REMEDIES FOR VIOLATION OF EU LAW BY MEMBER STATE COURTS
WHAT PLACE FOR THE KÖBLER DOCTRINE?

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Thesis abstract

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Context of the research

The Court of Justice of the European Union (hereinafter referred to as ECJ) held on 30 September 2003 in the judgment in Köbler (C-224/01, ECR, EU:C:2003:513) that Member States are obliged to make good the damage caused to individuals in cases where the infringement of EU law stems from a decision of a Member State court adjudicating at last instance. The conditions of this liability are, in principle, the same as those which govern state liability under EU law in general; that is, where the rule of 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. However, taking into account the specific nature of the judicial function, the ECJ restricted these conditions. In this regard, the ECJ held that state liability for an infringement of EU law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has ‘manifestly infringed the applicable law’.

As EU law is characterized by the absence of procedural and remedial organisation, it is obliged to rely on the respective national legal arrangements. This means that the liability of the state is to be enforced before national benches, and, in principle, according to national rules. The problem is that state liability for judicial breaches is severely restricted in most Member States. Therefore, based on national rules, state liability for judicial acts cannot be incurred or can only be incurred in strict conditions.

Nevertheless, as the principle of state liability for violation of EU law by Member State supreme courts originates directly from EU law, those infringed must be able to rely on this remedy, regardless of eventual limitations to such an action in national laws. Consequently, national courts adjudicating on Köbler claims are required to set aside domestic rules hindering the effective application of the Köbler principle in order to apply the criteria established by the ECJ. This is of utmost importance as under the remedial rules of the EU, state liability is the only generally available remedy for violation of EU law by Member State supreme courts.

Research objectives

Despite the abundant literature on the principle of state liability for breaches of EU law by national courts, little attention has yet been paid to the application of this much-criticized doctrine by national courts and to the real impact of Köbler on national remedies. Even though there has been a great deal of speculation that the doctrine might remain mere jurisprudence, more than a decade after the ECJ judgment, there is no analysis available to confirm or disprove this assumption.

The aim of this dissertation is to offer an analysis of the application, the impact, and the future of the Köbler principle. However, besides the features inherent to state liability, it is also the legal environment in which this principle operates that has a profound influence on its practical application. Therefore, the Köbler doctrine is examined in a wider context of remedies for violation of EU law by national courts.
At the beginning, the dissertation focuses on questions regarding the practice of the liability doctrine, such as: To what extent is the Köbler doctrine applied by national courts? What is the real, practical importance of this principle?

Next, it deals with questions regarding the place of the principle in the context of judicial remedies: Can the Köbler liability be substituted by alternative means of remedy? To what extent is the harmonization of national remedies necessary? Is it up to EU law, or that of Member States to determine the remedies available in cases of violation of EU law by Member State courts? What is the required standard of effective judicial protection in this regard?

Finally, the dissertation examines questions on the theory and the possible future applications of the doctrine: Is it the breach of a substantive EU rule or the violation of a procedural obligation regarding its application that triggers liability for the state? In what situations can a breach be considered a manifest violation of the applicable law? Can liability incur on the sole basis of violation of the duty to refer a preliminary question to the ECJ? Is it possible that liability may occur for violation of fundamental rights, e.g. the violation of the right to a fair trial in the future?

The present analysis is conducted in order to find the place of state liability within the complex system of remedies and to answer the main question: What is the place of the Köbler doctrine?

**Thesis plan**

Chapter I is the introduction, which presents the theoretical framework, the research objectives, the methodology and sources, and the terminology used in the dissertation.

Chapter II offers an overview of the context of the application of EU law, and a brief description of the remedial competence of the EU and the Member States.

Chapter III provides a presentation and an analysis of the cases decided on the basis of the Köbler principle. This chapter is divided into three sections. The first section presents the ECJ case-law on state liability for violation of EU law by Member State courts. The second section is devoted to an examination of national rules and case-law on state liability. At first, it offers an overview on legislative restrictions in national laws regarding state liability for judicial acts in general. After that, for each Member State, it presents the national jurisprudence on liability claims based on violation of EU law in particular. In this context, thirty decisions are presented and analysed. The third and final section of this chapter draws conclusions on the application of the Köbler principle between 2003 and 2016 in the 28 Member States. In this regard, the practical role of state liability in the effective application of EU law and in the effective judicial protection of individuals' rights is assessed.

