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LIABILITY OF THE EU MEMBER STATES FOR LAWS OR LEGAL OMMISSIONS CONTRAVENING TO THE EU LAW

Abstract: *The liability of the Lawmaking State for contravening EU Law can result not only from the direct lawmaking action of the State, but also from the application made by Judges and Courts of the member State of the internal legislation, making an interpretation of the said legislation which contravenes EU Law.*

Key words: EU Law, liability of the Administration, direct effect, precedence of EU Law

INTRODUCTION

Relations between E.U. Law and the E.U. member States internal laws are basically governed by the direct effect and precedence principles.

However, it is worth emphasizing that some authors such as BOULOUIS[1], from the point of view of the functions assigned to E.U. Law, talk about substitution, harmonization, co-ordination and co-existence relations.

DIRECT-EFFECT AND PRECEDENCE PRINCIPLES

1. Direct effect of E.U. Law.

Unlike as for International Law *stricto sensu*, E.U. Laws are not only aimed at States, but also citizens, even for provisions involving the member State's internal Law, and this is what we call direct effect of E.U. rules, which even affects judgements from the Court of Justice, which even dispenses with their publication in the Spanish Official Gazette (Boletín Oficial del Estado).

Thus, the direct effect, and according to "Van Gend-Loos" judgements, dated 5th of February of 1963[2], and "Simmenthal", dated 9th of March of 1978[3], has the following consequences:

- E.U. rules do not need to be incorporated or translated into rules of internal Law, but they become directly applicable since promulgated in the “Official Journal of the European Union”.

- E.U. rules are a direct source of laws and obligations for all those involved, whether member States or individuals, which are a part of the legal relations resulting from E.U. Law.

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[1] BOULOUIS, J.: Droit institutionnel du l´Union Européenne. Montchrestien. París, 1998, p. 209.

[2] *http://eur-lex.europa.eu/en/index.htm*

[3] *http://eur-lex.europa.eu/en/index.htm*

- E.U. rules can be directly invoked by individuals before the member States' jurisdictional bodies, which are obliged to apply them.

It is necessary to mention that, for the Court of Justice, the direct effect of the rules of Treaties is not only vertical (application of relations between individuals and the Public Administration), but also horizontal (application of relations between individuals or between entities). These judgements refer to the horizontal effect: "Walrave Union Cycliste Internationale", dated 12th of December of 1974, on the free movement of workers (art. 48, E.E.C. Treaty); "Bosch", dated 6th of April of 1962, on the restrictive practices of the competition (art. 85); "Defrenne", dated 8th of April of 1976, on the non-discrimination of retributions based on gender (art. 119),[4] etc.

E.U. regulations ("Ratti" judgement dated 5th of April of 1979[5]) also have a direct effect (vertical and horizontal). The Court of Justice has stated that, generally, regulations prevail over internal provisions and practices (Judgement dated 8th of February of 1973[6]), including the constitutional rules of member States (Judgement "Leonesio", 17th of May of 1972[7]). Regulations requiring complementary rules in order to precise the scope of the laws on the individuals referred to by the said regulations, do not have a direct effect.

Directives do not have, in principle, a direct effect, given that they are equivalent to Basic Laws and they need to be developed by member States. However, the judgement "Sace", dated 17th of December of 1970[8], acknowledged the direct effect of a directive issued in pursuance of art. 12.2 of the T.C.E., and later the Court established that they acquire a direct effect if they meet the regulatory requirements.

2. Precedence of E.U. Law.

The precedence of E.U. Law is a natural consequence of the European Union's conception and purpose themselves, which, in fact, lie in the progressive absorption of competences that are originally linked to the sovereignty of each member State and that is predictable no only as regards E.U. Treaties, which are set up, as we have implied, in the primary original Law, but also as regards the rules adapted for their application in which we have called secondary law, involving, concerning internal Law, every rule of any rank whatsoever, and acknowledging, from the performance of the Court of Justice, the impossibility that the States cause the prevalence of a unilateral measure adopted by them against E.U. legal regime, accepted on a reciprocity basis, as the judgement of Costa-Enel judgement showed on the 15th of July of 1964[9].

