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# THE LEGAL EFFECTS OF A SERIOUS INFRINGEMENT OF EU LAW ON ADMINISTRATIVE AUTHORITIES AND COURTS

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**THE LEGAL EFFECTS OF A SERIOUS INFRINGEMENT OF EU LAW ON ADMINISTRATIVE AUTHORITIES AND COURTS: COMMENTS ON THE JUDGMENT OF 10 MARCH 2022, CASE C-177/20 GROSSMANIA, EU:C:2022:175**

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# THE LEGAL EFFECTS OF A SERIOUS INFRINGEMENT OF EU LAW ON ADMINISTRATIVE AUTHORITIES AND COURTS: COMMENTS ON THE JUDGMENT OF 10 MARCH 2022, CASE C-177/20 GROSSMANIA, EU:C:2022:175

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**Abstract**

*The European Court of Justice's case-law has often dealt with conflicts between the principles of legality and legal certainty in national proceedings. In the Grossmania case, the Third Chamber of the Court ruled on the obligations of national administrative authorities and courts to nullify the unlawful consequences of a manifest and serious infringement of EU law. The preliminary ruling referred to the question of whether administrative authorities and courts should withdraw or disapply administrative decisions that are manifestly and seriously contrary to EU law but have become final in the absence of a challenge before the courts. The Court answered in the affirmative, save in specific cases in which objective and legitimate obstacles can preclude such measures. Nevertheless, in those cases affected persons should be granted the right to compensation, whether financial or other; otherwise, the State is liable for damage caused by the breach of EU law.*

## 1. Introduction

Throughout the years, the Court of Justice of the European Union (CJEU) has ruled many times on the balance to be struck between the principle of legality and the principle of legal certainty in national proceedings, when assessing the status of national decisions adopted infringing upon EU law. As such, the basic legal problem addressed in these rulings is not unfamiliar to Member States' administrative law: all national legal orders have reflected on it, and most of them consider it resolved or at least fully framed by notions such as *res judicata* and legal certainty, and through instruments such as time limits for legal remedies. However, what makes the CJEU's case-law in this field so fascinating and thought-provoking is that, in some circumstances, it leads to a reconsideration of the national well-established assessment of that balance. It actually tends to reinforce the value of the principle of legality endorsed by the primacy of EU law (broken by national legality or practice) in order to avoid its infringement remaining fully or largely deprived of consequences or its practical effect diminished. As the *Grossmania* case will show,[1] the limitation of national procedural autonomy is sometimes necessary.

## 2. The Background to the Case

Grossmania is a commercial company, based in Hungary and owned by nationals from other Member States. It held usufruct rights over agricultural parcels in Hungary. Those rights were cancelled by operation of law, pursuant to a provision of a 2013 Hungarian Law that made it impossible for legal or natural non-Hungarian nationals or residents to hold usufruct rights by contract on agricultural land.[2] Grossmania did not appeal the cancellation of its usufruct rights.

In due time, the CJEU established the incompatibility with EU legislation of the mentioned Hungarian legislation in two different proceedings, first in a preliminary question and later in an infringement procedure. In the *SEGRO and Horváth* case, it affirmed that the Hungarian legislation restricted the free movement of capital and could not be justified, in accordance with the principle of proportionality, either by overriding reasons in the public interest that are recognised by case-law or on the basis of Article 65 TFEU, so that it infringed on Article 63 TFEU.[3] In *Commission v Hungary*, the declaration of infringement was extended to the breach of the combined provisions of Article 63 TFEU and Article 17 of the Charter of Fundamental Rights of the European Union, which recognises the right to own, use, dispose of, and bequeath one's lawfully acquired possessions.[4]

[1] Case C-177/20 *Grossmania* [2022] EU:C:2022:175.

[2] Act No. CCXII of 2013, para 108(1).

[3] Joined Cases C-52/16 and C-113/16 *SEGRO and Horváth* [2018] EU:C:2018:157, para 127.

[4] Case C-235/17 *Commission v Hungary (Usufruct Over Agricultural Land)* [2019] EU:C:2019:432, para 131.

Following the *SEGRO and Horváth* judgment, Grossmania requested the reinstatement of its cancelled usufruct rights. The administrative authorities declared the application inadmissible since the disputed legal provisions were still in force and prevented the reinstatement sought. They also excluded the *SEGRO and Horváth* judgment from having effect on cases other than the main proceedings. The national court, that had to adjudicate on the legality of the rejection, was doubtful of whether the failure to appeal against the cancellation constituted a relevant legal difference with the situation adjudicated in *SEGRO and Horváth* by the CJEU, otherwise materially identical. For this reason, it referred a new question to the CJEU in March 2020.

