

THE LIABILITY OF THE STATE FOR DAMAGE CLAIMS RESULT OF VIOLATION OF THE EUROPEAN UNION LAW

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Abstract

The article deals with the questions connected with different court procedures on damage claims grounded in State and Municipalities Liability for Damages Act (1989) result of illegal acts of Bulgarian administrative bodies. The article designates the specific issues of the state liability including the issues connected with the new regulation of the court liability for violation of the European Union law.

Keywords: damage compensation, European Union law, procedural prerequisites for admissibility, claim.

JEL Codes: K4, K23, K33

Introduction

The liability of the state through its bodies for unlawful activities is a general principle of the public law, stipulated in the State and Municipalities Liability for Damages Act (SMLDA), (1989). The liability of the state for damage in all cases is non-contractual liability and has an objective character – it arises regardless the culpable behaviour of the official executing public functions. The institute for the non-contractual liability of the state plays a substitution role in the protection of the rights of the individuals and legal entities against the illegal acts and actions of the state's bodies as it is an additional tool, along with the possibility of appeal, to control the activities of the state bodies and to claim for damage reparation for violation of subjective rights. It is an expression as well of another main legal principle – that of the legality. State bodies are generally obliged to issues acts and perform actions that do not contradict the “law” in the general sense of the term and when this principle is infringed, the individuals are entitled to claim from the state the reparation of the damage occurred.

The individuals could claim damage reparation when law is infringed. The term “law” covers all binding legal rules, part of the domestic legal system, that regulate the behaviour of the subjects. The European law, in that sense, became an internal part of the domestic legal system since the accession of Bulgaria to the European Union (EU) in 2007, as well as the cornerstone of the European Union institutional law - the liability for breach of the Union law (Gutman, 2016). However, until 2019, the SMLDA (1989) did not provide an explicit rule on the liability of the public authorities for damage caused by infringement of the Union law, similar to the explicit rule of article 1 of the SMLDA (1989) on the liability of the administrative bodies for damages caused by illegal administrative activities or article 2 of the SMLDA (1989) on the liability of the judiciary for damages caused by violation of the defendant's rights. In 2019 an amendment in the SMLDA (1989) was accepted by adoption of article 2c of the SMLDA (1989) that particularly specifies the domestic courts which are competent to resolve disputes arisen from violations of the European Union (EU) law. Although the new article 2c of the SMLDA (1989) could be defined as a procedural norm,

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because it does not specify the preconditions of the liability of the public authorities in cases of inflictions of the Union law, it could serve as a legal basis for damage claims grounded on violation of the European Union (EU) law. Article 2c of the SMLDA (1989) establishes a material ground for the damage claims result of European Union (EU) law infringement because it explicitly links the violation of the Union law to the possibility of bringing an action for damage before the administrative or civil court. Furthermore, with the adoption of article 2c of the SMLDA (1989) the legislator recognizes the right of individuals to hold accountable not only the administrative bodies for illegal administrative acts, but also the administrative court itself for its refusal to comply with Community law or decisions of jurisdictions that are not part of the judiciary, to which the Bulgarian court belongs.

As the State and Municipalities Liability for Damages Act (1989) applies to the liability of the executive and judiciary authorities, the article deals with the responsibility of these authorities, although the violation of the European Union (EU) law could lead to the liability of the legislative in cases where the preconditions of its emergence are met.

1. Methodology

The systematic and comparative-legal methods were used in the article. The systematic method reveals the relationship between the different institutes of the liability – the liability of administrative bodies in cases of illegal administrative acts and the liability of the violation of the EU law, as well as the prerequisites of the liability, etc., which are relevant to the subject of current study. The comparative legal method presents the case law of the Court of Justice of the European Union that designates the legal frame of the state's liability and the main conditions of it comes into being.

