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State Liability for Judicial Decisions Infringing EU Law – the Polish Experience

Abstract: The liability of Member States for damages caused by the issuance of a judicial decision in breach of EU law has been shaped in the jurisprudence of the CJEU, as a mechanism to ensure effective legal protection of EU citizens. Its primary purpose is to ensure that in a situation where a court of a Member State causes damage to a citizen by violating EU laws by its ruling, the citizen has a legal remedy to obtain compensation for such a violation. Based on the principle of procedural autonomy of the Member States, such claims can be asserted on the grounds of national procedural rules under the substantive legal grounds laid down by the CJEU in its case law.

Research conducted by the authors of the article indicates that despite more than 18 years of Poland's presence in the European Union, it is extremely difficult to find rulings on liability for damages for breach of EU law by Polish courts. It seems that such a state of affairs may be caused by ambiguities and interpretative doubts that arise on the grounds of Polish procedure in the case of claims for damages for breach of EU law by the courts. Both in the doctrine and case law there are far-reaching divergences as to whether the pre-judgment provided for in the Polish Civil Code should apply to claims for breach of EU law, and if so, when it should be applied. These doubts are

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reflected in the scant judicial case law on the issue in question. It seems that the indicated procedural doubts and lack of clarity as to the proper procedure in pursuing such claims may deter parties from more frequent initiation of proceedings to obtain compensation for breach of EU law by a national courts in the Polish context.
Keywords: judicial decision infringing EU law, state liability, EU law.

Introduction

The defining feature of the European Union's legal order as supranational law is the principle of direct effect and primacy.[1] The consequence of these principles is the recognition of EU law as part of the internal legal system of all the Member States.[2] EU citizens may rely directly on European law to protect their rights. It has consistently emerged from the case law of the Court of Justice of the European Union[3] that Member States, on the basis of the principle of sincere cooperation, are obliged to ensure in their national law the protection of an individual's rights derived from the Community law.[4] CJEU case law refers to the need to provide "effective judicial protection to the individuals."[5] The provision that somehow sanctions the jurisprudence of the Court with regard to the principle of effective legal protection is Article 19 TEU, which stipulates that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."[6] Meanwhile, Member States

1 See: José Antonio Gutiérrez-Fons, Koen Lenaerts, "The constitutional allocation of powers and general principles of EU law", *Common Market Law Review* 47, iss. 6. 2010: 1632; Armin von Bogdandy, and Jürgen Bast (eds.), *Principles of European Constitutional Law*. Oxford, and München, 2010, 29–30.

2 See: Martin Stiernstrom, "The Relationship Between Community Law and National Law", *Jean Monnet/Robert Schuman Paper Series* 5, no. 33. 2005: 5.

3 Hereinafter: "CJEU" or "Court."

4 *Amministrazione delle Finanze dello Stato v. Simmenthal* SpA, case 106/77, Judgment of the Court of 9 March 1978, ECLI:EU:C:1978:49.

5 *Traghetti del Mediterraneo SpA v. Repubblica italiana*, case C-173/03, Judgment of the Court of 13 June 2006, ECLI:EU:C:2006:391, paragraph 28.

6 Katharina Pabel, "The Right to an Effective Remedy Pursuant to Article II – 107 Paragraph 1 of the Constitutional Treaty", *German Law Journal* 6, no. 11. 2005: 1601–1602.

ensure effective legal protection by following the principle of procedural autonomy. This means that in areas not covered by EU law, it is for the Member States to lay down procedures to protect citizens' rights under EU law.[7]

The necessity for Member States to implement the principle of effective legal protection has led the CJEU to adopt specific mechanisms to ensure this protection. One such mechanism is the Member States' liability for damages for breaches of EU law that have caused harm to an individual in a particular situation.[8] In its jurisprudence, the Court has indicated that Member States also have an obligation to compensate their citizens for damages caused by violations of EU law by national courts.[9]

The authors of this paper have attempted to verify to what extent the institution of state liability for breach of EU law by national courts has so far been applied in the practice of the Polish legal system. In order to achieve this, a study was conducted by searching the largest electronic databases of Polish courts' jurisprudence for cases related to the recovery of damages for violation of EU law by a national courts.[10] The analysis of the available case law indicates that this mechanism has been applied only sporadically. In practice, therefore, citizens very rarely attempt to obtain compensation for possible violations of EU law by Polish courts. We argue that one of the possible reasons

7 Koen Lenaerts, "National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness", *Irish Jurist* 46. 2011: 13–37; Denis Baghrizabehi, "The Current State of National Procedural Autonomy: A Principle in Motion", *Intereulaweast* 3. 2016: 13–30.

