CASE-LAW ASPECTS CONCERNING THE REGULATION OF STATES OBLIGATION TO MAKE GOOD THE DAMAGE CAUSED TO INDIVIDUALS, BY INFRINGEMENTS OF EUROPEAN UNION LAW

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Abstract

The priority principle of EU law in relation to the internal law of the Member States, a principle enshrined by the Court of Justice case-law and the principle of direct effect allow the national court to give full effect to EU law. Breaching the EU law by Member States draws under certain conditions their responsibilty for the breach thereof. Unlike public international law, the constitutive treaties do not contain provisions relating to liability of Member States for breach of EU law. As in other cases, the Court was the one that, over time, has defined a right of redress, which has its foundation in EU law and in the conditions necessary to engage the victims' right to repair.

Keywords*: Liability of Member States, EU law, priority principle of EU law, Court of Justice, case-law aspects.*

1. Introduction

The priority principle of EU law in relation to national law of Member States, jurisprudentially enshrined by the Court of Justice, and the principle of direct effect allow the national court to provide absolute effect to EU law. The non-compliance with EU law, by Member States, draws, under certain conditions, the states' liability for its breach.

Unlike public international law, the constituent Treaties do not contain provisions relating to the liability of Member States for breaching EU law.

As in other cases, the Court of Justice is the one that, over time, has defined a reparatory law, which is grounded on EU law and on the necessary conditions in order for the right to compensation to be committed, in the victims' benefit. Thus, the Court has supplemented this protection of litigants' rights, by enshrining the principle of state liability for breaching EU law. This principle applies when a Member State fails to transpose or when it incorrectly transposes an EU rule, but also for the breach of EU rules, with or without direct effect.

Next, we shall highlight the main moments in the consecration, by judicial way, of the principle of states obligation to make good damage caused to individuals, by breaches of EU law.

2. Francovich Judgement[1]

The Court of Justice enshrined for the first time, the principle of Member States liability for the breach of EU law in *Francovich*[2] Judgement, from 1991.

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[1] ECJ Judgement of 19 November 1991, *Francovich and Bonifaci* v. *Italy*, C-6/90.

By the Ordinance of July 9, 1989, registered at the Court on January 8, 1990, the national Court[3], under article 234[4] TEC, filed an application for a preliminary ruling on the interpretation of the third paragraph of Article 249[5] of the Treaty establishing the European Community and on Council Directive no. 80/987 on the harmonization of Member States laws on the protection of employees in case of insolvency of their employer. Thus, the national Court asked the Luxembourg Court if the Italian Government's liability for failing to transpose a directive, which had caused damage to an Italian citizen, could be committed, on the one hand, and if the individual could require an indemnity[6], from the Member State which had not fulfilled its obligation to transpose the directive, on the other hand.

Regarding the first question, the Court established that the directive had no direct effect[7], therefore people injured in their right, could not invoke before the competent national Court, the Directive provisions against the State.

We consider that the point of view of the Luxembourg Court is interesting for our study, more exactly the point of view regarding the second question of the Italian Court, namely the existence and extent of state liability for damages caused by the infringement of obligations arising from EU law. In its decision, the Court referred to the following aspects: the principle of extra contractual liability of a state; the conditions under which state liability can be committed, the principle of the obligation to compensate and state liability limits.

2.1. The consecration of the principle of extra contractual liability of Member States

We notice, to a careful analysis of the Court's Judgement that the Luxembourg Court starts in its motivation, primarily from highlighting the major principles developed by judicial interpretation.

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[2] Circumstances of the case: Andrea Francovich, part in the main proceedings in Case 6 / 90, was employed to the CDN Elettronica SnC enterprise in Vicenza. From his position, he had received only occasional payments, in advance, of the amounts which were rightfully his, as wages. Consequently, Francovich brought an action before the competent Italian Court, which condemned the accused company to pay a sum of approximately 6 million Italian liras. During the execution phase of the decision, the executor of the Court issued a report finding the debtor's insolvency. Under those circumstances, Andrea Francovich invoked his right to obtain, from the Italian State, the guarantees provided in Directive 80/987 or, alternatively, damages-interests. The Directive invoked has to provide employees a minimum of protection at Community level, in case of insolvency of the employer, subject to more favourable national provisions, regulating, in particular, specific guarantees for payment of wages. The Directive had to be transposed into national law of Member States, no later than October 23, 1983. By the Judgement of February 2, 1989, the ECJ found that Italy had not fulfilled its obligation to transpose the Directive. For details, see **Sergiu Deleanu, Gyula Fabian, Cosmin Flavius Costas, Bogdan Ionita**, *"Curtea de Justiţie Europeană. Hotărâri comentate"*, (Editura Wolters Kluwer, Bucureşti, 2007), p. 233.

