

# Action for damages against the EU

## SUMMARY

Most legal systems, both of states and of international organisations, provide for the liability of public administrations for damage done to individuals. This area of the law, known as 'public tort law', varies considerably from country to country, even within the European Union (EU). The EU Treaties have, from the outset, provided for liability of the EU for public torts (wrongs), in the form of action for damages against the EU, now codified in the second and third paragraphs of Article 340 of the Treaty on the Functioning of the European Union (TFEU). However, these rules are notoriously vague and brief, and refer to the 'general principles common to the laws of the Member States' as the source for the rules of EU public tort law. Since the laws of the Member States on public torts differ significantly, the reference has been treated by the Court of Justice of the European Union (CJEU) as empowerment to develop EU public tort law in its own case law.

The rules developed by the CJEU have been criticised by some academics as being very complex, non-transparent and unpredictable. Experts have also pointed out that the threshold of liability is set so high that actions for damages prove successful in very few cases only. According to the data available, from the establishment of the EU until 2014, the Court only actually granted compensation to applicants in 39 cases. As a result, some scholars have even pointed out that the principle of EU liability for public torts is 'illusory' and that action for damages is not an effective means of protecting fundamental rights. Other academics add that the question of establishing the principles of EU public tort law is not merely a technical issue, but a political one, as it touches upon fundamental questions of distributive justice and the form of government in the Union, and therefore should be the subject of democratic debate.

*This Briefing is one in a series aimed at explaining the activities of the CJEU.*



### In this Briefing

- Who may bring an action for damages?
- Against whom may an action for damages be filed?
- When may an action be filed?
- Jurisdiction and possible compensation
- Evaluation
- Conclusions

## Introduction

### Public tort law as a key element in the rule of law and fundamental rights

The possibility for individuals to seek damages in the event of a breach of law by the public administration is considered an essential guarantee of fundamental rights<sup>1</sup> and even 'a **key element of the rule of law**'.<sup>2</sup> Within the European Union (EU) legal order, provision for individuals' right to damages for harm caused by an action of the institutions was already made in the [Treaty of Paris](#) (Articles 34 to 40), the [Treaty of Rome](#) (Article 215) and the [Euratom Treaty](#) (Article 188). Furthermore, the principle of liability in damages is considered to be a fundamental principle of international law.<sup>3</sup> The non-contractual liability of public bodies such as the EU institutions for damages is known in the English-speaking world as **public tort law**, as opposed to ordinary tort law (law of delict) concerning the liability of private parties to other private parties for wrongful acts (such as car accidents, defamation, etc.).

### Current legal basis of EU public tort law

The current legal basis for action for damages against the EU lies in Article 340 of the [Treaty on the Functioning of the European Union](#) (TFEU). The second paragraph of that article provides that:

*In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.*

An analogous rule is provided for in the third paragraph with regard to the [European Central Bank \(ECB\)](#):

*Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.*

### Impact of the Lisbon Treaty

The wording of the second paragraph of Article 340 has not changed materially in comparison with its predecessors (Article 215 Treaty of Rome, Article 288 of the Treaty establishing the European Community, TEC), the only difference being the replacement of 'Community' by 'Union'. Therefore, both the case law and academic literature developed under the previous rules retain their validity after the entry into force of the [Lisbon Treaty](#). Importantly, in the post-Lisbon legal landscape, there is one **single EU legal personality**, and as a consequence 'the rules on liability are also applicable to measures based on the former second and third pillars',<sup>4</sup> which was not the case before Lisbon (see cases: [C-355/04 P Zubimendi Izaga](#); [C-354/04 P Gestoras Pro Amnistía](#)). Whereas before the entry into force of the Lisbon Treaty the Court clearly stated it had no jurisdiction to rule on any action for damages in the area of Common and Foreign Security Policy, under the Lisbon Treaty it has recognised its ability to rule on damages regarding restrictive measures adopted by the EU (Case [C-239/12 P Abdulrahim](#)).

