicata* to actual exceptions to the principle (3).

2. A Welcome Restatement of the Links between National and EU *Res Judicata*

Reminders that EU law acknowledges the importance of *res judicata* as an essential feature of any judicial system – and, notably, those of the Member States – are a relatively recent addition to the Court of Justice’s case law on this principle. They have, however, become a consistent feature of all judgments that deal with the interactions between national rules on *res judicata* and EU law, as well as a significant number of judgments concerning *res judicata* as a principle of EU procedural law. Since *Kapferer*,¹³ the ECJ has linked EU and national rules related to *res judicata* through an increasingly frequent use of reminders of ‘*the importance, both in the legal order of the European Union and in national legal systems, of the principle of res judicata*’.¹⁴ The consistent use of this phrase should not simply be understood as a result of the Court’s ‘copy and paste’ approach to writing judgments. It expresses a willingness to draw a parallel between the ECJ’s understanding of the principle as it has introduced it in EU procedural law and as it exists in national legal systems.

¹² Cases C-370/17 and 37/18, *CRPNPAC v. Vueling Airlines SA* and *Vueling Airlines SA v. Poignant*, EU:C:2020:260.

¹³ Case C-234/04, *Kapferer*.

¹⁴ The use of the phrase has become increasingly frequent in CJEU case law on *res judicata*, both as a principle of EU procedural law, and as a principle of national law. See, notably: Case C-2/08, *Amministrazione dell’Economia e delle Finanze e Agenzia delle entrate v. Fallimento Olimpiclub Srl*, EU:C:2009:506, para. 22; Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, EU:C:2009:615, para. 35; Case C-526/08, *European Commission v. Luxembourg*, EU:C:2010:379, para. 26 ; Case C-352/09 P, *ThyssenKrupp Nirosta GmbH v. European Commission*, EU:C:2011:191, para. 123; Case C-221/10 P, *Artogodan GmbH v. European Commission*, EU:C:2012:216, para. 86; Case C-529/09, *European Commission v. Spain*, EU:C:2013:31, para. 64; Case C-213/13, *Impresa Pizzarotti & C. SpA v. Comune di Bari and Others*, EU:C:2014:2067, para. 58, Case C-69/14, *Dragoș Constantin Târșia v. Statul român and Serviciul Public Comunitar Regim Permise de Conducere si Inmatriculare a Autovehiculelor*, EU:C:2015:662, para. 28; Case C-421/14, *Banco Primus SA v. Jesús Gutiérrez García*, EU:C:2017:60, para. 46; Case C-226/15 P, *Apple and Pear Australia Ltd and Star Fruits Diffusion v. EUIPO*, EU:C:2016:582, para 51; C-34/19, *Telecom Italia SpA*, EU:C:2020:148, para. 64; Cases C-370/17 and 37/18, *CRPNPAC v. Vueling Airlines*, para. 88; Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, EU:C:2020:367, para. 185.

The parallel can be justified, first, by the simple fact that the source of the norms introduced and developed in EU procedural law is of course to be found in the legal systems of the Member States. The need for *res judicata* in EEC procedural law seemed so evident in early case law that the ECJ did not even bother to look for evidence in the Treaties for the existence of this norm, neither did it see fit to explain that it was creating new rules, nor to explain which sources had influenced it. The different facets of *res judicata* simply appear in the case law as natural facts of procedural law.¹⁵ This can only be explained by the fact that the members of the Court were steeped in national legal traditions in which this principle was well-established as an essential feature of procedural law.¹⁶

The very fact that the members of the ECJ drew upon national traditions in order to construct *res judicata* in EU procedural law means that they understood it as serving the same purpose in both contexts. What the case law lacks in explicit acknowledgements of the normative input of the ECJ, it makes up for in a clear awareness that the need for these rules in EU procedural law was created by the same causes which led to similar rules being established in all Member States. Even before the ECJ started explicitly stating that *res judicata* was a principle of EU law, or that it was linked to the principle of legal certainty,¹⁷ the judgments and Advocate General opinions clearly showed an awareness that the principle must exist in the EU legal order if it is to have a functioning judicial system. An effective and coherent judicial system at the level of the European Union must include *res judicata* precisely because

¹⁵ The ECJ does not bother to establish a general rule or principle of *res judicata* before deriving procedural consequences from it, but rather starts implementing specific procedural rules related to it without explicitly stating them. For instance, in *Raymond Elz* (Joined Cases 22 and 23/60), the Court of Justice rejects an objection of inadmissibility because the subject-matter of the action is different from the one in the case which gave rise to the previous judgment. The vocabulary used by the Court and the Advocate General indicates that this is an implicit application of the ‘triple identity’ rule applicable to claims of inadmissibility based on *res judicata* in domestic contexts such as French law (a claim is only inadmissible if it is identical in its parties, cause and subject-matter to a claim which has previously been decided). Other judgments apply these criteria to rule a claim inadmissible without even mentioning *res judicata*, see for example : Joined Cases C-172 and 226/83, *Hoogovens Groep BV v. European Commission*, EU:C:1985:355, para. 9. The first clear and explicit use of these criteria by the CJEU appears in Joined Cases 159/84, 267/84, 12/85 and 264/85, *Alan Ainsworth and Others v. European Commission*, EU:C:1987:172.

¹⁶ The main influence, though never explicitly acknowledged, was clearly French procedural law, which is unsurprising in the broader context of the early development of EEC procedural law. This is apparent in the adoption of the ‘triple identity’ criteria (see note 14), or in the use of the concept of ‘absolute’ *res judicata* in relation to judgments annulling an act of the European Union, see for example Case C-310/97 P, *European Commission v. AssiDöman Kraft Products AB and Others*, EU:C:1999:407, para. 54; Joined Cases C-442 and 471/03, *P & O European Ferries (Vizcaya), SA & Diputación Foral de Vizcaya v. European Commission*, EU:C:2006:356, para. 41. The notion of ‘*autorité absolue de la chose jugée*’ is a well-established feature of French administrative procedure, see *inter alia*: Weil, *Les conséquences de l’annulation d’un acte administratif pour excès de pouvoir* (Jouvet & Cie, 1952), at 137-138. On the ‘triple identity’ criteria in French law, see *inter alia*: Bouty, “Chose jugée”, *Rép. proc. civ.* (2018) para. 569.

¹⁷ The first judgment to explicitly link *res judicata* to legal certainty in EU law was in Case 126/97, *Eco Swiss*, para. 46; although the first legal argument linking the two in ECJ case law was in fact made by the Commission, in Case 106/77, *Simmenthal*, EU:C:1978:49, p. 639 of the Court Reports.

it is a common feature of the judicial systems of the Member States although it does take different forms in different national contexts.¹⁸

The parallel drawn between the EU procedural law principle and its equivalents in the Member States can also have an important purpose in helping lawyers and national judicial bodies make sense of the way in which the principle operates in EU law. The role of *res judicata* in the relations between national judicial systems and the CJEU remains insufficiently clear, much like the difference between *res judicata* and the normative value of ECJ judgments, in particular in relation to preliminary rulings. Cases such as *Hochtief*¹⁹ show how important it is to clarify the distinction between the *res judicata* which attaches to a preliminary ruling and can produce its effects in the national legal system during the same proceedings or later litigation related to the same set of facts, and the fact that the same ruling contains a precedent which is capable of producing a normative impact throughout the EU legal system.

The Hungarian case which led to *Hochtief* was complex and unfortunately not clearly explained by the referring court. During a first stage of litigation, a Hungarian court had made a preliminary reference to the ECJ, but *Hochtief*, a local branch of a German construction company, was not satisfied with the way in which the ECJ ruling was applied by the national courts and brought a motion for a retrial.²⁰ After this request was rejected, *Hochtief* brought a claim for damages on the grounds that the national courts should have allowed the retrial and referred to the ECJ a question in order to establish whether EU law required a retrial in such a case. The case therefore combined both of the ways in which *res judicata* can play a role in the interaction between national judicial systems and the CJEU: first, it raised the question of the authority that should be attached to a preliminary ruling in the national proceedings which gave rise to it, second, it questioned whether the appropriate application of EU law could require a final judicial decision to be called into question through a retrial. Unfortunately, the ECJ did not seize this opportunity to clarify how *res judicata* is attached to preliminary rulings and how it should be distinguished from their precedential value.