Despite the reiterated judicial declaration of the infringement of EU law by Hungarian legislation, by the time the issue arrived again to the CJEU, the national legislature had still not repealed that national legislation, nor had it enacted a new one to ensure that EU law was being complied with in Hungary. By contrast, its reaction to the Court's judgment in *SEGRO and Horváth* went in the opposite direction; the passage of new provisions, under which the proceedings for re-registration of rights cancelled in breach of EU law, were made more difficult. They remain pending the conclusion of the investigation by the Public Prosecutor's Office and the resultant judicial proceedings.[5] The national legislature had not even reacted to a previous call of the Constitutional Court of Hungary in 2015 to pass provisions by 1 December 2015, at the latest, allowing for financial compensation for exceptional pecuniary losses caused by the cancellation of usufruct rights.[6]

In other words, not only had EU law been infringed upon, but the binding character of the Court's judgments (including the declaratory, *erga omnes* and retroactive character of its interpretation) had also been fully ignored for three years in Hungary and, instead of a remedy, new legal obstacles were created to the effectiveness of EU law. These contextual circumstances were inevitably relevant for the adjudication of the case, and they were considered in the Advocate General's (AG) Opinion.

## 3. Blowing Hot and Cold at the Same Time: AG Tanchev's Opinion

AG Tanchev was not sure whether the administrative decisions, that rejected the request for the reinstatement of the cancelled usufruct rights, were final. However, assuming that they were, he considered that the precedent *Byankov* judgment[7] had to be followed, and that, by consequence, in light of the principle of effectiveness, EU law precluded national legislation to impose the final character of a decision that had not been contested before the courts 'in the event of the prohibition being clearly contrary to EU law, and despite the fact that such a prohibition continues to produce legal effects with regard to its addressee'.[8]

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[5] Act No. CCXII (n 2) para 108(4) and (5).

[6] Alkotmánybíróság [Constitutional Court of Hungary] July 21, 2015, Judgment no. 21.

[7] Case C-249/11 *Byankov* [2012] EU:C:2012:608.

[8] Case C-177/20 *Grossmania* [2022] EU:C:2022:175, Opinion of AG Tanchev, para 45.

For the AG Tanchev, Hungary cannot legitimately invoke the principle of legal certainty whilst it preserves, in its legal order, provisions which have been declared by the Court to be contrary to EU law two and a half years earlier. Should objective obstacles impede the reinstatement of the usufruct rights, as far as no financial compensation was available in the Hungarian legal order, AG Tanchev proposed the application of the *Brasserie du pêcheur* case-law to require the State to make good damage caused to Grossmania by a breach of EU law attributable to the State.

Nevertheless, AG Tanchev's Opinion did not end there. He also submitted 'general considerations and criticism of the Court's case-law on the finality of administrative decisions contrary to EU law and their withdrawal.' He took advantage of the preliminary reference to criticize the *Kühne & Heitz* judgment; in his view, the latter 'lacks an understandable justification of the adopted view and spreads uncertainty with regard to the interpretation of the four *Kühne & Heitz* conditions.'[9] His stance was that 'a coherent approach should be taken to balancing the principle of legality and the principle of legal certainty' and that 'that approach should not, in my opinion, vary according to whether what is at stake is the withdrawal of an unlawful EU act or that of an unlawful national act.'[10] He did not involve himself in a broader doctrinal discussion on the topic, but his considerations on the matter finished with the following proposal:[11]

> 'Hence, the Court should not leave the determination of that approach to the laws of the Member States in the name of national procedural autonomy. On the contrary, as was the case in the judgment in *Gerekens and Procola*, the Court should align the regime of withdrawal of unlawful national administrative acts with that of the unlawful EU administrative acts.'

## 4. Tilting the Balance: The CJEU's Reasoning

The preliminary question brought to the Court was simple in its reading: it asked about the application of the *SEGRO and Horváth* judgment 'in subsequent national administrative or judicial proceedings either, notwithstanding that the facts of the subsequent proceedings are not entirely identical to those of the previous preliminary ruling proceedings'.[12] At the start, the Court reformulated the question into two issues: one that we might call the *explicit* issue which was whether the omission of a legal contestation of the cancellation of the usufruct rights was relevant in the application of the *SEGRO and Horváth* judgment;[13] and the *latent* issue which was whether, in the absence under Hungarian law of a legal basis allowing Grossmania to be compensated for its losses, the national court could order the reinstatement of the usufruct rights.[14] The Court's answer to this second issue was particularly complete.

