THE NON-CONTRACTUAL LIABILITY OF THE EU : CASE STUDY OF ŠUMELJ CASE

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DIGITALNI AKADEMSKI ARHIVI I REPOZITORIJI

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THE NON-CONTRACTUAL LIABILITY OF THE EU – CASE STUDY OF *ŠUMELJ* CASE

ABSTRACT

The EU is in obligation to cover the damage to member states and individuals on behalf of the institution that caused it. There is contractual and non-contractual liability of the EU. The aim of this paper is to discuss the non-contractual liability of the EU with special reference to joint liability of the EU and member states. In that sense, we will discuss the case "Šumelj and Others v Commission", which is the first Croatian case before the Court of Justice of the European Union (CJEU). The action was brought before the General Court on 20 October 2013. The applicants claimed that the Commission had breached its obligation to monitor the implementation of the Treaty concerning the accession of the Republic of Croatia to the European Union, under Article 36 to the Act of Accession. The General Court recently issued a negative decision. The applicants lodged an appeal to the Court of Justice but the Court confirmed General Court's decision So, we analyse the judgment of the General Court.

Keywords *: "Šumelj and Others v. EU", CJEU, non-contractual liability*

1. INTRODUCTION

The EU is in obligation to cover the damage caused to member states and individuals, on behalf of the institution that caused it. There is contractual and non-contractual liability of the EU. The aim of this paper is to discuss the non-contractual liability of the EU with special reference to joint liability of the EU and member states. In that sense, we will analyse the case Šumelj *and Others v Commission*.[1]

The paper is divided into four parts. Following the introductory first part, the second part will describe non-contractual liability of the EU for damage and review

[1] See case: T-546/13 - *Šumelj and Others v Commission* [2016] ECLI:EU:T:2016:107.

the relevant Articles 340(2) TFEU and 268 TFEU. In terms of substantive conditions of liability, Article 340(2) refers to general principles common to the laws of member states. Seeing as how Treaty itself does not define the conditions, it is at the discretion of the CJEU to define them through case law. The second part of the paper will thus analyse the above two Treaty articles, but also the relevant case law of the CJEU to answer the following questions: who has active legal standing (*locus standi*) to bring an action; who is the action brought against; within what time limit; what constitutes a claim; which court is the action brought before; what are the conditions of liability for damage, with particular focus on the legal concept of the so-called *joint liability*. We will also reflect on the interrelation of this action and actions for annulment and actions for failure to act.[2]

The third part of the paper is divided into three sections. Section 3.1 outlines the facts of the case that lead to bringing both the actions for damage before national courts and to bringing the action for damage before the General Court pursuant to Article 340(2) TFEU. In section 3.2, we considered it necessary to describe the proceedings before the national courts. In section 3.3 we analyse the decision of the General Court. Even though a complaint was lodged against the decision of the General Court to the Court of Justice, the latter rejected the complaint and confirmed the findings of the General Court. We will thus analyse only the decision of the General Court and point to the contradictions in the decision itself.

Lastly, the final, fourth part of the paper, will give concluding remarks and suggest possible further legal steps.

2. NON-CONTRACTUAL LIABILITY FOR DAMAGE

It is necessary to distinguish between contractual and non-contractual liability of the Union for damage. Article 340(1) TFEU governs contractual liability for damage that is regulated by the law applicable to the concerned contract.[3] The discussion on contractual liability will be omitted given that the subject of our interest is non-contractual liability, as stipulated under Article 340(2):

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[2] This paper is partly based on a chapter of the book *Postupci pred Sudom EU*. See: Petrašević, T., *Postupci pred sudom* EU in Ljubanović, B. et al. Procesno-pravni aspekti prava EU, Faculty of Law in Osijek, Osijek, 2016. The research was complemented by the contribution of the co-author Mato Krmek, who was a representative in the case T-546/13 – Šumelj *and Others v Commission*.

[3] For more on contractual liability of the EU see: Hartley, T.C, *Foundation of EC Law*, Pravni fakultet Sveučilišta u Rijeci, 2012. (version translated in Croatian), pp. 443-447, Petrašević, T., *op.cit.*, note 2, p. 54 and Barents, R.; *Remedies and Procedures before the EU Courts* (Bresese, Helen E., ed.), Walters Kluwer, 2012., pp. 324-325.

