Liability of Member States for Violations of European Union Law in the Field of Legislation: Jurisprudence of the Supreme Courts of Lithuania

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Abstract: The article analyzes and evaluates the jurisprudence of the Court of Justice of the European Union (hereinafter – European Court of Justice, CJEU), which establishes the basis, criteria and conditions of the liability of Member States' for violations of European Union law. The article further analyses the jurisprudence of the Supreme Administrative Court of Lithuania and the Supreme Court of Lithuania in cases adjudicated on the violation of European Union (hereinafter – also the EU) law, caused by the actions (inaction) of an entity entitled to adopt normative legal acts, and the compensation of the injured persons. Document analysis and comparative methods are used.

The article leads to a conclusion that in deciding on violations of EU law committed by the actions (inaction) of an entity entitled to adopt normative legal acts, case-law of the highest tier courts of Lithuania adheres to the jurisprudence of the CJEU. However, the methods of resolving the aforementioned disputes differ in the practice of the Supreme Administrative Court of Lithuania and the Supreme Court of Lithuania. The Supreme Administrative Court of Lithuania directly follows and evaluates the criteria of Member States' responsibility established and developed in the jurisprudence of the Court of Justice. Meanwhile, the Supreme Court of Lithuania often uses another path: the court recognizes the inconsistency of national provisions with the EU law, assesses whether individuals are granted rights by the EU law provisions, refuses to apply provisions of national law that are in conflict with the EU regulation and seeks to interpret national legal provisions in a manner that they were in line with the goals pursued by the provisions of EU law.

Key words: *responsibility for violation of EU law, practice of the highest courts of Lithuania.*

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Introduction

Through its case-law the CJEU has developed an authentic, albeit incomplete, system of liability of Member States for violations of European Union law, which uses genuine EU law concepts. Although the conditions for the Member States to compensate damages to the individuals caused by their actions (inaction) in violation of EU law are formulated in the case-law of CJEU, it is also recognized that compensation for such violations may be based on national law, if a national system satisfies the requirements of effectiveness and equivalence. It is possible that national legal systems provide for a wider range of compensable instances or simpler compensation mechanisms than those following from the case-law of CJEU. The existence or absence of a Member State (entity entitled to adopt normative acts) liability for an EU law violation is always assessed and determined by national courts.

This article aims to clarify the criteria applicable to the liability of the Member States for violations of EU law in the field of adoption of normative legal acts, as well as to determine and evaluate how these criteria are applied in the selected jurisprudence of the highest tier courts in Lithuania – the Supreme Administrative Court of Lithuania (SACL) and the Supreme Court of Lithuania (SAC). Document analysis and comparative methods are used to achieve this goal.

1. Conditions of Liability of EU institutions and Member States for violations of EU law

1.1. Conditions of Liability of EU institutions for violations of EU law committed through normative legal acts

Although this sub-topic does not directly follow from the title of the article, taking into account the genesis of the criteria of Member States' liability for violations of EU law and for the sake of consistency, it is appropriate to briefly cover the most important aspects of EU institutions' liability.

Primary sources of EU law do not provide for a tortious liability of the Member States. The case-law of the European Court of Justice, in which the criteria for tortious liability of the Member States have been formulated and developed, is based on the provisions of Article 340 Paragraph 2 of the Treaty on the Functioning of the European Union (hereinafter – TFEU), dedicated to the liability of EU institutions for violations of EU law. Thus, the European Court of Justice first formulated case-law regarding the liability of EU institutions, which was later used and adapted to construct the criteria (conditions) for the liability of the Member States.

Article 340 Paragraph 2 of the TFEU 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"[1]. This provision is the only existing basis of tortious liability for violations of EU law in the primary sources. When evaluating the text and construction of the provision itself, it is often noted that the wording is very general and abstract, so it can be *flexibly* adapted to specific factual circumstances[2]; the reference to the general principles of the law of the Member States does not require a detailed analysis of such principles – it rather aims to search for common fundamental characteristics and align them with EU goals and objectives[3].

It is also relevant that the analyzed provision of the TFEU has remained stable and unaltered since 1957, but the jurisprudence of the CJEU interpreting it has evolved. Already from the first decisions of the Court of Justice, related to the liability of EU institutions for the compensation of damages caused by legislative actions of general character, it may be seen that the damages to individuals in this area are not compensated for an ordinary violation but for a particular type of violation. According to the CJEU, in instances when legal acts are related to economic policy choices, the EU is not liable for damage suffered by individuals, unless there was a sufficiently flagrant violation[4] of a superior rule intended to protect the rights of individuals, and when the institution gravely disregarded the limits of its powers. A provision of a Treaty or another general EU law provision is considered as a superior rule[5]. The Court of Justice has also emphasized that when assessing the responsibility of the EU institutions (which arises regardless of the individual fault of the person performing the functions), it has to be considered

1 Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012 p. 193. It is noteworthy that although the actual location of this provision has changed, the provision itself has remained unaltered since 1957. Other types of lawsuits against EU institutions are possible under TFEU, for example, questioning the legality of the legal act that caused damages (Article 263) or on the inaction of EU institutions (Article 265 TFEU). Bringing a lawsuit regarding acts of general application (under TFEU Article 263) in principle does not deny a possibility to apply for compensation for damages caused by the legal act, although certain reservations exist. *See*, Ken Oliphant, *The Liability of Public Authorities in Comparative Perspective* (Intersentia, 2017), 560. It should also be noted that an essentially analogous provision was later formulated as a personal right, stating that every person has the right, in accordance with the rights common to the Member States' principles, that the Union would compensate him for the damage caused by Union institutions or their servants in the performance of their duties. This right is enshrined in the Article 41(3) of the Charter of Fundamental Rights of the European Union.

2 *Oliphant*, p. 560.

3 *Ibid*.

4 *Ibid*., p. 563.

5 *Ibid*., p. 564.

that one of the essential features in the implementation of Community policies is the wide discretion of the institution[6].