The **reference to national law** ('general principles common to the laws of the Member States') means, in theory, that the European Court of Justice (ECJ) should analyse and compare the legal systems of the 28 EU Member States, identify their common general principles, and apply them *mutatis mutandis* to the extra-contractual liability of the EU. However, the legal systems of the Member States are quite varied as regards this form of liability.<sup>5</sup> Some legal systems, such as those of Belgium, the Netherlands and Italy, apply the same principles to the delictual liability of private parties and the state (as regulated by civil law – the law of obligations). In French law, it is a matter of public law. In Germany, there are a number of special rules concerning that liability and a well-developed case law. In this context, Markus Kotzur claims that the reference to national law should rather be understood as 'an authorisation for the ECJ to [engage in] **dynamic law-making** on the basis of general principles that [have] evolved through European law tradition'.<sup>6</sup>

## Impact of the Charter of Fundamental Rights

With the entry into force of the [Charter of Fundamental Rights](#) (CFR) in 2009 as an act of primary EU law, the right to damages became an officially binding fundamental right, considered as part of the right to good administration. Article 41(3) CFR thus provides that:

*Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*

The provision in the Charter places an emphasis on the individual perspective ('every person'), but its scope is not limited to violations of fundamental rights (as, for example, in Article 41 of the [European Convention on Human Rights](#)).<sup>7</sup>

### No secondary legislation

Until now, no act of secondary EU law (for instance a regulation) has been adopted to lay down the principles of EU's liability for damages. Therefore, it is up to legal scholars and the case law of the [Court of Justice of the EU](#) (CJEU) to determine the principles of such liability in more detail (national courts do not have jurisdiction).

### Who may bring an action for damages?

Article 340 TFEU does not specify who may bring an action for damages, leaving it to the 'general principles common to the laws of the Member States'. Article 41(3) of the Charter, in contrast, specifies that the right to damages is granted to 'every person', i.e. any natural or legal person. This is a consequence of the nature of the Charter as a legal act guaranteeing the fundamental rights of individuals, rather than regulating the relations between the EU institutions or between the EU and its Member States.

Under Article 340 TFEU, the issue as to whether **a Member State or a third country** could bring an action for damages against an EU institution remains open. While some authors consider this to be possible,<sup>8</sup> others disagree.<sup>9</sup> There has been no precedent of this kind, and therefore the CJEU has not had an opportunity to express its view on the matter.

Concerning individuals, there is a consensus that any natural or legal person, under public or private law, established in the EU or not, is eligible to bring action.<sup>10</sup> Likewise, there is no doubt that **an EU institution may not bring an action for damages** against another EU institution as, in legal terms, the defendant is the *European Union* as such, only represented by the given institution (in recent case law of the CJEU, this has been made explicit in the headings of the cases).

In 2017,<sup>11</sup> a total of 86 actions for damages were launched before the [General Court](#) (acting as a court of first instance), and a total of 22 appeals from that Court to the [Court of Justice](#). The rate of success of applicants has been relatively low. For instance, in 2016, the General Court ruled on 131 actions for damages, out of which applicants were successful in only nine cases (6.9 %) and 2017 only nine applicants were successful (out of the 113 cases decided by the General Court).

### Against whom may an action for damages be filed?

#### The EU as defendant

In formal terms, the action for damages must be brought either against the EU as a whole (represented by one or more of the institutions) or against the European Central Bank. This is because under Article 340(2) TFEU, it is the EU that is liable ('the European Union shall...'), while under Article 340(3) TFEU, it is the European Central Bank that is liable, 'notwithstanding' Article 340(2). Therefore, the formulation of Article 340(3) concerning the ECB, introduced in Lisbon, is understood as meaning that it is the ECB only that is liable for its acts, and not the EU as a whole (as in the case of other institutions).<sup>12</sup> Article 340(2) TFEU refers to 'institutions' but in practice this has

not been limited to 'institutions' as defined in Article 13 TEU, but the European Investment Bank has also been allowed to be held liable ([case C-370/89 SGEEM](#)). To sum up, all bodies and agencies and, after Lisbon, even the European Council (which is now officially an EU institution) may be defendants in the action for damages.<sup>13</sup>

A relatively new defendant institution is the **Court of Justice of the EU itself**, which can be sued for protracted proceedings (institutionally acting as *judex in causa sua*, a 'judge in its own case'). The first cases of this kind were decided as early as the 1990s (e.g. [case C-185/95 P](#), *Baustahlgewerbe*, where €50 000 were awarded for protracted proceedings before not only the Commission, but also the General Court). Some cases decided in 2017 and brought against the Court of Justice as institution include *Guardian Europe v EU (Commission and CJEU)* ([T-673/15](#)), *Plásticos Españoles v EU (CJEU)* ([T-40/15](#)), *Gascogne v CJEU and Kendrion v EU (CJEU)* ([T-479/14](#)). The substantive legal basis for such claims is Article 47 CFR, which provides for the right to have one's case heard by EU courts within a reasonable time (*Kendrion*, paragraphs 44-45). Actions for damages are also brought against the European Ombudsman, claiming compensation for breach of the right to good administration (e.g. case [C-337/15 P](#) *Claire Staelen v Ombudsman*).

