



EU-Law Limiting of the Principle of State Liability and of Member State Limitation Periods for Actions

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Abstract. This paper analyses key legal issues arising from a Romanian legal dispute involving the principles of EU law, particularly focusing on the compatibility of national procedural rules with the obligations under EU directives. The case, centred on a judgment by the Romanian Supreme Court that imposed imprisonment, highlights potential conflicts with Directive 2016/343 and Directive (EU) 2012/13. Central to the discussion are two challenges: the expiry of national limitation periods for claims and the requirement under Romanian law to establish the unlawfulness of a judicial decision before filing claims for damages. The study evaluates exceptions to the principle of legal certainty as established in key judgments by the Court of Justice of the European Union (CJEU), including the Emmott, TK UL VM, and Călin cases. It explores whether these exceptions allow individuals to overcome procedural obstacles that hinder their ability to assert rights under EU law. Additionally, the paper examines the ‘Köbler principle’, which holds Member States accountable for breaches of EU law stemming from judicial acts, emphasizing that such liability does not annul the principle of *res judicata*. The analysis reveals that while EU law generally respects national limitation periods, it mandates exceptions where procedural rules render it impossible or excessively difficult to enforce rights arising from EU law. The study concludes that national courts must disregard procedural rules that contravene the principles of effectiveness and state liability under EU law, even in cases involving *res judicata*. The findings contribute to the broader discourse on the interaction between national legal frameworks and EU law, particularly in ensuring effective judicial protection and safeguarding individual rights.

Keywords: EU law, state liability, legal certainty, limitation periods, *res judicata*

1. Introduction

This paper discusses certain issues of a legal dispute in Romania, without specifying the parties involved in that dispute or the most important details of the legal dispute. However, the issues presented here can be considered to be quite innovative and less widespread in the Hungarian practice. This may provide sufficient reason for the publication of this study. The highly rated international literature discussing EU law also regularly publishes articles on the application of EU law by courts of other Member States. Incidentally, the legal dispute at issue is based on a judgment handed down by the Romanian Supreme Court, in which this court imposed the penalty of imprisonment.¹ Yet, in our opinion, this judgment overlooked the requirements set by the provisions of two directives, namely Directive 2016/343 and Directive (EU) 2012/13.²

One of the most important obligations of the Member States stemming from the EU legal order is to remedy violations committed against individuals, regardless of which body of the state the violation of EU law can be attributed to. In the following, we will discuss in detail the principles of *res judicata* and legal certainty: based on these, as a general rule,³ EU law does not require the review of court decisions that have become final, even if this would allow for remedying situations that violate EU law. In the case concerned, the internal procedural rules do not allow for any possibility of review. For such cases, the practice of the CJEU developed the so-called ‘Köbler principle’, which, under specific circumstances, allows for enforcing the responsibilities stemming from the judicial acts of the national courts as an *ultima ratio* for asserting the rights of individuals arising from EU law. The case law can be considered clear and established in that the so-called *res judicata* decision does not constitute an obstacle to the establishment of liability arising from court acts. It should be noted, however, that in such a procedure, the possible establishment of the state’s liability does not result in the termination of the fact that the court’s decision constitutes *res judicata*.⁴

1 For reasons of privacy of the individuals involved, we do not publish any further specific details related to the legal dispute.

2 We will not touch upon the aspects of the legal dispute related to criminal law within the framework of this paper.

3 Of course, there are exceptions to this general rule in the case law of the CJEU, mainly in areas that conflict with the EU ban on state subsidy.

4 As far as we know, a criminal case similar to the case that gave rise to our study has not yet been brought before the Court of Justice of the European Union.

However, the action aimed at establishing the state's liability arising from the violation of EU law as a result of court acts has two significant obstacles: the examination of these obstacles is actually the subject matter of this paper.

In the case concerned, according to Romanian law, the time limits for submitting a claim or claims for damages has expired.⁵ We will examine whether the expiry of such deadlines can generally prevent the determination of the liability of the Member States arising from judicial acts and whether, under the circumstances of the present case, it is possible to rely on a special CJEU case law, based on which the acting national court must accept the claims despite the principle of legal certainty.

