THE NOTION OF DAMAGE AS A FUNDAMENTAL COMPONENT OF NON-CONTRACTUAL LIABILITY OF EUROPEAN COMMUNITY

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The Notion of Damage as a Fundamental Component of Non Contractual Liability of European Community

I. The Approach of the European Court of Justice about the Notion of Damage

The fundamental requisite for a plaintiff to be allowed to bring an action before European Court of Justice (ECJ) under Article 288 paragraph 2 EC Treaty against any Community institutions is that plaintiff must have suffered some sort of loss or damage.

Even it is understood from the Article 288 paragraph 2 EC Treaty that all kind of damages could be indemnified, the judicial bodies of the Community ruled that some kind of damages could indemnified under specific conditions and limits.

First, it should be observed that applicants are required under Article 46 paragraph 1 (c)[1] of the Rules of Procedure of the European Court of Justice (RPECJ)[2].

The above mentioned situation became clear with *Asia Motor France Case*[3] that the requirement of " clarity and precision " is to be taken very seriously, as the case will otherwise be dismissed. In this connection it should be observed that this requirement is among the bars to proceeding, which the Court may raise of its own motion at any time, cf. Article 92 paragraph 2[4] of the RPECJ.

In the early times of the European Coal and Steel Community, the Court made it clear that for the damage action to be successful, the plaintiff's loss should be " actual, significant and definite "[5], "direct"[6], "real"[7] and "actual and certain"[8].

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[1] This provision corresponds to Article 38 paragraph 1 (c) in the RPCFI.
[2] http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/txt5.pdf
[3] T-387/94 **Asia Motor France** at paragraph 108-110.
[4] This provision corresponds to Article 113 in the RPCFI.
[5] Case 23/59 **Feram**.
[6] Case 18/60 **Worms**.
[7] Case 4/65 **Metallurgique Hainaut-Sambre**.
[8] Cases 67-85/75 **Lesieur**.

Later on, under the EEC Treaty, Advocate General *Capotorti* developed four criteria in his opinion for the *Quellmehl and Gritz Case*[9] which should be met for the loss to be recognized; the loss should be "direct", "certain", "specific" and "serious"[10].

"Direct" damage relates to the requirement of a causal connection between the damage and the events bringing about liability, and as such an investigation of this concepts falls outside the scope of this dissertation. But to discover the contents of the other terms, it will be necessary to analyze other criteria.

1. The Loss Should Be "*Certain*"

The fact that a loss can only be claimed to compensate if it would be accepted as a "certain" loss. This statement carries the meaning that a hypothetical loss[11] or a mere risk of a future loss is insufficient.[12]

In *Kampffmeyer II Case*[13] the Court opined that it is possible to bring an damage action in respect of "*imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed*" and thus it marked a clear departure from the jurisprudence under the Treaty establishing the European Coal and Steel Community.

In his opinion to the case, Advocate General *Reischl* declared that "sufficient certainty" normally mean that the events bringing about the liability (the Community action) should have taken place, whilst the caused damage need not have developed fully[14].

Under such circumstances the plaintiff can obtain a declaration of his authority to compensation once the loss has been finally assessed[15].

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[9] Case 238/78 **Ireks-Arkady**.
[10] HARTLEY, Trevor C., *The Foundations of European Community Law,* Oxford University Press, 1998, Fourth Fdition.
[11] CRAIG, Paul & DE BÚRCA, Gráinne, *EU LAW. Text, Cases, and materials.* Oxford University Press, 2003, Third Edition, p. 570 et.seq.
[12] *Ibid*, p. 571
[13] Cases 56-60/ 74 **Kampffmeyer II** at paragraph 6.
[14] HARTLEY, (1998) p. 457.

As the Court's case-law is not always consistent, in other words have also been used to describe what is curtailed by "certain" as mentioned above. Among other similar words the Court has declared that a loss must be *actual*, *concrete*[16] and *real*[17].

