

CJEU: No Rehearing for Alleged Infringements of EU Fundamental Rights

Thomas Wahl

On 24 October 2018, the CJEU published a judgment on the question of whether national legislation laying down a remedy allowing criminal proceedings to be reheard in the event of infringement of the ECHR must be extended to alleged infringements of fundamental rights enshrined in EU law (*Case C-234/17 – “XC, YB and ZA”*).

I. The Legal Question

Member States often allocate a special status to the ECHR. When it comes to criminal proceedings, national provisions may allow the reopening of finally judged cases if the ECtHR finds a violation of the ECHR or its protocols and if the national criminal court’s decision might have been affected by the infringement. Sec. 363a of the Austrian Code of Criminal Procedure, for instance, does this.

Since this exception from the authority of *res judicata* is limited to the ECHR, the question arises as to whether it also covers infringements of fundamental rights guaranteed by other legal sources, in particular the EU’s Charter of Fundamental Rights (CFR).

II. The Facts of the Case and the Question Referred

This question was triggered by a case in Austria that concerned several defendants who were alleged to have illegally obtained VAT refunds of over 835,000 Swiss francs. The Swiss Prosecutor’s Office submitted mutual legal assistance requests to the Austrian judicial authorities, with a view to the parties concerned being questioned by the prosecution office of Feldkirch, Austria. The requested defendants XC, YB, and ZA appealed against this idea, arguing that criminal proceedings against them in the same matter had been already concluded in Germany and Liechtenstein. Therefore, mutual legal assistance is precluded because of the *ne bis in idem* principle, enshrined in Art. 54 CISA and Art. 50 CFR. The Higher Regional Court of Innsbruck, ruling at last instance, had dismissed these objections, however, and found that there were no elements pointing to an infringement of the European *ne bis in idem* principle.

Although the order of the Higher Regional Court of Innsbruck had become final, the defendants referred to Sec. 363a of the Austrian Code of Criminal Procedure and asked the Austrian Supreme Court (*Oberster Gerichtshof*) for a rehearing of the criminal proceedings because the Higher Regional Court had wrongly neglected their fundamental rights according to EU law.

Against this background, the Supreme Court referred the question to the CJEU: whether EU law, in particular Art. 4(3) TEU in conjunction with the principles of equivalence and effectiveness inferred from it, obliges Sec.

AUTHOR

Thomas Wahl

Senior Researcher
Max Planck Institute for the
Study of Crime, Security and
Law

ISSN: 1862-6947

<https://eucrim.eu>



363a of the Criminal Code of Procedure to be applied to alleged infringements of fundamental rights guaranteed by EU law (in the case at issue: Art. 50 CFR, Art. 54 CISA).

III. The CJEU's Answer

The CJEU ruled that EU law must be interpreted such that a national court is not required to extend to infringements of EU law, in particular to infringements of the fundamental rights guaranteed in Art. 50 CFR and Art. 54 CISA, a remedy under national law permitting, only in the event of infringements of the ECHR or one of the protocols thereto, the rehearing of criminal proceedings closed by a national decision having the force of *res judicata*.

IV. The Reasoning

The CJEU justified its rationale by examining the principles of equivalence and effectiveness.

1) The *principle of equivalence* prohibits a Member State from laying down less favourable procedural rules for actions for safeguarding rights that individuals derive from EU law than those applicable to similar domestic actions. Therefore, the CJEU has to ascertain "whether the action in question [here: action for the rehearing of criminal proceedings] may be regarded as similar to an action brought to safeguard EU law, in particular the fundamental rights enshrined by that law, taking into consideration the purpose, cause of action and essential characteristics of those actions."

In this context, the CJEU acknowledged fundamental differences between the legal orders of the European Union and the ECHR. It observed that Sec. 363a of the Austrian Code of Criminal Procedure is an exceptional remedy – a remedy to implement the judgments of the ECtHR and thus to comply with the obligations laid down in Art. 46 ECHR.

