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THE ACTION FOR DAMAGES AGAINST THE EUROPEAN UNION: THE DIFFICULT RECOGNITION OF THE EU LIABILITY IN THE RECENT CASE LAW OF THE COURT OF JUSTICE***

Summary

An action for damages against the European Union (EU) may be brought by any person who considers that the EU has incurred non-contractual liability. In particular, the Court of Justice can be directly appealed for the purpose of establishing the EU's liability and obtaining compensation for damage caused by unlawful acts and conduct committed by the EU Institutions or bodies or by their servants in the performance of their duties.

This type of action, as is well known, is not typical only of EU Law, as most legal systems - both of States and International Organizations - provide for the liability of public administrations for damage done to individuals.

As for the EU, this set of rules is codified by the Treaties in a few and vague regulatory provisions, that basically refer to the "general principles common to the laws of the Member States" (Article 340, TFEU). Given the significant differences between the national regulatory systems in the EU Member States in this matter, as well as the mentioned haziness and brevity of the normative

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provisions of the EU Treaties, a central role has been played, over time, by the CJEU. In its even recent jurisprudence, however, a difficult recognition of the EU Liability can be noticed, as will be analysed in this paper.

Keywords: *Action for Damages, Compensation, European Union, EU Liability, Court of Justice.*

1. Introduction

The action for damages against the EU is provided for by the Treaties as a specific type of appeal that can be brought before the Court of Justice of the European Union (comprising the Court of Justice - or "the Court" - and the General Court, collectively indicated as "EU Courts").[1]

In particular, the Court can be directly appealed by any EU Member States, legal person or individual (who are, therefore, the appellants), for the purpose of establishing the Union's non-contractual liability and, consequently, obtaining compensation for damage caused by the EU Institutions or bodies or by their servants in the performance of their duties.

This action, therefore, "seeks to have the Union held non-contractually liable to make good damage caused by its institutions or by its servants in the performance of their duties"[2] and its role and effectiveness shall be considered in the more general framework of the EU judicial system and its relationship to other actions brought before the Union Courts, such as the action for annulment or the action for failure to act. That is why next paragraph will deal with the legal framework governing the action for damages and its functioning in practice.

Moreover, in a further paragraph, an evaluation of the Court's jurisprudential practice will be attempted, in the belief that the Union Courts' case law is the main data to consider and interpret in order to assess whether EU liability is actually recognized.

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[1] See Article 19 (1) of the Treaty on European Union (hereinafter: TEU) - consolidated version (OJ C 202 of 7.6.2016, 13-45): "1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed."

[2] K. Lenaerts, K. Gutman, J. T. Nowak, "The Action for Damages", in: *EU Procedural Law* (eds. K. Lenaerts, K. Gutman, J. T. Nowak), Oxford University Press, Oxford 2023, 473–520.

2. The Legal Framework and the Functioning of the Action for Damages

As for the legal framework that regulates the action for damages against the EU, it is necessary first of all to recall the provisions of the primary law of the European Union, starting from Article 268 of the Treaty on the Functioning of the European Union (TFEU), which establishes the jurisdiction of the Court of Justice in this matter. Pursuant this provision, "the Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage".[3]

The exclusivity of the jurisdiction of the Court of Justice in disputes relating to compensation for damage against the EU can be easily deduced from this provision. Consequently, jurisdiction of national Courts of the EU Member States, as well as of any other International Jurisdiction, is excluded, making impossible to sue the EU before national or international courts to obtain compensation for a damage caused by the administrative or legislative activity of its institutions, bodies or servants.[4]

In addition to Article 268 TFEU, another provision of absolute importance for the topic we are dealing with is Article 340 TFEU, that codifies and regulates the conditions for the liability of the EU for public torts (wrongs), in the form of action for damages against the EU.[5]

In particular, paragraph 1 of Article 340 sets for the contractual liability of the Union, providing that it "shall be governed by the law applicable to the contract in question".[6]

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

[3] Art. 268 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) of 13 December 2007 - consolidated version (OJ C 202 of 7.6.2016, 47-360). It should be recall that there are no sources of secondary EU law that regulate the matter in detail.

[4] For an in-depth overview on the topic see, among others, A. Biondi, M. Farley, *The Right to Damages in European Law*, Wolters Kluwer, 2009.

