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Liability in Tort of Financial Supervisory Authorities – a comparative analysis

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1. Introduction

Liability of financial supervising authorities (FSAs) raises several questions and disputes, many of which relate to the classical division between public and private law. The duties of the authorities are regulated by public law, but liability claims by aggrieved persons are rooted in private law. Entitlement to private law remedies, while nowadays undoubted, is not limited to individuals such as depositors, and also embraces financial institutions (banks, insurers, stock exchange, etc.) that can suffer damage to reputation or to their financial position in the market. Moreover, the aggrieved financial corporations can transfer their loss to the shareholders¹. European courts have increasingly admitted the possibility of seeking civil remedies, specifically based on tort law, against FSAs and/

¹ See R.J. Dijkstra, *Is limiting financial supervisory liability a way to prevent defensive conduct? The outcome of a European survey*, "European Journal of Law and Economics" 2017, Vol. 43, p. 60 ff, DOI 10.1007/s10657-015-9484-1.

/or the State². The article reviews recent case law and also provides a theoretical framework for such claims.

Before we proceed to the details of FSAs liability, a few general remarks should be made in order to cast some light on the current state of the liability of public authorities in Europe³. It is self-explanatory that the nature of the liability of FSAs is tortious as we cannot establish a contractual relationship between a public authority and an individual. Depending on a national system the rules on liability of public authorities belong to either private or public law domain, or to both. In a vast majority of European systems, public authority liability is presently governed by special rules that are stricter than the ordinary rules of tort liability. Only the common law countries have, in principle, retained uniform rules of liability for public and private persons⁴.

The core elements of a compensatory claim are common for most legal systems: an event giving rise to liability, damage and causation. Additional requirements can flow from the particularisation of special rules, for example in cases of the liability of judiciary or for legislative functions. The essential question is the standard of liability. In general, a trend towards objectivisation and extension of public authority liability can be observed in recent decades in Europe. Most importantly, liability can already be triggered by a purely illegal conduct. Nevertheless, subjective fault can still

² See R.J. Dijkstra, *Liability of Financial Supervisory Authorities in the European Union*, "Journal of European Tort Law" 2013, No 3, p. 346.

³ See D. Fairgrieve, M. Andenas, J. Bell (eds.), *Tort liability of public authorities in comparative perspective*, London 2002, D. Fairgrieve, *State liability in tort. A comparative law study*, Oxford 2003, K. Oliphant (ed.), *The Liability of Public Authorities in Comparative Perspective*, Cambridge–Antwerp–Portland 2016.

⁴ See G. Eörsi, *Private and governmental liability for the torts of employees and organs*, in: A. Tunc (ed.) *International Encyclopaedia of Comparative Law*, Vol. XI (Torts) (1975), 149; C. Harlow, *State liability: problem without solution*, "National Journal of Constitutional Law" 1996, 6, 71, E. Bagińska, *Odpowiedzialność odszkodowawcza za wykonywanie władzy publicznej*, Warszawa 2006, s. 125, K. Oliphant, *The liability of public authorities in comparative perspective*, in: K. Oliphant (ed.), *The Liability of Public Authorities in Comparative Perspective*, p. 881.

play a role in cases of specific governmental activities, which we will see below.

Furthermore, a preliminary question arises: ‘who to sue?’. Should a claimant sue the institution itself or the State standing behind the institution? In many continental legal systems a public supervisory authority having its own legal capacity and budget should be sued. However, the matter is not so clear in other countries, where claimants can face a true problem of legal standing. The matter is linked with the historical shift from the exclusive liability of the individual servant towards the joint liability of the public institution by which the servant was engaged and frequently its exclusive liability. However, even those systems that decide, as a matter of policy, to channel liability onto the institution, grant the institution a limited right of recourse against the servant, in particular where he/she acted with gross negligence or intent. As might be expected, the institution’s deep pockets attract claims even where the servant bears a notional joint liability⁵. In the light of the above, a civil servant of a financial supervisory authority will most likely not be sued personally, although it cannot be excluded that the institution will seek recourse by way of indemnity for damages already paid.