[3] Pretura di Vicenza, Italy.

[4] The current art. 258 TFEU.

[5] The current art. 288 TFEU.

[6] Emphasis added.

[7] In its argumentation, the Court recalled that the provisions of a Directive may have direct effect only if they are unconditional and sufficiently precise. In this case, the examination of the accomplishment of those criteria was made by determining the beneficiaries and content of the guarantee, as well as the identity of the guarantee debtor. In terms of beneficiaries and content of the guarantee, the Court held that they were sufficiently precise and unconditional. However, regarding the identity of the debtor, the conditions are not achieved, as long as Member States may finance the public funds of the guarantee with exclusively public means, but also they may resort to the employers' contributions. As a result, the Court stated: although the directive provisions are sufficiently precise and unconditional, as for the determination of the beneficiaries of the guarantee, its content does not offer sufficient evidence for individuals to be able to invoke the provisions of a directive before national Courts. In this respect, on the one hand, these provisions do not specify the identity of the guarantee debtor and, on the other hand, the state can not be considered debtor for the sole reason that it has not taken the necessary measures to transpose the directive within the prescribed period.

Thus, the Court reiterates that the Treaty establishing the European Economic Community creates its own legal order, integrated in the legal systems of Member States, which is imposed not only to them, but also to nationals of Member States[8]. The Court recalls that national Courts are obliged to apply EU law, to ensure the full effectiveness of EU rules and to protect the rights that EU law confers on individuals[9]; next, the Court indicates that the effectiveness of Union rules, as well as the protection of rights would be jeopardized if the possibility of obtaining compensation was not recognized to individuals, in the case where their rights from EU law were violated, breach attributable to the state[10]. Moreover, the Court states that the principle of state liability for damage caused to individuals, as result of the infringement of Community law, is inherent in the system of the Treaty[11], and the obligation of Member States to make good such damage is grounded on article 5[12] of the Treaty[13].

In paragraph 37 of the Judgement, it is clearly stated that Community law imposes the principle under which Member States are compelled to repair the damage caused to individuals, by the breach of Community law, attributable to them.

After analyzing the Union Court's reply, we can say that the ground for state liability in this case, is found both in provisions of the Treaty establishing the European Community, as well as in the Court's previous case-law that covers the relation between EU law and national law of Member States, in general and the direct application (together with the direct effect), as well as the application, as a priority, of EU law before national law.

Thus, the principle of state liability was consecrated. This principle is specific to EU law and represents "a right to compensation in the benefit of individuals, allowing, as outlined in the doctrine, the material and financial concretization of Community rule"[14].

2.2. The conditions under which state liability may be committed

Point b) of the Judgement intends to identify the conditions under which states can be held liable. According to the Court, while the state liability for damages caused to individuals by infringements of EU law, for which it is responsible, has its legal basis in the EU law itself, the conditions under which a right to compensation arises, depend on the nature of the EU law breach

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[8] According to paragraph 31 of the decision: "We recall that the Treaty establishing the EEC has created its own legal system, integrated into the legal systems of Member States and which is imposed to their judicial organs, that the subjects of this legal system are not only the Member States, but also their nationals and that, as the Community law creates obligations for individuals, in the same manner the Community law can also create rights included in their legal heritage; these rights arise not only when they are specifically mentioned in the Treaty, but also under obligations that the Treaty imposes both to individuals, as well as to Member States and Community institutions".

[9] In this regard: paragraph 32 of the decision, according to which it should be remembered that, under the constant case-law of the Court, the national judicial bodies are responsible with the application of Community provisions, with ensuring the absolute effectiveness of these rules and with the protection of rights that they confer on individuals.

[10] Paragraph 33: It should be recognized the fact that the very effectiveness of Community rules would be jeopardized and that the protection of rights that they enshrine would be diminished, if individuals were not able to obtain compensation when their rights were breached by failure to comply with Community law, attributable to the State.

