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CONCEPT OF COURT'S FAULT IN STATE LIABILITY ACTION FOR INFRINGEMENT OF EUROPEAN UNION LAW

Regina Valutytė

Mykolas Romeris University, Faculty of Law,
Department of International and European Union Law
Ateities 20, LT-08303 Vilnius, Lithuania
Telephone (+370 5) 2714 669
E-mail r.valutyte@mruni.eu

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Abstract. *The article deals with the concept of the court's fault in the action for damages against a state suffered due to infringement of European Union law. The author searches for the right position of the criterion in the system of the conditions of state liability and discusses whether European Union law establishes a uniform standard of fault, or at least the guidance on the application of the criterion that would enable uniform national judicial practices concerning state liability for the infringements attributable to the courts of last instance. The article also analyses national legal regulation and jurisprudence of several Member States such as France, Belgium and Italy, providing the definitions of different forms of fault and (or) examples of their practical implementation.*

Keywords: *European Union institutional law, state liability, national courts, fault, Köbler case*

Introduction

On the basis of 15 years of university teaching experience in various Member States, Mr Köbler, a professor in Austria, applied for a special length-of-service increment pursuant to Austrian law. His application was rejected because the legislation made the grant of that increment conditional on 15 years service as a professor in Austrian universities alone. He appealed against that decision, claiming indirect discrimination, contrary to the principle of freedom of movement for workers. The Austrian supreme administrative court made a reference to the Court of Justice.

Since the Court of Justice had delivered a judgment in a comparable case, it asked the Austrian supreme administrative court whether it maintained its question. In the light of that judgment, the national court withdrew its question and found that the increment at issue was a loyalty bonus justifying a derogation from the principle of freedom of movement for workers, so that the rejection of Mr Köbler's application was not contrary to EU law.

Mr Köbler decided that the decision of the Austrian Supreme Administrative Court infringed a number of EU legal provisions and thereby caused him loss. Therefore he brought forth an action for damages against the Republic of Austria before the Regional Civil Court in Vienna, which has also made a reference to the Court of Justice asking whether the principle of state liability for loss or damage caused to individuals by a breach of EU law, developed in such cases as *Francovich*¹, *Brasserie du Pêcheur*², *Dillenkofer*³, *Hedley Lomas*⁴, extends to the case of a breach for which the supreme court is responsible.

The Court of Justice repeated its previous practice in the cases mentioned above and emphasized that in the light of the essential role played by the judiciary in the protection of the rights derived by individuals from EU 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 EU law attributable to a decision of a national court of last instance.⁵ Recalling the conditions governing state liability, the Court of Justice indicated that state liability for an infringement of EU law can be incurred only in the exceptional case where the court has manifestly infringed the applicable law. According to the Court, the manifest nature of the infringement

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- 1 Case C-6/90 and 9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*. 1991. ECR I-05357.
 - 2 Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd*. 1996. ECR I-1029.
 - 3 Case C-178-179/94, C-188-190/94, *Dillenkofer v. Federal Republic of Germany*. 1996. E.C.R. I-4867.
 - 4 Case C-5/94, *R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd*. 1996. E.C.R. I-2553.
 - 5 Case C-224/01, *Gerhard Köbler v. Republik Österreich*. 2003. ECR I-10239, para. 33.

respectively depends on various factors including, among other, intentional nature of the infringement.⁶

Advocate General Léger was skeptical about the application of the criterion in the cases concerning state liability for the infringements committed by national courts. In his opinion, it is neither necessary nor appropriate to pay particular attention to factor whether the breach of EU law was intentional or involuntary. The Advocate argued that it would be particularly difficult to adjudicate on whether a subjective element existed, a fortiori where, as is very likely, the judgment in question was collegiate. Furthermore, in his view, it would be delicate to ask a national judge to ascertain whether one of his brethren had acted on the basis of a malicious intention to infringe a rule of law.⁷

The criterion was also criticized by the scholars of EU law. Some academics (M. Dougan, E.C. Mendazona) claimed that the application of this criterion can incur liability just if a judge is encouraged to adopt a particular decision using non-legal means.⁸ E.C. Mendazona added that this criterion could also be applied and the infringements of EU law could be considered intentional if EU law was applied by a national court contrary to its content or the practice of Court of Justice or a national court “rebeled” against the application of EU law and did not apply it. Even in this particular situation the scholar doubted as to the possibility to evaluate the subjective element of judge’s behavior.⁹

In order to evaluate the critics concerning the inclusion of this criterion among other criteria showing the existence of manifest infringement of EU law, it is necessary to give a glance to the national and international practice concerning the application of the criterion of fault in the cases of state liability for the acts of judicial power, to set its position in the system of all the criteria of state liability and to disclose its content.