> *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.*

The above article should be read in conjunction with Article 268 TFEU:

> *The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.*

Below we will analyse the two articles, but also the relevant case law of the CJEU to answer to the following questions: who has active legal standing (*locus standi*) to bring an action; who is the action brought against; within what time limit; what constitutes a claim; which court is the action brought before; what are the conditions of liability for damage, with particular focus on the legal concept of the so-called *joint liability*. We will also reflect on the interrelation of this action and actions for annulment and actions for failure to act.

As regards active legal standing, an action may be brought by member states and natural and legal persons. It should be noted that the disputes between civil servants of the EU and the EU itself (i.e. its institutions), including the issue of compensation for damage, are regulated under the separate Article 270 TFEU and are under first-instance jurisdiction of the Civil Service Tribunal.[4] Civil servants thus do not have active legal standing under Article 268 TFEU.[5]

Passive legal standing is that of the Union, i.e. of the institution that is ascribed with the conduct that caused the liability of the EU for damage. If a joint act is involved (e.g. of the Council of the EU and the Parliament), they are jointly (co-) liable.[6] Passive legal standing should be distinguished from the power (i.e. right) of representation of EU before the courts. As regards representation before EU courts, the Union is regularly represented by the Commission. If the damage was caused by the European Central Bank (ECB), pursuant to Article 340(3) TFEU, the action is then brought directly against the ECB and not the EU.[7] Interestingly,

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4 The reform of the CJEU that foresees the abolition of the Civil Service Tribunal is ongoing. See: Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union [2015] OJ L 341, pp. 14–17, par. 9.

5 Petrašević, *op.cit*.note 2, p. 54.

6 *Ibid*., p. 55.See also: Hartley, *op.cit*. note 3, p. 451.

7 Art. 340(3) TFEU: '*Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the member states, make good any damage caused by it or by its servants in the performance of their duties."*

the time limits for bringing actions are not defined under the Treaty itself, so that the relevant provision here is that of Article 46 to the Statute of the CJEU stating that the right of action expires after a period of five years from the occurrence of adverse events giving rise to such action.[8]

The action is brought against a respective institution of the EU for compensation of damages caused by unlawful conduct or failure to act. Thus, the damage may arise from unlawful conduct or failure to act.

Article 256 TFEU implicitly provides that the competent court for actions of individuals (natural and legal persons) is the General Court, and for the actions of member states the Court of Justice.[9]

Whereas earlier prevalent understanding was that actions for damage compensation had to be based on a previously established violation that gave rise to an action for annulment or for failure to act, the position adopted by the Court of Justice today is that it involves an independent action. Such action in fact represents a supplement to the mechanism of protection of the individual that allows him to bring such an action and have legal standing therefor even if he did not have legal standing for an action for annulment of an act of the EU or an action for failure to act.[10] Of course, this leaves room for manipulation in the sense that individuals might bring such actions in cases where they could not prove active legal standing that gave rise to the action for annulment or action for failure to act, or when they failed to bring an action in the strict statutory period of two months.

As regards the criteria (conditions) of liability, the Treaty (Article 340) refers to general principles of rights common to the legal systems of member states. This gave a considerable freedom to the CJEU to define the conditions of liability. According to settled case law for liability of the Union for damage, several cumulative conditions are required. Primarily, the conduct of the institution must be illegal. Further, the damage to an individual must exist and there must be a causal link.[11] Where one of the conditions is absent, the CJEU will not examine the

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8 Petrašević, T., *op. cit*. note 2, p. 54.. See also: Hartley,*op.cit*. note 3, p. 451.

9 See: Art. 256 TFEU. See: Petrašević, *op.cit*. note 2, p. 55.

10 See: Petrašević, *op. cit*. note 2, p. 54 and Meškić, Z., Samardžić, D., *Pravo Evropske unije I*, GIZ, Sarajevo, 2012, p. 444.