[11] Paragraph 35 of the Judgement.

[12] The current art. 4 TFEU. According to this article, Member States shall take all necessary measures to ensure the fulfilment of incumbent obligations, under EU legal rules.

[13] Paragraph 36.

[14] **Roxana Munteanu**, *"Rolul jurisdicţiilor naţionale în aplicarea principiului răspunderii statului pentru daunele cauzate particularilor prin încălcarea dreptului comunitar"*, in *Dreptul comunitar şi dreptul intern. Aspecte privind legislaţia şi practica judiciară*, (Editura Hamangiu, Bucureşti, 2008), p. 63.

which is at the origin of the damage caused[15]. In this case, when a Member State ignores its obligation under the Treaty, to take all measures necessary in order to achieve the result required by a EU rule, the full effectiveness of that rule requires the granting of a right to compensation, if three conditions[16] are met, namely:

- the directive must create rights in the individuals' patrimony;
- the content of these rights must result from the directive provisions;
- the existence of a causal link between the infringement of any obligation, by the state and the damage caused to the person injured.

The Court considers that these three conditions are sufficient to give rise, in the individuals' benefit, to a right to receive compensation, right that is directly grounded on Community law[17].

The Judgement covers naturally, only those conditions under which the state is liable before individuals, for failure to implement or for incorrectly implement a directive. Thus, in *Francovich* Case, the Court's Judgement does not provide answers, but questions such as: may the state liability be committed in cases other than those when the state breaches obligations relating to the transposition of directives? Is the state liable only if it breaches a Union rule which has direct effect, or may its liability be committed also in other EU rules? Given that the conditions required are fulfilled, is the state liability lawfully committed (without checking other elements, such as: guilt, possible causes of removing liability)?

The Luxembourg Court of Justice answered at some of those questions, developing in time an important case-law.

3. Brasserie du pêcheur[18]

Francovich Judgement has the merit to have grounded the principle of European Union Member States obligation to make good damage caused to individuals, by breaches of EU law, but it "has also unleashed an avalanche of studies and analysis that whether noticed the attitude of the Court of Justice or they strongly contested it"[19]. It should also be noted that although the Court gave response to concerns about the protection of individuals' rights, by the proclamation of that principle, *Francovich* Judgement generated a series of new issues referring on the one hand, to the scope of the principle, and on the other hand, to the general conditions for committing liability. According to the General Attorney, Giuseppe Tesauro, the issue of state liability for infringements of Community law, very important both in terms of principles and consequences that a comprehensive and general definition of such liability might have for Member States, is complex and certainly has some traps, as demonstrated in the rich doctrinal debate developed in this respect, in recent years[20].

A key decision to ground the principle of Member States obligation to make good for damage caused to individuals, by the breach of EU law, was ruled in the *Brasserie du Pêcheur* Case[21]. In that

[15] Paragraph 38 of the decision.
[16] These are clearly shown, in paragraph 40 of the decision.
[17] Paragraph 41.
[18] ECJ Judgement, 5 March 1996, *Brasserie du pêcheur / Bundesrepublik Deutschland and the Queen / Secretary of State for Transport, ex parte Factortame e.a.* C-46/93.
[19] **Carol Harlow**, *"Francovich and the problem of the disobedient state"*, European Law Journal (1996), p. 103.
[20] Conclusions presented at the meeting of November 28, 1995.
[21] Circumstances of the case: *Brasserie du pêcheur* SA, a French brewery based at Schiltigheim (Alsace), was forced to discontinue exports of beer to Germany in late 1981 on the grounds that the beer it produced did not comply with the "purity" requirement of the Biersteuergesetz ("BStG"). Further controls on retailers, made by the German

case, since the Luxembourg Court had already established that the Member State was responsible for the infringement of EU law, *Brasserie* requested German courts to cover the prejudice suffered, meaning the profit losses caused by the restrictive provisions of German law. The national court, Bundesgerichtshof, ruled that, under the German law for Government's liability, the state did not have to be held liable for the inaction of the state legislative power, especially since it did not contain provisions covering the protection of rights of a third party. In this case, estimating that German law does not provide any basis for allowing a repair of the damage caused to the applicant, the German court sent to the Luxembourg Court a request for a preliminary ruling to determine if the principle of state liability for damage caused to individuals, by the breach of EU law, damage attributable to the state, as shown in *Francovich* Judgement, applies also to the litigation brought before that court. More specifically, the Court was asked to answer the following questions:

- does the principle of EU law, according to which Member States are obliged to pay compensation for damage suffered by an individual as a result of infringements of Community law attributable to the state also apply where such an infringement consists of a failure to adapt a national parliamentary statute to the higher-ranking rules of Community law?;

- may the national legal system provide that any entitlement to compensation is to be subject to the same limitations as those applying where a national statute breaches higher-ranking national law, for example, for where an ordinary Federal law breaches the Grundgesetz of the Federal Republic of Germany?

- may the national legal system provide that entitlement to compensation is to be conditional on fault (intent or negligence), on the part of the organs of the State responsible for the failure to adapt the legislation?

- if the answer to the first question is affirmative and the answer to the second question is negative:

a) may liability to pay compensation, under the national legal system, be limited to the reparation of damage done to specific individual legal interests, for example property, or does it require full compensation for all financial losses, including lost profits?

b) does the obligation to pay compensation also require the reparation of the damage already incurred before it was held in judgement of the Luxembourg Court of March 12, 1987 (C-178/84) that article 10 of the German Biersteuergesetz breached higher-ranking Community law?

In other words, the Court had to determine if the State had any obligation to make good the damage and, if so, under what conditions and for which types of damage, towards individuals who had suffered prejudices due to the application of national laws contrary to EU law.

First, the Court had to determine if it was necessary, in that case, to define *the obligation to make good damages* caused by the application of a national law contrary to rules of the Union, given the fact that in *Francovich* Judgement, the Court had stated that the failure to transpose a directive, under certain conditions, was committing the state liability.

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authorities, who contested the compliance of the beer quality with the law, determined the only German importer of *Brasserie du pêcheur* not to renew the distribution contract. By Judgement of 12 March 1983, the Court held that the prohibition on marketing beers imported from other Member States, considered inconsistent with BStG, was incompatible with Article 30 EC. *Brasserie du pêcheur* brought an action against the Federal Republic of Germany for reparation of the loss suffered by it as a result of that import restriction between 1981 and 1987, seeking damages in the sum of DM 1.8 million, representing only a fraction of the loss actually incurred. The action being dismissed by lower courts, *Brasserie du Pêcheur* maintained the same conclusions in the appeal before the Bundesgerichtshof. As the infringement mentioned must be considered as an omission of the legislative body, because it did not change BStG in accordance with Community law, the Bundesgerichtshof points out that the damage reparation is provided in the Federal Republic of Germany, by the German Civil Code provisions – *"BGB"* and the Basic Law (Grundgesetz).

Secondly, it was necessary to determine if, subject to the reservation of limits identified by the Court, the conditions for liability were the proper conditions of each national legal order or if EU law required, at least, the sufficient *substantive conditions* in order for the defaulting Member State to be required to make good the damage caused. Also, in terms of causation, it was necessary to assess if, by its nature, the infringed Union provision allowed the individual to directly defend his rights in order to eliminate the already established illegality regarding the substance.

Finally, it was necessary to bring into discussion *the procedural conditions* regulating the right to compensation, and the criteria for evaluating the damage dimension.

What has the *Brasserie du Pêcheur* Judgement brought new? First, through this decision, the Court clarifies the principle of Member States obligation to make good for damage caused to individuals, by the breach of EU law and, on the other hand, the extension of the mentioned principle scope is found[22]. Thus, as for the clarification of the principle, we notice that the Judgement contains a list of general conditions to be fulfilled in order for the obligation of the defaulting state to be committed, namely:

- the breached rule of law must confer subjective rights on individuals;
- the breach must be sufficiently serious;
- there must be a causal link between the breach of obligation and the damage suffered.