2. An event giving rise to liability (tort) of Financial Supervisory Authorities

2.1. What standard of liability?

Both the regulation of a financial market (setting rules) and the supervision over it (monitoring and enforcement of rules) are conduct, which can result in someone’s unwanted losses and thus lead to liability. A primary argument against the liability of FSAs reads that regulatory and supervisory powers are regarded as not

⁵ See K. Oliphant, *op.cit.*, p. 868.

justiciable⁶. Administrative decision-makers are allowed a degree of discretion in the exercise of their powers and the courts cannot second-guess their decision; deciding on liability would mean infringing on the administrative organ's sphere of discretion⁷. Most often individuals suffer from omissions of supervising authorities, which in itself enjoy a wide margin of discretion in taking actions and implementing measures. Other market actors are exposed if the authorities interfere with their business activities or overreact to certain facts. From the perspective of private law the basic question is: what is the standard of liability?

The answer is pretty hazy. It appears that that no common approach to financial supervisory liability exists in the EU⁸. In the last decade the standard seems to have included simple negligence in supervision (eg. in Denmark, Sweden, Hungary), unlawfulness (Czech Republic, Poland, Greece, Spain), gross negligence (France⁹, Belgium, Italy) and intent (UK, Ireland, the Netherlands). In some countries liability was de facto abolished (Germany, Austria)¹⁰.

In general, the contemporary model of public authority liability in Europe, and specifically in new democratic states, is liability based on unlawfulness (public illegality, wrongfulness). For example Polish law provides¹¹ that the Financial Supervision Authority (KNF) and persons performing banking supervision shall not be liable for damages resulting from actions or the omission thereof that are in compliance with the provisions of the law and which are exercised by the KNF when supervising the activities of banks,

⁶ Except for countries, such as France, where a finding of public law illegality is sufficient to establish *faute*, consideration of discretion and justiciability is obviated. Notwithstanding this, for financial regulators *faute lourde* is the standard. See D. Fairgrieve, F. Lichere, *The liability of public authorities in France*, in: K. Oliphant (ed.), *The Liability of Public Authorities in Comparative Perspective*, p. 165 ff.

⁷ See K. Oliphant, *The liability of public authorities* (fn 4), p. 866.

⁸ See R.J. Dijkstra, *Liability of Financial Supervisory*, p. 368–369.

⁹ See D. Fairgrieve, *op.cit.*, p. 109 ff.

¹⁰ See R.J. Dijkstra, *Liability of Financial Supervisory*, p. 370 ff.

¹¹ In accordance with Article 133 par. 4 of the Act of 29 August 1997 Banking Law consolidated text: Journal of Laws of 2016, item 1988 as amended.

branches, and representatives of foreign banks and branches of credit institutions.

The objective standard is rooted in constitutional values and principles. However, the sphere of application of the objective standard may exclude licensing and supervisory activities, such as those performed by financial regulators. The discretionary powers of those authorities require a reaction of law to the arbitrariness (disproportionality) in their actions and failure to relinquish functions and powers. Negligent supervision (simple negligence/fault) or ‘maladministration’ will likely not be sufficient to hold the State or the authority itself liable in damages. Technical discretion and attention to the likely impact of the action of public authorities on the economic or social area in question may influence the assessment of responsibility¹². In most countries a plaintiff will have to prove gross negligence (*culpa lata*) or bad faith, which means that discretionary activities remaining within the parameters of reasonableness will not trigger liability¹³. Gross negligence depicts a situation where the condemned FSA should have uncovered fraud or other irregularities at the institution¹⁴, or should have recognized signs of financial difficulties, or should have acted more decisively (e.g. revoke a license, impose other sanctions), applying the ordinary standard of care. Bad faith, on the other hand, is a notion unorthodox to continental civil law systems, which prevails in common law. By bad faith continental lawyers would most likely understand a situation that is quite close to intentional infliction of damage¹⁵.

The evolution of the liability standard is clearly seen in those countries where public authority liability is based on general li-

¹² See M. Martin-Casals, J. Ribot, *The liability of public authorities in Spain*, in: K. Oliphant (ed.), *The Liability of Public Authorities in Comparative Perspective*, p. 489.

¹³ See *ibidem*, p. 463, 483.

¹⁴ See e.g. *Three Rivers District Council v. Bank of England III* [2000] 2 WLR 1220.