Hochtief's claim was that the Hungarian courts before which the initial litigation took place had not, or not accurately, applied EU law as established in the ECJ's response to the preliminary reference. To quote the pertinent distinction made by A.G. Bobek, this was clearly

¹⁸ The Common law tradition is the outlier, although an in-depth analysis of the cause of action estoppel and the issue estoppel under the doctrine of *res judicata* shows that they serve very similar functions to different mechanisms which aim to guarantee *res judicata* in continental legal systems: see Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process*, (Yale University Press, 1986), 29-46. On the doctrine of *res judicata* in Common Law traditions, see Spencer Bower & Handley, *Res Judicata*, 5th ed., (LexisNexis, 2019).

¹⁹ Case C-620/17, *Hochtief Solutions AG Magyarországi Fióktelepe*, EU:C:2019:630.

²⁰ See the summary of the case at issue in the main proceedings suggested by A.G. Bobek in his Opinion in Case C-620/17, EU:C:2019:340, paras 1-2.

a claim based on the *inter partes* effects of a preliminary ruling, rather than on its *erga omnes*, normative value.²¹ However, the Opinion may be criticised for the way in which it explains this distinction. The Advocate General rightly states that it is settled case law that a preliminary ruling is binding on the referring court for the purposes of the decision to be given in the main proceedings, however the rule is much older than the judgments he quotes.²² Similarly, the *inter partes* authority of a preliminary ruling does extend to the subsequent stages of the main proceedings,²³ but this is simply a consequence of the *res judicata* principle which applies to preliminary rulings²⁴ as it does to any judgment of the ECJ or the General Court. This manifestation of *res judicata* is similar to that which exists in national procedural systems where preliminary references are possible between jurisdictional orders, e.g. between ordinary courts and constitutional courts, or between the administrative and private orders in France. In the language of French procedural law, acknowledged by the ECJ, this is the ‘positive’ effect of *res judicata* (*autorité positive de la chose jugée*).²⁵

It is unfortunate that the ECJ did not deal with this aspect of the preliminary reference more explicitly. There has been significant confusion over the judicial nature of preliminary rulings and their characterization as decisions having *res judicata*. French-speaking scholarship provides an excellent example of this, with the concept of *autorité de la chose interprétée*. This concept initially purported to describe the specific authority of preliminary rulings which, it was suggested, could not be *res judicata* (because they did not decide cases) and could not have an autonomous normative value (because judicial decisions cannot be a source of law): the *erga omnes* impact of such judgments was therefore be due to the fact that the *interpretation* of a provision by the ECJ was integrated into the written norm.²⁶ This approach is unconvincing for a number of reasons, notably: the normative value of preliminary rulings in no way differs from that of other CJEU judgments, such rulings do not only interpret written provisions but have in fact created several principles and rules of EU law, and the ECJ

²¹ Opinion in Case C-620/17, paras 59-62.

²² Ibid., para. 59: A.G. Bobek quotes the ECJ judgments in Cases C-173/09, *Elchinov*, EU:C:2010:581, and C-62/14, *Gauweiler e.a.*, EU:C:2015:400. The rule can be found in ECJ case law as early as Case 29/68, *Milch-, Fett- und Eierkontor GmbH/Hauptzollamt Saarbrücken*, EU:C:1969:27, para. 49.

²³ Opinion in Case C-620/17, para. 61.

²⁴ Opinion of A.G. Lagrange in Joined Cases 28 to 30/62, EU:C:1963:6, Court Reports p. 83 ff.

²⁵ On the concept of ‘positive’ *res judicata* in French procedural law, see Botton, *Contribution à l'étude de l'autorité de la chose jugée au pénal sur le civil*, (LGDJ, 2010), at 47 ff; and Perrin, "Questions préjudicielles", *J.-Cl. Administratif*, fasc. 1061 (2016), para. 70.

²⁶ Boulouis, "À propos de la fonction normative de la jurisprudence. Remarques sur l'œuvre jurisprudentielle de la Cour de justice des Communautés européennes", in *Mélanges offerts à Marcel Waline. Le juge et le droit public* (t. 1), (LGDJ, 1974), 149-162.

has explicitly indicated that preliminary rulings are *res judicata*.²⁷ The concept has since been expanded to refer to almost any kind of judicial lawmaking, especially in EU law, and remains popular across French-language scholarship, probably in large part because it avoids importing the vocabulary of *stare decisis* and of precedents. However, it also continues to be presented as an alternative to *res judicata* applicable to preliminary rulings and thus to muddy the waters in any analysis of the impact of such rulings on the main proceedings and beyond.

The questions raised by the Hungarian referring court in *Hochtief* illustrate a lack of understanding of the relationship between national courts and the ECJ. This case would have been an excellent opportunity to restate what the case law already establishes: the principle of *res judicata* does apply²⁸ and it must be dissociated from the normative impact which may be produced by preliminary rulings or any other ECJ judgment.

Recent case law also presents interesting examples of the way in which the CJEU uses its own understanding of *res judicata* when confronted with equivalent national rules. The effective application of EU law does not, in theory, require national courts automatically to go back on final judgments in order to take into account the appropriate interpretation of EU law, even when this interpretation was established before the national judgment at issue.²⁹ EU law nevertheless requires national courts to take care to differentiate the normative effects of their own case laws, which may be modified and therefore must be corrected when found in breach of EU law, from the rules related to *res judicata* which prevent any modification of a ruling made in a specific case. Although this was apparent in previous case law,³⁰ it was made very clear recently in *Telecom Italia*, in which the ECJ notes that it is not convinced that the previous judgment invoked in a preliminary reference is capable of binding the referring court as regards the case in the main proceedings and insists that, if *res judicata* does not apply, the referring court is bound by its obligation to interpret national law in conformity with EU law, if necessary by modifying its own case law.³¹

²⁷ For an in-depth criticism of the concept of '*autorité de chose interprétée*' and its pertinence in the context of EU law, see Turmo, *L'autorité de la chose jugée en droit de l'Union européenne* (Bruylant, 2017), at 376 ff.

²⁸ Case C-69/85, *Wünsche Handelsgesellschaft GmbH & Co. v. Federal Republic of Germany*, EU:C:1986:104, para. 13. See Bebr, "Commentary of Case 69/85, *Wünsche Handelsgesellschaft v. Federal Republic of Germany*, Order under Article 177 (EEC) of the Court of justice of 5 March 1986", 24 CMLRev. (1987), 719-730.

²⁹ This is settled case-law, established in Case C-234/04, *Kapferer* and recently confirmed for instance in Case C-34/19, *Telecom Italia SpA*, paras 65-66.

³⁰ See, *inter alia*, the ECJ refusing a limitation by the Spanish *Tribunal Supremo* of the retroactive effects of one of its own judgments which led to an undue restriction of the rights of consumers cannot be interpreted as a restriction of national *res judicata* but as management of the normative effects of national case law: Joined Cases C-154 and 307/15, *Francisco Gutiérrez Naranjo v. Cajasur Banco SAU, Ana María Palacios Martínez v. Banco Bilbao Vizcaya Argentaria SA (BBVA), Banco Popular Español SA v. Emilio Irlés López and Teresa Torres Andreu*, EU:C:2016:980, para. 70.

³¹ Case C-34/19, *Telecom Italia SpA*, paras 54-63.