In addition to this list, we find also the clarification of these conditions and the necessary tools for their adequate application. If, as for the first[23] and third condition, things are clear, with no difficulty whatsoever in their application, in the case of the second condition, its application (check) has encountered some difficulties. Why? Because we believe that it is quite difficult to give an objective answer on the following two questions: "what is a sufficiently serious breach"? and where begins the limit when the breach becomes *sufficiently* serious? This time too, the Court attempts and for the moment also manages to present a series of tools, which could be used to provide an accurate assessment of the gravity of EU law infringement, by the respective Member State. In this respect, according to the Court, the concrete analysis of each case must take into account the following factors[24]:

- the degree of clarity and precision of the rule infringed;
- the extent of discretion that the rule infringed leaves to the national authorities;
- the intentional or culpable character of the rule infringed;
- the excusable or inexcusable character of any possible error of law;
- the extent to which the Community institutions attitude contributed to the infringement by the Member State.

And yet, what is a breach of EU law, given the tools provided by the Court? For example, a breach of EU law is manifest, meaning serious enough, if the state persists to infringe EU law, although there is a decision establishing this fact or a constant case-law of the Court, which establishes that the respective conduct represents a breach of EU law.

With regard to the extent of the principle scope, it follows from the content of the decision that the principle is applicable, regardless of the state body that has breached EU law.

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[22] **Paul Craig, Gráinne de Burca**,*"EU Law. Texts and Cases"* (Oxford University Press, London, 2003), p. 330.

[23] What is, however, *"to create subjective rights in the individuals' patrimony?"* How can it be checked, in practice, if a rule meets this condition? In the *Brasserie du pêcheur* case, the Court of Justice did not provide any definition, but only noted that in that case, the condition was fulfilled.

[24] Paragraph 56 of *Brasserie du pêcheur* Judgement, cited above.

Compared with *Francovich* Judgement, where the breach of EU law was represented by the failure to transpose a directive, in the *Brasserie du pêcheur* case, there was an infringement resulting from the fact that the national law was contrary to EU law.

4. Köbler[25]

Although the *Brasserie du pêcheur* Judgement brought additions and clarifications in the matter of EU Member States liability for breaching EU law, another aspect remained, however, unanswered, namely: does the Member States liability for acts of the judicial authorities represent grounds for committing liability? This issue appears because, from the content of the *Brasserie* Judgement, one can infer (interpret) that the principle is also applicable in the situation where the EU infringement is committed by a national Court. However, this interpretation does not result explicitly from the ruling of the Court. Thus, seven years after the ruling in *Brasserie du pêcheur* case, this aspect was also clarified in the decision to *Köbler* case[26].

In this case, *Köbler* sued the Austrian state for compensation, showing that the Austrian Administrative Court had infringed EU law, causing him damage by not paying the proper addition based on seniority. The Austrian state defended itself arguing that the Administrative Court decision had not breached EU law, since the purpose of such bonus was the reward of employees' loyalty who had been working at least 15 years continuously, serving the same employer, meaning the Austrian state[27].

However, Austria's representatives argued that the state obligation to offer compensations could not be grounded on an ultimate ruling (as it was the Austrian Administrative Court ruling). In this dispute, the Court that had to rule on Mr. *Köbler's* claims, considered necessary to receive further clarification of the Luxembourg Court, in order to solve the case, which is why it addressed several questions to the Luxembourg Court of Justice[28], of which, relevant to our analysis, is the next: "does the Court case-law according to which the State liability is committed in case of Community law infringement, regardless of the Member State body which is being held liable for this breach (especially *Brasserie du Pêcheur* joined decisions) apply also if the alleged behaviour of the body, contrary to Community law stems from a decision of the Supreme Court of a Member State, in this case of Verwaltungsgerichtshof?"[29]

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[25] ECJ Judgement of 30 September 2003, *Gerhard Köbler c. / Republik Österreich*, C-224/01.

[26] Circumstances of the case: Professor Gerhard *Köbler* had worked at various universities in Germany and Austria. In 1996, he requested the Administrative Court (Verwaltungsgerichtshof) to compel the employer to grant him an age addition, addition provided in Austrian law and taken into account when calculating the pension. *Köbler* showed that even though he had not worked 15 years at an Austrian university, he was meeting that condition of length of service, taking into account the years when he had been professor at other universities in Member States of the Community. He had demonstrated that it was meeting that condition of service, taking into account the years of activity from other universities in the Community. Mr. *Köbler* also claimed that disregarding the period in which he had been professor at other universities in the Community, constituted indirect discrimination contrary to Article 39 of the Treaty and Council Regulation no. 1612/68 on the free movement of workers within the Community. The Austrian Administrative Court, by the closure of 22 October 1997, required a preliminary ruling asking the ECJ if Article 48 TEC could be interpreted in the next situation: if when calculating the length of service, the seniority obtained in other European countries should be also included.