[9] ibid para 32.
[10] ibid para 68.

[11] ibid.

[12] *Grossmania* (n 1) para 28.

[13] ibid para 30.

[14] ibid para 31.

In the first part of the judgment, the Court recalled established case-law. An interpretation given by the Court, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, clarifies and defines the meaning and scope of a rule of EU law as it must be or ought to have been understood and applied from the time it came into force:[15] 'in the light of the primacy principle, where it is unable to interpret national law in compliance with the requirements of EU law, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any provision of national legislation, even if adopted subsequently, which contrives a provision of EU law having direct effect, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means.'[16] In the case, 'the referring court, hearing an action of annulment of a decision based, inter alia, on that legislation, is required to ensure that Article 63 TFEU is given full effect by disapplying that national legislation for the purposes of resolving the dispute pending before it.'[17] The same obligation was incumbent on the national administrative authorities before which Grossmania had applied for the reinstatement of its rights of usufruct in the land register.[18]

The Court considered that the referring court had not explained how the lack of contestation of the cancellation of the usufruct rights 'raises any difficulty for the resolution of the dispute in the main proceedings,' since the refusal of the competent national authority to reinstate the rights of usufruct of Grossmania had been based on the national legislation, which despite having been declared contrary to EU law was still in force. For AG Tanchev, the final character of the administrative decisions was not certain in the case; for the Court, it was the relevance of that possible finality what was not clear. Nevertheless, the Court reminded the referring court of the general framework for the application of national law while implementing EU law: the principle of procedural autonomy and its two conditions, the principles of equivalence and effectiveness.[19]

The CJEU's case-law does not go against the finality of administrative decisions, the compliance with time limits for lodging complaints against administrative decisions and, consequentially, the preservation of the principle of legal certainty.[20] But it establishes exceptions; 'particular circumstances' may be capable, by virtue of the principles of effectiveness and sincere cooperation, of requiring a national body to review or disapply an administrative decision that has become final, because, in that context, 'it is necessary to take account of the particular features of the situations and interests at issue in order to strike a balance between the requirement for legal certainty and the requirement for

[15] ibid para 42.

[16] ibid para 43.

[17] ibid para 45.

[18] ibid para 46.

[19] ibid para 49.

[20] ibid paras 52-53.

legality under EU law.'[21] At this point, the legal reasoning of the judgment started landing on the factual context of the case.

The Court argued, first, that the national legislation at issue, like the administrative decisions implementing that legislation, constituted 'a manifest and serious infringement both of the fundamental freedom provided for in Article 63 TFEU and of the right to property guaranteed in Article 17(1) of the Charter.' Furthermore, the infringement appears to have had significant repercussions, since more than 5,000 nationals of Member States other than Hungary were affected by the cancellation of their usufruct rights. In these circumstances, the Court concludes, particular importance must be attached to the requirement of legality under EU law.

The third 'circumstance' to be considered was that the extinguishing of usufruct rights resulted from the 'operation of law', that is, it produced its effects independently of the deletion decisions adopted subsequently by the competent national authority. The reasoning was as such: even if the cancelation of the usufruct rights were an event independent of the extinguishing by operation of law of those rights, as submitted by the Hungarian government at the hearing, the national legislation was liable to give rise to confusion as to whether it is necessary that the holders of usufruct rights affected by extinguishing contest the subsequent deletion decisions in order to safeguard their usufruct rights.[22]

The conclusion of the first part of the judgment follows, stating 'if it were to be confirmed that Hungarian law does not make it possible, in an action brought against the rejection of a request for reinstatement of rights of usufruct, to contest the measure deleting those rights, which has since become final, that impossibility cannot reasonably be justified by the requirement for legal certainty and therefore should be rejected by that court as being contrary to the principle of effectiveness and the principle of sincere cooperation arising from Article 4(3) TEU.'[23]

The second part of the judgment addresses the possibilities to redress the consequences of the infringement of EU law. According to established case-law, national authorities not only have to disapply national legislation incompatible with EU law, but also to take all other general or particular measures necessary to ensure that EU law is complied with within that State.[24] The Court analyzed several possibilities available in the case.

First, it affirmed that the reinstatement of unlawfully cancelled rights of usufruct is 'the most suitable means of restoring, at least with prospective effect, the legal and factual situation in which the person concerned would have been had it not been for the unlawful cancellation of its rights.'[25] The national court is empowered by EU law to order that reinstatement.

