



UNIO
EU LAW JOURNAL

**A question of procedural law:
the principle of the inalterable nature of a tried case and the violation of EU law**

João Ramos Lopes

Judge at Court of Appeal of Guimarães

ABSTRACT: The reform operated in the regime of civil appeals by the Decree-law 303/2007, from 24 August 2007, introduced a new basis for an extraordinary appeal for review. This paper states our views on the (in)conformity with EU law of the solution put forward by the Portuguese legislator in order to ensure, on the one hand, the legal certainty and, on the other hand, the validity (here entailed in the jurisprudence of the CJEU), by establishing for the extraordinary appeal for review a maximum preclusion time limit of five years from the moment the ruling under review is passed, in cases in which the decision was made by a court of last resort, that failed to fulfill its obligation to ask for a preliminary ruling.

KEYWORDS: extraordinary appeal for review of res judicata – inalterability of res judicata – violation of EU law – limitation period.

1. Our inspiration for the present text came when we stumbled upon an impressive expression used by Judge Cunha Rodrigues to illustrate the transfer (on the international scene) of parcels of state sovereignty to supra-national organizations or institutions constituted as powerful centres on the legislative front (EFTA, NAFTA, MERCOSUL, ASEAN, CARICOM, CCG and European Union), a reality that coexists with the fragmentation of power or political authority within states – the modification of the «landscape of sovereignty».¹

¹ Cunha Rodrigues, “As novas fronteiras do direito”, in *Os espaços curvos do direito*, Instituto da Conferência (Porto: Conselho Distrital do Porto da Ordem dos Advogados, 2006), 11.

Focusing our attention on the European Union and the judicial power – which is after all, the backdrop of this colloquium – the best example of the modification of the «landscape of sovereignty» that we can find in our domestic legal system results from European Union law itself [*rectius*, from the decisions of the Court of Justice of the European Union (CJEU)] as the basis of the extraordinary appeal for review.

Furthermore, the legal institute for sentence review (which tends to reconcile the permanent and constant tension between legal certainty and validity) based on the violation of EU law, demonstrates that the jurisdictional power also entails, as a complement to the nationality dimension (translated by the rule of inalterability of a final judgement – in the guise of legal certainty), the European citizenship (translated here in the basis for review – in the guise of respect for EU law).

2. The reform carried out in the regime of civil appeals by Decree-law 303/2007, 24 August 2007, introduced a new basis for extraordinary appeal for review.

According to the provisions of paragraph f) of article 771 of the Code of Civil Procedure (CCP), a final decision from a Portuguese court can be revised when it is irreconcilable with the final decision of an international instance of binding appeal for the Portuguese State.

This expansion of the basis for extraordinary appeal for review was justified in the preamble of this legal act permitting that «the internal decision passed in court can be reviewed when it violates the European Convention on Human Rights or the norms issued by the competent organs of international organizations to which Portugal is a party».

This provision covers, therefore, the decisions of the European Court of Human Rights (ECtHR).

The States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention of Human Rights (ECHR)] commit to respect and enforce final judgments of the European Court of Human Rights (Article 46 of the Convention), compensating the damages and losses caused by the violation in question.

Notwithstanding, whenever the violation was a consequence of a judicial act covered by *res judicata*, compliance with a decision of the ECHR would be unachievable – in fact, a decision, in these circumstances, would not constitute, in light of our legal system, a basis for reviewing the national sentence. The amendment introduced by the Decree-law 303/2007 responded to this distortion, enabling the 'judicial' execution of the decision of ECHR through the legal institute of sentence review of the (national) final decision.²

The fact is that ECHR is not an international court of appeal – the access to ECHR does not seek intervention of a hierarchically superior court with the intention of cancelling, modifying or replacing the national decision based on an error of judgment or procedure.

Moreover, we are not aware, of the existence of any international body of binding appeal for the Portuguese State – i.e., any international body that works as a court of a hierarchically superior category to national courts. An international court hierarchically superior to which the parties in the proceedings can seek to challenge an unfavourable decision and obtain, on appeal, the cancellation, modification or replacement of the decision, is to our knowledge non-existent.

However, the ECHR is a binding international body for the Portuguese State, as can be read in the preamble of Decree-law 303/2007, the normative point of reference that should be effectively considered for the interpretation of paragraph f) of article 771 of the CCP.

The Court of Justice of the European Union (CJEU) is a binding international instance for the Portuguese State, also.