Taking up again the basic considerations extracted from Simmenthal Judgement dated 9th of March of 1978[10], to which we have referred, the national Judge in charge of applying E.U. provisions within their jurisdiction is required to guarantee the full effect of E.U. rules and unapply when necessary and by virtue of their own authority, any provision contravening any previous or subsequent legislation, without a need for requesting for nor waiting for the previous elimination of the said last rule whether by the lawmaking procedure or by any other constitutional procedure.

By virtue of the E.U. precedence principle, its provisions, with their entry into force, make any provision of national legislation inapplicable, and it prevents the valid formation of national lawmaking acts which may be incompatible with E.U. rules, and the National Judge's mission here as a E.U. Law Judge is essential at the time of the application of the said E.U. Law, since he has to exclude any internal lawmaking provisions which even hinder,

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[4] *See http://eur-lex.europa.eu/en/index.htm*
[5] *http://eur-lex.europa.eu/en/index.htm*
[6] *http://eur-lex.europa.eu/en/index.htm*
[7] *http://eur-lex.europa.eu/en/index.htm*
[8] *http://eur-lex.europa.eu/en/index.htm*
[9] *http://eur-lex.europa.eu/en/index.htm*
[10] *http://eur-lex.europa.eu/en/index.htm*

temporarily, the full effectiveness of E.U. rules. This full efficiency of E.U. Law cannot be restricted by any internal rule or law-making, administrative or judicial practise in the opposite direction. Therefore, if the full application of E.U. Law is hindered in any of these manners, the liability of the Member State as a lawmaking State arises, including, as we will see below, when it is not the internal rule itself which contravenes E.U. Law, but the judicial bodies' interpreting of the internal Law.

Thus, E.U. Law's precedence lies, according to PESCATORE[11], in the principle of hierarchy of rules, but, for most authors, in the principle of autonomy or attribution of powers, given that the powers conferred to the European Union not only can be governed by E.U. rules, since the member States have lost authority over the transferred matters, and thus the nullity (given the defect of incompetence, in fact) of subsequent national laws aimed at governing them (Judgement of the Court of Justice, 16th of December of 1960[12]).

This precedence principle of the E.U. Law on Internal Law, which is subsequently reiterated by the Court of Justice in Simmenthal judgement dated 9th of March of 1978[13], entails the fact that acknowledging a legal effectiveness in national law-making actions which take over the field in which E.U. lawmaking power is exercised, if it is incompatible with E.U. provisions, would be equivalent to denying the effective nature of the commitments assumed by member States by virtue of the Treaty and they would question the Community's basis themselves.

Finally, we would like to mention that the Treaty of Lisbon includes a Statement concerning precedence. "17. The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):

"Opinion of the Council Legal Service of 22 June 2007

It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL,15 July 1964, Case 6/641 (1)) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."

LIABILITY OF THE MEMBER STATE FOR LAW-MAKING ACTS AND OMISSIONS CONTRAVENING E.U. LAW ACCORDING TO THE COURT OF JUSTICE OF EUROPEAN COMMUNITIES

1.- Foundations.

[11] Pescatore, P. (1981). Aspectos judiciales del "acervo comunitario". *Revista de instituciones europeas*, *8*(2), p. 331-366.
[12] *http://eur-lex.europa.eu/en/index.htm*
[13] *http://eur-lex.europa.eu/en/index.htm*

The "communitisation"[14] made by *Francovich*[15] judgement of a liability action of member States for breaches of E.U. law which are attributable to national lawmakers, was received by many States with distrust.

However, as highlighted by GALÁN VIOQUE[16], the initial position of the European Court of Justice was soon made more restrictive by its subsequent ruling of 5th March 1996[17], *Brasserie du pêcheur SA and República Federal de Alemania and The Queen and Secretary of State for Transport ex parte: Factortame LTD e.a. (As. C-46/93, 48/93)*.

This ruling requires member states to answer to their citizens under the same conditions and with the same requirements as those established for EU institutions to be answerable when they contravene EU law. Breach of EU law by a member state must therefore be a "sufficiently serious violation of EU law". The following criteria are taken into consideration in order to assess whether or not this has occurred:

- The margin of discretion which EU law has left to the parliaments of member states when exercising their legislative power.
- The intent of the breach committed.
- Whether the alleged error is excusable or inexcusable.
- Previous practices of EU bodies which may have contributed to the legislative breach.