[5] It should be recalled that the liability of the EU for public torts (wrongs) in the form of action for damages against the EU, codified in Article 340 of the TFEU, falls within the area of law known as "public tort law". This is an area specific to both the legal systems of States and International Organizations, each of which establishes its own rules with regard to the liability of public administrations for damage done to individuals. As for the the European Union, it is referred to, among many, the essential Volumes of G. Brüggemeier, *Tort Law in the European Union*, Wolters Kluwer, 2018; C. Van Dam, *European Tort Law*, Oxford University Press, Oxford 2013.

[6] Art. 340, para. 1 TFEU.

good any damage caused by its institutions or by its servants in the performance of their duties".[7]

Notwithstanding this, 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".[8]

Finally, last paragraph of Article 340 provides that the personal liability of its servants towards the Union "shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them."[9]

Together with the provisions of the TFEU, we should also recall the Charter of Fundamental Rights of the European Union and, in particular, Article 41 entitled "Right to good administration", that states, at paragraph 3: "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".[10]

Thus, with the entry into force of the Lisbon Treaty and of the Charter of Fundamental Rights at the same level as the Treaties in 2009, "the right to damages became an officially binding fundamental right, considered as part of the right to good administration".[11]

As can be deduced from the regulatory provisions reported here, there isn't any list of possible appellants in the mentioned articles, except for the reference to "every person" (to be read as any natural or legal person) in Article 41 of the Charter of Fundamental Rights.[12] The other categories of appellants for an action for damages can be thus deduced from the "general principles common to the laws of the Member States", as for Article 340. At this regard, the question remains open whether an action for damages can be brought by a EU Member State; also by analogy with other types of appeal

[7] Art. 340, para. 2 TFEU.

[8] Art. 340, para. 3 TFEU.

[9] Art. 340, para. 4 TFEU.

[10] Art. 41, para. 3 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, 391–407).

[11] European Parliamentary Research Service (EPRS), *Action for damages against the EU*, Brussels 2018, 1-11, available on the European Parliament Website at the following link: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf, last visited on August 1st, 2024.

[12] R. Geiger, D. E. Khan, M. Kotzur, *European Union Treaties: A Commentary*, C.H. Beck, London 2015, 1026.

typical of the European Union jurisdictional system, many scholars affirm this possibility, even if it has not occurred in practice so far.[13]

As for the possible subject against whom an action for damages can be filed, we should read together paragraph 2 of the aforementioned Article 340, that indicates the EU liable as a whole («the Union shall [...] make good any damage caused by its institutions or by its servants […]") and paragraph 3 (introduced by the Lisbon Treaty), stating the liability of the European Central Bank (ECB), that is, thus, liable for its own acts. The reference to "institutions" by Article 340, paragraph 2, makes it possible that all Institutions – to be intended, given the CJEU case law, as including all bodies and agencies - may be defendants in the action for damages.[14]

Another essential aspect to be examined with regard to the functioning of the action for damages concerns the main substantive requirements under which the EU liability can be established. In fact, such liability presupposes that three cumulative conditions relating to unlawfulness are met – so the claimant must prove that all three of the following elements cumulatively prevail - namely: a sufficiently serious breach of a rule of law intended to confer rights on individuals; the fact of damage; the existence of a causal link between the unlawful conduct of the European Union and the harm suffered and damage claimed.

These conditions have been developed by the Union Courts that, in the relevant case law, have underlined the necessity for individuals to establish that three substantive conditions are satisfied cumulatively in order for the European Union to incur non-contractual liability, and more specifically: the unlawfulness of the conduct attributable to the institution or its servants in the performance of their duties in the light of EU law (conduct consisting of a positive action or an omission or abstention); the existence of real and certain damage; the existence of a causal link between the alleged conduct and the damage complained of.[15]

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[13] A. Biondi, M. Farley, 88.

[14] 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, 701.

[15] See, *inter alia* and in the most recent case-law: Judgment of the General Court of 5 June 2024, *Malacalza Investimenti Srl and Vittorio Malacalza v European Central Bank,* C T-134/21, ECLI:EU:T:2024:362, paragraph 34; Judgment of the Court of 20 September 2016, *Ledra Advertising and Others v Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 64; see also Judgment of the General Court of 7 October 2015, *Accorinti and Others v ECB*, T-79/13, EU:T:2015:756, paragraph 65; Judgment of

As for the Court deciding on the admissibility of the action, this depends on the fact that the damage is attributable to an institution, as well as that it was caused by an institution or one of its staff in the performance of their duties.