8 See: *Andrea Francovich and Danila Bonifaci and others v. Italy*, Joined Cases C-6/90 and C-9/90, Judgement of the Court of 19 November 1991, ECLI:EU: C:1991:428; see also *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, joined cases C-46/93 and C-48/93, Judgment of the Court of 5 March 1996, ECLI: ECLI:EU:C:1996:79.

9 See: *Gerhard Köbler v. Republik Österreich*, case C-224/01, Judgment of the Court of 30 September 2003, ECLI:EU:C:2003:513; *Traghetti del Mediterraneo SpA v. Repubblica Italiana*.

10 We have conducted text searches in the two largest electronic databases of Polish case law, i.e. LEX Legal Information System (one of the largest Polish legal information systems, currently published by Wolters Kluwer Polska concern) and LEGALIS Legal Information System (a legal information system in Poland, created and developed by C.H. Beck Publishing House).

for the sporadic use of this legal remedy in Poland is the divergence in interpretation and uncertainty about the procedure for pursuing such claims under the Polish procedural provisions.

We begin with a brief introduction to the genesis and development of the Member States' liability for breach of EU law by national courts, shaped in the Court's jurisprudence. Then we move on to the Polish procedural provisions in this respect, which is followed by an analysis of the judgments regarding liability for damages for violation of EU law that we managed to find. The article concludes with the authors' observations concerning the State's liability for damages for breaches of EU law by national courts in the specific Polish context.

Development of the Concept of Member State Liability for Breach of EU Law by a National Courts in the CJEU Case Law

In order to analyze in detail the issue of state liability for breach of EU law by national courts in Poland, it is desirable to first devote some attention to the development of the concept in EU law. It is relevant for our considerations insofar as state liability for damages for breach of EU law by national courts is a legal mechanism shaped by the jurisprudence of the CJEU and does not have a precise basis in the Treaties.[11] It follows unequivocally from this case law that, in accordance with the principle of procedural autonomy, the establishment of the procedural framework for pursuing such claims rests solely with the individual Member States.[12] However, as the Polish example seems to prove, the specificity of procedural regulations has a significant impact on the practical use of this institution in the given judicial system.

11 Arwel Davies, "State liability for judicial decisions in European Union (EU) and international law", *The International and Comparative Law Quarterly* 61, no. 3. 2012: 595.

12 Davies, 586; Łukasz Stępkowski, "Naruszenie prawa UE przez sąd krajowy w odpowiedzialności odszkodowawczej państwa członkowskiego", *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 13. 2015: 137.

The concept of Member States' liability for damage caused to individuals for breach of the Community law was first outlined by the Court in the judgment in the joined cases of *Andrea Francovich and Danila Bonifaci*.[13] The Court stated that the principle of Member States' liability for damages is "inherent in the system of the Treaty."[14] The Court emphasized that it is precisely the principle of the full effectiveness of Community law which requires that an individual must be able to claim compensation from the State where an infringement of Community law by that State has caused him harm.[15] The Court also noted that the principle of loyal cooperation requires that any unlawful effects of an infringement of EU law should be eliminated.

In *Francovich*, the Court was referring to a very concrete infringement of Community law by a Member State, namely the failure to transpose a directive into national law within the required period of time. In its subsequent case law, the Court has developed and clarified the general concept of Member States' liability for damages for breach of EU law. Of central importance in this context was the judgment in the joined cases *Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others*.[16] The cases concerned the issue of liability for damages for breach of European Union law resulting from a legislative act or omission. The Court stated that the principle of the Member States' liability for

13 *Andrea Francovich and Danila Bonifaci and others v. Italy*. It is worth to indicate that before the CJEU first articulated the general principle of Member States' liability for breach of EU law in the *Francovich* judgment, it had already signalled that the Treaty system inherently implies such liability(see: *Amministrazione delle Finanze dello Stato v. San Giorgio*, case 199/82, Judgment of the Court of 9 November 1983, ECLI:EU:C:1983:318, paragraph 12). The right to the reimbursement of fees and taxes wrongly levied by the state in breach of EU law, as established by the Court of Justice, should be regarded as a precursor to such liability(see: Oliver Dörr (ed.), *Staatshaftung in Europa: Nationales und Unionsrecht*. Berlin, and Boston, 2014, 44). The Court of Justice emphasized that the repayment of wrongly levied benefits, can only take place within the framework of the substantive and formal requirements laid down by the relevant national legislation.