¹⁵ See D. Nolan, *The Liability of Financial Supervisory Authorities*, (2013) 4, pp. 190–191.

ability rules, for example in the Netherlands and Italy¹⁶. In the Netherlands, the general clause on liability for fault contained in art 6:162 of the Dutch civil code was applicable to the liability of financial authorities before 2012. The Dutch Supreme Court (*Hoge Raad*, HR) in the judgment *X v Autoriteit Financiële Markten* (2014)¹⁷ confirmed its position taken earlier, in 2006, in *Vie d'Or* case¹⁸, which concerned the liability of the insurers' supervising authority for loss suffered by the insured when their life insurance company had gone bankrupt. The HR held that the crucial question was whether the insurance supervisory authority under the circumstances at the time of the decision and with the information available at that moment could reasonably have come to its decision. The court thus rejected the hindsight test. The defendant authority was under a duty to take effective measures, and if they failed, other measures should have been implemented. However, because the authority had been granted a large margin of discretion when taking decisions and interfering in insurance companies, the courts' power to investigate and test those decisions should be curbed¹⁹. In 2014, the HR applied similar approach to test the conduct of banking regulators. In *Autoriteit Financiële Markten* the plaintiff, who had deposited money in a bank which later became insolvent, alleged that the regulator failed to fulfil the duties under the relevant laws and that it had acted unlawfully against her. The court of appeal held that the bank had not violated the Financial Supervision Act provisions on disclosure of information. Secondly, the regulator, had it conducted research on subordinated deposits

¹⁶ Equivalent in the English common law is the tort of misfeasance in public office, see *Three Rivers District Council v. Bank of England Three Rivers District Council v. Bank of England III* [2003] AC 1.

¹⁷ Judgment of 21 November 2014, *X v Autoriteit Financiële Markten*, RvdW 2014, 1310, J.M. Emaus, A.L.M. Keirse, *The Netherlands*, in: E. Karner, B.C. Steininger (eds.), *European Tort Law 2014*, Berlin 2015, p. 429.

¹⁸ Judgment of 13 October 2006, NJ 2008, 527, commented by M.G. Faure, T. Hartlief, *The Netherlands*, in: E. Karner, B.C. Steininger (eds.), *European Tort Law 2007*, Wien-New York 2008, p. 416.

¹⁹ *Ibidem*.

in 2008, would not have acted unlawfully if it had decided not to oblige the Bank to provide potential clients with certain information. The HR upheld the judgment stating that it is not sufficient to argue that the regulator did not prevent the damage. The HR underlined the so-called ‘regulators’ dilemma’. One of the aims of the financial supervision authority is to protect the clients’ interests in the best way it can. But taking measures to enforce compliance with legal rules may at the same time hurt the financial institution’s business. In this regard, the HR’s inquiry is whether the regulator contributed to the development of the dilemma²⁰.

The evolution of case law has led to the reduction of the liability of financial supervising authorities by the legislator. Since 1 July 2012 *Autoriteit Financiële Markten* and the Dutch Central Bank are only liable for intentional acts²¹.

In Italy the case law admits the liability of the Italian Financial Supervisory Authority – the Securities and Investments Board (CONSOB) based on the general clause of tort liability for fault (art. 2043 of the Italian Civil Code). In 2006 the Italian legislator reduced the liability proclaimed by the courts, which wished to protect individual depositors, to cases of gross negligence or intention²². In a case of 23 March 2011²³, the Supreme Court confirmed that CONSOB is not only a supervisory authority, but is also charged with the task to protect private and national investments. Hence, CONSOB is liable for the grossly negligent omission to comply with the duty to protect the private and national savings, which is covered by the Italian Constitution (art. 47). CONSOB was not only obliged to comply with standards of conduct stated in legislation on financial markets, but was also subject to art. 2043 of the Italian Civil Code.

²⁰ See J.M. Emaus, A.L.M. Keirse, op.cit. p. 429 ff, nos 62–66.

²¹ Based on the *Wet aansprakelijkheidsbeperking DNB en AFM*, see J. Emaus, A. Keirse, *The Netherlands*, in: K. Oliphant, B.C. Steininger (eds.), *European Tort Law 2012*, Berlin 2013, pp. 469, 470.