Furthermore, certain additional requirements are generally relevant to its admissibility, such as compliance with the limitation period. In particular, proceedings against the Union in matters arising from non-contractual liability "shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union".[16]

In the latter case, the application must be made within the period of two months or, if the institution concerned fails to respond, under the conditions laid down for bringing an action for failure to act.[17]

As already mentioned, there are no sources of secondary EU law that regulate the matter of the action for damages in detail. This also concerns the amount of possible compensation to grant to the applicant from the EU budget. Thus, there are no specific rules regarding the amount of compensation or the method for its calculation, and also this aspect is left to the discretion of the Union Courts. In most cases, when the General Court rules that an institution is liable, it let the parties decide amicably on the calculation and amount of damages. Only in case an amicable agreement is not reached, it is up to the Court to decide the amount of the compensation.[18]

Looking at the practice in this matter, it is easy to notice how, in proportion, very few have been the cases in which satisfaction has been given to the applicants, thus making it difficult to recognise the EU's liability, as will be better evaluated in the next paragraph.

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the General Court of 2 March 2010, *Arcelor SA v European Parliament and Council of the European Union*, T-16/04, ECR, EU:T:2010:54, paragraph 139 and the case-law cited; Judgment of the Court of 9 November 2006, *Agraz and Others v Commission*, C-243/05 P, ECR, EU:C:2006:708, paragraph 26; Judgment of the Court of 30 June 2005, *Alessandrini Srl and Others v Commission* [2005], Case C-295/03 P, ECR I-5673, paragraph 61.

[16] Statute of the Court of Justice of the European Union (consolidated version), Art. 46.

[17] In particular, according to the mentioned Article 46 of the Statute of the CJEU, "In the latter event the proceedings must be instituted within the period of two months provided for in Article 263 of the Treaty on the Functioning of the European Union; the provisions of the second paragraph of Article 265 of the Treaty on the Functioning of the European Union shall apply where appropriate".

[18] European Parliamentary Research Service, 7. It should be recalled that it is possible for the Court to quantify both material and immaterial damages.

3. The Case Law of the Court of Justice: The Recognition of the EU Liability in Practice

With regard to the effective recognition of the EU Liability, it should be noted the very low number of cases in which the Union Courts have ruled in favour of the applicants, thus recognising their right to compensation for damages.

From this point of view, many Authors have criticized this EU jurisprudential practice, underlining how difficult it is for individuals to have their "Right to good administration" guaranteed and to breach immunity of EU institutions and bodies.[19]

This is explained by several Scholars with the fact that the requirements developed and specified over time by the EU Judge are such as to make it very difficult to meet them in order to demonstrate EU liability and receive compensation.[20]

In this regard, several cases decided by Union Courts can be recalled and among these it is worth mentioning - as it is, at the time we are writing, one of the latest in order of time to exemplify this jurisprudential orientation, as well as for the notable media coverage it has been the object of in the country of the parties (Italy) - the case *Malacalza Investimenti Srl and Vittorio Malacalza* v *European Central Bank* (hereinafter *Malacalza* case).[21]

In particular, in his Judgment of 5 June 2024 given in the '*Malacalza* case', the General Court of the European Union has dismissed the action for damages brought by Malacalza Investimenti and Mr Vittorio Malacalza against the ECB stating that none of the instances of unlawful conduct alleged against the ECB (in the context of its supervision of Banca Carige between 2014 and 2019) and relied on by the applicants "is capable of giving rise to non-contractual liability on the part of the European Union within the meaning of the third paragraph of Article 340 TFEU."[22]

More in detail, we should contextualize the General Court's decision by recalling that Banca Carige is a major credit institution established in Italy which is listed on the stock exchange and has been subject to direct prudential supervision by the ECB since 2014.[23]

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[19] In this sense, see C. Van Dam, 533, but 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, 439.

[20] On this point, see A. Biondi, M. Farley, 162; K. Gutman, 700.

