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## MEMBER STATES LIABILITY IN DAMAGES FOR THE BREACH OF EUROPEAN UNION LAW—LEGAL BASIS AND CONDITIONS FOR LIABILITY

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**Abstract.** *This article analyses the legal basics of the Member States liability in damages for the breach of European Union law and the conditions for liability. It is emphasized that the Member States liability in damages for the breach of European Union law has three different grounds—one direct legal background (Article 4 of the Treaty of the European Union) and two indirect basics—principles of direct effect and that of effectiveness of European Union law. The author subsequently examines the content of each condition for liability established in the practice of the Court of Justice of the European Union—the intention of the rule of European Union law infringed to confer rights on private parties, the sufficiently seriousness of the breach and the direct causal link between the breach and the damage. It is stated that in order to prove that a Member State is liable for the breach of European Union law, one more condition for liability should be established—a private party must prove that he has incurred particular damage. It is also highlighted that the second condition for the Member States liability in damages for the breach of European Union law—sufficiently seriousness of the breach—restricts the right of a private party to obtain compensation.*

**Keywords:** *state liability in damages, infringement of EU law, recovery of damage, conditions for liability, conferment of rights to private parties, sufficiently serious breach, direct causal link, damage.*

## Introduction

Every Member State of the European Union (hereinafter referred to as EU), by accepting the obligations under the Treaty on the Functioning of the European Union (hereinafter referred to as Treaty)<sup>1</sup>, must comply not only with the provisions of primary EU law, but secondary EU law as well. It is a common situation when a Member State breaches EU law—does not comply with the provisions of the Treaty, regulation, does not implement a directive, implements it incorrectly or belatedly, infringes EU law in another way. Therefore, one Member State can be found liable and be obliged to pay compensation to a private party for harm caused for such a breach of EU law.

There is no article in the Treaty, determining neither the concept of the Member States liability in damages for the breach of EU law (hereinafter referred to as state liability in damages) nor the conditions for liability. The possibility to apply this type of liability was established in the practice of the Court of Justice of the European Union (hereinafter referred to as Court). The Court stressed that if a Member State infringes EU law and causes damage to a private party, it has an obligation to recover this damage. Having formulated the conditions for liability, the Court established common requirements, binding on national courts. The conditions for liability were subsequently revised and interpreted, but national courts were faced with the problem, how to interpret and apply these conditions for liability in practice. The biggest problem was and still is the second condition for liability—sufficiently seriousness of the breach—as it is very difficult for the private party to prove it. This raises many theoretical and practical problems, which must be examined very thoroughly and which were not comprehensively disclosed by the Court.

The subject matter of this research is relevant in both scientific and practical approaches. It should be stressed that foreign legal authors (for example, S. Prechal, K. Lenaerts, M. Dougan, Ch. Hilson, K. and V. van Themaat, T. Tridimas, W. van Gerven, R. Rebhahn, J. Steiner, M. G. Puder, L. Antonioli, A. Ward, N. Reich) pay sufficient attention to the issues of the state liability in damages. However, they analyse only particular aspects of this type of liability, do not relate them and analyse the state liability in damages integrated. This allows making a conclusion that problems of the legal basics of the state liability in damages and conditions for liability are not sufficiently identified in the foreign legal literature. Lithuanian legal authors examine the state liability in damages very fragmentary, this analysis is largely related either to some narrow aspects of this type of liability (V. Valančius, S. Selelionytė-Drukteinienė, M. Šeškauskis) or to the questions of the state liability in damages for the acts of the courts of last instance (R. Valutytė). Thus the problems of the legal basics of the state liability in damages and the conditions for liability are not identified, the methods of their resolution are also not clear. According to what was mentioned above, it can be emphasized

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1 Consolidated version of the Treaty on the Functioning of the European Union. *Official Journal*, C 2008, No. 115-1.

that the research executed in this article comprehensively examines the legal basics of the state liability in damages and the content of the conditions for liability.

The aim of the research is to analyse the legal basics of the state liability in damages and the conditions for liability comprehensively and thoroughly, disclose crucial theoretical and practical problems related to the reasoning of this type of liability, application of conditions for liability, and determine, whether the right of a private party to claim compensation from the state, which has infringed EU law, is not restricted.

The subject matter of this research is the legal basics of the state liability in damages and conditions for liability according to the jurisprudence of the Court, legal doctrine and provisions of the Treaty. The abovementioned subject matter can be attained using such methods as logical-analytical, systemical analysis, theological, comparative, historical, linguistic, the method of analysis of cases of the Court.

## 1. Legal Basis of the State Liability in Damages

The obligation of a Member State to compensate damages for the breach of EU law was recognized by the Court years ago, though all the questions of the recovery of damages were left to national courts.<sup>2</sup> Legal authors highlight this feature of the Court's case law by stressing that such a right of a private party to submit a claim in a national court for the recovery of damages was executed solely on the background of national law. But neither the conception of the state liability in damages, nor common conditions for liability could be found in EU law<sup>3</sup>. Therefore, all the cases heard before *Francovich* did not constitute a suitable basis for clear and explicit conditions for such liability.<sup>4</sup> As a result, in order to properly to reveal the basis of the state liability in damages, it should be briefly scrutinized how the damage was recovered in the national courts before *Francovich* and how this decision influenced the subsequent development of the state liability in damages.

### 1.1. The Genesis of the State Liability in Damages

In *Humblet* the Court admitted that a Member State has to make good damage which was incurred because of the national legal act conflicting with EU law and repeal such an act<sup>5</sup>. The Court in *Commission v. Italy* held that his decision enacted according to Article 228 (Article 260 at present) of the Treaty, is the fundamental basis for the liability of a Member State to arise against another Member State, EU or a private party.<sup>6</sup> A lot of cases judged by the Court during this period also showed that the Court considered the doctrine of direct effect and the principle of effectiveness sufficient for the protec-

2 Case 60/75, *Russo* [1976] ECR 45, para. 9.

3 Prechal, S. *Directives in EC Law*. Second edition. Oxford: Oxford University Press, 2005, p. 271.

4 Möllers, M. J. von Thomas. Doppelte Rechtsfortbildung contra legem? Zur Umgestaltung des Bürgerlichen Gesetzbuches durch den EuGH und nationale Gerichte. *Europarecht*. 1998, 33: 20–21.