The parallel between the national and EU principles of *res judicata* does, however, have its limitations. The ECJ has required national courts to adjust their understandings of *res judicata* to take into account the requirements of the effective implementation of EU law. Interestingly, the ECJ only started pledging its respect for *res judicata* as a principle of EU law and linking it with its national equivalents when it started requiring Member States to make adjustments to these same rules.³² Indeed, a rule of national procedural law can never be seen as completely equivalent to a rule of EU procedural law, because the two levels of procedural systems do not serve the same purpose from the point of view of the CJEU. Whereas the Court of Justice may understand and respect the principle of *res judicata* as serving the same purpose at both levels, as a rule of national law, it becomes subject to the apprehension of all national procedural law as a set of tools primarily analysed from the point of view of their usefulness for the effective application of EU law. The limitations of national *res judicata* in CJEU case law are part of a phenomenon common to many aspects of the interaction between EU law and national procedure: insofar as national rules allow the effective application of EU law, Member States are autonomous, however if a rule creates an obstacle which the ECJ deems excessive, it will require the rule to be bent, or broken.

3. A Limited Expansion of the Scope of Exceptions to National *Res Judicata*

Although the principle remains that national judges do not have to disregard rules related to *res judicata* in order to set aside previous judgments which are contrary to EU law, the integration of national courts within a common EU judicial system means that the usual limits to procedural autonomy apply. These limits have included, on a small number of occasions, a requirement that such national rules be disregarded where the protection granted by *res judicata* seems to create too great and durable an obstacle to the effective application of EU law. Where a final decision protected under national *res judicata* is contrary to EU law, there may be a powerful temptation to challenge this decision and the rules which protect its irreversibility on the basis of the effectiveness of the EU norm at issue. Recent case law confirms well-established rules which allow such exceptions to the finality of national judicial decisions, in particular where the ECJ wants to defend certain EU competences from *ultra vires* judgments of national courts (2.1). The *Vueling Airlines* judgment, however, seems to have the potential to create a broader exception to national *res judicata* (2.2).

3.1. A Confirmation of the Established Exceptions to National *Res Judicata*

³² See, notably, Case C-126/97 *Eco Swiss*, para. 46 and C-224/01, *Köbler*, para. 37.

One of the first judgments of the ECJ which required a national judge to set aside national rules of *res judicata* was *Lucchini*.³³ This ruling, like others similar to it, seems to be based on the need to protect the effective application of EU law from the excessive reach of decisions made by national judges. Almost all rulings in which the ECJ has established restrictions to national *res judicata* can be justified by the clash between a particularly high value being placed on the proper application of EU law and a particularly serious obstacle related to specific procedural rules at the national level. Although these precedents did represent encroachments upon the procedural autonomy of Member States, recent case law confirms their limited scope.

In *Lucchini*, the ECJ challenged the interpretation of Article 2909 of the Italian Civil Code under which the *res judicata* attached to a final judgment covered not only what had explicitly been determined but also matters which could have been raised in these proceedings but were not. In this case, the final judgment at issue was the finding, by the Corte d'Appello di Roma, that *Lucchini* was entitled to an aid granted to it, made without examining whether the aid was compatible with Community law. If a ruling on the matter was to be considered implicit in the judgment, any other court would be precluded from examining the issue and this would have meant that the aid could never be recovered, although it was granted in breach of Community law. Although this ruling was far from being uncontroversial, it could be understood as an exceptional solution aiming to protect the EU's exclusive competence in State aid matters. The *Klausner Holz Niedersachsen Case*³⁴ raised similar questions. Here, too, the ECJ was presented with a situation in which the referring court had found a breach of State aid rules but had to contend with a previous, final judicial decision which had not taken these rules into account. The Court again held that allowing such national decisions, which are clearly contrary to Treaty provisions within an exclusive competence of the EU, to prevent later litigation from ensuring compliance would be an excessive obstacle to the effective application of EU law.³⁵ In these cases, the ECJ into account the specific area of EU law at issue, as well as the long-term effects of the violation of EU law which would have resulted from the expected application of *res judicata*.

The CJEU confirmed this approach recently, in the *Buonotourist Case*.³⁶ In this case, an Italian company attempted to rely on a final national judgment not to argue against the recovery of State aid found to be incompatible with the internal, but as a factor preventing Commission from even identifying the aid. The General Court held that the exclusive competence of EU institutions to determine whether aid is compatible means that it is not

³³ Case C-119/05, *Lucchini*.

³⁴ Case C-505/14, *Klausner Holz Niedersachsen GmbH v. Land Nordrhein-Westfalen*, EU:C:2015:742.

³⁵ *Ibid.*, paras 42-45.

³⁶ General Court judgment in Case T-185/15, *Buonotourist Srl v. European Commission*, EU:T:2018:430, and Court of Justice judgment in Case C-586/18 P, *Buonotourist Srl v. European Commission*, EU:C:2020:152.

possible to rely on national *res judicata* rules to argue against the Commission's competence to adopt a decision on State aid.³⁷ The ECJ confirmed this, explaining that, while national courts must refrain from taking decisions running counter to Commission decisions on State aid, the converse is not true and the decision of a national court cannot prevent the Commission from exercising its exclusive jurisdiction on these matters.³⁸ Once again, the existence of an exclusive competence in this area of the law plays a significant role in the Courts' reasoning. *Res judicata* cannot be a sufficient motive to reject the correct application of EU law when the national court had no competence to make the decision it made - or did so without taking EU law into account.

As exceptions to the general rule that national *res judicata* can constitute a legitimate obstacle to the correct application of EU law in a Member State, these judgments present convincing justifications. The specificity of State aid as an area of exclusive competence for the EU and the fact that the national courts which made the judgments at issue did not have the power to do so appear to be the decisive factors in this line of case-law. The case law contains two other exceptions to the general respect for national rules of *res judicata* which are not justified by exclusive competences of the EU. However, both examples may be understood as similar to the *Lucchini* exception in the sense that they dealt with national applications of the principle which would create too broad an obstacle to the application of EU law, in areas where the ECJ could justify giving particular importance to compliance.

Fallimento Olimpclub dealt with the same provision of the Italian Civil Code as *Lucchini*, Article 2909 of the Italian Civil Code. In this case, the generally accepted interpretation of this provision would have prevented national authorities from modifying, in later litigation concerning the same person but other fiscal years, the incorrect application of EU VAT rules relied upon in one final judicial decision.³⁹ The ECJ held that such an interpretation of *res judicata* went beyond what could be accepted under the principle of effectiveness. The *Cabinet de avocat UR* Case⁴⁰ recently provided the ECJ with an opportunity to confirm this approach. The referring court indicated that the proper application of the national principle of *res judicata* would prevent it from taking into account the proper interpretation of EU legislation on VAT, in the sense that the 'positive effect' of *res judicata* meant that considerations contained in an initial judgment would have to continue to apply for later fiscal years.⁴¹ The ECJ was seemingly not convinced that this was truly a matter related to the

³⁷ Case T-185/15, *Buonotourist*, paras 185-191.

³⁸ Case C-586/18 P, *Buonotourist*, paras 91-92.

³⁹ Case C-2/08, *Fallimento Olimpclub*, para. 29.

⁴⁰ Case C-424/19, *Cabinet de avocat UR v. Administrația Sector 3 a Finanțelor Publice prin Direcția Generală Regională a Finanțelor Publice București and Others*, EU:C:2020:581.

⁴¹ *Ibid.*, paras 27-29.

irrevocability of *res judicata* and that the national court was unable to modify the interpretation which it had adopted in its earlier judgment. It suggested the referring court should change the interpretation applied in the present proceedings if at all able to.⁴² In the event the national court should confirm that *res judicata* prevented it from doing so, this national rule should be set aside as an excessive obstacle to the effectiveness of EU VAT law.⁴³

This certainly encroaches upon national procedural autonomy, however it had to do with limiting the impact of *res judicata* on proceedings dealing with different sets of facts from the one which led to the initial decision. The possible consequence of such a rule would be to prevent EU law from ever being correctly applied to an individual if it had been incorrectly applied in the past. One must also take into account the particular importance given by the ECJ to the correct application of EU law in matters related to the EU budget, among them VAT law. In this respect, this case law is very similar to the cases related to State aid rules: although not an area of exclusive competence, the fight against abusive practices in the field of VAT is certainly a priority for the ECJ and the EU as a whole.