[21] Judgment *Malacalza*, C T-134/21, cit.

[22] Judgment *Malacalza*, C T-134/21, paragraph 216.

[23] This supervision is to be framed within the Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating

Between 2015 and 2019, the ECB adopted several intervention measures in the context of that supervision until the decision to place the bank under temporary administration.[24]

to the prudential supervision of credit institutions (OJ 2013 L 287, 63-89).

[24] In particular, by decision of 9 December 2016, the ECB adopted an early intervention measure which consisted of requesting that the bank submit, by 28 February 2017, a strategic plan and an operational plan to reduce the issue of non-performing loans, with a clear indication of the measures to be taken and the schedule to be followed in order to achieve that objective. In order to meet the objectives set out in the early intervention measure, in September 2017 the bank's board of directors approved a recapitalisation plan which included, inter alia, a capital increase of EUR 560 million to be implemented by the end of 2017; plan completed in December 2017, for an amount of EUR 544 million.

Few days after, the ECB notified the bank of its decision establishing the prudential requirements for 2018 and, as a consequence, the bank tried unsuccessfully to increase its own funds in order to meet the applicable requirements.

Later on, given the bank's failures in its attempt to place its capital instruments on the market, by decision of 14 September 2018 ('the own funds decision') the ECB refused to approve the capital conservation plan drawn up by the bank and asked it to submit and obtain approval from its board of directors, by 30 November 2018 at the latest, of a new plan to restore and ensure sustainable compliance with the financial requirements by 31 December 2018 at the latest. In response to that request, the bank's board of directors adopted a capital strengthening plan involving two stages: the issue of Class 2 subordinated bonds and an increase in capital subject to shareholder approval.

About the second stage, the proposal was rejected given the opposition expressed by shareholders holding 70% of the capital, thus causing the resignation of several members of the bank's board of directors. Those resignations led to the disqualification of that board of directors pursuant to Article 18(12) of the bank's statutes and Article 2386 of the Italian Civil Code.

On 1 January 2019, the ECB decided to place the bank under temporary administration pursuant to the italian *Testo unico delle leggi in materia bancaria e creditizia* (consolidated version of the Legislative Decree No 385 of 1 September 1993, transposing Article 29 of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms) thus provoking that the trading of securities issued or guaranteed by the bank was suspended by the Italian National Companies and Stock Exchange Commission during the period of application of that decision or until the restoration.

The decision to place the bank under temporary administration was extended three times until, on August 2019, the bank, Cassa Centrale Banca – Credito Cooperativo Italiano, the FITD and the FITD's voluntary intervention fund signed a framework agreement defining the characteristics of a business plan which provided for a capital

The appeal filed by Mr Vittorio Malacalza, an individual shareholder of the bank, and Malacalza Investimenti, an investment company, which in 2018 were the largest shareholders of Banca Carige with a 27.5% share before the temporary administration decided by the ECB the following year, was aimed at contesting the decisions (and omissions) of the supervisory body and the final decision to initiate extraordinary temporary administration at the beginning of 2019.[25]

Both applicants claimed that the General Court should order the European Union to pay them, respectively, the sums of EUR 9 546 022 (for the former) and EUR 870 525 670 (for the latter) as compensation for the harm which they considered they have suffered as a result of actions undertaken by the ECB in the context of its supervisory functions over Banca Carige. From their point of view, in fact, some of those actions were contrary to the duties associated with those functions, such as the principles of protection of property, proportionality, sound administration, impartiality, equal treatment, transparency, good faith and the protection of legitimate expectations.

In particular, the applicants claimed that the European Union has incurred non-contractual liability on the basis of eight instances of unlawful conduct on account of the sufficiently serious breach by the ECB of EU rules in its relations with the bank's board of directors and of the Italian law.[26]

Furthermore, the applicants complained sufficiently serious breaches by the ECB: "when adopting the early intervention measure, of various rules

increase of EUR 700 million and the issue of new Class 2 subordinated bonds.
This proposed capital increase was considered, by the ECB, "not contrary to the sound and prudent management of the bank", and was approved at an extraordinary general meeting of the bank's shareholders on September 2020. After the implementation of the capital increase, on January 2020 a new board of directors and supervisory board were elected at the bank's ordinary general meeting of shareholders, thus putting an end to the temporary administration of the credit institution (cfr. paragraphs 6-25 of the Judgment *Malacalza*, C T-134/21).