[27] According to paragraph 11 of *Köbler* Judgement.

[28] **Sergiu Deleanu**, **etc**., *op. cit*., p.367-368.

[29] **Laura Ana-Maria Vrabie** (coordinator), *"Jurisprudența istorică a instanțelor comunitare - culegere de hotărâri integrale",* vol.2, European Institute of Romania, Translation Coordination Department, Bucharest, 2008, p. 450.

The Luxembourg Court gave to this question, a very clear answer, namely: the principle according to which Member States are obliged to make good damage caused to individuals, by infringements of Community law for which they are responsible is also applicable when the alleged infringement stems from a decision of a court adjudicating at last instance. That principle, inherent in the system of the Treaty, applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation. Subject to the reservation that it is for the Member States to ensure in each case that those rights are effectively protected, it is not for the Court to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system"[30].

In other words, the Court held that, given the "specificity of the judicial service" and the legitimate requirements of security in legal relations, the State liability for damage caused to individuals, by infringements of EU law in cases where the infringement resulted from a Court decision, was governed by the same conditions as any other infringement of EU law, by the state. Thus, the ruling "puts the judicial grounds for the developing of the law of Member States liability for infringements of Community law"[31], started by *Francovich* ECJ Judgement.

Köbler Judgement too represents only a stage in the evolution of the principle of Member States liability for damage caused to individuals, by infringements of EU law.

5. Traghetti del Mediterranea[32]

Three years after the ruling in *Köbler* case, on June 13, 2006, the European Court of Justice issued a new decision, which has the merit of having cleared conditions under which a Member State is liable for damage caused to individuals by infringements of EU law, as a result of decisions of national Courts adjudicating at last instance.

In the *Traghetti del Mediterraneo*[33] case, the Geneva Courthouse asked the Luxembourg Court to answer the following questions: does EU law, in particular principles set out by the Court in *Köbler* case, oppose to a national regulation, in this case the Italian law, which on the one hand, excludes any Member State responsibility for damage caused to individuals by infringements of EU law, by a national Court adjudicating at last instance, the breach resulting from the misinterpretation

[30] *Ibidem*, p. 443-444.

[31] **Camelia Toader**, *"Curtea de Justiție a Comunităților Europene. Hotărârea Curții din 30 septembrie 2003"*, Analele Universității din Bucureşti, Seria Drept, no. IV/2004, (Editura All Beck, Bucureşti, p. 129.

[32] ECJ Judgement, 13 June 2006, *Traghetti del Mediterraneo SpA v. / Repubblica Italiana*, C-173/03.

[33] Circumstances of the case: in 1981, the shipping company *Traghetti del Mediterraneo* ("TDM") sued a rival company, *Tirrenia di Navigazione*. TDM wanted to obtain compensation for damage caused by the competitors because of practicing a low tariff policy on routes between Italy and Sardinia, respectively, Sicily, policy made possible by benefiting of public subsidies. TDM claimed that the granting of such public subsidies was an act of unfair competition, being prohibited by the Treaty establishing the European Community. TDM's action was dismissed, in turn, both at first instance, as well as on appeal and recourse. Considering that the judgement of the Court of Appeal was based on an incorrect interpretation of the provisions of Community law, TDM, company that, meanwhile, went into liquidation, sued the Italian state, before the Genoa Court. TDM requested the Court, the reparation of damages that the company had suffered because of the misinterpretation of the Court of Appeal. TDM also wanted to be demonstrated that the mentioned Court had infringed the Community law, by not complying with its obligation of asking ECJ for a preliminary ruling.

of EU law or from the incorrect assessment of facts or evidence and, on the other hand, is this kind of liability limited only to cases of intent or serious negligence of the Court.

Starting from the idea according to which excluding the possibility that the State responsibility would be committed when the EU law infringement resulted from the interpretation of a Union provision or incorrect assessment of facts or evidence, would prejudice the effectiveness of the liability established by *Köbler* decision, the Court answered both questions, as it follows[34]:

- Community law makes inapplicable the national legislation which excludes State liability, in general, for any damage caused to individuals by infringements of Community law, caused by a Court of last instance, when the breach is the result of a misinterpretation of a Community rule or an incorrect assessment of facts and evidence;

- Community law makes inapplicable the national legislation which limits such liability solely to cases of intentional fault or serious negligence by the Court, if such a restriction leads to the removal of state liability in other cases where a manifest breach of the applicable rule was committed.

