

**ADMINISTRATIVE ACTIVITY AND LIABILITY FOR
INFRINGEMENT OF EUROPEAN UNION LAW**

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1. JUDICIAL REVIEW AND ADMINISTRATIVE LIABILITY - TWO REMEDIES FOR THE INFRINGEMENT OF EU LAW

In the Legal Systems of European Countries, the principle of legality in Administrative Law is generally enforced by means of two instruments, namely *judicial review* and *administrative liability*¹, with each of them presenting relevant peculiarities in the event of infringement of European Union rules and regulations.

Focusing only on *Liability* for the violation of Rights recognised by the European Union, it is about any administrative tort perpetrated by a Member State due to the delayed, inadequate, or non-implementation of a Directive; to the passing of laws that are incompatible with European law; or to the infringement of European Law by one of that Member State's Public Administrations or national courts². In this framework, liability for breach of EU Law established by the landmark decision of the European Court of Justice in *Francovich* introduces a special notion of liability, based on the obligation for each Member State to fully and adequately implement EU Law³.

¹ For a quick overview of the administrative systems of Western Countries, see R. SEERDEN (ed.), *Administrative Law of the European Union, its Member States, and the United States. A Comparative Analysis*, II ed., Antwerpen-Oxford, 2007, 77.

² C. HARLOW, *Francovich and the problem of the Disobedient State*, in *European Law Journal*, 1996, 209, where the function of unlawful acts of the Public Administration is examined. On the one hand, the European Court of Justice has utilised civil liability as a *deterrence* tool, in order to discourage Member States from circumventing EU Law; on the other hand, it has been used to ensure the protection of citizens, for *compensation* purposes.

³ The regulatory framework of liability in tort for breaches of EU Law mainly consists of court decisions. The judgement that paved the way for the establishment of such regulatory framework was the ECJ's decision of November 19th 1991, in Case C-6/90 and 9/90, *Francovich vs. Italian Republic*, where the liability of the legislator

It is a form of institutional liability, stemming from the obligations imposed on National institutions by European Law. Due to its function as a remedy for damage – aiming at ensuring full compliance with the principle of legality in Europe – it presents some particularly interesting aspects. Should any Member State fail to fulfil its obligations, an infringement procedure may be launched against such State, which may also be imposed a penalty. Furthermore, “if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law”, “the full effectiveness of [Community] rules would be called in question”⁴.

for the non-implementation of a EU Directive whose provisions did not have direct effect was established. In its subsequent decision of March 5th 1996, in Joint Cases C-46/93 and C-48/93, *Brasserie du Pecheur Vs. Germany, The Queen vs. Secretary of State for Transport, ex parte: Factortame and Others*, by widening the scope of the principle of Governmental liability for breaches of EU Law, the European Court of Justice ruled that liability not only arises from non-implementation of a EU Directive, but also when a Government passes or maintains rules and regulations that are incompatible with EU provisions protecting the rights of individuals, even if they are not have immediate effect.

Literature: R. CARANTA, *La responsabilità oggettiva dei pubblici poteri per violazioni del diritto comunitario*, in *Giur. it.*, 1992, I, 1169; ID., *Governmental Liability After Francovich*, in *Cambridge Law Journal*, 1993, 272 et seq. On the composite nature of the liability regime, A. SAGGIO, *La responsabilità dello Stato per violazione del diritto comunitario*, in *Danno resp.*, 2001, 223 et seq.; R. BIFULCO, *Responsabilità dello Stato per violazione del diritto dell’Unione europea*, in *Digesto*, 2010. In particular, on administrative action as the source of liability for infringement of EU Law, see M.P. CHITI, *La responsabilità dell’amministrazione nel diritto comunitario*, in *Riv. it. dir. pubbl. com.*, 2009, 533. See also: M. MACCHIA, *Legalità amministrativa e violazione dei diritti non statali*, Milan, 2012, 155; M. ZAMBELLI, C. ZAMBELLI, *La responsabilità extracontrattuale dello stato nell’implementazione del diritto europeo: il contesto comunitario e l’esperienza inglese*, in *Riv. it. dir. pubbl. com.*, 2011, 857.

⁴ European Court of Justice, September 30th 2003, in Case C-224/01, *Köbler c. Republic of Austria*; reference is significantly made to case law. Moreover, refer to the ECJ decisions of July 4th 2000, in Cas C-424/97, *Haim*; and ECJ decision of March 24th 2009, in Case C-445/06, *Danske Slagterier*. On infringement of EU Law by sufficiently serious breaches, see ECJ decision of January 18th 2001, in Case C-150/99, *Stokholm Lindopark vs. Sweden*. On the evolution of Italian case law following actions brought against breaches of EU Law, see M.G.