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[21] ibid para 54.

[22] ibid para 61.

[23] ibid para 62.

[24] ibid para 64.

[25] ibid para 65.

The Court nevertheless conceded that, as stated by AG Tanchev, 'in specific cases, objective and legitimate obstacles, in particular those of a legal nature, may preclude such a measure, in particular where, since the cancellation of the rights of usufruct, a new owner has acquired in good faith the land affected by the rights concerned or where that land has been restructured.' The referring court should ascertain, in light of the legal and factual situation existing at the time of ruling, whether it is appropriate to order the competent authority to reinstate the rights of usufruct held by Grossmania.[26]

Thus, the second situation is one in which reinstatement proves impossible: in that case, the former holders of the cancelled rights of usufruct should be granted 'the right of compensation, whether financial or other, the value of which would be capable of making financial reparation for the economic loss arising from the cancellation of those rights.'

Then, the Court goes a step further and refers to the principle of State liability for loss or damage caused by a breach of EU law that, according to a well-established line of case law,[27] requires three conditions to be satisfied: the breached rule of EU law must be intended to confer rights on the individuals, the breach of that rule must be sufficiently serious, and there must be a direct causal link between that breach and the harm suffered by the individual. The Court considered that the three conditions were satisfied in the present case. The legal reasoning had already stressed the manifest and serious character of the infringement in substantive terms. In the context of the State liability, the Court additionally pointed to the duration of the infringement; it persisted despite two judgments finding the breach in question to be established.[28]

## 5. Comments

The *Grossmania* judgment tackles two important issues for the effectiveness of EU law, both related to the legal consequences of a breach of it by national authorities: (i) the alteration caused by the primacy of EU law to the balance struck by national law between the principle of legality and the principle of legal certainty with regard to legal situations that have become final and unreviewable in national legal orders, and (ii) the instruments to restore legality and to nullify the consequences of the implementation of national legislation that infringes on EU law. These topics are so vast and the CJEU's case-law so rich and manifold that only some ideas can be stated in this commentary. I will start with a couple of general considerations on national procedural autonomy and then move to the main aspects raised by the case.

### *5.1. The legally evasive, but politically inescapable notion of national procedural autonomy*

Both the topics mentioned above—due relevance of the primacy of EU law and its restoration when infringed—fall within the area enclosed by the tricky notion of national

[26] ibid paras 66-67.

[27] Joined Cases C-6 and 9/90 *Francovich and Bonifaci* [1991] ECR I-5357, para 40; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para 51.

[28] ibid para 71.

procedural autonomy.[29] National procedural autonomy is sometimes considered (and presented as such in many textbooks) as a kind of legal norm or principle of EU law, but, strictly speaking, this is not the case.[30] No provision of EU law defines to what extent Member States should preserve their procedural autonomy to implement EU law or to remedy the consequences of an eventual infringement, which is to say, how and when they should use their procedures and legal instruments to channel and resolve individuals' claims based on EU law. There is no such definition because there is no clear division of responsibilities along the substantive/procedural differentiation; the notion of national procedural autonomy has neither the capacity nor the function of demarcating the substantive law of the EU from the procedural law of the Member States.

The notion of national procedural autonomy refers to a situation in a given sector whereby the EU either lacks the competence to fully address the procedural rules governing the Member States' implementation of EU law or it opts, for the time being, to limit itself to rule on the substantive issues, with little or no regulation on the procedural issues of implementation.[31] If the assessment reveals that EU law lacks specific rules in the given sector regarding the implementation of EU law in Member States, that implementation can qualify as one falling within national procedural autonomy. If, by contrast, EU law includes, to some extent, specific procedural or implementation rules, national procedural autonomy must be denied or excluded in the same measure. The existence of EU specific rules of implementation is not conditioned or limited by a prevailing or otherwise to-be-optimized principle of national procedural autonomy, but only by the principle of conferred competences and the criteria guiding their exercise (proportionality and subsidiarity).[32]

The second general consideration is that, through case-law, national procedural autonomy has been powerfully framed and even instrumentalized through the principles of

[29] G. C. Rodríguez Iglesias, 'Sui limiti all'autonomia procedimentale e processuale degli Stati membri nell'applicazione del diritto comunitario' (2001) Rivista italiana di diritto pubblico comunitario 5-28; T. von Danwitz, 'Die Eigenverantwortung der Mitgliedstaaten für die Durchführung von Gemeinschaftsrecht – Zu den europarechtlichen Vorgaben für das nationale Verwaltungs- und Gerichtsverfahrensrecht' (1998) Deutsches Verwaltungsblatt 421-432; D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer 2010); V. Couronne, 'L'autonomie procédurale des États membres de l'Union européenne à l'épreuve du temps' (2010) 3-4 Cahiers de droit européen 296-307; C. Kronke, *Die Verfahrensautonomie der Mitgliedstaaten der Europäischen Union* (Mohr Siebeck 2013).