²² Art 24(6) of the Law 28 of December 2005.

²³ Judgment of 23.03.2011, no 6681, E Bargelli, *Italy*, in: K. Oliphant, B.C. Steininger (eds.), *European Tort Law 2011*, Berlin 2012, pp. 339, 346.

2.2. Legislative limitations

In some other countries the legislature also stood by the central supervisory organs and introduced criteria of gross negligence and/or intent (or bad faith) to limit their potential liability in damages, in line with Principle 2 of Basel Committee on Banking Supervision 2012²⁴. This Principle recommends legal protection of supervisors and their staff through immunity regarding actions or omissions taken in good faith. The fact that in many countries an immunity or essential restriction on liability have been put by national legislators led to the domino effect in other countries where many internationally operating large financial institutions are located and have remained subject to general tort liability rules with no cap or limitations²⁵.

This regulatory trend has also been marked in countries that are not centres of international financial business, such as e.g. Lithuania (since 2015²⁶) and Croatia (since 2013²⁷). The bad faith standard (i.e. intent), has been adopted in Bulgaria, Malta and Estonia, in addition to the United Kingdom and Ireland²⁸.

Exceptional is the approach in Germany and Austria where complete immunity from liability toward third parties is enjoyed by FSAs. The absence of liability is partially due to the theoretical restraints and partially due to the intervention of the legislator. The respective legislators introduced stipulations that supervisors owe their duties to the public at large rather than to individual depositors. In consequence, in the absence of a specific duty to protect individual interests, financial supervisors (or the State) cannot be held liable for any pecuniary losses that depositors (or

²⁴ Available at www.bis.org. (access: 30.07.2018).

²⁵ See M. Faure, T. Hartlief, *op.cit.*, p. 419.

²⁶ See S. Selelioniyte-Drukteinienė, L. Saltinyte, *Lithuania*, in: E. Karner, B.C. Steininger (eds.), *European Tort Law 2015*, Berlin 2016, p. 349.

²⁷ See S. Baretić, *Croatia*, in E. Karner, B.C. Steininger (eds.), *European Tort Law 2015*, p. 76.

²⁸ See R.J. Dijkstra, *Liability of Financial*, p. 370.

shareholders) may suffer as a result of the supervisors' deficient performance of their public law tasks.

In Germany the revision of law was a reaction to the judgment of BGH of 15 February 1979²⁹ in which the Court held that the rules of banking supervisors also had the purpose of protecting individual investors. In 1984 art. 4 § 4 *Finanzdienstleistungsaufsichtsgesetz* (Financial Services Supervision Act) was introduced. It specified that the German financial regulator, *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin), is an independent public law body that performs its financial supervision only in the general public interest.

In Austria the State is liable pursuant to the provisions of the *Amtshaftungsgesetz* (Public Liability Act)³⁰ for damage caused by the *Finanzmarktaufsicht* (FMA) organs and employees in the enforcement of the Federal Acts. The rule dictates that reparable damage is such that was directly caused to the legal entity subject to supervision pursuant to this federal act. The FMA as well as its employees and bodies shall not be liable towards the injured party. The immunity thus covers third-party claims, but not the directly injured entities that are subject to the supervision.

After the 2007 financial crisis the legislative change met with doctrinal criticism in Austria for i.a. incompatibility with constitutional law and EU law³¹. However, a constitutional argument failed before the German BGH in an earlier case of 20 January 2005³², in which BGH held that the then actual statutory immunity of a supervisory authority organ from liability for negligent supervision towards individual depositors did not infringe art. 34 (concerning State liability) or art. 14 § 1 (concerning protection of property) of the German Constitution. The holding puts emphasis on the wide margin of appreciation in the realisation of *Schutzpflichten* by public regulatory and supervisory agencies. A positive duty to

²⁹ BGHZ 74, 144.

³⁰ Federal Law Gazette no 20/1949.

³¹ See B.C. Steininger, *Austria*, in: H. Koziol, B.C. Steininger (eds.), *European Tort Law 2008*, Wien-New York 2009, p. 108 and pp. 114–115.

³² NJW 2005, 742.

protect through a specific legislative measure is owed solely by the parliament³³.

