

# The Application of the Köbler Doctrine by Member State Courts

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## I Introduction

The CJUE held in the judgment in *Köbler*<sup>1</sup> 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.<sup>2</sup> 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. Under EU law, state liability is a generally applicable remedy which originates directly from EU law. It means that infringed individuals must be able to invoke state liability, notwithstanding the eventual limitations to such an action in national law.<sup>3</sup>

The significance of *Köbler* lies in the fact that Member State courts play a particularly important role in the application of EU law.<sup>4</sup> As EU law is primarily given effect by the national courts, individuals are obliged to claim the full enforcement and protection of their rights derived from EU law before national benches. It is, therefore, essential that the national courts fulfil their obligations in this regard and apply EU law correctly.

Since this seminal CJUE judgment, delivered in 2003, the principle of state liability for breaches of EU law by national courts has received considerable attention in scholarly writing. These works have already provided an in-depth analysis of a number of central issues. In that regard, the main focus has been placed on the acceptance of state liability for judicial breaches

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<sup>1</sup> (CJUE) Case C–224/01 *Köbler* ECLI:EU:C:2003:513 [2003] ECR I-10239.

<sup>2</sup> In *Köbler*, the CJUE held, for the first time, that the principle of state liability for breaches of EU law also applies when a breach is attributable to a Member State court. The *Köbler* judgment was therefore an extension of the already established state liability doctrine to violations of EU law by Member State supreme courts. See (CJUE) Joint cases C–6/90 and C–9/90 *Francovich and others* EU:C:1991:428 [1991] ECR I-05357.

<sup>3</sup> Under the remedial rules of the EU, state liability is the only generally available remedy for violation of EU law by national supreme courts. Even though final judgments contrary to EU law may be reopened under special circumstances, retrial cannot be considered as a generally available remedy.

<sup>4</sup> See, for example Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU procedural law* (Janek Tomasz ed, Oxford University Press 2014, Oxford) 3, 13–14.

of EU law as a matter of principle.<sup>5</sup> Liability due to judicial errors has been criticised with regard to the principles of *res judicata*, and the procedural autonomy of the Member States in particular.<sup>6</sup> Moreover, the criterion of sufficiently serious breach of the EU norm has also been thoroughly analysed. It has notably been subject to criticism by several scholars;<sup>7</sup> and Scherr has already offered a detailed analysis of this criterion from a comparative law perspective.<sup>8</sup> Hofstötter has put the *Köbler* decision into a wider context, offering a comprehensive study of the non-compliance of national courts with their EU obligations.<sup>9</sup> Similarly, the potential consequences of a judicial breach of EU law under national law of several Member States have been presented in a recent publication edited by Coutron.<sup>10</sup>

To conclude, *Köbler* has already been extensively studied. However, the main focus of these works has remained theoretical, as they primarily offer an analysis of the doctrine with regard to the legal concept of state liability for judicial acts. Nevertheless, much less attention

<sup>5</sup> See, for example Marten Breuer, 'State Liability for Judicial Wrongs and Community Law: The Case of Gerhard Köbler v Austria' (2004) 29 *European Law Review* 243–254; Claus Dieter Classen, 'Case C-224/01, Gerhard Köbler v. Republik Österreich' (2004) 41 *Common Market Law Review* 813–824, 816–817; Jan H. Jans, 'State Liability and Infringements Attributable to National Courts: A Dutch Perspective on the Köbler Case' in Jaap W. de Zwaan and others (eds), *The European Union: an Ongoing Process of Integration: Liber Amicorum Alfred E. Kellermann* (TMC Asser Press 2004, The Hague) 165–176, 176; Peter J. Wattel, 'Köbler, CILFIT and Welthgrove: We Can't Go on Meeting like This' (2004) 41 *Common Market Law Review* 177–190, 186–187; Jan Komárek, 'Inter-Court Constitutional Dialogue After the Enlargement – Implications of the Case of Professor Köbler' (2005) 1 *Croatian Yearbook of European Law and Policy* 7–94, 77; Pedro Cabral and Mariana C. Chaves, 'Member State Liability for Decisions of National Courts Adjudicating at Last Instance' (2006) 13 *Maastricht Journal of European and Comparative Law* 109–126, 123.

<sup>6</sup> See, for example Jan Komárek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order' (2005) 42 *Common Market Law Review* 9–34, 17; Takis Tridimas, 'State Liability for Judicial Acts Remedies Unlimited?' in Paul Demaret and others (eds), *European Legal Dynamics. Revised and Update Edition of 30 Years of European Legal Studies at the College of Europe? = Dynamiques juridiques européennes. Édition revue et mise à jour de 30 ans d'études juridiques européennes au Collège d'Europe* (P.I.E. Peter Lang 2007, Brussels/Bruxelles) 147–161, 157; Wattel, Köbler, CILFIT and Welthgrove (n 5) 177.

<sup>7</sup> See, for example Pablo Martín Rodríguez, 'State Liability for Judicial Acts in European Community Law: The Conceptual Weaknesses of the Functional Approach' (2005–2004) 11 *Columbia Journal of European Law* 605–621, 614–615; Björn Beutler, 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?' (2009) 46 *Common Market Law Review* 773–804, 792; Mariusz Jerzy Golecki and Bartosz Wojciechowski, 'The application of law within a multicentric legal system: economic analysis of Köbler and Traghetti' in Tadeusz Buksinski and Piotr W. Juchacz (eds), *Multicentrism as an Emerging Paradigm in Legal Theory* (Peter Lang 2009, Frankfurt am Main, 173–196) 195–197; Regina Valutyté, 'Concept of Court's Fault in State Liability Action for Infringement of European Union Law' (2011) 18 *Jurisprudence* 33–50, 37, 47.

<sup>8</sup> Kathrin Maria Scherr, *The principle of state liability for judicial breaches: the case Gerhard Köbler v. Austria under European Community law and from a comparative national law perspective* (Thesis. European University Institute, 2008); Kathrin Maria Scherr, 'Comparative Aspects of the Application of the Principle of State Liability for Judicial Breaches' in 12 *ERA Forum* (Springer 2012, 565–588).

<sup>9</sup> Bernard Hofstötter, *Non-Compliance of National Courts: Remedies in European Community Law and Beyond* (TMC Asser Press 2005, The Hague).

<sup>10</sup> Laurent Coutron, Jean-Claude Bonichot, *L'obligation de renvoi préjudiciel à la Cour de justice: une obligation sanctionnée?* (Bruylant 2014, Bruxelles).

has yet been placed on the real impact of *Köbler* on national remedies and on the application of this much-criticised doctrine by national courts. Even though there has been a great deal of speculation that the *Köbler* doctrine might remain mere theory,<sup>11</sup> more than a decade after the CJUE judgment, there is no analysis available to confirm or disprove this assumption.

Even so, there are some studies on the application by the national courts of the state liability doctrine in general, including EU law violations by the legislature and the executive. These papers incorporate national case-law regarding breaches of EU law by the judiciary. In this regard, the study by Granger from 2007<sup>12</sup> must be mentioned; this offered a comprehensive analysis of the *Francovich* case-law, covering the judicial follow-up of this judgment in the 15 'old' Member States on the basis of research conducted by the T.M.C. Asser Institute.<sup>13</sup> National cases have also been described by Claes in her in-depth work on the mandate of national courts in the European Constitution.<sup>14</sup> Moreover, in 2012, Lock provided an assessment of the case-law of German, English, and Welsh courts in order to examine the effectiveness of the state liability principle as a means of enforcing EU law, compared to the infringement procedure.<sup>15</sup> In his study, he pointed out the need for more detailed research in this regard.

The aim of this paper is to provide a presentation and an analysis of national cases decided on the basis of the *Köbler* liability. In the context, this work focuses on questions regarding the practice of the liability doctrine, such as to what extent is the *Köbler* doctrine applied by national courts and what is the real, practical importance of this principle. The research is based on published case-law on liability cases before Member State courts for violation of EU law by national courts of last instance.<sup>16</sup>

<sup>11</sup> Beutler (n 6) 789–790; Dimitra Nassimpian, 'And We Keep on Meeting: (de)fragmenting State Liability' (2007) 32 *European Law Review* 819–838, 826; Wattel, Köbler, CILFIT and Welthgrove (n 5) 182.

<sup>12</sup> Marie-Pierre F. Granger, 'National Applications of *Francovich* and the Construction of a European Administrative *Jus Commune*' (2007) 32 *European Law Review* 157–192.