This point may be tackled from different angles. Focus is here placed on invalid administrative action that, besides infringing European Union laws, is also the cause of torts⁵. The two most interesting aspects of this type of liability will be examined in this Paper, which shall not deal with the well-known elements relating to liability for infringement of European Law in general. The *peculiarity* of the aforementioned remedy for damage and the relation with the *invalidity* of administrative action shall therefore be tackled.

It is worth highlighting that, when legal protection does not lead to non-financial compensatory remedies, individually favourable legal situations of single individuals benefitting from European Union Law should be safeguarded. The State's liability action for damage caused by breach of EU Law by the Public Administration becomes, then, "a corrective action for the lack of protection ensured to single individuals by other safeguard

PIZZORNI, *La recente evoluzione della giurisprudenza nazionale in tema di responsabilità dello Stato per violazione del diritto dell'Unione*, in *Il dir. dell'UE*, 2010, 149 et seq.

This is what has recently happened to Italy in the area of liability for damage caused by the judiciary, when infringement results from the interpretation of legal provisions or from the assessment of facts and evidence by a court itself, in European Court of Justice, November 24th 2011, C-379/10, *European Commission vs. Italian Republic*.

⁵ Government liability for infringement of EU Law by a public administration was introduced for the first time in the ECJ decision of May 23rd 1996, in Case C-5/94, *The Queen c. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland)*. The dispute under consideration was about the non-issuance of a permit to export slaughter cattle to Spain. The UK Ministry of Agriculture had infringed EU laws prohibiting quantitative restriction on exports, as it had not granted the relevant permit to the Hedley Lomas, while it did not have the discretionary powers required to make such choice. The ECJ ordered the Government to redress the tort, highlighting that, in that particular case, the public authority had very limited discretionary powers. A similar case was dealt with by the ECJ in its decision of April 2nd 1998, Case C-127/95, *Norbrook Laboratories Ltd vs. Ministry of Agriculture, Fisheries and Food*, relating to a permit for the marketing of medicinal drugs. When a public authority is required to meet European parameters, any infringement of EU law is a serious and obvious breach.

procedures and, in particular, by action for annulment»⁶. By partially anticipating the final conclusions, it is worth pointing out at this stage peculiarity is due to the fact that action for liability is not additional or complementary to protection seeking the annulment or elimination of the relevant act, as it actually *almost replacing* it, whenever it is no longer possible to resort to the latter⁷.

⁶ As it is pointed out in M.P. CHITI, *La responsabilità dell'amministrazione nel diritto comunitario*, cit., 533. On the legislation regulating action for liability for breaches of EU Law with reference to administrative action taken pursuant to any law that is not compliant with EU Law; and on the difference between the latter and State liability in damage for administrative acts adopted pursuant to an unconstitutional law, see ECJ January 26th 2010, in Case C-118/08, *Transportes Urbanos*, commented by F. CORTESE, *Responsabilità per violazione del diritto dell'Unione e azionabilità dei rimedi interni: la Corte di giustizia, il dibattito spagnolo e la flessibilità dell'integrazione europea*, in *Riv. it. dir. pubbl. com.*, 2010, 1304 et seq.

⁷ The relation between (traditional) protection through annulment and protection through compensation for unlawful administrative acts is a highly topical issue in the Italian legal debate. Also under the recently adopted Code of Administrative Procedure (Legislative Decree n° 104 of July 2nd 2010), pursuant to Art. 34, if the appeal is upheld, the court can adopt the most suitable measures aiming at ensuring the enforcement of *res judicata*. Furthermore, no annulment ruling is envisaged when nullifying the act does not serve the purpose of the plaintiff acquiring the relevant legitimate interest. Therefore, the court is only entitled to ascertain the unlawfulness of the act, so to allow redressing the tort. It is also not possible to annul any act whose effect has ceased, while an annulment action can be transformed into an action for declaration. Based on this approach, annulment is no longer unquestionable, as it becomes just one of the penalties for unlawfulness.

2. THE SPECIAL NATURE OF THIS ACTION FOR LIABILITY

Starting from the first profile, this action for liability due to infringement shows multiple *peculiarities* due to the fact that it aims at protecting “European interests”. Actually, all related regulations are the fruit of the interpretation by supranational court decisions, which have developed a complex set of principles on this point, some of which are derived from national laws, while some others are original principles.