Despite the fact that this court is not an international instance of appeal in the aforementioned sense, it is indeed an international binding court [it is a European Union Institution – cf. Article 13 (1) of the Treaty of European Union (TEU)]. The decisions of the CJEU³ are binding for all the judicial courts of the Member States and not only for the recipient one.

² In this sense, cf. Luís Correia de Mendonça e Henrique Antunes, *Dos Recursos (Regime do Decreto-Lei n° 303/2007)*, Quid Juris, 2009, p. 354/355.

³ The CJEU is responsible for ensuring compliance with the law in the interpretation and application of the Treaties and to decide on the validity and interpretation of acts of other institutions and bodies of the Union - article 19 (1), second part of the TEU and Article 267 of the TFEU.

Since the CJEU is a European Union Institution and its decisions have binding force (*via* the precedent) we can conclude that the required (and sufficient) assumptions are met to affirm that the decisions from the CJEU may provide a basis for an extraordinary appeal for review, in the light of paragraph f) of article 771 of the CCP.⁴

Such extraordinary appeal for review – as prescribed by article 772 (2) (b) CCP – cannot be brought before the Court if more than five years have elapsed since the final judgment and it should be filed no later than 60 days since the decision, in which the revision is based, has become final.

This regulatory framework remains in force in the CCP which is about to take effect (articles 696 and 697) with an alteration that we would like to highlight– there will no longer be a limitation period of five years counted from the final judgement to be reviewed when rights of personality are at stake [article 697 (2)].

That amendment, I believe, is an inevitable and imperative submission of positive law to the claims of human personality – the recognition that human personality is not the product of any positive regulation but the reflection, in this regulation, of the personality of each person *tout court*.⁵

Consequently, with exception of cases, in which the decision revises aspects related to rights of personality, the limit of five years for bringing an extraordinary appeal for review will, however, remain in the regulatory framework that is to take effect – the limitation period that is applicable to all grounds of review, including the incompatibility with the final decision of the international binding judicial instance for the Portuguese State.

⁴ We share this conclusion with the Portuguese doctrine. Cf. Fernando Amâncio Ferreira, *Manual dos Recursos em Processo Civil*, 9th ed., 336; Maria José Rangel Mesquita, “Âmbito e pressupostos da responsabilidade civil do Estado pelo exercício da função jurisdicional”, *Revista do CEJ*, 1st semester 2009, 11, 289; Maria José Rangel Mesquita, *A responsabilidade pelo exercício da função jurisdicional: âmbito e pressupostos*, 18, note 66, where the author defends that the provision entails unquestionably a final decision of a national judicial organ that is incompatible with a decision of the CJEU, regarding both infringement actions and cases where preliminary rulings were raised and, in that respect, in violation of the EU law and the principle of primacy.

⁵ Cf. Orlando de Carvalho, *Teoria Geral do Direito Civil*, ed. Francisco Liberal Fernandes, Maria Raquel Guimarães e Maria Regina Redinha, 3rd ed. (Coimbra: Coimbra Editora), 230.

3. A relevant question to consider in our view – in light of both the current Code of Civil Procedure and the one about to take effect – concerns the conformity with EU law of the solution put forward by the national legislator to achieve a balance between legal certainty and validity (here entailed in the jurisprudence of the CJEU), by establishing for the extraordinary appeal a maximum preclusion time limit of five years from the moment the ruling under review is passed, in cases in which the decision was made by a court of last resort that failed to fulfill its obligation to ask for a preliminary ruling, whether or not the interested party suggested it and whether or not it pleaded/argued with reference to EU law.⁶

The Court of Justice (Judgment *Kempter*⁷) has already ruled that EU law does not impose any time limit for the submission of an application for reviewing final decisions. It also stated that Member States have the freedom to fix, in the name of the principle of legal certainty, reasonable time constraints as long as they are consistent with the principles of equivalence and effectiveness.

The time limit prescribed in the national legal system for filing an extraordinary appeal for review [60 days from the moment the ruling under review becomes final – according to article 772 (2) (b) of the current CCP and article 697 (2) (b) of the CCP about to take effect] should therefore be analysed and considered in the light of the principle of effectiveness.

The question addressed is not focussed on this time limit for filing an appeal attached to the decision of the CJEU, but rather on the aforementioned limit of five years from the moment the ruling under review becomes final.