<sup>13</sup> Gerrit Betlem and others 'Francovich Follow-Up. Cases on State Liability for Breach of European Community Law', 22 May 2007, <<http://www.asser.nl/eel/sectors/general/dossiers-and-papers/francovich-follow-up/>> accessed 15 May 2016.

<sup>14</sup> Monika Liesbeth Hilde Katelijne Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006, Oxford/Portland).

<sup>15</sup> Tobias Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after *Francovich*' (2012) 49 *Common Market Law Review* 1675–1702.

<sup>16</sup> 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 <<http://www.aca-europe.eu/index.php/en/colloquies-top-en/244-21st-colloquium-in-warsaw-from-15-to-16-june-2008>> accessed 15 May 2016;
- the 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) <[http://ec.europa.eu/atwork/applying-eu-law/index\\_en.htm](http://ec.europa.eu/atwork/applying-eu-law/index_en.htm)> accessed 15 May 2016;
- bulletin *Reflets: Informations rapides sur les développements juridiques présentant un intérêt communautaire* <[http://curia.europa.eu/jcms/jcms/Jo2\\_7063/](http://curia.europa.eu/jcms/jcms/Jo2_7063/)> accessed 15 May 2016; translation in English of the issues published after 2008 are available at <<http://www.aca-europe.eu/index.php/en/reflets-en>> accessed 15 May 2016;

Before analysing the national case-law, a brief presentation of the CJUE judgments regarding state liability for violation of EU law by Member State courts is offered.

## II The Application of the Köbler Liability

### 1 The CJUE Case-law

There have been so far three judgments in which the CJUE dealt with issues concerning state liability for judicial acts.<sup>17</sup>

The first case was *Köbler*. In its judgment, the CJUE stated that its doctrine of state liability applies to all Member State actions, including those of the judiciary. Therefore, Member States are liable for breach of EU law by national supreme courts. Moreover, regarding the conditions for liability, the CJUE did not distinguish based upon the branch or department of government that had actually committed the violation of EU law. As a result, the three already established conditions for state liability also apply to judicial violations.<sup>18</sup> However, concerning the condition of a sufficiently serious breach, the CJUE stated that liability can be incurred only in the exceptional case where a court adjudicating in last instance has manifestly infringed the applicable law.<sup>19</sup>

The second case concerning state liability for judicial acts before the CJUE was *Traghetti del Mediterraneo*.<sup>20</sup> In this case, the question arose whether Italian rules, which severely restricted the possibility to hold the state liable for judicial activity, were compatible with the principle of effectiveness of the EU law, and, especially, with the *Köbler* principle. The CJUE declared the Italian rules on judicial responsibility overly restrictive and, for this reason, contrary to the EU rules.

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– the Internet site of the Associations of the Councils of State and Supreme Administrative Jurisdictions of the European Union, especially the databases Jurifast <<http://www.aca-europe.eu/index.php/en/jurifast-en>> accessed 15 May 2016 and Dec.Nat <<http://www.aca-europe.eu/index.php/en/dec-nat-en>> accessed 15 May 2016;

– the Internet site of the Network of the Presidents of the Supreme Judicial Court of the European Union <<http://www.network-presidents.eu/>> accessed 15 May 2016;

– the Internet site of the Lus Commune Casebooks for the Common Law of Europe, especially the Jean Monnet Database on State Liability <<http://www.casebooks.eu/JeanMonnetDatabase/-StateLiability/>> accessed 15 May 2016.

Cases noted in the above-mentioned studies of Granger (n 12) and Lock (n 15) dealing with the national follow-up of the *Franovich* doctrine and in the publications of Claes (n 14) and Coutron (n 10) will also be mentioned. However, a limitation is that the study is based on cases that have been made publicly accessible either through databases or in other forms such as collections and digests of case-law. This means that there may be a limited number of judgments which were never reported and therefore were not considered.

<sup>17</sup> We can add to this list a pending case: Case C-168/15 *Tomášová*.

<sup>18</sup> (CJUE) *Franovich and others* (n 2).

<sup>19</sup> This solution was adopted with regard to the specific nature of the judicial function and to the legitimate requirement of legal certainty.

<sup>20</sup> (CJUE) Case C-173/03 *Traghetti del Mediterraneo* ECLI:EU:C:2006:391 [2006] ECR I-05177.

In the third case, a Portuguese court asked the CJUE whether national rules which require the reversal of the contested judicial decision as a precondition to a liability claim are compatible with the *Köbler* principle. Examining this provision, the CJUE concluded that EU law precludes a provision of national law which requires, as a condition for a declaration of state liability, the prior reversal of the decision that caused the loss or damage when such setting aside is, in practice, impossible.<sup>21</sup>

## 2 Member States' Position

According to the research conducted, there have been about thirty-five reported cases<sup>22</sup> judged on the basis of the *Köbler* principle for violation of EU law by national courts since the pronouncement of the CJUE judgment in 2003. Of them, damage has been awarded only in four occasions so far.<sup>23</sup>

### a) Overview of the legislative restrictions

It seems useful to bring up at this point the results of the comparative research conducted by Scherr, who in 2008 revealed the restrictions in national laws regarding liability for judicial activity in general.<sup>24</sup> Combining her results with my findings, the following overview can be provided on national restrictions regarding judicial liability.

Almost complete exclusion of liability for judicial activity characterises five national legal systems (Bulgaria, Greece, Ireland, the Netherlands, and the UK).<sup>25</sup> The importance of res

<sup>21</sup> (CJEU) Case C-160/14 *Ferreira da Silva e Brito e.a.* ECLI:EU:C:2015:565 [2014] OJ C175 (ECJ), 9 September 2015) paras 51–52, 60.

<sup>22</sup> The main sources for the identification of national cases see under (n 16).

<sup>23</sup> See (FI) Korkein oikeus, tuomio, 05/07/2013, A Oy, KKO:2013:58, reported in Reflets n° 3/2013, 22–23; (IT) Tribunale di Genova, Sentenza, 31/03/2009, Fallimento Traghetti del Mediterraneo/Repubblica italiana, reported by Bruno Gencarelli, 'Rapport italien' in Coutron (n 10) 279; (SE) Justitiekanslern, Justitiekanslerns beslut 06/04/2009, Flexlink AB, reported by Frida-Louise Göransson, 'Rapport suédois' in Coutron (n 10) 493–495; (BG) Okrazhen sad Yambol, Reshenie, 26/11/2015, reported in Reflets n° 1/2016, 14. A uniform method is applied to refer to national court judgments in footnotes. Therefore, reference is made to the original language name of the court or tribunal, followed by the original name and the date of the decision, and sometimes – where usual in national law – by the number of the decision, the name of the parties, and, where available, the ECLI number of the decision. At the end, reference is made to the publication and source.

<sup>24</sup> It should, however, be borne in mind that the same reason lies behind the apparently different restrictions. This ultimate reason is the protection of legal certainty and the final nature of the judgments rendered at last instance. Moreover, as it is evident from Scherr's analysis, generally more than one restriction applies within one legal order as well. Therefore, the following list is merely indicative. For further information, see Scherr, *The principle of state liability* (n 8) in particular 168, 227, 306, 408–409, 414, and 417.

<sup>25</sup> (BG) *Zakon za otgovornosta na darzhavata i obshtinita za vredi* (Act on liability for damages incurred by the state and the municipalities) art 2; (EL) *Εισαγωγικός Νόμος του Αστικού Κώδικα* (Introductory Law to the Greek Civil Code) art 105; *Συμβούλιο της Επικρατείας* (Symvoulío tis Epikrateias, Hellenic Council of State) 2744/2000; *Άρειος Πάγος* (Areios Pagos, Supreme Civil and Criminal Court), 256/1996, both cases reported by Vassili Christianos, in Coutron (n 10) 236–237, n 33; (IR) House of Lords, 12/02/1974, *Sutcliffe v Thackrah* [1974] A.C. 727; *Pine*

judicata and the unquestionable nature of final judgments is a major impediment to judicial liability in five Member States (Croatia, France, Hungary, Italy, and Luxembourg).<sup>26</sup> The prior reversal of the contested judgment is a prerequisite for liability under seven national laws<sup>27</sup> (Belgium, the Czech Republic, Cyprus, Finland, Portugal, Slovakia, and, as far as supreme courts' liability is concerned, in Sweden).<sup>28</sup> The declaration of unlawfulness of the final judgment is required before asking damages from the competent authority in three Member States (Lithuania, Poland, and Spain).<sup>29</sup> The establishment of criminal responsibility of the judge is a precondition for state liability in three Member States (Estonia, Germany, and Romania).<sup>30</sup> The liability of the highest national courts is excluded in one state (Austria).<sup>31</sup> In

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*Valley Developments Ltd v Minister for the Environment* [1987] I.R. 23, both cases reported by Scherr; Comparative aspects (n 8) 576, n 71; see also Marie-Luce Paris, 'Rapport irlandais' in Coutron (n 10) 262; (NL) Hoge Raad, Uitspraak, 03/12/1971, NJ 1971, 137, ECLI:NL:HR:1971:AB6788; (UK) Crown Proceedings Act 1947, s 2(5).