2. Legal base of the liability for violating the European Union law

The institute of the liability of the state bodies, including the administrative ones, is regulated in the State and Municipalities Liability for Damages Act (1989). The SMLDA (1989) lays down the legal basis which specify the types of state bodies, from whose acts or actions the persons can claim compensation for damages, as well as the specific preconditions under which this claim can be realized. The material basis for the liability for damages resulting of the activity of the administrative bodies is established in article 1, paragraph 1 of the Law. The liability of the administrative bodies is an expression of the principle of rule of law that requires supervision of the actions of administration and reparation of damage caused by illegal actions of administration (Adaoglu, 2016). The administrative bodies shall be liable in the cases when they issue an illegal administrative act or perform unreasonable actions by which they cause property or non-property damages to the persons. A specific feature of the liability of administrative bodies is that they could be hold responsible for damage reparation in cases of administrative silence as well (Saddy & Teixeira, 2016). The liability is expressed in the payment of monetary compensation for damages, the amount of which is determined according to their type - real losses or lost profits (property) or non-property (damage to good name, honour, dignity, etc.). The main feature of the responsibility of administrative bodies for unlawful administrative activities is its objective nature. It is objective liability for another's illegal behaviour, which is subject to the established principles of tortious (non-contractual) liability under article 45 from the Law for obligations and contracts. The liability of the state and municipalities for damages is also defined as “public liability”, due to the fact that the damage arise from an illegal exercise of state power as imperium, i.e. in a legal relationship between unequal parties (Elenkov, Lazarov & Kandeveva, 2007). As the liability of the executive arises in the process of exercising administrative activity, it could also be designated as “administrative tort” under the SMLDA (1989). The responsibility of the administrative bodies is an objective responsibility, which occurs regardless of the guilty conduct of the official, who

issued the illegal administrative act or carried out the unfounded factual action or inaction. In that sense, the damage compensation shall be paid by the administrative body and not by the official who directly issued the illegal administrative act or carried out the unfounded factual action. The personal liability of the official towards the administrative body, sentenced to compensate the damages, shall be realized according to the type of legal relationship with the body and its assessment whether and in what way to punish the official. In case the legal relationship between the official and the administrative body is labour, his responsibility towards the employer is realized by the Labour Code (1986) and the established in the same rules for property and disciplinary liability of the employee, and when the official is a state employee, his responsibility to the appointing authority is in accordance with the rules of the Civil Servant Act (1999) and the disciplinary sanctions provided for therein.

The main precondition for the occurrence of the objective responsibility of the administrative bodies is the illegality of the administrative act or factual action or inaction. The illegality is established by issuing a court decision on an appeal of the affected persons, which annuls the administrative act or the effect of the administrative action or inaction. In this regard, the main prerequisite for engaging the responsibility of the administrative bodies under article 1 of the SMLDA (1989) is the preliminary annulment of the administrative act or factual action or inaction. The claim for damages from illegal administrative activity shall be filed, according to the second paragraph of article 1, before the administrative court. The administrative court rules according to the proceedings for compensations, established in the Administrative Procedure Code (2006).

Article 1 of the SMLDA (1989), on the other hand, covers the non-contractual liability only of the administrative and no other state bodies, such as the administrative court. Until the amendment of the SMLDA (1989) in 2019, individuals had no other line of defence against incorrect court decisions than to challenge them before the second instance, whose decision is final and not subject to appeal.

In 2019 the Bulgarian legislator accepted an amendment in the SMLDA (1989) that has established the legal regulation of the procedure for claims against the administrative bodies as well as the court authorities for damages resulting of substantial infliction of the European Union law. Article 2c of SMLDA (1989) was accepted named "Procedure for dealing with claims against the state for damages for violation of the European law". For the first time the legislator connects the liability for damage not only to administrative authorities but also to court authorities. At the same the law expands the liability to cases where a sufficiently serious infringement of the Union law is executed and thus introduces a new legal ground of the non-contractual liability of the state bodies. Article 2c could be defined as procedural norm as it deals with the procedural questions of the damage claims for violation of the European union law which, when result of the administrative acts and court decisions of administrative courts, are filed before the administrative or Supreme Administrative Court and when result of civil court authorities are held before the civil courts according the Civil Procedure Code (2008).

The amendments in the State and Municipalities liability act follow a Judgment of the Court of Justice of the European Union C-571 – Kantarev (2016) on request for a preliminary ruling of Varna Administrative court (Bulgaria) regarding a damage claim against the Bulgarian National Bank (BNB) under article 1 of the SMLDA (1989).