The first peculiarity can be observed in the legal basis of said title of liability. Although there are no explicit legal provisions and no express recognition in the Treaties – also after the entry into force of the Treaty of Lisbon, where the opportunity was not seized – liability is anyway indisputably envisaged in European court decisions based on what could be defined as an “imitation mechanism”. The liability of Member States for breaches of EU Law is there just as the liability of EU Institutions causing any damage in the performance of their duties⁸. This, in line with the interpretation that considers national administrations as Agencies of the European Union, due to the supranational tasks they have to fulfil⁹.

⁸ This liability model has been designed based on liability in tort of EU Institutions for damages caused by EU agencies in the performance of their duties. Art. 340, paragraph 2 of the TFEU provides for the regulatory bases of EU non-contractual liability. Instead, Member State liability for failing to fulfil the obligations imposed on them due to their EU membership arises from the duty to *sincerely cooperate* with other Member States, whose violation is judicially punished by means of an infringement procedure.

⁹ On the creation of common administrative systems in Europe based on the coordination and cooperation of National administrations and supranational entities, refer to S. CASSESE, *La signoria comunitaria sul diritto amministrativo*, in *Riv. it. dir. pubbl. com.*, 2002, 291 et seq.; L. SALTARI, *Amministrazioni nazionali in funzione comunitaria*, Milano, 2007. For a wider perspective, see C. FRANCHINI, *Amministrazione nazionale e amministrazione comunitaria. La coamministrazione nei settori di interesse comunitario*, Padova, 1993; E. CHITI,

As it has been repeatedly reaffirmed by the European Court of Justice, liability of Member States for damage caused to individuals by breach of EU Law is inherent in the EU Treaty system, and is in line with the general principles laid down by the Laws of EU Member States. The effect of such liability mechanism is implicit, as there is no need for any explicit legal provision. Otherwise, if EU citizens were not enabled to take legal action against EU Member States for breach of EU Law, the efficacy of EU Law itself would be jeopardised¹⁰. Hence, in spite of the lack of explicit legal bases, recognition of the aforesaid liability stems from the supremacy of EU Law and its effectiveness.

Another peculiarity is the rule of the indistinctness of public functions. Actually, as for the purposes of EU interests only the enforcement of supranational law is relevant, it is of secondary importance whether such enforcement is due the action of the legislator, of an administrative authority, or of a court of last resort¹¹. Regardless of the entity exercising public powers, in the event of non- or mis-enforcement of any EU source of law, the obligation may arise to make good damage, provided that some conditions are met. Pursuant to the general principle of liability for breaches of EU provisions, an obligation is imposed on each member State as a whole, which has a very wide scope of application,

Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie; Padova, 2002; G. CORSO, *Sistemi amministrativi europei e principio di autonomia*, in *Riv. trim. dir. pubbl.*, 1992, 979.

¹⁰ The principle of such implicit nature was laid down for the first time by the ECJ in its decision of November 19th 199, Case C-6/90 e 9/90, *Francovich vs. Italian Republic*, paragraph 32. In the ECJ judgement of March 5th 1996, Cases C-46/93 and 48/93, *Brasserie du pêcheur e Factortame*, it is stated that the principle of non-contractual liability (or liability in tort) is nothing but a «general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused». If the relevant conditions are met, the Administration is liable when it does not perform its tasks or when does not fulfil its duties the way it should.

¹¹ So far, the field in which this liability has been applied the most is the passing of abstract and general regulations.

including to situations that are unknown to national Law, as the profiles of the relevant torts have been defined by EU court decisions.

This is why the liability of a Member State for infringement of EU Law is a special one, which was designed in order to remedy breaches of EU rules¹². Among the conditions for such liability to arise is a sufficiently characterised and qualified infringement – that is, a *sufficiently serious breach of law* – of any provision intended to confer rights upon individuals, as well as a direct causal connection between such breach and the damage incurred¹³. Member States cannot add any additional condition or requirement, including stricter ones¹⁴. However, this does not apply to recourse action regulations, which do not fall within the province of EU Law. This is why the implementation regime is regulated by national Law, provided that it does not make it too difficult for citizens to bring action before a court¹⁵. Nevertheless, the role played by

¹² One is entitled to compensation for damages caused by breaches of EU Law when three conditions are met. First, the infringed provision should confer rights upon the individuals who suffered the damage. Secondly, there should be sufficiently serious and obvious breach. Thirdly, there should be a direct causal connection between the infringement and the relevant damage.

