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Doctoral of Law and Political Sciences

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The criterion of sufficiently serious infringement in European Union tort law

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Content

I. Outline of the research objective

1. The choice of research topic and its importance

The primary law of the European Union establishes the non-contractual liability of the institutions of the Union to individuals for damages, and the Court of Justice of the European Union (Court of Justice or ECJ) has established in its case law a system of liability of Member States to individuals for breach of EU law. Nevertheless, the effective enforcement of liability based on EU law still faces serious obstacles. Concurrently, there is a growing demand from individuals for effective remedies due to the inefficiency of the EU's decision-making mechanisms[1] and the crises that have seriously challenged the EU.

The liability of EU and Member State institutions exercising public power under EU law functions as a safety net[2] for individuals behind other means of enforcement. However, the present state of this safety net is not very dense, and liability under EU law is the least successful of the EU's legal principles. This situation is paradoxical because, in addition to the crises, the increased emphasis in recent years on the protection of fundamental rights and the strengthening of the rule of law would require that the system of private liability for the exercise

[1] ENDRE ORBÁN: Article 7 TEU is a Nuclear Bomb - with all its Consequences? *Acta Juridica Hungarica*, 2016. no. 1. pp. 119-128.
[2] JAMES MARSON: Holes in the Safety Net? State Liability and the Need for Private Law Enforcement. *Liverpool Law Review*, 2004. no. 2. p. 121.

of public authority also function properly. This justifies research in the field of public liability for damages on the basis of EU law.

One of the biggest holes in the liability safety net seems to be the gap left by the sufficiently serious infringement criterion. This condition can be described as the Achilles' heel of liability under EU law, the centre of criticism in the legal literature and an almost insurmountable challenge for case law. Therefore, the examination of this liability condition is of crucial importance for the effectiveness of the liability regime.

Moreover, the review of the legal literature also showed that, although there are many works on the subject that deal with the criterion of a sufficiently serious infringement, a full scientific analysis of this criterion has not yet been carried out, either in the national or in the international legal literature.

2. The aim of the research

The main objective of the research was to examine the role of the EU law criterion of a sufficiently serious infringement in the private liability regime for breaches of EU law. In pursuit of this objective, the investigation will determine the role of this criterion, which restricts public liability, in limiting the ability of the principle of liability for damages under EU law to fulfil its function.

In this context, two fundamental hypotheses were formulated, with the objective of the research being to confirm or refute them:

a) **One of the main limitations to private enforcement is the criterion of a sufficiently serious infringement.**

b) **The criterion of a sufficiently serious infringement is now an outdated, in many respects inconsistent legal concept reflecting a state immunity approach that has been superseded.**

In addition to the general, overarching objectives, the paper also set specific objectives. These are:

- Defining the concept of a sufficiently serious infringement as a condition for liability.
- A presentation of the private and public law principles that affect its conception.
- Demonstrate the interaction of the criterion of a sufficiently serious infringement with the principles of state responsibility in international law and the system of public liability in the Member States' legal systems.
- Outline the evolution of the sufficiently serious infringement criterion.

- A summary of the circumstances to be examined in the context of a sufficiently serious infringement and an analysis of their practical application.
- Examining the impact of the set of criteria on the enforcement of liability under EU law.
- A comparison of the application of the principle of sufficiently serious infringement of the law in the context of national liability and the Union's non-contractual liability.
- Determining the place of the liability threshold in the light of national legal systems.

Finally, if the basic assumptions regarding the criterion of a sufficiently serious infringement are confirmed, the research aims to formulate comments and proposals for a more effective liability regime. It should also help the national courts to apply the liability based on EU law.

II. Description of the research and research methods

The starting point in defining the methods was that the EU legal institution is at the centre of the research. The need for an autonomous interpretation of the EU legal institutions justified the analysis from the perspective of EU law. The limits of the research are defined on the basis of Pekka Aalto's convergence model. On this basis, the research focused on three areas. The exploration of the theoretical foundations, the

analysis of the case law of the ECJ and the comparison of the law of the EU Member States. Each of the areas covered by the research justified a different methodological approach.