1. Requirement of Fault in State Liability Cases: its Position and Concept under EU Law

The Court of Justice has repeatedly stated in his jurisprudence that the obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of EU law. In the Court’s opinion, imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the EU

6 Case C-224/01, *Gerhard Köbler v. Republik Österreich*. 2003. ECR I-10239, para. 54–55.

7 Opinion of Advocate General Léger in Case C-224/01, *Gerhard Köbler v. Republik Österreich*. 2003. ECR I-10239, para. 154, 156; Opinion of General Advocate Léger in Case C-173/03, *Traghetti del Mediterraneo SpA v. Repubblica Italiana*. 2006. ECR I-05177, para. 102.

8 Dougan, M. *National remedies before the Court of Justice: issues of harmonisation and differentiation*. Oregon: Oxford and Portland Oregon, 2004, p. 250; Mendazona E. C. La responsabilidad por actuaciones judiciales. el último gran paso en la responsabilidad de los estados por el incumplimiento del derecho comunitario. *Civitas. Revista Española de Derecho Europeo*. 2004, 10: 307.

9 Mendazona, E. C., *ibid.*, p. 307–308.

legal order.¹⁰ Its position concerning the subjective element of infringement was based on the argument that the concept of fault does not have the same content in the various legal systems.¹¹

On the other hand, it has to be reminded that the Court of Justice also mentioned that certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of EU law is serious.¹² Therefore, among other criteria, the national court when hearing a claim for reparation must take account of intentional or unintentional nature of infringement. Such a position raises a question whether the expression “*cannot depend on*” means that 1) the fault criterion has no influence to the determination of state liability or that 2) the fault criterion influences the determination of state liability, but it is not a determinant factor the establishment of which *per se* conditions the existence of state liability.

The analysis of the problematic question first of all requires to analyse the circumstances of two cases (*Brasserie du Pêcheur* and *Traghetti*).

Before the national court a French company *Brasserie du Pêcheur* claimed that it was forced to discontinue exports of beer to Germany because the competent German authorities considered that the beer it produced did not comply with purity requirement laid down in Law on Beer Duty. The Commission took the view that those provisions were contrary TFEU and brought infringement proceedings against Germany on two grounds, namely the prohibition on marketing beers lawfully manufactured by different methods in other Member States and the prohibition on importing beers containing additives. By judgment of 12 March 1987 in Case 178/84 *Commission v Germany* [1987] ECR 1227, the Court held that the prohibition on marketing beers imported from other Member States which did not comply with the provisions in question was incompatible with Article 30 of the Treaty. *Brasserie du Pêcheur* consequently brought an action against Germany for reparation of the loss suffered by it as a result of that import.¹³

10 Joined Cases C-178-179/94, C-188-190/94, *Dillenkofer et al. v. Bundesrepublik Deutschland*. 1996/ ECR I-4867, para. 28; Joined Cases C-46/93 ir C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd* [1996] ECR I-1029, para. 79; Case C-424/97, *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein*. 2000. E.C.R I-5123, para. 39.

11 Case C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd*. 1996. ECR I-1029, para 76. In his opinion in *Brasserie du Pêcheur* case Advocate General Tesouro paid special attention to the difficulty of identifying conduct displaying fault on the part of the public authorities on the basis of the same criteria used for the purposes of civil law, especially since the mechanisms devised for explaining the actions of legal persons by attributing to them the same manner of acting as natural persons are said to prove completely useless or at least inadequate from this point of view. Opinion of Advocate General Tesouro in Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd* [1996] ECR I-1029, para 85. Such a position was also accepted by other scholars. See: Puder, M. G. Beer wars—a case study is the emerging European private law civil or common or mixed or *sui generis*? *Tulane European and Civil Law Forum*. 2005, 20.

12 Case C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd*. 1996. ECR I-1029, para. 78.

13 *Ibid.*, para. 3–5.

In that respect paragraph 839 of the German Civil Code provided that “if an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom.” Article 34 of the Basic Law set forth the rule that “If a person infringes, in the exercise of a public office entrusted to him, the obligations incumbent upon him as against a third party, liability therefor shall attach in principle to the state or to the body in whose service he is engaged.”¹⁴ Taking into account these provisions German Federal Court *inter alia* sought to establish whether a national court is entitled to make reparation conditional upon the existence of fault (whether intentional or negligent) on the part of the organ of the state to which the infringement is attributable¹⁵, that is whether fault is a condition *sine qua non* for the state to incur liability.