The main cause of action is that the ECtHR deals with a matter *after* all domestic remedies have been exhausted, which implies the decision of a national court adjudicating in last instance and with the force of *res judicata*. By contrast, the legal order of the European Union establishes a different judicial system intended to ensure consistency and uniformity in the interpretation of EU law. The characteristics of this judicial system are as follows:

- The key element is the preliminary ruling procedure provided for in Art. 267 TFEU;
- The preliminary ruling procedure is based on the idea of a dialogue between one court and another;
- National courts have the widest discretion in referring a matter to the CJEU;
- Courts of last instance are, in principle, obliged to bring a matter before the CJEU if a question relating to the interpretation of EU law is raised before them.

As a result, the constitutional framework of the EU secures the protection of fundamental rights during the proceedings, i.e. *before* a court decision comes into existence with the force of *res judicata*.

In the light of this analysis on the very nature of the legal orders, it must, therefore, be concluded that the procedure securing implementation of the ECtHR, such as that of Sec. 363a of the Austrian Code of Criminal Procedure, on the one hand, and the actions for protecting the individuals' rights deriving from EU law, on the other, are not similar within the meaning of the principle of equivalence.

2) As regards the *principle of effectiveness*, the CJEU stated that it must be determined whether the impossibility of requesting (on the basis of said Sec. 363a of the Code of Criminal Procedure) the rehearing of criminal proceedings finally closed by a decision relying on the infringement of EU fundamental rights makes it impossible in practice or excessively difficult to exercise the rights conferred by the EU legal order.

The CJEU first pointed out that the TFEU does not intend to make additional requests from the Member State other than those laid down by national law in order to ensure the protection of the rights that individuals derive from EU law.

Secondly, the CJEU stressed the very importance of the principle of *res judicata*, both in the legal orders of the European Union and in national legal systems. By referring to previous case law, the CJEU noted that the Union law does neither of the following:

- Oblige national courts to disapply rules of procedure conferring finality of judgements, even if this would remedy a situation that is incompatible with EU law;
- Go back on a judgment having the authority of *res judicata* in order to take into account the interpretation of EU law delivered by the CJEU after that judgment.

The CJEU concluded that, in the present case, it could not find any indications that the Austrian legal order does not provide for legal remedies that effectively guarantee the protection of the individual's rights deriving from Art. 50 CFR and Art. 54 CISA.

V. On Focus

The CJEU upheld the national systems that only provide for a breakthrough of *res judicata* effects in the event of ECHR infringements. It justified this finding with the different mechanisms of action under EU law and the ECHR system: an individual can only take recourse to the ECtHR if national remedies have been exhausted and a national court decision has the force of *res judicata*.

By contrast, the “constitutional framework” of the EU legal order – which provides the preliminary ruling procedure for enforcing EU law – does not necessitate exceptions from *res judicata* effects.

The CJEU followed the [opinion of Advocate General \(AG\) Henrik Saugmandsgaard Øe](#) of 5 June 2018 in this case C-234/17. The AG also highlighted the different characteristics of EU law as an autonomous legal order and of the ECHR as part of international public law.

Both the CJEU and the AG clarified that individuals cannot “play another card” after having missed the opportunity to convince national judges to submit questions of interpretation to the CJEU. In the present case, this was not completely out of question, since Art. 50 CFR/Art. 54 CISA are regularly the subject of interpretation in preliminary ruling procedures. The question must be raised, however, as to which extent defendants can realistically influence the judges' decision to file a reference for a preliminary ruling before the CJEU.

The CJEU's ruling in this case is also relevant for the interpretation of other legal orders with similar provisions as that of Sec. 363a of the Austrian Code of Criminal Procedure. Sec. 359 No. 6 of the German Criminal Procedure Code, for instance, provides for the reopening of the proceedings if the ECtHR held a ECHR violation and the judgment is based on it.

About eucrim

eucrim is the leading journal which regularly informs about current developments in European criminal and “criministrative” law.

All news items are freely accessible at: <https://eucrim.eu/news/>

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases of issues.

The project is co-financed by the [Union Anti-Fraud Programme \(UAFP\)](#), managed by the [European Anti-Fraud Office \(OLAF\)](#).



Co-funded by
the European Union