Secondly, according to Romanian legislation, in this case it is only possible to file a lawsuit for damages in the event of an unlawfully imposed imprisonment to be served,⁶ if the Romanian courts have previously established the unlawfulness of the punishment. In the following, we will examine whether EU law allows Member States to accept claims for damages submitted in the event of a violation of the EU legal order, inter alia, on the condition that the court of the given Member State previously establishes the unlawfulness of the decision in question.

2. EU Override of Member State Limitation Periods

As mentioned above, EU law, as a general rule, takes into account the principle of legal certainty; therefore, if the review options defined in the internal procedural rules have been exhausted, or the deadlines defined in the Member State's procedural rules have expired, the EU law does not require the reopening of the given decision even if that would allow for remedying a decision that violates EU law. Exceptions to this general rule were established by the case law of the CJEU: we will examine the case law established in the *Emmott* case, in the *TK UL VM* case, and in the *Călin* case, as well as their applicability.

5 Based on Romanian legislation and the case law of the national courts, it is uncertain which procedure should be used in this case.

6 In the event of the violation of EU law, in the light of the institutional and procedural autonomy of the Member States, the actions for damages allowed for by the national legislation serve also as actions to be initiated on the grounds of the EU law, noting that the Member States must take into account the rules developed regarding State liability by the CJEU, as well as the principles of equal treatment and effectiveness.

3. The Case Law Developed in the *Emmott* Case

It should be noted that Romania did not properly transpose one of the directives mentioned in the introduction by the end of the transposition deadline,⁷ and therefore it can be examined whether the judgment of the CJEU rendered in the *Emmott* case⁸ can be applied to the present case.

In this decision, the CJEU ruled, *inter alia*, that in the event that a Member State has not transposed a directive in accordance with the transposition deadline, it cannot rely on the delay of a court action by which an individual wishes to enforce against the concerned Member State their rights arising from the directive and guaranteed by the EU legal order.

Yet, it should be mentioned that the case law of the CJEU developed in the *Emmott* case was partially overridden by the latter case law of the CJEU, including the judgment rendered in the *Tonina Enza Iaia* case.⁹ There, the CJEU ruled, *inter alia*, that the case law developed in the *Emmott* case can be applied only in cases where, similarly to the *Emmott* case, special circumstances exist in which the statute of limitations has deprived the person concerned of the possibility of exercising all his rights arising from the EU legal order. In the judgment in the *Emmott* case, the CJEU emphasized, *inter alia*, that until the directive is properly implemented, individuals cannot fully understand their rights guaranteed by the EU legal order.¹⁰ It should also be pointed out that the directive in question has been transposed into its legal system in several parts by the concerned Member State.

After the 1987 judgment of the CJEU, the person concerned in the main case immediately turned to the Ministry of Social Affairs, requesting that his allowance be paid in accordance with the directive of 1984. In its response, the

7 In the scope of application of the directive, it is clear from the opinion of the Advocate General (in case C-310/18, paragraph 38) that the Recitals (16) and (48) of Directive 2016/343 are to be interpreted jointly, as well as that considering articles 3, 4, and 10, Directive 2016/343 forms a unified system; it follows that only full transposition ensures the assertion of the rights of individuals arising from EU law. The transposition of certain provisions of the directive, as well as the non-transposition of certain provisions, logically make the joint interpretation and application of the recitals and individual articles of the directive impossible. It is confirmed in paragraphs 44, 45, and 46 of the opinion of the Advocate General that the purpose of Directive 2016/343 is to establish minimum requirements for the procedural protection of suspects and the accused, which is also not possible if a Member State transposes only certain provisions of the Directive, while other provisions remain omitted. Thus, the level of protection defined by the directive cannot be achieved. Paragraph 47 of the opinion of the Advocate General emphasizes that Directive 2016/343 cannot be interpreted in any other way than as a complete and exhaustive legal act, the purpose of which is, *inter alia*, to define all the conditions related to the judgment of the case in question.