In the *Traghetti* case, Traghetti, a maritime transport undertaking running regular ferry services between mainland Italy and the islands of Sardinia and Sicily, brought proceedings against Tirrenia, another maritime transport undertaking, before the Naples District Court, seeking compensation for the damage that it claimed to have suffered during the preceding years as a result of the EU and national competition law provisions. By decision of the district court, upheld on appeal by Naples Court of Appeal, the action for compensation was, however, dismissed on the ground that neither EU law, nor national law had been infringed. Taking the view, for his part, that those two decisions were vitiated by errors of law since, *inter alia*, they were based on an incorrect interpretation of the Treaty rules on state aid, the administrator of Traghetti lodged an appeal against the judgment of the Naples Court of Appeal, requesting the *Corte Suprema di Cassazione* to submit the relevant questions of interpretation of EU law to the Court of Justice pursuant to the third paragraph of Article 267. However, the *Corte Suprema di Cassazione* refused to accede to that request on the ground that the approach adopted by the court ruling on the substance followed the letter of the relevant provisions of the Treaty and was, moreover, perfectly consistent with the Court’s case-law.

Taking the view that the judgment was based on an incorrect interpretation of the Treaty rules on competition and state aid and on the erroneous premise that there was settled case-law of the Court of Justice on the matter, the administrator of Traghetti, which had in the meantime been put into liquidation, instituted proceedings against Italy before Genoa District Court for compensation for the damage suffered by that undertaking as a result of the errors of interpretation committed by the *Corte Suprema di Cassazione* and of the breach of its obligation to make a reference for a preliminary ruling pursuant to the third paragraph of Article 267 TFEU.¹⁶

An Italian law excluded state liability in damages for damage caused to individuals by a national court where the infringement of EU law was the result of the interpretation of legal provisions or the assessment of facts and evidence. Furthermore, it limited liability to cases of intentional fault and serious misconduct on the part of the national

14 Case C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd.* 1996. ECR I-1029, para. 6.

15 *Ibid.*, para. 8.

16 Case C-173/03, *Traghetti del Mediterraneo SpA v. Repubblica Italiana* [2006] ECR I-05177, para. 7–16.

judicial body. Therefore, Genoa District Court referred for a preliminary ruling asking whether national legislation can limit state liability solely to cases of intentional fault and serious misconduct on the part of a national court.¹⁷

The circumstances mentioned above clearly show that in both cases national legal provisions made state liability dependant on existence of fault (whether intentional or negligent behavior) that raised a serious doubt about the possibility to implement the principle of state liability in practice. Thus it is obvious that the expression “the obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault” has to be interpreted as a statement that fault is not a condition *sine qua non* for the state to incur liability, that is that fault is not autonomous and determinant criterion of state liability as e.g. direct causal link or sufficiently serious infringement of EU law. Respectively, fault is regarded as a criterion taken into account when the decision concerning the nature of the infringement of EU law is made.

Such a conclusion is not surprising and the idea of exempting fault from determinant criteria of state liability is not a new one. On the contrary, it the position of fault state liability under EU action is very similar to the position of fault in state responsibility in international law that was one of the sources for the Court of Justice to substantiate state liability for the EU law infringements attributable to the court of last instance.

J. Crawford, commenting on International Law Commission's Articles on State Responsibility argues that international law does not prescribe that conduct, apparently inconsistent with the international obligations of a state, could only give rise to responsibility if the act was performed intentionally or through the lack of due diligence. In particular, Article 1 states that every internationally wrongful act of a state entails its responsibility, and Article 3 identified two, and only two, elements of an internationally wrongful act, (a) conduct attributable to a state which (b) is inconsistent with its international obligations.¹⁸

However, in the commentary of *Draft articles on Responsibility of States for Internationally Wrongful Acts* International Law Commission explains that whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be “subjective.” For example, Article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ...” In other cases, the standard for breach of an obligation may be “objective,” in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence.

17 *Ibid.*, para. 4, 20.

18 Crawford, J. *The International Law Commission's Articles on state liability: Introduction, Text and Commentaries*. Cambridge: Cambridge University Press, 2002, p. 12.

Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.¹⁹

Thus, under international law fault does not constitute a necessary element of state responsibility. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a state that matters, independently of any intention.²⁰ It is obvious that a similar attitude was adopted by the Court of Justice. The only difference is that in international law a specific requirement of a mental element is rather exception than a rule.

Furthermore, the analysis leads to the question whether there is a uniform standard of fault established by the Court of Justice that would be obligatory to all national courts deciding on seriousness of the infringement.