1. The theoretical basis of public liability

The thesis did not attempt to fully develop the theoretical foundations of public liability, but only dealt with those that were necessary for the analysis of the criterion of a sufficiently serious infringement. The method used was an analysis of the relevant concepts, a summary of the results of the legal literature and a review of the legal history of the legal institutions.

The paper deals with the concepts of sovereignty and immunity and their relation to European integration. It presented the development of state responsibility in international law and the history of the development of the law of state liability in the European Union. Finally, it outlined the relevant private law and tort liability mechanisms.

On this basis, it is concluded that the theoretical categories of sovereignty and immunity are evolving in a direction that allows for an increasing scope of recoverability of damages caused to individuals by the exercise of public power. The softening of the doctrinal basis for State irresponsibility is paralleled by the development of the international legal concept of State responsibility, which today aims at strengthening the private liability of the State. At the same time, the expansion of state

responsibility challenges traditional private liability regimes. The application of classical private law principles of liability, in particular liability criteria such as fault and wrongfulness, is difficult when it comes to assessing State liability.

2. The development of the legal history

The paper describes the development of damage liability under EU law and divides it into three phases: 1. The development of liability by the integration institutions themselves; 2. The intensive legal development phase following the introduction of liability by the Member States; 3. The stagnation of case law on liability under EU law. In addition, EEA law is briefly discussed.

3. Analysis of the case law of the Court of Justice

The case-law was examined in different ways in relation to the institutional liability of the Union and the liability of the Member States.

a) The criterion of a sufficiently serious infringement of the Union's (Community's, Communities') non-contractual liability regime

Since the case-law of the Court of Justice is a closed system and the Court of Justice acts exclusively in such cases, it was appropriate to examine it

by organising the case-law in chronological order. In doing so, only those judgments which substantially develop the criterion of a sufficiently serious infringement have been considered.

As a result, the paper shows that the Union's non-contractual liability is not very effective. Up to 1 February 2024, only 14% of actions for damages had been successful. The criterion of a sufficiently serious infringement does not play a fundamental role, but its impact is not negligible. An important finding was the failure of the Court to recognise its own liability for damages. Finally, the paper examines in detail the Court's method of assessing the existence of a sufficiently serious infringement.

b) The sufficiently serious infringement criterion in Member States' liability regimes based on EU law

The analysis of the EU legal regime of national liability demanded a distinct approach, given that the legal regime of national liability constitutes an open system. This signifies that an extensive number of national courts possess the jurisdiction to adjudicate such actions, and the private law of 27 Member States determines the conditions of liability. Additionally, the jurisprudence of the Court of Justice is much more limited. In view of these factors, it was deemed appropriate to undertake a detailed analysis of the judgments and to systematise the case-law based on the nature of the infringement in the Member States.

In light of these considerations, the present thesis has examined the case law on compensation for damages caused by legislation, administrative measures and court decisions, in a distinct and separate manner.

The analysis concluded that there are three distinct categories of liability: 1. quasi-objective liability, 2. quasi-fault based liability, 3. liability for damage caused by national courts. The assessment of these categories, particularly in relation to judicial damages, has proven to be a very controversial issue.

c) Comparison of the two liability schemes

The paper compares the results of the research in terms of the application of the sufficiently serious infringement criterion as a liability criterion. The paper concludes that the liability of the EU institutions for damage caused to individuals is more limited than that of the Member States.

4. Examining national legal systems

The present paper takes a comparative approach to the public liability regimes of the EU Member States, focusing on the main substantive legal background of the Member States' regimes and their theoretical basis, rather than on the actual functioning and enforcement of public liability. The domestic legal systems and public liability regimes of France,

Germany, Italy and Spain are examined in more depth, while the other Member States are examined only in summary form.

The research aimed to identify the common general principles underlying EU rules. In this context, the research found that the limitation of public liability is based on different generally accepted principles in the Member States. However, it is also evident that the EU public liability regime is characterised by significant restrictions when compared with those observed in the Member States. The Union's rules on institutional liability are subject to the strictest limitations in the Member States, while the Member States' liability is also very limited compared to the individual national rules.