5 Case 6/60, *Humblet* [1960] ECR 559, p. 569.

6 Case 39/72, *Commission v. Italy* [1973] ECR 101, para. 11.

tion of the rights of private parties. Therefore, the Court tended to leave all the issues of reparation to national courts.<sup>7</sup> For the abovementioned reasons it was not clear if the right to require compensation derived from EU law.<sup>8</sup> Some legal authors pay attention to the fact that the questions of liability of public institutions were being solved differently in various Member States. This situation could not, however, safeguard the uniform protection of the right to claim damages in all the Member States, as there were no relevant conditions for liability in EU law<sup>9</sup>. Legal authors, examining this period of the jurisprudence of the Court, point out several means of protection private parties' rights both in national and EU courts: firstly, invoking direct effect of EU law<sup>10</sup>; secondly, submitting a claim for annulment or inaction (but only with exceptions under Articles 230 and 232 (Articles 263 and 265 at present) of the Treaty)<sup>11</sup>; thirdly, submitting a claim for the recovery of damages against EU institutions (EU non-contractual liability)<sup>12</sup>; fourthly, invoking the former decision of the Court adopted under Article 228 (article 260 at present) of the Treaty.<sup>13</sup> Many legal authors agree that direct effect of EU law was the most usually invoked mean of the protection of private parties' rights in national courts.<sup>14</sup> However, it is important to mention that even direct effect of EU law was not able to solve the problems of compensation. In conclusion, neither common definition of the state liability in damages nor conditions for liability could be found in the jurisprudence on the Court. Direct effect of EU law and the former decision of the Court enacted on

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- 7 Case 13/68, *Salgoil* [1968] ECR 453, p. 463; Case 33/76, *Rewe* [1976] ECR 1989, para. 6; Case 45/76, *Comet* [1976] ECR 2043, para. 12; Case C-199/82, *San Giorgio* [1983] ECR 3595, paras. 12–18; Case 179/84, *Bozzetti* [1985] ECR 2301, para. 17; Case C-213/89, *Factortame* [1990] ECR I-2433, paras. 18–22.
  - 8 Ward, A. *Judicial Review and the Rights of Private Parties in EU Law*. Oxford: Oxford University Press, 2007, p. 206.
  - 9 van Themaat, K. V. *The Law of the European Union and the European Communities*. Fourth edition. Hague: Kluwer Law International, 2008, p. 556.
  - 10 Steiner, J. From direct effects to *Francovich*: shifting means of enforcement of Community Law. *European Law Review*. 2003, 18: 3–22; van Themaat, K. V., *supra* note 9, p. 517.
  - 11 van Gerven, W. The Legal Protection of Private Parties in the Law of the European Economic Community. *European Law and the Individual*. Amsterdam: North-Holland Publishing, 1976, p. 1.
  - 12 Moniz, C. B. Overview of the Mechanisms of Enforcement of Community Law. *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle*. Koln: Bundesanzeiger Verlag, 2004, p. 29–30; Hilson, Ch. The Role of Discretion in EC Law on Non-contractual Liability. *Common Market Law Review*. 2005, 42: 677–695; Schermers, H. G.; Waelbroeck, D. F. *Judicial Protection in the European Union*. Sixth edition. Hague: Kluwer Law International, 2001, p. 540–588; Antonioli, L. Community Liability. *Tort Law of the European Community*. Wien: Springer, 2008, p. 213–240; Hix, J. P. Zur Ausservertraglichen Haftung der Gemeinschaft. *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle*. Koln: Bundesanzeiger, 2004, p. 199–223; Lenaerts, K. Interlocking Legal Orders in the European Union and Comparative Law. *International and Comparative Law Quarterly*. 2003, 52: 887–893; Lenaerts, K.; von Nuffel, P. *Constitutional Law of the European Union*. London: Sweet and Maxwell, 1999, p. 369–384; Tridimas, T. *The General Principles of EU Law*. Second edition. Oxford: Oxford University Press, 2007, p. 477–497; van Gerven, W. The Emergence of the Common European Tort Law: the EU Contribution—One Among Others. *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle*. Koln: Bundesanzeiger Verlag, 2004, p. 229–236.
  - 13 Köck, H. F.; Hintersteiner, M. The Concept of Member State Liability for Violation of Community Law and Its Shortcomings. An Analysis of the Case Law of the European Court of Justice on This Matter. *Austrian Review of International and European Law*. 1998, 3: 32.
  - 14 Steiner, J., *supra* note 10, p. 3–22; van Themaat, K. V., *supra* note 9, p. 517.

the ground of Article 260 of the Treaty could not be a proper basis for the recovery of damages. All these controversial issues were solved (least partly) in *Francovich*.

## 1.2. The Legal Basics of the State Liability in Damages

The Court's decision in *Francovich* reformed the recovery of damage to private parties in national courts. Except the newly formulated conditions for liability and the statement that the issues of reparation for the breach of EU law are left explicitly to national courts, the Court provided legal basis of the state liability in damages. The Court held that: firstly, the state liability in damages was framed as having a direct basis in EU law; secondly, the state liability in damages was essentially grounded on three different backgrounds: direct effect of EU law, the principle of effectiveness of EU law and the former Article 10 of the Treaty<sup>15</sup> (Article 4 of the Treaty of European Union at present).<sup>16</sup> All these three backgrounds were very much related to each other according to the Court's arguments in *Francovich*. However, it can be seen that the state liability in damages was mostly in coherence with the principle of effectiveness.<sup>17</sup> The grounding of the state liability in damages on two other basics was not properly disclosed as the Court's arguments relating to them were not sufficiently comprehensive.<sup>18</sup> In comparison to *Francovich*, legal doctrine distinguishes these backgrounds and other factors, which could have influenced the foundation of the state liability in damages in the Court's jurisprudence. Firstly, former Article 10 of the Treaty, which entrenched the principle of loyalty (cooperation).<sup>19</sup> Secondly, direct effect of EU law.<sup>20</sup> Thirdly, the principle of human rights protection.<sup>21</sup> Fourthly, the principle of the effectiveness of EU law.<sup>22</sup> Fifthly, the jurisprudence of the Court in EU non-contractual liability cases<sup>23</sup>. Sixthly, the liability of States in international law.<sup>24</sup> Seventhly, legal systems of separate Member States (in relation to second paragraph of Article 340 of the Treaty).<sup>25</sup> It has to

15 Joined Cases C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357, paras. 31–37.

16 Consolidated version of the Treaty of European Union. *Official Journal*, C 2008, No. 115-1.

17 Joined Cases C-6/90 and C-9/90, *Francovich* [1991] ECR I-5357, paras. 32–34.

18 *Ibid.*, paras. 31, 36.