[30] Among the many critics, see M. Kakouris, 'Do the Member States possess judicial procedural 'autonomy'?' (1997) 34 Common Market Law Review 1408; J. S. Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2003) 9 European Law Journal 5, 599-600; W. Schroeder, 'Nationale Maßnahmen zur Durchführung von EG-Recht und das Gebot der einheitlichen Wirkung. Existiert ein Prinzip der nationalen Verfahrensautonomie?' (2004) 129 Archiv des öffentlichen Rechts 5, 34-35; M. Bobek, 'Why There is No Principle of 'Procedural Autonomy' of the Member States' in H.-W. Micklitz and B. De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2011) 316, 320; X. Arzoz, 'La autonomía institucional y procedimental de los Estados miembros en la Unión Europea: mito y realidad' (2013) 191 Revista de Administración Pública 178. Similarly, Galetta (n 29) 3: 'the procedural autonomy subsists only and to the extent that the procedural competence of the Member States exists and disappears the moment when (…) the procedural competence is taken over by the Union'.

[31] F. Becker, 'Application of Community law by Member States' public authorities: Between autonomy and effectiveness' (2007) 44 Common Market Law Review 1037.

[32] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU), art 5(1).

equivalence and effectiveness.[33] Even in the absence of EU specific rules, any national procedural rule is *not* admissible for the implementation of EU law, only rules that are equivalent to those governing the implementation of domestic law, and which do not render impossible or very difficult the implementation of EU law.[34] These two conditions, particularly the second, provide a regulative yardstick to assess national procedural rules on a case-by-case basis when, for instance, they provide for, or result in, 'legal obstacles' to the full implementation of EU law. What is a tolerable difficulty or a legal obstacle to the effectiveness of EU law may vary with the time and from one area of activity to another.[35]

In this context, the requirement of effectiveness of national rules implementing EU law provides the primacy of EU law with a kind of bulletproof vest. There is never a full level of implementation or legal coherence within a legal order. A degree of effectiveness, however, is not merely an aspiration; primacy without effectiveness would render this principle empty. National autonomy does not allow for infringing on EU law nor for ignoring the consequences of national unlawful decisions. National rules must be instrumental, never detrimental, to the implementation of EU law. That is why the CJEU's case-law on national procedural autonomy focusses less on national procedural autonomy as such and instead on the effectiveness of EU law. The principle of effectiveness of EU law functions in a similarly way to that of preemption in the US.[36]

The legal evasiveness of the notion of national procedural autonomy does not make it politically irrelevant. Reconciling both the effectiveness of EU law and national procedural autonomy is not an easy task, but the solution is not to suppress national procedural autonomy for the sake of the effectiveness of EU law and to replace it by uniform procedural rules for the implementation of EU law by national authorities—be them set by the EU legislature or, as AG Tanchev seems to propose in his Opinion, at least regarding the withdrawal of unlawful national administrative acts, by the CJEU itself. Even if legally evasive, the cancellation of national procedural autonomy would be neither legally and politically feasible nor desirable. The purpose of the European Union is not reduction of complexity through uniformity, but unity in the diversity through multilevel governance, demarcation of competences and subsidiarity. The notion of national procedural autonomy underscores the primary responsibility of Member States

[33] Galetta (n 29) 52-59 speaks of *functionalization*. French scholars refer to *encadrement*: see R. Mehdi, 'L'autonomie institutionnelle et procédurale et le droit administratif' in J.-B. Auby and J. Dutheil de la Rochère (eds), *Droit administratif européen* (Bruylant 2007) 708; P. Girerd, 'Les principes d'équivalence et d'effectivité: encadrement ou désencadrement de l'autonomie procédurale des Etats membres' (2002) 38 Revue trimestrielle de droit européenne 1, 94-102.

[34] See, for instance, Case C-2/06, *Willy Kempter KG/Hauptzollamt Hamburg-Jonas* [2008] ECR I-411, p. I-411, para 57; in the bibliography see Girerd (n 33) 75-102; M. Acetto and S. Zleptnig, 'The principle of effectiveness: Rethinking its Role in Community Law' (2005) 11 European Public Law 375-403.