2. The Loss Should Be "*Specific*"

For the loss to be recoverable, it should pertain to plaintiff in a specifically and individually. The underlying reason of this approach is that the nature of compensation is to offset an unlawful inequality faced by one legal person. However, if the inequality affects all individuals in a relevant sector, they will not suffer in relation to each other, thereby there is no need for compensation[18].

If an illegal conduct of the Community institution has involved a loss for the purposes of several legal persons, they all ought to be awarded compensation regardless of their relative situation[19].

Rather, as it is declared by *Arnull*, this discussion should be considered in the context of liability for general acts versus individual acts. But yet, that is not the approach considered by the Court[20].

3. The Loss Should Be "*Proved*"

As it was stressed by the Court, the burden of proof of the loss in damage actions under Article 288 paragraph 2 EC Treaty belongs to the plaintiff[21].

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[15] *Ibid*, p. 457
[16] Case 26/74 **Roquette Frères** and Case 74/74 **CNTA**.
[17] T-231/97 **New Europe Consulting** at paragraph 29.
[18] ARNULL, Anthony, *The European Union and Its Court of Justice*, Oxford University EC Law Library, 2006, Second Edition, p. 366 et.seq.
[19] *Ibid*, p. 367
[20] *Ibid*, p. 367 et.seq.
[21] Case 26/74 **Roquette Frères** at paragraph 24 and C-362/95 P **Blackspur DIY** at paragraph 31.

According to Article 45 of the RPECJ, the Court will decide which measures of damage that it considers appropriate by means of an order setting out the facts to be proved.

From his opinion to *Roquette Case*[22], Advocate General *Trabucchi* said that:

"To claim compensation for injury it is not enough to show that it was likely; it is also necessary to demonstrate that it was actually sustained".

The standards of proof are very high and many cases have been lost on the grounds of insufficient proof of damage. It should be noted that if documents and information are not publicly available, in other words there is no public access to them; the Community institutions should help the plaintiff to provide documents and information in their possession[23].

4. The Loss Should Be "*Quantifiable*"

The loss should be "quantifiable" means that it should be possible to express the loss in terms of money / cash. In other words the plaintiff is required to clearly state in his application the exact monetary value of the alleged damage.

The Court is not bound by the parties' claims but has discretion to assess the amount of damage on its own - if it is necessary assisted by an independent expert as for instance in *Usines de la Providence Case*[24]**.**

In this connection, it would be very suitable to remember the Advocate General *Capotorti*'s expression in his opinion for *Ireks-Arkady Case*[25] in 1978
"The object of compensation is to restore the assets of the victim to the condition in which they would have been apart from the unlawful act, or at least to the condition closest to that which would have been produced if the unlawful act had not taken place: the hypothetical nature of that restoration often entails a certain degree of approximation… These general remarks are

[22] Case 26/74 **Roquette**.
[23] ARNULL, (2006) p. 370.
[24] Case 29/63 **Usines de la Providence**.
[25] Case 238/78 **Ireks-Arkady**.

not limited to the field of private law, but apply also to the liability of public authorities and more especially to the noncontractual liability of the Community".

According to above declared statement, the Court will compare the plaintiff's situation with the other legal persons who have remained unaffected by the contested act or omission in the relevant sector.

Regarding to the notion of *quantifiable damage*, it will be quite suitable to mention the *Zukerfabrik Schöppenstedt Case*[26]. As it could be seen in this case, "compensation" can not take form of "annulment" of a given legislative or administrative act.

As it is understood from above mentioned information / statements, the Court did not develop definite principles in order to determine which kind of damages could be indemnified or how these kinds of damages could be indemnified. Instead of type determining approach, Court tries to make its decisions within the frameworks of the conditions for each case.[27]

II. Recoverable Varieties of Damages

1. Material Damage

The loss should possess in order to be accepted as such by the European Courts. In this chapter we are going to examine the Court stance to compensate the different types of damage. Now we are going to examine the material damage.

1.1. Reduction of Assets

The Court has never laid down / declared any general principles concerning what types of damage that the Court is willing to accept as recoverable damage under Article 288

[26] Case 5/71 **Zukerfabrik Schöppenstedt**.
[27] HARTLEY, (1998) p. 466

paragraph 2 EC Treaty, nor how the loss is calculated. Thereby we could get information only from case law to create the big picture.