The request had been made in proceedings between Mr Nikolay Kantarev and the Bulgarian National Bank concerning the harm that Mr. Kantarev claimed to have sustained due to the late payment of the guaranteed deposit on the basis of deposits made to a current account opened with Commercial Trade Bank (CTB) which became unavailable. Mr. Kantarev claimed that the Bulgarian national bank (BNB) failed to comply with the obligation to apply EU law with direct effect in the field of repayment of guaranteed deposits, as the BNB had in relation to Directive 94/19/EC of the European Parliament and of the Council of 30.05.1994 on Deposit

Guarantee Schemes (1994). In the preliminary request the administrative court asks about the procedure that should be followed when deciding on the liability of the bank – whether it should be the procedure according to the SMLDA (1989) or the procedure according to the Obligation and Contracts Act (1950) having in mind the different legal prerequisites of the administrative and civil damage liability. According to the SMLDA (1989), specifically article 1, claim against state or administrative body could be filed only when the administrative act is previously annulled by the court, while this prerequisite under the Obligation and Contracts act is not stated. The question of the Varna administrative court had been provoked by the lack of national legislation determining the procedure for examining damages claims for breaching of EU law and established criteria for distinguishing the jurisdiction of the court - the administrative or general civil court. The request for the preliminary ruling was provoked and from the inconsistent case – law of the Bulgarian courts regarding the jurisdiction of the civil or administrative court’s ruling on actions for damages for harm caused by a breach of EU law. In the previously stated case, the Bulgarian National Bank missed to fulfil its obligations to guarantee the deposits in the stated terms which miss action was not annulled as illegal, but the BNB violated EU law through the said inactivity, as a result of which the plaintiff suffered property damage. Firstly, the Court noted that the principle of State liability for loss and damage caused to individuals as a result of breaches of European Union law for which the State can be held responsible is inherent in the system of the treaties on which the European Union is based. “Thus, it is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with EU law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation”². Furthermore the Court, as to the conditions for incurring the non-contractual liability of the State to make reparation for loss and damage caused to individuals as a result of breaches of EU law, rules that a right to reparation arises when three main prerequisites are at hand: if the rule of EU law infringed confers rights to the individuals, if the breach of that rule is sufficiently serious and if there is a direct causal link between that breach and the loss or damage sustained by the individuals. The Court concluded that the principle of effectiveness requires the national legislation to ensure the individuals the access to court that does not require additional conditions as the three general conditions pointed by the Court. In that respect, the preliminary annulment of the miss activity of the Bulgarian National Bank should not be a prerequisite of the damage claim in the case, or the payment of the 4 % state tax as the Obligation and Contracts Law (1950) requires. The Court ruled that the state liability for reparation of damage result of breach of the European Union law should be held according the procedure in SMLDA (1989).

The judgment of the Court of Justice of the European Union (CJEU) in *Kantarev* (2016) became the reason for the establishment of article 2c in the Liability of the State and Municipalities for Damage act, which despite of its title reference as to the procedure to be followed when filing claims against the administrative or court authorities for violation of the EU law, is the material legal ground for such claims. Article 2c of the SMLDA (1989) enshrines the basic principle of the non - contractual liability of Member States for damage caused to individuals by infringements of Community law of the European Union, established in the case law of the Court of Justice of the European Union (CJEU).

The institute of non-contractual liability of the state for damages for violation of EU law has been consistently introduced in a number of decisions of the CJEU, which assume that the non-contractual liability of the state derives from the principle of loyal cooperation established in Art. 4, § 3 Treaty of EU (2012), and is inherent in the system of treaties on which

² See judgment of 28 July 2016, *Tomášová*, C 168/15, EU:C:2016:602, paragraph 22 and the case-law cited, (2016)

the Union has been founded³. It is considered that the liability of a Member State for damage caused by an infringement of Community law is linked to the need to ensure the effective exercise of the rights conferred on individuals by Community law and their protection. It is the protection of the rights conferred on individuals by Community law that requires them to be able to obtain compensation from national courts for damage caused by an infringement of those rights, including where the infringement results from a final judicial act.

Article 2c from the SMLDA (1989) introduces the institute of non-contractual liability of the state for damages from violation of EU law in the national legislation as an independent ground for engaging the liability of the state through its bodies for damages, among other grounds under the law. Despite the imprecise legislative technique that refers to the general ground of the state responsibility under article 1 of the SMLDA (1989), the provision of article 2c regulates a new special substantive legal basis for liability for damages from administrative activity, along with article 1 of the SMLDA (1989), when the damages are caused by a sufficiently significant breach of European Union (EU) law.