[25] For an initial comment immediately after the Judgment see, among others, the article published in the Italian daily newspaper *La Repubblica* on June 5th, 2024: *Corte UE respinge ricorso e maxi risarcimento ai Malacalza per Banca Carige,* available at https://finanza.repubblica.it/News/2024/06/05/corte_ue_respinge_ricorso_e_maxi_risarcimento_ai_malacalza_per_banca_carige-45/, last visited on August 1st, 2024.

[26] In particular, the applicants claimed that a sufficiently serious breach by the ECB of Italian law would have occurred: when the ECB failed to intervene to rectify misleading statements made about the soundness of the bank by its directors; as regards the approval, on September 2019, of an increase in capital contrary to the pre-emption rights provided for in the bank's statutes; in relation to the appointment of temporary administrators who had a conflict of interest.

and principles"; "in the own funds decision, of the principle of proportionality as a result of the imposition on the bank of a period of time that was too short to allow it to comply with the own funds requirements imposed on it»; «of the principle of the protection of legitimate expectations as a result of the assurances given to shareholders as to the situation of the bank"; "of the shareholders' right to property as a result of the significant reduction in the value of their shareholdings in the bank".[27]

In its judgment the General Court pointed out, as a preliminary remark and referring to its own case-law, that the European Union "is a union based on the rule of law in which its institutions, bodies, offices and agencies are subject to review of the conformity of their acts, *inter alia*, with the Treaty and the general principles of law."[28]

The General Court then recalled that, in order for the European Union to incur non-contractual liability, "individuals must establish that three conditions are satisfied cumulatively: the unlawfulness of the conduct attributable to the institution or its servants in the performance of their duties, the fact of damage and the existence of a causal link between the alleged conduct and the damage complained of."[29]

With regard to the first of the mentioned conditions, the General Court considered appropriate to examine whether it was satisfied in the *Malacalza* case, affirming that, according to the relevant and consolidated case-law, that is the case "where the contested conduct involves a rule of law intended to confer rights on individuals and where the breach alleged against the institution is sufficiently serious."[30]

Thus, according to the General Court as regards the first requirement concerning the nature of the rules which may give rise to the non-contractual liability of the European Union, "the case-law makes it clear that a rule of law is intended to confer rights on individuals where it creates an advantage for

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[27] Judgment *Malacalza*, C T-134/21, paragraph 28.

[28] *Ibid*., paragraph 29, where the General Court recalled, in particular, relevant judgments on this point such as (judgment *Ledra Advertising*, C-8/15 P to C-10/15 P, paragraph 64; judgment *Accorinti*, T-79/13, paragraph 65 and the case-law cited).

[29] Judgment *Malacalza*, C T-134/21, paragraph 34.

[30] *Ibid*., paragraph 35. At this regard the General Court mentioned the following case-law: judgment of the Court of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 42; of 7 October 2015, judgment *Accorinti*, T-79/13, paragraph 67; judgment of the General Court of 24 January 2017, *Nausicaa Anadyomène and Banque d'escompte* v *ECB*, T-749/15, not published, EU:T:2017:21, paragraph 69).

individuals which could be defined as a vested right, is designed for the protection of their interests or entails the grant of rights to individuals, the content of those rights being sufficiently identifiable".[31]

In this sense, in order for the European Union to incur liability the General Court reiterated, in the judgment we are dealing with, that the protection offered by the rule invoked "must be effective vis-à-vis the person who invokes it. A rule cannot be taken into account if it does not confer any right on the person who invoked it, even if it confers a right on other natural or legal persons."[32]

As regards the second requirement, concerning the type of infringement required for the European Union to incur non-contractual liability, the General Court has underlined, in the judgment *Malacalza*, that the main element to keep into consideration in order to determine whether a breach is sufficiently serious, is whether the institution concerned "gravely and manifestly disregarded the limits on its discretion."[33]

Thus, a determining factor in deciding whether there has been a sufficiently serious infringement is the extent of the discretion available to the institution, taking into account "the complexity of the situation to be regulated, the difficulties in the application or interpretation of the legislation, the clarity and precision of the rule infringed, and whether the error made was inexcusable or intentional", bearing in mind that "mere errors of assessment cannot of themselves be sufficient to define an infringement as manifest and grave."[34]