Advocate General *Caporti* shows us a way to understand the Court's approach in his opinion for *Ireks-Arkady Case*[28]:

"…the legal concept of damage [used by the ECJ] covers both a material loss stricto sensu, that is to say a reduction in a person's assets [damnum emergens], and also the loss of an increase in those assets which could have occurred if the harmful act had not taken place" [lucrum cessans / loss of profit].

The Court ruled in *Mulder II Case*[29] that the total amount of compensation payable by the Community should respond the damage which is caused. Reduction of assets (*Damnum emergens*) includes direct damage caused by an unlawful act or omission. The *Embassy Limousines Case*[30] is a quite adequate and very good example of a case that speaks out / shows the various kinds of *damnum emergens* in detail.

The case concerned an undertaking, which was participating in a public tender for the transport of European Parliament personnel and wrongfully was encouraged by the European Parliament to make irreversible investments before the tender process was over. It therefore suffered various kinds of damage when eventually another tenderer won the contract. Embassy was granted compensation *inter alia* for the following expenses:

- cost of active fleet reserved for the Parliament from 1 January 1996 until 31 March 1996 and insurance for 36 cars
- parking expenses for 36 vehicles
- expenses of breaking off the contract for the fleet of 25 vehicles

[28] Case 238/78 **Ireks-Arkady** as cited by CRAIG & DE BÚRCA, (2003) p. 539.

[29] Cases C-104/89 and C-37/90 **Mulder II**.
[30] T-203/96 **Embassy Limousines & Services**. Incomplete quotation from paragraph 89.

- preparation of the contract, feasibility study and statistical analysis
- assistance and preparation of data, tender and organizational advice
- preparation, negotiation for fleet of vehicles, telephone contract and parking
- travel and representation expenses
- secretarial expenses (flat-rate basis)
- fax, telephones, administration, copying and printing
- expenses in connection with recruitment, medical examinations, training (drafting of contracts, hiring of a meeting room) and familiarization expenses for the drivers
- fees of Mr Hautot, working exclusively on the tender and subsequently on the setting up of the Parliament contract[31].

In other cases, material damage in the context of Article 288 paragraph 2 EC Treaty has been held to include the payment of an *illegal import levy*[32], *loss arising from an illegal abolition of a compensatory scheme*[33] or *loss of earnings resulting from an accident at a Community institution failing to comply with the local rules concerning the prevention of industrial accidents*[34].

Also there have been such cases[35] where compensation has been claimed for losses sustained from unlawful Community assistance to an undertaking's competitors. This has not been finally settled by the Court because the cases have been dismissed on other grounds, and moreover, it will be difficult to satisfy the requirement of a *causative* connection in such cases[36].

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[31] SAHLSTRAND, Johan, *The Non Contractual Liability of the EC*, Faculty of Law – Lund University, January 1999, p. 32 et.seq.
http://www.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/0/CDEACD09E91E644AC125694600427E06/$File/exam.pdf?OpenElement
[32] Cases 5, 7 and 13-24/66 **Kampffmeyer I**.
[33] Case 74/74 **CNTA**.
[34] C-308/87 **Grifoni**.
[35] 26/74 **Roquette**
[36] HARTLEY, (1998) p. 455.

1.2. The Loss of Profit

Despite the opinion of Advocate General *Caporti* for *Ireks-Arkady Case* above mentioned, it could seem that the European Courts are more reluctant to grant compensation for the loss of profit than to grant compensation for the actual loss.

In *Kampffmeyer I Case*[37] the ECJ ruled that the profits that Kampffmeyer lost were "*speculative"* and the ECJ therefore reduced its compensation to 10% of the lost profits. Nevertheless in *CNTA Case*[38] it was ruled that claims for loss of profit could not be compensated where the claim was founded on the principle of legitimate expectations of a Community compensatory scheme.