19 Puder, M. G. Phantom Menace or New Hope: Member State Public Tort Liability after the Double-Bladed Light Saber Duel Between the European Court of Justice and the German *Bundesgerichtshof* in *Brasserie du Pêcheur*. *Vanderbilt Journal of Transnational Law*. 2000, 33: 333–336.

20 van Themaat, K. V., p. *supra* note 9, p. 517.

21 Puder, M. G., *supra* note 19, p. 333–336.

22 Brealey, M.; Hoskins, M. *Remedies in EC law. Law and Practice in the English and EC Courts*. London: Longman, 1994, p. 72.

23 The relationship between Member States' liability and EU non-contractual liability was later on emphasized by the Court itself. See Opinion of Mr. Advocate General Mischo, delivered on 28 May 1991 in Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, para. 85; Moniz, C. B., *supra* note 12, p. 29–30; Antoniolli, L., *supra* note 12, p. 213–240; p. 199–223; Lenaerts, K. Interlocking Legal Orders in the European Union and Comparative Law, *supra* note 12, p. 887–893.

24 The relationship between Member States' liability in EU law and State's responsibility in international law was later on emphasized by the Court itself. See Köck, H. F.; Hintersteining, M., *supra* note 13, p. 31–35.

25 Part 2 of Article 340 of the Treaty shows the relationship between Member States' liability and EU non-contractual liability as well. See van Gerven, W. European Standards for Civil Liability of the State. In *Com-*

be mentioned that the relationship between the state liability in damages and EU non-contractual liability was also mentioned in the subsequent jurisprudence of the Court (considering the reformulation of conditions for liability).<sup>26</sup> The connection between the state liability in damages in EU law and State's responsibility in international law was later on emphasized by the Court as well (in determining the concept of the Member State's authorities).<sup>27</sup>

In conclusion, the Court in *Francovich* provided one direct legal background of the state liability in damages (Article 4 of the Treaty of the European Union) and two indirect basics—principles of direct effect and that of effectiveness of EU law. These two principles were earlier established and developed by the Court himself and which for a very long time formed a basis for a private party to claim reparation of damages in national courts. The foundation of the state liability in damages on the abovementioned three backgrounds (even though not very much comprehensive) reflects the intention of the Court to find a solid basis of the state liability in damages issues in EU law thus creating some general provisions, which should be observed by the national courts of Member States.

## 2. Conditions for the State Liability in Damages

Conditions for the state liability in damages—general requirements, which were elaborated in the jurisprudence of the Court. Despite the fact, that it is for national courts to determine, whether the conditions for liability are met, the Court usually indicate certain circumstances, which the national courts may take into account in their evaluation<sup>28</sup>. Therefore, the explanation and application of these conditions for liability is most of all dependent on the opinion of the Court on this matter.<sup>29</sup> Legal doctrine emphasizes that the determination of the conditions for liability were influenced by such factors: firstly, separate national legal systems of Member States (especially French)<sup>30</sup>; secondly, Court's decisions in EU non-contractual liability cases.<sup>31</sup> Both national legal norms regulating the questions of liability of public institutions and EU non-contractual liability have interplay—second paragraph of Article 340 of the Treaty (this paragraph lays down that EU is obliged to make good damages caused by its institutions or its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States). Article 340 of the Treaty gives a legal basis to the Court

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*pliance and Enforcement of European Community Law*. Hague: Kluwer Law International, 1999, p. 335.

26 Joined Cases C-46/93 and 48/93, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paras. 28–43; Case C-392/93, *British Telecommunications* [1996] ECR I-1631, paras. 40–42; Case C-352/98, *Bergaderm* [2000] ECR I-5291, paras. 41–43.

27 Case C-224/01, *Köbler* [2003] ECR I-10239, para. 32.

28 Case C-452/06, *Synthon* [2008] ECR I-0000, para. 36; Case C-445/06, *Danske Slagterier* [2009] ECR I-0000, paras. 19–20; Case C-118/08, *Transportes Urbanos* [2010] ECR I-0000, paras. 29–31.

29 Ward, A., *supra* note 8, p. 252.

30 van Gerven, W. Of Rights, Remedies and Procedures. *Common Market Law Review*. 2000, 37: 509–510.

31 Puder, M. G., *supra* note 19, p. 321.

to apply a comparative method in its practice on EU non-contractual liability.<sup>32</sup> From the other point of view, the establishment of conditions for the state liability in damages shows how national legal systems were influenced by EU law.<sup>33</sup> This is true as after *Francovich* all Member States must apply not the relevant national law, but common conditions for liability elaborated by the Court.

### 2.1. The First Condition—the Rule of EU Law Infringed Must Have Intended to Confer Rights on Private Parties

The first condition for liability, which must be satisfied before a private party can claim compensation from the state—the rule of EU law infringed must have intended to confer rights on private parties.<sup>34</sup> In *Francovich* (which concerned non-implementation of the directive) the Court held that *the result prescribed by the directive should entail the grant of rights to individuals*. In *Brasserie du Pecheur* case this condition for liability was reformed (by adjusting it to any other breach of EU law) in such a way: *the rule of law infringed must have intended to confer rights on private parties*.<sup>35</sup> Major part of the cases show that particular EU provisions (directives, Treaty provisions, regulations) were intended to confer rights on private parties, especially these norms, which were related to the fundamental freedoms of the EU.<sup>36</sup> The Court has confirmed that rights of private parties can arise not only directly, but even indirectly, i. e., stemming out of the obligations of the third parties.<sup>37</sup> Notwithstanding this, the content of this condition for liability is still unclear as the Court only on some occasions explained it in more detail.<sup>38</sup> Legal doctrine tends to clarify the content of the first condition for liability. According to legal authors, a *right* is to be understood as the concept of EU law, not of national law. For that reason national courts have to interpret the content of this condition for liability according to EU law, no discretion of Member States is possible.<sup>39</sup> The right is considered to be a subjective right, which can be explicitly described or can be described at least.<sup>40</sup> Many legal authors raise a question that not only directly but also indirectly

32 Antonioli, L., *supra* note 12, p. 218–219.

33 van Gerven, W., *supra* note 30, p. 335, 343.

34 Joined Cases C-283/94, C-292/94, *Denkavit* [1996] ECR I-5063, para. 48.

35 Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame* [1996] ECR I-1029, paras. 20, 51.