<sup>26</sup> (HR) *Zakon o sudovima* (Courts Act) članak 105; (FR) *Code de l'organisation judiciaire* (Code of Judicial Organisation) art L141-1; Conseil d'État, Assemblée, décision, 29/12/1978, n° 96004, ECLI:FR:CEASS:-1978:96004.19781229, Darmont, publié au recueil Lebon; (HU) *A bíróságok szervezetéről és igazgatásáról szóló 2011. évi CLXI. törvény* (Law on the organisation and administration of the courts), 2. § (1) bek; (IT) *Risarcimento dei danni cagionati nell'esercizio delle funzioni giudiziarie e responsabilità civile dei magistrati* (Compensation for damage caused in the exercise of judicial functions and the civil liability of judges), Legge, 13/04/1988, n° 117, art 2; see also Gencarelli (n 23) 270–271; (LU) Code civil, 01/01/2004, arts 1382–1383; *Loi du 1er septembre 1988 relative à la responsabilité civile de l'Etat et des collectivités publiques* (Law on the liability of the state and state bodies), 01/09/1988, art 1, alinea 1.

<sup>27</sup> The CJUE has recently found, in a Portuguese case, that EU law precludes a provision of national law which requires, as a condition for a declaration of state liability, the prior reversal of the decision that caused the loss or damage, when such setting aside is, in practice, impossible. See (CJUE) *Ferreira da Silva e Brito e.a.* (n 21) para 60.

<sup>28</sup> (BE) Code civil, 21/03/1804, arts 1382–1383; Code judiciaire, 10/10/1967, art 23; Cour de cassation, arrêt, 19/12/1991, Pas., 1992, I, n° 215., reported in ACA Europe (n 16), National report of Belgium, Question 14, point 119; (CZ) *Zákon o odpovědnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem a o změně zákona České národní rady č. 358/1992 Sb., o notářích a jejich činnosti (notářský řád)* (Law on liability for damage caused in the exercise of public authority decision or incorrect official procedure) §8 (1); (CY) Constitution of the Republic of Cyprus, 16/08/1960, art 146.6; (FI) *Vahingonkorvauslaki* (Tort Liability Act), 31.5.1974/412, 3 luku, 5§; (PT) Lei n.º 67/2007, *Aprova o Regime da Responsabilidade Civil Extracontractual do Estado e Demais Entidades Públicas* (Law no 67/2007 on the non-contractual liability of the state and other public bodies), 31/12/2007, Artigo 13.º N.º 2; Supremo Tribunal de Justiça, Acórdão 24/02/2015, Processo: 2210/12.9TVLSB.L1.S1, reported in Reflets n°2/2015, 47–48; (SK) *Zákon o zodpovednosti za škodu spôsobenú pri výkone verejnej moci a o zmene niektorých zákonov* (č. 514/2003 Z. z.) (Law on liability for damage caused in the exercise of public power), § 3(1) (a) and (d) and (2); (SE) *Skadeståndslag* (Tort Liability Act), 1972-06-02, 3 kap, 7 §.

<sup>29</sup> (LT) Lietuvos Respublikos Konstitucinis Teismas, Nutarimas, 19/08/2006, Bylos Nr. 23/04, reported by Regina Valutytė, 'Lithuanian report' in Coutron (n 10) 287, n 16; (PL) *Kodeks cywilny* (Civil Code) art 417<sup>1</sup>, § 2; *Kodeks postępowania cywilnego* (Code of Civil Procedure) art 424<sup>1a</sup>; *Prawo o postępowaniu przed sądami administracyjnymi* (Regulations of Proceedings in Administrative Court) art. 285a. However, this rule does not apply with regard to judgments delivered by the *Sąd Najwyższy*; (ES) *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial* (Organic law on the judiciary) art 293.

<sup>30</sup> (EE) *Riigivastutuse seadus* (State Liability Act) 02/05/2001, § 15(1); (DE) *Bürgerliches Gesetzbuch* (German Civil Code) § 839, Abs. 2; (RO) *Legea privind statutul judecătorilor și procurorilor* (Law on the statute of judges and prosecutors) art 96 (4).

<sup>31</sup> (AT) *Amtshaftungsgesetz* (Public Liability Act), § 2.

addition, in several Member States, the strict criterion concerning the degree of fault on the part of the judge is an important obstacle to the allocation of damages. This appears to be the case with regard to Slovenian law, for example.<sup>32</sup>

However, as a reaction to the *Köbler* judgment and as far as the erroneous judgment concerns the application of EU law, several Member States' courts and legislatures created exemptions from these overly strict requirements. These cases are the subject of the next part of the paper.

On the other hand, at first sight, national provisions do not appear to exclude the theoretical possibility to hold the state liable for supreme courts' breaches in two Member States (Denmark and Latvia).<sup>33</sup>

The position of Malta is not clear in this regard, as liability of the state is accepted under the general regime of tort law; however, the cases filed up to date have only dealt with the executive and legislative arms of the state but not the judiciary.<sup>34</sup>

The following overview presents the national case-law regarding breaches of EU law by national supreme courts.

## *b) Case-law of the Member State courts*

### *ba) Austria*

The *Verfassungsgerichtshof* (Constitutional Court, VfGH) applied the *Köbler* conditions only two weeks after the CJUE decision, in a judgment pronounced on 10 October 2003.<sup>35</sup> As under Austrian law the liability of the highest courts is expressively excluded, there was no legal basis for liability actions before the civil court.<sup>36</sup> Nevertheless, the VfGH declared its own competence to hear such tort actions for damage caused by a judicial decision of the *Verwaltungsgerichtshof* (Supreme Administrative Court, VwGH) allegedly in breach of EU law.<sup>37</sup> However, the VfGH ruled out the violation of EU law by the national court in that specific case.

<sup>32</sup> (SI) Vrhovnega sodišča Republike Slovenije, Sodba, 12/01/2005, II Ips 714/2003, ECLI:SI:VSRS:2005:II.IPS.714.2003; Vrhovnega sodišča Republike Slovenije, Sodba, 13/11/2003, II Ips 556/2002, ECLI:SI:VSRS:2003:II.IPS.556.2002, both cases reported by Verica Trstenjak and Katja Plautstajner, 'Slovenian Rapport' in Coutron (n 10) 472, n 76.

<sup>33</sup> (DN) *Betænkning 214/59 om statens og kommunernes erstatningsansvar* (Report on the Liability of Central and Local State bodies) 16; (LV) *Latvijas Republikas Satversme* (Constitution of the Latvian Republic), 15/02/1922, 92.pants; *Administratīvā procesa likums* (Administrative Procedure Law) 01/02/2004, 92.pants; *Latvijas Republikas Augstākās tiesas, Senāta Civillietu departamenta, spriedums*, 24/11/2010, Lietā Nr. SKC-233; see also ACA Europe (n 16), National report of Latvia, Question 14.

<sup>34</sup> (MT) Constitution of Malta, art 46, Civil Code, arts 1030–1033; see also Scherr, *The principle of state liability* (n 8) 168.

<sup>35</sup> (AT) VfGH, Erkenntnis, 10/10/2003, A36/00, VfSlg 17019/2003, reported by Beutler (n 6) 789, Granger (n 12) 168, n 61, and Alexandr Pelzl, 'Rapport autrichien' in Coutron (n 10) 102, n 136.

<sup>36</sup> For more explanation, see Pelzl (n 35) 112, ns 135–136.

<sup>37</sup> This statement on the competence of the VfGH have been subsequently confirmed at several occasions. See reference to those cases in Pelzl (n 35) 113, ns 142–143.