First of all, it is noteworthy that the Court of Justice does not specify the content of the criterion. On the contrary, specifying its previous practice in *Traghetti* case the Court of Justice stated that although it remained possible for national law to define the criteria relating to the nature or degree of the infringement which must be met for a state to incur liability, under no circumstances might such criteria impose requirements

19 Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, p. 34–35 [interactive]. [accessed 01-02-2011]. <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. Originally, fault was considered to be a “natural” element of tort in the relations between sovereigns as it was, and partly still is, considered to be a “natural” element of a civil tort or of a criminal offence within a national legal system. The Roman notion of *culpa* was extended by Gentilis and Grotius to the actions and omissions of sovereigns and States. Difficulties emerged rather late, notably in the works of Anzilotti and Kelsen. Anzilotti noted that “it would be difficult to determine fault—indeed, often impossible and almost always extraneous to the facts, which, in a given case, entail the State’s international responsibility: a defect can occur in the laws regardless of great vigilance or foresight. In addition, since doubts cannot be entertained about ... the state’s responsibility, whatever the defect in its legislation or its organization and whatever the root cause, establishing or ruling out fault would in short have no effect on the responsibility. In this case, one could speak of *culpa qui inest in re ipsa*, of fault based on the fact that there is no internal organization to ensure fulfillment of the state’s international duties in all instances, in other words, fault which in reality is not fault. But these are abstractions that have nothing to do with the facts. Here too, we have to admit that responsibility has a purely objective basis; the State is answerable for the injurious act for the reason that the act stems from its activity.” So, if the State was internationally responsible it was not, according to Anzilotti, in consideration of any fault (of its own or of the agent’s). International responsibility would have had again a purely objective basis. Ago reached a different conclusion by rejecting Anzilotti’s and Kelsen’s notion that the attribution of the agent’s act or omission was a matter left to national law. Ago took a different position with regard to the source of the legal rules effecting the allegedly legal operation. The rules in question, according to Ago, could only be the rules of the same legal system within which the State was an international person, namely international law itself. Consequently, international law could consider such a conduct as affected by *dolus* or *culpa* regardless of whether that conduct was considered not so affected but perfectly lawful, or even due, under municipal law. Arangio-Ruiz, G. Second report on State responsibility, No. A/CN.4/425 & Corr.1 and Add.1 & Corr.1, 9 and 22 June 1989, p. 48–49 [interactive]. [accessed 01-02-2011]. <http://untreaty.un.org/ilc/documentation/english/a_cn4_425.pdf>.

20 Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, *supra* note 19, p. 36.

stricter than that of a manifest infringement of the applicable law, as set out in *Köbler* judgment.²¹

The concept of fault isn't either analysed widely in the in the opinions of Advocates General²², nor in legal literature. The criterion of fault is briefly mentioned in the opinion of Advocate General Tesauo in the case of *Brasserie du Pêcheur* where the Advocate indicates that by fault he means a subjective factor, or, in other words, a mental or psychological factor, which he characterizes as being at fault or negligent or in any sense traditionally attributed to the expression fault—the conduct of the entity to which the infringement and, with it, liability is attributed.²³ He argues that seeking fault in the subjective sense—and, *a fortiori*, wrongful intent—raises some considerable difficulties even at the conceptual level, especially since fault as a condition of state liability has always been the subject of profound reflection and conflicting assessments. In particular, the Advocate draws attention to the difficulties of identifying conduct displaying fault on the part of the public authorities on the basis of the same criteria used for the purposes of civil law, especially since the mechanisms devised for explaining the actions of legal persons by attributing to them the same manner of acting as natural persons are said to prove completely useless or at least inadequate from this point of view. Basing the conclusions on these arguments, Tesauo suggests that there is no relevance in inquiring into the existence of fault as a subjective component of the unlawful conduct.²⁴

L. Bergkamp, on the contrary, thinks that the establishment of fault as one of the criteria of sufficiently serious breach of EU law indicates that the Court of Justice dismissed the subjective (moral) nature supported the objective nature of fault where the existence of sufficiently serious infringement presupposes the existence of fault.²⁵

In the author's mind, both positions lack the precision. In civil law, fault is understood objectively as the external assessment of the behavior of a violator according to the objective standards of behavior. Fault is established if a violator is not behaving as a "reasonable man." Thus although fault criterion retains its subjective nature and is described as a relation of a person and his act, it is determined according to objective standards.

It is suggested to adopt a similar understanding of fault criterion by applying the EU rules on state liability. This trend, in the author's opinion, is implicitly supported by

21 Case C-173/03, *Traghetti del Mediterraneo SpA v. Repubblica Italiana* [2006] ECR I-05177, para. 44.

22 The situation can easily be explained by the fact that in his opinion in the *Köbler* and *Traghetti* cases, General Advocate M.P. Léger suggests a non-application of the criterion.

23 Opinion of Advocate General Tesauo in Case C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd* [1996] ECR I-1029, para 85.