## Joint liability of the EU and its Member States

Since most EU law is either implemented through national legislation (and then applied by national administrations) or directly applied by national administrations, the wrongful implementation and application of otherwise legal EU action may be ascribed exclusively to the Member States, making them liable for public torts.<sup>14</sup> However, if damage is caused jointly by an illegal action of the EU and one or several of its Member States, shared (concurrent) liability of both may be established. This occurs if 'it was illegal to delegate implementation to the Member State in the first place, or when Member States are liable for the implementation of a wrongful [EU] act'.<sup>15</sup> Were a Member State to be held liable for damages vis-à-vis an individual for implementing or applying EU law, this Member State could claim repayment of such damages from the EU and, in the event of non-payment, bring an action for damages.<sup>16</sup> However, no such case has, as yet, been brought.

## When may an action be filed?

### Liability for unlawful discretionary acts

In the case of discretionary acts, i.e. those that the EU institutions adopted with a certain margin of discretion, the so-called *Schöppenstedt* formula applies: the applicant must show 'sufficiently flagrant violation of a superior rule of law for the protection of the individual' (case [5/71](#)). The notion of '**sufficiently flagrant**' is, of course, a general clause (standard) open to the evaluation of the CJEU. As Raúl Letelier notes, the restrictions introduced in the CJEU case law with regard to EU liability for its discretionary acts 'are better explained from a public perspective of distribution of power than a private one focused only in a corrective of commutative justice'.<sup>17</sup>

In evaluating whether the breach is 'sufficiently flagrant', the CJEU analyses whether the institution '**manifestly and gravely**' disregarded the limits of its discretion ([C-198/03 P CEVA](#)), as well as the complexity of the situation that was subject to regulation and difficulties in interpreting the relevant rules of EU law ([C-472/00 P Fresh Marine](#)). Therefore, determination of the liability of the EU institutions is a matter of the General Court and Court of Justice interpreting vague, general and open norms. As the General Court has explicitly admitted:

*...the requirement of a sufficiently serious breach of Community law ... seeks, whatever the unlawful nature of the measure in question, to avoid the situation where the risk of having to bear the losses alleged by the undertakings concerned **hinders the ability of the institution concerned to fully exercise its competences in the general interest**, both in the context of its activities that are regulatory or involve economic policy choices and in the sphere of its administrative competence....*<sup>18</sup>

## Liability for unlawful non-discretionary acts

In the case of non-discretionary acts, a mere breach of law (even if it is not 'sufficiently serious') should be sufficient to obtain compensation from the EU. However, the CJEU has interpreted the notion of 'illegality' narrowly, excluding, for instance, an incorrect interpretation of a regulation ([cases 19, 20, 25, 30/69 Richez-Parise](#)) or lack of diligence by the Commission in applying EU law ([case T-178/98 Fresh Marine](#)).

## Liability for lawful acts

In its earlier case law, the General Court theoretically accepted the possibility of EU liability for lawful acts, under specific circumstances.<sup>19</sup> In *Dorsch Consult* ([case T-184/95](#)), it laid down three requirements for such possible liability: (1) unusual character of the damage; (2) special character of the damage; and (3) the fact that the lawful act was not justified by a general economic interest. The hypothetical possibility of EU liability for lawful acts was upheld in *Beamglow* ([T-383/00](#)), where the Court of First Instance specified that a damage is atypical if it exceeds the boundaries of economic risk typical for a given sector. Nonetheless, the issue of EU liability for lawful acts remained a theoretical question with no winning applicants.<sup>20</sup> In later case law, the CJEU rejected the possibility of such liability ([cases C-12 & 13/13 P Buono](#), paragraph 43). However, in a different case, it explored the possibility of damages in cases of a lawful act impinging upon the essence of a fundamental right, such as the fundamental right to property ([case C-120 & 121/06 P FIAMM](#)), paragraph 184). According to Nina Póltorak, however, *FIAMM* does not really allow for liability for lawful acts, 'but rather [refers] to the liability for the disproportionate limitations ... of the fundamental rights which infringe the EU standard specified in Article 52(1) CFR'.<sup>21</sup>

## Common requirements

On top of 'sufficiently flagrant violation' (in the case of discretionary acts) or mere illegality (in the case of non-discretionary acts), the applicant must also prove that he or she sustained damage and that there was a causal link between that damage and the illegal act of the institutions.