In a judgment delivered on 13 October 2004, the VfGH applied the conditions of state liability to a situation similar to that of *Köbler*.<sup>38</sup> In this judgment, the VfGH confirmed the limits of state liability for damages resulting from a decision of a national court which failed to make a request to the CJUE for a preliminary ruling. The VfGH first restated that it was not competent to review the decision of the VwGH, but could, however, examine the gravity of the violation. It recalled the stricter conditions for state liability resulting from acts committed by a national judiciary, and, applying them to the case at hand, rejected the claim. Indeed, the VfGH considered that a simple non-referral is not *per se* a sufficiently serious breach. The court pointed out that the outcome could be easily deduced from the case-law even though the question at issue had not been specifically decided upon by the CJUE. Hence, the VwGH could reasonably conclude that the correct application of EU law left no doubt as to the solution to be adopted. Moreover, the VwGH had provided a very detailed statement of reasons on the issue.<sup>39</sup>

In its decision dated 19 June 2013, the VfGH confirmed that the infringement by the same court of the duty to make a reference for a preliminary ruling to the CJUE does not as such trigger liability of the State.<sup>40</sup> The VfGH found that it is not incumbent upon it to reconsider its own decisions or the decisions made by other supreme courts in proceedings based on state liability claims. Its only task is to determine whether a specific infringement of EU law had been committed. A claim concerning the state's liability is well-founded only in the event of a manifest and sufficiently characterised infringement of EU law; and the breach of the obligation to refer a preliminary question to the CJUE does not as such trigger the liability of the state.<sup>41</sup> Consequently, the complaints were rejected by the VfGH.

Similarly, *Köbler* claims had been rejected on the ground of absence of manifest infringement of the EU law in other proceedings before the VfGH.<sup>42</sup>

#### *bb) Belgium*

In Belgium, the Civil Code had been traditionally interpreted in a way that it sets out as a condition for state liability the previous annulment of the contested decision. However, since the judgment of the *Cour constitutionnelle* (Constitutional Court) delivered on 30 June 2014, this condition does not apply in the event of manifest violation of the applicable law by the

<sup>38</sup> (AT) VfGH, Erkenntnis, 13/10/2004, A5/04, VfSlg 17330/2004, reported by Beutler (n 6) 790, Granger (n 12) 167–168, n 59, Pelzl (n 35) 113, n 143 and in Reflets n° 2/2005, 9.

<sup>39</sup> Granger (n 12) 167, n 59.

<sup>40</sup> (AT) VfGH, Beschluss, 19/06/2013, A2/2013 ua, VfSlg 19757, reported in Reflets n° 3/2013, 17.

<sup>41</sup> The VfGH confirmed that principle in several subsequent decisions. See reference to cases in Pelzl (n 35) 113, n 142.

<sup>42</sup> See, for example (AT) VfGH, Beschluss, 23/03/2015, E444/2015, G135/2015, A 2/2015; VfGH, Beschluss, 21/11/2013, A9/2013 ua; VfGH, Beschluss, 11/06/2015, A1/2015; VfGH, Beschluss, 11/05/2015, A3/2015; and VfGH, Beschluss, 19/11/2015, A8/2015; VfGH, Beschluss, 02/05/2011, A4/10, VfSlg 19361; VfGH, Erkenntnis, 22/09/2009, A14/08, VfSlg 18866; VfGH, Erkenntnis, 12/12/2003, A2/01 ua, VfSlg 17095, reported by Beutler (n 6) 789.



national court of last instance.<sup>43</sup> In this judgment, the *Cour constitutionnelle* interpreted the conformity of this requirement with the fundamental right to access to justice, as established under the Constitution and under Articles 6 and 13 European Convention on Human Rights (ECHR). The *Cour constitutionnelle* reached the conclusion that this condition does not apply in the case of manifest violation of the law by the national Supreme Court. In this regard, it pointed out the need to harmonise the requirements of judicial liability under national, EU and international law.

Moreover, in a judgment delivered on 14 January 2000, the *Cour de cassation* (Court of Cassation) arrived at the conclusion that the violation by the national court of a directly effective provision of an international agreement constitutes, in itself, a fault.<sup>44</sup> Therefore, there is neither a need to submit the liability of the state under the *Köbler* conditions, nor is there a need to examine whether a sufficiently serious breach occurred.

### bc) Bulgaria

In its ruling dated 3 January 2014, the *Sofiyski gradski sad* (Sofia City Court) handed down a verdict in a liability case for violation of EU law by the *Varhoven administrativen sad* (Supreme Administrative Court).<sup>45</sup> Regarding the claim that in the main proceedings, EU rules had been erroneously applied, the *Sofiyski gradski sad* found the judgment of the *Varhoven administrativen sad* to be correct in the light of CJUE case-law. On the second claim, brought on the basis of the infringement of the obligation to submit a preliminary reference to the CJUE, the *Sofiyski gradski sad* pointed out that the relevant EU provision was sufficiently clear. As a result, the *Sofiyski gradski sad* rejected, applying the *Köbler* criteria, the liability claim lodged against the *Varhoven administrativen sad*.

Furthermore, in a judgment delivered on 8 May 2015, the *Varhoven kasatsionen sad* (Supreme Court) interpreted the national procedural rules which may provide a legal basis for a *Köbler* liability claim.<sup>46</sup> In fact, Bulgarian case-law had been ambiguous regarding the rules which can provide a legal basis for such liability claim. In this regard, the *Varhoven kasatsionen sad* concluded that such claims are to be judged on the basis of the national act on the liability of state and of the state bodies. Therefore, the general rules on tort liability do not apply in these cases.<sup>47</sup> To reach such a conclusion, the *Varhoven kasatsionen sad* has relied on the obligation of cooperation and on the principle of loyalty of the Member States under EU law.

<sup>43</sup> (BE) *Cour constitutionnelle*, arrêt, 30/06/2014, n° 99 /2014, numéro du role: 5611.

<sup>44</sup> (BE) *Cour de cassation*, arrêt, 14/01/2000, C980477F, reported in *ACA Europe* (n 16), National report of Belgium, Question 14, point 123. The case at hand concerned Art. 28 TEC.

<sup>45</sup> (BG) *Sofiyski gradski sad*, *Reshenie*, 03/01/2014, *Pretsiz-2 EOOD/Varhoven administrativen sad*, 1782/2013, reported in *Reflets* n° 1/2014, 16.

<sup>46</sup> (BG) *Varhoven kasatsionen sad*, *Opreделение*, 08/05/2015, n° 269, reported in *Reflets* n° 2/2015, 24.

<sup>47</sup> This led to the result that in the case at hand, the *Varhoven kasatsionen sad* overturned the order of the *Sofiyski gradski sad*.

The court has also invoked the CJUE case-law on state liability and in particular the judgments in *Francovich* and in *Köbler*.<sup>48</sup>

In a judgment dated 26 November 2015, the *Okrazhen sad Yambol* (Regional Court, Yambol) has established joint and several liability of the *Varhoven kasatsionen sad*, as well as national administrative and legislative bodies for the damage sustained by a company due to the application of a national act contrary to EU law.<sup>49</sup> The particularity in this case is that the court rebuked all three branches of government for having applied a national law contrary to EU law. It had the possibility to do so, as the claimant itself had claimed such a cumulative breach, and sued all three branches of government. The *Okrazhen sad Yambol* pointed out the Bulgarian Parliament had infringed its obligation of cooperation enshrined under Art. 4(3) TEU by not having amended the national law which had already been subject of an infringement proceedings before the Commission. In addition, the administration had also contributed to the damages by having rendered its decision on the basis of the national provision contrary to EU law. Moreover, the *Okrazhen sad Yambol* held the *Varhoven kasatsionen sad* responsible for the breach, too. In this regard, the first instance court argued that the Supreme Court should have referred a preliminary question to the ECJ in order to evaluate the compatibility of the national law with the EU law. Given the circumstances of the case, i.e. the serious doubts regarding such compatibility, the referral should not have been avoided. At all, the *Okrazhen sad Yambol* held all the three branches of the state responsible for the damages suffered and ordered them to pay, jointly and severally, compensation to the company. One must not, however, forget that this judgment is not definitive.

#### *bd*) Finland

In its judgment rendered on 5 July 2013, the *Korkein oikeus* (Supreme Court) awarded damages in favour of the claimant on the basis of the *Köbler* doctrine.<sup>50</sup> The Finnish State, as the defendant party, raised the issue of jurisdiction as a preliminary point before the *Korkein oikeus*. It argued that the action concerned an administrative dispute that should have been taken to the administrative court. It also relied on the principle of *res judicata*, stating that the contested decision by the *Korkein hallinto-oikeus* had ended the case. The *Korkein oikeus* rejected these arguments. Referring to CJUE judgments, it stated that the Finnish rules applied in the administrative proceedings had been in breach of EU law, and, therefore, ordered the state to pay compensation to the claimant.<sup>51</sup> The *Korkein oikeus* had to rule out the national

<sup>48</sup> Even though this order is not obligatory to the national courts, it offers guidance regarding the rules which should be applied in a liability action. Moreover, it reinforces the conclusion that Bulgarian courts acknowledge and apply the principle of *Köbler* liability.