On this element, the General Court held that the conduct complained of was adopted by the ECB in the exercise of the prudential supervision tasks to ensure the safety and soundness of credit institutions, and in this performing those tasks the ECB has the power to carry out a series of transactions (pursuant

[31] Judgment *Malacalza*, C T-134/21, paragraph 36, and the case-law cited (judgment of the General Court of 23 May 2019, *Steinhoff and Others* v *ECB*, T-107/17, EU:T:2019:353, paragraph 140 and the case-law cited, and Judgment of the General Court of 9 February 2022, *QI and Others* v *Commission and ECB*, T-868/16, EU:T:2022:58, paragraph 90 and the case-law cited).

[32] Judgment *Malacalza*, C T-134/21, paragraph 37, and the case-law cited (judgment *Steinhoff*, T-107/17, paragraph 77 and the case-law cited, and judgment *QI*, T-868/16, paragraph 90 and the case-law cited).

[33] Judgment *Malacalza*, C T-134/21, paragraph 38, and the case-law cited (judgments *Bergaderm*, C-352/98 P, paragraph 43; *Accorinti*, T-79/13, paragraph 67; and *Nausicaa*, T-749/15, paragraph 69).

[34] Judgment *Malacalza*, C T-134/21, paragraphs 38-41.

to Article 4 of Regulation No 1024/2013) that, on account of their complex nature, "justify granting the ECB, according to the case-law, a broad discretion."[35]

Taking into account the reasoning reported here and the case law recalled, the General Court concluded that, in the *Malacalza* case, "if the applicants wish to establish the non-contractual liability of the ECB, they must prove to the requisite legal standard that the ECB seriously and manifestly disregarded, beyond the discretion conferred on it, a rule of EU law conferring rights on individuals". Moreover, in order to determine whether such an infringement has been committed, the Courts of the European Union must take into account, in the light of the information put forward by the applicants, "the broad discretion conferred on the ECB in the exercise of its prudential supervision tasks."[36]

Just a few months before the *Malacalza* ruling, in a Judgment of March 7th, 2024 rendered in the case *OC* v *Commission*, the Court of Justice had ruled in a different matter - but always in relation to an action for damages brought to establish non-contractual EU liability and obtain compensation for damage caused by unlawful acts and conduct committed by the EU Institutions or bodies - with a significant judgment that should be recalled.[37]

In this case the Court of Justice did not reject the applicants' appeal, as in the *Malacalza* case, but ruled on the request for annulment of the General Court's judgment of May 4th 2022 (hereinafter: the judgment under appeal),[38] in the sense of only partially annul the judgment while dismissing the appeal as to the remainder. In particular, the Court considered that it was not in a position to make a definitive decision given that «the state of the proceedings does not permit final judgment to be given in the matter», thus effectively denying an immediate compensation for the alleged damage suffered by the appellants referring the case back to the General Court.[39]

More in detail, it should be recalled that in the case *OC* v *Commission* the appellant OC (a Greek national, university researcher in the fields of nanotechnology applications, energy storage and biomedicine) asked to have set aside the judgment under appeal, by which the General Court rejected her action under Article 268 TFEU seeking compensation for the damage she allegedly

[35] *Ibid*., paragraphs 42-45.

[36] *Idem*, paragraphs 46-47.

[37] Judgment of the Court of 7 March 2024, *OC* v *Commission,* C-479/22 P, ECLI:EU:C:2024:215.

[38] The judgment under appeal is the Judgment of the General Court of 4 May 2022, *OC* v *Commission*, T-384/20, EU:T:2022:273.