¹³ See ECJ March 5th 1996, in Cases C-46/93 and 48/93, *Brasserie du pêcheur and Factortame*; ECJ., July 4th 2000, in Case C-424/97, *Haim*; ECJ., March 24th 2009, in Case C-445/06, *Danske Slagterier*.

¹⁴ As it is pointed out by the Court of Justice, March 5th 1996, in Cases C-46/93 and 48/93, *Brasserie du pêcheur*, «the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States concerning reparation of damage must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation». A typical example is in Italy the liability of judges, where the highest court usually does not interpret Art. 2, Paragraphs 1 and 3 of Law n° 117 of April 13th 1988 as a «manifest breach of the applicable laws». As a consequence, it becomes possible to say that the victims of a tort due to any behaviour, act, or measure taken by a judicial authority are solely to be compensated by the Government in the event of fault or serious misconduct of a court.

¹⁵ Again in the area of administrative action, and considering our regulatory framework, voidness and unlawfulness need to be ascertained, which are predicated on the tort caused by a subjective legal situation

national law is also crucial due to the fact that the line of decisions of the ECJ is not comprehensive and does not cover all aspects, thus needing to be complemented and coordinated with national rules and regulations on liability.

In assessing such tort, there is no room to consider any subjective condition, that is, assessing the relevance of malice and fault¹⁶. For the subjective factor, it is essential to access an objective notion that takes into account the defects and flaws that invalidate the decision, as well as – in line with the orientations of EU Court decisions – the seriousness of the breach perpetrated by the public administration, also in the light of the extent of its discretionary assessment powers, of the relevant case law, of the real conditions, and the contribution given by private actors to the proceedings¹⁷. This proves that the aforesaid liability aims at safeguarding the right to full protection of one's legally relevant interests.

protected by law, which occurs when unlawfulness violates a private citizen's substantial interest thus causing unfair tort. There is vast literature on this topic; refer to R. CARANTA, *La responsabilità extracontrattuale della pubblica amministrazione*, Milan, 1993; A. BARTOLINI, *Il risarcimento del danno tra giudice comunitario e giudice amministrativo*, Turin, 2005.

¹⁶ EU Court of Justice, June 13th 2006, in Case C-173/03, *Traghetti del Mediterraneo/Italian Republic*, pointing out that «Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed».

Conversely, national courts continue to deem it necessary to ascertain the fault with a view to establishing liability for breaches of EU Law. For instance, in the event that a public administration has enforced an Italian law instead of highlighting its non-compliance with an EU Directive. In *Court de Cassation*, January 21st 2005, n. 20454, the administration had enforced a decree-law, which the European Court of Justice had later deemed in contrast with the purpose of a previously passed EU Directive. The main point is, therefore, the immediate effect of the relevant EU regulation. In particular, an administration is not deemed to have acted wrongfully if, by adjusting to the laws in force, it has not pointed out the non-compliance with an EU Directive that the European Court of Justice would only later declare as having immediate effect in the Member States.

¹⁷ Lombardy Regional Administrative Court (TAR), Milan, Div. I, June 14th, 2010 , n° 1811.

The Government is therefore held accountable for any mistake made by the administration, in the event of any damage caused by the infringement of EU Law. Hence, it is not about direct liability – as it is the case for ordinary violation of legitimate interests. This means that public administration errors causing indemnifiable damage should be remedied through appeal.

Actually, action for liability does not aim at changing the decision – which, actually, is deemed unchangeable and impossible to challenge. Any tort – even when it causes indemnifiable damage – can only be remedied by lodging an appeal. However, in order to safeguard the principle of legality, EU Law envisages a remedial mechanism – through indirect compensation – for any error in the interpretation and enforcement of European Union Law, especially for those cases in which reference for preliminary ruling is not properly resorted to, and the efficacy of EU provisions – providing for an advantage – depends on an action of the State/Administration under consideration¹⁸.

¹⁸ In Court of Justice, June 28th 2001, in Case C-118/00, *Gervais Larsy vs. INASTI*, the Belgian National Institute for Social Security had independently adopted a measure to the detriment of Mr. Larsy, prohibiting overlapping pension benefits, when such benefits were regularly paid by the French administration. This, even if the plaintiff had paid old-age pension insurance contributions in both Countries and EU laws prohibited the adoption of any measure aiming at reducing pension benefits in the event of double payment of social security contributions (Art. 46 of Regulation n° 1408/71). In that specific case, as Mr. Larsy had not appealed against said unfavourable decision, the Court held that “to the extent that national procedural rules precluded effective protection of Mr Larsy’s rights derived under the direct effect of Community law, Inasti (that is, the Belgian National Institute for Social Security) should have disapplied those provisions”. Therefore, even when there is a final judgment, national procedural rules in serious breach of EU Law should be disapplied.