<sup>49</sup> (BG) *Okrazhen sad Yambol, Reshenie*, 26/11/2015 (n 23). This judgment is, however, not definitive.

<sup>50</sup> (FI) *Korkein oikeus, tuomio*, 05/07/2013 (n 23).

<sup>51</sup> After all, it seems to be due to the specific legal and factual background that the liability of Finland was established for a final judicial decision. First, the EU provision on neutral taxation was infringed from the beginning of the procedure: the legislature, the tax authority and the administrative court were all in breach in that regard. Second, the Finnish State itself had been sued, which enabled the civil court to assess the violation as to its integrity. Third, CJUE case-law has already made clear that the Finnish regulation was contrary to EU law.

provision that limited the liability of public entities in order to be able to follow up the claimant's applications.

be) France

Through its decision in *Gestas*, delivered on 18 June 2008, the *Conseil d'État* (Council of State) acknowledged that in principle it is possible to obtain damages when the content of a judgment is in manifest breach of EU law.<sup>52</sup> However, since the facts of the case did not give rise to any intervention of EU law, no liability was established. Even so, the judgment is of utmost importance as the *Conseil d'État* departed from its longstanding *Darmont* case-law concerning damages caused by EU law violations. According to the *Darmont* principle, the content of a judicial decision cannot be challenged by way of a state liability action once it has become final.<sup>53</sup> By the *Gestas* judgment, the *Conseil d'État* admitted that misconduct by a court can lead to compensation in a case where an obvious incompatibility can be found between the content of the judgment and a provision of EU law.

By its judgment delivered on 7 May 2008, the *Tribunal de grande instance de Paris* (Regional Court, Paris) dismissed a claim seeking compensation for breach of EU law by the *Cour de cassation* (Court of Cassation). The regional court concluded that an erroneous interpretation of law cannot constitute a sufficiently serious breach, notwithstanding the fact that it concerns EU law.<sup>54</sup> The court reached its judgment on the basis of the national rules on liability of courts. It emphasised that an erroneous judgment cannot constitute a '*faute lourde*,' a sufficiently serious breach of law.

In a series of judgments handed down on 26 October 2011, the *Cour constitutionnelle* (Constitutional Court) dealt with the question of whether the failure to make a preliminary reference can be considered as denial of justice. In this regard, it was investigated whether it can constitute, for this reason, a manifestly serious breach entailing state liability for failure to operate the public service properly.<sup>55</sup> However, in the absence of a violation of EU law, the *Cour constitutionnelle* dismissed the claims. Nevertheless, the *Cour constitutionnelle* reached its conclusion using the criterion set by the CJUE in *Köbler*, i.e. evaluating the manifest character of the breach, instead of evaluating it against the French '*faute lourde*' condition.

<sup>52</sup> (FR) Conseil d'Etat, décision, 18/06/2008, *Gestas*, ECLI:FR:CESSR:2008:295831.20080618, publié au recueil Lebon, reported by Olivier Dubos, Daniel Katz and Philippe Mollard, 'Rapport français', in *Coutron* (n 10) 221, in *Reflets* n° 2008/3, 19 and in the database *JuriFast*.

<sup>53</sup> The *Conseil d'État* reiterated that, by virtue of the general principles on state liability, gross negligence committed by an administrative court is likely to give rise to compensation. However, it also pointed out that the state cannot incur liability in cases where the alleged gross negligence resulted from the content of a judicial decision that was subsequently made final. However, it has made an exception to these rules, in line with the solution implemented by the CJUE in *Köbler*: In this regard, it ruled that liability can be incurred by the state if the content of a final judicial decision is marred by a clear violation of EU law aiming to give rights to individuals.

<sup>54</sup> (FR) Tribunal de grande instance de Paris, 07/05/2008, n° 04/13911, reported by Dubos, Katz and Mollard (n 52) 222–223, n 59.

<sup>55</sup> (FR) Cour de cassation, Arrêts, 26/10/2011, n° 1002 (10-24.250 à 10-24.262), Bull. 2011, I, n° 181, reported by Dubos, Katz and Mollard (n 52) 223–224, n 62.

*bf)* Germany

In its judgment handed down on 9 June 2009, the *Bundesverwaltungsgericht* (Federal Administrative Court, BVerwG), dismissed a liability claim, arguing that the breach of EU law by the German court was not sufficiently serious.<sup>56</sup> The BVerwG pointed out that the scope of application of the *Köbler* liability, as triggered by a breach of EU law by the German judiciary, is wider than liability for breach of official duty in terms of German law. This is because state liability under EU law applies to breaches committed by the legislature and also by the judiciary, while state liability in terms of German law does not. It pointed out that the practical enforcement of state liability as a remedy under EU law takes place in national courts, which assess whether the conditions for state liability are fulfilled. In this case, the breach of law was not sufficiently manifest to meet the requirement of a sufficiently serious breach. In this regard, the BVerwG concluded that the EU provision lacked the required level of clarity and the applicability of that provision to the case of the claimant was doubtful. Therefore, Germany was not held liable to pay damages to the claimant, since the violation of EU law by the judgment of the *Verwaltungsgericht Aachen* (Administrative Court, Aachen) had not met the threshold established in *Köbler*.

In a judgment handed down on 28 October 2004, the *Bundesgerichtshof* (Federal Court of Justice, BGH) dismissed a liability claim stating that the refusal to submit a preliminary reference to the CJUE was justified.<sup>57</sup> The BGH expressly acknowledged the possibility to hold the state liable for miscarriages of justice based on the principles developed by the CJUE in *Köbler*. However, after reiterating the conditions set up by the CJUE, the BGH came to the conclusion that there had been no manifest infringement in the case. In the court's opinion, the correct interpretation of the EU directive was so obvious that, based on the standards set in *Cilfit*,<sup>58</sup> there had been no need for the *Oberlandesgericht Koblenz* (Higher Regional Court, Koblenz) to refer the case to the CJUE for a preliminary ruling.<sup>59</sup>

As for two judgments rendered by higher regional courts, the *Oberlandesgericht Karlsruhe* (Higher Regional Court, Karlsruhe), on 9 March 2006,<sup>60</sup> and the *Oberlandesgericht Frankfurt* (Higher Regional Court, Frankfurt), on 13 March 2008,<sup>61</sup> they contended that state liability for miscarriages of justice could only be incurred where the infringement was attributable to a court adjudicating at last instance. These decisions did not refer to *Köbler* and *Traghetti del Mediterraneo* but to articles in German literature instead. After all, they stated

<sup>56</sup> (DE) BVerwG, Urteil, 09/06/2009, 1 C 7.08, NVwZ 2009, 1431, ECLI:DE:BVerwG:2009:090609U1C7.08.0, reported in Jean Monnet Database.

<sup>57</sup> (DE) BHG, Beschluss, 28/10/2004, III ZR 294/03, NJW, 2005, n° 11, p. 747, reported by Beutler (n 6) 788–789, Daniel Dittert, 'Rapport allemande' in Coutron (n 10) 77–78, n 80, and Lock (n 15) 1683, n 50, and 1684, n 59.

<sup>58</sup> (CJUE) Case 283/81 *Cilfit and others* EU:C:1982:335 [1982] ECR 3415.

<sup>59</sup> Beutler (n 6) 788–789.

<sup>60</sup> (DE) Oberlandesgericht Karlsruhe, Urteil, 09/03/2006, 12 U 286/05, NJW-RR, 2006, n° 21, 1459, reported by Beutler (n 6) 789, Dittert (n 57) 77–78, n 80, and Lock (n 15) 1683, n 50, and 1684, n 59.

<sup>61</sup> (DE) Oberlandesgericht Frankfurt, Urteil, 13/03/2008, 1 U 244/07, reported by Beutler (n 6) 789, n 111, and in the database Juris, para 17.

that at any rate there had been no manifest infringement.<sup>62</sup> Altogether, only a few cases have been so far rendered on the basis of *Köbler* claims in Germany.<sup>63</sup>

#### *bg*) Hungary

The *Kúria* (Supreme Court) held on 11 December 2013, that a civil court adjudicating on a liability claim cannot reassess the merits of a final judgment that has already gained *res judicata*, notwithstanding a violation of EU law.<sup>64</sup> First, the *Kúria* emphasised that a liability action cannot serve to review a judgment or re-examine a dispute that had already gained *res judicata*. Moreover, the illegality of the main proceedings before the administrative court must be evaluated in the light of the procedural rules. In this regard, the *Kúria* pointed out that the claimant himself had not invoked the EU law in the main proceedings. Since the court is bound by the pleas raised by the parties, the administrative court had not committed any breach in the main proceedings when it had not considered the EU law. As such, the *Kúria* as appeal court had not infringed EU law in the administrative dispute. In this regard, the also *Kúria* pointed out that the Hungarian procedural rules are in line with the principles of effectiveness and equivalence, and are also allowed in terms of the CJUE case-law.