8 Court of Justice of the European Union, *Theresa Emmott v Minister for Social Welfare and Attorney General*, Case C-208/90.

9 Court of Justice of the European Union, *Tonina Enza Iaia and Others v Ministero dell'Istruzione, dell'Università e della Ricerca and Others*, Case C-452/09.

10 *Id.* paragraphs 21 and 4.

Ministry emphasized that a lawsuit is pending before the national higher court, and no decision can be rendered until the conclusion of the proceedings. In its decision, the High Court of Cassation and Justice nevertheless allowed a claim to be submitted so that the person concerned could claim the amounts not paid in violation of the directive.

The question arises as to what extent the special circumstances set out in the *Emmott* case can be applied to the case under our examination. It is clear that the plaintiff has only one option to assert his rights guaranteed by the directives and stemming from the EU legal order, and this is the lawsuit for damages filed on the grounds of the violation of EU law. The lack of proper transposition of the directive may have made it difficult for those concerned to learn about their rights guaranteed by the EU legal order.

Based on the *Clifit* criteria,¹¹ the Romanian High Court of Cassation and Justice, as it qualifies as a court acting on the last instance, should have referred the case to the CJEU, but it obviously did not comply with that obligation. After that decision, the affected parties had no other means of redress.

It follows from the above, as well as from the economic and other difficulties related to the imprisonment to be served, that the plaintiffs faced severe difficulties in asserting their rights stemming from EU law, similar to the *Emmott* case.

4. Consequences Stemming from the Judgement Rendered in the *TK UL VM* Case

We mentioned above that, based on the principle of legal certainty, EU law does not, as a general rule, require the overriding of the statute of limitations and limitation periods for actions defined in the procedural rules of the Member States.

Another exception to this rule is, from a certain point of view, the judgment of the CJEU rendered in the *TK UL VM* case:¹² the CJEU examined the procedural rule of the Member State based on the EU principle of effectiveness, that is, it did not juxtapose it with the principle of legal certainty. In that regard, the CJEU, inter alia, referred to the fact that, according to established case law, in general, when assessing whether a procedural rule of a Member State makes it impossible or too difficult to assert the rights stemming from EU law, the following should be taken into account: the role of the given rule in the proceedings, the specifics

11 Court of Justice of the European Union, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Case 283/81.

12 Court of Justice of the European Union, *TK and Others v Land Sachsen-Anhalt*, Joined Cases C-773/18 to C-775/18.

of its application, the right to defence, legal certainty, and the principle of the orderly conduct of the procedure.

The CJEU already ruled in its judgment rendered in the *Bulicke* case¹³ that the starting date of the limitation period cannot be determined in such a way that makes the concerned individual unable to recognize the existence or significance of the discrimination they suffered, as in this case they would be unable to make use of the options for asserting their rights stemming from the EU legal order.

In its ruling in the *TK UL VM* case, the CJEU recognized that the relevant national legislation found to be incompatible with the requirements of EU law was actually available to the parties involved in the main proceeding, but the parties concerned could not learn and could not recognize that the legislation in question was unlawful or discriminative, as they only became aware of it shortly before filing their claim.

It follows from this that EU law, with regard to the starting date of a mandatory period, in this case the limitation period, based on the legal development taking place, inter alia, in the judgments rendered in the *Bulicke* and *TK UL VM* cases, considers that this date is the time when the plaintiffs became aware of the unfavourable or discriminatory nature of the legislation in question.

It should be mentioned that, after the decision of the Romanian High Court of Cassation and Justice, the plaintiffs were in fact aware of that a prison sentence had been imposed against them, but they were not aware of the fact that this decision overlooked the EU directives mentioned in the claim. The inadequate transposition of the directives in question supports this argument. It follows that if it is substantiated that the persons concerned did not become aware of the unlawful nature of the judgement imposing imprisonment to be served, based on the ruling in the *TK UL VM* case, the acting national court must determine the starting date of the limitation period at the time when the persons concerned became aware of the unlawful nature of the sentence.

