Liability of judges of the Supreme Administrative Court for infringement of the EU law

I.

According to Article 77 of the Constitution of Poland, everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.

Next, pursuant to Article 417 (1) § 2 sentence 1 of the Polish Civil Code, after its revision in 2010, if damage has been inflicted by unlawful non-revisable court decision or other final decision, its compensation demand can be raised after the declaration of non-compliance of that decisions (s) in proper proceedings, unless separate regulations provide otherwise.

According to Article 285a § 1 of the Law on proceedings before administrative courts, a motion for a declaration of a legally binding judicial decision unlawful may be lodged against a legally binding judicial decision of a voivodship administrative court, where such a decision has resulted in harm to the party and has not been and cannot be modified or reversed by other means of recourse available to the party. A motion shall not be lodged against judicial decisions of the Supreme Administrative Court, with the exception where the unlawfulness (of the decision) results from a flagrant breach of the rules of the European Union law. (§ 3).

The motion for a declaration of a legally binding judicial decision of the Supreme Administrative Court unlawful is the effect of the ECJ judgment in case C-224/01 Köbler¹ as well as the judgment of the Polish Constitutional Tribunal of 8 December 2009 in case SK 34/08.²

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² OTK ZU 2009, nr 11, poz. 165.
In that ECJ judgment has been clarified that the principle of liability of Member States for breach of EU law also applies if the damage was caused by the unlawful judgment of the last instance court of the Member State.

In accordance with the solution adopted in Polish law, the full enforcement of the Köbler judgment requires the cooperation between administrative and civil court. According to Polish law, the judgment declaring a legally binding judicial decision unlawful pursuant to Article 285a of the Law on proceedings before administrative courts is *sine qua non* condition for compensation from the Treasure of State for a damage caused by the unlawful judicial decision, according to Article 417\(^1\) § 2 of the Civil Code.

Hence, the role of the Supreme Administrative Court is to assess whether the Supreme Administrative Court actually issued the judgment which is "a flagrant breach of the provisions of European Union law." The concept of "a flagrant breach" used in the Law on proceedings before administrative courts must correspond to the concept of "sufficiently serious", mentioned in the Köbler case.

In the Köbler judgment ECJ stated, that an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter.\(^3\)

Other situations of non-compliance with EU law will be subject to the discretion of the national courts, provided that the term "sufficiently serious" breach of EU law must be interpreted with regard to its autonomous nature.

In addition, it should be noted that, in accordance with the Traghetti judgment, it is possible to limit the State liability solely to cases of intentional fault and serious misconduct.

Due to division of powers between the administrative and civil courts, the issue to be resolved is that which court is obliged to assess the damage within the meaning of the Köbler judgment. It seems that, the administrative court should examine only the proof for the possibility of harm. According to Article 285e § 1 point 4 of the Law on proceedings before administrative courts, a motion for a declaration of a legally binding judicial decision unlawful shall contain, i.a. "the proof for the possibility of harm being caused by issuance of the judicial decision to which the motion relates".

Further assessment of whether the conditions of Article 417 (1) § 2 of the Civil Code

\(^3\) Köbler judgment, point 56.
have been met and whether the compensation is reasonable and, possibly, how much, should make a civil court.

To meet the requirements specified in Article 285e § 1 point 4 of the Law on proceedings before administrative courts, the possibility of harm must be connected with flagrant breach of specific rule of EU law.

If the Supreme Administrative Court will be inclined to agree to the complainant’s arguments, the Court, granting the motion, shall declare contested judicial decision - in requested scope - unlawful.

The Court shall reject the motion, particularly if complainant does not indicate the possibility of harm or specific rule of EU law, which has been flagrant breached and caused – in opinion of complainant – harm.

II.

Another issue is a personal liability of the officials of administration of justice. That is a quite complex question.

In today’s Europe, the encroachment of civil liability rules into the sphere of the judicial power, gradually breaks so called judicial immunity - judge’s complete protection from personal liability for exercising judicial functions.

The recourse liability of these persons (pursued by State Treasury) is possible only in case of intentional fault (dolus) or severe negligence (culpa lata).

In Polish law, the fault can substantiate personal tort liability of the judge (for example in case of fraud or influence peddling) both in proceedings initiated by a victim of a tort and in recourse proceedings, initiated by State Treasury on the basis of the provisions of the Polish Labour Code.

Another separate issue is also disciplinary liability and responsibility of judges.

In matters not regulated by the Act of 25th July 2002 Law on System of Administrative Courts, the provisions on the system of common courts and on Supreme Court concerning disciplinary liability shall Apple, as appropriate, to voivodship administrative courts judges and to Supreme Administrative Courts Judges.
In accordance with the established disciplinary case-law of the Supreme Court of Poland, the rule of judicial independence excludes from the scope of notion „manifest and flagrant breach of law regulations”, referred in Article 107 § 1 of the Act of 27 July 2001 – Law on the System of Common Courts, errors in interpretation and application of substantial law. It follows therefrom that disciplinary transgression can include in practice only breach of procedural rules.⁴

It should be also mentioned, that Act of 20 January 2011 on personal liability of a public servants for flagrant breach of law (Journal of Laws -Dz. U. of 2011, No. 34, item 173) does not apply to judges. Art. 1 of above mentioned Act defines public servant– as a person acting as a public administration authority or as a person acting on the basis of its authorization or as a member of a collegial body of public administration.


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