36 Case C-127/95, *Norbrook Laboratories* [1998] ECR I-1531, para. 108; Case C-150/99, *Stockholm Lindöpark* [2001] ECR I-493, para. 33; Case C-445/06, *Danske Slagterier* [2009] ECR I-0000, para. 21. But see, on the contrary, *Peter Paul*, where the Court rules that relevant provisions of the directive were not intended to confer rights on private parties: Case C-222/02, *Peter Paul* [2004] ECR I-9425, paras. 49–51.

37 Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame* [1996] ECR I-1029, para. 54.

38 Case C-140/97, *Rechberger* [1999] ECR I-3499, paras. 22–23; Case C-224/01, *Köbler* [2003] ECR I-10239, paras. 102–103.

39 Obradovich, D.; Lawranos, N. *Interface between EU Law and National Law*. Groningen: Europa Law Publishing, 2007, p. 288.

40 Lageard, S. Commentary to Art. 288 EC. *Kommentar zu dem Vertrag über die Europäische Union und zu dem Vertrag zur Gründung der Europäischen Gemeinschaft*. 2 Auflage. Köln: Bundesanzeiger, 1999, p. 1967.

conferred rights must be protected, i. e. rights, which arise from the obligations of third parties.<sup>41</sup>

The abovementioned condition for liability is related to so called *Schutznormtheorie*.<sup>42</sup> But its application in the state liability in damages cases, according to many legal authors, is too narrow as the aim of EU law is to confer a broad protection of rights (it means that rights can be conferred even by the provisions of the EU law, not directly aimed to protect the rights of private parties).<sup>43</sup> Therefore, it is essential to pay attention not only to the aim, but also to the content of the relevant legal provisions.<sup>44</sup> Some other aspects can also be important, for instance, the possibility of a private party to submit a claim for compensation in a national court<sup>45</sup>, the designation of the relevant provision to sufficiently defined group of private parties, to which belongs the private party who is seeking reparation.<sup>46</sup> Summing up, the definition of the first condition for liability is a matter of EU law, which can be established according to various criteria and taking into consideration factual and legal basics of the individual case.

The Court in *Francovich* case held that one more condition for liability—the possibility to identify the content of rights of a private party on the basis of the provisions of the directive (the duty to prove this condition for liability was also reiterated in *Faccini Dori* and *Dillenkofer* cases)<sup>47</sup>—must be proved. On the contrary, this condition for liability was no longer mentioned in *Brasserie du Pecheur*.<sup>48</sup> In *Norbrook Laboratories* and *Carbonari* cases this condition for liability was not qualified as a separate, but it was taken into consideration when evaluating the first condition for liability.<sup>49</sup> In the subsequently practice (*Sidney Evans*, *Robins*, *Synthon*, *Danske Slagterier*, *Transportes Urbanos* cases) the Court no longer mentioned that for the state liability in damages

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- 41 Eilmansberger, T. The Relationship between Rights and Remedies in EC Law: in Search of the Missing Link *Common Market Law Review*. 2004, 41: 1224–1225; Tison, M. Do not Attack the Watchdog! Banking Supervisor’s Liability after *Peter Paul*. *Common Market Law Review*. 2005, 42: 640; Tison, M. Who is afraid of *Peter Paul*? The European Court of Justice to Rule on Banking Supervisory Liability. *The Financial Regulator*. 2004, 9: 67; Binder, J. H. The Advocate-General’s Opinion in *Paul and others v. Germany*—Cutting Back State Liability for Regulatory Negligence? *European Business Law Review*. 2004, 15: 474.
- 42 Caranta, R. Judicial Protection Against Member States: A New *Jus Commune* Takes Shape. *Common Market Law Review*. 1995, 32: 284; Betlem, G. Being “Directly and Individually Concerned”, The *Schutznorm* Doctrine and *Francovich* Liability. *Public Interest Litigation before European Courts*. Baden-Baden: NOMOS, 1996, p. 1–25; Reich, N. Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights. *Common Market Law Review*. 2000, 44: 718–719; Prechal, S. Member State liability and Direct Effect: What’s the Difference After All. *European Business Law Review*. 2006, 3, p. 309.
- 43 Tison, M., *supra* note 41, p. 660.
- 44 Prechal, S., *supra* note 3, p. 307.
- 45 Aalto, P. Twelve Years of *Francovich* in the European Court of Justice: A Survey of the Case-law on the Interpretation of the Three Conditions of Liability. *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle*. Köln: Bundesanzeiger, 2004, p. 62–63.
- 46 Dougan, M. *National Remedies before the Court of Justice*. Oxford: Hart Publishing, 2004, p. 238–240.
- 47 Case C-91/91, *Faccini Dori* [1994] ECR I-3325, para. 27; Joined Cases C-178/94, 179/94, 188/94, 189/94 and 190/94, *Dillenkofer* [1996] ECR I-4845, para. 27.
- 48 Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame* [1996] ECR I-1029, para. 51.
- 49 Case C-127/95, *Norbrook Laboratories* [1998] ECR I-1531, para. 108; Case C-131/97, *Carbonari* [1999] ECR I-1103, para. 52.

to arise it should be possible to identify the content of the rights of the private party.<sup>50</sup> Some authors suggest that the condition to define the content of the right on the basis of the provisions of the directive is not a separate one, but more the supplement of the first condition for liability, its integrate element.<sup>51</sup> Other authors support the proposition that this condition for liability is a separate condition, but if the existence of it is confirmed then it is easy to define the content of the legal provision of EU law infringed.<sup>52</sup>

In summary, these conclusions can be made. Firstly, a private party is no longer obliged to prove that it was possible to identify the content of his rights on the basis of the provisions of the directive. Secondly, the first condition for liability does not restrict a right of a private party to obtain compensation.

## 2.2. The Second Condition—Sufficiently Seriousness of the Breach

Sufficiently seriousness of the breach is considered to be the most difficulty provable condition for liability—a private party is obliged to prove not an ordinary breach, but a breach, which is a manifest one.<sup>53</sup> The concept of *sufficiently serious breach* originates from the Court's practice in EU non-contractual liability cases<sup>54</sup>, which was upwards adapted to the state liability in damages cases.<sup>55</sup> For that reason this condition for liability is a matter of EU law as well.