5. The Judgement Rendered in the *Călin* Case and the Applicability of the Principle of Legal Certainty

In the judgment rendered in the *Călin* case,¹⁴ the CJEU ruled, inter alia, that the principle of legal certainty must be interpreted jointly with the principle of legitimate expectation, which means that the applied national legislation must

13 Court of Justice of the European Union, *Susanne Bulicke v Deutsche Büro Service GmbH*, Case C-246/09.

14 Court of Justice of the European Union, *Oana Mădălina Călin v Direcția Regională a Finanțelor Publice Ploiești – Administrația Județeană a Finanțelor Publice Dâmbovița and Others*, Case C-676/17.

be clear and precise so that individuals can foresee their application. The period for action set by the judgement of the concerned Romanian court in the *Călin* case could not be applied because it was not published in the Romanian Gazette.

The case law of the Romanian courts is uncertain as to whether the claim in a similar case is considered non-pecuniary damage. Pursuant to Romanian legislation, non-pecuniary damages are not statute-barred. If it can be substantiated that individuals could not have foreseen the application of the limitation periods, based on the principle of legitimate expectation, the concerned national court must refrain from applying them in the given case.

6. Compatibility with EU Law of the Obligation to Previously Establish the Unlawfulness of a Sentence Imposing Imprisonment

As already mentioned, according to Romanian legislation, the prerequisite for filing a claim for damages due to unlawful punishment is, *inter alia*, that the court of the given Member State first establishes the fact of unlawful punishment. On the other hand, Romanian law does not allow for this in the case concerned, since the Romanian High Court of Cassation and Justice has rendered a final decision, so internal law does not provide any further option of retrial or review of the decision. In such cases, EU law, in line with the principle of legitimate expectation, consequently does not oblige the Member States to reopen the decisions. In such cases, however, based on the established case law of the CJEU, it is possible to establish the responsibility of the state resulting from the violation of EU law.

In order to determine whether the aforesaid Romanian procedural rule is compatible with the requirements set forth in EU law in the concerned proceedings, the following are to be taken into account from the case law developed by the CJEU: the principle of equal treatment that limits the national procedural rules, the principle of effectiveness, and the principle of state liability.

The legal basis of the claim for damages is not based on a violation of internal Romanian law but on a violation of EU law; therefore, in the case of establishing state liability, the rules of EU law must be taken into account. According to the case law developed by the CJEU in the *Köbler* case,¹⁵ in such cases the claim for damages stems directly from the EU legal order.

Claims for damages initiated on the grounds of the violation of EU law must be submitted on the basis of the institutional and procedural autonomy of the Member States, that is, on the basis of the procedural and liability rules of the concerned Member State, but the acting national court must dispense with the application

15 Court of Justice of the European Union, *Gerhard Köbler v Republik Österreich*, Case C-224/01.

of those procedural and liability rules that make it extraordinarily difficult or impossible to assert a claim for damages against a Member State based on EU law.

The question raised in the present case was clarified¹⁶ by the CJEU in the *Silva e Brito* case,¹⁷ in addition to the basic principles developed in the *Köbler* case. In the judgment, inter alia, the acting national court referred the question to the CJEU as to whether the requirements stemming from EU law preclude the application of a Member State legislation which only allows for the assertion of damages caused by the violation of EU law by the courts of the last instance if the unlawful decision is set aside in advance, when at the same time such setting aside is not possible in practice.

The CJEU recalled that the principle of *res judicata* plays an important role in both the national legal system and the EU legal order. If state liability is established, a decision obliging the state to compensate the damage caused is rendered, but this does not necessarily eliminate the *res judicata* nature of the decision that caused the damage.¹⁸

Regarding the legislation at issue, the CJEU explained that the rules for damages developed in relation to state liability would be questioned if it were excluded that private individuals could receive damages under certain circumstances.¹⁹

In its judgment²⁰ rendered in the *Nikolay Kantarev* case,²¹ the CJEU examined, inter alia, whether the fact that in the given Member State, namely Bulgaria, claims for damages against the state can be asserted in two different procedures violates the requirements set by EU law.²² It follows from the procedural autonomy of the Member States²³ that it is not for EU law to determine which of the procedures established by the law of a Member States should be selected, inter alia, for the assertion of claims for damages. The opinion of the Advocate General came to the conclusion that, based on the established case law of the CJEU, there are three criteria of state liability under EU law: (1) the rule of EU law infringed must

16 The Opinion was drawn up by Advocate General Yves Bot for the judgement.

17 Court of Justice of the European Union, *João Filipe Ferreira da Silva e Brito and Others v Estado português*, Case C-160/14.