The special legal protection given to financial supervisory authorities is typically motivated by concern that the threat of liability is likely to be detrimental to the effective exercise of their functions³⁴. As a matter of fact, it is difficult to evaluate the deterrent effects of liability in this context (whether detrimental or otherwise).

It has been argued, on the other hand, that the rules providing for full immunity save claimants the trial costs whereas the result is close to the same as in gross negligence or bad faith cases³⁵. Thus, efficiency argument would favour full immunity to the prerequisite of gross negligence or/and intent.

3. Other conditions for a compensatory claim as obstacles to liability

3.1. The protective purpose of legal rules (norms)

In the so called Germanic legal family as well as in Denmark, Netherlands³⁶, or Italy the liability is curbed through the doctrine of protective purpose of legal rules even in the absence of the explicit statutory language mentioned earlier (the case of Germany and Austria). The doctrine means that a tort law claim requires the violation of a strongly protected and precisely described right (such as a property right). The damage suffered by the victim must fall within the scope of protection of the particular norm that has been violated. This scope may be construed differently in various legal systems.

The purpose of the rules on financial supervision was interpreted positively for investors in Italy in the cases cited earlier. Also in an

³³ See A. Scarso, *Tortious liability of regulatory authorities*, in: H. Koziol, B.C. Steininger (eds.), *European Tort Law 2005*, Wien–New York 2006, p. 110.

³⁴ See D. Nolan, *op.cit.*, p. 221.

³⁵ *Ibidem*, pp. 221–222.

³⁶ See M. Faure, T. Hartlief, *European Tort Law 2007*, p. 419.

Austrian case of 25 March 2003 the Austrian Supreme Court held expressly that ‘savers are included in the protective purpose of the provisions on banking supervision’³⁷. It is, however, unclear whether the State is liable also towards the bank shareholders, and whether the auditors bear any additional liability besides the State³⁸.

In this context, it should be borne in mind that in judgment of the European Court of Justice of 12 October 2004 (*Peter Paul*)³⁹ the Court held that in instances when the deposits of individuals were unavailable because of negligent bank supervision, the so-called ‘Codified Banking Directive’⁴⁰ did not confer upon depositors the right to have banking supervisory authorities take appropriate supervisory measures or to hold that body or a given country liable in situations in which the payment of damages is provided for by the Directive on deposit guarantee schemes⁴¹.

Another illustration how the protective purpose of the rules concept may limit the liability of supervising authorities in a system where unlawfulness is generally sufficient to hold a public authority liable, is Switzerland. In a decision of 11 April 2012 the Schweizerisches Bundesgericht (SB) accepted a rule of no liability of the Swiss Confederation towards Bank shareholders for faulty bank supervision⁴². Under the facts of the case, in 2000, the Canton of Geneva had to subject its own bank, the Cantonal Bank of Geneva, to a capital reconstruction for CHF 3.4 billion to prevent bankruptcy. As a consequence, the Canton of Geneva filed a liability

³⁷ Oberster Gerichtshof, 25 March 2003, 1 Ob 188/02g, [2003] ecolex, 416 = [2003] B.C. Steininger, Austria in: H. Koziol, B.C. Steininger (eds.), *European Tort Law 2003*, Wien-New York 2004, p. 34.

³⁸ See B.C. Steininger, *ibidem*, p. 43.

³⁹ Case C-222/02 *Peter Paul*, Cornelia Sonnen-Lütte and Christel Mörkens v. Bundesrepublik Deutschland, ECLI:EU:C:2004:606.

⁴⁰ Directive 2000/12/EC of 20 March 2000 on the taking up and pursuit of the business of credit institutions, OJ L 126, 26.5.2000, 1.

⁴¹ Directive 94/19/EC of 30 May 1994 on deposit-guarantee scheme, OJ L135/5, 31.5.1994, 5–14.