In addition, as highlighted by the Judgement by the Court of Justice (Plenary Session) dated 12th of October of 2004[18] (Case C-222/02), one more requirement is set out in order to appreciate the member State's liability for contravening an E.U. rule:

The third question, which was raised only if the first two questions were answered at least partly in the affirmative, relates to the possibility of a State incurring liability in accordance with the principles of Community law in the event of defective supervision on the part of the competent national authorities.

It follows from the case-law that a State incurs liability for breach of a rule of Community law only where, in particular, the rule of law infringed is intended to confer rights on individuals (see Joined Cases C-46/93 and C-48/93 Brasserie du pêcheur and Factortame [1996] ECR I-1029, paragraph 51; Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 DillenkoferandOthers [1996] ECR I-4845, paragraph 21; and Case C-63/01 Evans [2003] ECR I-0000, paragraph 83).

However, it is clear from the answers given to the first two questions that Directives 94/19, 77/80, 89/299 and 89/646 do not confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities, if the compensation of depositors prescribed by Directive 94/19 is ensured.

Under those conditions, and for the same reasons as those underlying the answers given above, the directives cannot be regarded as conferring on individuals, in the event that their deposits are unavailable as a

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[14] DUBOUIS, *La responsabilité de l'État pour les dommages causes aux particuliers par la violation du Droit communautaire (décision de la Cour de justice des Communautés européennes 19 novembre 1991 Francovich et Bonifaci, aff. jointes C-6/90 et C-9/90)*, "Revue Française de Droit Administratif", núm. 8 (1), 1992, pág. 8.

[15] *http://eur-lex.europa.eu/en/index.htm*

[16] GALÁN VIOQUE, ROBERTO, *De la teoría a la realidad de la responsabilidad del Estado legislador* ('*From the theory to the reality of the liability of legislator states*') in *Revista de administración pública* ('*Central Government Journal*'), no. 155 (May-August 2001), p. 285-329.

[17] *http://eur-lex.europa.eu/en/index.htm*

[18] *http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en*

result of defective supervision on the part of the competent national authorities, rights capable of giving rise to liability on the part of the State on the basis of Community law.

Regarding the authority to determine whether there is a "sufficiently serious violation of EU law" to generate extra-contractual liability of the member state towards individuals, the Court of Justice established the following in case C-302/97[19]:

By its second question, the national court seeks, in substance, to ascertain whether it is for the Court of Justice, in proceedings for a preliminary ruling, to assess whether a breach of Community law is sufficiently serious for a Member State to incur non-contractual liability vis-à-vis individuals who may be victims of that breach.

It is clear from the case-law of the Court that it is, in principle, for the national courts to apply the criteria to establish the liability of Member States for damage caused to individuals by breaches of Community law (Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029, paragraph 58), in accordance with the guidelines laid down by the Court for the application of those criteria (Brasserie du Pêcheur and Factortame, paragraphs 55 to 57; Case C-392/93 The Queen v H.M. Treasury, ex parte British Telecommunications [1996] ECR I-1631; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others v Federal Republic of Germany [1996] ECR I-4845; and Joined Cases C-283/94, C-291/94 and C-292/94 Denkavit Internationaal and Others v Bundesamt für Finanzen [1996] ECR I-5063).

The answer to the second question must therefore be that it is in principle for the national courts to assess whether a breach of Community law is sufficiently serious for a Member State to incur non-contractual liability vis-à-vis an individual. (Judgment of the Court 1 june 1999).

The same ruling also stated who incurs liability when a federal state is concerned:

By its fourth question, the national court seeks, in substance, to ascertain whether, in Member States with a federal structure, reparation for damage caused to individuals by national measures taken in breach of Community law must necessarily be provided by the federal State in order for the obligations of the Member State concerned under Community law to be fulfilled.

It is for each Member State to ensure that individuals obtain reparation for damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation. A Member State cannot, therefore, plead the distribution of powers and responsibilities between the bodies which exist in its national legal order in order to free itself from liability on that basis.