Prior to the amendment of the SMLDA (1989), the grounds for engaging the state's liability for damages from violation of EU law were derived from the principle of loyal cooperation (Art. 4, § 3 of the Treaty of EU, 2012). Member States are obliged to take all necessary measures, general and specific, to ensure the fulfilment of their obligations under the Treaties or by acts of the institutions of the Union, to assist the Community in achieving its objectives and to refrain from any measures which might jeopardize those objectives. A number of specific obligations derive from the general principle of loyal cooperation, including for national courts, some of which are stated in the Treaties and others derived from the case law of the Court of Justice. The institute of non-contractual liability of a Member State for damage caused by infringement of the Union law is considered by the researchers to have arisen following the Judgment of the Court of Justice of the European Union (CJEU) in the Francovich (1991) case, from which date it became part of EU law and the basis for engaging the responsibility of the state through its bodies. The Judgment of the CJEU in the Francovich (1991) case has been defined as a legal norm, created exceptionally by the Court of Justice, further developed in the subsequent case law of the Court of Justice of the European Union (CJEU), which has been the basis for engaging the non-contractual liability of the state for damages for violation of EU law, not article 4, § 3 of the Treaty of the European Union (TEU) (Kostov, 2013). Furthermore, the Judgment of the CJEU in Francovich (1991) case has been considered to established a doctrine in the sphere of the non-contractual liability of the state bodies (Kostov, 2017). Regardless which view of the basis of the non-contractual liability of the state will be shared, with the amendments to the SMLDA (1989) in 2019 and the introduction of the provision of article 2c overcomes the search for a legal basis in the domestic legislation for claims for damages for violation of EU law.

Article 2c applies independently from the general provision of article 1 of the SMLDA (1989) that states the general principle of the damage liability of the state through its administrative bodies in cases of unlawful administrative activities. Article 1 of the SMLDA (1989) is the legal ground of the liability of the administrative bodies for damages arisen from illegal administrative activity. The main condition for damage claims under article 1 is the annulment of the administrative act because of its conflict with the law. There is a contradiction, in that sense, in the norm of 2c when referring to article 1 of the SMLDA (1989) saying that when the damages are caused by a sufficiently significant violation of the EU law

³ in that sense are: Judgment of 19 November 1991 C 6/90 и C 9/90 (Francovich and others), Recueil, c.I 5357; Judgment from 5 May 1996 г. C 46/93 и C 48/93 (Brasserie du pêcheur и Factortame), Recueil, c.I 1029; Judgment C-392/93 British Telecommunications (1996), c. I-1631; Judgment C-5/94 Hedley Lomas (1996), c.I-2553; Judgments on joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others (1996), c. I-4845 and others

under article 1, the procedure for consideration of the claim is that under the Administrative Procedure Code (2006). The second paragraph of article 1 explicitly regulates the procedure for consideration of claims for damages from illegal administrative activity, due to which the repeated reference to the Administrative Procedure Code (2006) in article 2c is not necessary. Moreover, the ground for liability for damages for breach of European Union (EU) law is not related to the annulment of the act, action or omission resulting from an administrative activity as illegal. If a court decision rejects the challenge against the administrative act its legality is confirmed and the ground of article 1 of the SMLDA (1989) does not occur. At the same time, however, if the court decision is rendered in violation of EU law, which is sufficiently substantial and from which the persons bound by the decision suffer damages, then there will be ground for engaging the state's liability for damages under article 2c of the SMLDA (1989). The grounds of article 2c may also arise in cases when the administrative act has entered into force as unappealed, but contradicts EU law, which has been related to damages to its addressees. That is why the reference to article 1 of the SMLDA (1989) in the norm of article 2c, in addition to not being necessary, confuses the regulation of liability for damages for violation of EU law, which, as indicated, is a ground different from the general hypothesis of article 1 of the Liability of the SMLDA (1989).

Subjects of liability under article 2c of the Liability of the SMLDA (1989) are the administrative authorities, whose act, which entered into force as unappealed or excluded from judicial review by a special law, violates a rule of EU law or the administrative court, respectively the Supreme Administrative Court, whose court decision rejects the challenge of an administrative act and thus infringing EU law.

The liability of the administrative bodies and administrative courts for damages caused by violation of the European Union (EU) law is an objective liability that arises regardless of whether the actions of the administrative body or the court were intentional in connection with the application of European Union (EU) law. The rule is explicitly established in the case law of the Court of Justice of the European Union (CJEU) and repeatedly mentioned in the judgments of the CJEU. In that sense the Court of Justice of the European Union (CJEU) in case C-429/09 (Fus) states that: "... although certain objective and subjective circumstances which may be linked within the national legal system to the concept of culpable unlawful conduct are relevant in assessing whether or not a breach of European Union law is sufficiently serious in the light of the case-law (...), the obligation to compensate individuals for damages cannot be made conditional on a concept of culpable unlawful conduct which goes beyond that of a sufficiently serious breach of European Union law."