The *Finanmadrid*⁴⁴ Case presents a different type of intervention in national procedural law, one which is required by EU legislation, in this case by Directive 93/13 on unfair terms in consumer contracts.⁴⁵ The ECJ found that Spanish civil procedure was contrary to the Directive insofar as it prevented the court ruling on the enforcement of an order for payment to assess, of its own motion, whether a term was unfair, because of the *res judicata* granted to the decisions of court registrars who were competent to hear applications for such orders but not to assess the fairness of contract terms. The result was that it could be excessively difficult, or impossible, to ensure that consumers obtain the protection conferred upon them by the Directive.⁴⁶ The only avenues available to obtain an assessment of unfair contract terms were to challenge the decision by which the court registrar closed an order for payment, which was too unlikely, or for the court registrar to refer the matter to the court of their own motion, which they were only required to do under specific circumstances.⁴⁷ If a court registrar closed the order, and this went unchallenged, *res judicata* made it impossible to review unfair terms at the stage of litigation concerning the enforcement of the order.⁴⁸

⁴² Ibid., para. 30.

⁴³ Ibid., paras 31-33.

⁴⁴ Case C-49/14, *Finanmadrid EFC v. Jesús Vicente Albán Zambrano and Others*, EU:C:2016:98.

⁴⁵ Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts, O.J. 1993, L 95/29.

⁴⁶ C-49/14, *Finanmadrid*, para. 54.

⁴⁷ Ibid., paras 52-53.

⁴⁸ Opinion of A.G. Spuznar in Case C-49/14, *Finanmadrid*, EU:C:2015:746, paras 74-75.

One interesting aspect of this case from the point of view of *res judicata* is the type of national decision whose finality was at the root of the problem. As Advocate General Szpunar noted, is not commonplace for judicial decisions made without any adversarial process to benefit from such a protection.⁴⁹ Indeed, in a number of national traditions as in EU law, *res judicata* does not apply to judicial orders which do not rule on an aspect of the conflict on which both parties have been heard or at least have had an opportunity to be heard.⁵⁰ This rule is usually justified by motives very similar to those which were used by the ECJ in this case: both parties need to have been able to make their case on any issue which, once decided, can become irrevocable.

Although this ruling does not fit the same pattern as the previous examples in terms of areas of EU competence in which the autonomy of Member States might lead to problematic consequences for of EU interests, it can also be considered a fairly reasonable exception to procedural autonomy. First, because this ruling is part of a gradual harmonisation of national procedural law in matters related to consumer protection, on the basis of legislative instruments. Second, because the authority granted to orders issued by court registrars under these national provisions seemed to expand the scope of *res judicata* in a way that was incompatible with consumer rights - indeed, the question whether these procedural rules were compatible with the right to effective judicial protection under Article 47 of the Charter was raised by the referring court, although it did not provide enough information to enable the ECJ to rule on the matter.⁵¹

3.2. A New Limitation of Cross-Jurisdictional *Res Judicata*

The exceptions to national *res judicata* described above can be understood as based on the protection of important EU competences from *ultra vires* decisions of national judges and from excessive protection being granted through *res judicata* to certain decisions in a way that prevents the effective application of EU law in significant ways. However, the Court of Justice judgment in *CRPNPAC v. Vueling Airlines*⁵² seems to create a new exception which could have broader consequences.

The facts of the cases at issue in the main proceedings had led to litigation before French labour and civil courts, on the one hand, and criminal courts, on the other. The *Chambre*

⁴⁹ Ibid., para. 72.

⁵⁰ See Bouty, op. cit. supra note 16, para. 297. In EU procedural law, see for example Case T-106/13, *d.d. Synergy Hellas Anonymi Emporiki Etaireia Parochis Ypiresion Pliroforikis v. European Commission*, EU:T:2015:860, para. 47.

⁵¹ Case C-49/14, *Finanmadrid*, paras 56-57.

⁵² Cases C-370/17 and 37/18, *CRPNPAC v. Vueling Airlines*.

criminelle (Criminal Chamber) of the *Cour de cassation* found that Vueling had committed fraud by obtaining E-101 certificates from the Spanish authorities for its flight and cabin crew members operating out of the Paris-Charles de Gaulle Airport. The certificates stated that these workers were only temporarily posted to France under Article 14(1)(a) of Regulation no 1408/71⁵³ whereas the labour inspectorate found a number of irregularities, including false declarations of residence. The Court of Appeal of Paris and the *Chambre criminelle* found that Vueling had a branch or, at least, an operating base at the Paris-Charles de Gaulle Airport and had deliberately violated French law. The *Chambre criminelle* is a supreme court, its judgment therefore automatically became *res judicata*. The civil law court hearing one of the cases at issue in the main proceedings, and the *Chambre sociale* (Social Chamber) of the *Cour de cassation* in the other case, both had doubts concerning the compatibility of the judgment of the *Chambre criminelle* with EU law, and decided to refer questions to the ECJ. The problem was that the criminal courts had convicted Vueling without making use of the procedure set out in Article 84a(3) of Regulation 1408/71,⁵⁴ which permits national institutions in both Member States to engage in dialogue in order to determine whether E-101 certificates have been fraudulently obtained.

The aspect of this case that is relevant here is the fact that courts examining civil and labour law cases after the publication of the judgment from the *Chambre criminelle* were expected to comply with the cross-jurisdictional rule of *autorité de la chose jugée au pénal sur le civil*. This rule provides a specific, often termed absolute, authority to criminal judgments over civil proceedings concerning the same facts.⁵⁵ It prevents judges dealing with civil law proceedings from calling into question the essential elements of the earlier criminal law judgment, including all important components of the grounds of the decision such as the existence of the facts as characterised by the court, or indeed the guilt of the accused.

The consequence of this rule in this case was that, in principle, the French courts in the main proceedings had to disregard the potential violation of EU law by the *Chambre criminelle* and consider themselves bound by its finding that the certificates had been fraudulently obtained in order to hold Vueling liable to pay damages to parties who claim to have been affected by this fraud. The ECJ found that the French criminal courts had violated EU law by making a finding of fraud and disregarding the E-101 certificates without initiating the procedure laid down in Article 84a(3), which would have allowed them either to cooperate with the

⁵³ Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, OJ, English Special Edition, Series I 1971(II), p. 98, in the version as amended and updated by Council Regulation No 118/97 of 2 December 1996, OJ 1997 L 28/1, as amended by Regulation No 631/2004 of the European Parliament and of the Council of 31 March 2004, OJ 2004 L 100/1.

⁵⁴ Now Article 76(6) of Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ 2004 L 166/1, as amended by Regulation No 465/2012 of the European Parliament and of the Council of 22 May 2012, OJ 2012 L 149/4.

⁵⁵ See Botton, op. cit. *supra* note 24.

competent Spanish institution in order to review the evidence, or to establish that this institution had failed to undertake such a review and to make a decision based on the evidence provided to it within a reasonable time.⁵⁶ With this finding, the ECJ confirmed the referring courts' dilemma: they had to choose between obeying an essential principle of French procedural law or applying EU law.