11 Regarding the criteria of liability see the following cases: *Oleifici Mediterranei v EEC,26/81* [1982] ECLI:EU:C:1982:318, par. 16. and T-383/00 *Beamglow v Parliament and Others* [2005] ECLI:EU:T:2005:453, par. 95. See also a more recent case T-309/10 *Christoph Klein v Commission* [2011] ECLI:EU:T:2011:262(not yet published) and appeal C-120/14 *P Klein v Commission* [2014] ECLI:EU:T:2014:19.

remaining conditions.[12] The CJEU is also not obliged to examine the existence of the conditions in a specific order.[13]

Of particular interest to us is the so-called *concurrent liability* or *joint liability* of the EU and one or more member states that exists where the EU had not taken adequate measures to prevent violation of the EU law by the national authorities of a member state. This thesis was developed by the CJEU in the case *Lütticke*.[14] In this paper, we are most interested in cases of inadequate supervision of the Commission over the proper application of the EU law at a national level.[15]

In terms of joint liability, it is important to note that it is not possible to bring a single/joint action against the EU and a member state before the same court, since the national court has jurisdiction over determining the liability of the state and the CJEU the liability of the EU. It is thus necessary to bring two separate actions. The position of the CJEU is that the applicant would first have to exhaust the legal remedies available in national law. This however does not exclude simultaneously bringing actions to the national court and the EU courts.[16] In our particular case Šumelj *and Others v Commission* (T-546/13), the applicants used that very possibility and brought an action for damages before the CJEU (concretely to General Court) and not the national judiciary, for the reason that they deemed the General Court would decide the case faster and – more importantly – be impartial therein. The only proceedings that the applicants initiated before national courts were those before the Constitutional Court in which they challenged the constitutionality of laws that terminated their service, but nothing related to compensation for damages.[17]

As regards the liability of the Union for damage, the key question is that of discretion enjoyed by the respective/liable institution. The CJEU has a different approach depending on whether the respective body did or did not have discretion in their actions. Where one institution had reduced discretion or none at all, the very violation of the EU law can suffice for determining the existence of a

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12 See case; C-146/91, *KYDEP v Council and Commission*[1994] ECLI:EU:C:1994:329, par. 81 and T-170/00 *Förde-Reederei v Council and Commission* [2002] ECLI:EU:T:2002:34, par. 37.

13 See *case:* C-257/98*Lucaccioni v Commission* [1999]ECLI:EU:C:1999:402 , par. 13.

14 See case: Joined cases 31/62 and 33/62*Milchwerke Heinz Wöhrmann & Sohn KG and Alfons Lütticke GmbH v Commission of the EEC* [1962] ECLI:EU:C:1962:49.

15 See: Kawczyńska, M., *Concurrent Liability of the EU and member states*, URL=http://eulaw.pl/data/documents/M.-Kawczynska_CONCURRENT-LIABILITY-OF-THE-EUROPEAN-UNION.pdf. Accessed 1. Febraury 2017,

16 See: Barents, R., *op. cit.*, note 3, pp. 334-335.

17 Please note that the public bailiffs (71 of them) were not unified and not all chose to bring an action to the General Court; those who did, did not have the same legal representative.

sufficiently flagrant violation.[18] Where the body did have discretion, the decisive factor is whether the EU institution manifestly and gravely disregarded the limits of its discretion.[19] It was precisely the first Croatian case before the CJEU (T-546/13 *Ante Šumelj and Others v European Commission*) that raised the question of whether the Commission overstepped the limits of its powers. We will analyse the case in more detail below, but we would first like to point out that the CJEU in the case *Kampffemeyer*[20] already commented on the discretion enjoyed by the Commission. Where a body has no discretion, the very failure to act or failure to fulfil obligations is sufficient to give rise to liability for damage.

Key to determining liability of the Union, regardless of whether discretion was enjoyed or not, is the existence of the criterion of "a sufficiently flagrant violation."[21]

The fact that the Commission adopted a formal measure for approving a national measure or conduct contrary to EU law goes in favour of the individual/the injured party. But, to avoid the injured party being insufficiently or excessively compensated by the national court and the CJEU, the rule is that the CJEU will not decide on the application until the national court delivers its final decision of on the amount of damage. The position of the CJEU is to wait for the decision of the national court on compensation. Thus, in accordance with the decision of the CJEU in the case *Kampffmeyer*[22], clearly the EU can be liable for damage (together with the member state) if it authorized a measure of national authorities that is contrary to EU law. We believe that this is analogous to the situation in the case *Šumelj and Others v European Commission* as analysed below.