The principle of non-contractual liability applies in any case where a Member State infringes Community law, irrespective of which institution of the Member state is responsible for that breach. In that regard the Court of Justice of the European Union (CJEU) in C-224/2001 (Kobler) judged that in international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether that breach which gave rise to the damage has been attributable to the legislature, the judiciary or the executive. That principle has to apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals. The mentioned judgment of the CJEU answers the request of a preliminary ruling on the question whether the principle of the non-contractual liability of the Member States is also applicable where the infringement of the EU law stems from a decision of a court adjudicating at last instance and whether, if so, it is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to reparation of the damage. The Court ruled that: "In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be

called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance (...) that the principle of *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance” (Kobler, C-224/2001)

Practically, that decision affirmed the principle of State liability for damage caused by infringements of Community law by final judgments, which liability is fully compatible with the principle of *res judicata* and the independence of the judiciary. In that regard, the decision emphasized on the differences between the two proceedings, the damages proceedings against a Member State and the proceedings in which the final judgment was given, as to the purpose and the parties. “The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage⁴.”

3. Conditions of the damage liability of executive and judiciary for infringement of the EU law

The State and Municipalities Liability for Damages Act (1989) does not establish conditions of the damage liability of the executive and judiciary for violation of Union law. In fact, the legal regulation of liability for infringement of European Union law is limited to the new provision of article 2c, which designates only the procedure for filing the claim for damages, but does not indicate the material prerequisites of the claim. The lack of material regulation, in that sense, requires the preconditions of the damage claim to be derived from the case law of the Court of Justice of the EU. In numerous decisions the CJEU has ruled that the liability of the state for infringement of the law of the union arises when three general conditions are at stake, namely - infringement of a Union rule which has a direct effect and confers rights for the individuals, the breach of the norm is sufficiently substantial and there is a causal link between the infringement and the damage suffered.

These three conditions are sufficient to involve the State’s liability for infringement of EU law. The Member States are not entitled in their national legislation to lay down additional requirements for the State's liability for damages, such as the prior annulment of the act, the action or the inaction, exhaustion of domestic remedies or filing for preliminary administrative proceedings for damage reparation from court decision before the Supreme Judicial Council.

3.1. Breach of EU law

The first condition for engaging the liability of the administrative bodies or court to repatriate the damage arose from the administrative act or service or the final court decision is the violation of the EU law. The breach of law is an obligatory condition of the liability as the state bodies could not be hold responsible for originally defined as lawful and justified conduct (Sonnekus, 2017).

The sources of Union law have been differentiated as primary and secondary sources of legal norms - primary and secondary law, which stay in normative hierarchical dependence. At the top of the normative hierarchy is the primary law, which covers the treaties - the Treaty on European Union, the Treaty on the Functioning of the European Union and its annexes, the Treaty of Lisbon, the Charter of Fundamental Rights as well as the general principles of Union law. The international agreements concluded by the EU with third countries or organizations

⁴ See CJEU in C-224/2001 (Kobler)

under Art. 261, § 1 Treaty on the Functioning of the European Union (TFEU) 2012 are subject to primary law and are also part of Union law. Secondary law covers the legal acts of the Union listed in article 288 of the TFEU - regulations, directives, decisions, recommendations and opinions. Binding legal force has the regulations, directives and decisions. Recommendations and opinions are not a source of rights or obligations, but provide guidance on the interpretation and content of Union law.

The regulation is generally applicable and binding in its entirety. It shall apply directly in all Member States from its entry into force, on the date specified in the Regulation or, if no specific date is specified, on the twentieth day following that of its publication in the Official Journal of the European Union, without the need to implement it into national law.

The Directive has been binding on all the Member States to which is addressed as to the result to be achieved, but leaves it to the national authorities to choose the forms and means of its implementation. The national legislature must adopt an act transposing the directive into national law, bringing national legislation in accordance with the objectives set out in the directive. The individuals are subject to the relevant rights not directly from the directive but by the national law that implemented it. The principle of loyal cooperation obliges Member States to transpose directives in a way that ensures the effectiveness of EU law. Therefore, it is considered that incorrect transposition of a directive leads to its direct effect in the Member State, if, in addition, its provisions are sufficiently precise and clear and create rights for individuals. The directive applies directly also in cases where not implemented at all in the stated terms into national law and has clear provisions which create rights to the individuals. In these cases, the individuals could rely directly on the provisions of the directive before the administrative authorities or court and the breach of the directive gives rise to the right for damage claim under article 2c of the SMLDA (1989).