4. The CJEU recognizes the importance of the principle of *res judicata*, both for the European Union legal order and national legal systems. In fact, to ensure both stability of the law and legal relations and the sound administration of justice, it is necessary that

⁶ Cf. Judgement *Kempter*, 12 February 2008, Case C-2/06 and Judgment *Kuhne & Heitz*, 13 January 2004, Case C-453/00.

⁷ Cf. Judgement *Kempter*, 12 February 2008, Case C-2/06.

judicial decisions which have become final, after all the appeal procedures have been exhausted, and upon expiry of those periods to appeal, can no longer be challenged.⁸

From this reasoning, the CJEU understands – and has decided accordingly – that EU law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of EU law by the case in question.⁹

As a matter of fact, in the absence of European regulations on the matter, the procedures for the application of the principle of the authority of *res judicata* lie within the sphere of competence of Member States (in accordance with the principle of procedural autonomy).

However, as set by the binding jurisprudence of the Court of Justice, when certain conditions are met, the national body (bound by the principle of European loyalty¹⁰) will be obliged to re-examine/review a final judgement taking into account the interpretation of EU law as made by the CJEU.¹¹

Also, according to the binding jurisprudence of the CJEU, the obligation to review an administrative decision exists when the following requirements are fulfilled (and because this is also a condition, the interested party requests a review in a timely manner):¹²

- the national body, in accordance with national law, has the power to review the decision;

⁸ Cf. Judgement *Kapferer*, 16 March 2006, Case C-234/04 and Judgement *Kobler*, 30 September 2003, Case C-224/01.

⁹ Cf. Judgement *Kapferer*, 16 March 2006, Case C-234/04 and Judgement *Eco Swiss*, 1 June 1999, Case C-126/97.

¹⁰ The principle of loyalty [or «principle of loyal cooperation» according to article 4 (3) of TEU] bounds the Union and the Member States to respect and assist in carrying out tasks arising from the Treaties. This entails, for Member States, both the negative obligation to refrain from measures which could jeopardize the attainment of the objectives of the Union (among them, the effective application of EU law) and the positive obligation to adopt general or specific measures to ensure the execution of obligations which may arise under the Treaties or resulting from the acts of institutions of the Union.

¹¹ Cf. Judgment *Kuhne & Heitz*, 13 January 2004, Case C-453/00.

¹² Cf. Judgement *Kuhne & Heitz*, 13 January 2004, Case C-453/00. This ruling was reaffirmed in Judgment *Kempter*, 12 February 2008, Case C-2/06 and recalled in Judgment *Kapferer*, 16 March 2006, Case C-234/04.

- the administrative decision became final as a result of a judgement of a national court ruling at last resort;¹³

- the national court's decision, in the light of the CJEU subsequent jurisprudence, was based on a misinterpretation of EU law and was applied without submitting a preliminary ruling to the CJEU under the conditions laid down by article 267 of TFEU (mandatory request for preliminary ruling).

Another essential condition (as results unequivocally from the jurisprudence of the CJEU), in light of the principle of procedural autonomy of the Member States on this issue, is that the national court has the power, in accordance with national law, to review the decision.

The transposition of these principles set out by the CJEU (relating to administrative decisions which become final by decision of the court ruling in last instance) in the context exclusively regarding judicial decisions which became res judicata (not only to the administrative decision that became final due to the judicial decision) was not clearly excluded nor firmly rejected by the CJEU, as it results from the *Kapferer* Judgment.

Effectively, in *Kapferer* Judgment the CJEU, having considered this possibility (the transposition of such principles in the context of res judicata), fails to take a clear position on the issue (as mentioned above), because in that case the national body was not empowered under national law to reopen that decision (recital 23, final part).

Since the Portuguese legal system (through the legal institute of extraordinary appeal for review) allows courts to re-examine/review judicial rulings when these decisions are inconsistent with the rulings of the CJEU – considering our interpretation of article 771 (f) of the present CCP and article 696 (f) of the CCP about to take effect –, the transposition of the principles established by the CJEU in *Kuhne & Heitz* Judgment and *Kempter* Judgment in the context of decisions pronounced by judicial courts will assume paramount

¹³ It should be stated that the obligation to raise a preliminary ruling (Article 267, § 3 TFEU) exists for the national court that decides on the specific issue in last resort (that is, without the possibility of ordinary appeal). The obligation to raise a preliminary ruling is, therefore, not limited to the national court occupying the highest position in the hierarchy of national courts, in accordance with organic law.

importance (as long as they constitute or reflect a minimum conformation with EU law concerning this matter). This is especially relevant in light of the principle of primacy.¹⁴

In such an event (i.e., the CJEU deciding that the referred principles as regards to the requirement that final administrative decisions, made definitive by rulings of the courts, are transposed to the framework of courts' decisions), it is important to clarify (patently) under what terms Member States may (within the framework of their national legislation) limit the ability to grant their courts the re-examination/review of judicial decisions that prove to be irreconcilable with subsequent rulings of the CJEU.