14 *Andrea Francovich and Danila Bonifaci and others v. Italy*, paragraph 35.

15 *Andrea Francovich and Danila Bonifaci and others v. Italy*, paragraph 33.

16 *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others.*

damage caused to individuals by breaches of Community law "holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach."[17] States are therefore responsible for the actions of any of their organs which may cause damage to citizens due to the breach of EU law. The Court formulated three conditions for States to be liable for damages for breach of Community law: "the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties."[18] In the light of these conditions, it is essential for attribution of liability to determine whether the infringement is of a sufficiently serious nature. The Court has indicated that an infringement is sufficiently serious where the State has manifestly and gravely disregarded the limits of its discretion.[19] At the same time, the specific conditions of liability depend on the nature of the breach of Community law.

In *Brassarie*, the CJEU emphasised that the liability of a Member State for a breach of EU law is linked to an act or omission of any organ of that State. It follows from further Court case law that a national court is also such an organ that may infringe EU law. The Court had the opportunity to address this issue directly in the *Gerhard Köbler* case.[20] In this judgment the Court emphasized 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

17 *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, paragraph 32.

18 *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, paragraph 51.

19 *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, paragraph 55.

20 *Gerhard Köbler v. Republik Österreich*.

infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance."[21]

It should be noted that in the *Köbler* case, the CJEU referred specifically to the actions of the court of last instance. In fact, the judgment pointed out that the court of last instance is the final authority before which individuals may assert the rights conferred upon them by Community law. Since the infringement of those rights by the final decision of such a court can no longer be remedied in any way, individuals cannot be deprived of the possibility of holding the State responsible in order to obtain effective judicial protection of their rights derived from Community norms.[22]

With regard to the conditions governing State liability for breach of EU law by a national court, the Court pointed out that those conditions are the same as those governing breaches of EU law by other State organs, i.e. the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation of the State and the loss or damage sustained by the injured party.[23] The Court noted that when referring to the second condition, thus determining whether a court has sufficiently seriously infringed Community law, account must be taken of the "specific nature of the judicial function and to the legitimate requirements of legal certainty."[24] Consequently, State liability for damages for breach of EU law by a national court of last instance can only arise in exceptional cases where the court has "manifestly infringed the applicable law."[25] In addition, the court noted that, in any event, an infringement of EU law is sufficiently serious if the ruling in question was given in clear breach of the Court's case law on the subject.[26]

21 *Gerhard Köbler v. Republik Österreich*, paragraph 33.
22 *Gerhard Köbler v. Republik Österreich*, paragraph 34.
23 *Gerhard Köbler v. Republik Österreich*, paragraph 51.
24 *Gerhard Köbler v. Republik Österreich*, paragraph 53.
25 *Gerhard Köbler v. Republik Österreich*, paragraph 53.
26 *Gerhard Köbler v. Republik Österreich*, paragraph 56.

What is important for the considerations of this article is that in the *Köbler* judgment the Court made it clear that, while the substantive conditions for the liability of a Member State for an infringement of EU law by a national court of last instance are determined by Community law, the enforcement of claims on this subject is based entirely on national law.[27]

An important development and clarification of the Court's jurisprudence in the area of state liability for breach of EU law by a national court was the *Traghetti* judgment.[28] In this judgment, the Court referred to Italian legislation which excluded State liability for infringement of EU law by courts of last instance where such infringement was the result of an interpretation of provisions of law or an assessment of facts and evidence by that court. Furthermore, the Italian rules limited State liability only to cases of intentional fault or gross misconduct on the part of the judge or for refusal of legal protection.

Referring to its previous case law on the subject, the Court stated that there are three necessary and at the same time sufficient conditions for the State to be liable for a judicial decision contrary to EU law.[29] The Court emphasized that a state may be liable under less restrictive criteria. On the other hand, creating more stringent conditions, as the Italian legislation did, is contrary to EU law, as it would nullify the effectiveness of the Court's case law to date on the liability of States for damages for breach of EU law by the courts of last instance.[30] Consequently, the Court decided that Community law precludes the

27 *Gerhard Köbler v. Republik Österreich*, paragraph 58.