18 Id. paragraphs 54–55.

19 Id. paragraph 47.

20 The Opinion was drawn up by Advocate General Juliane Kokott for the judgement.

21 Court of Justice of the European Union, *Nikolay Kantarev v Balgarska Narodna Banka*, Case C-571/16.

22 In the opinion, the Advocate General indicated that in the absence of a law on liability in Bulgaria, the Code of Civil Procedure can be applied. On the other hand, based on the State Liability Act, the Administrative Procedure Act may also be applied. According to the information provided by the court that referred a procedural question for preliminary ruling, the advantage of the administrative court procedure is that the responsibility is not conditional on the attributability of the authority, and the fees are lower. However, this procedure can only be applied if the damage was caused by a legal act of the public administrative body that was annulled.

23 Opinion of the Advocate General, *Nikolay Kantarev v Balgarska Narodna Banka*, Case C-571/16, paragraph 102.

be intended to confer rights on individuals; (2) the breach of that rule must be sufficiently serious; (3) there must be a direct causal link between the breach and the loss or damage sustained by the individuals.²⁴

According to the opinion of the Advocate General, the uncertainty related to the procedure of claims for damages may in itself give grounds for an infringement of the principle of effectiveness when it is doubtful whether the principle of effectiveness precludes Member State legislation in public administrative law, according to which the concerned legal act is to be set aside in advance.²⁵

In the end, the opinion of the Advocate General came to the conclusion that it is not contrary to the principle of effectiveness if two procedures can be applied in the event of a violation of EU law provided that it can be clearly established which procedure applies to which cases and that these procedures are suitable for the assertion of claims for damages stemming from EU law.²⁶

The CJEU examined, *inter alia*, whether the provision of the state liability act, which allows, *inter alia*, the right to damages in the event that the damage was caused by an annulled legal act of the public administrative body, was compatible with the principle of effectiveness.

On the basis of the established case law, the acting national court may examine whether the injured party concerned has taken due care to prevent or reduce the damage, thus whether they have exhausted the available legal remedies.²⁷ In any case, it is contrary to the principle of effectiveness to stipulate that the affected parties are obliged to exhaust the legal remedies available to them in each case even if that would involve excessive difficulties or if it cannot be reasonably expected from them.²⁸

As a result of the above, in the CJEU's interpretation, the obligation to set aside the administrative act causing damage in itself is not contrary to the principle of effectiveness; nonetheless, such an obligation can make it extremely difficult to receive damages for the violation of EU law if this setting aside is excluded in practice.²⁹

7. Conclusions

In the case of the condition discussed in the second part of this paper, the application of EU law, in other words, the national legislation preventing the

24 This criterion is also to be applied in the framework of civil procedural law.

25 *Id.* paragraphs 109–110.

26 *Id.* paragraph 114.

27 *Id.* paragraphs 140–142.

28 *Ibid.*

29 Court of Justice of the European Union, *João Filipe Ferreira da Silva e Brito and Others v Estado português*, Case C-160/14.

submission of a claim for damages, according to which the national court must previously establish the unlawfulness of the judicial decision, is contrary to the EU rules on effectiveness and state liability. The concerned national court must omit the application of this legislation.

The limitation periods in the Member States raise many more problems. As a general rule, upon expiry of these deadlines, EU law does not require the admission of a claim for damages based on a violation of EU law.

The judgments in the *Emmott*, *TK UL VM*, and *Călin* cases can only be exceptions to the above general rule. These cases must be examined separately by the concerned national court and, if necessary, it must respect its obligation to refer questions for preliminary ruling to the CJEU.