The ECJ did not stop here but went on to answer whether the primacy of EU law should lead a civil court of tribunal of a Member State to disregard a national rule of *res judicata* such as the one at issue. The Court starts with the usual disclaimer that it understands the importance of *res judicata* in both the legal order of the EU and in those of the Member States and that EU law does not require national courts to set aside such domestic rules even if to do so would make it possible to remedy a situation incompatible with EU law, neither does it require them to automatically revisit a decision that has acquired *res judicata*.⁵⁷ However, the ECJ reminds us of the broader principles which regulate the interaction of EU law with national procedural laws: the principles of equivalence and of effectiveness. In this case, the relevant test was effectiveness: the application of the procedural rule at issue would have prevented the civil courts from calling into question the findings of fact and legal classifications made by the criminal courts in breach of EU law. As a consequence, this incorrect application of Article 84a(3) of Regulation no 1408/71 would persist through all later litigation concerning the same facts. According to the ECJ this effect of *res judicata* goes beyond what could 'reasonably be justified by the principle of legal certainty'.⁵⁸

The reasoning presented in paragraphs 92 to 97 of the *CRPNPAC* judgment is striking for several reasons. The ECJ uses a number of rhetorical tools that have become quite common in the case law related to national *res judicata*: for example, the judgment switches from examining whether the principle of effectiveness allows such an interpretation of the principle of *res judicata* to examining how it should be balanced with the principle of legal certainty. This leads the Court to frame the debate as a balancing act between two principles of equal constitutional importance in the legal order of the EU. It also helps move the focus away from the fact that the ruling may require a national court to set aside domestic procedural rules. The ECJ also establishes an analogy between the national rule at issue in this case and that which gave rise to *Fallimento Olimpiclub*. However, this analogy is not entirely convincing. The exception to national rules of *res judicata* established in that judgment was based on what were deemed excessive temporal effects of an initial judicial decision which clearly violated EU substantive law in the specific policy area of the fight against abusive practices in VAT. By contrast, *CRPNPAC v. Vueling Airlines* has to do with a purely procedural violation of a mechanism for cooperation between national authorities in matters related to social security.

⁵⁶ C-370/17 and 37/18, *CRPNPAC v. Vueling Airlines*, para. 86.

⁵⁷ *Ibid.* paras 88-90.

⁵⁸ *Ibid.*, para. 96.

Moreover, it deals with the protection granted to *res judicata* in later litigation which, at least in part, concerns the same set of facts. Such protection is extremely common in the Member States - and in EU procedural law.⁵⁹ Although the peculiarities of each national procedural law system prevent broad generalisations, concepts such as *autorité positive de la chose jugée* in French law,⁶⁰ *materielle Rechtskraft* in German law, the second function of *cosa juzgada material* in Spanish law⁶¹ or of *cosa giudicata sostanziale* in Italian law,⁶² and even issue estoppel in the Common law⁶³ can be seen as expressing this necessary aspect of *res judicata*, whose effects cannot be restricted to the same parties engaged in litigation about the same aspects of the same sets of facts, but must be extended to protect final judicial rulings from being called into question in later proceedings even if the new litigation involves other parties, or if it concerns different facts or a different legal characterisation of the facts.

This protection granted to *res judicata* beyond the strict bounds of the initial proceedings is often considered particularly important when the first judgment was made by a criminal court. Such judgments, once final, are protected in particular from being challenged before courts outside the criminal order. One frequent example of proceedings which may take place outside the criminal court system but be related to a final decision made by a criminal court is the situation where civil law claims arise out of the same set of facts and are decided in later litigation. The specific protection granted to the judgments of criminal courts before civil courts is a traditional feature of many civil law systems and remains an important rule in France and other Member States.⁶⁴ It is based on the idea that criminal trials are better suited to reach the truth of a situation and on the particular status of criminal justice. In other systems where no general obligation to follow the findings of the criminal court exists, elements such as a finding of fact (e.g. of the inexistence of a fact) or a guilty verdict may not be rebuttable in civil courts or are at least granted high evidentiary value, and parties and judges in civil litigation commonly refer to the results of investigations or the contents of criminal judgments as evidence.⁶⁵

⁵⁹ See, for example, the use of *res judicata* in Cases 77/70, *Maurice Prelle v. European Commission*, EU:C:1971:68, para. 10 and T-45/01, *Stephen G. Sanders and Others v. European Commission*, EU:T:2007:221, para. 26; or even implicitly, in Case T-291/04, *Enviro Tech Europe and Enviro Tech International v. European Commission*, EU:T:2011:760.

⁶⁰ Tomasin, *Essai sur l'autorité de la chose jugée en matière civile* (LGDJ, 1975), para. 239.

⁶¹ Tomé Tamame, "La cosa juzgada formal y la cosa juzgada material", *La Ley: Revista jurídica española de doctrina, jurisprudencia y bibliografía* (2004) 1175-1784, at 1778.

⁶² Biavati, *Diritto processuale dell'Unione europea*, 3^a ed. (Giuffrè, 2005), at 240.

⁶³ Tapper, *Cross and Tapper on Evidence*, 12th ed. (Butterworth, 2010), at 92-93.

⁶⁴ Danet, "Chose jugée", *Rép. pénal* (2019), para. 133.

⁶⁵ Pradel, *Droit pénal comparé*, 4e éd. (Dalloz, 2016), at 566.

Although the cross-jurisdictional effects of *res judicata* are always a contentious issue,⁶⁶ Advocate General Saugmandsgaard Øe was quick to dismiss concerns based on such domestic rules. He addresses them in a mere footnote indicating that the French rule is ‘not generally accepted in the Member States’.⁶⁷ The ECJ does not address the issue but the Advocate General seems to consider the exception to the French rule acceptable because it is in a minority position among Member States. Setting aside the question whether the Advocate General has indeed provided proof that it is a minority position,⁶⁸ one should question whether this should be the criterion on which such adjustments of national procedure are required. More importantly, the judgment completely overlooks the more general questions raised by the authority and evidentiary value of criminal judgments in civil litigation, which is far more common and a very useful tool to ensure the coherence of a legal system. As Daniel Sarmiento writes, this judgment creates a strong incentive for parties to undermine the conformity of criminal judgments with EU law in order to challenge convictions which have become final.⁶⁹

It is unclear whether the ECJ was aware of the importance of challenge to certain national doctrines of *res judicata*. This is a significant addition to the previous exceptions which were related to inability to rectify a violation of EU substantive law. In *Vueling Airlines*, the ECJ requires national courts to introduce exceptions to the cross-jurisdictional authority of a final criminal conviction in simultaneous litigation based on the same facts, not because the conviction is incompatible with EU substantive law but because national courts reached their decision without complying with procedural requirements established in EU law. It is too early to tell whether this addition to the bases found in EU law to challenge national *res judicata* will have more far-reaching consequences than the previous ones but some clarification and a better engagement with the internal logic of national procedural systems are definitely needed.

The lack of engagement with the internal justifications for the rule in *CRPNPAC v. Vueling Airlines* is all the more disconcerting by the fact that other recent judgments show the Court of Justice trying to take a more holistic view of domestic procedural systems. The balanced approach to potential uses of EU law in order to challenge the authority of national judicial decisions is found not only in case law related to the limited direct exceptions required by EU

⁶⁶ See the interesting case made by Coutts in "The Effect of a Criminal Judgment on a Civil Action", 18 *Modern Law Review* (1955), 231.

⁶⁷ Footnote 113 under para. 165 of the Opinion of A.G. Saugmandsgaard Øe in Joined Cases C-370/17 and 37/18, *CRPNPAC v. Vueling Airlines*, EU:C:2019:592.

⁶⁸ *Ibid.* The Advocate General does not provide much evidence for this statement and quotes a textbook which does not, in fact, refer to all the legal systems for which he seems to have found evidence.

⁶⁹ Sarmiento, "Primacy of EU law and *res iudicata* in national criminal proceedings, revisited and reversed. A comment on *Vueling* (C-370/17 and C-37/18)", *EU Law Live*, 8 April 2020.

law but also in the more frequent cases where the ECJ requires limited adjustments or refuses to allow a wider use of EU law-based claims to counter national *res judicata*.