28 *Traghetti del Mediterraneo SpA v. Repubblica Italiana*; On the importance of *Traghetti* judgement see also: Tomasz Tadeusz Koncewicz, *Zasada jurysdykcji powierzonej Trybunału Sprawiedliwości Wspólnot Europejskich – o jurysdykcyjnych granicach i wyborach w dynamicznej „wspólnocie prawa"*. Warszawa, 2009, 190; Marten Breuer, *Staatshaftung für judikatives Unrecht. Eine Untersuchung zum deutschen Recht, zum Europa- und Völkerrecht*. Tübingen, 2011, 464.

29 Referring to previous case law, the Court reiterated in this judgment that the State's liability for damages occurs under the following conditions: the rule of law infringed is intended to confer rights on individuals; there is a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties; the breach must be sufficiently serious. *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, paragraph 45.

30 *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, paragraph 40.

existence of such national laws that would, in principle, exclude state liability for damage caused to an individual by a national court of last resort if it follows from "the interpretation of provisions of law" or "an assessment of facts or evidence carried out by that court."[31]

In the same way, also unacceptable from the point of view of Community law are national provisions that would limit state liability for breaches of Community law by the courts to the intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State where a manifest infringement of the applicable law was committed.[32]

For the considerations undertaken in this article, the ruling of the Court in the case of the *European Commission v. Italian Republic*[33] is also important. It seems that this ruling has further complicated the already complex picture of Member States' liability for breach of EU law by national courts and thus influenced the concerns related to the application of national procedures when seeking compensation for violations of EU law by the courts. This judgment was a follow-up to the *Traghetti* case. After the Court found that Community law precluded Italian legislation laying down criteria for liability that were more restrictive than the existing case law of the Court, the Commission brought an action against Italy, which, despite warnings, had not changed its legislation on the matter. In the operative part of its decision, the Court pointed to the "General principle that Member States are liable for the infringement of European Union law by one of their courts adjudicating at last instance."[34]

It therefore appears that the Court has explicitly articulated the legal principle of Member States' liability for breach of EU law by national courts of final instance.[35] This is significant insofar as legal principles are a source of EU law that can be the basis for judicial decisions of the Court. As the Court did

31 *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, paragraph 46.
32 *Traghetti del Mediterraneo SpA v. Repubblica Italiana*, paragraph 46.
33 *European Commission v. Italian Republic*, case C-379/10, Judgment of the Court of 24 November 2011, ECLI:EU:C:2011:775.
34 *European Commission v. Italian Republic*, operative part of the judgement.
35 Stępkowski, 150–151.

not elaborate further on the nature of this principle of EU law in its judgment, including its relationship to the general principle of Member States' liability for breach of EU law arising from the *Francovich* and subsequent judgments, questions remain about its place in the EU legal system.[36]

Action for Damages for Breach of EU Law by a National Court in the Polish Legal System

According to the case law of the Court, having regard to the principle of procedural autonomy, the recovery of damages for a judgment which infringes Community law takes place on the basis of the procedural rules of national law.[37] Therefore, when looking at the problem of practical functioning of the model of liability for issuing a judicial decision contrary to EU law in Poland, it is justified at this stage to devote some attention to the Polish procedural regulations in this regard.[38]

In the Polish legal system the liability of the state for damage caused to citizens by the actions of public authorities has its constitutional basis**.** According to Article 77 (1) of the Constitution of the Republic of Poland: "Everyone has the right to compensation for damage caused to him by unlawful action of a public authority."[39] The provisions specifying conditions for state liability for damage caused to individuals are provided in the Civil Code in Articles 417–420.[40] The general principle of liability is set forth in Article 417 § 1, which states that "The State Treasury, territorial self-government unit or an-

36 Stępkowski, 150–151.

37 The CJEU used the concept of procedural autonomy of the member states in: *The Queen, on the application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions*, case C-201/02, Judgment of the Court of 7 January 2004, ECLI:EU:C:2004:12, paragraph 65, 67, 70.

38 Maciej Taborowski, *Konsekwencje naruszenia prawa Unii Europejskiej przez sądy krajowe*. Warszawa, 2012.

39 Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws of 1997, no. 78, item 483, of 2001, no. 28, item 319, of 2006, no. 200, item 1471, of 2009, no. 114, item 946).