This question leads to verify the compatibility of the mandatory nature of this review (the mandatory nature would be present if the assumptions made in the *Kuhne & Heitz* and *Kempter* case law were fulfilled and if the CJEU established that such principles should be transposed to the context of the decisions of the courts) with the procedural autonomy of the Member States – namely if, in this particular subject, beyond the possibility of Member States to allow their courts to review decisions that are incompatible with EU law (considering a subsequent decision of the CJEU), it also entailed the possibility, by granting that power (and in the normative adaptation of the national tool for its exercise), to limit the possibility of review by (namely) imposing preclusion limits attached to the date in which the decision to revise becomes final.

These are issues that only the CJEU can resolve by exercising the powers attributed by the Treaties, especially when dealing with a preliminary ruling. It is important to consider, first, whether the reasoning from *Kuhne & Heitz* Judgment and *Kempter* Judgment can be transposed to the context of court decisions, verified the assumptions upon which that jurisprudence is based, and secondly, to assess whether Member States may, by granting their courts this power of review, confine it by imposing time limits attached to the date in which the decision to revise becomes final.

¹⁴ The principle of primacy was affirmed by the Court of Justice from the observation that the transfer of powers, first in the sphere of Member States on behalf of European institutions, while confined to certain areas, implies a definitive limitation of the sovereignty of the Member States. Judgment *Van Gend & Loos*, 5 January 1963, Case 26/62 and Judgment *Costa/Enel*, 7 July 1965, Case 6/64. According to the Court of Justice this principle implies that Member States are bound to respect and enforce EU law and they are not to apply national law which does not conform or is incompatible with EU law. They shall, therefore, suppress or at the very least, repair national acts that are contrary to EU law. Member States are also bound to respect an autonomous legal order. They cannot, even in order to pursue their own objectives, make any internal arrangement that would result in weakening the Community character and that could shake the legal foundation of the European Union.

The relevance of such a preliminary ruling (provided that the circumstances of this specific case require this decision) is justified considering that the imposition of limitation and prescription limits may result in a violation of the principle of primacy if it results in the imposition of more restrictive conditions than those laid down by EU law, if the principles from those judgments could only be transposed to the strict context of judgments made by courts that rule in last resort and that did not comply with the duty to request a preliminary ruling.

In fact, this would result in a situation where the individual went to court with the intention of enforcing a right that was definitively denied because this same court did not fulfil its obligation to obtain a preliminary ruling. At the direct disposal of the individual only the national litigation is available (the right of action), and not the contentious judicial procedures in the European Union courts (namely the preliminary ruling, which is exclusively in the sphere of jurisdiction of the court¹⁵).

The question differs somewhat from the assessments of the CJEU, particularly in the Judgment *Grundig Italiana*¹⁶ and Judgment *Haar Petroleum*.¹⁷ These cases were primarily concerned with the time limits stipulated for exercising the right to recover sums unduly paid (request of refund of unduly paid taxes and fees). The CJEU affirmed the compatibility of EU law with the fixation, by the legal orders of the Member States, of reasonable time limits for bringing claims or demands to court, in order to ensure legal certainty. Notwithstanding, the CJEU also stated that those time limits may not render virtually impossible or excessively difficult the possibility of exercising the rights conferred by EU law, even though, by definition, the course of such time limits would imply that the action cannot proceed.

However, in the case that we have been analysing, what is at issue is not only the time limit to file an action in court; the subject matter at stake is more precisely the re-examination/review of a decision pronounced by a court ruling in last resort when the latter does not comply with the obligation to obtain a preliminary ruling. This decision is,

¹⁵ Nor is it in the direct availability of the individual the infringement procedure entailed in article 258 of TFEU. In fact, the active legitimacy is conferred, exclusively, to the Commission or to a Member State.