4. A Balanced Engagement with National Procedural Rules

Trends in recent case law give the impression that the Court of Justice is becoming more comfortable developing solutions which, without going as far as requiring exceptions to the finality of judicial decisions, require a detailed engagement with domestic procedural law. The ECJ enters into a dialogue with national judges about their possible options in order to circumvent these rules. Asking national courts to tweak procedural rules in order to favour the effective application of EU law is not a new phenomenon. The ECJ has long been willing to ask national courts to accept limitations of national *res judicata*, provided that they only consist of taking full advantage of mechanisms which already exist in national law, even if the result is to considerably expand the scope of application of a rule which, in purely national contexts, would only be relevant in exceptional situations.⁷⁰ The development of the case law on the interaction of national *res judicata* with EU law has nevertheless seen an interesting evolution in recent years. This inflection is apparent, for example, in the Court's new insistence that in applying the principle of equivalence, courts must take into consideration 'the purpose, cause of action and essential characteristics' of the action at issue and the one to which it is being compared.⁷¹

One factor in this evolution is that ECJ is asked to examine increasingly complex mechanisms being established in the Member States in order to allow national courts to revise final rulings, whose exceptional nature within procedural systems makes it difficult to establish the limits to procedural autonomy and national *res judicata* in EU law. These mechanisms have required the ECJ to revisit its case law on the use of national rules allowing limitations to *res judicata* in order to apply EU law (3.1). More generally, the ECJ seems to be engaging increasingly often, and in a more detailed way, in a dialogue with national judges about the ways in which they can circumvent the limits to proper application of EU law caused by national *res judicata* (3.2).

⁷⁰ See Cases C-453/00, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*, EU:C:2004:17, paras 24-27; C-234/04, *Kapferer*, para. 23; C-40/08, *Asturcom*, para. 53; C-213/13, *Impresa Pizzarotti & C. SpA v. Comune di Bari and Others*, EU:C:2014:2067, para. 62; C-69/14, *Dragoș Constantin Târșia v. Statul român, Serviciul public comunitar regim permise de conducere și înmatriculare a autovehiculelor*, EU:C:2015:662, paras 30-41.

⁷¹ This is not a new test in EU law but it was rephrased in Case C-234/17, *XC and Others*, EU:C:2018:853, para. 27.

4.1. A Moderate Approach to National Remedies Allowing Retrials

Recent developments in the procedural systems of several Member States include the establishment, or the modification, of special mechanisms which allow final judicial decisions to be revised under exceptional circumstances. These ‘hybrids and procedural mutants’ bred by the Member States⁷² are notably the result of the development of constitutional justice and of European Convention (ECHR) law. An application to the European Court of Human Rights (ECtHR) can only intervene once there is a final decision⁷³ at the national level. A number of national mechanisms have been established to allow the victims of human rights violations recognised by the ECtHR to challenge the judicial decision made in their case and obtain a retrial, especially in criminal matters.⁷⁴ Other mechanisms have been set up on the basis of similar concerns for the effectiveness of constitutional review, in order to allow any claimant to challenge a final judicial decision based on a norm which is found to be contrary to the constitution. All of these mechanisms constitute exceptions to normal rules of *res judicata* which claimants may be tempted to use in order to challenge national judgments contrary to EU law.

The rule introduced in judgments such as *Kapferer* allows the ECJ to maintain the general rule that EU law respects national *res judicata* while encouraging claimants to make the most of whatever mechanism is available to challenge it. Where the exceptions to *res judicata* move beyond traditional claims such as those based on the discovery of new elements of fact, to include claims based on new evidence that a norm applied in a case was unconstitutional or contrary to European Convention law, this has the potential to significantly alter the scope of the *Kapferer* approach to challenges to national *res judicata* based on EU law. The delicate balance which the ECJ had tried to find between the effectiveness of EU law and the protection of national *res judicata* is challenged by the introduction of new, broader exceptions at the national level and the inevitable question of their extension to claims based on EU law.

⁷² Opinion of A.G. Bobek in Case C-676/17, *Oana Mădălina Călin v. Direcția Regională a Finanțelor Publice Ploiești*, EU:C:2019:94, para. 90.

⁷³ Article 35(1) of the European Convention of Human Rights. There may of course be special circumstances where the applicant is absolved from the requirement, see e.g. : ECtHR, *Akdivar and Others v. Turkey*, Appl. No. 21893/93, judgment of 16 September 1996.

⁷⁴ See, for example: in Austria (Paragraphs 363a to 363c of the *Strafprozessordnung*, introduced by the *Strafrechtsänderungsgesetz*, BGBl. 762/1996); in France (Articles 622 ff. of the *Code de procédure pénale*, introduced by the *Loi 2014-640* of 20 June 2014, *JORF* no. 142 of 21 June 2014); in Spain (Article 5 bis of the *Ley Orgánica del Poder Judicial*, introduced by the *Ley Orgánica 7/2015*, of 21 July 2015 (*BOE*, 22 July 2015)).

The temptation to draw a parallel between EU and ECHR law in order to expand the scope of one such remedy appears in *XC and Others*.⁷⁵ The review mechanism at issue was established in Paragraph 363a of the Austrian Code of Criminal Procedure, under which a case can be reheard after it is found to be based on a rule which violates the ECHR by the European Court (or even earlier) and the violation may have affected the substance of a decision on criminal law in a manner detrimental to the person concerned.⁷⁶ The claimants had submitted an application under this mechanism, alleging inter alia an infringement of the *ne bis in idem* principle enshrined in EU law. The referring court asked whether Article 4(3) TEU and the principles of equivalence and effectiveness required it to extend the scope of this mechanism to alleged violations of EU law.

The ECJ replied that they did not and, interestingly, relied on the effectiveness of the EU legal system in order to protect national *res judicata* from the threat which could have resulted from such a claim. Indeed, the judgment of the ECJ relies heavily on its previous case law and the general rule established therein, that the interaction of EU and national judicial systems should not lead to a weakening of national rules related to *res judicata*.⁷⁷ From the point of view of the Court of Justice, EU law in principle relies on national procedural rules and is particularly respectful of *res judicata* as an expression of fundamental principles and requirements common to both the EU and national legal orders. Here, the usual *obiter dictum* linking national and EU principles of *res judicata*, which usually appears to be an attempt to reassure national judges that EU law would only ever require minor changes to their procedural rules, serves a different purpose since it reinforces the Court's assertion that EU law cannot expect to benefit from a remedy such as that at issue.⁷⁸

The ECJ relies on a rather predictable application of the principles of equivalence and effectiveness combined with an interesting constitutional argument related to the characteristics of the EU legal and judicial system. The ECJ's position is, essentially, that the EU judicial system already provides EU law - and the Court's rulings - sufficient effectiveness not to require Member States to damage *res judicata*. Although such mechanisms may be required in order to allow ECtHR rulings to have some effectiveness for the victims of human rights violations, the EU legal order has other means at its disposal

⁷⁵ Case C-234/17, *XC and Others*. For a more detailed presentation of the facts and commentary of the Case in this journal, see Varga, "Retrial and principles of effectiveness and equivalence in case of violation of the ECHR and of the Charter: *XC*", 56 CMLRev. (2019), 1673-1696. See also : voir aussi Simon, "Répétition d'une procédure pénale en cas de violation des droits fondamentaux", *Europe* (2018), Décembre, Comm. n° 12, 10-11; Turmo, "La efectividad del derecho de la Unión Europea como motivo de protección de la cosa juzgada nacional: nota sobre la sentencia de 24 de octubre de 2018, *XC Y otros*", *Revista de Derecho Comunitario Europeo* 2019, n° 63, 599-626.

⁷⁶ *Ibid.*, para. 6.

⁷⁷ *Ibid.*, paras 52-54, 57.