The decision is binding in its entirety when it designates specific addressees - Member States, natural or legal persons. However, it is binding only on them and provides for measures relating to the specific situation of the Member States or persons concerned. The individual may assert the rights conferred by a decision addressed to a Member State only if it has adopted an act transposing the decision or it is sufficiently clear, creates rights and has not been transposed into national law.

EU law is an integral part of the legal systems of the member states. The violated norm may be part of both the primary and the secondary legislation, may have direct effect or may not be directly applicable. Article 291 (1) of the Treaty on the Functioning of the European Union (2012) obliges Member States to take all necessary measures under national law to implement legally binding Union acts. Furthermore, is an obligation of the court to apply EU law in cases where the national law is inconsistent with the requirements of Union law. The obligation to apply directly the EU law when the national law does not meet the European standards of protection the rights of the individuals, despite the court, have and the administrative authorities. The obligation for administrative authorities to apply EU law is reciprocal to the right of individuals to invoke binding rules, including directives and decisions with direct effect.

The priority of European Union law over national law and its direct effect do not release Member States from the obligation to repeal a national law which does not comply with Community law. This is because maintaining it creates uncertainty in subjects about the ability to rely on it. On the other hand, administrative bodies and the court are obliged to apply the Community legal order when an internal norm contradicts it, regardless of its effect until its repeal, as well as regardless of the type of norm - whether it is legal or by-law. To the greatest extent, the rule of observance of the principles of Community law applies to the administrative court, which is obliged to ensure the full effect of these rules. The national court responsible for the application of the rules of Community law within its jurisdiction is required to ensure

the full operation of those rules, leaving any provision of national law contrary to them, if necessary on its own initiative, without demanding or waiting for the repeal of such a provision by legislative or other constitutional order⁵.

Moreover, the decisions of the CJEU on the interpretation of Community law, rendered on references for a preliminary ruling, have a declaratory effect, which leads to the fact that they operate from the entry into force of the interpreted rule, i.e. have retroactive effect, unless the court limits the effect of the decision in time. “A preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force”⁶. In this sense, even if the national rule is not repealed, the later judgment of the CJEU, which finds a conflict with Community law, is a ground for it not to be applied by both the administrative authorities and the court. That is why the application of an internal norm, which has not been repealed, but contradicts Community law, will constitute a violation of EU law within the meaning of article 2c of the Law on Liability of the State and Municipalities for Damage and will lead to the opportunity for damage claims by private individuals.

The scope of the violation of a norm of the European Union (EU) law also includes cases of non-compliance with the case law of the Court of Justice of the European Union, as well as those in which the court was obliged to make a preliminary reference, the answer to which depends on resolving the administrative law dispute, but did not do so. In its practice, the Court of Justice of the European Union (CJEU) has held that failure of the court to make a reference for a preliminary ruling on the application of European Union law, where it is necessary to resolve a dispute, constitutes a breach of the primary rule of Art. 267 of the Treaty on the Functioning of the European Union (TFEU, 2012) and infringes the European Union law. Whether this violation is sufficiently significant is already a matter of judgment by the court which considers the claim for damages under article 2c of the SMLDA (1989).

3.2. The term “significantly substantial breach” of EU law

Article 2c of State and Municipalities Liability for Damages Act (1998), on second place, demands the infringement of the EU law to be of a “sufficiently substantial” nature. The assessment of whether the violation is sufficiently substantial belongs to the court hearing the claim for damages. According to the CJEU case-law, such a breach implies a manifest and grave disregard by the Member State for the limits set on its discretion. The factors which may be taken into consideration in that regard include, inter alia, the clarity and precision of the rule breached, the measure of discretion left by that rule to the national authorities, whether any error of law was excusable or inexcusable, whether the infringement and the damage caused was intentional or involuntary, or the fact that the position taken by an EU institution may have contributed towards the omission, adoption or retention of national measures or practices contrary to EU law.

In any case where there has been a manifest breach of Court of Justice of the European Union (CJEU) practice, the infringement of Community law is considered to be sufficiently serious.