In *Brasserie du Pecheur* case the Court for the very first time stated that a breach will be sufficiently serious if the authority of a Member State concerned manifestly and gravely disregarded the limits on its discretion. The Court similarly submitted the factors, which the national court may take into consideration when deciding on this condition for liability. These factors include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national authority, whether the infringement caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by the EU institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to EU law.<sup>56</sup> This list of factors remained unaltered in the subsequent jurispru-

50 Case C-63/01, *Sidney Evans* [2003] ECR I-14447, para. 83; Case C-278/05, *Robins* [2007] ECR I-1053, para. 69; Case C-452/06, *Synthon* [2008] ECR I-0000, para. 35; Case C-445/06, *Danske Slagterier* [2009] ECR I-0000, para. 20; Case C-118/08, *Transportes Urbanos* [2010] ECR I-0000, para. 30.

51 Rebhahn, R. Non-contractual Liability in Damages of Member States for Breach of Community Law. *Tort Law of the European Community*. Wien: Springer, 2008, p. 192.

52 Martin, C. P. Furthering the Effectiveness of EC Directives and the Judicial Protection of Individual Rights Thereunder. *International and Comparative Law Quarterly*. 1994, 43: 48.

53 Marson, J. Holes in the Safety Net? State Liability and the Need for Private Law Enforcement. *Liverpool Law Review*. 2004, 25: 121–122.

54 Case 5/71, *Schöppenstedt* [1971] ECR 975, para. 11; Cases 83/76, 94/76, 4/77, 15/77 and 40/77, *Bayerische HNL* [1978] ECR 1209, para. 4; Joined Cases 9/71 and 11/71, *Grand Moulin de Paris* [1972] ECR 391, para. 13.

55 Case C-445/06, *Danske Slagterier* [2009] ECR I-0000, para. 20; Case C-118/08, *Transportes Urbanos* [2010] ECR I-0000, para. 30.

56 Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame*, [1996] ECR I-1029, paras. 51, 55–56.

dence of the Court<sup>57</sup> until the decision in *Köbler* was enacted. The Court in *Köbler* held that in case EU law is infringed by national courts adjudicating at last instance, one more important criterion is to be taken in consideration—non compliance by the court of last instance with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 of the Treaty.<sup>58</sup> According to the practice of the Court, the abovementioned factors are more subjective than objective, this list is not exhaustive. There should be no obligation to identify all these factors in every case—one or two of them are considered sufficient.<sup>59</sup>

For a long time it was considered that the measure of discretion left by the rule of EU law was the most important factor when deciding on the sufficiently seriousness of the breach.<sup>60</sup> According to the Court, the authority of a Member State can have wide/limited discretion (or no discretion at all).<sup>61</sup> In *Haim* was established that the right of discretion must be defined in the first place by EU, not national law. For that reason, the limits of discretion conferred on the national institution under national law is not important.<sup>62</sup> According to the practice of the Court, in wide discretion cases (when the authority of a Member State has a possibility to make legislative choices; these are usually the cases of non-implementation of directives), the test of sufficiently serious breach is always applied.<sup>63</sup> It means that it is essential to take into consideration the other factors of sufficiently serious breach, for instance, the clarity and precision of the rule breached, etc.<sup>64</sup> On the contrary, if the institution of a Member State was not called to make any legislative choices and had only reduced, or even no, discretion (in case of non-implementation of directives<sup>65</sup>, incorrect implementation of a directive<sup>66</sup>, infringement of the Treaty provisions<sup>67</sup>, infringement of legal norms of a regulation<sup>68</sup>), the mere infringement could be enough to establish the existence of a sufficiently serious breach and no other factors are to be applied.<sup>69</sup> But in *Haim* the Court held that a mere infringement of EU law by a Member State may, but does not necessarily, constitute a sufficiently serious breach.<sup>70</sup>

57 Case C-118/00, *Larsy* [2001] ECR I-5063, para. 39; Case C-63/01, *Sidney Evans* [2003] ECR I-14447, para. 86; Case C-278/05, *Robins* [2007] ECR I-1053, para. 77.

58 Case C-224/01, *Köbler* [2003] ECR I-10239, para. 55.

59 Case C-173/03, *Traghetti del Mediterraneo* [2006] ECR I-5177, para. 43; Case C-452/06, *Synthon* [2008] ECR I-0000, paras. 37–39.

60 Opinion of Mr. Advocate General Tesouro delivered on 28 November 1995 in Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para. 78.

61 Case C-278/05, *Robins* [2007] ECR I-1053, paras. 70–74.

62 Case C-424/97, *Haim* [2000] ECR I-5123, para. 40.

63 Joined Cases C-46/93 and 48/93, *Brasserie du Pêcheur and Factortame*, [1996] ECR I-1029, paras. 47, 51.

64 Case C-319/96, *Brinkmann* [1999] ECR I-5255, paras. 30–33.

65 Case C-127/95, *Norbrook Laboratories* [1998] ECR I-1531, paras. 108–109.

66 Case C-150/99, *Stockholm Lindöpark* [2001] ECR I-493, para. 42; Case C-452/06, *Synthon* [2008] ECR I-0000, para. 46.

67 Case C-5/94, *Hedley Lomas* [1996] ECR I-2553, paras. 27–29.

68 Case C-118/00, *Larsy* [2001] ECR I-5063, para. 55.

69 Case C-452/06, *Synthon* [2008] ECR I-0000.

70 Case C-424/97, *Haim* [2000] ECR I-5123, paras. 41–42.

The decisions in modern jurisprudence of the Court upholds such a position. These are the judgments in *Rechberger*<sup>71</sup>, *Stockholm Lindöpark*<sup>72</sup>, *Larsy*<sup>73</sup>, *Synthon*<sup>74</sup> cases.

Legal authors emphasize that the wider the discretion is, the more difficult is to prove that the breach committed was sufficiently serious.<sup>75</sup> On the contrary, the narrower the measure of discretion (the more detailed requirements are determined in EU law), the easier to prove sufficient seriousness of the breach.<sup>76</sup> Some authors maintain that the sufficiently serious breach test should be applied only in cases when Member States enjoy a wide margin of discretion.<sup>77</sup> The others are of the opinion that it is essential to evaluate if the breach was sufficiently serious on every occasion—both in wide and no (limited) discretion cases.<sup>78</sup> Most legal authors consider non-implementation or belated implementation of a directive to be a sufficiently serious breach *per se*, as in such cases a Member State has no option to implement a directive or not, or even do it later (in other words, a Member State in question enjoys no discretion).<sup>79</sup> The decision can be made that legal doctrine does not fully reflect the Court's opinion on the assessment of the measure of discretion for the purposes of determining the sufficiently serious breach of the EU law. In summary, the measure of discretion left to a Member State's authority is no longer a decisive factor for the assessment of the sufficiently seriousness of the breach, but this criterion, determining the second condition for liability, must be firstly applied in all state liability cases.