The *Kúria* have rendered several other judgments in which it rejected the liability of the state for violation of EU law by the national courts.<sup>65</sup> In terms of these judgments, a liability action cannot serve to review an already finally decided matter.

#### *bh*) Italy

Following the CJUE judgment in *Traghetti del Mediterraneo*, the Italian *Tribunale di Genova*, the court which had made the preliminary reference, ordered the state to pay compensation to the claimant because of the violation of EU law by the *Corte Suprema di Cassazione*.<sup>66</sup> To render this judgment, the *Tribunale di Genova* set aside, and gave an interpretation *a contrario* to the national rules on judicial liability.

Nonetheless, the *contra legem* application of national rules is no longer necessary, following the recently adopted legislative modifications aiming to align national rules with the CJUE's requirements in this matter of law. The new provisions offer wider grounds to invoke liability of the state for judicial acts, and, especially clarify that the manifest violation of EU law constitutes, in itself, '*colpa grave*'. Specifically, since the entry into force of these amendments on 19 March 2015, erroneous interpretation of law, as well as assessment of facts and evidence can also give rise to liability, on condition that they are the result of gross negligence or manifest violation of law. Moreover, the new provisions specify the factors to

<sup>62</sup> Beutler (n 6) 789.

<sup>63</sup> (DE) BGH, Beschluss, 28/10/2004, III ZR 294/03 (n 57).

<sup>64</sup> (HU) *Kúria*, ítélet, 11/12/2013, Pfv.III.22.112/2012/13, reported in *Reflets* n° 2/2014, 30.

<sup>65</sup> (HU) *Kúria*, ítélet, 28/02/2014, Pfv.III.21.591/2013/5.

<sup>66</sup> (IT) *Tribunale di Genova*, Sentenza, 31/03/2009 (n 23).

be taken into consideration when assessing the gravity of the breach. In this regard, the elements elaborated by the CJUE in the *Köbler* judgment are borrowed, in essence.<sup>67</sup>

*bj) Lithuania*

In its judgment delivered on 24 April 2008, the *Vyriausiasis administracinis teismas* (Supreme Administrative Court) acknowledged the liability of the state for final decisions of administrative courts which are contrary to EU law. However, it dismissed the claimant's request for compensation in the case at hand.<sup>68</sup> Acting as a court of appeal, the *Vyriausiasis administracinis teismas* concluded that the state is liable for unlawful final administrative court judgments, and administrative courts are competent to evaluate the illegality of those acts. To reach its conclusion, the *Vyriausiasis administracinis teismas* specifically referred to the Constitutional Act of Lithuania on the EU membership of the State, to the *Köbler* judgment, and to the principle of national procedural autonomy of the Member States. In this way, the *Vyriausiasis administracinis teismas* acknowledged the *Köbler* liability. However, as the main proceedings had been reopened in the meantime,<sup>69</sup> the *Vyriausiasis administracinis teismas* dismissed the claim for damages in the case at hand.

In two recent cases before Lithuanian courts, the *Lietuvos apeliacinis teismas* (Court of Appeal)<sup>70</sup> and the *Vilniaus apygardos teismas* (Vilnius Regional Court)<sup>71</sup> have also dealt with *Köbler* liability claims. However, both courts concluded that neither substantive EU provisions, nor the referral duty had been violated in the preliminary proceedings and the claims were therefore dismissed.

*bj) Luxembourg*

There has already been a liability claim before the *Cour d'appel* (Court of Appeal) against the state on the basis of the violation of the EU law by the *Cour de cassation* (Court of Cassation).<sup>72</sup> In the liability proceedings, the *Cour d'appel* referred a question to the CJUE asking whether there had actually been a violation of EU law in the main proceedings. The CJUE gave some guidance on the interpretation of the relevant EU provision, however, left to the referring court the application of these criteria to the case at hand.<sup>73</sup> The follow-up of this judgment before the national court is not yet available.

<sup>67</sup> (IT) Legge, 13/04/1988, n° 117 (n 26) art. 2. This law was amended by Disciplina della responsabilita' civile dei magistrati, Legge 27/02/2015, n° 18.

<sup>68</sup> (LT) Lietuvos vyriausiojo administracinio teismo 2008 m. balandžio 24 d. nutartis administracinėje byloje S. T. V. Lietuvos valstybė, byla Nr. AS444-199/2008, reported by Valutyté (n 29) 288-289.

<sup>69</sup> (LT) Lietuvos vyriausiojo administracinio teismo, 10/04/2008, nutartis administracinėje byloje Nr. P444-129/2008, reported by Valutyté (n 29) 288–289.

<sup>70</sup> (LT) Lietuvos apeliacinis teismas, 23/06/2014, Byla 2A-871/2014.

<sup>71</sup> (LT) Vilniaus apygardos teismas, 21/01/2015, Byla 2A-1116-392/2015.

<sup>72</sup> (LU) Cour d'appel de Luxembourg, jugement, 13/01/2010, reported by Georges Ravarani, 'Rapport luxembourgeois', in Coutron (n 10) 328–333.

<sup>73</sup> (CJUE) Case C–29/10 *Koelzsch* EU:C:2011:151 [2011] ECR I-01595.

*bk) Netherlands*

In its judgment delivered on 15 February 2011, the *Gerechtshof's-Gravenhage* (District Court, The Hague) refused compensation for breach of EU law by the national court, relying on national procedural rules which prohibited the allocation of damages.<sup>74</sup> The *Gerechtshof's-Gravenhage* pointed out, that the claimant had already received damages following an administrative procedure. Therefore, as a civil court, it did not have the competence to decide again on the damages claim.

In a decision handed down on 5 May 2010, the *Rechtbank's-Gravenhage* dismissed the damages claim on the grounds that the claimant had not exhausted all remedies, an appeal in cassation being still available for him.<sup>75</sup>

*bl) Poland*

In a judgment rendered on 26 June 2014, the *Naczelny Sąd Administracyjny* (Supreme Administrative Court) pointed out that a judgment delivered by a supreme court can only be declared unlawful<sup>76</sup> if its unlawfulness results from a gross violation of EU law.<sup>77</sup> Applying this principle to the case at hand, it dismissed the motion of the claimant brought against its own previous judgment. In the first place, the *Naczelny Sąd Administracyjny* emphasised that under Polish administrative procedural law, unlawfulness has a strict meaning. A gross violation of the rules of law means that the breach is obvious and indisputable, since it clearly departs from a given rule, and, therefore, can be described as extraordinary. The court alluded directly to CJUE judgments in *Köbler* and in *Traghetti del Mediterraneo*. In the second place, the *Naczelny Sąd Administracyjny* pointed out that an action to declare a final judgment unlawful cannot substitute, supplement or be filed before an appeal in cassation. Therefore, if the claimant himself had not invoked the violation of EU law in the appeal proceedings before the Supreme Court, it was not possible to claim a violation of EU law in an action to declare unlawful a final and legally binding judgment either.

Several other judgments have also been rendered on the ground of the same provision in the Polish administrative procedural code.<sup>78</sup> In a judgment delivered on 11 June 2014, the

<sup>74</sup> (NL) *Gerechtshof's-Gravenhage*, Uitspraak, 15/02/2011, ECLI:NL:GHSGR:2011:BP6841, reported by Tony P. Marguery and Herman J. van Harten, 'Rapport néerlandais' in Coutron (n 10) 352, n 70.

<sup>75</sup> (NL) *Rechtbank's-Gravenhage*, Uitspraak, 05/03/2010, ECLI:NL:RBSGR:2010:BL6948, reported by Marguery and van Harten (n 74) 352, n 69.

<sup>76</sup> According to the Polish Civil Code, if the damage has been inflicted by issuing a final court ruling or a final decision, its redress may be demanded after it has been acknowledged in an appropriate proceeding that the ruling or decision contradicts the law. The declaration of unlawfulness as a *sui generis* procedure is one possible way to establish such a violation of law. Hence, the declaration of unlawfulness of a final judgment is a procedural element of an action for damages for breach of law by Polish courts. Therefore, with regard to the strong connection between the action for liability and this special remedy, the relevant case-law is presented in this section.

<sup>77</sup> (PL) *Naczelny Sąd Administracyjny*, Wyrok, 26/06/2014, I FNP 5/14, reported in database *JuriFast*.