⁴² Judgment of 11 April 2012, A7111/2010, At <http://www.bvger.ch> (access: 30.07.2018). See P. Loser, *Switzerland*, in: E. Karner, B.C. Steininger (eds.), *European Tort Law 2013*, Berlin 2014, pp. 673, 686.

lawsuit for that amount against the Swiss Confederation, alleging that the supervisory authority for banks (then the Federal Banking Commission, now FINMA) failed to exercise due care in supervision. The Federal Administrative Court rejected the lawsuit arguing that the federal provisions on banking supervision serve to protect depositors from the risk of losing their deposited funds in the case of the bank's insolvency. However, the purpose of such regulation is not to protect shareholders and cantons guaranteeing liabilities for their cantonal bank from the risk of having to restructure the bank's capital. Although technically and indirectly the Canton guaranteeing the deposits is also protected, it is not covered by the legal purpose of the protection. Hence, the supervisory duties are not supposed to protect the bank's shareholders in Switzerland.

3.2. Compensable damage

In all countries the principle of full compensation applies to tort claims and thus also to public authorities liability⁴³. Nevertheless, in a few countries the nature of damage inflicted through the negligent conduct of FSA upon individuals and supervised institutions may serve as a tool to circumscribe the liability⁴⁴. Some European courts are hesitant to expand public authority liability when a claim is one for loss of chance or pure economic loss. Legal systems based on the general clause of liability for faulty conduct do not apply the concept of pure economic loss. It is irrelevant because, as a rule, all interests, including pure economic loss, deserve legal protection in tort. However, in the systems based on the concept of protected interests (eg. Germany, Denmark⁴⁵ and other Scandinavian legal systems) pure economic loss of third parties must be included in the list of protected interests to be recoverable in tort. The first

⁴³ See K. Oliphant, *The liability of public authorities* (fn 4), p. 859.

⁴⁴ See E. Karner, *Tort Law and the Financial Crisis: Basic Questions*, "Journal of European Tort Law" 2013, Vol. 4, p. 126.

⁴⁵ See V. Ulfbeck, *The liability of public authorities in Denmark*, in: K. Oliphant (ed.) *The Liability of Public Authorities in Comparative Perspective*, p. 118.

group of systems thus has to use other mechanisms and instruments to react to unpredictable and limitless expansion of liability (eg. through the concepts of ‘damage’ or ‘causation’)⁴⁶. A possible argument against limiting the State liability for pure economic loss is rooted in the constitutional values and the fundamental rights, which include protection of property and may include the principle of public authorities liability for damage to individuals⁴⁷.

A recent example of holding the supervisory authorities liable for pure economic loss is an Austrian court ruling of 2012⁴⁸. The Austrian Republic was held liable to investors for omissions by the public supervisory agency in charge at that time of supervising the securities market. The authority failed to adequately control a private financial services provider who had acted fraudulently.

Additionally, an important exclusion of the liability of FSAs concerns losses that have been or could have been covered by a deposits-guarantee funds or schemes. In cases of insolvency of supervised entities, limitations and caps on State liability are understandable when actual loss is first of all covered, albeit to a certain ceiling, through a mandatory deposit guarantee scheme. The deposit scheme implicates, on the one hand, stricter liability towards the depositors, and on the other one, a departure from the principle of full compensation. Other injured parties (e.g. the supervised entities) remain outside special protection regimes.

3.3. Causation

In order to determine the liability of FSAs a causal link between the alleged the violation of the latter’s duty and the claimant’s loss should be established.

⁴⁶ See D. Nolan, *op.cit.*, p. 202 ff.

⁴⁷ See e.g. art. 34 of the German Constitution 1949, art. 48 of the Italian Constitution 1948, art. 106 sec 2 of the Spanish Constitution 1978, art. 77 of the Polish Constitution 1997.

⁴⁸ OGH 22 June 2012, 1 Ob 186/11a = ÖBA 2013, 52.

In principle, when damage is the result of a failed business activity, financial institutions as direct tortfeasors should bear the burden of compensation in the first place. Financial supervision for a great part consists of examining whether legal rules have been complied with; therefore the causal link between economic losses and negligent omission in supervision is indirect. Indirect causation is not an obstacle to liability in most countries, where the test of adequate causation is used, except for the systems where the test of direct causation prevails⁴⁹. Nevertheless, causation is a tricky element of a compensatory claim against FSAs.