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18 In case Schöppenstedt the CJEU developed the test for establishing non-conractual liability which uis further extended and explained in case Bergaderm. See: and C-352/98 P - *Bergaderm and Goupil v Commission* [2000]ECLI:EU:C:2000:361, par. 43 and 44.In Bergaderm, the Court of Justice equilized the conditions under which Union institutions incur liability with conditions for liability of Member States. See more in: Mlinarić, M., *Sufficiently Serious Breach Requirement for Obtaining Reparation of Damages in Union Law*, diploma paper, Pravni fakultet Zagreb, 2016, p. 14-16. More about flagrant violations/serious breach see: Craig, P., De Burca, G., *EU Law, Text, Cases and Materials*, Fourth edition, Oxford, 2011., pp.561-563.

19 See case: C-282/05 *P Holcim (Deutschland) AG v Commission of the European Communities* [2007] ECLI:EU:C:2007:226 and T-28/03 - *Holcim (Deutschland) v Commission*,

20 See case: *Firma E. Kampffmeyer and Others v Commission of the EEC* [2005]ECLI:EU:T:2005:139, Joined cases 5, 7 and 13 to 24-66 [1967] ECLI:EU:C:1967:31.

21 Petrašević, *op.cit.*, note 2, p. 56.

22 *Op.cit.*, note 20.

3. ANALYSES OF CASE T-546/13 - ŠUMELJ AND OTHERS V. COMMISSION

3.1. Background of the Case

With their action brought to the General Court on 20 October 2013, the applicants sought that the General Court deliver an order to the EU to cover damage (material and non-material) to Mr. Šumelj and other applicants, which they suffered on the basis of non-contractual liability of the EU in accordance with Article 340(2) TFEU. They argued that the European Commission had breached its obligation to monitor the implementation of the Treaty concerning the accession of the Republic of Croatia to the EU under Article 36 of the Act of Accession (Annex VII, par. 1)regarding the introduction of the public bailiff service in the legal system of the Republic of Croatia.

The background of the case is as follows. As part of accession negotiations (Chapter 23: Judiciary and Fundamental Rights), the Republic of Croatia undertook the obligation to reform its judiciary. To this end, in December 2010 the Croatian Parliament adopted the *2011-2015 Judicial Reform Strategy"*.[23] To improve the enforcement system, a new legislative framework had been adopted. A number of acts were passed, but the key is the Public Bailiffs Act[24] that was passed in November 2010 and was expected to enter into force on 1 January 2012. The said Act provided for the transfer of enforcement powers from the courts to the public bailiffs. The applicants passed the public bailiff exam and the Minister of Justice appointed them to the function of public bailiffs. These bailiffs had legitimate expectations of commencing their new duties beginning of 2012. In the meantime, the Accession Treaty[25] was signed on 9 December 2011. In its Article 36, the Act of Accession, which forms an integral part of the Treaty of Accession, provides for the monitoring by the Commission of the commitments undertaken by the Republic of Croatia during the accession negotiations, including the obligation to establish a public bailiff service and to establish all conditions necessary for the full implementation of that service. However, the exact opposite happened. On 22 December 2011, the Croatian Parliament postponed the entry into force of the disputed Act until 1 July 2012 and then until 15 October 2012. Following this, on 15 October 2012 the Croatian Government proposed the Act Repealing the Public Bailiffs Act and abolished the public bailiff service. This decision was taken

[23] See: The Judicial Reform Strategy 2011-2015 (OG 145/10).

[24] See: Public Bailiffs Act (OG 139/10).

[25] See: Treaty of Accession between the member states of the European Union and the Republic of Croatia [2012] OJ L 112.

without reasonable explanation and without proposals for compensation and by stating *tacit* approval of the Commission.

The position held by the applicants (and supported by the authors)is the fact that one of the conditions for closing "Chapter 23" was the introduction of public bailiffs in the legal system of the Republic of Croatia.