According to the jurisprudence of the Court, the clarity and precision of the norm breached is one of the most frequently applied factors determining the sufficiently seriousness of the breach (*Larsy*, *Robins*, *Synthon* cases).<sup>80</sup> This criteria can be satisfied in many ways. In *Larsy* the provisions of the particular regulation were similarly explained by both the Advocate General and EU institutions (the European Commission and the Court, which has already explained the provisions of this regulation). Accordingly, it

71 Case C-140/97, *Rechberger* [1999] ECR I-3499, paras. 50–53.

72 Case C-150/99, *Stockholm Lindöpark* [2001] ECR I-493, paras. 39–42.

73 Case C-118/00, *Larsy* [2001] ECR I-5063, paras. 41–55.

74 Case C-452/06, *Synthon* [2008] ECR I-0000, paras. 41–46.

75 Prechal, S., *supra* note 3, p. 289.

76 Gasparon. The Transposition of the Principle of Member State Liability into the Context of External Relations. *European Journal of International Law*. 1999, 10: 616; Tridimas, T. Liability for Breach of Community Law: Growing Up and Mellowing Down? *Common Market Law Review*. 2001, 38: 311.

77 Oliver, P. Case C-5/94, *The Queen v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas (Ireland)*, [1996] ECR I-2553. *Common Market Law Review*. 1997, 34: 672–673; van Gerven, W. The Emergence of the Common European Tort Law: the EU Contribution—One Among Others. *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle* van Gerven, *supra* note 12, p. 230; van Themaat, K. V., *supra* note 9, p. 561;

78 Hilson, Ch., *supra* note 12, p. 693; Lenaerts, K., *supra* note 12, p. 892–893; Dougan, M., *supra* note 46, p. 243–246.

79 Wakefield, J. Case C-472/00 P, *Commission v. Fresh Marine AS*, Judgment of the Full Court of 10 July 2003. *Common Market Law Review*. 2004, 41: 243; Somek, A. Inexplicable Law: Legality's Adventure in Europe *Transnational Law and Contemporary Problems*. 2006, 15: 119; Reich, N., *supra* note 42, p. 714–715; Rebhahn, R., *supra* note 51, p. 198.

80 Case C-278/05, *Robins* [2007] ECR I-1053, 73–80; Case C-452/06, *Synthon* [2008] ECR I-0000, paras. 39–46.

was established that Belgium had committed a sufficiently serious breach.<sup>81</sup> *Synthon* case illustrates that notwithstanding the fact that the provisions of the directive were construed complex, they were sufficiently precise and clear for the transposition into the national law. Consequently, the breach was confirmed as sufficiently serious.<sup>82</sup> In conclusion, the clearer and more precise the norm of EU law breached is, the more easier is to enact the decision on the sufficiently seriousness of the breach. The more ambiguous this norm is, the more easier is to justify the conduct of a Member State.

When evaluating whether any error of law was excusable or inexcusable, such criteria can also be taken in consideration: the former decision of the Court that a Member State has breached EU law, the position of EU institutions, the jurisprudence of national courts on the relevant matter, etc.<sup>83</sup> Therefore, this factor is very much related to the abovementioned criterion—the clarity and precision of the EU norm breached.<sup>84</sup> The doctrine sees the relation between the clarity and precision of the legal norm of EU law breached and excusability/inexcusability of the error of law made by a Member State. It is being emphasized that clarity and precision of the norm breached is an essential criterion of the sufficiently serious breach, meaning that the content of EU legal norm must be as clear as leaving no uncertainties for a Member State how to interpret it<sup>85</sup>. If a Member State wants to evade the liability by relying on the error of law made, it is possible only in case this error of law is justifiable (logical, rational)<sup>86</sup>—if the norm of EU law is clear and precise, the error of law made by a Member State will not be justifiable. Conversely, if it is ambiguous and leaving possibilities for any interpretations, the error of law made by a Member State will be justifiable. In conclusion, a Member State, thus, can escape liability if the error of law, made by its institution, was excusable. This is usually the case when the rule of law breached is ambiguous and not clear enough. Therefore, a national court hearing a case, shall have to apply other factors determining the second condition for liability.

In summary, it can be mentioned that the second condition for the state liability in damages restricts the right of a private party to claim compensation from the state, as the content of this condition for liability is very hardly provable.

### 2.3. The Third Condition—Direct Causal Link between the Breach and the Damage

The Court does not tend to examine causality thoroughly and usually leaves this question for a national court according to national legal norms.<sup>87</sup> In its early jurisprudence of state liability in damages cases, the Court had not mentioned that causal

81 Case C-118/00, *Larsy* [2001] ECR I-5063, paras. 46–55.

82 Case C-452/06, *Synthon* [2008] ECR I-0000, paras. 41–46.

83 Joined Cases C-46/93 and 48/93, *Brasserie du Pecheur and Factortame* [1996] ECR I-1029, paras. 59–64.

84 Case C-392/93, *British Telecommunications* [1996] ECR I-1631, paras. 43–46.

85 Tridimas, T., *supra* note 76, p. 311.

86 Köck, H. F.; Hintersteiner, M., *supra* note 13, p. 26–27.

87 Case C-127/95, *Norbrook Laboratories* [1998] ECR I-1531, para. 110.

link between the breach and the damage should be a direct one.<sup>88</sup> But subsequently the necessity to prove a direct causal link was confirmed<sup>89</sup> (this condition for liability was borrowed from EU non-contractual liability cases).<sup>90</sup>

The condition of causation was most thoroughly examined in *Brinkmann* and *Rechberger* cases.<sup>91</sup> In *Rechberger* it was held that there was a direct causal link between the breach made by Austria (incorrect implementation of the Directive 90/314 on package travels, concerning the protection of consumers in the event of the insolvency of the travel organizer) and the damage, which was suffered by consumers because of the insolvency of the travel organizer. The Court estimated the direct causal link by addressing the specific aim of the abovementioned directive—the protection of consumers.<sup>92</sup> In *Brinkmann*, on the contrary, the Court enacted there was no direct causal link between the incorrect implementation of the Directive 79/32 on taxes other than turnover taxes, and the damage, which was suffered by one Danish company (because of the improper classification of cigarettes and smoking tobacco according to national law). The Court held that such provisions of national law did not contravene the provisions of the directive (this position was supported by the Government of Finland and the European Commission) and taking in consideration the insufficient clarity and ambiguity of the provisions of this directive.<sup>93</sup>

These two decisions illustrate that there is no evident answer how a direct causal link should be determined. To rely on the Court's practice in EU non-contractual liability cases is not purposeful, since the Court, interpreting direct causal link in the state liability in damages cases, does not follow its practice concerning EU non-contractual liability. Such position of the Court is easy to understand as direct causal link is being interpreted strictly in EU non-contractual liability cases. Therefore, it should be worth supporting the position that direct causal link must be examined by national courts according to national legal norms taking in reference the principles of effectiveness and equivalence.