### Chain of causation

In proving the causal link, the applicant must prove that the chain of causation was not broken by the Member State or by the applicant ([case 132/77 Exportation des Sucres](#)). Negligence by the applicant will also lead either to the reduction of damages, or to rejection the action entirely ([case 145/83 Adams](#); [T-178/98 Fresh Marine](#)).<sup>22</sup>

### Damage

The applicant must prove that he or she suffered **certain, specific and quantifiable** damage.<sup>23</sup> In principle, the Court declares to take into consideration not only actual damage (*damnum emergens*), but also lost profit (*lucrum cessans*) ([C-104/89 & C-37/90 Mulder](#)).<sup>24</sup> However, in practice, it is very difficult to win a case claiming lost profit.<sup>25</sup>

### Must fault be proven?

In tort law, liability can either be **based on fault** or it can be **objective** ('absolute' or 'strict' liability), i.e. established merely on the basis of illegality, damage and causal link between the illegal action and the damage, without any need to prove fault. Fault can either be intentional (if the tortfeasor wished to commit the damage) or take the form of negligence (if the tortfeasor acted in a careless way leading to the damage). The CJEU has traditionally limited the conditions of EU liability for torts to three elements: an illegal act; a causal link; and damage (see cases: [C-352/98 Bergaderm](#), paragraph 42; [C-472/00 P Fresh Marine](#), paragraph 25), thereby leading scholars to conclude that fault is not required. However, some authors claim that interpretation of the liability test applied by the CJEU (especially regarding the notion of a 'sufficiently serious breach'), allows for fault in the form of 'institutional fault' and 'gross maladministration'.<sup>26</sup>

## Standard of proof

The laws of the Member States differ with regard to the standard of proof required to establish civil liability. In common law and Scandinavian law, the standard applied is 'preponderance of evidence'; in most continental legal systems, 'high probability' or 'very high probability'; and in German law, '(very) high probability' with regard to establishing the grounds for liability and 'clear preponderance' with regard to proving the actual amount of damages claimed.<sup>27</sup> The CJEU has never disclosed what standard of proof it applies, simply stating that the applicant failed to adduce sufficient evidence.<sup>28</sup>

## Deadline to file the action

According to Article 46 of the [CJEU Statute](#), action for damages must be filed within five years of the event that gives rise to EU liability. The exact starting point for the calculation of the deadline may be deferred to the moment in time when the event that caused the damages becomes fully known ([case 256/80 Birra Wührer](#)). Some authors claim that the deadline should start to run only once the damage becomes quantifiable.<sup>29</sup> If the damage caused by the EU institution is of a continuous nature (for instance if producers suffer a certain damage every single day over a period of time), the claims for compensation become successively time-barred, so that damages cannot be claimed beyond the five-year period prior to the filing of the action ([case 257/81 Birra Wührer II](#)).

An applicant may demand that an action be heard despite the deadline having passed if they were delayed in learning about the event that caused the damage and, owing to the expiry of the deadline, would not have been in a position to file the action ([case 145/83 Adams](#)). Nonetheless, the action must, in such a case, be filed within a 'reasonable' time. The running of the time limit is suspending when the applicant makes a request for legal aid,<sup>30</sup> and is stopped once the applicant actually files an action for damages (but not any other action, such as action for annulment, as ruled in [case C-282/05 P Holcim](#), paragraph 36). If the deadline has expired, it is up to the defendant institution to raise this fact; the Court will not take this into account *ex officio* ([case 20/88 Roquette](#)).

## Relationship to other actions

In its early case law, the CJEU treated action for damages as a subsidiary action. Applicants had first to bring an action for annulment or failure to act, and only then – if successful – bring an action for damages ([case 25/62 Plaumann](#)). Later on, the Court changed its approach and proclaimed action for damages as being an independent remedy, not conditional on the earlier successful pursuit of a different cause of action ([case 4/69 Lütticke](#)). This approach has been consistently followed in later case law.<sup>31</sup> However, litigants may not abuse action for damages with the purpose of reaching the results they should seek to achieve by using action for annulment or for failure to act (cases: [T-166/98 Dolianova](#), [T-86/03 Holcim France](#)).<sup>32</sup>

## Jurisdiction and possible compensation

### Jurisdiction

The jurisdiction of the CJEU (comprising the General Court and Court of Justice) in tort cases against the EU is exclusive ([Article 268 TFEU](#)). This means that the EU cannot be sued in tort before a different court (national or international). Within the CJEU, all actions for damages are heard by the General Court (Article 51 [CJEU Statute](#)). Any party may lodge an appeal regarding that decision before the Court of Justice, acting as the court of second instance. In 2017, the Court of Justice decided on 21 appeals from the General Court in damages cases.<sup>33</sup> Only two appeals were successful (cases [C-337/15 P](#) and [C-677/15 P](#)).