Furthermore, another important fact is that in September 2012, Mr Šumelj (as the main applicant in this case) sent a letter to the Commission, in which he invited the Commission to take necessary measures to warn the Croatian Government of their failure to meet obligations under the Accession Treaty.[26] Therefore, the Commission was called upon to act, but the letter did not produce an adequate response of the Commission. Given that the facts came into occurrence prior to formal accession, the Commission could not bring an action against the member state for violation of EU law before the CJEU, but we do hold that the Commission might and should have warned the Croatian Government of not fulfilling its obligations.

The General Court accepted the action and two years later found that the Commission (i.e. EU) was not liable for any damage.[27] The applicants lodged an appeal, but on 1 February 2017 the Court of Justice dismissed the appeal as unfounded.

We are truly surprised by the decision of the Court of Justice as we expected that the Court would examine the case in more detail than the General Court.[28] Given that the Court of Justice only confirmed the findings of the General Court, we will analyse the decision of the General Court. But we consider it necessary to first state what is (and had been) happening before the national courts.

3.2. Proceedings before National Courts

After the Public Bailiffs Act was repealed, Ante Šumelj applied for constitutional review of several acts: the Enforcement Act, the Act Repealing the Public Bailiffs Act and the Act Repealing the Public Bailiff Fees Act. By its ruling of 23 April 2012, the Constitutional Court dismissed the application for constitutional review, but acknowledged the violation of legitimate expectations of 71 persons appointed public bailiffs by the Minister of Justice under the Public Bailiffs Act, as

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26 Letter is mentioned in par. 20 of the judgment in case Šumelj, infra n. 27.

27 Judgment of the General Court of 26 February 2016. Please note that the General Court joined cases T-546/13, T-108/14 and T-109/14 and issued a joint decision.

28 See: Order of 1st February 2017, C-239/16 P Šumelj *and Others v Commission* [2017] ECLI:EU:C:2017:91.

well as their right to redress in a lump sum net amount of 18,000.00 HRK.[29] The said amount is certainly disproportionate to the damage they suffered. However, the Constitutional Court said that "*the redress does not affect the general right of each person appointed public bailiff to seek in court proceedings damages incurred pursuant to the general rules of the law on obligations. The redress shall not be included in the calculation of that possible court indemnity*."[30]

Importantly, the Constitutional Court further stated that this was a case of violation of the acquis.[31]

As a result, public bailiffs brought individual applications for damages incurred to national courts. These proceedings are pending. To our knowledge, thus far only one court requested data for the purposes of a financial expertise by the Ministry of Justice. There is however an interim judgment of the court in Varaždin that established liability of the Republic of Croatia for damage, but did not decide on amount of damages.[32] Presumably, the national court waited for the decision of the Luxembourg courts.

In the particular case ''Šumelj", the applicants decided to bring the action for damages to the General Court first.

3.3. Commentary on the Decision of the General Court

Below we will give a critical review of the decision of the General Court and point out discrepancies and contradictions.

First, the General Court claimed that it did not find any provisions in EU law establishing liability of the Commission: "*The applicants have therefore failed to establish that the Commission had caused them to have a legitimate expectation and had thus, by its failure to act, breached the principle of protection of legitimate expectations.*"[33] The General Court further concluded that there was no wrongful

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29 Ruling of the Constitutional Court of the Republic of Croatia No. U-I-5612/2011 and others of 23 January 2013.

30 *Ibid*., part III.

31 *Ibid*., par. 22.

32 An action brought by Marko Lapaine, claiming damages of 1.6 mil HRK from the state. In addition to damages, Lapaine is claiming annuity until his retirement on the grounds of loss of expected profit. In anticipation of commencement of his public bailiff duties, Lapaine deregistered from the Bar Association, but has not been allowed re-admission to the Association to this day. The proceedings are pending before the Supreme Court and the authors are not familiar with the status thereof. See: URL=http://www.vecernji.hr/hrvatska/javni-ovrsitelj-dobio-tuzbu-drzavu-cekaju-milijunske-odstete-923880. Accessed 1 March 2017.