Difficulties in establishing causation are best illustrated by the French *El Shikh* case. The French appellate administrative court dismissed the claims for the lack of causal link between the alleged failures of *the Banque de France* and the loss of the deposits by the claimants (the client of the bank)⁵⁰. In this case the bankruptcy of the bank was largely attributable to the fraudulent conduct of its London office, so – according to the court – there was not a direct causal connection between omissions on the part of the French supervisory authorities and the losses sustained by the depositors⁵¹. Also the failure to revoke the bank's license did not give rise to liability because it had not been established that the bank's collapse was attributable to its failure to comply with the requirements of its license. The key question for the establishment of the causation is thus: Would the revocation of the licence have prevented the loss?

An interesting solution can be found in the decision of 25 January 2000 by the Court of Appeal in Paris. The court held that while inadequate supervision had been causally significant in the failure of another bank, it had only deprived depositors of the chance of avoiding their losses. Hence, damages should be limited to one fifth of the funds each had lost⁵². The loss of chance doctrine served

⁴⁹ See in general B. Winiger, H. Koziol, B.A. Koch, R. Zimmermann (eds.), *Digest of European Tort Law, vol I: Essential Cases on Natural Causation*, seria National Court Practice and Tort Law, Wien–New York 2007.

⁵⁰ CAA Paris, 30.03.1999, *El Shikh*. See D. Fairgrieve, op.cit., pp. 109–110.

⁵¹ See D. Nolan, op.cit., p. 216 ff.

⁵² CAA Paris, 25 January 2000; see D. Nolan, op.cit., p. 217.

to overcome the problem of uncertain causation, thus the liability was eventually proportional⁵³.

The role of causation in litigation involving FSAs can also be illustrated by the cited Italian CONSOB judgment of 2001. In that case the Italian Supreme Court disagreed with the rejection of the compensatory claims by the Court of Appeal of Milan, arguing that the existence of the causal relationship between CONSOB's conduct and the damage suffered by investors should not be confused with the aspects related to the assessment of reparable damage. The causal inquiry should examine what should have been the result of a timely and correct fulfilment of CONSOB's duties on the subscriber's investment. After remand, the Court of Appeal of Milan held that even risk-friendly investors would have turned their attention to different forms of investment if CONSOB had properly fulfilled its duties. In consequence, the claimants received full compensation⁵⁴.

4. Conclusions

This brief overview of the problems concerning the liability of national financial supervisory authorities demonstrates that it is a part of a wider debate on public authorities liability. There are several policy arguments usually raised in doctrine against the expansion of public authorities liability: the need to preserve limited financial resources, the risk of detrimentally defensive action by public authorities, the alleged conflict between the duty to the public (in particular a duty to protect the stability of the banking system)⁵⁵ and the private duty⁵⁶, discretionary powers granted to

⁵³ See the study by the European Group on Tort Law: I. Gilead, M.D. Green, B.A. Koch (eds.), *Proportional liability: Analytical and Comparative Perspectives*, Berlin–Boston 2013.

⁵⁴ See A. Scarso, *op.cit.*, p. 105.

⁵⁵ Financial regulators are under an obligation to protect a plurality of interests, including, more specifically, the stability of the banking system.

⁵⁶ See K. Oliphant, *The liability of public authorities* (fn 4), pp. 860–861.

FSAs especially in the area of disciplinary (quasi-judicial) powers⁵⁷, ineffective financial supervision, and unjust redistribution of wealth. It is also argued that public authorities should not be deterred from using their powers to achieve public benefit. As concerns the last argument, even though from a theoretical perspective the impact of financial supervisory liability is hard to predict, there is actually no empirical data supporting the thesis that tort law liability has deterrent effect on the conduct of financial regulatory authorities⁵⁸. Indeed, the fact that FSAs are granted powers to be used to achieve public goals provides reason for holding them responsible for their proper exercise⁵⁹. In fact, sometimes they seem to have fallen short of fulfilling their obligation of preventing reckless market conduct in order to diminish improper financial risks⁶⁰.

On the other hand, the arguments pro-liability, beside the regular motives supporting public authority liability, also include i.a. the need for consumer protection (due to information asymmetry), promotion of ‘awareness of liability’, and the transparency and efficiency of financial markets⁶¹. Those arguments can rarely be found in judicial decisions. The French philosophy of holding the State liable for damage is based on a particular assumption that all losses suffered by individuals due to governmental activities must be born by the society as a whole. Such expenses from public resources are regarded as the correct way of spending public money⁶². On the contrary, the English courts debate in each case over the economic effects of establishing the cause of action through expanding the duty of care of public bodies⁶³.