### Possible compensation to the applicant

If the action for damages is successful, the applicant can be granted compensation from the budget of the EU. The absence of an act of secondary EU law regulating the issue means that there are no

specific rules regarding the amount of compensation or the method for its calculation. In practice, if the General Court rules that an institution is liable, it leaves the calculation to the parties – to be reached amicably. Only if they do not reach an agreement does the case come back to the Court in order to decide on the amount of damages.<sup>34</sup> Therefore, since the content of such amicable agreements is not published systemically, it is difficult to ascertain the amount of damages awarded. The available sources are, firstly, the sums allocated for this purpose in the EU budget and, secondly, those cases in which the Court decided explicitly about the amount of damages.

The Court may grant both material damages (*damnum emergens* [actual loss] and *lucrum cessans* [lost profit]), as well as non-material damages (*préjudice moral*), i.e. those that are not of a patrimonial nature, but are a form of quantification of the applicant's suffering, distress, loss of faith in the EU justice system, etc.<sup>35</sup> In the case of actions for damages on account of protracted proceedings, the Court awards both material damages (on account of actual loss or lost profit) and non-material ones. For instance, in the recent case of *Kendrion* (T-479/14), the General Court awarded €590 000 in material damages, and €6 000 in non-material ones.

## Relevant items in the EU budget

Within the EU budget, sums for damages are provided for each institution, and for the Commission separately for general administrative matters and for common agricultural policy matters. These appropriations are intended to cover not only actual damages paid out to winning parties, but also legal costs incurred by the institution, before both EU and national courts, in contractual as well as in delictual damages. Therefore, only a fraction of these sums is destined to be paid out under Article 340(2) TFEU.

Table 1 – Sums earmarked for liability in damages in the [2018 EU budget](#)

Institution	Budget article and item	Appropriation (in €)
Commission – administrative issues	26 01 60 07	150 000
Commission – common agricultural policy issues	05 07 02	124 500 000
Commission – competition policy	03 01 07	5 869 123
Committee of the Regions	2 3 2 (p. 2063)	30 000
Council and European Council	2 3 3 6 (p. 296)	1 000 000
Court of Auditors	2 3 <sup>o</sup> 2 (p. 2109)	200 000
Court of Justice	2 3 <sup>o</sup> 2 (p. 2061)	130 000
European External Action Service	2 2 3 6 (p. 2355)	293 000
European Economic and Social Committee	2 3 <sup>o</sup> 2 (p. 2166)	150 000
European Parliament	2 3 2 (p. 213)	1 010 000
Ombudsman	2 3 2 (p. 2257)	15 000
<b>Total</b>		<b>133 347 123</b>

The sums earmarked for damages in the case of some institutions have grown significantly in comparison to the [2017 budget](#), for instance in the case of the European External Action Service from €80 000 to €293 000 or in the case of the Court of Justice from €70 000 to €130 000.

The actual sums awarded by the General Court to winning applicants vary. For instance, in 2016 and 2017 the following damages were awarded:

Table 2 – Damages awarded by the General Court and Court of Justice in 2016-2017<sup>36</sup>

Case				Damages (in €)	
Number	Applicant	Defendant	Subject matter	Material	Non-material
<a href="#">C-337/15 P</a>	Claire Staelen	Ombudsman	Maladministration	--	7 000
<a href="#">T-673/15</a>	Guardian Europe	Commission and CJEU	Protracted proceedings	654 523.43	--
<a href="#">T-40/15</a>	Plásticos Españoles	CJEU	Protracted proceedings	44 951.24	--
	Armando Álvarez	CJEU	Protracted proceedings	111 042.48	--
<a href="#">T-577/14</a>	Gascogne Sack Deutschland and Gascogne	CJEU	Protracted proceedings	47 064.33 (Gascogne)	5 000 each
<a href="#">T-479/14</a>	Kendrion NV	CJEU	Protracted proceedings	588 769.18	6 000
<b>Total</b>				<b>1 446 350.66</b>	<b>23 000</b>

