MEMBER STATE LIABILITY FOR JUDICIAL BREACH OF EU LAW

EJTN ADMINISTRATIVE LAW TRAINING: “The role of the Administrative Judge in the State”

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The Theoretical Origins of the Member State Liability Principle

- One of the basic principles governing EU law is the principle of the rule of law. In accordance with this principle, if a State body causes damage to an individual as a result of an unlawful act, the former is obliged to compensate the latter for the harm suffered.

- Pursuant to the effet utile principle, Member States must adopt the necessary and effective measures in order to secure the rights of the European citizens that derive from EU Law.

- The principles of the direct application and supremacy of EU law are duly important. In this context, the national judge, to whom the application of EU law provisions is assigned, has an obligation to ensure their full effectiveness.
Member State liability for breaches of EU law was established by case-law. The recognition and structuring of the said doctrine was initially developed in the principles of Francovich (1991), further clarified in Brasserie du Pêcheur (1996) and extended in Köbler (2003), in order to also cover breaches by the judiciary as enriched in Traghetti (2006).

The liability is triggered by breaches of any state body, i.e. the executive, legislature and judiciary. With regard to the latter, a manifest breach of EU law by the national judge leads to the civil liability of the respective Member State, as a means of compensating private parties for damage suffered.
Mechanisms Provided by EU Law to Address Violations of its Normative Provisions

- **Infringement proceedings** (Articles 258-260 of the Treaty): the European Commission identifies possible infringements of EU law via its own investigations or complaints from citizens or companies.

- Affected individuals can bring forward cases of EU law breaches (C-6/90, *Francovich v. Italy*).

- National judges must re-interpret, negate or shape national law according to the provisions of EU law (article 4.3 of the Treaty; C-26/62, *Van Gend en Loos*; C-6/24, *Costa v. ENEL*; C-106/77, *Simmenthal*).
Francovich (C-60/90)

- The national court referred to the CJEU questioning whether individuals affected by the failure of a Member State to implement a Directive are entitled to claim (and in what capacity) reparation of the harm suffered.

- The CJEU introduced damages as a remedy for the lack of implementation of EU Directives, given that:
  - The Directive grants rights to individuals;
  - It is possible to identify the content of those rights;
  - There is a causal link between the breach of the State's obligation and the harm suffered by the individuals.

- Therefore, the possibility for individuals to pursue redress for damages incurred in violation of EU law was established.
Brasserie du Pêcheur (C-46/93)

- The CJEU declared that the liability of the Member State for EU law breaches also includes cases of positive acts or omissions of the national legislator, repeating Francovich's reasoning with regard to the nature of liability as inherent in the Treaties.

- The CJEU further proceeded in the wording of an additional condition, i.e. that the positive acts or omissions of the national judge must violate **blatantly** the rules of EU law in order to establish Member State liability.
Köbler (Case C-224/01)

- The CJEU extended the application of the *Francovich* principle in order to also cover breaches of EU Law by the national judiciary. The Court considered whether the Austrian Supreme Court violated its referral obligation with regards to questions of free movement of workers.

- Such liability would arise only “in the exceptional case where the *national* court has *manifestly* infringed the applicable law”. Therefore, although the CJEU found that the VGH’s decision was in breach of EU law, in the case at hand, regarded the breach as not “sufficiently serious” to raise state liability.
The CJUE confirmed the principle laid down in Köbler case and ruled that EU law precludes the existence of two types of national rules that limit State liability:

- rules that exclude liability for damages due to an infringement of EU law that arises out of an interpretation of legal provisions or an assessment of facts or evidence carried out by a court adjudicating at last instance, or

- those limiting liability solely to cases of intentional fault and serious misconduct on the part of the court, if such limitation were to lead to exclusion of the liability of the Member State in other cases where a manifest infringement of the applicable law was committed.
Alleging the Supreme Court’s liability for judicial malpractice, the applicant relied on the Köbler judgment of the CJEU. It requested that the Budapest Regional Court obtains a preliminary ruling from the CJEU as to the conformity of the Supreme Court’s judgment with EU law and the conditions for establishing whether the Supreme Court might be liable for a wrongful judgment.

The ECtHR notes that, for liability to be established under the “Köbler” criteria, it is not sufficient for a court to have infringed EU law, such infringement moreover must be manifest.

Lastly, the court found that, because of the applicant’s own omissions in the first set of proceedings, there was no liability resting upon the competent court for – allegedly – wrongly applying EU law.
Effectiveness of the State Liability Doctrine

■ The crucial question today lies in Member State liability’s scope and the choice of legal means to raise it rather than the doctrine’s validity as such. Given the difficult distinction between acts of State in a public capacity and in a private capacity that varies among Member States, the latter have been forced to comply with the European standard set by Francovich.

■ A crucial issue arises when it comes to deciding which court is competent to adjudicate in such cases raised by Member State liability. Is it deemed acceptable that a lower court might end up evaluating a superior court’s ruling, or – even worse – the same court ruling on its own merits, thereby on its past malpractice?
Member State Liability: Counter Arguments

- A major grievance raised in Köbler case was the risk of compromising judicial independence. The CJEU dismissed the argument with a reasoning well-grounded on the principles of international law. Although State liability is intertwined with the personal accountability of individual judges the two concepts are dogmatically distinct.

- It has been argued that the imposition of stricter scrutiny to judicial behaviour for the purpose of establishing Member State liability necessarily implies the expansion of individual judges’ accountability thus jeopardising the judicial independence; as a result, the judiciary would be more constrained and reluctant to engage in a process of complete and extensive review.

- The *res judicata* argument: the right to reparation on the ground of an allegedly mistaken application of EU law, by a definitive decision of a national court would run against this “fundamental value in legal systems founded on the rule of law and the observance of judicial decisions”.

Concluding remarks

- It remains an open question as to which mechanisms ought to be used by domestic law in order to hold the State accountable for the wrongful application of EU law by national judges.

- Establishing a special tribunal to hear cases involving alleged EU law breaches by the judiciary might be a solution.