40 Act of April 23, 1964 – Civil Code (consolidated text – Journal of Laws of 2022, item 1360).

other legal person exercising public authority by virtue of law shall be liable for a damage inflicted by unlawful activity or cessation thereof which occurred in exercise of such authority."[41]

The problem of liability for issuing a judicial decision causing damage is addressed in art. 4171 § 2 of the Civil Code which stipulates as follows:

"If damage has been caused by the issuance of a final judgment or a final decision, its redress may be demanded after their unlawfulness has been established in appropriate proceedings, unless separate provisions stipulate otherwise. This shall also apply in the event that a final decision or judgment has been issued on the basis of a normative act which is inconsistent with the Constitution, the ratified international agreement or a statute."[42]

Polish regulations on this subject raise a number of practical problems. First of all, the literature on the subject expresses different views as to whether Article 4171 § 2 of the Civil Code should apply at all to procedural claims for breach of EU law by courts. For this purpose, it is necessary to clarify that Article 4171 § 2 requires that an action for damages for a violation of the law by a court must be preceded by a determination in a relevant proceeding that such a judgment was unlawful. We refer to this prior proceeding for the purposes of our discussion with the term "pre-judgment." The concept of pre-judgment has already been analyzed by the Court in the context of obtaining compensation for violation of the EU law by national courts. In *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado*, the Court found that the use of pre-judgment violates the principle of equivalence.[43] From the perspective of this article, however, this issue does not require further analysis, because, as Ł. Stępkowski aptly points out, the Polish regulation does not violate the principle of equivalence. This is because the pre-judgment applies equally to obtaining compensation for the violation of Polish and Euro-

41 Civil Code, Article 417 § 1.

42 Civil Code, Article 4171 § 2.

43 *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado*, case C-118/08, Judgment of the Court of 26 January 2010, ECLI:EU:C:2010:39, paragraph 46.

pean law by the court.[44] Thus, the pre-judgment procedure *per se*, as long as it does not discriminate against claims for violations of EU law, does not conflict with the rules for seeking liability for violations of EU law by a national court as established by Court.

Therefore, some representatives of the doctrine take it for granted that such a pre-judgment must also apply to compensation proceedings related to breaches of EU law by the courts.[45] However, there are authors who point out that the pre-judgment procedure for pursuing claims of violation of EU law by a national court is not necessary at all, due to the specificity of such claims.[46] At this point, it should also be noted that other authors also point out that, at least in some cases, because of the failure of the Polish regulation to meet the condition of effectiveness, a pre-trial is not necessary to pursue claims for damages related to the court's violation of EU law.[47]

In addition to doubts about whether Article 4171 § 2 of the Civil Code should apply at all to claims for damages related to a court's breach of EU law, even if we acknowledge that the norm is applicable, the question arises: what is the appropriate procedure for such a pre-judgment procedure? Polish legislation provides for a number of regulations allowing the commencement of such a procedure. First, it is necessary to recall the general principle, regulated by the provisions of the Code of Civil Procedure. According to Article 4241 § 1 of

44 Stępkowski, 156.

45 See: Zbigniew Banaszczyk, *Odpowiedzialność za szkody wyrządzone przy wykonywaniu władzy publicznej*, chapter IX – *Odpowiedzialność władzy publicznej za naruszenie prawa unijnego*. Legalis/el., 2015, 21–22; Edyta Gapska, *Wady orzeczeń sądowych*. Warszawa, 2009, 202; Monika Wałachowska, "Komentarz do artykułu 4171" in *Kodeks cywilny. Komentarz*. Vol. 3. *Zobowiązania. Część ogólna (art. 353–534)*, eds. M. Fras, and M. Habdas. LEX/el., 2018, 24.

46 See: Gerard Bieniek, "Komentarz do art. 4171" in *Kodeks cywilny. Komentarz*, ed. G. Bieniek. LEX/el., 2011, 8.

47 See: Nina Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych*. Warszawa, 2010, 480; Ewa Bagińska, "Odpowiedzialność Skarbu Państwa za szkody wyrządzone przez wydanie niezgodnego z prawem orzeczenia sądu", *Transformacje Prawa Prywatnego*, no. 3. 2011: 19; Jolanta Zatorska, "Odpowiedzialność odszkodowawcza państwa członkowskiego za działania władzy sądowniczej na przykładzie Polski i Francji", *Europejski Przegląd Sądowy*, no. 7. 2008: 7; Stękowski, 158.

the Code of Civil Procedure: "A petition for a final and non-revisable judgment of the court of second instance to be declared unlawful may be filed if a party suffered loss as a result of such judgment being rendered, provided that such judgment neither could nor can be varied or set aside through the exercise of legal remedies available to the party."[48]