33 *Ibid*., par. 77.

omission by the Commission as one of the three conditions of liability for damage.[34] Consequently, there is no liability of the EU for damage.[35]

We agree that the Commission did not directly create any legitimate expectations for applicants, but the Croatian Government, i.e. the Croatian Parliament did by adopting the Public Bailiffs Act. The violation was undoubtedly committed by the Croatian Government, but the Commission turned a blind eye to this omission. The question is: why? Had there really been a tacit agreement between the Government and the Commission?

In our view, this case is a classic example of joint liability of the EU and a member state. Firstly, the Croatian Government undoubtedly committed a violation and the Commission approved it. The joint liability of the Commission is twofold. On the one hand, the Commission did not take adequate steps to prevent a breach of EU law by national authorities. In this regard, the breach was constituted by tacit consent of the Commission.[36] On the other hand, the Commission adopted a more formal measure – the Final report, thereby approving the illegal national action. It is thus clear that the Commission legitimized the unlawful conduct of the Croatian Government both by failing to take adequate action as well as by issuing a positive report on the fulfilment of all obligations in negotiations, which was the basis for signing the Treaty of Accession..

Secondly, not only did the General Court not acknowledge the legitimate expectations of the public bailiffs and establish liability of the Commission for damage, but it also aggravated their legal position in the proceedings before the national courts. We will explain our viewpoint. As previously, mentioned,(parallel) proceedings for damages are pending before national courts. In its decision, the Constitutional Court concluded that there had been a violation of legitimate expectations under the *acquis*, or in other words – that a violation of the rights under EU law existed. In par. 51, the General Court states the following: *"Commitment 1 therefore does not give rise to any obligation for the Croatian authorities to establish the office of Public Bailiff."*[37] The General Court thus very clearly concludes that there

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[34] See par. 77: *"It follows from all of the foregoing that the Commission cannot be criticised for any wrongful omission."*

[35] See par. 78: *"It follows that one of the three cumulative conditions of EU liability is not satisfied and that the present actions must therefore be dismissed, without there being any need to examine the other conditions that must be satisfied in order for such liability to be incurred."*

[36] As already noted, the fact that the Commission could not initiate proceedings due to a violation of EU law goes in its favour.

[37] Under Annex VII to the Act of Accession, entitled 'Specific commitments undertaken by the Republic of Croatia' in the accession negotiations (referred to in Article 36(1), second subparagraph, of the Act of Accession)", Commitment I provides: "*To continue to ensure effective implementation of its Judicial*

has been no violation by the national authorities. The Croatian Government could use this as defence in the proceedings before the national court and claim that the General Court itself concluded that there had been no violation (as confirmed by the Court of Justice on appeal). In our opinion, the General Court overstepped the limits of its jurisdiction, because it was asked to determine whether the EU had been obliged to compensate damage, and not to decide on the liability of the member state, which it would be authorized to do only in the context of an action under Article 258 TFEU (the so-called *infringement procedure*).

Thirdly, in the pending national proceedings, the competent court could refer a preliminary question on interpretation of relevant provisions of the Act of Accession.[38] This begs the question: in confirming the decision of the General Court by dismissing the application, had the Court of Justice pre judged its decision on the preliminary question?

Fourthly, a particularly controversial issue in the case was whether the Commission had discretionary power to "interfere with" the contractual provisions of the Act of Accession(to authorize reinstating of agreed special obligations to the judicial enforcement system) and what degree of discretion it enjoyed. If the Commission did have the said discretionary power (which does not follow from any of the provisions of the Accession Treaty or any of the provisions of EU law), was it obliged to take into account the EU values and violation of a higher principle of law (legal certainty, legitimate expectations), its obligations under the Accession Treaty, the provisions of the Charter of Fundamental Rights and Articles 2, 13 and 17 TEU?

In our view, the Commission as the "guardian of the Treaty" should have and was allowed to act only within the limits of the powers as conferred to it under the Treaties, to enjoy the discretion only in negotiations (which ceased upon conclusion of the Accession Treaty). But even if the Commission (contrary to Article 26 of the Vienna Convention) did have the discretion to negotiate with Croatia amendments to the Accession Treaty (as concluded with member states of the EU), the liability for damage caused to the public bailiffs would still exist given the "sufficiently grave violation of higher principles of law for the protection of individuals."