Since the regular concept of violation associated with illegality of activities was not sufficient to trigger liability of the EU institutions, and in order not to constrain the discretion of the institutions in making decisions, a concept of a *sufficiently serious violation* was used by the Court of Justice. Thus, when reviewing the system of EU institutions' liability developed in the case-law of the Court of Justice, the following criteria are distinguished: (1) the rule granting rights to an individual is violated; (2) the violation is sufficiently serious; (3) the person suffered damages as a result of those actions; (4) there is a causal link between the institution's actions and damages suffered.[7] Taking into account the aim of this article, and the fact that the CJEU has basically transferred the aforementioned criteria to the system of Member States' liability for the EU law violations, the criteria and the relevant CJEU case-law are discussed in the following subsection[8].

1.2. Conditions for the Liability of the Member States for the violation of EU law

The goal of liability of the Member States for violations of EU law is to ensure the effectiveness of EU law and the protection of the rights granted to individuals by EU law[9]. The scholars note that the recognition of the Member States' liability for violations of EU law committed by the actions (inaction) of an entity entitled to adopt normative legal acts, was an important step in the development of the EU

6 *Ibid*.

7 Analysis of European Court of Justice practise reveals that it is possible to find additional rules which the Court of Justice considers to be general principles of the law of the Member States and takes them into account when assessing damages. For example, in some decisions, references can be found that the damage suffered by a person must go beyond normal economic risk, that the liability of the EU institutions arises in cases where economic losses are greater than usual in that sphere. The Court of Justice has stated as a general principle for all member states that the victim must show reasonable diligence in order to limit his (her) losses or damages or to assess whether he (she) will have to bear them yourself. See e.g., *Oliphant*, p.564. Cees van Dam, *European Tort Law*, 2nd ed, p. 323.

8 In the opinion of some scholars, even though the criteria of the liability of EU institutions and criteria applicable to establish liability of the Member States are named in the same manner, they are subtly different. Yet, the aim of this article is to analyze the liability of Member States for violations of the EU law and revealing such subtle differences (provided that they exist) requires a separate, detailed analysis, which cannot be carried out within the framework of this article.

9 *See*, Pekka Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond*, Modern Studies in European Law (Oxford: Hart Publishing, 2011), p. 154. Judgement of the Court of Justice of the European Union of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, C-6/90, ECLI:EU:C:1991:428.

tortious liability system. This continuation of tortious liability prevented a situation where an institution could be held liable in the event of a violation of EU law, while a Member State could have avoided such liability. In the *Francovich* decision, the Court of Justice indicated that if individuals were not provided with a possibility to receive compensation when their rights were violated due to a violation of EU law for which a Member State was responsible, the effectiveness of the European Union rules would be weakened. The possibility to receive damages is particularly relevant in cases where, in order to achieve the full effectiveness of Union law, a Member State must take certain actions and when, as a result of inaction, individuals cannot defend rights conferred upon them by Union law in national courts. Taking this into account, the Court of Justice decided that the liability of the Member State for damages caused by the violation of EU law is an integral EU law element[10].

The general features of the liability system developed by the European Court of Justice are the following: it is considered incomplete because, on the one hand, the final assessment of whether a violation exists and a decision on compensation is made by a national court; on the other hand, certain elements of liability are based solely on national legal systems (for example, questions on statute of limitations, issues of causation[11]). Also, according to the CJEU case-law, damages may be assessed and compensated in accordance with the rules of national law, provided that those rules are not less favorable to the injured person in instances of EU law violation than in instances of similar national claims (principle of equivalence)[12] and they are not constructed in a manner that would make compensation for

10 *Francovich*, p. 33-35. However, it is possible to find opinions that, despite the parallel introduced between the liability for EU law violations of EU institutions and Member States, there remain substantial differences due to different discretionary limits. Yet, the criteria to assess liability are in essence analogous and the test of a sufficiently serious breach is applied, which takes into accounts the discretionary limits of, respectively, Member States and EU institutions. See *Oliphant*, p. 572.

11 *Cees van Dam*, 2nd ed, p. 323.

12 An example of equivalence may be found in Judgement of the Court of Justice of the European Union of 26 January 2010, *Transportes Urbanos y Servicios Generales SAL v Administración del Estado*, ECLI:EU:C:2010:39. In this judgement, the CJEU stated that European Union law precludes the application of a rule of a Member State under which an action for damages against the State, alleging a breach of that law by national legislation which has been established by a judgment of the Court of Justice of the European Communities given pursuant to Article 226 EC, can succeed only if the applicant has previously exhausted all domestic remedies for challenging the validity of a harmful administrative measure adopted on the basis of that legislation when such a rule is not applicable to an action for damages against the State alleging breach of the Constitution by national legislation which has been established by the competent court. The CJEU thus found that the requirement under the Spanish law was contrary to the principle of equivalence.

damages impossible or particularly difficult (principle of effectiveness)[13]. Other possible methods of compensation for damages established in national law for violations of EU law are also recognized[14].

Liability for EU law violations is applicable to all branches of Member States' government, therefore, national entities entitled to adopt normative acts must comply with the rules of EU law, regulating the situation of individuals[15]. Liability arises independently of personal (subjective) fault[16], thus liability system may be regarded as comparable to progressive national liability systems of public actors, establishing liability without fault.

1.3. Liability criteria developed in the case-law of European Court of Justice

For the first time, criteria of Member States' liability were enumerated in *Francovich* decision, where the CJEU found that if the Member State failed to implement the obligation to take all necessary measures to achieve the results provided for in a directive, injured persons must be granted the right to compensation, if following conditions are met: (1) the directive aims to grant rights to individuals and it is possible to identify the content of these rights and (2) there is a causal link between the state's obligation and the harm suffered by individuals[17]. In a decision *Brasserie de Pecheur 48/93*, the European Court of Justice introduced a parallel between EU institutions' and Member States' liability and supplemented the list of criteria by (3) a criterion of a sufficiently serious breach[18]. The application of this criterion depends on the discretion of a Member State in a particular case. The liability of a Member State for a violation of EU law can be strict (*per se*) when it is sufficient that a result set out by EU law provision is not achieved[19]. In instances where a certain discretion exists, liability of a Member State for an EU law violation can

13 *Oliphant*, p. 580 – 581. If the national rules are less favorable, then the court should not apply them and substitute them with the CJEU rules. As far as rules that are not directly linked to the determination of liability, their application depends on compliance with the principle of effectiveness. If the application of a particular rule makes determination of liability impossible or very difficult, the national court should apply national rules for similar actions. In cases where there are no rules at all in national law regarding the liability of state institutions, it is possible that the decision will be made based purely on the case law of the Court of Justice.