Chapter IV places the doctrine into the wider context of remedies serving the ultimate aim of effective application of EU law and effective judicial protection of individual rights within the EU. It shows that Köbler liability is not the only method available in national laws to remedy EU law violations by Member State supreme courts. This
Chapter is divided into five sections; the first three examine one alternative remedy each. The first such remedy is the Francovich liability claim, which can be used instead of a judicial liability action to seek compensation in the event of joint responsibility of legislative, administrative and judicial branches of the state for violations of EU law. The second alternative remedy is retrial on the grounds of violation of EU law in a final judgment, often established in a subsequent ECJ judgment on the same matter of law. The third remedy is constitutional complaint, based on an infringement of national constitutional rights, namely the right to a lawful judge or a fair trial. This remedy can be used in situations where a national court has breached its obligation to refer a preliminary question to the ECJ. The fourth section presents, as examples, other remedies that do not have a general scope of application but are only recognized in several Member States. Through the presentation of these remedies and the analysis of their association with the Köbler doctrine, this chapter examines whether they can offer broadly equivalent protection than state liability. Finally, the fifth section of this chapter deals with the question whether EU law should require Member States to offer specific effective remedies (i.e. Köbler liability) or, instead, an effective remedial system to ensure the application of EU law and the judicial protection of individual rights.

Chapter V provides some guidance on the theory and prospects of the doctrine. This chapter is divided into three sections. The first section presents in detail the criterion of ‘manifest infringement of the applicable law’, as well as the stance of academic writers with regard to this condition of liability. In the second section, the procedural obligations of Member State courts regarding the application of EU law are examined in order to identify scenarios amounting to such qualified infringement. In this regard, a separate point is devoted to the breach of the obligation to refer a preliminary question to the ECJ. The third section in this chapter concerns the violation of procedural fundamental rights. In this context, it describes the possible future application of the Köbler principle, especially with regard to breaches of fundamental rights and to the breach of the obligation to refer a preliminary question to the ECJ.

**Methods and sources**

Because of the linguistic barriers and the absence of available sources, the research is not conducted on normative legal rules in the first place. Instead, it is primarily based on published case-law regarding the legal consequences of violation of EU law by national supreme courts.

The main sources for the identification of national cases are the following:

- ACA Europe. National reports. ‘Consequences of incompatibility with EC law for final administrative decisions and final judgments of administrative courts in the Member States’ 21st colloquium, Warsaw, 15 June 2008;
- Bulletin Reflets: Informations rapides sur les développements juridiques présentant un intérêt communautaire, established by the Research and Documentation Directorate of the Court of Justice of the EU;
The European Commission’s Annual Reports to the European Parliament on Monitoring the Application of EU Law (Annex VI: Application of Community law by national courts: a survey);

The Internet site of the Associations of the Councils of State and Supreme Administrative Jurisdictions of the European Union, especially the Jurifast database;

The Internet site of the Ius Commune Casebooks for the Common Law of Europe, especially the Jean Monnet Database on State Liability,

The Internet site of the Network of the Presidents of the Supreme Judicial Court of the European Union;

On the one hand, the evident drawback of this method is that not all cases are published and translated; therefore, the research cannot be exhaustive. On the other hand, this method has several advantages. First of all, besides its feasibility, it has allowed an examination of judicial practice regarding the topic in question, and not only the theory. Furthermore, it has made it possible to observe developments in the field of national remedies against EU law violations. In fact, Member State judiciaries appear to be much more flexible than their legislatures in accommodating national rules to EU requirements. Lastly, the cases have provided me with the references to the relevant legislative provisions.

Research findings

On the basis of the research conducted, the following answers can be provided to the questions posed in the research objectives.

To what extent is the Köbler doctrine applied by national courts?