24 Opinion of Advocate General Tesauo C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and R. v. Secretary of State for Transport, ex parte Factortame Ltd* [1996] ECR I-1029. It is also noteworthy that already in 1977 General Advocate J.P. Warner indicated that in the judicial sphere Articles 258 could only come into play just in the event of the court of the member state deliberately ignoring or disregarding EU law. Opinion of General Advocate Warner in Case 30/77, *Régina v. Pierre Bouchereau* [1977] ECR I-01999. The concept of "deliberate" disrespect of EU law was not provided.

25 Bergkamp, L. *Liability and Environment*. Leiden, Boston: Martinus Nijhoff Publishes, 2001, p. 182.

the practice of the Court that does not provide the concept of fault but suggests some guidelines on the possible application of the criterion.

In *British Telecommunications* case the Court of Justice applied the criterion of fault and implicitly came to the conclusion that the infringement was not intentional because *inter alia* the provisions of the directive were not clear and precise.²⁶ For this reason the infringement was not sufficiently serious and the state did not incur liability for the actions of its officials. The argument of the Court shows that neither intentional, nor negligent behavior is presumed. The existence of fault is determined by taking into account all the circumstances of a case.

The qualification of the actions of Austrian Supreme Administrative Court in the *Köbler* case can be analysed in parallel with the above-mentioned case. In the *Köbler* case, where the criteria of fault was not applied obviously, the Court of Justice found that the infringement of EU law cannot be regarded as being manifest in nature and thus as sufficiently serious. The Court of Justice stated that the provision of EU law was not clear and the jurisprudence of the Court did not provide the explanation on how the legal norm had to be applied. The fact that the national court in question ought to have maintained its request for a preliminary ruling, was not of such a nature as to invalidate that conclusion.²⁷ Thus, the national court erred in interpreting and applying the EU law, but its behavior did not show that the court had an intention to infringe EU law. On the contrary, it is obvious that the national court sought to apply the EU law correctly therefore had made a reference for a preliminary ruling. The Austrian Supreme Administrative Court had decided to withdraw the request for a preliminary ruling, on the view that the reply to the question of EU law to be resolved had already been given in the judgment in *Schöning-Kougebetopoulou*. This circumstance shows that the national court acted in good faith and did not infringe the EU law intentionally.

With reference to the arguments submitted above, the author proposes that for the purposes of state liability for the acts of the judicial power the fault criterion is satisfied when a national judge does not behave as a reasonable person would under the same or similar circumstances and shows a clear intention to ignore EU law.

2. The Concept of Fault at National Law and Jurisprudence

Solving the problems faced by persons claiming damages incurred by governmental institutions (because of organization of the complicated work of the institutions, unclear division of particular functions, collegial nature of work and similar reasons, the injured person is helpless to prove the fault of a particular official or at least this is a difficult task) most countries decided to refuse to regard the requirement of fault like obligatory condition of state liability.²⁸ Such a practice was reflected in the documents

26 Case C-392/93, *R. v. H.M. Treasury, ex parte British Telecommunications Plc* [1996] ECR I-1631, paras. 42–43.

27 Case C-224/01, *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239, para. 121–124.

28 Selelionytė-Drukeitinienė, S. *Valstybės deliktinės atsakomybės raidos tendencijos* [Trends in the Develop-

of international institutions. The Recommendation of the Council of Europe Committee of Ministers No. R 84 (15) stipulates that failure of a public authority to conduct itself in a way which can reasonably be expected from it in law is presumed in case of transgression of an established legal rule (principle 1). Thus, the presumption for the purpose of legal certainty is applied just in case of infringement of clear legal provisions that is the provisions that are known when a decision is adopted and not those which were interpreted by a national court after damage was done. State institution is not responsible for the damage if it succeeds to prove that the infringement of a legal provision fits into the range of expected standards of behavior.²⁹

Nevertheless, in this widespread practice in some countries the requirement of fault is still considered as one of the conditions of state liability. In France, Belgium and Italy, state liability is linked to the existence of gross fault (fr. – *faute lourde* or it. – *colpa grave*).