14 *Pekka Aalto*, p. 155.

15 *Pekka Aalto*, p. 156.

16 *Oliphant*, p. 560.

17 *Francovich,* p. 40.

18 *Oliphant*, p. 580.

19 Marjeta Tomulić Vehovec, "Member State Liability for Breach of EU Law Before English Courts," *Croatian Yearbook of European Law & Policy* 8, no. 1 (2012), p. 394.

arise after assessing its behavior through the lens of sufficiently serious breach[20]. Considering the importance of these criteria, each of them is discussed separately.

The first criterion of lability is that the violated EU legal provision confers rights to individuals. Thus, a violated EU law provision has to directly confer rights to individuals and individuals must be able to bring a claim in a national court on the basis of this provision. Same as in with the liability of the EU institutions, it is not required for a provision to grant rights to a specific person, it is sufficient that the purpose of the provision in general would be to grant rights to individuals[21]. Individuals can be granted rights both by secondary and by primary EU law[22]. The fulfillment of this liability condition is determined through assessment of the purpose of the provision and the nature of the interests it seeks to protect, and it is not relevant whether a provision itself is general or precise. When assessing whether a specific provision or legal act grants rights to individuals, the analysis of the Court of Justice focuses on the content and purpose of the provision[23]. Damages may not be granted for a violation of a rule intended to protect general interests[24].

It is also important to note that this criterion should not be equated with direct effect of EU law (directive) provisions. A provision is directly effective when it is clear, precise, unconditional and leaves no discretion to Member States; is self-executing. Direct effect of a provision has more to do with the nature of a provision while whether a particular rule confers rights on individuals has to do with the content of a provision[25]. Thus, although directly effective rules will usually also confer rights to individuals, the direct operation of the violated EU law provision is not a condition for the Member State's liability to arise.

The second criterion of Member State liability for a violation of EU law is an evaluative concept of a sufficiently serious breach. Sufficiently serious breach is a purely EU law concept developed in the *Bergdem* decision [26]. The use of this criterion made it possible to create a system of no-fault Member States' liability, where liability depends on the breach itself. Using the criterion of a sufficiently serious breach CJEU has avoided not only concepts of fault, but also other elements of liability characteristic to national legal systems, such as duty of care or unlaw-

20 *Ibidem*.

21 *Oliphant*, p.582.

22 *Cees van Dam*, 2nd ed, p. 289

23 *Ibid*., p. 290.

24 *Ibidem*.

25 *Cees van Dam*, p. 559.

26 The term differs from the concept used in international law – manifest breach, which correlates with broad state sovereignty, it also does not include elements of liability characteristic to national law, such as fault.

fulness[27]. The criterion of sufficiently serious breach also allows to avoid policy reasons sometimes hidden behind the conditions of national liability concepts, such as a desire not to open the gates to an influx of complaints, protection of national finances, protection of institutions' competence so they would not be afraid to regulate and other. However, the concept of a sufficiently serious breach itself is close to national concepts in a sense that it is multifaceted[28].

The criterion of a sufficiently serious breach is closely related to the degree of Member State's discretion in the implementing a specific EU law provision. It is the margin of appreciation of a Member State that is evaluated when deciding whether a sufficiently serious breach has been committed when violating an EU law provision[29]. The degree of discretion given to Member States differs in various situations. The wider the discretion, the less likely that a breach committed by a Member State will be considered sufficiently serious, i.e. the Member State will have manifestly and gravely violated the limits of discretion[30]. In the *Brasserie* decision, CJEU provided a catalogue of criteria, which the national courts may consider when deciding on the seriousness of the infringement in instances where the Member State's discretion is wide. The decision states that such factors are clarity and precision of a violated provision, the scope of freedom of action left to national or Community institutions according to that provision, whether the violation or damage were caused intentionally or due to negligence, whether the legal error made is justified or unjustified, the fact that the the position of a Community institution chose have encouraged inaction, the activation or non-stopping of national measures or activities contrary to Community law[31].

Instances where the discretion of Member States is narrow or non-existent have to be mentioned separately. They primarily include instances where violation of EU law continues, even though it was established by a decision of the CJEU, or when it is clear from the case-law of the CJEU, that specific actions of a Member State violate EU law[32]. The second group of instances is a violation committed by authorities with administrative powers in an area where they had no operational

27 *Cees van Dam*, 2nd ed, p. 566. It should be noted that scholarly literature provides opinions that the concept of "sufficiently serious" affects the criterion of unlawfulness, not every unlawful action leads to liability.

28 *Cees van Dam*, 2nd ed, p. 559.

29 *Ibidem*. *See also*, Judgement of the Court of Justice of the European Union of 4 July 2000 *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities*, C- 352/98 P, ECLI:EU:C:2000:361.

30 An illustration may be found in the Judgement of the Court of Justice of the European Union of 26 March 1996 *The Queen v H. M. Treasury, ex parte British Telecommunications plc.*, C-392/93, ECLI:EU:C:1996:131.

31 *Braaserie*, p. 56.

32 *Cees van Dam*, 2nd ed, p. 561.

discretion or a very limited one[33]. The third group of instances encompasses cases when a Member State does not transpose the requirements of directives into national law[34]. However, instances of an improper transposition of directives are not so clear and national courts have to refer to the catalog of *Brasserie du Pecheur* when assessing them. In such instances, it is also important whether a Member State made a mistake implementing the directive due to the lack of clarity and precision of the EU regulatory instrument. The deficiency of clarity is one of the most important tools of defense in cases of improper transposition of directives[35].

When assessing seriousness of a breach, national court must take into account all the specified factors characterizing the situation under consideration[36].