As it is stipulated in abovementioned provision the rule is that the final and non-revisable judgment of the court of second instance can be petitioned as unlawful. However, § 2 of the indicated provision sets forth an exception to this general rule. According to this norm, in exceptional cases, where unlawfulness results from a violation of the fundamental principles of the rule of law or constitutional freedoms or human and civil rights, "a petition for a final and non-revisable judgment of the court of first or second instance may also be filed if a party has not exercised legal remedies available to it, unless the judgment may be varied or set aside through the exercise of other legal remedies available to the party."[49]

Furthermore, it is necessary to mention that in accordance with the Article 4241b § 1 of the Civil Procedure Code, no petition may be filed against judgments of the court of second instance appealed to the Supreme Court or against judgments of the Supreme Court. In such a situation, when the final judgment is not subject to the complaint, it is possible to claim compensation without prior finding that the decision is unlawful in the proceedings under the co plaint, unless the party has not resorted to the legal remedies available to it.[50]

The literature on the subject also raises doubts as to whether the aforementioned Polish regulations satisfy the principle of effectiveness (efficiency) in pursuing claims for damages for breach of EU law. In the course of proceedings for a declaration of unlawfulness of a final judgment (which con-

48 Act of November 17, 1964 – Code of Civil Procedure (consolidated text – Journal of Laws of 2021, item 1805, 1981, 2052, 2262, 2270, 2289, 2328, 2459, of 2022, item 1, 366, 480, 807, 830, 974, 1098).

49 Code of Civil Procedure, Article 4241 § 2.

50 Code of Civil Procedure, Article 4241b.

stitutes the pre-judgement procedure), the basis for the complaint may not be allegations concerning the establishment of facts or assessment of evidence. Such a solution, however, contradicts the position of the Court expressed in the *Traghetii* case.[51]

All of the doubts identified above indicate that an individual who deems that a judgment that has been issued in his case violates EU law has a very complicated procedural path to follow. The Polish civil procedure, which will apply in his case on the basis of the procedural autonomy of the Member States, raises a number of interpretative doubts with regard to compensation claims related to the breach of EU law.

It seems that it is the complexity and ambiguity of this procedure that is central to the infrequency of initiating compensation proceedings for violations of EU law in Poland. This thesis seems to be confirmed by the research described below.

Claiming Compensation for a National Court Judgment that Violates EU Law in Polish Judicial Practice

As mentioned above, the authors' research consisted of searching electronic case law databases of Polish courts for judgments concerning compensation for breach of EU law by Polish courts. The authors conducted text searches in the two largest electronic databases of Polish case law, i.e. LEX Legal Information System (one of the largest Polish legal information systems, currently published by Wolters Kluwer Polska concern) and LEGALIS Legal Information System (a legal information system in Poland, created and developed by C.H. Beck Publishing House).

Following various search configurations, we managed to find only two rulings by Polish courts regarding the liability for the issuance of a judicial decision in breach of EU law. They were: Judgment of the Court of Appeals

51 Stępkowski, 157.

in Warsaw on March 19, 2021 in case number V ACa 502/19[52] and Judgment of the Court of Appeals in Warsaw dated February 27, 2018, in case number VI ACa 1578/16.[53]

The first case (Judgment of the Court of Appeals in Warsaw on March 19, 2021 in the case numbered V ACa 502/19) involved a claim for damages related to the issuance of an order dismissing the plaintiff's complaint for protracted proceedings. The plaintiff, having waited more than a year for a ruling on the cassation complaint in the administrative proceedings, filed a complaint regarding the lengthiness of the proceedings. This complaint was dismissed. The plaintiff then filed a lawsuit seeking damages, indicating that the ruling in the protracted proceedings violated EU law. The plaintiff did not specify what this violation consisted of. He sought compensation before the Warsaw Regional Court.

The Regional Court dismissed the claim, indicating that the plaintiff had failed to provide a pre-judgement ruling, which is a condition for awarding damages for breach of EU law under the art. 4171 § 2 of the Civil Code. The court indicated that the plaintiff should have obtained such pre-judgment in accordance with the rules of administrative court procedure as his case was originally tried in an administrative court. The court concluded that in the absence of a pre-judgment procedure stating the illegality of the order dismissing the complaint for lengthy proceedings, the action in the case was unjustified.[54]

The plaintiff appealed the ruling of the Regional Court. Then the case was decided by the Appellate Court in Warsaw. From our perspective, the appellate court's decision aptly highlights the problems associated with seeking damages for breach of EU law by national courts in Poland. The Court of Appeals pointed out that the Regional Court misinterpreted Polish procedural rules for