[35] For P. Nicolaides and M. Geilmann, 'What is effective implementation of EU law?' (2012) 19 Maastricht Journal of European and Comparative Law 3, 383-399, its assessment is still open to non-legal considerations.

[36] Effectiveness is also a component of the principle of preemption in the US. See Tushnet's definition of the doctrine of field preemption: 'if the state law stands as an impediment to the full accomplishment of the federal statute's goals, then it is invalid and the federal law prevails': M. Tushnet, *Taking back the Constitution* (Yale University Press 2020) 140. In the EU legal order, by contrast, the national rule detrimental to the effectiveness of EU law is not invalid but non-applicable.

to implement EU law with their own rules and procedures, unless EU law and its effectiveness require otherwise.

*5.2. The AG Tanchev's criticism of Kühne & Heitz*

From time to time, there is criticism of the pressure that the CJEU's case-law puts on the well-established national balance between the principle of legality and the principle of legal certainty. The more sensitive area is the exceptional breaking of *res judicata*.[37] Even though AG Tanchev's proposal to adjudicate on the case is fully in line with the final decision of the CJEU and even though he is ready to accept the deviation from *res judicata* as was established in the *Biankov* case, in his Opinion, he does not hide a critical stance towards the *Kühne & Heitz* case-law of the CJEU.[38] AG Tanchev's proposal for the adjudication of the case is correct as is the resulting ruling, but his criticism of that case-law, which was irrelevant in the context of the case,[39] is, in my view, questionable.

The *Kühne & Heitz* case-law deals with a special constellation that has no parallel in national legal orders.[40] The first condition for applying this case-law is that the national legal order confers power upon administrative authorities to review final administrative decisions, regardless of its scope. Second, a national court of last resort must fail to submit a preliminary reference to the CJEU, despite the existence of a controversy on the meaning or scope of a rule of EU law. Therefore, while infringing on the duty to refer established in Article 267 TFEU, it interprets that rule under its own authority. Third, a judgment of the CJEU must later clarify the correct meaning or scope of the controverted

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[37] For a recent, thorough account of that case-law, see S. Kohlhepp, *Die unionsrechtlich veranlasste Rechtskraftdurchbrechung* (Duncker & Humblot 2021).

[38] Case C-453/00, *Kühne & Heitz NV/Productschap voor Pluimvee en Eieren* [2004] ECR I-837; confirmed by Joined Cases C-392/04 and C-422/04 *i-21 Germany and Arcor* [2006] ECR I-8559. AG Tanchev is not the only advocate general that criticizes *Kühne & Heitz*: see also the Opinion of AG Ruiz-Jarabo Colomer, in mentioned *i-21 y Arcor* case, para 67.

[39] The *Biankov* and *Kühne & Heitz* judgments do not establish the same case-law. Both accept a breach of *res judicata*, but in very different circumstances. If one accepts one of those judgments as the case-law line to be followed, it is not necessary to polemize with the other.

[40] See case comments by L. Coutron, 'Cour de Justice, 13 janvier 2004, Kühne & Heitz NV/Productschap voor Pluimvee en Eieren' (2003-2004) 3 Revue des Affaires Européennes 417-434; Z. Peerbux-Beaugendre, 'Une administration ne peut invoquer le principe de la force de chose définitivement jugée pour refuser de réexaminer une décision dont une interprétation préjudicielle ultérieure a révélé la contrariété avec le droit communautaire (Commentaire de l'arrêt de la CJCE du 13 janvier 2004)' (2004) 3 Revue du droit de l'Union européenne 559-567; P. Martín Rodríguez, 'La revisión de los actos administrativos firmes: ¿un nuevo instrumento de garantía de la primacía y efectividad del Derecho comunitario? Comentario a la Sentencia del STJCE de 13 de enero de 2004, C-453/00, Kühne & Heitz NV' (2004) 5 Revista General de Derecho Europeo 1-28; M. Potacs, "Bestandskraft staatlicher Verwaltungsakte oder Effektivität des Gemeinschaftsrechts' (2004) Europarecht 595-603; W. Frenz, 'Rücknahme eines gemeinschaftsrechtswidrigen belastenden Verwaltungsakts" (2004) Deutsches Verwaltungsblatt 373-376; G. Britz and T. Richter, 'Die Aufhebung eines gemeinschaftsrechtswidrigen nicht begünstigenden Verwaltungsakts' (2005) Juristische Schulung 198-2002; R. Caranta, (2005) 42 Common Market Law Review 179-188; M. Eliantonio, 'The enforcement of EC rights against national authorities and the influence of Köbler and Kühne and Heitz on Italian administrative law: opening Pandora's box?' (2006) Maastricht Faculty of Law Working Paper 4; X. Groussot and T. Minssen, 'Res Judicata in the Court of Justice Case-law: Balancing Legal Certainty with Legality?' (2007) 3 European Constitutional Law Review 385-417; J.H. Jans y B.A.T. Marseille, "Competence remains competence? Reopening Decisions that Violate Community Law' (2007) 0 Review of European Administrative Law 1, 75-86; X. Arzoz, *Revisión de actos administrativos nacionales en Derecho administrativo europeo* (Civitas 2013) 139-177.