3. RELATION WITH THE INVALIDITY OF ADMINISTRATIVE ACTION

As it has been pointed out above, according to the European Court of Justice, declaring damage caused by breaches of EU Law non indemnifiable means calling in question the “full effectiveness of Community laws providing for such rights”. Therefore, anyone can see that, denying the responsibility of a Member State for any obviously wrong administrative act would entail the same consequence.

Hence, in order to ensure the effectiveness of EU Law, invalidity and accountability/liability rules are introduced, just as it is the case for national law¹⁹. Invalidation rules and regulations aim at ensuring that there are no differences between actual acts and measures and the abstract ones envisaged by the EU legislator, implemented by the legal principles regulating the exercise of public powers. Instead, accountability/liability rules and regulations assume that pecuniary damage was caused to the individual concerned and aim at protecting the legitimate interest that such individual intends acquire or maintain.

All the above being said, the infringement of an EU provision may affect the validity of an administrative act, but may also be the source of liability for damages. It can

¹⁹ This expression is used in G.P. CIRILLO, *L'azione amministrativa sospesa tra regole di invalidità e regole di responsabilità*, in *Cons. St.*, 2005, 1137. As it was repeatedly held by the Italian Constitutional Court, protection for damages is an “additional protection tool besides the classical one – that is, protection by way of annulment”. Based on the principle of equivalence, when administrative action infringes the regulatory principles of European Union law, two types of mechanisms can be triggered, namely mechanisms promoting protection by way of annulment – as it has been explained above – as well as systems envisaging protection by way of compensation for damages, regardless of the possible annulment of the act under consideration. See decisions n° 204 of 2004 ad n° 191 of 2006. It is not Art. 2043 that applies, but public law provisions of Art. 30 of the Code of Administrative Procedure (*Codice del processo amministrativo*).

both influence the judicial review and be the source of liability for damages, should the administration have acted illogically, arbitrarily, or obviously unreasonably. As a matter of fact, governmental liability is just one element of the wider EU's case law effort and commitment to guaranteeing the effectiveness of EU Law and protection for individuals.

Action for liability for infringement of EU Law is an independent action from judicial review aiming at ascertaining the invalidity of administrative acts, and it is not influenced by any concomitant plea for annulment²⁰. Compensation for damage is not an automatic consequence of the annulment of an act as, for damage to be compensated, all the conditions required need to be met. It is a remedy aiming solely at remedying damage caused to private citizens by any act deemed "incompatible".

It cannot be an action whereby one tries to obtain the annulment of any act through an action that was not brought in due time. As a matter of fact, an action for liability does not aim at obtaining the elimination of any act but, rather, at obtaining compensation for the damage caused by any authority in the performance of their duties. As the act is not disapplied, it cannot be considered as *tamquam non esset*. Therefore, it has effect without prejudice to the accountability/liability of the authority that issued it²¹.

And this is not all. The mechanisms of reference for preliminary ruling do not apply either. A claim for damages can be put in even if no appeal has been filed against the relevant administrative act within the deadline provided for by law²². As a consequence, the

²⁰ The principle of the self-standing nature of action for liability has been developed since the earliest relevant decisions, including Court of Justice decision of July 15th 1963, in Case C-25/62, *Plaumann*; ECJ., April 28th 1971, in Case C-4/69, *Luetticke*; ECJ., December 2nd 1971, in Case C-5/71, *Schoeppenstedt*.

²¹ *Consiglio di Stato*, Dep. VI, May 20th 2005, n° 2566.

²² Generally speaking, the Government should be required to make good any damage – as it has legal capacity to be brought action for damages against – and not the administration that took the action, but this does not exclude the possibility that the administration may be held legally liable and be required to make good the relevant damage. EU Court of Justice, July 4th 2000, in Case C-424/97, *Haim*, "if a legally independent public-law body of

possible unlawfulness of the act – due to its non-compliance with EU law – can be theoretically established before a national court, even after the deadline for appeal has expired, if there is liability. Hence, the court is attributed some control on the exercise of power, although such control is for the purposes of compensation. Even if the administration’s action becomes final, it is still under scrutiny and its lawfulness is assessed for compensation purposes. And the validity of the act can be challenged, because the violation of the individual’s right is unjustified by virtue of the relevance of extra-state law.