III. Thesis summary of new scientific results

1. Definition of the criterion of a sufficiently serious infringement

The definition of a sufficiently serious infringement can be formulated ***as a condition for the compensation of damages caused to individuals by acts of public authority of the institutions of the European Union and of the Member States of the European Union which infringe EU law, which grants immunity to the tortfeasor for certain infringements***.

In contrast to the references in the judgments of the Court of Justice, it is not an objective category, but rather a mixed measure of culpability tending towards objectification, with objective elements added. From a private-law perspective, the criterion of a sufficiently serious infringement of the law may also be termed European imputability.

2. Prove that the criteria of the sufficiently serious infringement is a significant barrier to private enforcement

The research carried out in this thesis has led to the conclusion, both from a theoretical and practical point of view, and in the light of comparative law analysis, that the criterion of a sufficiently serious infringement is a significant limitation on the damages that individuals can claim. This

further undermines the effectiveness of a legal instrument that is already ineffective for other reasons.

3. Demonstrate that the criterion of a sufficiently serious infringement is now an outdated, inconsistent legal concept reflecting an outdated approach to state immunity

In support of this hypothesis, the thesis, as a result of the research carried out, criticises the concept of the criterion of a sufficiently serious infringement in several respects.

a) The concept is not based on sufficiently substantiated assumptions

In upholding the criterion of a sufficiently serious infringement, the ECJ has based its decision on the fact that the limitation of the liability of public authorities derives from the common legal traditions of the Member States and that an excessively strict liability would undermine the proper exercise of public authority in the public interest. Of these two assumptions, the analysis of the legal systems of the Member States has confirmed the first to a certain extent, but not the second. The other hypothesis, the existence of a "sword of Damocles" effect, is also questioned in legal theory and has never been supported by concrete studies. Indeed, it is questionable why it is only the exercise of public authority that is feared to be subject to increased liability for damages,

whereas the private legal consequences of certain activities must also be reckoned with in other areas.[3]

b) The imposition of a risk of damage and a burden of proof is incompatible with the rule of law

If we remove from the set of criteria for assessing the criterion of a sufficiently serious infringement the elements of intent and negligence which are classically part of fault, we are left with objective circumstances beyond the control of the injured parties, or circumstances which can be assessed on a predominantly objective basis. The result is that the injured party has to bear the risk of damage caused by factors independent of them. This solution is not in line with the EU's treatment of the rule of law as a fundamental value of the Union. This is because the criterion of a sufficiently serious infringement is linked to the conduct that caused the damage, not to the result that was caused. Thus, individuals may suffer significant harm for reasons beyond their control without being entitled to compensation.

The Court requires the victim to prove that the infringement is sufficiently serious. It also does not recognise the principle of the presumption of fault, which applies in many Member States, once it has

[3] ÁDÁM FUGLINSZKY:*Tort Law*. Budapest, 2015, Orac Publishing Ltd. p. 493.

established the illegality of the infringer. This also places the burden of proof on the injured party, contrary to the rule of law.

c) Inconsistencies in the application of conditions

The Court of Justice applies stricter liability requirements to bodies exercising public authority in the Member States than it does to EU bodies. The most significant manifestation of this is that there is objective liability only for infringements committed by Member States, and the ECJ is reluctant to recognise its own liability. This is particularly worrying in view of the fact that the ECJ is, in principle, committed to a uniform assessment of the two liability regimes.

d) The liability threshold does not follow the changes of the legal environment

The results of the research show that the criterion of a sufficiently serious infringement does not correspond to the current legal environment. The perception of sovereignty, and with it the doctrine of state immunity, is moving away from the doctrines of strong sovereignty and absolute immunity towards the recognition of an ever more extensive protection of the individual. The codification of international law is also moving in this direction.