52 Judgment of the Court of Appeals in Warsaw of 19 March 2021, V ACa 502/19. LEX no. 3248320.

53 Judgment of the Court of Appeals in Warsaw of 27 February 2018, VI ACa 1578/16. LEX no. 2545167.

54 Judgment of the Court of Appeals in Warsaw of 19 March 2021.

seeking compensation for violations of EU law. According to the Court of Appeals, neither the provisions of administrative procedure nor the provisions of civil procedure regarding the necessity of obtaining a pre-judgment declaring the unlawfulness of the ruling should apply in the case at issue. The Court of Appeals pointed out that the Act of June 17, 2004 on complaints for violation of a party's right to have a case heard in court proceedings without undue delay was applicable to the dispute. Therefore in the court's opinion, the provisions of the Act should be interpreted in such a way that the legislator did not provide at all for the possibility of filing an action for a declaration of the illegality of a final decision issued as a result of a complaint concerning the lengthiness of court proceedings, whether civil or administrative. This means that in the opinion of the Appellate Court, in cases concerning the lengthiness of proceedings, an action for a declaration of the illegality of rulings issued in such proceedings is not available at all. As the court put it: "Contrary to the position of the court of first instance, therefore, the plaintiff could never be able to obtain a pre-judgment declaring the illegality of the order he challenged in the absence of a procedure giving the possibility of obtaining one at all."[55]

The Court of Appeals made it clear that the plaintiff was seeking damages in connection with a judgment rendered in a case involving protracted proceedings. There is no procedure to declare the unlawfulness of judgments issued in these proceedings. Under these circumstances the court pointed out that the proper basis for the claim for damages should be Article 417 of the Civil Code rather than Article 4171 § 2 (which is generally dedicated to this type of claim, but not in the situation in question).[56]

The divergence of positions between the district and appellate courts as to the necessity of obtaining a pre-judgment for the assertion of damages for

55 Judgment of the Court of Appeals in Warsaw of 19 March 2021.

56 The court referred to the position expressed in the literature on the subject (Zbigniew Banaszczyk, "Odpowiedzialność za szkodę wyrządzoną przy wykonywaniu władzy publicznej" in *Prawo zobowiązań – część ogólna. System Prawa Prywatnego*, vol. 6, ed. A. Olejniczak. Warszawa, 2018, 891–892), according to which "when the legislation does not provide for a preliminary procedure, it should be up to the compensation court to decide on the illegality of the decision."

violation of EU law by the court clearly shows that on the ground of Polish procedure regarding such claims, theoretical ambiguities also have a practical dimension. Not only is there a lack of consensus among representatives of the doctrine as to whether it is necessary to obtain a pre-judgment for the vindication of claims related to the violation of EU law by the court, but there is also a lack of a consistent position in the case law.

Similarly, in the second ruling identified by the authors of this article regarding state liability for breach of EU law by a national court, the problem of the procedure for pursuing such claims took an important place.

In the case VI ACa 1578/16, which was pending before the Warsaw Court of Appeals, the plaintiff was a company that filed a claim in relation to her participation in a public tender procedure.[57] During the bidding process, the contracting authority accepted the plaintiff's bid and rejected the bid of another competing entity. The entity whose bid was not selected appealed to the court. The court upheld the appeal and ordered the contracting authority to repeat the evaluation of the bids. As a result of the re-tendering, the contracting authority again selected the plaintiff's bid, but the new bid was for a significantly lower amount than the original tender.

The plaintiff demanded damages from the State, claiming that the ruling under which the tender procedure was reopened caused damage to his property in the form of lost benefits. The plaintiff derived its claim primarily from the court's application of Article 43(1)(17) of the VAT Act[58] in complete disregard of the provisions of the VAT Directive[59] and their interpretation adopted in the CJEU rulings, which, according to the plaintiff, was contrary to the principle of interpreting domestic law in accordance with European Union law.

On the merits of the case, both the appellate court and the court of first instance agreed that the plaintiff was not entitled to compensation, because the plaintiff had

57 Judgment of the Court of Appeals in Warsaw of 27 February 2018.

58 Act of March 11, 2004 on tax on goods and services (Journal of Laws of 2004, no. 54, item 535, with further amendments).