<sup>78</sup> (PL) *Prawo o postępowaniu przed sądami administracyjnymi* (n 29), art. 285a, § 3. See also Przemysław Mikłaszewicz, 'Rapport polonais', in Coutron (n 10) 382 and *Naczelny Sąd Administracyjny*, Wyrok, 28/02/2013, I FNP 10/12.

*Naczelny Sąd Administracyjny* held that the refusal by the same court to make a preliminary reference in the previous proceedings had not breached any EU rule, as the interpretation of the EU norm was not ambiguous.<sup>79</sup> The *Naczelny Sąd Administracyjny* pointed out that the national courts of last instance enjoy certain discretion on whether to make a request or not. Especially, if the interpretation of the EU rule is not doubtful, the court does not have to make a referral, even if one of the parties proposes such a submission. Accepting a contrary position would mean to deny the possibility of the national courts to adjudicate on EU law matters.

Furthermore, in a judgment pronounced on 26 August 2011, the *Naczelny Sąd Administracyjny* dismissed the claim as it found that the interpretation of the EU provision in the contested final decision had been correct.<sup>80</sup> In a series of judgments rendered on 21 December 2010, the *Naczelny Sąd Administracyjny* reiterated that the interpretation and the application of Polish procedural rules come under the scope of the national procedural autonomy, and, consequently, dismissed the claims.<sup>81</sup>

As for civil cases, in a judgment handed down on 8 December 2009, the *Sąd Najwyższy* (Supreme Court) declared the contested final judgment unlawful.<sup>82</sup> The *Sąd Najwyższy* arrived at this conclusion as the inconsistency of the final judgment with the EU law became clear following the CJUE judgment on the same matter of law. Moreover, a judgment by the *Sąd Najwyższy* from 12 October 2006 seems to suggest that the flagrant violation of the obligation to submit a preliminary reference to the CJUE may in itself suffice to declare a final civil judgment unlawful.<sup>83</sup>

#### *bm*) Portugal

In a judgment handed down on 3 December 2009, the *Supremo Tribunal de Justiça* (Supreme Court) dismissed on appeal a liability claim brought against the state for breach of the EU law by its own decision.<sup>84</sup> The *Supremo Tribunal de Justiça* argued that since at the time of the facts the national law on judicial liability<sup>85</sup> had not yet been in force, there was no rule in Portuguese law under which the state could be held liable for breach of law by the judiciary.

<sup>79</sup> (PL) *Naczelny Sąd Administracyjny*, Wyrok, 11/06/2014, I GNP 2/14, reported in *Reflets* n° 3/2014, 38.

<sup>80</sup> (PL) *Naczelny Sąd Administracyjny*, Wyrok, 26/08/2011, I GNP 1/11, reported by Mikłaszewicz (n 78) 381, n 107.

<sup>81</sup> (PL) *Naczelny Sąd Administracyjny*, Postanowienie, 21/12/2010, I FNP 1/10, I FNP 5/10 and I FNP 8/10, reported by Mikłaszewicz (n 78) 382, n 109.

<sup>82</sup> (PL) *Sąd Najwyższy*, Wyrok, 08/12/2009, I BU 6/09, reported by Mikłaszewicz (n 78) 380–381. The judgment was based on the Civil Code. In terms of this provision, and contrary to the rules in administrative law, the breach of both Polish and EU law can serve as a legal basis to an action to declare unlawful a final judgment. On the other hand, an action to declare unlawful a final judgment cannot be initiated against the judgments of the *Sąd Najwyższy*. These latter points can be contested directly in a liability claim. See *Kodeks cywilny* (n 29) art. 417-1, § 2.

<sup>83</sup> (PL) *Sąd Najwyższy*, Wyrok, 12/10/2006, I CNP 41/06, reported by Mikłaszewicz (n 78) 381, n 102.

<sup>84</sup> (PT) *Supremo Tribunal de Justiça*, Acórdão, 03/12/2009, Revista n.º 9180/07.3TBRRG.G1.S1, available at Network of the presidents of the supreme judicial courts of the European Union, reported by José Narciso da Cunha Rodriguez and Helena Maria de Jesus Patricio, 'Rapport portugais' in *Coutron* (n 10) 400–404.

<sup>85</sup> (PT) *Lei* n.º 67/2007 (n 31). See also da Cunha Rodriguez and Jesus Patricio (n 84) 398, n 21.



This decision meant to overturn the judgment of the *Tribunal da Relação de Guimarães* (Court of Second Instance of Guimarães), which, in the same case, ordered the Portuguese State to pay compensation.

In the above mentioned judgment of 23 April 2009, the *Tribunal da Relação de Guimarães* found the liability claim well founded on the basis of the CJUE case-law on state liability, and, therefore, ordered the state to pay compensation. The *Tribunal da Relação de Guimarães* argued that the state can be held liable for the breach of EU law by its courts even in the absence of national law on judicial liability.<sup>86</sup>

In a judgment delivered on 9 July 2015, the *Tribunal Constitucional* examined the constitutionality of the criteria requiring the prior reversal of the contested judgment as a condition for liability.<sup>87</sup> Even though the dispute was not related to EU law, it hence appears that the *Tribunal Constitucional* approved this restrictive condition being set aside for claims arising from violation of EU law by Portuguese courts. First, the *Tribunal Constitucional* stated that the Constitution only provides a general framework for liability claims and therefore, the legislator has the right to establish specific rules concerning the exercise of this right. However, these rules cannot arbitrarily and unreasonably restrict the right to compensation. The court then pointed to the conflict between judicial liability and the principles of legal certainty and *res judicata*. In this regard, it raised the question of which court has the final word on an already decided matter. At this point, the *Tribunal Constitucional* made reference to the CJUE's case-law and arguments in the judgments in *Köbler* and *Traghetti del Mediterraneo*. According to the *Tribunal Constitucional*, recognising judicial liability for breaches of EU law is justified because the parties do not have direct access to the CJUE and they cannot enforce a preliminary reference being made before the CJUE. Therefore, Member State liability is important to provide effective judicial protection where violation of EU law has occurred. However, as for domestic matters, the criterion of prior reversal of the contested judgment is not contrary to the constitutional right to compensation. The restriction that it implies does not restrict the essential content of this right and the restriction is not arbitrary, either.

#### *bn) Slovakia*

Even if there is no judgment on the case, it is noteworthy that in a request for preliminary ruling dated 12 March 2015,<sup>88</sup> the *Okresný súd Prešov* (District Court, Prešov) raised the question whether Slovakian rules concerning judicial liability, especially those with regard to the duty of mitigation, are in conformity with EU requirements.<sup>89</sup> In particular, the court asked whether liability might arise before the claimant had used all legal remedies available in the legal order of the Member State, such as requiring an account for unjust enrichment in proceedings for the enforcement of an award.

<sup>86</sup> (PT) *Tribunal da Relação de Guimarães*, Acórdão, 23/04/2009, 9180/07.3TBBERG.G1.

<sup>87</sup> (PT) *Tribunal Constitucional*, Acórdão, 09/07/2015, n.º363/2015.

<sup>88</sup> (SL) *Okresný súd Prešov*, *Uznesenie*, 12/03/2015, 7C 6/2010-316.

<sup>89</sup> (CJUE) *Tomášová* (n 17)

*bo)* Sweden

In its decision of 6 June 2009, the *Justitiekanslern* (Office of the Chancellor of Justice) awarded compensation for damages suffered by the claimant due to judicial decisions contrary to EU law.<sup>90</sup> The unlawful judicial act consisted in the decision by the *Regeringsrätten* (Supreme Administrative Court), to declare inadmissible the appeal of the claimant against the judgment of the *Kammarrätten i Göteborg* (Administrative Court of Appeal, Göteborg). In fact, the *Kammarrätten* had dismissed the motion of the claimant to revise the original tax decision in its case on the basis of the EU law. Examining the liability claim lodged before it, the *Justitiekanslern* found that the erroneous interpretation of the EU law in the main, primary proceedings cannot be considered sufficiently serious. It pointed out that the appeal court had analysed in detail the available CJUE case-law and that the erroneous interpretation attributed to the directive was excusable. However, the violation of law by the *Regeringsrätten*, consisting of declaring the appeal against the above appeal court judgment inadmissible, was a sufficiently serious breach to give rise to compensation. The *Justitiekanslern* stressed that, at that time, the *Regeringsrätten* already had information about the CJUE judgment concerning the relevant question of law. Therefore, in the light of this new CJUE jurisprudence, the appeal should have been declared admissible. By declaring the appeal inadmissible, the *Regeringsrätten* committed a sufficiently serious breach of the EU law, and the claimant was therefore entitled to compensation.