The third criterion of Member States' liability for violations of EU law is the causal link between the violation and the damages suffered by individuals. The European Court of Justice in *Brasserie de Pecheur* held that this element must be determined by national courts[37]. An opinion that this element of liability is left to the field of national law also prevails in the scholarly literature, although considerations of whether the question of causality is completely decentralized also exist[38]. Scholars assess the extent to which the criterion of a sufficiently serious breach is relevant for determining causation, and to what extent the criteria of liability characteristic of national legal systems, such as the concepts of fault, may influence it[39]. In general, this element is closely related to the discretion of a Member State. If a Member State has no discretion or a very narrow discretion in a particular case, a factual analysis is sufficient to establish causal link, while in a

33 This category includes cases where the institutions have all the necessary information to make a decision, the provisions of the EU are sufficiently clear and there are not many possible interpretation options. Judgement of the Court of Justice of the European Union of 17 April 2007 A.*G.M.-COS.MET Srl v Suomen valtio and Tarmo Lehtinen*, C-470/03, ECLI:EU:C:2007:213, is often cited as an example in this category.

34 The CJEU stated in both the *Francovich* and the *Dillenkofer* judgements that failure to transpose a directive by the specified deadline is a breach of EU law. In the Judgement of the Court of Justice of the European Union of 8 October 1996 *Dillenkofer and Others v Bundesrepublik Deutchland*, C-178/94, (ECLI:EU:C:1996:375), the situation, which arose from Germany's non-transposition into national law of the travel package directive, was decided. The CJEU stated that the directive grants rights to individuals, and that failure to transpose it into national law on time is a sufficiently serious violation of EU law.

35 In the *Brinkmann* decision, the CJEU noted that the Danish government's interpretation of the EU regulation is persuasive and that in line with the objective of the EU regulation, therefore a sufficiently serious breach was not established. *See*, *Cees van Dam*, 2nd ed, p. 562.

36 *Cees van Dam*, 2nd ed, p. 560.

37 *Brasserie*, p. 65.

38 Andrea Biondi and Martin Farley, *The Right to Damages in European Law* (Kluwer Law International, 2009), p. 55.

39 *See*, *e.g.*, *Tomulić Vehovec,* p. 370.

case of a broad Member State discretion, both factual and legal causal links have to be established[40].

Based on the analysis above, it may be concluded that the case-law of the European Court of Justice has created an authentic although not fully complete system of Member States' liability for violations of EU law. It consists of several elements and is cascading in a sense that some of the elements fully belong to the field of EU law and are considered concepts of EU law, thus creating a unified and harmonizing effect, but other elements are nevertheless left to the discretion of national legal systems and courts. It is the national courts of the Member States that make the final assessment regarding the violation of the EU legal provision. Therefore, an element of a more general dialogue between the European Court of Justice and national courts is also present here.

2. Liability for EU law violations in case-law of the highest tier courts of Lithuania

This section presents selected case-law of the highest tier courts of the Republic of Lithuania, which directly deals with the issue of state liability for violations of EU law due to improper legal regulation established by normative legal acts, as well as selected case law, where these issues arise and are assessed indirectly. First, relevant jurisprudence of the Supreme Administrative Court of Lithuania (hereinafter – SACL) is presented, followed by the practice of the Supreme Court of Lithuania (hereinafter – SAC), related to the State's obligations under deposit holders' and investors' guarantee schemes. It is also worth mentioning that, in Lithuania, this jurisprudence has been formed in similar areas as in other EU Member States, namely the travel package directive, which at least several EU Member States did not transpose on time or its provisions were transposed incorrectly, also deposit and investment guarantee systems.

Case-law of the Supreme Administrative Court of Lithuania. The first case of national regulation that does not meet requirements established by the EU legislation is found in a SACL judgement no. N444-2513/2010. In this case, the court ruled on an administrative offense when a person operated a vehicle without

40 Factual causal link includes the sequence from the actions of the Member State to the damage suffered, legal causal link also evaluates such aspects as the remoteness of the cause, intervening facts and purpose. According to scholarly literature, depending on the degree of discretion, the tests for determining causation used in national law may differ: strict liability and fault-based liability. The causal link is determined by both assessing the facts of the case and applying substantive law as cause, consequences, remoteness, questions of altering cause are not purely questions of fact. *See*, *Tomulić Vehovec*, p. 371-372, p. 394.

having a document granting the right to do so according to the legislation of the Republic of Lithuania, although such a document was issued to him in the United Kingdom. The national court noted that when applying national law, regardless of whether the national provisions were adopted before or after the entry into force of the directive, they must be interpreted considering the text and purpose of the directive as much as possible[41]. The Supreme Administrative Court of Lithuania took into account the purpose of Directive 91/439/EEC on driver's licenses – to facilitate the movement of persons who have settled in a Member State other than the one where the driving test was taken and the recognition of the driver's license provided for in the directive without any formalities, based on the principle of mutual recognition of driver's licenses issued by Member States. In this light, the panel of judges, following the case-law of the CJEU[42], held that the directive established a clear and precise obligation for the Member States, which left no discretion in the matter of the measures to be applied and the Member State cannot apply any formalities before recognizing a driver's license issued by another Member State. Thus, already in this decision, even in the absence of a detailed assessment of liability of a Member State, several aspects are clearly visible: a national court assessed a purpose of EU legislation, which granted rights to individuals, and the limits of the Member State's discretion in implementing EU law.

Another example of the Supreme Administrative Court case-law is a decision No. A556-105/2012, where a dispute regarding the entry of breeding cattle in the pedigree book was resolved. Despite the fact that the cattle brought to Lithuania were in the pedigree books in their respective countries of origin, the Lithuanian Association of Beef Cattle Breeders and Improvers, to which the state had delegated the function of entering the cattle in the pedigree book, decided there were additional requirements for entry. The position of the association did not change upon clarification of the General Directorate of Health and Consumer Affairs of the European Commission that according to the provisions of EU law in force, cattle entered in the pedigree books in one Member State should be included in the pedigree books in another EU Member State. In the absence of cattle registry in the pedigree book in Lithuania, applicant suffered damages, since their offspring were sold at a lower price.

The court of first instance resolved the dispute in accordance with national legislation and did not establish a required condition for the liability of the administrative institution according to Article 6.271 of the Civil Code – unlawful action.

41 Judgement of the Court of Justice of the European Union of 13 November 1990 *Marleasing SA v La Comercial Internacional de Alimentacion SA*, C-106/89, (ECLI:EU:C:1990:395), p. 8.

42 Judgement of the Court of Justice of the European Union of 10 July 2003 *Commission v Netherlands,* C-246/00, ECLI:EU:C:2003:398, p. 60; Order of the Court of Justice of the European Union of 28 September 2006 *Kremer*, C-340/05, ECLI:EU:C:2006:620, p. 27.