The decisive point is that the crystallization of the administrative relation due to the expiry of the deadline or to a judgment becoming final, is not an obstacle to a claim for damages. As a matter of fact, if the relevant conditions are met, action can still be brought.

In other words, in the event of a void act, after pursuing all possibilities for non-financial compensation or compensation by way of specific measure (*risarcimento in forma specifica*), it is possible obtain financial compensation for an equivalent amount (*risarcimento per equivalente*). This, because – although the act in breach of EU law was not declared void – it is nevertheless necessary to protect the legal benefits provided for by supranational law²³. In this respect, this form of compensation *replaces* the non-financial compensation or compensation by way of a specific measure that did not occur.

a Member State infringes Community law in the context of an individual decision, there is nothing from the point of view of Community law to preclude the public-law body from being held liable as well as the Member State”.

²³ This presupposes that the cause of action (*causa petendi*) and the redress sought (*petitum*) through the action for damages are not the same as those of the application the decision relates to; refer to Court of Rome, June 28th 2001, in *Giur. merito*, 2002, 359 et seq., with note by F. GIANFILIPPI, *Violazione di norme comunitarie, giudicato interno contrastante e responsabilità civile dello Stato*. As a matter of fact, a proceeding aiming at establishing Government’s liability does not have the same subject matter and does not concern the same parties as the action that brought about the final decision. Such a binary system is adopted by the German obligation system, which makes a distinction between two types of compensation: compensation “instead of” the benefit that was not provided, and an “additional” compensation to the first one.

As it was stated in *Wells*²⁴, subject to the limits laid down by the principle of procedural autonomy, lacking an environmental impact assessment, Member States may revoke or suspend a consent that has already been granted, even if no appeal is lodged against such consent. In any case, the Member States are likewise required to make good any harm caused by the measure under consideration.

It is therefore like a remedy of last resort, punishing the violation of a supranational provision. Hence, should it not be possible to nullify an unlawful act, the relevant Member State is required to make good any harm caused by the that administrative act, if applicable. Furthermore, this liability system may be risky for any authority that does not comply with supranational law. As a matter of fact, such authority obviously risks being condemned to make good the damage caused by an unlawful act that has become final, should an action for damages be successfully filed.

Action for liability for infringement of EU Law, as it is outlined above, is therefore a tool complementing the system of checks for compliance of national administrative acts with EU provisions, by means of remedies redressing torts. Hence, in the judicial framework of the EU system, citizens act as EU Law *private attorneys*²⁵.

²⁴ ECJ., January 7th 2004, Case C-201/02, *Delana Wells*, the EU Court of Justice held that all Member States are required “to nullify the unlawful consequences of a breach of Community Law”, and it is up to the authorities of the Member States to adopt the measures required in order to exercise such self-protection power.

It could be envisaged to protect citizens’ confidence by means of pecuniary compensation for damage solely covering the loss. All in all – from a financial analysis standpoint – unreviewability is a cheap solution considering the real problem of the dissociation of validity and effectiveness.

²⁵ D. NASSIMPIAN, *And we keep on meeting: (de-)fragmenting State liability*, in *European Law Review*, 2007, 2 et seq. S. MOREIRA DE SOUSA, W. HEUSEL, *Enforcing Community Law from Francovich to Köbler: twelve years of the State liability principles*, Köln, Bundesanzeiger, 2004.

4. THE COMPREHENSIVENESS OF THE TECHNIQUES FOR THE PROTECTION OF EU RIGHTS

If, on the one hand, national courts are required to guarantee the effectiveness of EU rights, on the other hand, the protection offered by the latter is immediately available to private citizens who believe they have suffered damage from administrative actions. And the relating protection techniques are, in turn, influenced by the fact that the infringed provisions are supranational legal provisions.

The review for legality of administrative acts then becomes a precondition that can have various consequences. Not only can it lead to the annulment of the unlawful act, but it can also entail an obligation to remedy the tort or make good any damage, based on special rules other than ordinary ones. Hence, differentiated forms of protection seem to appear, as different legal relationships entail different judicial protection. The differentiated nature of the protection appears in a number of special provisions departing from ordinary standard proceedings²⁶. Action for annulment seems to have lost its traditional supremacy. The