## Evaluation

### Critique of the 'hurdles' faced by applicants

Academics have noted the unusually low success rate of actions for damages against the EU. According to the research available,<sup>37</sup> from the beginning of the Community until 2000, only 20 actions for damages were successful, and in the 2000 to 2014 period, only 19. The average rate of success is calculated at 8%. This has led to criticism. Scholars have pointed out that the requirements found in the CJEU's judge-made law on EU liability for public torts make it very difficult to receive compensation. As Cees Van Dam notes, 'the loud barking of the principle of liability rarely leads to a bite. In practice, the claimant has many hurdles to overcome ... and it is, therefore, not surprising that most runners never reach the finish line'.<sup>38</sup> Kathleen Gutmann agrees that 'the hurdles that must be surmounted by applications in order to obtain compensation... remain high'.<sup>39</sup> Therefore, in Van Dam's view, CJEU case law makes 'only a modest contribution to breaking down immunities of public bodies',<sup>40</sup> i.e. the EU institutions, and, as Nina Pórtorak emphasises, 'the liability in damages of the EU can hardly be treated as an effective remedy protecting individuals'.<sup>41</sup> As a result, Andrea Biondi and Martin Farley go as far as to claim that 'the Court is, in effect, only paying lip service to its commitment to individual protection. A right cannot be properly called a right ... unless it is capable of being enforced'.<sup>42</sup> Also in the view of Van Dam, the hurdles set up by CJEU case law are so rigorous that it 'calls into question the effectiveness of the rules of liability for breach of EU law'.<sup>43</sup> Specific criticism has been directed at the requirement of fault (the notion of 'sufficiently flagrant violation' and 'manifest and grave disregard of the limits on the exercise of power') for which the CJEU 'requires proof of special and abnormal damage', leading, in the view of Luisa Antoniolli, to double standards as 'the standards applied to Member State liability for normative acts are stricter than the one employed for the [EU]'.<sup>44</sup>

## Criticism of the inconsistencies of the rules developed in the case law

Not only have the difficulties in winning a case been criticised by experts, but also the complexity and lack of clarity of the principles developed by the Court. In the words of Van Dam, 'the framework developed by the ECJ is haphazard, riddled with inconsistencies and lacks an overarching approach based on the general principles of the Member States'.<sup>45</sup>

## Political nature of public tort law

A third cause for criticism is the fact that laying down the rules and principles of public tort law is, ultimately, a political rather than merely technical exercise. As Letelier highlights, the question of laying down the principles of EU liability *vis-à-vis* individuals is highly political precisely because 'the problem is not only to look for a fair compensation of the damages that apply the principles of commutative justice or to find the best corrective sanction ... Public liability [such as that under Article 340 TFEU] is a decision about **how we wish to be governed** because it always involves an idea of how to design checks and balances between public powers and how to build a suitable relationship between norms'.<sup>46</sup>

Hence, in his view, the exact layout of the action for damages under Article 340 TFEU and, more specifically, the conditions and extent of EU liability for its legislative and administrative acts, are not something that can be simply deduced from the succinct wording of the treaty or produced on the basis of comparative analysis. It involves choices that are pertinent to the shape of the European polity<sup>47</sup> and hence would lend themselves to democratic debate within the framework of the ordinary legislative procedure. Letelier actually criticises the CJEU for treating the law of liability merely as a matter of compensation and overlooking the nature of the defendant – the European Union itself.<sup>48</sup> Furthermore, he claims that 'public tort law is a mechanism for allocation of economic resources and this type of allocation is precisely one of the tasks of the political process'.<sup>49</sup> Public tort law also has clear budgetary implications.<sup>50</sup>

## The link to European private law

Furthermore, as Gutman points out, 'the case law on the Union's non-contractual liability is littered with concepts – e.g. **damage, loss, injury, causal link, fault, negligence**, etc. – that are interpreted differently in the Member States'. In this context, she notes that the Court's case law interpreting those notions in the context of Article 340 TFEU has been relied upon by various academic groups working on the unification of European private law and also, vice versa, the workings of such groups (European group of tort law, Study group on a European civil code, Commission on European contract law) have been relied upon by advocates general (such as [AG Mengozzi](#) in C-282/05 *P Holcim*, paragraphs 58 and 115), by the Commission ([case T-333/03 Masdar](#), paragraphs 89-90) or in applicants' arguments before the Court ([cases T-8 & 9/95 Pelle and Konrad](#), paragraphs 43, 54, and 97). This phenomenon of interaction between European private law and the law on EU liability in damages could be seen as an additional argument in favour of codifying the principles, hitherto vaguely expressed in Article 340 TFEU.