The Supreme Administrative Court of Lithuania stated that the purpose of Directive 77/504/EEC on purebred breeding cattle (hereinafter – Directive 77/504) was the gradual liberalization of intra-Community trade in all purebred breeding animals, and one of the reasons for its adoption was to reduce barriers to trade in breeding animals. The court stated that Directive 77/504 and Decision 84/419/EEC fully harmonized the criteria for the registration of breeding cattle in pedigree books at the level of the European Union and that it was the provisions of the aforementioned EU legal acts and the objectives pursued by them that had to be implemented by the relevant national legislation. Thus, the duty of the court of first instance was to interpret the relevant provisions of national legislation and to resolve the dispute considering the regulation established by EU legislation, but it failed to do so. SACL held that according to the EU legal regulation, breeding cattle had to be entered in the pedigree book immediately, therefore the provisions of national legal acts did not meet requirements of EU legal acts and this could lead to a different qualification of defendant's unlawful actions as one of the conditions for liability.

Therefore, although SACL did not rely on the case-law of CJEU in detail, it stated that the EU legal regulation is clear and the national legal regulation did not comply with it. SACL also indicated that the court of first instance had to take this into account when assessing the conditions of state liability established in national law. In this case, it is not completely clear by which legal system – EU or national – the court is guided, especially considering the fact that compliance of national liability system with the liability system developed by the European Court of Justice was not analyzed in more detail.

In a normative administrative case no. I-1-756/2017, SACL adjudicated on compliance of a requirement set by a sub-statutory national regulation for used tractor vehicles imported into Lithuania with provisions of the Directive 2003/37/EC on agricultural or forestry tractors, their trailers and replaceable towing equipment, their systems, components and separate technical units type approval and repealing Directive 74/150/EEC (hereinafter – Directive 2003/37) and the short term of entry into force of the national requirement. Applicant maintained that Directive 2003/37 regulates the procedure for assessing the conformity of new tractor vehicles, while the procedure for assessing the conformity of used tractor vehicles with the requirements of Directive 2003/37 is not required. To clarify the regulatory scope of the directive, the Supreme Administrative Court of Lithuania applied for a preliminary ruling. The European Court of Justice stated that the provisions of the Directive 2003/37 are also applicable to the first registration of used tractor vehicles in the territory of the Community. Taking this into account, the Supreme Administrative Court of Lithuania considered the requirement established by national legal regulation to be lawful. However, in this case, the SACL also evaluated the compliance of the national regulation with the provisions of the Constitution of the Republic of Lithuania and the principles of protection of le-

gitimate expectations, legal certainty and legal security arising from it. Since these [constitutional] principles presuppose the state's duty to ensure the certainty and stability of legal regulation, protect the rights of individuals, respect legitimate interests and legitimate expectations, and the national regulation established new (additional) requirements for business without a transitional period, the court found a violation of these principles[43].

Perhaps the most comprehensive assessment of the liability of a Member State for a violation of EU law by legislative actions is presented in the judgement No. eA-990-502/2017 of the Supreme Administrative Court of Lithuania, where the court adjudicated on a situation in which an applicant had recovered only 5% of the amount paid for the trip after the tour operator went bankrupt.

The analysis of the court started with the national legal system, i.e. Article 6.271 of the Civil Code, which establishes conditions of state institutions' liability. The court noted that the condition of unlawful actions has to be established first, therefore it was necessary to assess the adequacy of the transposition of Directive 90/314/EEC on travel, vacation and organized outing packages (hereinafter – Directive 90/314) into national law of Lithuania. In carrying out this assessment, SACL analyzed the objectives of Directive 90/314 and its provisions, the jurisprudence of the European Court of Justice and stated that the purpose of the guarantees provided in Article 7 of Directive 90/314 was to protect the consumer from financial risks related to the insolvency or bankruptcy of the tour operator, therefore the tour operator must provide sufficient guarantees that in a case of insolvency or bankruptcy the money paid will be returned or the user will be repatriated[44]. According to the court's assessment, the aforementioned provision specified an obligation to achieve a certain result, and it could be seen from the case-law of the

43 When assessing the compliance of the adopted bylaws with the principles arising from the Constitution, SACL took into account the practice of the ECtHR that a systemic situation, which was tolerated by state institutions and existed for a long time, can be regarded as the basis for acquiring legitimate expectations. The principle of protection of legitimate expectations, as a criterion for the legality of normative acts, is recognized both by the ECtHR and the EU legal system (p. 26). Furthermore, SACL established, that in setting an additional requirement for business entities, a transitional period should have been established so that individuals could implement the rights acquired before the entry into force of the new requirement and finalize the actions that they undertook on the basis of previous regulation. The duration of a transitional period should be decided on a case-by-case basis, taking into account the various circumstances, *inter alia*, and whether there is a public interest in the particular case that may outweigh the private one and the test of competing interests is in line with the EU law. SACL further noted that the principle of protection of legitimate expectations prohibits institutions from changing the rules applicable to transactions already carried out by economic entities without adopting transitional measures.

44 Decision of the Supreme Administrative Court of Lithuania, based on the Judgement of the European Court of Justice of 8 October 1996 *Dillenkofer and Others v Bundesrepublic Deuchland*, C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, ECLI:EU:C:1996:375, p. 34–35.

CJEU that there was no reason to limit this guarantee. Moreover, after evaluating the case-law of the European Court of Justice, the provisions of Directive 90/314 would be considered properly transposed if, regardless of the measures, the result was achieved – the consumer was actually guaranteed the return of all the money he had paid and his repatriation in the event of the tour operator's insolvency[45].

Next, SACL assessed whether the situation that the tourist could not recover all the money paid was a result of actions of national legislator. The court came to a conclusion that the applicant could not recover all the funds paid for the trip precisely because of the inadequacy (insufficiency) of the insurance system enshrined in the provisions of the Law on Tourism and the procedure for reimbursement of expenses established in the secondary legislation. The court noted that, when the directive imposes a result to be achieved[46], Member States are obliged to take all necessary measures to achieve that result, and national courts must ensure legal protection of individuals and the full effectiveness of the provisions of EU law.