Subject to that reservation, Community law does not require Member States to make any change in the distribution of powers and responsibilities between the public bodies which exist on their territory. So long as the procedural arrangements in the domestic system enable the rights which individuals derive from the Community legal system to be effectively protected and it is not more difficult to assert those rights than the rights which they derive from the domestic legal system, the requirements of Community law are fulfilled.

The answer to the fourth question must therefore be that, in Member States with a federal structure, reparation for damage caused to individuals by national measures taken in breach of Community law need not necessarily be provided by the federal State in order for the obligations of the Member State concerned under Community law to be fulfilled.

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[19] *http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en*

2.- Recent Trends

Regarding the material liability of the legislator state, recent trends in the European Union regarding breach of EU law by member states are paying particular attention to breaches, relating them to the actions of the courts of member states.

The principle of precedence of EU law over national law means that the courts of a member state play a leading role in the legislator state's material liability. This principle of precedence therefore results in courts being obliged not to apply national regulations, including laws, which contradict EU law. If a judge or court in is doubt as to whether national law complies with EU law, or as to how national law should be interpreted in order to comply with EU law, the judge or court must raise the issue of preliminary judgement.

As stated by XIOL RÍOS, J.A.[20], in many cases a member state, as the legislator state, incurs liability for breach of EU law because of incorrect interpretation of national regulations by the judges of the member state, such interpretation not complying with EU law. This explains the increased EU interest in this type of breach. Two major rulings of the European Court of Justice stand out:

A) The Commission vs Italy Ruling:

COBREROS MENDAZONA[21] highlights this ruling as the first to reflect the change in the interpretation of the European Court of Justice in this sphere. This is the Court of Justice's ruling of 9th December 2003, European Commission against the Republic of Italy, case C-129/00[22].

In this case the European Commission sued the Republic of Italy, and the Court of Justice upheld the appeal and declared that Italy had breached its EU obligations by not altering a specific precept of its legal system which contradicted EU law as it was being interpreted and applied by judges and courts, including the *Corte Suprema di Cassazioni* (Italy's Supreme Court of Cassation), and the Government. The text of the ruling states that such interpretation and application was being carried out *"making excessively difficult the exercise of the right to repayment of charges contrary to Community law"*. It also adds that *"The scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see, particularly, Case C-382/92 Commission v United Kingdom [1994] ECR I-2435, paragraph 36)".*

B) The Köbler Ruling:

This Ruling, dated 30th September 2003 (case C-224/01 // Gerhard Köbler // Republic of Austria // Plenum)[23] was handed down as part of a preliminary issue raised by an Austrian court.

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[20] XIOL RÍOS, JUAN ANTONIO, La responsabilidad patrimonial por acto legislativo ('Material liability by legislative act'), in La responsabilidad civil y su problemática actual ('Civil liability and its current problems'), coordinated by Juan Antonio Moreno Martínez, -Dykinson, 2008.

[21] COBREROS MENDAZONA, E.: *Las sentencias prospectivas en las cuestiones prejudiciales de interpretación del Derecho comunitario* ('*Prospective rulings in preliminary issues of the interpretation of EU law*'), Civitas, Spanish Journal of European Law, October-December, no. 4, 2002.

[22] *http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en*

Concentrating on the type of breach of EU law to which we are referring, the Court takes a quantum leap in its position regarding such breaches. Thus the *Commission vs Italy* ruling explicitly ruled out the possibility of a single judiciary resolution representing a breach, and stated that on the contrary significant, non-prohibited jurisprudential interpretation was required. However, the Köbler ruling explicitly acknowledges that a single judiciary resolution may entail the liability of a state when it hands down a final ruling: "*the principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is manifest. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation".*

3.- Conclusions

On the basis of the forgoing jurisprudence and the regulatory framework described above, it can be stated that within certain limitations European jurisprudence is contemplating the possibility of sentencing a state which does not adapt its laws to EU law to compensate individuals who are adversely affected by this failure to adapt them. It should be said, however, that the traditional problems of civil liability remain; thus the plaintiff must demonstrate that in addition to the failure to adapt national laws to EU law the other components of civil liability have also occurred, such as actual damage caused and a causal relationship between the failure to adapt national laws and the damage suffered.

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[23] *http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en*

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