## Conclusions

The terse and simultaneously vague<sup>51</sup> Treaty provisions on the extra-contractual liability of the EU, already introduced in the Paris and Rome Treaties, have remained virtually unchanged over the years. Despite the reference to 'general principles common to the laws of the Member States' as a source of the rules governing the EU's liability in damages, the CJEU has developed those rules without analysing, at least not explicitly, the relevant rules and principles of national law. In practice, the number of cases in which applicants manage to win compensation from the EU has remained very low over the years, arguably discouraging litigation.

## MAIN REFERENCES

- Biondi A., *The Right to Damages in European Law*, Wolters Kluwer, 2009.
- Van Dam C., *European Tort Law*, Oxford University Press, 2013.
- Brüggeemeier G., *Tort law in the European Union*, Kluwer, 2015.

## ENDNOTES

- <sup>1</sup> See P. Tuleja, *Prawo konstytucyjne RP*, C.H. Beck 2005, p. 205; R. Mańko, 'Odpowiedzialność deliktowa Wspólnot Europejskich' in *Unia Europejska: Prawo instytucjonalne i gospodarcze*, ed. A. Łazowski, ABC 2008, p. 605.
- <sup>2</sup> M. Kotzur in *European Union Treaties: A Commentary*, C.H. Beck 2015, p. 1025.
- <sup>3</sup> J. Wakefield, *Judicial Protection Through the Use of Article 288(2) EC* (The Hague 2002), p. 2; A. Łazowski & A. Zawidzka, *Prawo międzynarodowe publiczne*, Warszawa, 2003, p. 48; N. Półtorak in *Traktat o funkcjonowaniu Unii Europejskiej*, ed. A. Wróbel, LEX, 2012, p. 1028.
- <sup>4</sup> M. Kotzur, op. cit., p. 1025; K. Gutman, '[The evolution of the action for damages against the European Union and its place in the system of judicial protection](#)' *Common Market Law Review* 48/2011, p. 700.
- <sup>5</sup> See for example E. Bagińska, *Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej*, Warszawa, 2006, pp. 7, 20-21, 54, 80, and 117; C. Van Dam, *European Tort Law*, OUP, 2013, p. 530.
- <sup>6</sup> M. Kotzur, op.cit., p. 1026. See also N. Półtorak, 'Action for Damages in the Case of Infringement of Fundamental Rights by the European Union' in *Damages for Violations of Human Rights*, ed. E. Bagińska, Springer, 2016, p. 430.
- <sup>7</sup> N. Półtorak, 'Action for Damages', p. 429.
- <sup>8</sup> See for example P. Oliver, 'Joint Liability' in *The Action for Damages in Community Law*, ed. T. Heukels and A. McDonald, Kluwer, 1997, p. 295; C. Stefanou and H. Xanthaki, *Legal and Political Interpretation of Article 215(2)*, Ashgate, 2000, p. 75; U. Säuberlich, *Die ausservertragliche Haftung im Gemeinschaftsrecht*, Springer, 2005, pp. 175-181 (on the basis of Article 10 TEC); R. Mańko, 'Zasada solidarności a odpowiedzialność odszkodowawcza Wspólnoty' in *Solidarność jako zasada działania Unii Europejskiej*, ed. C. Mik, TNOiK, 2009, pp. 115-152; A. Biondi and M. Farley, *The Right to Damages in European Law*, Wolters Kluwer, 2009, p. 88; M. Ahl, M. Szpunar, M. Nowacki, *Prawo europejskie* (5th ed., C.H. Beck 2011), p. 139; R. Ostrihansky in *Prawo instytucjonalne Unii Europejskiej*, 6th ed., CH Beck, 2015, p. 401.
- <sup>9</sup> See for instance A. Wyrozumski, 'System ochrony prawnej' in *Prawo nii Europejskiej. Zagadnienia systemowe*, ed. J. Barcz, Warszawa, 2003, p. 300; C. Mik, *Europejskie prawo wspólnotowe*, Warszawa, 2000, p. 769.
- <sup>10</sup> M. Kotzur, op.cit., p. 1026.
- <sup>11</sup> All data in this box are the fruit of a search of the CJEU's official [InfoCuria](#) database (last accessed: 15 May 2018).
- <sup>12</sup> N. Półtorak in *Traktat*, p. 1028.
- <sup>13</sup> K. Gutman, op.cit., p. 701.
- <sup>14</sup> L. Antonioli, 'Community Liability' in *Tort Law of the EC*, ed. H. Koziol and R. Schulze, Springer, 2008, p. 222.
- <sup>15</sup> L. Antonioli, 'Community Liability', p. 222.
- <sup>16</sup> N. Półtorak in *Traktat*, p. 1053.
- <sup>17</sup> R. Letelier, '[Democracy and non-contractual liability of states for breaches of EU law](#)', in *The Sinews of European Peace: Reconstituting the Democratic Legitimacy of the Socio-Economic Constitution of the European Union*, ed. R. Lettier and A. J. Mendendez, Oslo: ARENA, 2009, p. 289 n. 66.
- <sup>18</sup> C-429/05 *Artedogan*, para. 55.
- <sup>19</sup> R. Mańko, 'Odpowiedzialność', pp. 642-644; P. Craig and G. de Burca, op.cit., pp. 570-571.
- <sup>20</sup> K. Scheuring, *Ochrona praw jednostek w postępowaniu przed sądami wspólnotowymi*, Wolters Kluwer 2007, p. 176.
- <sup>21</sup> N. Półtorak, 'Action', p. 437.
- <sup>22</sup> P. Craig and G. de Burca, op.cit., p. 573.
- <sup>23</sup> P. Craig and G. de Burca, op.cit., p. 573.
- <sup>24</sup> N. Półtorak in *Traktat*, p. 1046.
- <sup>25</sup> P. Craig and G. de Burca, op.cit., p. 574.
- <sup>26</sup> G. Brüggeemeier, *Tort Law in the European Union*, Wolters Kluwer, 2015, p. 74; Antonioli, op.cit., p. 238.
- <sup>27</sup> G. Brüggeemeier, *Tort Law*, p. 76.
- <sup>28</sup> G. Brüggeemeier, *Tort Law*, p. 76.
- <sup>29</sup> M. Broberg, 'The Calculation of the Period of Limitation in Claims Against the European Community for Non-Contractual Liability', *European Law Review*, 26(3), 2001, p. 277.