²⁶ M. NIGRO, *Trasformazioni dell'amministrazione e tutela giurisdizionale differenziata*, in *Riv. trim. dir. proc. civ.*, 1980, 3 et seq., points out that field of legal disputes with public administrations appears like a "mosaic consisting of different types of protection", notwithstanding its serious deficiencies. The cause for such deficiencies lies in the administration's existence being based on its own actions. As a matter of fact, «the ideology of the liberal State required extracting (or, rather, abstracting) the administrative part of such organisational model, based on which an administration legally exists solely through its administrative action, which is an immediate and accurate synthesis of its authority and the freedom of citizens». Hence, «administrative procedure allows obtaining the (only) justiciability required by a model where administrative acts are the sole expressions and the only legally recognisable results of administrative action – justiciability that is inherent in the validity and in the fate of the act». On administrative procedure similarities identified through a comparative-law analysis of an action for annulment, a "conditional-utility subjective situation", and an action for failing to act, refer to D. DE PRETIS, *La tutela giurisdizionale amministrativa in Europa fra integrazione e diversità*, in *Riv. it. dir. pubbl. com.*, 2005, 1 et seq.; R. VILLATA, *Osservazioni in tema di incidenza dell'ordinamento comunitario sul sistema italiano di giustizia amministrativa*, in *Dir. proc. amm.*, 2006, 848.

demand for protection – which is usually met through action for a relief – in the cases under consideration becomes more complexly organised, as it consists of different forms of remedies such as non-financial compensation or compensation by way of a specific measure (*risarcimento in forma specifica*) or financial compensation for an equivalent amount (*risarcimento per equivalente*), which aim at ensuring fully meeting the plaintiff's request for compensation. The relating legal regime is different from the ordinary one. The reason for this change can be that «the fact that annulment is the only decision ordinary courts can make in the framework of a judicial review, is not in line with the proportionality principle as it is also outlined by EU Law»²⁷.

It can therefore be inferred that the protection of supranational rights requires adopting a comprehensive remedial approach, which is typical of unlimited jurisdiction procedural models. It is no coincidence that, in France, rights are the ones still allowing making a distinction between *contentieux de pleine juridiction* and *contentieux d'annulation*. In fact, in the first case, action “*en annulation*” is limited to the demand for judicial annulment, while in the second case, an action “*de pleine juridiction*” allows the court not only to annul the act, but also to order the relevant administration to take specific action, such as paying an amount of money or adopting a specific measure²⁸. With latter type of action having limited scope, based on the need to protect subjective rights.

Similarly, the protection of EU rights is ensured through different legally enforced penalties, including, first of all, protection by way of annulment (or extinction); secondly,

²⁷S. GIACCHETTI, C. GIACCHETTI, *Occupazione in carenza di potere, riparto di giurisdizione e concezione «a matrioska» del provvedimento amministrativo*, in *Foro amm. C.d.S.*, 2006, 1093.

²⁸ On the conformity of French unlimited jurisdiction in appeals (*contentieux de pleine juridiction*) with EU Law, see R. TINIERE, *La notion de «pleine juridiction» au sens de la Convention européenne des droits de l'homme et l'office du juge administratif*, in *Revue française de droit administratif*, 2009, 729 et seq. On the full judicial protection principle, see, S. CASSESE, *Verso la piena giurisdizione del giudice amministrativo: il nuovo corso della giustizia amministrativa italiana*, in *Giorn. dir. amm.*, 1999, 1221 et seq.

protection by way of reinstatement (or restitution), whereby the plaintiff can claim the acquisition of the legitimate interest he/she was deprived of; thirdly, protection through compensation, in various forms. Some of the aforesaid penalties affect the act itself, due to its non-compliance with the regulations in force; some others, instead, aim at the Administration, which was responsible for the unlawful act, when there is unlawfulness correlated to compensation.

As one can see, this connotation shows some similarities with a special individual protection approach, like the German one, called *Systementscheidung für den Individualrechtsschutz*, which envisages a wide range of possible actions to be brought against public authorities – also including compensatory action – as well as strict control over discretionary powers²⁹.

In particular, if it is true that the violation of supranational rights entails the invalidity of administrative action, it is also true that this approach shows some sort of discretionary sanctioning power. The aforementioned unlawfulness may have various consequences, depending on the case and on the infringed law. A trend is then confirmed according to which invalidity does not concern a legal act considered in its static nature, but rather relates to power and to the rules governing its exercise, meaning the “situation characterised by the production of legal effects, which are the consequence of the acts representing its exercise”³⁰. Actually, thanks to the consequences of ongoing extra-state system integration processes – which also affect the judicial system – techniques and methods are less and less hindered by the legal form obstacle.