⁵⁷ See D. Nolan, *op.cit.*, p. 211.

⁵⁸ See R.J. Dijkstra, *Is limiting*, p. 61.

⁵⁹ See K. Oliphant, *op.cit.*, p. 860–861.

⁶⁰ See E. Karner, *op.cit.* p. 125.

⁶¹ See A. Scarso, *op.cit.*, p. 114.

⁶² See P. Le Tourneau, L. Cadet, *Droit de la responsabilité et des contrats*, Paris 2002, p. 45.

⁶³ See *Dorset Yacht Co. v. Home Office* [1970] AC 1004, *Anns v. Merton London Borough Council* [1978] AC 728, *Stovin v. Wise* [1996] AC 923 (Lord Hoffman), *Three Rivers District Council v. Bank of England III* [2000] 2 WLR 1220.

Legal scholars quite rightly emphasise the need for balance in weighing the countervailing policy arguments⁶⁴. Most importantly, the constitutional nature of the principle of liability of public authorities in many countries is considered an essential argument in controlling the use of the powers of public authorities and extending of the protection of interests of citizens.

Furthermore, a closer examination of the practical results of the application of the different private and public law doctrines and theories to the cases of the liability of FSAs, as well as the methodology that the courts use to solve actual conflicts, have revealed a certain level of the convergence of the systems of public liability⁶⁵. This general conclusion remains valid even though some particular problems, such as for example the scope of compensation of pure financial losses, might be given different answers. The opinion, according to which a full immunity of the supervisory authorities from the liability toward third parties is model which indicates a broader trend in Europe, is in my mind unsupported by actual case law⁶⁶. The scope of public authorities liability of course varies because the legal solutions are closely dependent on constitutional values, social and legal policy, as well as other economic, moral and cultural factors⁶⁷.

STRESZCZENIE

Odpowiedzialność deliktowa organów nadzoru finansowego – analiza prawnoporównawcza

W artykule dokonano przeglądu orzecznictwa i opisano teoretyczne ramy roszczeń osób fizycznych i instytucji finansowych o zapłatę odszkodowania

⁶⁴ See K. Oliphant, *The liability of public authorities* (fn 4) 862, no 28, M. Martin-Casals, J. Ribot, op.cit., pp. 463, 479.

⁶⁵ See also A. Scarso, op.cit., p. 94, 110.

⁶⁶ See E. Karner, op.cit., 126.

⁶⁷ See B. Markesinis, *Unity or division: the search for similarities in contemporary European law*, in: D. Fairgrieve, M. Andenas, J. Bell (eds.), *Tort liability of public authorities in comparative perspective*, London 2002, pp. 458 ff, K. Zweigert, H. Kötz, *An introduction to comparative law*, Oxford 1998, p. 34.

pieniężnego wobec władz publicznych za brak nadzoru nad rynkiem finansowym. Autor przedstawia podstawowe elementy czynu niedozwolonego organów nadzoru finansowego oraz analizuje ewolucję zasady odpowiedzialności. Omówiono również inne przesłanki roszczenia odszkodowawczego, które stanowią przeszkodę dla odpowiedzialności (np. cel ochronny przepisów prawnych i odszkodowanie). Na koniec podsumowano argumentację za i przeciw odpowiedzialności organów nadzoru finansowego.

Słowa kluczowe: organy nadzoru finansowego; odpowiedzialność za szkodę; delikty

SUMMARY

Liability in Tort of Financial Supervisory Authorities – a comparative analysis

The article reviews case law and also provides a theoretical framework for claims of individuals, such as depositors, and financial institutions, who seek monetary compensation against public authorities for failure to supervise the financial market and its institutions. The author presents the core elements of a tort of Financial Supervisory Authorities and analyses the evolution of the standard of liability. Other conditions for a compensatory claim which operate as obstacles to liability (eg. the protective purpose of legal rules and compensable damage) are also discussed. Finally, policy argument pro and on the liability of Financial Supervisory Authorities are recapitulated.

Key words: Financial Supervisory Authorities; liability for damage; torts

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