These criteria have been identified as guiding the practice of the CJEU in dealing with disputes concerning the direct effect of rules of directives which confer rights, in so far as regulations are legally binding regulations applicable under national law. Therefore, some of the criteria are the clarity of the norm of the directive, as well as the scope of the operational autonomy of the member states with a view to transposing the measures established in it. Community law does not define the limits of the discretion of the Member States in choosing the measures when implementing in the national law the EU directives. Undoubtedly, the

⁵ See Judgment of the Court of Justice of the European Union (CJEU) on case C-106/77 (Simmenthal)

⁶ See Judgment of the Court of Justice of the European Union (CJEU) on case C-2/06 (Willy Kempter)

choice of a decision should be in accordance with the general principles of the law of the Union as principles that respect freedom, democracy and the rule of law. The Treaties contain few references to the principles of Union law which are established and developed mainly in the case law of the Court of Justice. These are the principles of legal certainty, institutional balance, justified legal expectations, proportionality, legitimacy, the principle of equal treatment and others. The settled case-law of the Court of Justice of the European Union (CJEU) accepts, in the absence of Community rules in one field, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)⁷.

In this respect, compliance with the principles of Union law has emerged as one of discretion limits of the Member States. If a fundamental principle of Union law is infringed in the act transposing a directive, there is a breach of EU law. Whether this violation will be qualified as sufficiently significant is a matter for the court which hears the case on a claim for damages under article 2c, whose decision will take in mind the circumstances of the specific case and the justification of the violation in view of the protection and predominance of the public over the private interest. There may be cases where specific principles are not applied or are applied, but to a lesser extent, given the need another legally defensible principle of both Union and domestic national law to prevail.

3.3. Direct link between the damage and the EU law breach

The third prerequisite of the claim for damages under article 2c is the existence of a causal link between the violation and the occurred damages. The link should be direct – the administrative act or the court decision that breach the law of the Union should be the main reason for the damage. The causal link is present when the act is a condition that causes negative consequences in the sphere of the injured person, which condition is a condition sine qua non for the damage, i.e. a condition without which the damage would not have occurred. Conversely, there is no causal link where the damage would have occurred in the legal sphere of the injured party and if the administrative act or court decision had not been issued. The damage, in this sense, should naturally and objectively result from the act and not be its accidental consequence. The existence of the casual link in all cases is a task of the national court to determine (Vehovec, 2012). In practice, the absence of a direct causal link in many cases is a ground for the rejection of the damage reparation claim by the court.

The three abovementioned conditions are sufficient for the individual to file a damage claim against the administrative authority or administrative court and engage their liability for EU law violation under article 2c of the SMLDA (1989).

In the case before the court the applicant must indicate the provision of breached Community law which he considers to have direct effect and confers rights and to prove the occurrence of the damage claimed. On the other hand, the plaintiff is not required to prove or refer to the case law of the Court of Justice. The assessment of the existence of the case law of the Court of Justice of the European Union (CJEU), which is applicable in the concrete dispute, belongs to the administrative court hearing the claim for damages. The assessment of whether there is a breach of a rule which directly confers rights and whether that breach is substantial also belongs to the administrative court.

⁷ See Judgment of the Court of Justice of the European Union (CJEU) on case C-2/06 (Willy Kempter).

Conclusion

The amendment of the Law on Liability of the State and Municipalities for Damages (1998) in 2019 and the acceptance of article 2c explicitly established the legal basis for liability for damages for violation of EU law. Among the responsible subjects, along with the administrative bodies, is now the administrative court. Apart from the correct application of the law in the broadest sense of the word, including European Union (EU) law, the court must now observe the practise of the Court of Justice of the European Union (CJEU), which makes its task to resolve the dispute correctly and fairly even more difficult and responsible. On one hand, the designated amendment of the law has increased the scope of protection of personal rights of the individuals and legal entities entitling them to claim reparation from final court judgment whose legal strength applies directly in their legal sphere and could not be repealed.

On the other hand, with the adoption of article 2c of SMLDA (1989) another basic problem of the damage claims, resulting of the infringement of the Union law, was solved – the problem connected with the competent court to resolve the dispute. The regulation is already clear - when the damages are caused by an administrative body or a court decision of the administrative court, the claim is brought before the administrative or Supreme Administrative Court, following the procedure established in the Administrative procedure code and when the damages are caused by a civil court, the claim is brought before the civil court under the procedure of the Civil Procedure code.

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