Later on, the Court has been more generous and has allowed compensation for lost profits. As for instance in *Peine-Salzgitter Case*[39] where the Commission's wrongful denial of adjusting the undertaking's steel production ration was held to entail a loss of profit. Also in *Mulder II Case*[40] it was confirmed that loss of profit is part of the damage under Article 288 paragraph 2 EC Treaty and therefore this should be regarded settled case-law.

However, compensation claims for the loss of profit are generally invoked unsuccessfully in such cases which are relating to the public tenders. In *Embassy Limousines Case*[41] the CFI held that Embassy Limousines could not claim for the loss of profit. CFI explained its reasons for this decision as:
"*In this case, it has been established that the fault committed by the Parliament gives rise to non-contractual liability on the part of the Community. On the other hand, no contractual liability has been incurred. In the circumstances the applicant is not justified in claiming*

[37] Cases 5, 7 and 13-24/66 **Kampffmeyer I**.
[38] Case 74/74 **CNTA**.
[39] T-120/89 **Stahlwerke Peine-Salzgitter** and confirmed by the appeal case C-220/91P.
[40] C-104/89 and 37/90 **Mulder II**.
[41] T-203/96 **Embassy Limousines & Services**.

compensation for its loss of profit, since that would result in giving effect to a contract which never existed"[42].

1.3. The Interest

If the plaintiff convinces the Court that a Community institution has wrongfully caused a loss, he or she would most likely claim that the defendant institution should also compensate interest in addition to the current / realized loss, since a delay in payment adversely affects the value of the amount of money[43].

Such a claim for interest causes/ raises two quite important questions, which are namely from when the interest will start to run and at which rate that the interest will be granted / established.

The legal theory in most Member States distinguishes between two types of interest; the *default interest* and the *interest on the judgment debt*.

Default interest is damages for wrongful delay in the performance of an obligation and it starts to run from the time of the default act[44]. A claim for default interest is usually only admissible where the principal loss can be established with certainty, either by agreement or by objective criteria[45].

Interest on the judgment debt starts to run on the date of the final judgment, and seeks to create an incentive for the convicted defendant to pay the judgment debt as soon as possible as well as to make up for the decrease in value of the compensatory amount over time[46].

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[42] T-203/96 **Embassy Limousines & Services**, at paragraph 96.
[43] BAYKAL, Ass. Prof. Sanem, *Avrupa Birliği Hukukunda Tazminat Davası – AB Kurumlarının ve üye Devletlerin Tazminat Sorumluluğu Çerçevesinde Bir İnceleme*, Yetkin Yayınları, 2006, First Edition, p. 106 et.seq.
[44] *Ibid*, p. 108
[45] LASOK, Dominic, *Law and Institutions of the European Union*. Butterworths, 1994, Seventh Edition, p. 549

[46] *Ibid*, p. 549

In most cases relating to the non-contractual liability, the Court has inclined to grant interest only on judgment debt. Claims for default interest have mostly arisen in staff cases where it is not as much the amount of damage, as the other conditions for liability which are at dispute[47].

As regards to interest on judgment debt, the Court has consistently held that the obligation to pay damages arises on the day of the final judgment, and therefore interest starts to run from that date[48].

Unlike most Member States, the interest rate of the European Community is not based upon a statutory rate. In other words, the interest rate in European Community is not based upon any Community legislative act; it is a result of judge made law[49].

In this context, it could be said that there is a more urgent need for stating the reason behind the applied rate of interest. So far, however, the Court has not showed any willingness in giving a detailed explanation for the level and bases of interest[50].

2. Non-Material Damage

Various kinds of non-material damage – for instance, damage which does not cause a decrease in tangible assets or lost profit - have also been recognized as recoverable damage, and thus they will be considered as a part of the damage used by the Court.

The value of the non-material damage is naturally determined and considered in a different way from in the case of material damage. However in *BAI Case* [51]ECJ ruled that the plaintiff will still have to prove that the damage is "actual", "certain", and "quantifiable" and cannot,

[47] *Ibid*, p. 550
[48] See e.g. C-152/88 **Sofrimport** at paragraph 32.
[49] BAYKAL, (2006) p. 108
[50] *Ibid*, p. 108-109
[51] T-230/95 **BAI** at paragraph 38.

in principle, confine itself to pleading the wrongful nature of a Community institution's conduct.