In France the main legal act governing state liability for the acts of judicial power is the Code of Judicial Organisation. Article L141-1 of the Code stipulates that the state is responsible for miscarriage of justice, but the state can be held liable in case of serious misconduct (fr. - *faute lourde*) or in case of denial of justice (fr. - *déni de justice*).³⁰

The law does not explain the concept of *faute lourde*. Its content is developed by national courts especially by the *Cour de Cassation* in its caselaw. The decision *Consorts Bolle-Laroche c. Agent judiciaire du Trésor* of the 23rd of February 2001 is considered to be a turning-point in the *Cour de Cassation* jurisprudence by most scholars. By this decision, the *Cour de Cassation* considerably softened the key elements of gross fault.³¹ Reversing the restrictive approach in earlier case law, it declared that a gross fault consists in “any deficiency characterized by a fact or series of facts demonstrating the unsuitability of the public service to fulfil the mission with which it is entrusted.”³² The disputed behavior of a national court is compared to the abstract model of proper administration of judicial power, that is, the standard of a reasonable judge is taken into account.³³

In 2008 the *Conseil d’Etat* acknowledged that it is possible to obtain damages when the content of a judgment is in manifest breach of EU law departing from its longstanding *Darmont* case law in which it had held that the content of such a judicial decision

ment of the State Liability in Tort]. Doctoral thesis. Social sciences (law). Vilnius: Mykolas Romeris University, 2008, p. 110.

29 *Ibid.*, p. 110.

30 Décret n°78-329 Instituant de code de l’organisation judiciaire, 16/03/1978Legifrance [interactive]. [accessed 23-02-2010]. <http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19780318&numTexte=&pageDebut=01129&pageFin>.

31 Canivet, G. The responsibility of judges in France. In Andenas, M.; Canivet, G.; Fairgrieve, D. (eds.). *Independence, accountability and the judiciary*. London: BIICL, 2006, p. 37; Errera, R. Le contrôle externe institutionnalisé: de la responsabilité des magistrates et du service public de la justice. In Andenas, M.; Canivet, G.; Fairgrieve, D. (eds.). *Independence, Accountability and the Judiciary*. London: BIICL, 2006, p. 295; Guinchard, S. *Responsabilités Encourues pour Fonctionnement Défectueux du Service Public de la Justice*. 2007, para. 26 [interactive]. [accessed 10-10-2009]. <<http://www.dalloz.fr/>>.

32 Canivet, G., *op. cit.*, p. 37.

33 Guinchard, S., *op. cit.*

could not be challenged by way of a state liability action once it had become final.³⁴ In the *Gestas* judgment of the 18th of June 2008 the plaintiff had claimed compensation for the damage he sustained due to the excessive length of the proceedings as well as grave mistakes made by the administrative courts. His claim was partially successful but only with regard to the fact that the proceedings had lasted 15 years and 8 months. In this respect the *Conseil d'Etat* held that based on general principles governing the functioning of the administrative courts Mr. Gestas was entitled to compensation. Yet it repudiated his allegation that the administrative courts had made grave mistakes when applying the law. The *Conseil d'Etat* denied in particular that the principle of legitimate expectations and legal certainty as guaranteed by EU law had been infringed.³⁵ *Conseil d'Etat* in principle admitted that misconduct by a court can lead to the right of compensation in the case where an obvious incompatibility can be found between the content of the judgment and a provision of EU law.³⁶ The court contradicted Mr. Gestas contention that there had been a manifest breach of EU law, but did not provide precise arguments of the negative decision. Thus it remains difficult to evaluate the application of the criterion of fault and the compliance of the application with the practice of the Court of Justice.

In Belgium the practice of the *Court of Cassation* shows that reversal of an illegal decision of a court is a necessary condition of state liability but not sufficient for a state to incur liability. It is necessary to weigh the behavior of the judge, whose decision was annulled taking into account the standard of “*normally mindful and cautious behavior of a judge at the same time in analogous circumstances.*”³⁷ The requirement of fault is held to be established if: 1) the legal provision infringed is sufficiently clear and known and 2) the court adopting illegal decision made a manifest inexcusable error, taking into account the information available.³⁸ Their conditions are cumulative. The state does not incur liability if a national court commits the manifest inexcusable error applying a weasel-worded legal act.³⁹

In the Italian legal system, State liability for judicial errors is governed by the Law of 13 April 1988 No. 117 (Law No. 117/88), which is applicable to the activities of all courts, including administrative courts. This law was passed after a referendum, with

34 Beutler, B. State liability for breaches of Community law by national courts: is the requirement of a manifest infringement of the applicable law an insurmountable obstacle. *Common Market Law Review*. 2009, 46: 788. In her analysis on the application of the legal provision in the case law R. Errera observes that in the decision *Garde des Sceaux, ministre de la justice c. M. Magiera* of the 28th of June 2002 *Conseil d'Etat* acknowledged that the state can be found liable for the infringement of Article 6 of ECHR because of prolonged proceeding in administrative courts. Errera, R. State Liability For Defective Functioning Of Justice. Case Comment. *Public Law*. 2004, WIN: 899. Nevertheless, the decision concerned just the infringements of ECHR but not the EU law.