Legal doctrine emphasizes that the Court's practice in EU non-contractual liability cases could undoubtedly be the basis for the determination of causal link for the state liability in damages. Therefore, such rules can not be more strict as dealing with EU non-contractual liability issues.<sup>94</sup> It is pointed out that the establishment of causality is,

88 Case C-192/94, *El Corte Ingles* [1996] ECR I-1281, para 22.

89 Case C-373/95, *Maso* [1997] ECR I-4051, para. 35; Case C-66/95, *Eunice Sutton* [1997] ECR I-2163, para. 32; Joined Cases C-94/95 and C-95/95, *Bonifaci and Berto* [1997] ECR I-3969, para. 47; Case C-118/00, *Larsy* [2001] ECR I-5063, para 36; Case C-224/01, *Köbler* [2003] ECR I-10239, para. 51; Case C-278/05, *Robins* [2007] ECR I-1053, para. 69.

90 Case C-352/98, *Bergaderm* [2000] ECR I-5291, paras. 41–42.

91 Case C-319/96, *Brinkmann* [1999] ECR I-5255; Case C-140/97, *Rechberger* [1999] ECR I-3499.

92 Case C-140/97, *Rechberger* [1999] ECR I-3499, paras. 67–77.

93 Case C-319/96, *Brinkmann* [1999] ECR I-5255, paras. 26–29.

94 Smith, F.; Woods, L. Causation in *Francovich*: The Neglected Problem. *International and Comparative Law Quarterly*. 1997, 46: 936–941; van Gerven, W. Remedies for Infringements of Fundamental Rights. *European Public Law*. 2004, 10: 267; Rebhahn, R., *supra* note 51, p. 201–204; Antonioli, L., *supra* note 12, p. 234–235; Reich, N., *supra* note 42, p. 726–728; Tridimas, T., *supra* note 76, p. 310.

at the first place, the matter of EU law, which has to be determined according to individual factors of the case.<sup>95</sup> Consequently, these negotiable issues can be distinguished. Firstly, this sphere of EU law is very much influenced by national law, as determination of the causal link is related to national procedural legal norms, such as rules on evidences.<sup>96</sup> Secondly, there is a risk that EU legal norms will be applied differently in all Member States. Therefore, some standards for the uniform application of causal link, according to the jurisprudence of the Court, should be determined under EU law.<sup>97</sup> Thirdly, a private party can be prevented from the recovery of damages because of difficult rules (standards) of causation in the national law.<sup>98</sup> As was mentioned above, it is much better to uphold a position that a direct causal link should be established according to national law.

The doctrine agrees with the arguments of the Court that causal link should be a direct one. However, legal authors indicate different factors, which can be dominating for the determination of the causal link: the identification of the institution, which is responsible for the commitment of damage; the damage can not be too remote from the breach itself<sup>99</sup>; the imprudent behavior of the private party, who wants the recovery of damage suffered<sup>100</sup>; the damage must be directly related to the private party, who incurred it<sup>101</sup>; the conduct of the injured person and that of third parties (for that reason the causal link should be exceptional and immediate<sup>102</sup>). Legal authors address the inadequacies of the jurisprudence of the Court concerning causation. Firstly, though the Court requires proving a direct causal link, sometimes it goes apart from this proposition. Therefore, causation must be related to the first condition for liability hereby determining the private party to whom the legal norm of EU law conferred particular rights and the damage incurred by him.<sup>103</sup> Secondly, the Court does not properly solve the complicated issues of causation because it uses the concept of causation, which in many Member States has long been abandoned (the behavior of the private party who suffered damage and the conduct of third parties). For that reason a substantial factor should be the actions of the Member State's authority by proving that without the breach of EU law, there were no damage.<sup>104</sup> Thirdly, the standards of causation are too high for a private party. Fourthly, how causality between the breach and indirect damages (such as loss of profit) should be established. Fifthly, how a private party should prove that they availed themselves all the legal remedies available to avoid the loss, or limiting the extent of it.

95 Tridimas, T., *supra* note 76, p. 310; Reich, N., *supra* note 42, p. 728.

96 Prechal, S., *supra* note 3, p. 290.

97 Reich, N., *supra* note 42, p. 727–728.

98 Dougan, M., *supra* note 46, p. 246.

99 Ward, A., *supra* note 8, p. 243.

100 Antonioli, L., *supra* note 12, p. 235.

101 Toth, A. G. The Concepts of Damage and Causality as Elements of Non-contractual Liability. *The Action for Damages in Community Law*. Hague: Kluwer Law International, 1997, p. 180.

102 Lage, S. M.; Brokelmann, H. The liability of the Spanish State for breach of EC Law: the landmark ruling of the Spanish Tribunal Supremo in the Canal Satelite Digital case *European Law Review*. 2004, 29: 543.

103 Reich, N., *supra* note 42, p. 729.

104 Rebhahn, R., *supra* note 51, p. 203–204.

In summary, the direct causal link between the breach and the damage must be established in national courts applying national legal norms. This condition for liability does not restrict the right of a private party to obtain compensation.

#### 2.4. The Fourth Condition—Damage Incurred by a Private Party

The Court has never established in its jurisprudence that damage incurred by a private party is a condition for liability. Nevertheless, the damage must be considered as a mandatory condition for the state liability in damages. This conclusion can be done for the reason that the third condition for liability—direct causal link between the breach and the damage—shows that in case there is no damage, it would be impossible to prove a direct causal link. Therefore, a private party must on every occasion prove that he has suffered particular damage because of the breach of EU law committed by a Member State. The content of damage should be determined according to national legal norms, which should not contradict the principles of effectiveness and equivalence. In conclusion, the fourth condition for liability does not restrict the right of the private party to claim compensation from the state.