Contrary to what might have been previously expected, the Köbler liability has found a certain acceptance in several national regimes. In particular, thirteen Member States have accepted, at least theoretically, to hold the state liable for breaches of EU law by their supreme courts (Belgium, Bulgaria, Germany, France, Italy, Lithuania, Netherlands, Austria, Poland, Portugal, Finland, Sweden, and UK). Moreover, recent requests for preliminary ruling submitted by Luxembourgish and Slovak courts suggest that these courts are also inclined to accept state liability.

In most of these Member States, the Köbler principle has been transposed into the national legal order through jurisprudence. In nine Member States, courts have relied directly on the Köbler principle to adjudicate claims regarding violation of EU law by national courts. To do so, they had to set aside domestic rules restricting state liability for judicial breaches. Therefore, in these Member States, the implementation of the Köbler doctrine has resulted in the duplication of liability regimes. It means that the conditions of state liability for judicial acts are less strict with regard to damages caused by violation of EU law rather than violation of national law in nine Member States (Bulgaria, Germany, France, Lithuania, Netherlands, Austria, Portugal, Finland, and
UK). The exception is Belgium, where the judicature has made general adjustments, altering the liability regime for violation of law by national supreme courts in general.

Moreover, the duplication of liability regimes is due to legislative amendments in two Member States (Italy, Poland).

In Sweden, as an informal way to receive damages before the Justitienasleren already existed, it was possible to apply the Köbler doctrine under this procedure without any legislative amendment or judicial intervention. Moreover, national provisions do not appear to exclude the theoretical possibility to hold the state liable for breach of EU law by supreme courts in two Member States (Denmark and Latvia). Therefore, even if there has not yet been an available judgment on a Köbler claim from these Member States, the application of the doctrine should not, in principle, have conceptual difficulties.

There are, however, Member States that have still consistently refused to adapt their liability regime to the ECJ’s requirements (e.g. Hungary). As for the other ten Member States not mentioned so far, there has not been any evidence of accommodation of the restrictive national conditions on state liability to the Köbler doctrine.

Nevertheless, as experience shows, even in Member States where Köbler liability is accepted theoretically, it is not a frequently used method to make good of damages caused to individuals by a final judgment of a national supreme court. In fact, even on the rare occasions when it has been relied on, compensation has almost never been awarded.

**What is the real, practical importance of this principle?**

The jurisprudence of the ECJ on remedies, including the Köbler judgment, has certainly made its impact on national regimes. It has especially contributed to raising the level of protection of individual rights in general. This follows not only from the adaptation of liability regimes to the Köbler principle (see the answer to the first question), but also from the introduction of new alternative remedies into the national remedial systems (see the answer to the third question). On a few occasions, these new remedies even exceed the level of protection required under EU law.

As for the question whether Köbler liability has proved specifically to be an effective remedy in individual cases, we need to answer in the negative. In fact, pecuniary compensation has been awarded on very few (according to the research, only four) occasions. This shows that Köbler liability is more a deterrent tool to prevent violation than a remedy for infringed individual rights. Therefore, its primary function appears to be an incentive for Member States to fulfil their obligations regarding the application of EU law.

**Can the Köbler liability be substituted by alternative means of remedy?**

To answer this question from the empirical point of view, Member States do have methods other than Köbler liability to protect individual rights and to make good any damages caused by final judicial decisions contrary to EU law. The two most important
alternative methods are retrial and constitutional complaint. These remedies may eventually offer a real alternative to Köbler claims. Moreover, the reliance upon them even assures, depending on the conditions attached to them, a higher standard of protection of individual rights than a liability claim.

As for retrial, in five Member States, cases have actually been reopened due to violation of EU law in the final judgment (Finland, Lithuania, Romania, Slovakia, and the UK). In two of them, legislative provisions had been introduced into the procedural codes in 2008 in order to recognize the violation of EU law as specific grounds for retrial. That has been the case in Romania, where amendments concerned the administrative procedural code, and in Slovakia, where the civil procedural code was amended. In the other three Member States (Finland, Lithuania, and the UK), the application of retrial to breaches of EU law was possible due to the broad scope of application of this remedy. In these legal systems, retrial is granted in the event of manifest, substantive or extraordinary breach of law. In this regard, legal rules in another three Member States (Denmark, Malta, and Sweden) are also similar and, therefore, seem also capable to offer adequate protection.