35 Beutler, B., *supra* note 34, p. 787.

36 Charpy, C. France. The Conseil d'Etat Abandons Its Cohn Bendit Case-Law. *Conseil d'Etat*, 30 October 2009, Mme Perreux. *European Constitutional Law Review*. 2010, 6: 129.

37 Van Gerven, W.; Lever, J.; Larouche, P. *Tort law*. Oxford and Portland, Oregon: Hart Publishing, 2000, p. 388. In Seelionytë-Drukteinienë, S., *supra* note 28, p. 200.

38 *Ibid.*, p. 200.

39 Guinchard, S., *supra* note 31.

which the previous regime of liability was repealed. Before the referendum, the liability for judicial errors was governed by Articles 55, 56 and 74 of the Code of Civil Procedure, pursuant to which an unlawful behavior of a judge could never give rise to liability for the State, but only for the judge him/herself. Moreover, the judge could be held personally liable only if he/she had violated the law intentionally, or if he/she was found guilty of fraud or corruption.⁴⁰

The main change introduced with Law No. 117/88 was the shift of focus of the liability from the judge to the state.⁴¹ As it was mentioned above, pursuant to Article 2 of Law No. 117 of 13 April 1988 *on compensation for damage caused in the exercise of judicial functions and the civil liability of judges* any person who has sustained unjustifiable damage as a result of judicial conduct, acts or measures on the part of a judge who is guilty of intentional fault or serious misconduct in the exercise of his functions, or as a result of denial of justice, may bring proceedings against the State for compensation for pecuniary damage he has suffered. In contrary to the regulation in France and Belgium, Italian legislator does not leave a discretion to national courts to interpret the notion of serious misconduct. Serious misconduct is understood as: (a) a serious breach of the law resulting from inexcusable negligence; (b) the assertion, due to inexcusable negligence, of a fact the existence of which is indisputably refuted by the case-file; (c) the denial, due to inexcusable negligence, of a fact the existence of which is indisputably established by documents in the case-file; (d) the adoption of a decision concerning personal liberty in a case other than those provided for by law or without due reason.⁴²

Although such a limitation was considered to be incompatible with EU law, Italy still retains the restriction in force. On 29 July 2010 Commission brought an action against Italy before the Court of Justice asking the court to declare that remaining in force and applying the law No. 117, Italy infringed the established case law. The court, citing his practice in *Traghetti* case declared that by excluding any liability on the part of the Italian state for damage caused to individuals by an infringement of EU law attributable to a national court adjudicating at last instance where such an infringement results from interpretation of provisions of law or assessment of facts or evidence carried out by that court and limiting such liability to cases of intentional fault and serious misconduct ... the Italian Republic has failed to fulfill its obligation in connection with the general principle of the liability of Member States, laid down by the Court in its case law, for breach of European Union law by one of its courts adjudicating at last instance, which is a principle established by the Court of Justice.⁴³

The analysis of the national legal regulation and jurisprudence enables to make three conclusions. Firstly, the above mentioned countries still retain the criterion of fault as a condition of state liability which generally is established taking into account gravity

40 Mariolina Eliantonio, M. The enforcement of EC rights against national authorities and the influence of Koblner and Kuhne & Heitz on Italian administrative law: opening Pandora's box? *Maastricht Faculty of Law Working Paper*. 2006, 4: 5.

41 *Ibid.*

42 Case C-173/03, *Traghetti del Mediterraneo SpA v. Repubblica Italiana* [2006] ECR I-05177, para. 3.

43 Case C-379/10, *Commission v. Italian Republic* [2010] OJ C 301, 6.11.2010, paras. 40–41.

of an error, the manifest nature and excusability of infringement. These are the characteristics that a national court, when adopting a decision on the seriousness of a breach of EU law has to take into account thus as such are not inconsistent with the EU law. Moreover, such a practice explains why the Court of Justice included the fault criterion among other criteria of sufficiently serious infringement making easier for the national to adapt their national practice to the EU standards. On the other hand, it is clear that the states retain the requirement of fault as a condition *sine qua non* what is clearly accepted to be incompatible with EU law requirements and has to be changed by national legislators or by national courts in their jurisprudence.

Conclusions

The findings of the Article may be summarized as follows:

1. The Court of Justice has repeatedly stated in his jurisprudence on state liability that the obligation to make reparation for loss or damage caused to individuals cannot depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of EU law thus establishing that fault is not a prerequisite of state liability for the infringements of EU law as direct causal link or sufficiently serious infringement of EU law. Intentional nature of infringement is regarded as one of the criteria taken into account when the decision concerning the nature of the infringement of EU law is adopted.