*bp)* United Kingdom

In its judgment of 12 May 2010, handed down as an appeal court in a state liability action, the *Court of Appeal* found the contested judgment contrary to EU law.<sup>91</sup> However, the breach was not sufficiently serious to engage liability on the basis of the principles set out in *Köbler*. The *Court of Appeal* stated that the violation of EU law had indeed taken place, as both the EU directive, and the Treaty provision on the obligation to ask preliminary ruling had been breached. As for the gravity of the violation, the *Court of Appeal* found the contested judgment consistent with other judgments made by other Member States' courts in similar cases at that time. Furthermore, even though the Commission had been notified on the national law before it came into force, it was not the subject of a complaint at that time. Bearing in mind all of these factors, the *Court of Appeal* ruled that the failure to submit a request for a preliminary ruling to the CJUE was an excusable error.

<sup>90</sup> (SE) Justitiekanslern, beslut, 06/04/2009 (n 23).

<sup>91</sup> (UK) Court of Appeal (England), Civil Division, judgment, 12/05/2010, *Cooper / Her Majesty's Attorney General*, [2010] EWCA Civ 464, reported by Lock (n 15) 1682, n 39 and in Reflets n° 2012/3, 21.

### III Conclusion

Two main conclusions can be drawn from the national case-law on *Köbler* claims. On the one hand, several Member States have actually implemented the *Köbler* liability in their legal framework, despite limitations in the domestic statutory provisions. Even though legal provisions have not been changed in most of these states, some courts have adjudicated liability claims directly on the basis of the *Köbler* judgment. On the other hand, even in these Member States, compensation has been allocated only in the rarest of circumstances. Both these statements need to be elaborated.

#### 1 The Impact of the Köbler Liability

Therefore, contrary to what might have been previously expected, the *Köbler* doctrine appears to have found a certain acceptance in several national regimes. The above analysis shows that thirteen Member States have accepted, at least theoretically, to hold the state liable for breaches of EU law by national supreme courts (Austria, Belgium, Bulgaria, Finland, France, Germany, Italy, Lithuania, the Netherlands, Poland, Portugal, Sweden, and the UK).<sup>92</sup>

Furthermore, even though there is no reported judgment on a *Köbler* claim from the Czech Republic, it follows from a judgment rendered on a liability claim against the state on the basis of a breach by an administrative authority<sup>93</sup> that, in theory, the principle of state liability on the basis of EU law is recognised in the Czech Republic as well. Moreover, the requests for preliminary ruling by the Luxembourgish and Slovakian courts suggest that these courts are inclined to accept state liability.

In most Member States, the implementation of the *Köbler* doctrine resulted in the duplication of liability regimes. It means that the conditions of state liability for judicial acts appear be less strict with regard to damages caused by violation of EU law rather than violation of national law. In most Member States, this is the result of the fact that national courts had to set aside their domestic rules on liability for judicial activity to be able to establish the liability of the state for breach of EU law by the national supreme courts.<sup>94</sup> This is the case in Austria, Bulgaria, Finland, France, Germany, Lithuania, the Netherlands, Portugal, and the UK. The exception is Belgium, where the jurisprudential changes have general application.

<sup>92</sup> However, the position of Spanish courts is not unanimous in this regard.

<sup>93</sup> (CZ) Nejvyšší soud České republiky rozsudek ze dne 20/08/2012, n°28 Cdo 2927/2010, ECLI:CZ:NS:-2012:28.CDO.2927.2010.1, reported by David Petrlik, 'Rapport tchèque' in Coutron (n 10) 427–429, n 75 and in Reflets n° 3/2012, 18–19.

<sup>94</sup> It has been the case in Austria (exclusion of liability of supreme courts'), Belgium (condition of the prior reversal of the contested judgment), Bulgaria (exclusion of liability), the Czech Republic (condition of the prior reversal of the contested judgment), Finland (condition of the prior reversal of the contested judgment or conviction or condemnation for damages of the judge), France (no liability for final judgments), Germany (liability for judicial errors only for criminal offences), Italy (unquestionable nature of final judgments), the Netherlands (exclusion of liability for judicial activity), and the UK (absolute immunity of courts) as well.

The duplication of liability regimes is due to legislative amendments in two Member States. In Italy, recent amendments allow the possibility to make the state liable for judicial breaches on wider grounds than previously foreseen, and provide an explicit ground for liability in the case of manifest infringement of EU law. In Poland, holding the supreme courts liable is possible on wider grounds with regard to EU law infringements than national breaches.

In Sweden, because an informal way to receive damages before the *Justitienaslern* had already existed,<sup>95</sup> it was possible to apply the *Köbler* doctrine under this procedure without any legislative amendment or judicial intervention.

On the other side, even though there has not yet been an available judgment on a *Köbler* claim from Denmark and Latvia, the application of the doctrine should not, in principle, have major difficulties in this two Member States. In Denmark, similarly to Spain, liability of the state for judicial acts had already been recognised under the general regime of liability even before *Köbler*. The conditions set by Danish law do not seem to be more restrictive than those established by the CJUE. Similarly, national provisions do not appear to exclude the theoretical possibility to hold the supreme courts liable for breach of EU law in Latvia.

There are, however, Member States which have still refused to adapt their liability regime to the requirements of the *Köbler* and *Traghetti del Mediterraneo* case-law. The available case-laws show such reticence especially from the Hungarian Supreme Court, which has repeatedly held that it cannot reassess in a liability claim a final legal judgment that has already gained *res judicata*.

As for other not-yet-mentioned Member States, in the absence of available case-law, there is no possibility to evaluate their position in this regard.

Another issue is the condition in national laws regarding the gravity of the breach, which appears to jeopardise the allocation of damages for EU law violations in several Member States in practice. However, the incompatibility of this condition with the ECJ's case-law is not obvious for two reasons. First, as far as these requirements apply without distinction to national and EU law violations, the principle of equivalence is well observed. Second, the CJUE itself set very strict conditions for liability in *Köbler*. As such, it is not obvious whether the strict, albeit subjective conditions for liability under the Spanish,<sup>96</sup> Slovenian<sup>97</sup> and Polish<sup>98</sup> regimes, for example, even if they may be contrary to the effectiveness principle, are in fact incompatible with the *Köbler* conditions.

The position of legal doctrine is not unanimous in this regard either. According to Scherr, 'the highly restrictive approach to the concept of state liability for judicial breaches, which appears to be the only commonality between all the national legal concepts of state liability

<sup>95</sup> (SE) Lag (1975:1339) *om justitiekanslerns tillsyn* (Act on the Chancellor of Justice's supervision); *Förordning (1995:1301) om handläggning av skadeståndsanspråk mot staten* (Regulation on the processing of claims against the state).

<sup>96</sup> See in this regard Daniel Sarmiento, 'Rapport espagnol' in Coutron (n 10) 179.

<sup>97</sup> Trstenjak and Plaustajner (n 32) 472–473.

<sup>98</sup> Miklaszewicz (n 78) 383–384.

for judicial breaches in the European Union Member States, is mirrored at European Union level in an equally restrictive system of Member State liability *à la Köbler*.<sup>99</sup>

## 2 The Role of the Köbler Liability

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. Moreover, even on the rare occasions when it has been relied on, compensation has almost never been awarded. Therefore, *Köbler* liability appears not to be an effective remedy for infringed individual rights.<sup>100</sup>

Nevertheless, it serves as an incentive for Member State courts to fulfil their obligations in applying EU law and, therefore, it can prevent the occurrence of damage. Hence, as a preventive or deterrent tool, it may contribute to the effective application of EU law.<sup>101</sup> In this regard, it is certainly true that the *Köbler* judgment has made its impact on national regimes, and has in general contributed to raising the level of protection of individual rights. This follows from the adaptation of domestic liability regimes to the *Köbler* principle.

<sup>99</sup> Scherr, Comparative aspects (n 8) 585. See also Beutler (n 6); Nassimpian (n 11) 824.

<sup>100</sup> Beutler (n 6) 790; Nassimpian (n 11) 834; Lock (n 15) 1685.

<sup>101</sup> In this regard, the literature has already pointed out that the state liability concept is not coherent enough, and it should be determined whether its primary function is to remedy infringed rights or to deter non-compliant supreme courts. See, in this regard Dorota Leczykiewicz, 'Enforcement or Compensation? Damages Actions in EU Law after the Draft Common Frame of Reference' 59 *Legal Research Paper Series* (University of Oxford, 2012) 1–3, 17; Lock (n 15), 1676, 1700, 1701; Rodriguez (n 7) 611, 614–615.