¹⁶ Cf. Judgment *Grundig Italiana*, 24 September 2002, Case C-255/00.

¹⁷ Cf. Judgment *Haar Petroleum*, 17 July 1997, Case C-90/94.

according to the jurisprudence of the CJEU, inconsistent with EU law. In this case, it cannot be considered that the individual has not promptly addressed the court exercising his/her rights. What happened was that this right was denied – being the dismissal of his/her request casually linked to the infringement of the obligation to request a preliminary ruling by the court ruling in last resort.

We would add that, in cases such as those considered, the accountability of the State for breaching EU law, with the consequent compensatory attribution, may in certain cases, be insufficient to effectively protect the right of the individual recognized by the EU legal order.¹⁸

For all that – and assuming that, in light of the principle of primacy, the interpretation that the CJEU makes of a certain provision of EU law (within its exclusive competence as laid down by article 267 of the TFEU) clarifies and defines the meaning and scope since the moment of its entry into force¹⁹ – I propose a reflection on the following questions:

- by giving their courts, through the institute of extraordinary appeal for review, the possibility of reviewing judicial decisions so that they can conform with subsequent decisions of the CJEU, should we not consider that the Member State undertakes to ensure (also in light of the principle of uniform application) the compliance of all the decisions taken by the courts ruling in last resort, that did not fulfil their obligation to ask for a preliminary ruling, to take all the steps in order to ensure the application of EU law?

- in cases in which a decision has been pronounced by a court of last resort, without reference for a preliminary ruling, should the State not – by granting national courts the power to review decisions which do not conform with EU law – take it upon itself to correct the infringement of its obligation to make a reference for a preliminary ruling (thus giving effective and full implementation to the principle of fairness, the principle of primacy and the principle of uniform application)?

¹⁸ That is why – and also due to the fact that the legal procedures of the Union are not directly available to the individual – the solution provided for in article 772 (4) of the CPC [and article 697 (5) of the CPC about to take effect] may be insufficient to safeguard effective judicial protection.

¹⁹ The judgments of the CJEU on preliminary ruling only have declaratory value and not constitutive one. Their effects, therefore, go back, in principle, to the date where the provision interpreted took effect (cf. Judgment *Kempter*). This interpretation is then applicable to all legal relations established prior to the judgment (cf. Judgment *Khune&Heitz*).

- again, in cases in which a decision has been pronounced by a court of last resort, without reference for a preliminary ruling, in granting its national courts the power to review decisions which are contrary to subsequent jurisprudence by the CJEU, isn't the State assuming as relevant the initial term corresponding to the effects of that jurisprudence, i.e., the date of entry into force of the norm interpreted?

- alternatively, does this statute of limitation not constitute a provision prone to unilaterally alter the initial date of expiry of the norm submitted to interpretation and imposed in the name of security and legal certainty, which the State was willing to sacrifice in accordance with EU law, by granting courts the option of reviewing final decisions, so that they conform to subsequent decisions of the CJEU (namely in cases in which the court failed to fulfil its obligation to make a reference for a preliminary ruling)?

- will the date of expiry established in national law not constitute an unacceptable discrimination, considering the principle of uniform application of EU law? Would disparities not lead to discrimination between fellow nationals? For example, a citizen may be prevented from appealing if the verdict regarding his or her case was pronounced more than five years before the decision of the CJEU, whereas another citizen may – on the same day and regarding the same matter – be given that option if that time limit was not reached before the pronouncement of the CJEU.

5. We recall the teachings of Judge Cunha Rodrigues: today's societies are «challenged to make reforms in which law exercises a central role», with one of the objectives being the recreation of «a legal and institutional framework able to provide citizens with tools that enable them to exercise their rights in a political geography that is no longer the Nation-State of recent decades and that obeys a network of connections that affect all areas of life in society».²⁰

Considering our (Portuguese) legal system and our modified «landscape of sovereignty», we believe that it is advisable to raise a preliminary ruling to establish the conformation of the national law – which prescribes the limitation period for bringing an extraordinary appeal for review based on a subsequent ruling of the CJEU – with EU law, in cases where

²⁰ Cunha Rodrigues, “As novas fronteiras do direito”, in *Os espaços curvos do direito*, Instituto da Conferência (Porto: Conselho Distrital do Porto da Ordem dos Advogados, 2006), 11.

the decision to review was pronounced by the court which decided in last resort and this court did not raise a preliminary ruling.