Reform Strategy and Action Plan." See par. 2 of judgment in Joined cases Šumelj *and Others v Commission* T-546/13, T-108/14 and T-109/14, *op.cit*. note 26.

38 We found this possible because in its nature the Act of Accession is an international treaty and Court of Justice has jurisdiction to interpret international treaties in the course of preliminary ruling procedure.For more about preliminary ruling procedure in general see: Petrašević T., *Prethodni postupak pred Sudom EU*, Pravni fakultet u Osijeku, Gradska tiskara d.d., Osijek, 2014.

Fifthly, it remains unclear why the CJEU (both General court and Court of Justice) gave perfunctory or no answers to one of the most important questions. Namely, Article 36 to the Act of Accession as an integral part of the Treaty of Accession of the Republic of Croatia to the European Union indisputably provides for obligation of the Commission to monitor all commitments undertaken by Croatia in the accession negotiations, including those which must be achieved before or by the date of accession and to focus such monitoring in particular on commitments undertaken by Croatia in the area of the judiciary and fundamental rights (Annex VII). As an integral part of its regular monitoring and report tables preceding the accession of Croatia, the Commission issued six-month assessments of the commitments undertaken by Croatia in these areas. In the proceedings before the General Court, the Commission did not present any serious/valid reasons to Croatia that would underlie the Commission's approval to change the agreed special commitments (a legal concept of extrajudicial enforcement that was not given the opportunity to prove its effectiveness) by introducing a judicial enforcement system, seeing as how the introduction of public bailiffs was one of the reasons for closing Chapter 23, whereon the Commission insisted and which it financed within the IPA 2010 "Improvement of the Enforcement system in the Republic of Croatia." Thus, the key and manifest violation of contractual obligations was by no means explained, much less sanctioned by the CJEU.

We will point at the contradictions in the decision of the General Court below.

In par. 57 of its decision, the view of the General Court is as follows: *"It therefore does not follow from any of the commitments in Annex VII to the Act of Accession on which the applicants rely that the Republic of Croatia was under an obligation to establish the profession of public bailiff, or that the Commission was under any obligation to have recourse, on that basis, to the means of action provided for in Article 36 of the Act of Accession in order to prevent the repeal of the Public Bailiffs Act."*

Yet in par. 52, the General Court (directly contrary to the views of par. 47 to 51 and par. 57) concludes: ''*It cannot be inferred, however, that the Croatian authorities, including those in place as a result of a new political majority, as was the case of the authorities who postponed and then repealed the Public Bailiffs Act, had unlimited discretion to amend the Judicial Reform Strategy 2011-2015 and the 2010 Action Plan. In view of the provisions of the Act of Accession, in particular Article 36 and Annex VII, those authorities were required to comply not only with commitment 1 but also with all the other commitments referred to in that annex, including commitments 2, 3, 6 and 9, on which the applicants rely."*

Thus, par. 57 reads as the Croatian Government not having had an obligation to establish the profession of public bailiff, whereas in par. 52 the General Court states that the very same authorities did not have discretion to change the "Strategy" and that they were obliged to comply with their commitments, primarily Commitment I. It is unclear to us what the General Court implied by that. The vagueness of the decisions of the CJEU in general has already been pointed out by some authors such as Hartely.[39]

Moreover, in par. 47 to 51 of its decision, the General Court – contrary to fundamental principles of law in our view – states that Commitment [40] is not aimed at a specific judicial reform strategy and action plan that were in force at the time of conclusion of negotiations up to abolishing of the act governing the public bailiff service. This was explained by the fact that the Commission identified in several later documents a different judicial reform strategy and action plan that no longer provided for public bailiffs. The General Court thus did not acknowledge the fact that the applicants were appointed as public bailiffs at the time of closing of Chapter 23, i.e. upon adoption of the Judiciary Reform, part of which were the public bailiffs. We gather that, precisely by conclusion of negotiations and the Treaty of Accession of Croatia to the EU; bearing in mind Article 26 to the Vienna Convention,[41] the applicants did have legitimate expectations in terms of the commencement of their chosen profession.