### Conclusions

1. Before the Court's decision in *Francovich* neither common definition of the state liability in damages nor conditions for liability were established in the jurisprudence on the Court. A private party could seek the recovery of damages incurred in national courts only in accordance with national legal norms, which were not uniform. Therefore, the standards for the protection of the infringed private parties' rights were not equal.

2. The Court in *Francovich* founded the state liability in damages by submitting three different grounds—one direct legal background (Article 4 of the Treaty of the European Union) and two indirect basics—principles of direct effect and that of effectiveness of EU law. The foundation of the state liability in damages on the abovementioned backgrounds reflected the intention of the Court to create stable general provisions, which should be observed by national courts of the Member States.

3. The content of the first condition for liability (the rule of EU law infringed must have intended to confer rights on private parties) can be established according to various criteria and taking into consideration factual and legal basics of the relevant case. This condition for liability does not restrict the right of the private party to claim compensation from the state.

4. The second condition for liability—sufficient seriousness of the breach—is reasonably considered to be the most restrictive condition for liability, since a private party must prove an infringement, which is a manifest and grave one. The measure of discretion left to a Member State's authority is no longer a decisive factor for the assessment of the sufficiently seriousness of the breach. For that reason it must be on every occasion evaluated whether the breach was sufficiently serious—both in wide and no (limited)

discretion cases. Therefore, the second condition for liability restricts the right of the private party to obtain reparation.

5. It should be left to national courts to determine the third condition for liability – the direct causal link between the breach and the damage. The direct causal link must be evaluated according to legal provisions of national law and taking into consideration the principles of effectiveness and equivalence. This condition for liability does not restrict the right of the private party to claim compensation.

6. In order to prove that a Member State is liable for breach of EU law, one more condition for liability should be established—a private party must prove that they have incurred particular damage. The content of this condition for liability should be determined according to national legal norms, which could not contradict the principles of effectiveness and equivalence. This condition for liability does not similarly restrict the right of the private party to obtain reparation from the state.

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## VALSTYBIŲ NARIŲ ATSAKOMYBĖ UŽ ŽALĄ PAŽEIDUS EUROPOS SAJUNGOS TEISĘ – TEISINIS PAGRINDAS IR ATSAKOMYBĖS SĄLYGOS

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**Santrauka.** Šiame straipsnyje nagrinėjama valstybių narių atsakomybės už žalą, pažeidus Europos Sąjungos teisę, teisinis pagrindas ir atsakomybės sąlygos. Pažymima, jog valstybės atsakomybė už žalą Sutartyje dėl Europos Sąjungos veikimo neregamentuota. Galimybę taikyti šią atsakomybės rūšį nustatė Europos Sąjungos Teisingumo Teismas pažymėdamas, jog valstybė narė, pažeidusi Europos Sąjungos teisę ir taip padariusi žalos asmeniui, turi pareigą atlyginti šią žalą. Europos Sąjungos Teisingumo Teismui suformulavus valstybės atsakomybės už žalą sąlygas, atsirado bendri reikalavimai, kurių nuo šiol nacionaliniai teismai turėjo laikytis. Vėliau atsakomybės sąlygos Europos Sąjungos Teisingumo Teismo jurisprudencijoje buvo ne kartą tikslinamos ir aiškinamos, tačiau nacionaliniai teismai susidūrė su problema, kaip šias sąlygas reikėtų aiškinti ir taikyti praktikoje. Daugiausiai problemų kelia antroji atsakomybės sąlyga – pažeidimo pakankamas akivaizdumas – kadangi asmeniui įrodyti šią sąlygą labai sunku.

Atlikus tyrimą, straipsnyje prieinama išvada, kad valstybės atsakomybės už žalą yra trys skirtingi teisiniai pagrindai – vienas tiesioginis (Europos Sąjungos sutarties 4 straipsnis) ir du netiesioginiai – Europos Sąjungos teisės tiesioginio veikimo ir efektyvumo principai. Šie skirtingi teisiniai pagrindai atskleidė Europos Sąjungos Teisingumo Teismo ketinimą sukurti taisykles, kurių privalo laikytis valstybių narių nacionaliniai teismai, nagrinėdami bylas dėl žalos atlyginimo. Konstatuojama, jog pirmoji atsakomybės sąlyga (pažeista Europos Sąjungos teisės norma siekiama suteikti teises asmeniui) gali būti įrodyta remiantis įvairiais kriterijais ir vadovaujantis konkrečios bylos faktinėmis ir teisinėmis aplinkybėmis. Ši atsakomybės sąlyga neriboja asmens teisės į žalos atlyginimą. Straipsnyje taip pat daroma išvada,

*kad sunkiausiai įrodyti antrąją atsakomybės sąlygą – pažeidimo pakankamą akivaizdumą. Todėl ši sąlyga laikytina ribojančia asmens teisę į žalos atlyginimą. Įvertinti, ar tenkinama trečioji atsakomybės sąlyga – tiesioginis priežastinis ryšys tarp pažeidimo ir žalos, turi nacionaliniai teismai, remdamiesi nacionalinės teisės normomis ir atsizvelgdami į iš Europos Sąjungos teisės kildinamus efektyvumo bei veiksmingumo principus. Konstatuojama, kad taip aiškinama ir taikoma trečioji atsakomybės sąlyga neriboja asmens teisės į žalos atlyginimą. Nors Europos Sąjungos Teisingumo Teismas savo praktikoje ir nėra nustatęs žalos kaip vienos iš atsakomybės sąlygų, tačiau, asmeniui neįrodžius žalos padarymo fakto, nebus galima taikyti valstybės atsakomybės už žalą. Šios atsakomybės sąlygos turinys aiškintinas remiantis nacionalinės teisės normomis bei atsizvelgiant į efektyvumo ir veiksmingumo principus. Ši atsakomybės sąlyga taip pat neriboja asmens teisės reikalauti žalos atlyginimo iš valstybės.*

**Reikšminiai žodžiai:** valstybės atsakomybė už žalą, Europos Sąjungos teisės pažeidimas, žalos atlyginimas, atsakomybės sąlygos, teisių asmeniui suteikimas, pakankamai akivaizdus pažeidimas, tiesioginis priežastinis ryšys, žala.

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