⁷⁸ *Ibid.*, pra. 52.

which mean that claims based on EU law norms are not comparable: this excludes any application of the principle of equivalence.⁷⁹ Moreover, the effectiveness of EU law does not require lessening the authority granted to final judicial decisions because of the options already available to claimants, such as direct effect combined with the possibility of preliminary references. The Court's position should not, in our view, be understood as stating that the effectiveness of EU law is absolute or that it completely prevents incorrect applications in final judicial decisions. On the contrary, this judgment takes a measured approach insisting on the need to preserve national *res judicata* from excessive challenges where it is not absolutely necessary,⁸⁰ placing a particular emphasis on the originality of the legal order of the EU. In this regard, the ECJ and the Advocate General are right to state that the effectiveness of CJEU decisions on the correct interpretation of EU law is better ensured than that of ECtHR decisions due to the structure of the judicial system established in the TFEU, and that even Protocol no. 16 is not comparable to the preliminary reference mechanism in terms of the protection it can provide claimants before national courts.⁸¹

The Court of Justice's approach to these exceptional remedies, as established in *XC and Others*, thus seems to be that EU law should not benefit from them on the sole basis of the principles of equivalence and effectiveness, because the effective application of EU law should not expand the scope of exceptions to *res judicata* beyond what is strictly necessary. This approach is confirmed in two other judgments concerning similar review mechanisms, *Hochtief* and *Călin*.⁸² In *Hochtief*, the remedy which the company had tried to rely on was the common revision mechanism applicable where a judgment that has become *res judicata* was made without taking into account facts which the party was unable to present through no fault on their part but were discovered later. This is similar to remedies available in many domestic

⁷⁹ *Ibid.*, para. 47.

⁸⁰ One must agree with D. Simon when he writes that allowing the analogy in order to extend the Austrian mechanism to EU law violations would have been simplistic (*op. cit.*, *supra* note 80). The interpretation according to which the ECJ was attempting to preserve its jurisdiction to interpret the Charter does not seem entirely convincing and does not place a strong enough emphasis on the necessary protection of *res judicata* at the national level (*contra*, Varga, *op. cit. supra* note 80, at 1695).

⁸¹ As the Advocate General explains (Opinion of A.G. Saugmandsgaard Øe in Case C-234/17, *XC and Others*, EU:C:2018:391, paras 80-82), Protocol No 16 is not likely to increase the effectiveness of the ECHR before national decisions have acquired the force of *res judicata* to a level comparable to that of EU law: first, not all Member States have signed it (indeed, Austria has not), second, it presents significant differences with the preliminary ruling mechanism insofar as it is only available to the highest courts, requests are filtered by the ECtHR, and the advisory opinions resulting from this procedure are not binding.

⁸² Case C-676/17, *Oana Mădălina Călin v. Direcția Regională a Finanțelor Publice Ploiești*, EU:C:2019:700.

systems and indeed to the revision procedure under EU law.⁸³ *Hochtief* sought to rely on the preliminary ruling delivered during the proceedings but this claim was rejected because this was evidently not a new fact discovered after the judgment was delivered.

Hochtief also sought to rely on a claim based on the principle of equivalence, indicating that there also exists a mechanism which allows final judgments to be revised following a decision of the Hungarian Constitutional Court. The claimant in *Călin* tried to rely on a similar reasoning based on equivalence in relation to a review mechanism established in Romanian law, although this judgment also examines the unusual case of an extraordinary remedy created specifically to allow claimants to challenge final judgments within a month if they are found to be contrary to EU law.⁸⁴ In the course of the main proceedings, this mechanism was compared to the one which allows parties to challenge a final judgment following a decision of the Constitutional Court. This remedy is available for three months after the publication of the Constitutional Court decision, but only for the parties in the proceedings which gave rise to this decision before being settled by a final judgment.⁸⁵ In both *Hochtief* and *Călin*, the claimant in the main proceedings argued that claims based on EU law should be able to benefit from the rule created to challenge unconstitutional judgments.

In both cases, the complexity of the national procedural systems at issue made it difficult to apply the principle of equivalence under the test set out in *XC e.a.*, which requires the judges to determine whether the purpose, cause of action and essential characteristics of the actions brought to safeguard EU law and the ones they are being compared to are clearly similar.⁸⁶ The extraordinary nature of these remedies makes them, by nature, more difficult to compare to other procedural mechanisms. In both cases, insofar as they were able to make sense of the national procedural rules,⁸⁷ A.G. Bobek and the Court found that the principle of equivalence does not require an extension of the more favourable rules to claims based on EU law. In particular, A.G. Bobek rightly argues that the ability to take into account the decision made by a Constitutional Court following an objection during the proceedings which gave rise to a judgment is not truly comparable to what was being sought in *Călin*, which was to challenge a

⁸³ Opinion of A.G. Bobek in Case C-676/16, *Călin*, EU:C:2019:94, para. 91. Under Article 44 of the Statute of the Court of Justice of the European Union, an application for revision of a judgment may be made on the discovery of a fact which is of such a nature as to be a decisive factor but was unknown to the Court and to the party claiming the revision when the judgment was given (Protocol n° 3 on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 (OJ L 228/1).

⁸⁴ Case C-676/17, *Călin*, para. 32.

⁸⁵ *Ibid.*, paras 37-39.

⁸⁶ Case C-234/17, *XC and Others*, para. 22, quoted in the Opinions of A.G. Bobek in Cases C-620/17, *Hochtief*, EU:C:2019:340, para. 96 and C-676/17, *Călin*, para. 67.

⁸⁷ In particular, in *Hochtief*, the precise nature and scope of the remedy which allows for a retrial of cases following a ruling of the Constitutional Court seems to have prevented the ECJ from making an explicit decision and even A.G. Bobek eludes the issue in his Opinion in Case C-620/17, *Hochtief*, paras 101-103.

final judicial decision following an ECJ judgment made in a different case. The remedy based on constitutional law was related to the *inter partes* effects of a judgment and this is typically the purpose of such extraordinary mechanisms for the review of judicial decisions.⁸⁸ The comparison with claims based on the *erga omnes*, normative effects of a preliminary ruling is therefore unfounded and cannot justify an exception to national procedural autonomy.

The ECJ therefore shows a measured approach, refusing to always choose the option that would best serve the effective application of EU law and respecting the exceptional nature of the challenges to *res judicata* which these remedies allow. This willingness to engage with the specifics of the domestic rules at issue is particularly visible in *Călin*, in the ECJ's reasoning on the effectiveness of the remedy established for claims based specifically on EU law,⁸⁹ more specifically on the one-month period of limitation. Referring to previous case law,⁹⁰ the ECJ set out to determine whether this rule is reasonable, *and* whether its application in the case at issue was reasonable, with regard to the date when it was introduced in Romanian law. This period of imitation seemed acceptable in the abstract,⁹¹ but its application was not in this specific case since it had been established and published in the Official Journal after the claimant had brought the claim for revision. The ECJ held that, because the claimant could not have known of a clear and precise period of limitation when she brought her claim, applying this rule could be contrary to the principle of protection of legitimate expectations, a corollary of the principle of legal certainty.⁹² The judgment presents a detailed analysis of the national procedural rules and is careful to present a balanced view, not exclusively focused on the effectiveness of EU law.

This detailed approach is probably necessary in view of the complexity of this type of remedy and the difficulty of any application of standards such as effectiveness and equivalence in these cases. However, other aspects of recent case law show a similar willingness to engage in the minutiae of national procedural law and to guide the national judge towards options which may allow a better application of EU law without requiring exceptions to *res judicata*.

⁸⁸ Opinion of A.G. Bobek in Case C-676/16, *Călin*, paras 76-77.

⁸⁹ Note that the same provision of Romanian law was at issue in Case C-69/14, *Târșia*, but the cases at issue in the main proceedings were sufficiently different to warrant a new examination of its effectiveness: Opinion of A.G. Bobek in Case C-676/17, *Călin*, paras 43-47.