In order to maintain a systematic order, the cases of non-material damage were divided into two categories; those which involve non-physical (mental) harm – such as; emotional harm and harm to the image and reputation - and those which concern physical (bodily) harm in settled opinion of the Court. In this chapter, both of the categories will be evaluated by sub-dividing into whether there exists an employment relation (staff cases) or not (third parties).

2.1. Non-Physical (Mental) Harm

In the early days of the Treaty establishing the European Coal and Steel Community, the ECJ ruled that some community servants' prospect of wrongful dismissal caused them the non-material damage of "*shock*", "*disturbance*" and "*uneasiness*"[52].

The Court has once decided to grant BEF 10.000 (in 1977) in damages for the consequential "*uncertain and anxious state of mind with regard to [the applicants] professional future*"[53].Moreover "*uncertainty* and "*anxiety* with regard to the recognition of a servants rights and professional future" role in the *Hautem Case*[54]. Mr. Hautem was wrongfully dismissed from the EIB, and faced difficulties in finding new employment due to the indeterminate nature of his present work status. In this case ECJ held that:

"*With regard to damage, the refusal by a Community institution or body to comply with a judgment of the Court of First Instance, even if such a refusal is limited to the period between delivery of that judgment and that of the judgment to be delivered by the Court of Justice on the appeal, will adversely affect the confidence that litigants must have in the Community judicial system, which is based, in particular, on respect for the decisions made by the*

[52] Case 7/56 & 3-7/57 **Algera** at paragraph 67.

[53] 61/76 **Geist** at paragraph 48f.
[54] T-11/00 **Hautem** at paragraph 52.

Community Courts. Consequently, irrespective of any material damage which might result from non-compliance with a judgment, an express refusal to comply with it will in itself involve non-material damage for the party who has obtained a judgment in his favour"[55].

The above mentioned cases concern Community staff, but there are such cases that the damages for non-material, emotional harm are also awarded to the persons without an employment relation to a Community institution[56].

Damage to the *reputation* or *integrity* of naturel or legal persons has also been claimed in several cases. In addition to the claims for material damages, the above mentioned *Embassy Limousines Case*[57] also involved a claim for non-material damage arising from the broken promises to the shareholders and third parties.

2.2. Physical (Bodily) Harm

2.2.1 Community Stuff

If an act of a Community institution causes bodily harm to a member of the Community staff - for instance due to an accident at work - the problem of non-material damage is regulated by the insurance scheme provided for by the Staff Regulation.

An example of the Court's interpretation of the Staff Regulation was seen in *Gerhardus Leussink Case*[58]. A Community official who was involved in a traffic accident in a community car while doing a Community mission and suffered injury on his hearing, sense of smell and sense of taste. The Court found that the psychological and non-physical consequences had been taken into account when the damages under the insurance scheme were assessed. This was done by adding an additional rate of 10% (of total invalidity compensation) for the psychological and non-physical injury.

[55] T-11/00 **Hautem** at paragraph 51.
[56] Case 145/83 **Adams**.
[57] T-203/96 **Embassy Limousines & Services.**
[58] Joined cases 169/83 and 136/84 **Gerhardus Leussink**.

The *Gerhardus Leussink Case* also gives useful information about the relation between the notion of damage and the requirement of directness. Apart from Mr. Leussink's own claim, his wife and four children sought compensation worth nothing less than 7 million Belgian Francs for the impaired family relationship with Mr. Leussink due to his change of psychological character following the accident. The respond of the Court for this claim is:

"*Although there can be no doubt about the reality of those effects or about the existence of a link with the accident, they are nevertheless the indirect result of the injury suffered by Mr. Leussink and do not constitute part of the harm for which the Commission may be held liable in its capacity as employer. This is borne out by the fact that the legal systems of most member states make no provision for compensating such effects*"[59].