[39] Judgment of the Court, *OC* v *Commission*, C-479/22 P, paragraph 93.

suffered as a result of Press Release No 13/2020 of the European Anti-Fraud Office (OLAF) of 5 May 2020, entitled 'OLAF investigation uncovers research funding fraud in Greece' ('the press release at issue'), in that it allegedly unlawfully processed her personal data and conveyed false information about her.[40]

On that point, the Court of Justice decided to annul the General Court judgment under appeal "in so far as, by that judgment, the General Court rejected the form of order of the action seeking an order that the European Commission pay compensation for the damage resulting from the infringement by the European Anti-Fraud Office (OLAF) of its obligations under Regulation (EU) 2018/1725, of the principle of the presumption of innocence and of the right to good administration."[41]

As to the remainder, as said, the Court of Justice has dismissed the appeal.[42]

The 2024 Judgments briefly examined here, which represent only some and more significant ones among the many ruled by the Union Courts, even recently, on the subject of action for damages against the EU, fall fully within the scope of a consolidated line of case-law which, as mentioned, tends to deny the non-contractual liability of the EU and the recognition of compensation for damages.

In all the examined cases the appeals were rejected or only partially accepted by the EU Jurisdictions, denying the EU liability and a compensation for damages to the appellants.

4. Conclusion

From the regulatory and jurisprudential data, even the most recent ones so far examined, a persistent difficulty emerges in making the action for damages an effective instrument of protection for individuals towards the damages caused by the institutions of the European Union.

On this point many Scholars agree, albeit with some differentiations. For example, in Van Dam's opinion, the case law of the Union Courts gives

[40] *Ibid*., paragraph 1.

[41] *Ibid*., paragraph 94.1. The reference is to the Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21/11/2018, 39–98.

[42] Judgment of the Court, *OC* v *Commission*, C-479/22 P, paragraph 94.2.

"only a modest contribution to breaking down immunities of public bodies",[43] also because the hurdles set up by the Courts are so strict as to endanger "the effectiveness of the rules of liability for breach of EU law."[44]

For Nina Półtorak "the liability in damages of the EU can hardly be treated as an effective remedy protecting individuals."[45]

Also with specific regard to the requirement of fault, some Authors have underlined how the Courts require "proof of special and abnormal damage" to the applicants in order to demonstrate a "sufficiently flagrant violation" and a 2manifest and grave disregard of the limits on the exercise of power".[46]

For all these reasons, it can be agreed with the mentioned Authors in assessing the difficulty, in practice, of enforcing the provisions of the EU Treaties concerning the non-contractual liability of the European Union through the instrument of the action for damages.

* * *

TUŽBA ZA NAKNADU ŠTETE PROTIV EVROPSKE UNIJE: TEŠKO PRIZNAVANJE ODGOVORNOSTI EU U NOVOJ PRAKSI SUDA PRAVDE EU

Apstrakt

Tužbu za naknadu štete protiv Evropske unije (EU) može podneti svako lice koje smatra da EU snosi vanugovornu odgovornost. Konkretno, Sudu pravde Evropske unije može da se obrati direktno u cilju utvrđivanja odgovornosti Unije i dobijanja naknade za štetu prouzrokovanu protivpravnim radnjama i ponašanjem institucija ili tela Evropske unije ili za štetu koju su prouzrokovali njihovi službenici u obavljanju svojih dužnosti.

Ta vrsta aktivnosti kao što je poznato, nije tipična samo za pravo Evropske unije, jer većina pravnih sistema – i država i međunarodnih organizacija – predviđa odgovornost javne uprave za štetu nanetu pojedincima.

[43] C. Van Dam, 533.

[44] *Ibid.*, 50.

[45] N. Półtorak, 439.

[46] L. Antoniolli, „Community Liability", in: *Tort Law of the EC. Tort and Insurance Law* (ed. H. Koziol, R. Schulze), Springer, Vienna 2008, 238.

Na nivou Evropske unije, ovaj skup pravila je kodifikovan ugovorima i sadržan je u nekoliko nejasnih regulatornih odredbi, koje se u osnovi odnose na opšta načela koja su zajednička za zakone država članica (Član 340 Ugovora o funkcionisanju Evropske Unije).

S obzirom na značajne razlike između nacionalnih regulatornih sistema u državama članicama EU u vezi sa navedenim pitanjem, kao i samoj nejasnoći odredbi Ugovora EU, centralnu ulogu je, vremenom odigrao Sud pravde Evropske unije. U praksi, pa čak i novijoj suda pravde Evropske unije, može se uočiti teško prepoznavanje odgovornosti Unije, a što predstavlja predmet analize u ovom radu.

Ključne reči: tužba za naknadu štete, kompenzacija, Evropska unija, odgovornost EU, sud pravde Evropske unije.

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