Concerning constitutional complaint, in five Member States, individuals can indirectly invoke a violation of their rights under EU law before constitutional courts (Austria, Germany, and recently in the Czech Republic, Slovakia, and Slovenia). Through the protection of constitutional rights to a fair trial and to a lawful judge, this remedy can ensure that a case concerning the interpretation of EU law is referred to the ECJ. Therefore, this can indirectly lead to the protection of their substantive rights conferred by EU rules. As for EU law, the ECJ has also linked the Köbler liability to the violation of Article 267 TFEU; furthermore, the scope of the referral obligation is not obvious under EU law either. Therefore, it is not excluded that the remedy of constitutional complaint might provide – as applied under certain national regimes – at the least an equivalent protection to the Köbler doctrine.

With regard to the strict conditions attached to a liability claim, these alternative remedies might not be considered, in general, less favourable for an individual than to invoke the Köbler principle.

To what extent is the harmonization of national remedies necessary? Is it up to EU law, or that of Member States to determine the remedies available in cases of violation of EU law by Member State courts?

I support the view that harmonization of national remedies, and, in particular, the harmonization of the conditions on state liability, is not absolutely necessary. I think that Member State remedial or procedural rules which are in violation of the Köbler principle must not be necessarily considered incompatible with EU law. Therefore, even if claiming damages for breach of EU law by national supreme courts is excessively difficult, the principles of effectiveness and effective judicial protections are not infringed on condition that other alternative means exist to protect individual rights and the application of EU law.
Accepting this stance means to extend the application of the effectiveness principle to the system of national remedies, instead of considering it within the framework of the principle of judicial liability. Adopting this solution presents the advantage of leaving unfettered the main principles of EU law, such as procedural autonomy, effectiveness, and effective judicial protection of individual rights. It is also easily concealable with the procedural rule of reason, and it leaves the universality of remedies also untouched. Moreover, by giving national courts more leeway to decide on how EU rights should be enforced in the national environment, the complications arising from the problem of reverse discrimination can also be avoided.

Therefore, I agree with Dougan, who suggests that the appropriate interpretation of the state liability principle should be that it does not create a right specifically to damages against the Member State for its breach of EU law, but has instead introduced a general right to remedy in whatever form the Member State finds it most convenient to provide. This apparently new stance leads us back to the traditional principle regarding the division of competence: it is within the power of national law to determine remedies and procedures, except that they provide an effective protection of rights conferred by EU law. The only modification is that effective protection, i.e. that standard of adequate protection, is from now on evaluated against the Köbler criteria.

What is the required standard of effective judicial protection in the case of violation of EU law by Member State courts?

In my opinion, the main function of Köbler doctrine lies in that it has determined an adequate standard of protection of individual rights, which must be granted in national laws in the event of violation of EU law by supreme courts. In general, this standard is observed where manifest and deliberate violations of EU law are sanctioned, and if there is the objective possibility to re-examine a final decision on the grounds that it is contrary to EU law. However, for non-deliberate breaches, Member States appear to be free to set the subjective standard, namely the criteria regarding the gravity or seriousness of the breach.

Moreover, if we accept that state liability can be substituted by equally efficient domestic remedies, that means that Member States’ are only required to offer any kind of remedy in the event of manifest or deliberate violation of EU law by national supreme courts.

However, the research shows that even this relatively low standard of protection is not provided in each Member States (Estonia, Ireland, Greece, Spain, Cyprus, Luxembourg, and Hungary). In this regard the question arises whether measures should not be taken against Member States not offering any remedy against manifest or deliberate violations of EU law by their national supreme courts. One possibility is to apply to the ECJ on the basis of Articles 258/260 TFUE for a declaration of an infringement on the part of the Member State for not providing adequate judicial protection. Given that a consistent and general violation in the application of law by national courts, as well as a national legislation non-compliant with EU requirements are sufficient for such a declaration of infringement on the part of the state, such action would probably be successful. The
other possibility would be to lodge an application to the ECtHR invoking the violation of the right to an effective remedy, enshrined under Article 13 ECHR.