"It follows that the application lodged by [the wife and children] must be dismissed"[60].

In this case the Court seems to confirm, that the impaired family relationship is indeed something which falls within the notion of damage. Therefore making it a rather broad concept as far as non-material damage is concerned.

2.2.2 Other Persons

A wrongful Community act or omission may inflict bodily harm also on other persons than Community officials, for instance independent workers and ordinary citizens. In this case the insurance scheme under the Staff Regulation is of course not applicable. Instead of the Staff Regulation, the claim for non-contractual damages may be based on Article 288 paragraph 2 EC Treaty alone[61].

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[59] 169/83 and 136/84 **Gerhardus Leussink** at paragraph 22.
[60] 169/83 and 136/84 **Gerhardus Leussink** at paragraph 23.
[61] SAHLSTRAND, (1999) p. 37
http://www.jur.lu.se/Internet/Biblioteket/Examensarbeten.nsf/0/CDEACD09E91E644AC125694600427E06/$File/exam.pdf?OpenElement

The infliction of bodily harm to a person may give rise to various types of loss. As was in the *Grifoni Case*[62] where a worker - an independent third party - was injured in a Community building due to the Commission's failure to take the safety measures prescribed by the Italian legislation; the recoverable loss may constitute the sum of the medical expenses (and expenses related to the treatment and recovery) caused by the accident to the extent they can be proved by original vouchers and other admissible evidence.

The infliction of bodily harm on a person who at the time of the accident was employed or otherwise engaged in economic activity may also lead to total or partial temporal incapacity and to permanent invalidity.

2.2.3. Violations of Administrative Rules

By *formal rules* is meant rules which govern the decision making process, whereas material rules are those which constitute the basis for the decisions themselves.

Formal rules – such as, the duty to give adequate reason for all public acts (Article 190 EC Treaty), the right of access to documents (Art. 255 EC Treaty)[63] and the obligation to conduct hearings of parties before a decision is taken - ideally aim at ensuring the correctness and the legality of the decisions.

The question which is to be investigated in this context is therefore: Can it give rise to a claim for damages under Article 288 paragraph 2 EC Treaty, if a Community institution violates such a formal rule?

Unfortunately this question can not be easily answered by a simple yes or no. Following the doctrine set out in *Schöppenstedt Case*[64] - which was the first case where ECJ set out the

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[62] C-308/87 **Grifoni**,

[63] Since 3 December 2001 the right of access to documents is governed by Regulation 1049/2001. See for a detailed information http://home20.inet.tele.dk/eurokrat/Transp.doc

[64] 5/71 **Zukerfabrik Schöppenstedt**.

principles governing Community liability for a legislative act - it will be necessary to distinguish between measures of general application and measures of individual application.

The Court has held that the Schöppenstedt Formula will not apply where the disputed act is labeled a regulation, but in fact is a legislative measure of individual application. Conversely, the Schöppenstedt Formula will apply to measures labeled decisions (which usually are acts of individual application) if they in fact are of general application[65].

However, the Schöppenstedt Formula only applies to measures of general application. The critical question is therefore if a violation of a formal rule in connection with an act of individual application can form the basis of a claim for damages under Article 288 paragraph 2 EC Treaty. In order to respond this question[66] we have to look at the decision given by the ECJ in *Compagnia Italiana Alcool Case*[67].

The ECJ was presented with the problem in *Compagnia Italiana Alcool Case*, which concerned a deficient statement of reasons for a Commission decision. In response the Court answered the question regardless of whether illegality of that kind may render the Community liable, as it found that there was no causal link between the damage allegedly suffered by CIA and the deficient statement of reasons. It supported its finding by stating that in the absence of that deficiency the damage allegedly suffered by CIA would have been the same[68].

[65] BAYKAL, (2006) p. 64 et.seq.
[66] However this question has not been responded in doctrine. The lecturers generally make reference to the *Compagnia Italiana Alcool Case* about the above mentioned question.
[67] C-358/90 **Compagnia Italiana Alcool**.
[68] C-358/90 **Compagnia Italiana Alcool** at paragraph 27.

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