2. Substantiating state liability for judicial acts the Court of Justice relied on international law where fault does not constitute a necessary element of state responsibility. It is rather an exception than a rule that international law sets a specific requirement of a mental element in terms of the primary obligation that shows that the Court of Justice, establishing the fault requirement as the criterion of sufficiently serious infringement, kept closer to national legal traditions. In the author's opinion, the position is determined by the existing national legal practice where the criterion of fault exists as a condition of state liability which is generally established taking into account gravity of error, the manifest nature and excusability of infringement. EU law is implemented at a national level, therefore the Court of Justice, establishing revolutionary means of legal protection, intended to take into account existing national legal traditions and facilitate implementation of the principle of state liability for the decisions of national courts in national jurisdictions.

3. Although there is no uniform European standard of fault expressly set by the Court of Justice, the Court gives implicit guidance concerning the application of the criteria in an action for damages against a state. The analysis of its practice allows us to draw the conclusion that a state can be held liable for the acts of judicial bodies if *inter alia* a national judge does not behave as a reasonable person would under the same or similar circumstances and shows a clear intention to ignore EU law.

4. The states still retain the requirement of fault as a condition *sine qua non* what is clearly accepted to be incompatible with EU law requirements. Thus the parliaments of

the Member States or the national courts are called upon to change the existing laws or practice thus keeping in line with the well-established practice of the Court of Justice.

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TEISMO KALTĖS SAMPRATA IEŠKINYJE PRIEŠ VALSTYBĘ DĖL EUROPOS SAJUNGOS TEISĖS PAŽEIDIMO

Regina Valutytė

Mykolo Romerio universitetas, Lietuva

Santrauka. Moksliniame straipsnyje analizuojama teismo kaltės sampratos ieškinyje prieš valstybę dėl žalos, padarytos pažeidus Europos Sąjungos teisę, problematika. Straipsnyje autorė kelia klausimą, kokia kaltės kriterijaus vieta valstybės atsakomybės sąlygų sistemoje ir ar Europos Sąjungos teisė įtvirtina vieningą kaltės standartą. Straipsnyje taip pat apžvelgiama keletas valstybių narių teisinis reglamentavimas ir (ar) teismų praktika įgyvendinant valstybės atsakomybės dėl galutinės instancijos teismų sprendimų principą nacionaliniame lygmenyje.

Atlikta Europos Teisingumo Teismo (toliau – Teisingumo Teismas) praktikos analizė leidžia daryti išvadą, kad Europos Sąjungos kaip ir tarptautinėje teisėje kaltė, kaip ir priešastinis ryšys bei teisės pažeidimas, nėra laikoma savarankiška valstybės atsakomybės sąlyga. Kaltė yra laikoma vienu iš faktorių, į kuriuos turi būti atsižvelgiama vertinant teisės pažeidimo „rimtumą“.

Straipsnyje pabrėžiami ir probleminiai nagrinėjamo kriterijaus turinio nustatymo aspektai. Teisingumo Teismas šio kriterijaus sampratos nepateikia, tačiau šio kriterijaus taikymo praktika leidžia apibrėžti tam tikras jo taikymo gaires, į kurias turėtų atsižvelgti nacionaliniai teismai, sprendami žalos atlyginimo klausimą.

Straipsnyje aptariami Prancūzijos, Belgijos bei Italijos teisės aktai, pateikiantys teismo kaltės sampratą, ir (ar) teismų praktika, kurioje sprendžiamas valstybės atsakomybės dėl teismų sprendimų klausimas. Analizuojant minėtų valstybių teisės normas ir (ar) praktiką, akivaizdu, kad nacionalinis teisinis reglamentavimas ir (ar) teisminė praktika vis dar nėra suderinta su Europos Sąjungos teisės reikalavimais. Valstybėse narėse sprendžiant valstybės atsakomybės dėl teismų veikų klausimą kaltės kriterijus, paprastai nustatomas atsižvelgiant į padarytos klaidos rimtumą, pažeidimo akivaizdumą bei galimą pažeidimo pateisinimą, yra laikomas savarankiška valstybės atsakomybės sąlyga.

Reikšminiai žodžiai: *Europos Sąjungos teisė, valstybės atsakomybė, nacionaliniai teismai, kaltė, Köbler byla.*

Regina Valutytė, Mykolo Romerio universiteto Teisės fakulteto Tarptautinės ir Europos Sąjungos katedros docentė. Mokslinių tyrimų kryptys: tarptautinė viešoji teisė, žmogaus teisės, Europos Sąjungos institucinė teisė.

Regina Valutytė, Mykolas Romeris University, Faculty of Law, Department of International and European Union law, associate professor. Research interests: public international law, human rights law, European Union institutional law.