6. Kapferer[35]

Remaining loyal to the principle of Member States responsibility for damage caused to individuals by infringements of EU law, the Luxembourg Court of Justice adjudicates again, in 2006, and the decision is part of the post-*Köbler* evolution of the principle mentioned.

In this respect, we bring to the forefront of attention the *Kapferer*[36] Judgement. In this case, the Court of Appeal (Landesgericht Innsbruck) filed a request for preliminary ruling. One of the questions was related to the fact if the national Court had, and if so, under what conditions, the obligation to reopen a case and to invalidate a final and irrevocable decision contrary to EU law regarding the international case-law.

Starting from the idea that the principle of *res judicata* is recognized both in the legal systems of EU Member States and in the European Union, the Court stated that, in order to ensure the stability of legal relations and the proper administration of justice, it was important that Court decisions which would become final after having exhausted all appeals or after the expiry of their exercise periods, could not be brought again in discussion[37].

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[34] *Communiqué de presse n° 49/06*, 13 June 2006 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp060049fr.pdf)

[35] ECJ Judgement, on 16 March 2006, *Rosmarie Kapferer v. / Schlank & Schick GmbH*, C-234/04.

[36] Circumstances of the case: as a consumer, residing in Tirol (Austria), Ms. *Kapferer* received from Schlank & Schick company (company established in Germany), a promotional material by which she was announced that she could win a prize of 3906,1 €. Receiving the award was subject to an order-test without, however, involving any commitment. Ms. *Kapferer* sent the order form to Schlank & Schick, but it was not possible to determine whether, in fact, she had ordered something on that occasion. By not having received the prize she thought she had won, Ms *Kapferer* brought an action against Schlank & Schick, before Bezirksgericht Hall in Tirol (the Austrian Court), seeking payment of € 3906.1, plus interest. Schlank & Schick claimed, under Regulation no. 44/2001 on case-law, recognition and enforcement of judgements in civil and commercial matters, that the Austrian Court had no jurisdiction, as defined in the Regulation, to hear the case. Bezirksgericht Hall in Tirol dismissed the application. Under those circumstances, Ms. *Kapferer* brought the case before the Landesgericht Innsbruck. Schlank & Schick did not appeal the first instance judgement, so in that respect, the judgement was final.

[37] *Communiqué de presse n° 423/06*, 13 march 2006 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp060023fr.pdf)

Thus, according to the Court, the answer to the question formulated by the Court of Appeal is negative, meaning that the principle of cooperation, provided by article 4 TFEU does not compel a national Court not to apply its own rules of procedure, in order to review and repeal a final and irrevocable decision contrary to Community law[38].

7. Conclusions

The principle of obligation of Member States of the European Union to make good the damage caused to individuals by infringements of EU law is one of the fundamental principles ensuring the full effectiveness of EU law.

The consecration of this principle is one of the most significant developments of the case-law, along with other principles, such as the direct effect and the priority of EU law in relation to national law.

Without the recognition of this principle, the direct effect of EU law would have probably been only partially effective for the exploitation of the legal rights conferred on individuals, by EU rules.

It should be noted that the affirmation of the principle of states responsibility for damage caused to individuals was evolutionary, if we consider the extension scope, starting from acts of the executive to all State authorities, whichever is their function, using, however, the same argument and logical line from *Francovich* Judgement and from other judgements fundamental for the shaping of EU law, as autonomous legal order.

In *Brasserie du pêcheur* Judgement, the Court held that the principle of state responsibility, being inherent in the system of the Treaty, was valid for any breach of EU law, whichever was the national body whose act or omission was responsible for the breach[39]. By this statement, the Court no longer acts only under the EU Treaty system, but also under the mandatory principle of the uniform application of Community law and of the useful comparison with state responsibility in international law[40].

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[38] *Idem*.

[39] Paragraph 32 in conjunction with paragraph 31 of *Brasserie du Pêcheur* Judgement.

[40] According to conclusions of the General Advocate Philippe Léger in *Köbler* Case, presented on 8 April 2003, paragraph 42.

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