**Is it the breach of a substantive EU rule or the violation of a procedural obligation regarding its application that entails liability for the state?**

On the one hand, as Prechal has pointed out, it is always the violation by a state body of its procedural obligation regarding the application of EU law which triggers liability. On the other hand, the infringement of such a procedural obligation creates liability for the state only when it results in the infringement of individual rights, protected under substantive EU provisions. Therefore, a mistaken interpretation or application of a substantive EU rule by the judiciary seems indispensable in establishing liability. In fact, in the absence of such violation, two conditions of state liability – the incurrence of damages, and the direct causal link between the damage and the infringement – risk to fail.

**In what situations can a breach be considered a manifest violation of the applicable law?**

In my opinion a breach of EU law by a national court is manifest in two situations. The first scenario is where the national court has made a mistake in the interpretation or application of a substantive EU rule, without even considering making a reference on a question that has not yet been clarified by the ECJ. The second scenario is where the national court has deliberately deviated from an established case-law of the ECJ. For this second case, it is irrelevant whether the national court had been under the obligation to make a reference to the ECJ and whether it had breached its obligation in this regard.

**Can liability occur on the sole basis of violation of the duty to refer a preliminary question to the ECJ?**

In my opinion, state liability occurs where a national court has infringed its procedural obligation to apply a substantive EU norm, which results in a breach of individual rights of a party to the proceedings. According to the present ECJ case-law and after the theoretical analysis of the rules on state liability, both violation of individual rights and infringement by the national court of its procedural obligation are necessary so that liability incurs. As the mere breach of the referral duty does not result either in the infringement of substantive individual rights, or in material damage, it is not sufficient in itself to trigger liability for the state.

It is however not excluded that the breach of the referral duty be considered as violation of the fair trial principle enshrined under Art. 47 of the Charter. In such a scenario, liability for the state may theoretically incur for violation of this fundamental procedural right. It is therefore necessary that the ECJ recognizes the compensation of non-material damages in this context; which has not yet been the case.
Is it possible that liability may occur for violation of fundamental rights, e.g. the violation of the right to a fair trial in the future?

It cannot be excluded that the case-law of the ECJ develops in a direction which recognises moral damages – caused by the infringement of procedural fundamental rights – as the basis of liability. It is especially possible as the right to a fair trial, enshrined under the Charter, must be respected by the Member States in EU-related cases. That obligation is being imposed on the Member States in terms of EU law; the violation of such rules amounts to the infringement of EU rights. It is however necessary that moral damages could be invoked as well.
List of publications by the candidate

- Why is the Köbler principle not applied in practice, *Maastricht Journal of European and Comparative Law*, 2016 (accepted for publication)

- Az Alkotmánybíróság határozata a tisztessegés eljárászhoz való jog sérelméről. Az előzetes döntéshozatali kérelem előterjesztésére irányuló indítvány elutasításának indokolására vonatkozó kötelezettség [The decision by the Constitutional Court about the infringement of the right to a fair trial. The obligation to give reasons for a refusal to make a preliminary reference], *Jogesetek Magyarázata* 2016 (accepted for publication)


- Az Európai Bíróság ítélete az Åkerberg Fransson ügyben. A ne bis in idem mint az EU Alapjogi Karta és az EJEE által biztosított elv [The judgment of the ECJ in the case Åkerberg Fransson. The principle of ne bis in idem in the Charter of Fundamental Rights of the EU and the ECHR], *Jogesetek Magyarázata* 3, no. 4 (2013): 68–78.

- Az Alapjogi Charta a magyar bíróságok előtt [The application of the Charter of Fundamental Rights by Hungarian national courts], *Jogtudományi Közlöny* 68, no. 11. (2013): 553–563.


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• A jogi szakfordításról [Legal translation], Fordítástudomány 14, no. 1 (2012): 34–47.