

Compensation claims against the State for a breach of EU laws



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The State's basic function is to impose new laws and to change old ones in order to fix problems for the future. The economic stakeholders must always try to adapt to the changing rules of play – this is a risk that all investors have to live with. However, there may be cases when a change in law makes it impossible to maintain a certain business activity, or results in serious disadvantages in relation to competitors. The new Civil Code of Hungary seems to let the genie out of the bottle, as it suggests a new litigation strategy for disappointed businesses seeking compensation.

Until now, Hungarian judicial practice did not seem to accept the concept of the State's liability for losses incurred due to legislative changes. Pursuant to the Supreme Court of Hungary, compensation for losses caused by the public administration was limited to administrative decrees taken in respect of individuals. No compensation was payable if the losses resulted from laws having a general effect. The Supreme Court found in full immunity from damages, even if it turned out later that a law was breaching the constitution.

Although the referred rulings originate from the time before Hungary joined the EU in 2004, we are not aware of any successful attempt in front of the domestic courts since then to challenge the concept of the State's immunity for lawmaking. For an investor feeling deprived of his property, the only possibility was to turn to international judicial forums, such as the European Court of Human Rights (ECHR) located in Strasbourg, or, in the case of international investors, to the International Centre for Settlement of Investment Disputes (ICSID) located in Washington.

A potential domestic litigation option could have been to base a compensation claim on the "Francovich judgement" of the Court of Justice of the European Union (hereafter: the "CJEU"). In this judgement, the CJEU stated that private individuals and companies are entitled to claim

reparation from a Member State of the EU for a loss or damage sustained as a result of the Member State's failure to comply with EU law. Through this judgement and consequent rulings, the CJEU established the principle of state liability.

The new Civil Code seems to remind its readers of this legal remedy. Although not in the main body of the new Civil Code, but in its official ministerial reasoning, it is expressly stated that compensation claims might be initiated against the State if a legislative act breaches the Constitution or obligations imposed by EU law. The reasoning says that the intention of the Civil Code was to change the Hungarian court practice that had been refusing such claims in the past.

Concerning the conditions of State liability, the CJEU has laid down the basic conditions, while leaving it to the national courts to assess whether or not those conditions apply. Firstly, the breach must be obvious and sufficiently serious. This condition is met if the breach was already established as a result of a prior infringement procedure initiated by the Commission, or if the subject matter was already settled by prior case-law. Secondly, a direct causal link must exist between the breach of EU law and the loss or damage. In addition to that, Hungarian courts require that the injured party should prove the exact amount of the loss of profit or damage suffered.

According to the CJEU, it should be irrelevant which State organ is liable for the breach, and as to whether the State acted in good faith (i.e. the liability is objective). If the claimant is successful in proving all the conditions, then the State must fully indemnify its losses, including the loss of profit. It must be noted that, as opposed to this procedure, the ECHR located in Strasbourg awards only a "just satisfaction" that is not always equal to the loss of profits.

To conclude, the new Civil Code seems to open the possibility for anybody to initiate compensation claims against the State in front of domestic courts, in case a legislative act breaches EU law and causes losses. Since several infringement procedures are pending against Hungary in EU law forums, it cannot be excluded that the liability of the State might be sought on that basis in front of Hungarian courts.

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