The consequence of deeper integration is that individuals who come into contact with EU law are increasingly seeking to protect their rights under EU law and to defend their rights against EU legislation and enforcement. At the same time, in the context of the protection of fundamental rights, it is questionable whether the requirements of the Charter of Fundamental Rights for effective remedies before the courts are met by the Union's liability law in the event of a breach of fundamental rights. Moreover, the European Court of Human Rights has also required in its case law that effective remedies must be such as to offer reasonable prospects of success.

e) The liability condition is inconsistent from a civil law point of view

The criteria for a sufficiently serious infringement include subjective elements such as intent and negligence, which are classically assessed in the context of fault. In the case of organisational liability, and in particular public liability, these are difficult categories to interpret. Moreover, the Court of Justice has repeatedly stated that the purpose of liability for breach of EU law is not deterrence but compensation. In the classical development of tort law, as compensation has come to the centre, subjective criteria of liability have receded into the background and the assessment of the existence of liability has shifted towards an objective approach.

4. Proposals to amend the terms and conditions of liability

Considering that the research has confirmed its two basic assumptions regarding the criterion of a sufficiently serious infringement, the paper also makes suggestions to the Court of Justice to resolve the resulting contradictions. These are as follows:

a) Establishing an objective basis for liability

The Court of Justice would be well advised to treat the liability of the Member States and the non-contractual liability of the Union in the same way as regards the conditions for liability, by not applying the criterion of a sufficiently serious infringement. Instead, an objective obligation should be introduced for the institutions of the Union and the Member States to make good the damage caused by the infringement in the event of a finding of illegality. This threshold of liability should be applied uniformly to all acts of public authorities in breach of EU law.

The liability of the EU institutions in a situation of narrow discretionary powers, which does not exist, should be adapted so that it is effectively an objective liability, similar to that of the Member States.

The principle of objective liability can also be applied today in the area of damage caused by the exercise of wide discretionary powers and the exercise of judicial discretion. In such cases, it would be appropriate for the abuse of discretion and the manifest disregard of the

applicable law to be assessed not in the context of a sufficiently serious infringement of the law as quasi-culpability, but in the context of the assessment of unlawfulness. In this sense, the body exercising public authority is liable for ultra vires acts because it exceeds the limits of its public authority. The existence of a discretionary power is also based on a statutory power. By its very nature, any activity requiring interpretation of the law and understanding of the facts involves the possibility of abuse of discretion. The legislator takes account of this possibility when granting discretionary powers. An unlawful act giving rise to liability for damages occurs when a body exercising public authority exceeds the discretionary power conferred on it by public law. The limits of this power can be determined on a case-by-case basis.

The assessment of the failure to comply with the obligation to initiate a preliminary ruling procedure should also be dispensed with in the context of assessing the liability of national courts. In the event of illegality being assessed in this manner, the failure to initiate a preliminary ruling procedure would constitute a risk for the national court in terms of liability. The failure to initiate such a procedure would be regarded as a risk for the national court in terms of liability, and would be assessed for damages at the court's own risk if the illegality of the national court's action was found to be unlawful.

This reformed and significantly objectified liability criterion would overcome the above concerns about public liability under EU law.

b) Justification for the introduction of liability without illegality

In addition to the objective basis for compensation for damages arising from unlawful acts of public authority, it is certainly worth considering whether the European Union should give general scope to the liability of public authorities for lawful acts of the EU institutions. It is an inherent aspect of crisis management, particularly in cases that are sudden or of a nature that has not been previously encountered, that legislation and other measures are adapted to the situation, with a view to following it and maintaining control. This process often results in a substantial increase in the number of public measures that are politically motivated, inadequately prepared or based on an inadequate assessment of the facts in an unknown situation. While such measures, undertaken in the public interest, cannot be declared unlawful under general principles, they can, nevertheless, have a significant impact on specific individuals or groups. In instances where the legislator has not provided for compensation within sectoral legislation, the resulting burden is shouldered by private individuals. In this regard, the principle of equal bearing of public burdens (égalité devant les charges publiques), as recognised in French law, and the concept of compensation for expropriation proceedings, rooted in the Sonderopfer theory of German law, serve as foundational principles. Arguments have been repeatedly made in favour of recognising liability without a wrongful act in EU law, based on these principles.