Lastly, the General Court in par. 55 states that the applicants do not indicate any specific violation other than breach of the principle of protection of legitimate expectations, even though they did refer to the principle of non-discrimination, the violation of the right to labour and invoked legal security throughout the entire proceedings.

4. CONCLUDING REMARKS

Given the facts of the case Šumelj and Others v the Commission as presented herein, it must have seemed more than logical to bring two actions – one before the national court against the Republic of Croatia and one before the General Court against the Commission (i.e. the EU). Albeit the applicants did not explicitly indicate joint liability in their application, it can be inferred indirectly. What

[39] See:Hartley, T.C, *op.cit*. note 3, p. 58. For more details on the reasoning of the decisions of the CJEU, see: Beck, G., *The legal reasoning of the Court of Justice*, Hart Publishing, Oxford and Portland, 2012.

[40] *Op. cit*. note 26.

[41] Article 26 refers to the principle of *pacta sunt servanda*.

the General Court could have done is stay the proceedings pending the decision of the national court, but instead it examined the merits.

The applicants based the action for damages on the provisions of Article 340(2) TFEU from which it clearly follows that in terms of non-contractual liability, the Union is obliged, in accordance with general principles of rights common to the legal systems of member states, to make good any damage caused by its institutions or by its servants in the performance of their duties. Thus, bearing in mind the previously cited provision, it emerges unequivocally that the EU, and not the member states, is liable for any damage caused by its institutions, i.e. that no distinction is made between damage caused to nationals of a member state of the EU and damage caused to nationals of a non-EU country. The above finding is logical when keeping in mind that the EU respects and promotes legal values; it would therefore be inconceivable for the EU to discriminate against persons based on the principle of holding a nationality of a member state of the European Union, i.e. for the liability for damage to be borne only toward nationals of member states of the EU. It is the very sense of the provision of Article 340(2) TFEU that the EU bear any damage in terms of non-contractual liability, and toward all, without exception, whom the damage was caused to as a result of unlawful or wrongful conduct of its body (in this particular case the Commission), provided that it meets the remaining conditions of liability for damage.

There was a founded concern that the General Court might dismiss the application *rationae temporis*, and such decision would find a foothold in the case law. Such was the position of the General Court in the case *Ynos***.**[42] It involved a preliminary question of a Hungarian court that was rejected by the CJEU because the case was out of scope *rationae temporis.* The CJEU gave a very brief decision stating inadmissibility because the facts of the case in the main proceedings preceded Hungary's accession to the EU.[43] In view of the above, the General Court did the right thing and granted the application.

Our conclusion is that the "breach" was constituted by the Croatian Government by abolishing the institution of public bailiffs and that the Commission legitimized this by not taking adequate measures and by issuing a positive report on the

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42 See case: C-302/04 *Ynos kft v János Varga* [2006] ECLI:EU:C:2006:9.

43 Petrašević, T., *Implementation of Preliminary Ruling Procedure in the legal systems of New member states and experiences for future member states as Croatia*, in Cross-border and EU legal issues: Hungary - Croatia / Drinoczi, T., Takacs, T. (eds.) Osijek-Pecs: Faculty of Law, Josip Juraj Strossmayer University; Pecs: Faculty of Law, University of Pecs, 2011, p. 558. For detailed analysis of case and critique on the CJEU see: Horvàthy, B., *After the First Lessons and Experiences – Cases Concerning Hungary before ECJ (2004-2007), 49* Acta Juridica Hungarica, No. 1, 2008, p. 93.

fulfilment of all obligations, based on which the Republic of Croatia signed the Association Agreement. Their joint liability undoubtedly exists.

We believe that the decisions of the General Court and the Court of Justice (on appeal) do not contribute to strengthening of the protection of the rights of the individual, but rather the opposite. Croatian citizens had greater expectations from the accession to the EU. They expected more "justice" and a stronger discipline of the "country." The CJEU not only did not award damage compensation, but also potentially aggravated their legal position in the proceedings before national courts, for the reasons explained above. But after the negative decisions of the European courts it only remains to wait for decision of national court(s).

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