- <sup>30</sup> M. Broberg, *op.cit.*, p. 287; Case T-92/92 *Lallemand-Ziller*.
- <sup>31</sup> K. Gutman, *op.cit.*, p. 703.
- <sup>32</sup> K. Gutman, *op.cit.*, pp. 704-705.
- <sup>33</sup> Source: search in the CJEU's official [InfoCuria](#) database (last accessed: 15 May 2018).
- <sup>34</sup> R. Mańko, 'Odpowiedzialność...', p. 650.
- <sup>35</sup> R. Mańko, 'Odpowiedzialność...', pp. 647-650.
- <sup>36</sup> Source: search in the CJEU's official InfoCuria database. Staff cases, based on the Staff Regulations and not Article 340 TFEU, were omitted. Last checked: 15 June 2018.
- <sup>37</sup> Data after N. Pótorak, 'Action', p. 439 n. 48-49.
- <sup>38</sup> C. Van Dam, *European Tort Law*, OUP 2013, p. 50.
- <sup>39</sup> K. Gutman, *op.cit.*, p. 750.
- <sup>40</sup> C. Van Dam, *European Tort Law*, OUP 2013, p. 533.
- <sup>41</sup> N. Pótorak, 'Action for Damages', p. 439.
- <sup>42</sup> A. Bioni, M. Farley, *The Right to Damages in European Law*, Wolters Kluwer 2009, p. 162.
- <sup>43</sup> C. Van Dam, *European Tort Law*, OUP 2013, p. 50.
- <sup>44</sup> L. Antonioli, *op.cit.*, p. 238.
- <sup>45</sup> C. Van Dam, *European Tort Law*, OUP 2013, p. 50.
- <sup>46</sup> R. Letelier, 'Democracy', p. 289.
- <sup>47</sup> R. Letelier, 'Democracy', p. 291-292.
- <sup>48</sup> R. Letelier, 'Democracy', *op.cit.*, p. 292.
- <sup>49</sup> R. Letelier, 'Democracy', *op.cit.*, p. 301. Cfr. L. Letelier, [Non-Contractual Liability for Breaches of EU Law. The Tension Between Corrective and Distributive Justice](#), RECON Online Working Paper 2010/24, p. 15.
- <sup>50</sup> R. Letelier, 'Non-Contractual Liability', pp. 14-15.
- <sup>51</sup> N. Pótorak, 'Action for Damages', p. 430.

## DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2018.

Photo credits: © European Union – Court of Justice of the EU / G.Fessy.

[ep@ep.europa.eu](mailto:ep@ep.europa.eu) (contact)

[www.eprs.ep.parl.union.eu](http://www.eprs.ep.parl.union.eu) (intranet)

[www.europarl.europa.eu/thinktank](http://www.europarl.europa.eu/thinktank) (internet)

<http://epthinktank.eu> (blog)