c) Proposal on how to reformulate the liability conditions

In view of the aforementioned arguments, it appears unnecessary to legislate at EU level to change the liability regime, but this can be done through the case law of the Court of Justice. The principle of liability without unlawfulness may be included in the EU's primary legal framework, potentially through an extension to the existing article on non-contractual liability. The change in approach that occurred earlier, when the Member States' liability and the EU's non-contractual liability were unified, was influenced by the legal problems that arose and by criticisms in legal literature. Similarly, the nature of tort cases and the rise of fundamental rights protection may together be capable of triggering a turnaround that could lead to a liberalisation of the conditions of liability. This potential shift could be significantly catalysed by the Union's accession to the European Convention on Human Rights, by the deliberate pursuit of claims by individuals, and by the persistent criticism within the field of legal literature.

IV. Publication list

1. Publications related to the topic of the thesis

1. **The requirements of the Court of Justice of the European Union in relation to compensation for damage caused by national legislation which is contrary to EU law**. In Éva Jakab - Péter Miskolczi-Bodnár (eds.): *Studies of the XXIV National Conference of Doctoral Candidates in Law.* Budapest, Patrocinium Publishing House, 2023.

2. **The evolution of case law on liability for damage caused by legislation in breach of EU law in the light of the restructuring of the gambling market.** *European Law,* 2022, No 1, pp. 28-37.

3. **The impact of the judgment of the Court of Justice of the European Union in the Hochtief case on the domestic judicial liability regime**. *Journal of Legal Studies,* 2022. no. 7-8. pp. 286-298.

4. **The Curia's decision on the admissibility of a renewal of proceedings based on a judgment of the Court of Justice of the European Union**. *EU Law,* 2023 No 2 DOI: 10.55413/561.A2300202.EUO

5. **Questions of codification of liability for damage caused by legislation contrary to EU law**. *Parliamentary Review*, 2023. no. 2. pp. 57-82.

6. **Polish rule of law before the Court of Justice of the European Union**. *EU Law*, 2024 No. 1 DOI: 10.55413/561.A2400102.EUO

7. **Civil procedure issues in times of emergency - temporary or permanent model change?** In Péter Miskolczi-Bodnár (ed.): *A joint volume of studies by teachers and students*. Budapest, Károli Gáspár Reformed University, Faculty of Law and Political Sciences, 2021. p. 211-239 (joint publication with András Osztovits)

8. **The Hochtief case**. In Éva Jakab - Péter Miskolczi-Bodnár eds.. XIII.

9. **The impact of the CJEU's Hochtief judgment on the domestic judicial liability regime**. *Law Journal* 2022. no. 7-8. pp. 286-297.

10. **Civil procedural law during the COVID-19 epidemic.** In Gyula Bándi - Anett Pogácsás (eds.): *Law in times of crisis*. Pázmány Péter Catholic University, Doctoral School of Law and Political Sciences, Doctoral Studies Series 2023.

11. **Domestic rules on compensation for damage caused by legislation in the light of EU law**. In Fejes Zsuzsanna (ed.) *Szegedi Jogász Doktorandusz Konferenciák XIII.* Szeged, University of Szeged, Doctoral School of Law and Political Sciences, 2023. p. 111-131.

12. **Jurisdictional dilemmas in the context of the concept of damage**. *European Law* 2022, no. 6, pp. 28-39 (joint publication with Attila Kincses, Eszter Juhász, András Samodai)

13. **The case-law of the Court of Justice of the European Union on the liability of Member States following the Köbler case**. *European Law* 2023, No 6, pp. 11-21.

14. **Foreign currency credit cases and the courts' liability for damages under EU law.** *Law Journal* 2024. no. 1. pp. 1-11.

2. Other publications

1. **Corporate social responsibility, CSR activities in Germany.** In *Glossa Iuridica* Volume VIII Special Issue Virus and Ethics. (Joint publication with Edith Knoll-Csete)

2. **The impact of the Covid-19 epidemic on the world of law.** *In Medias Res 2020/2*. Law Journal, 2021/10 (Review)

3. **C-222/15 - Hőszig case - Validity of a jurisdiction agreement in general terms and conditions.** In *EUB 70 volume of studies*. Budapest, 2023, National Office for the Judiciary.