SACL further drew attention to the conditions necessary for the direct effect of the directives' provisions. The court noted that it must ensure full operation of the provisions of the directives, if necessary, by refusing to apply any, even subsequent, provisions of national law that conflict with them, and is not obliged to request or wait for this provision to be repealed by legislative or other constitutional means[47]. Having taken into account the aim of Directive 90/314 and the content of its aforementioned provisions, SACL concluded that the provisions of Articles 7 and 8 of Directive 90/314 were transposed inappropriately in the national law of the Republic of Lithuania.

When deciding on the issue of compensation of damages, SACL was guided by the practice established by the European Court of Justice in the *Frankovič* and *Braaserie du Pecheur* decisions and evaluated the liability criteria formulated in them. In assessing the first criteria, the panel of judges noted that the CJEU's case law on this issue was not substantial but focused on the aim pursued by a specific

45 Decision of the Supreme Administrative Court citing the Judgement the Court of Justice of 15 June 1999 *Rechberger and others*, C-140/97, ECLI:EU:C:1999:306, p. 63-64.

46 SACL relied on this aspect, see, for example, Judgement of the European Court of Justice of 10 April 1984 *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, 14/83, EU:C:1984:153, p. 15; Judgement of 15 April 2008 *Impact v Minister for Agriculture and Food and Others*, C-268/06, ECLI:EU:C:2008:223, p. 40.

47 See, e.g., Judgement of the European Court of Justice of 9 March 1978 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77, ECLI: ECLI:EU:C:1978:49, p. 21 and 24; judgement 20 March 2003 *Helga Kutz-Bauer v Freie und Hansestadt Hamburg*, C-187/00, ECLI:EU:C:2003:168, p. 73; judgement of 3 May 2005 in joined cases *Berluskoni and others*, C-387/02, ECLI:EU:C:2005:270, p. 72; Judgement of 19 November 2009 in *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu*, C-314/08, ECLI:EU:C:2009:719, p. 81.

provision. The panel found that the objective of Directive 90/314 to compensate the consumer for all the damages suffered was not achieved. Regarding the sufficiently serious breach, SACL relied on previous decisions of the European Court of Justice that Member States did not have a discretion to limit the amount of protection established in Directive 90/314. Assessing the relevant provisions of the Law on Tourism, the panel of judges found that such a limitation existed in Lithuanian national law and was therefore incompatible with the EU law and constituted a sufficiently serious breach. Thus, the second criterion of state liability was fulfilled. Regarding the third criterion – the existence of a causal link between the breach and the damages suffered by the applicant – the panel noted that if Article 7 of Directive 90/314 was properly transposed, a system that would guarantee the consumer full compensation for a trip that did not take place would have been created, therefore there was a direct causal link between the violation of EU law and the occurrence of damages to the individual. Thus, the panel decided that all the conditions of the EU law violation have been met and the state was liable for the damages suffered.

When evaluating the analysis carried out by the Supreme Administrative Court of Lithuania in the previous judgement, attention should be drawn to several aspects. Firstly, the panel of judges started the analysis from unlawful actions, a condition for liability enshrined in the national law, but used this argument only as a transition and continued the analysis in accordance with the case-law of the Court of Justice. Secondly, considering the practice of the European Court of Justice regarding the direct effect of directives and established conditions of Member States' liability, assessed the existence of an EU law violation. Thus, SACL had consistently and accurately applied the criteria of liability developed in the CJEU case-law, but the reasoning why the analysis started with national legal provisions are not unequivocally clear. If the goal was to assess the equivalence and effectiveness of national law on liability of public administration entities in relation to the criteria established by the European Court of Justice, then the argument was not developed sufficiently in the judgement.

In accordance with the official search data, SACL made at least 52 more decisions in cases related to the bankruptcy of the same tour operator on essentially identical or very similar factual circumstances. After evaluating ten latest cases (the last of which was decided in May 2022), it may be noted that all of them were resolved on similar grounds, therefore it is surprising that the state institutions chose to file appeals in the presence of a clear and established practice of the Supreme Administrative Court of Lithuania and the corresponding decisions of the court of first instance. It is debatable whether the refusal to indemnify in good faith increased the state's losses as it had undoubtedly contributed to the workload of the courts.

The last and most recent judgement of the Supreme Administrative Court of Lithuania examining the issue of state liability for violations of EU law is No. eA-

3411-556/2021. This judgement deals with an inappropriate transposition of provisions of a Directive 2009/103/EC on the civil liability insurance of motor vehicle operators and the mandatory verification of such liability insurance (hereinafter – Directive 2009/103).

An individual, who was involved in a traffic accident and suffered injuries, applied to the court claiming non-pecuniary damages. The non-pecuniary damages were compensated in accordance with the EUR 5000 limitation stipulated in the national law of Lithuania. When examining the case, the court of first instance followed the provisions of Article 6.271 of the Civil Code and the conditions of liability of the state (institutions) established therein. Although the court of first instance agreed with the applicant that the state of Lithuania committed a breach and did not properly transpose and implement Article 9 of Directive 2009/103, nevertheless, when evaluating the condition of causality, it concluded that the applicant did not prove the "non-pecuniary damages (physical pain, mental experiences, etc.) were suffered as a result of improper implementation of the directive"[48].

In its judgement, SACL clearly noted that liability of a state should be considered, not under national liability rules, but in accordance with the criteria set out in the case-law of the European Court of Justice. Assessing the first criterion, that the provisions of EU law must confer rights to an individual, the panel noted that this assessment must take into account both the objectives of the EU provision and its content. The panel stated that one of the objectives of Directive 2009/103 were the harmonization of the minimum insurance amounts to be compensated and the fact that a sufficient level of minimum protection for victims of motor vehicle accidents was guaranteed throughout the EU in cases of injury and material damage[49]. The panel of judges took into account both the provisions of previous directives in this area and the case-law of the CJEU and came to a conclusion that the content and purpose of Article 9 of Directive 2009/103 reveals that "this provision clearly aims to give victims of traffic accidents the right to damages (first of all, damage to property and persons, including non-pecuniary damage) compensation, the amount of which would not be limited to less than the amount specified in the directive"[50]. When deciding on the existence of the second criterion, SACL