²⁹ This system guarantees the effectiveness of legal protection, in the event that the applicant’s rights are violated, with simple interest being insufficient pursuant to Art. 19 of *Grundgesetz*.

³⁰ A. ROMANO, *La pregiudizialità nel processo amministrativo*, Milan, 1958, 312. On the shift to focus from the act to the function, see F. BENVENUTI, *Funzione amministrativa, procedimento, processo*, in *Riv. trim. dir. pubbl.*, 1952, 118 et seq.

In the relevant regulation, such protection techniques are different compared to their standard model. They are actually “functionalised”, that is to say that their functioning mechanisms may partially differ from standard ones. In this respect, remedies are subject to the need for full compliance with supranational law, thus being considered as law enforcement tools «for an equivalent, should there be any resistance from national public authorities»³¹. Marrying those two elements allows obtaining a comprehensive and compensatory remedial approach. It is comprehensive in that it encompasses all forms of protection, and is compensatory because it aims at fully meeting the interests of private individuals. In the event that the annulment of an act may only be “possible”, the adverse legal consequences for infringing the law target both the act and the Administration that took such action – through compensation, the comprehensive nature of the remedy for any claimed tort is ensured³².

³¹ C. FRANCHINI, *Giustizia e pienezza della tutela nei confronti della pubblica amministrazione*, in *Il diritto amministrativo oltre i confini*, Milan, 2008, 181.

³² In line with Constitutional Court decision n° 204 of July 6th 2004. Actually, in the framework of non-state legality, the difference between legal provisions creating rights and legal provisions attributing powers tends to fade. It is generally pointed out that public administrations usually violate the provisions belonging to the latter category. As a matter of fact, while the first ones – which impose duties or obligations – entail unlawful behaviour in case of breach, the second ones – which establish the preconditions, forms and limitations for exercising power – entail invalidity. However, international law does not envisage this dichotomy. It attributes powers, but the statutory penalties for violating the relevant provisions target both the act and the administration that has taken action. Therefore, by providing a traditional interpretation, in the event of any breach of EU laws, the act is both unlawful and void. It is also worth highlighting that the penalty of annulment is not the only penalty an act that is the expression of administrative power can incur, with annulment being subject to the establishment of the act’s invalidity. Actually, under extra-state law, compensation for damage or redress are alternatives to annulment, especially when the latter is not possible. For precision’s sake, public administrations also have duties or obligations to act, but the point is that, violating such obligations – laid down by laws that cannot be distinguished from those conferring powers - are deemed “not to have self-standing relevance: it is the act constituting invalid exercise of power that is targeted, regardless of the fact that, with its behaviour, the administrative authority (and the official who acted on its behalf) also infringed provisions imposing duties», in G. CORSO, *L’attività*

Hence, the individuals concerned have a wide range of remedies available and, based on an Anglo-Saxon approach, this qualifies the rights themselves. Rights – whose supremacy is indisputable – oblige to adjust annulment, the enacting principle rule, to the highest protection standards. A similar obligation also arises based on the principle of the effectiveness of protection, which influences the proceedings³³. A substantive approach appears, aiming at compensating private individuals for the damage incurred. Protection by means of annulment is complemented with a general obligation for Public Authorities to make good the damage caused to individuals by the infringement of supranational law, which contributes safeguarding full effectiveness of the rights conferred upon citizens by their respective legal systems.

On this specific point, the European Union was the first one to adopt such criteria and fine-tune the above-mentioned wide range of protection techniques. Although a similar evolution can also be observed with respect to the European Convention on Human Rights (ECHR), suffice it to think of the decisions of the European Court of Human Rights, advocating for the equivalence of the Convention system and the European one, and punishing the exercise of power in breach of the Convention's provisions with financial compensation for damage as a remedy³⁴.

amministrativa, Torino, 1999, 246. However, it is also true that, in some cases, there is a self-standing unlawful action besides the invalid act.

³³ On this principle, in the frame of general theory, as a «term of the recurring and unsolved antinomy between the deontological and the existential elements of law», see C.M. BIANCA, *Il principio di effettività come fondamento della norma di diritto positivo: un problema di metodo della dottrina privatistica* (1969), now in *Realtà sociale ed effettività della norma. Scritti giuridici*, I, Milan, 2002, 35 et seq.

³⁴ This profile is examined in particular in ECHR decision n. 45036/98 of June 30th 2005, *Bosphorus*, commented by M. PACINI, *Il controllo della Cedu sugli atti nazionali in funzione comunitaria*, in *Giorn. dir. amm.*, 2006, 21 et seq.