rule. Lastly, the individual that had contested before the courts the EU incompatibility of the administrative decision that became final after the national ruling should immediately ask the competent national authority to review that decision. When all mentioned conditions are met, the national authority should review its original decision unless third persons are affected by that reconsideration.

The *Kühne & Heitz* case-law provides an extraordinary remedy, in both senses: applicable in very exceptional circumstances, in which many conditions must be satisfied successively and with very compelling consequences. This line of case-law operates as a kind of lighthouse for national courts of last instance in navigating the waters of EU law. The message to them is clear: please take the duty to refer questions of interpretation to the CJEU seriously in order to not put your authority at risk. Certainly, it affects legal certainty, but not the rights of third persons, and it only applies in circumstances in which decisions of courts of last resort recklessly fail to comply with EU requirements. The CJEU was cautious enough to not formally touch on *res judicata*, but instead on the finality of administrative decisions in certain circumstances.

The situation was different in the *Grossmania* case. Here, a national court of last instance had not confirmed an administrative decision applying an erroneous interpretation of EU law, without previously referring a question of interpretation to the CJEU.[41] *Grossmania* was not about removing the consequences of failing to refer to the CJEU nor about *deviating from* the force of *res judicata* of national judicial decisions, as in the *Byankov* case, but about *guaranteeing* the force of *res judicata* of the judgments of the CJEU. In other words, the case was about drawing the consequences of a judgment of the CJEU declaring a serious infringement of EU law. As the *Grossmania* judgment states, '[u]nder Article 260(1) TFEU, if the Court finds that a Member State has failed to fulfil its obligations under the Treaties, that Member State is required to take the necessary measures to comply with the judgment of the Court which has the force of *res judicata* as regards the matters of fact and law actually or necessarily settled by the judicial decision in question.'[42] Even if the Hungarian legislative power had failed to amend national provisions which had been the subject of that judgment of the CJEU, 'the referring court is required to take all measures to facilitate the full application of EU law in accordance with the *dicta* in the judgment establishing a failure to fulfill obligations.'[43] The same obligation was incumbent on the national administrative authorities.[44]

### *5.3. Balancing legality and legal certainty in a multilayered legal order*

The well-established national balance between the principles of legality and legal certainty cannot be considered as unalterable after the national legal order has integrated itself into a supranational legal order. Regarding the implementation of EU law, the balance can no longer be purely national, nor be exclusively drawn from domestic arguments, since the sources of legality have expanded. Now, the principle of legality has two main sources, national and supranational, and they can contain rules that contradict

[41] On that condition see Case C-249/11 *Byankov* [2012] EU:C:2012:608, para 51.

[42] *Grossmania* (n 1) para 35.

[43] ibid para 38.

[44] ibid para 46.

each other. When the contradiction has been declared by the CJEU and it is manifest and serious, the national balance may be adjusted.

This was the situation in the *Grossmania* case, in which the CJEU correctly underlined the manifest and serious character of the infringement of EU law by Hungarian legislation. It gave three reasons: the relevance of the EU primary law provisions that were directly infringed upon, including a fundamental freedom of the Treaties and a fundamental right of the Charter; the number of EU citizens being affected (around 5,000 have been estimated); and the persistence in time of the effects of the infringement. The manifest and serious qualification of the infringement is not rhetorical, but crucial; it is the added value of this ruling in comparison to the two previous rulings by the Grand Chamber on the Hungarian prohibition of holding usufruct rights by non-Hungarian citizens and legal persons.