48 Paragraphs 12-13 of the decision.

49 Paragraphs 29-30 of the decision.

50 SACL took into account the jurisprudence of the European Court of Justice, which indicated that in order to ensure the effectiveness of the provisions of the EU law on the mandatory civil liability insurance of vehicle drivers, those provisions must be interpreted in a manner that they prohibit national legal acts, which violate that effectiveness and do not *ex officio* entitle the victim the right to receive compensation for damages provided by the mandatory civil liability insurance (Judgement of the Court of Justice of the European Union of 14 September 2017 *Delgado Mendes*, C-503/16, ECLI:EU:C:2017:681, p. 38, p. 49 and the jurisprudence cited therein).

viewed that the purpose of the provision of Article 9 of the Directive 2009/103 and the clarity of this provision determined an obligation to give the injured persons the right to compensation of an amount not less than the one provided in the directive. The court held that ensuring at least certain minimum amount to be covered by an insurance is an important element of victim protection. The panel of judges noted that the provisions of Directive 2009/103 give Member States the discretion to set higher insurance amounts in national legislation, but the possibility of limiting the amounts is not foreseen. Regarding the fulfillment of the third liability criterion, the panel of judges indicated that there was a direct causal link between the improper transposition of the directive and the insurance amount receivable by the applicant, which could have been higher if the directive had been properly transposed.

It should be noted that it is the clearest SACL judgment in terms of motivation, in which, when deciding the issue of liability for the EU law violation, there are no more references to the provisions of national law and the criteria of liability established in the case-law of the CJEU are strictly followed. It probably also marks a clear, refined direction of the Supreme Administrative Court of Lithuania in this type of cases.

The practice of the Supreme Court of Lithuania in this area is not very abundant but sufficient to reveal the differences in the area analyzed by this article in the practice of the highest courts of Lithuania. The first judgement in which the Supreme Court of Lithuania decided on the issue of national legal acts' compliance with EU legal regulation is a decision No. 3K-3-207/2012. The case dealt with debt awarded to Kaunas Thermal Power Plant from Lietuvos Energija AB when the latter did not pay for the part of the energy produced by the Kaunas Thermal Power Plant in accordance with the Public Interest Services Agreement. The defendant justified its refusal to pay by the restriction set out in the order of the Minister not to compensate for the produced electricity if it is sold outside of Lithuania.

The panel of judges analyzed whether the provision of the order of the Minister of Economy, establishing such a restriction, does not contradict EU law. The panel drew attention to the principle of EU law primacy, as well as to the fundamental freedom of movement of goods and services. It pointed out that the restriction established by an act of a single person, which makes the export of electricity to another EU country unattractive, creates or may possibly create obstacles for electricity as a free commodity to move in the internal market. Based on the practice of the European Court of Justice, SCL stated that Article 34 of the TFEU is directly applicable, therefore the restriction established in the order of the Minister could potentially be considered a restriction hindering trade between the EU Member States. In order to ensure the principle of EU primacy, after establishing a limitation in a national legal act, the national court must check whether such a limitation can be justified. After evaluating the provisions of the directives relevant

to the relationship of the dispute, the panel of judges indicated that they do not contain obligations for Member States to support only that electricity produced from renewable sources of electricity, which is intended to meet the needs of national consumers, or a ban on supporting such energy in case of its export. Taking this into account, the panel of judges noted that a new legal norm establishing the limitation was created by the order of the Minister, which had no legal basis and lacked delegated competence to establish such a limitation. The panel of judges of the Supreme Court found a restriction on the free movement of goods within the European Union was created, therefore the court had to fulfill its duty and ensure the effectiveness of EU law. SACL refused to apply the mentioned clause of the Minister's order.

In this judgement, the Supreme Court of Lithuania analyzed in detail the compliance of national legal acts with the provisions of EU law, carried out an assessment and, having identified a contradiction, ensured the effectiveness of EU law by not applying the provision of national legal act contradicting the EU law.

Another group of decisions of the Supreme Court of Lithuania, which touch upon the issue of compliance of normative legal acts with EU law, are decisions on deposit and investor guarantee schemes. The first to be reviewed is decision No. 3K-7-602-684/2015 regarding the right of persons who purchased BAB "Snoras" deposit certificates and bonds to compensation under guarantee schemes. In this case, the court went beyond the scope of the cassation appeal and requested a preliminary ruling from the Court of Justice where it sought to clarify whether the provisions of national legal acts corresponded to the legal regulation established by the EU directives. When deciding the dispute, SACL was guided by the preliminary decision and relied on the rule formed in the *Marleasing* decision that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter[51].

The Supreme Court of Lithuania reviewed the goals and desired results of each of the guarantee directives. Thus, although it did not directly name it, the court carried out an assessment of whether the objectives and provisions of Directive 94/14 (Deposits Directive) and Directive 97/9 (Investor Protection Directive) granted rights to individuals (the first criterion of EU liability formulated in the jurisprudence of the CJEU). After evaluating the text of preamble, provisions and preparatory works of the Deposits Directive, SCL stated that the Deposits Directive pursued two main goals – to protect the depositors of each credit institution,

51 Judgment of the European Court of Justice 3 November 1990 *Marleasing SA v La Comercial Internacional de Alimentacion SA*, C-106/89, ECLI:EU:C:1990:395.

especially those who did not have enough financial knowledge to distinguish between reliable and unreliable credit institutions, and to ensure the stability of a whole banking system. Meanwhile, the purpose of the Investment Directive was to ensure the protection of investors, especially in cases of fraud, and a harmonized minimum protection for investors. Following these guidelines and refusing to apply national regulatory provisions that did not meet the objectives of the directives, the SCL came to the conclusion that the deposit certificates of were covered by the insurance provided for in the Deposits Directive, while bondholders were not covered by insurance under either the Investor Protection Directive or the Deposits Directive, and the courts had to evaluate a possibility of error in each case individually.

Therefore, the issue of state liability for violation of the EU law due to improper implementation of EU legislation was not resolved directly. The provisions of national law on state institutions' liability (Article 6.271 of the Civil Code) or the criteria formed in the practice of the European Court of Justice were not directly relied on, but *de facto* decisions were made in accordance with the guidelines provided by the European Court of Justice. The Supreme Court assessed whether the provisions of the directives granted rights to individuals, did not apply provisions that conflicted with the EU law, and interpreted national legislation in a manner that would ensure the results sought by the directives.