59 Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax (OJ L 347, 11.12.2006, 1–118).

not appealed the unfavorable court judgment invalidating the first tender, which was supposed to have caused it damage. The Court of Appeals, citing the Court jurisprudence, pointed out that the injured party failed to exercise due diligence to avoid incurring damage or to limit the extent of damage by failing to use all legal remedies available to it In the present case, the plaintiff, knowingly did not use the available review of the ruling of the adverse judgment and proceeded with a new tender. Thus, the plaintiff failed to prevent the development of an unfavorable causal link, and as a result, the plaintiff itself is liable for any damage that may have occurred.[60]

However, given the thesis posed by the authors of this text, the regional court's consideration of the procedural requirements for seeking damages for violation of EU law by a national court deserves attention. Namely, the Regional Court in Warsaw stated that in the pending case, the provisions of national law should be applied to assess the plaintiff's claim for damages, provided they are not less favorable than the EU rules. As a result, the court stated that:

"while Articles 417 and subsequent articles of the Civil Code, specifying that the prerequisites of the State liability for damage are 1. the illegality of the authority's action, 2. the existence of damage, and 3. the causal link between the illegality and the resulting damage (which prerequisites coincide with those indicated by the CJEU), according to the principles of the EU legal order, Article 4171 § 2 of the Civil Code will not apply, from which stems the requirement to obtain a so-called «pre-judgment» if the damage was caused by the issuance of a final judgment or final decision."[61]

Thus, in the opinion of the Regional Court, the plaintiff company, when seeking compensation for damage caused by the unlawful action of a State in violation of EU law, was not required to obtain the pre-judgment declaring the illegality of a final decision at all.[62]

This position of the court emphatically demonstrates the fundamental problem associated with the issue of seeking compensation for violation of EU law by a national court in Poland. Both in the doctrine and case law there are divergent

60 Judgment of the Court of Appeals in Warsaw of 27 February 2018.
61 Judgment of the Court of Appeals in Warsaw of 27 February 2018.
62 Judgment of the Court of Appeals in Warsaw of 27 February 2018.

opinions as to the proper procedure in pursuing such claims. The Warsaw court, following part of the academic community, pointed out that Article 4171 § 2 does not apply at all in the case of such claims. By the same token, a party does not need to seek a pre-judgment before asserting a claim for damages. Such a conclusion by no means follows from the previous ruling cited in the case V ACa 502/19. In that ruling the court declared that in all those situations where it is possible to obtain a pre-judgment, it should be sought. However the court indicated that one of the exceptions to this main rule are rulings issued in cases concerning the lengthiness of proceedings. In such cases, it is not necessary to obtain a prejudicial ruling, because the law simply does not provide for such a possibility.

The two rulings indicated above show how much doubt and lack of uniformity there is in the approach of the courts themselves to the issue of compensation for issuing a ruling contrary to EU law.

Concluding Remarks

The liability of Member States for damages caused by the issuance of a judicial decision in breach of EU law has been shaped in the jurisprudence of the Court, as a mechanism to ensure effective legal protection of EU citizens. Its primary purpose is to ensure that in a situation where a court of a Member State causes damage to a citizen by violating EU laws by its ruling, the individual has a legal remedy to obtain compensation for such a breach Based on the principle of procedural autonomy of the Member States, such claims can be asserted on the grounds of national procedural rules under the substantive legal grounds laid down by the Court in its case law.

Research conducted by the authors of the article indicates that despite more than 18 years of Poland's presence in the European Union, it is extremely difficult to find rulings on liability for damages for breach of EU law by Polish courts. It seems that such a state of affairs may be caused by ambiguities and interpretative doubts that arise on the grounds of Polish procedure in the case of claims for damages for breach of EU law by the courts. Both in the doctrine and

case law there are far-reaching divergences as to whether the pre-judgment provided for in the Polish Civil Code should apply to claims for breach of EU law, and if so, when it should be applied. Some representatives of the doctrine believe that in order to file a claim for damages for breach of EU law by a national court, as a rule, a pre-judgment under Article 4171 § 2 of the Civil Code should be obtained, while others take the position that this is not necessary. These doubts are reflected in the scant judicial case law on the issue in question.

It seems that the indicated procedural doubts and lack of clarity as to the proper procedure in pursuing such claims may deter parties from more frequent initiation of proceedings to obtain compensation for breach of EU law by a national courts in Polish context.

Certainly, further research on the jurisprudence of Polish courts regarding liability for damages for breach of EU law by the courts is necessary to be able to determine the reasons for the rarity of such cases in Poland, but there is no doubt that the ambiguities articulated by the doctrine and jurisprudence regarding the proper procedure in pursuing damages affect the preservative attitude of the parties in initiating such cases.

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