Classifying the infringement as manifest and serious served two purposes in the Third Chamber's legal reasoning. First, it justified the alteration of the ordinary balance between legality and certainty in the case, which is to say, that if these circumstances are met the principle of legality under EU law should prevail over the principle of certainty. It also brought about the extraordinary powers of national courts, which not only should disapply the national provisions contrary to EU law, but also order the competent national authority to reinstate the cancelled usufruct rights. Second, it grounded the final triumph that the ruling conferred on affected persons; if everything else had failed (the capacity to reinstate the cancelled usufruct rights and the national avenues to provided 'a right of compensation, whether financial or other'), the affected persons could claim State liability for damage caused by a breach of EU law under the *Francovich* and *Brasserie du pêcheur* case-law.[45]

The integrated nature of the legal orders of EU Member States also gives an argument to reject AG Tanchev's proposal to align the regime of withdrawal of unlawful national administrative acts with that of the unlawful EU administrative acts. In the withdrawal of the latter, there is a 'simple' conflict within the same legal order, and it tends to be confined to a single or a limited number of cases; in other words, it is a conflict just between EU legality infringed by a single or several administrative decisions and the EU principle of legal certainty promoting their finality. By contrast, in the withdrawal of unlawful national administrative acts, the conflict can be of an entirely different substance; it can neither be regarded solely from a national perspective, nor can it always be assimilated to the 'simple' conflict that may arise with the withdrawal of unlawful EU administrative acts. EU rules are, or must be, integrated into the national order and must be fully and timely complied with and implemented according to the principle of sincere cooperation. However, when national rules infringe on EU law, they do not only close the way to its correct implementation but also eventually multiply the infringement through numerous administrative decisions and judgments that apply those national rules. The resulting conflict is not a 'simple' one between national legality and national legal certainty, but one between *EU* norms and *national* rules that infringe on EU law, and

[45] See the references in (n 27).

which additionally disregard its effectiveness by establishing the finality of the decisions that apply them.

*5.4. Remedies against a serious and manifest infringement of EU law*

The most innovative aspect of the *Grossmania* judgment is the explicit assertion of the possible instruments to remedy the consequences of a serious and manifest infringement of EU law. The preferential remedy is restitution, in the form of the reinstatement of unlawfully cancelled usufruct rights, since this is 'the most suitable means of restoring, at least with prospective effect, the legal and factual situation in which the person concerned would have been had it not been for the unlawful cancellation of its rights.'[46] Nevertheless, if objective and legitimate obstacles, 'in particular those of a legal nature,' impede restitution,[47] it is necessary to grant the former holders of the cancelled right of usufruct the 'right to compensation' governed by national law ('whether financial or other').[48]

The CJEU did not define or clarify the nature of that national 'right of compensation' ('whether financial or other'), since it is incumbent on the national authorities, and therefore, falls within national procedural autonomy. It only pointed at the value of that compensation. The Court was obviously aware that the right of compensation might not exist in the national legal order nor be implemented in the short time. This is why, though the referring court did not ask about that possibility, the Court, willing to exhaust all means to provide remedy, not only invoked the option of State liability in general terms as did AG Tanchev, it also established that the three conditions necessary for its application were met in the case. To that effect, the qualification of the infringement as 'serious' was essential, since only serious violations of EU law ground State liability for the damage caused.

The CJEU observed that the principle of State liability is independent of the national measures of restitution and compensation: in other words, it may coexist with them. This raises the question of the relationship between the two types of compensation foreseen in the judgment. The same expression ('right to compensation') is used to refer to both remedies, which are defined very similarly: the value of the national compensation should be 'capable of making financial reparation for the economic loss arising from the cancellation of [usufruct] rights,' and the principle of State liability should make good the 'loss or damage caused by such a breach.'[49] Even though their sources are substantively and procedurally different and independent from each other, both remedies have the same purpose. When restitution, understood as restoring the legal and factual situation existing before the breach of law, is possible, it will be compatible with both ways of compensation. The reinstatement of unlawfully cancelled usufruct rights does not provide compensation for the period of time they remained cancelled and, therefore, both sources

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[46] *Grossmania* (n 1) para 65.

[47] The explicit examples of the judgment are the same given by AG Tanchev: that a new owner has acquired in good faith the land affected by the rights concerned or that the land concerned had been restructured. Ibid para 66, in connection with AG Tanchev's Opinion, para 55.

[48] ibid para 68.

[49] ibid paras 68-69.

of compensation could step in. Nevertheless, a caveat seems appropriate. The combination of both sources of compensation cannot exceed the effective, whole damage. A general principle of law, common to the legal orders of EU Member States, prohibits it.