National regulation of the Republic of Lithuania, which transposed the Deposit and Investor Protection Directives, was also assessed in the case No. 3K-3-213-687/2018, which dealt with the issue of application of protection to persons who planned to purchase shares of the bankrupt Snoras bank and who gave their consent to deduct funds from their accounts or who paid the funds themselves into a special account in another credit institution, while the shares were never issued. The European Court of Justice indicated in the preliminary ruling that (1) such claims of individuals were attributable to both the Deposits Directive and the Investors Directive's protection schemes; (2) when claims were subject to both guarantee schemes, applicants could choose the applicable protection scheme, (3) the provisions of both directives were sufficiently clear and precise, therefore individuals could rely on them in court directly.

The panel of judges of the Supreme Court, when adjudicating the dispute, spoke very succinctly about the plaintiffs' claims, applied the case-law of the CJEU to circumstances of the case and noted that plaintiffs should be compensated for the amount of the claims according to the chosen deposit protection scheme. In part, the situation was more clear in this case because the European Court of Justice clearly stated that individuals could rely directly on the provisions of the directives to protect their rights, so there was no doubt that the provisions of the directives granted rights to individuals.

In this decision, the Supreme Court of Lithuania did not analyze and assess the liability of the national legislator, however, taking into account the questions submitted to the European Court of Justice and the final ruling applying the interpretations of the CJEU, it may be said that relevant questions regarding the adequacy of the national regulation were present in this case. Attention should be paid to the fact that in this ruling, the Supreme Court of Lithuania also resolved a question of the statute of limitations for claims arising from the provisions of the directives, which is attributable to the national system in liability cases. It should also be noted that the bankruptcy of a bank and related issues of the application of guarantee schemes, the ambiguity of national regulation, as well as its shortcomings indicated by the European Court of Justice in preliminary rulings led to adoption of a new legislation in the area[52].

3. Assessment of compliance of the Republic of Lithuania highest tier courts' practice with state liability criteria established by the European Court of Justice

Summarizing the reviewed case-law of the highest tier courts of Lithuania regarding state's liability for a violation of European Union law through inappropriate normative regulation, it is worth noting that in all of the abovementioned cases, the European Court of Justice was either approached with a request for a preliminary ruling or a decision was based on the case-law of the CJEU. The jurisprudence of the highest tier courts of Lithuania on deciding on the state's liability for the damages caused by the actions (inaction) of entities entitled to adopt legislative normative acts are in line with the criteria of liability formulated by the CJEU. The cases are adjudicated either by applying the CJEU criteria in the context of specific circumstances of a case, or primacy and effectiveness of EU law is ensured by using other means – namely by interpreting national legal provisions as much as possible in accordance with the aim of the implemented legal act and refraining from application of national legal provisions, which conflict with the EU law.

52 The Law on insurance of deposits and liability towards investors of the Republic of Lithuania was adopted on 22 December 2020. The law amends a significant number of previous legislation, namely those related to proper application of deposit guarantee systems. The reasons for this amendment provided in the explanatory note state, that "the European Commission carried out a review of the implementation of Directive 2014/49/EU in the national law of Lithuania and cases related to depositors' and investors' rights were examined at the CJEU <...> [therefore] the purpose [of the draft law] is to improve the regulation of the operation of insurance systems of deposits and investor protection, in order to achieve a more efficient operation of these schemes".

The analysis of the practice of national courts shows that the criteria of state liability for violations of EU law were not particularly refined when deciding the first cases but currently are very clearly visible and consistently followed in the practice of the Supreme Administrative Court of Lithuania. Meanwhile, the Supreme Court of Lithuania tends to use other paths of protecting the rights of individuals established in EU law. This practice may be attributable to the fact that courts of general competence do not directly decide on the compensation of damages caused by illegal actions of state institutions. Such a situation undoubtedly arises due to the fact that Supreme Court encounters these issues indirectly when examining the individual claims. Evaluating both of these paths from a perspective of result, one may observe that the rights of individuals conferred to them by the EU legislation, which are violated by the actions (inaction) of an entity entitled to adopt normative legal acts, are effectively ensured.

After evaluating the analyzed judicial practice, it can also be noted that the criteria of state liability established in national law for an EU law violation by the actions (inaction) of an entity entitled to adopt normative legal acts were not directly applied in the practice of the highest level courts of Lithuania (although they were mentioned in one of the first SACL judgements), therefore it is not possible to assess whether the national state liability system corresponds to (principles of equivalence and efficiency) or is broader than the system developed by the CJEU and could be applied instead.

Conclusions

Following conclusions can be made from the analysis. First, the highest tier courts of Lithuania properly apply the system of liability for violations of EU law developed in the jurisprudence of the European Court of Justice. Secondly, the methods chosen by the Supreme Administrative Court of Lithuania and the Supreme Court of Lithuania to adjudicate on the violation of EU law committed by an entity entitled to adopt normative national legal acts differ. The Supreme Administrative Court of Lithuania directly applies liability criteria developed by the European Court of Justice in its case-law and assesses each criterion in detail. When evaluating SACL decisions from a chronological perspective, it is also observed that the practice in this field was increasingly refined throughout the years, while in the last analyzed judgement the criteria were applied confidently, essentially without any reference to national law. Meanwhile, the Supreme Court of Lithuania is guided by other instruments (provisions) of EU law in its practise. In its judgments, the Supreme Court of Lithuania identifies the inconsistency of national legal regulation with the provisions of EU law but does not assess the seriousness of the

breach, the causal link, and ensures primacy and effectiveness of EU law through interpretation of national provisions in such a manner that they complied with the EU legislation and protected the rights granted to individuals, as well as refrains from applying national provisions that conflict with the EU law.

It is noteworthy that in the case-law of the highest tier courts of Lithuania it was never assessed whether liability of entities entitled to adopt normative legal acts enshrined in national legal system is equivalent to the liability system developed by the CJEU. Although there were references to the national legal system in the early jurisprudence of the Supreme Administrative Court of Lithuania, it was never developed. Arguably, if an opportunity presented itself, such an assessment could and should be undertaken, given that the no-fault model of liability enshrined in Lithuanian national law makes it likely that the national system would be considered effective.