

# State's liability in damages as a key condition for building mutual trust between state and business in view of a judicial practice

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# Historical background & controversies

- Liability in damages as a domain of civil law relationships between natural and legal entities
- “the king can do no wrong” principle
- Development of rule of law and changes regarding state’s liability in damages (state is responsible for its acts and negligence)
- EU law background (Francovich ruling & other similar CJEU decisions)

# International & European recommendations

- Recommendation no. R (84) 15 on the Committee of Ministers relating to public liability
- Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule.
- The right to bring an action against a public authority should not be subject to the obligation to act first against its agent. If there is an administrative conciliation system prior to judicial proceedings, recourse to such system should not jeopardise access to judicial proceedings.

# Polish constitutional experience

- Polish Constitution of 1921, Art. 98 sec. 2: „No law can deprive the citizen from a right to court in order to pursue claims for damages”
- Art. 121: „Every citizen has got right to compensation of damage done to him by public authorities in result of unlawful actions. Responsible entity is the state and reponsible authrities together; right to sue the state or state officials shall not be a subject of previous consent of the public authority. The same reponsibility is borne by municipals and municipal authorities”.
- Law of 1956 on state’s liability in damages caused by public officials

# Constitution of 1997

- „All people are entitled to get compensation of damage done to them by unlawful act of public authority” (Art. 77 sec 1)
- Administrative path – inconsistent with Constitution
- Currently 2 stages procedure:
  - 1) acquiring confirmation that the action of the state (usually an administrative decision or a judgement of the court) was unlawful. Such confirmation can be achieved by a separate ruling issued by an administrative authority or an administrative court;
  - 2) if such prejudicative confirmation is granted, the case can be brought before civil court

# Sociological research regarding state's liability

- Respondents – over 200 judges and state officials
- Significant differences in attitude between state officials and judges
- State liability cases are not popular and are difficult, especially because lack of unified interpretation of law
- Claims are too high
- Two main factors impacting decision-making in discussed cases are: (i) established jurisprudence and (ii) attorneys competences
- In view of judges amicable resolution of such cases is most desired option
- On the other hand, state officials prefer court's dispute resolution.

# Weakness of current system

- Complicated path (2 stages)
- Narrow interpretation of „unlawfulness”
- „preliminary ruling” issue
- issue of causal link
- Difficulties with evidenciary proceedings
- Low rate of successful claims (in 2012 only 3,6 % of claims pursued in courts were successful)

# Other problems

- good quality of legal service delivered to the state by the office of the General Counsel to the Republic of Poland;
- general reluctance of Polish judges to award huge compensations against the state;
- reluctance of the state to set such cases on amicable basis (there are no settlements in this respect despite the fact that provisions of law do not exclude such claims to be settled);
- procedural obstacles (among others, mentioned requirement for prejudicial ruling or difficulties with proving of causal link);
- weakness of claims.

# Case study

- so-called hidden „fiscal” interest of the state, example:
- Resolution of the full Chamber of Economic Affairs of the Supreme Administrative Court dated on June 22, 2011, docket no. I GPS 1/11
- Case regarded overpaid excise tax. Several electricity producers, due to wrongful interpretation of tax law, overpaid excise tax (in fact, electricity wholesalers, not the producers, should pay this tax)
- According to the Polish tax law overpaid tax shall be reimbursed to the taxpayer

# Case study

- However, excise tax is an indirect tax so its economic burden in fact lays on electricity consumers (it is calculated in the price of energy). Thus – in economical context – electricity producers did not lose anything economically by paying wrongfully calculated tax
- On the other hand “economical burden” factor is not, according to the law, relevant in context of understanding of “overpaid tax”
- There was several billions of PLN of overpaid taxes to be reimbursed at stake
- The Supreme Administrative Court decided that there is no “overpaid tax” if the taxpayer did not carry economical burden – it was creative interpretation of law (in fact contrary to its exact wording) but, on the other hand, it was economically reasonable and secured “fiscal” interest of the state

# Causal link

- Usually Polish courts conduct the following test: Would the claimant also bear lost if the authority acts in line with the law
- If not – usually compensation is granted
- If yes – case is dismissed
- Burden of proof is extremely heavy because the claimant has to prove in such a test that there were no other factors that could result in less profits or in lost

# Social importance of the state's liability

- Long-lasting, finally unsuccessful claims built social impression that the citizen should not trust in state
- Some of such cases are not only result of simple unlawful acts of the state but sometimes, unfortunately, criminal conspiracy
- Poland has got specific experience with state's liability in damages in context of reprivatisation cases
- Controversies regarding special treatment of certain entities, i.a. Catholic Church
- Lack of equality in pursuing claims regarding state's liability in damages

# Famous cases

- „Optimus” case
- Marek Kubala’s case
- Lech Jeziorny’s case
- Tomasz Komenda’s case

# Procedural paths

- Amicable dispute resolution in state's liability cases – theoretically possible, practically not (reasons)
- Individual claims vs class actions
- Special paths in particular cases
- Investment arbitration – situation after Achmea ruling

# State's liability in damages – unlawful legislation

- Current situation with the Constitutional Tribunal
- Limits of state's liability in case of unconstitutional law
- Long-lasting procedure
- Limited group of legitimated entities
- Fiscal interest of the state

# Future?

- Could litigation be an attractive option for investment?
- Investment in class actions (litigation finance) – new actors in litigation theatre: investment funds which are financing litigation
- Current situation and the future
- Current class action procedure in Poland is ineffective and, as such, not attractive for potential investors

# Potential changes?

- Eliminating preliminary ruling requirement
- New regulation regarding burden of proof – presumption of existence of causal link?
- Special courts or quasi-courts dealing with state's liability cases? (examples – commissions regarding medical errors)
- New regulation regarding amicable dispute resolution in such cases?

# **Thank you for the attention**

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