⁹⁰ See the Court's judgment in Case C-676/17, *Călin*, para. 43: the Court notably refers to its foundational judgment in *Rewe*, stating that 'the setting of reasonable time limits for bringing proceedings is compatible with the principle of effectiveness' (Case 33/76, *Rewe-Zentralfinanz and Rewe-Zentral*, EU:C:1976:188, para. 5). The Court also makes a less than convincing reference by analogy to *Asturcom* (C-40/08, quoted *supra* note 13). On this point and for a more detailed analysis of the judgments in Cases C-620/17, *Hochtief*, and C-676/17, *Călin*, see Turmo, "Immutabilité des actes juridictionnels et droit de l'Union européenne: poursuite de l'exploration des mécanismes nationaux de révision et de réexamen par la Cour de justice", RAE (2019), no 3, 639-653, at 649.

⁹¹ Case C-676/17, *Călin*, para. 49.

⁹² *Ibid.*, paras 50-55.

4.2. An Increasing Confidence in Interactions with National Procedural Law

The Court of Justice seems much more willing in recent judgments to give detailed advice to judges on the options at their disposal to circumvent the impact of a final judicial decision on the effectiveness of EU law. Mitigating the effects produced by *res judicata* within the bounds of what is possible in the national judicial system is, of course, always deemed preferable to calling into question the finality of a judgment. This approach is apparent in the settled case law according to which, wherever a judge is able to reexamine an issue covered by *res judicata*, they should seize this opportunity in order to ensure the effectiveness of EU law. The ECJ has taken to examining the available options even in the absence of a national rule explicitly allowing the referring court to make an exception to *res judicata*.

This is evidenced in judgment such as the one the ECJ gave in joined cases *FMS and Others*,⁹³ on the grounds of inadmissibility used by Hungarian authorities examining asylum applications and the placing of asylum seekers in a detention centre at the Serbian-Hungarian border. In one of the questions, the referring court submitted that Serbia's refusal to readmit the applicants should reinstate an obligation for the Hungarian authority to examine their applications. Because the ECJ held that the motives invoked to reject the claimants' initial applications in Hungary were contrary to Article 33 of Directive 2013/32,⁹⁴ it refused to examine the question as framed by the referring court. Instead, it chose to answer whether the competent authority must reexamine an application *ex officio* or whether a new application must not be considered inadmissible as a 'subsequent application' in a situation where the initial application was rejected by a decision based on grounds contrary to EU law, but which has been confirmed by a court. The case of an administrative decision contrary to EU law being confirmed by a final judicial decision was already dealt with by ECJ case law. Perhaps due to the specificities of the legislative framework at issue, the Court chose to provide the referring court with a detailed answer which relied both on settled case law on national *res judicata* and on Directive 2013/32.

The ECJ confirmed that EU law does not require national authorities to reexamine *ex officio* an application on which a decision has already been made when that decision has been confirmed by a final judicial decision, even if the initial decision was contrary to Directive

⁹³ Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, EU:C:2020:367.

⁹⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180/60.

2013/32.⁹⁵ This is the result of settled case-law which the ECJ takes great care to restate.⁹⁶ A more interesting question was whether a new application could be rejected as a ‘subsequent application’ under Article 2(q) of the Directive.⁹⁷ According to the ECJ, a finding in one of its judgments that the legislation on the basis of which the first application was rejected is contrary to EU law constitutes a new element within the meaning of Article 33(2)(d), which means that a new application cannot be declared inadmissible on that basis. And this must be so even if the applicant does not refer to this ECJ judgment him or herself.⁹⁸ Without referring to national procedural law, the ECJ is effectively inviting national authorities to ignore national *res judicata* when examining a new application on the basis that the *ratio* for the first decisions, both administrative and judicial, was contrary to EU law.

The ECJ was clearly aware of this, as evidenced by the precedent quoted in this part of the reasoning: the *Vueling Airlines* judgment of 2 April 2020, quoted by analogy when affirming the importance of legal certainty and the risk that the applicant could never benefit from a correct application of EU law.⁹⁹ The ECJ then goes on to give national courts a hint as to a potential compromise solution which would not directly contravene *res judicata*, while allowing the initial decision to be overturned. At para. 199, it states that ‘*in the judicial review of the lawfulness of the return decision, which was adopted after the rejection of an application for international protection which was confirmed by a judicial decision which has become final, the national court hearing an action against the return decision may examine, by virtue of EU law and without the authority which the judicial decision confirming the rejection has acquired precluding it from examining, as an ancillary matter, the validity of such a rejection when it is based on a ground that is contrary to EU law*’. This suggestion is based on the idea that an ancillary examination of the validity of the rejection will not, in effect, lead to challenge the finality of the initial decision and its judicial confirmation. However it may, in practice, provide a useful alternative if a national court is willing to allow applicants to avoid expulsion and, perhaps, to present a new application for international protection.

⁹⁵ Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others*, para. 190.

⁹⁶ *Ibid.*, paras 185-188.

⁹⁷ A subsequent application under Article 2(q) of Directive 2013/32 is defined as ‘a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1).’

⁹⁸ Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others*, paras 194-195.

⁹⁹ *Ibid.*, para. 197.

This line of reasoning is very reminiscent of the one by which the ECJ answered Member States' objections to the *Köbler*¹⁰⁰ principle of liability based on *res judicata*. The Court replied that *res judicata* was not strictly at issue since a claim in damages does not lead to a direct challenge against the final judicial decision that has been found to be contrary to EU law, rather this claim is a way for parties to circumvent the problem and seek compensation.¹⁰¹ Damages are evidently not an ideal solution to ensure the effectiveness of EU law but they provide a good second-best option when the alternative requires an attack on such an essential principle of national procedural law.

Interestingly, another feature of recent case law on national *res judicata* is precisely the systematic inclusion of a reference to the *Köbler* option as a last resort, in case domestic law prevents the final judicial decision contrary to EU law from being challenged. At the end of the judgments in *XC and Others*, *Hochtief*, *Călin*, and *Telecom Italia*, the ECJ explicitly reminds the referring courts that individuals have the possibility of holding the State liable in order to obtain legal protection of their rights recognised by EU law.¹⁰² This may be a welcome reminder despite the known limitations of the implementation of the *Köbler* and *Francovich* principles in the Member States, but it is particularly interesting that the ECJ is explicitly presenting it as an alternative to direct challenges of national *res judicata*. Although the Court maintains that the liability of Member States for the actions of their courts adjudicating at last instance is not a violation of the finality of judicial decisions, this development in the case law indicates a willingness to more openly invite national judges (and litigants) to examine the available options beyond the direct challenges which must remain an exception.

5. Conclusion

The case law of the ECJ in recent years shows a maturation of the relationship between the two levels of the judicial systems set up by the Treaties. While confirming the Court of Justice's measured approach to restrictions to national *res judicata* based on the effectiveness of EU law, the judgments also show an increased willingness to engage with the detailed procedural rules at issue in order to provide useful responses to national courts and litigants. Some issues remain, however, such as the continued absence of a clear, explicit acknowledgement of some aspects of EU law related to this principle, and the possibly related insufficient awareness of the potentially far-reaching consequences of particular precedents at the EU and national levels. If the ECJ is going to encourage litigants to develop strategies

¹⁰⁰ Case C-224/01, *Köbler*.

¹⁰¹ *Ibid.*, paras 37-40.

¹⁰² To quote the term used by the ECJ in : Case *XC and Others*, para. 58; Case C-620/17, *Hochtief*, para. 64; Case C-670/17 *Călin*, para. 56; Case *Telecom Italia*, paras 67-69.

based on the potential challenges to national *res judicata* based on EU law, it would be better for it to do so in a more explicit way, based on clear restatements of the scope of the principle within EU procedural law. Some aspects of this case law, such as the consequences of the *CRPNPAC v. Vueling Airlines* judgment, will require further clarification from the Court. Overall, these judgments demonstrate that significant progress has been made, but they also remind us of the importance of the principle and the need to take *res judicata* seriously, by improving the coherence of the CJEU's own case law and engaging in serious benefit-risk analysis of the potential restrictions of national rules in the name of effectiveness.