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# ON THE PRINCIPLES OF EFFECTIVENESS AND EQUIVALENCE IN STATE LIABILITY ACTIONS FOR BREACHES OF EU LAW (C-278/00)

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# 1. Introduction

By its judgment of 28 June 2022, the Court of Justice has resolved the case C-278/20, brought by the European Commission against Spain for failing to fulfil its obligations under the principles of effectiveness and equivalence when establishing the conditions governing State liability for damages caused to individuals by acts of the legislature in breach of EU law. The Court declares that some of these conditions are contrary to the former principle, but not to the latter one.

This is the second time that the Court of Justice considers that Spanish legislation is not compatible with EU law on this matter. The present note explains the background of the case (section 2) and the content of the Court's ruling (section 3), discussing its most relevant and problematic statements (section 4).

# 2. Spanish Law on State Liability for Unlawful Legislation

## 2.1. The initial case law

In Spain, the rules regarding State liability for losses caused to individuals by unlawful legislation had their origin in the case law. Even though neither the Spanish Constitution nor the legislature had provided for such a liability, the Spanish Supreme Court (SSC) declared in 2000 that, under certain conditions, the State was liable for the harm caused by unconstitutional legislation. The leading case was as follows.

In 1996, the Spanish Constitutional Court (SCC) quashed a 1990 law that had established a tax with retroactive effects, thereby violating the principle of legal certainty.[1] At that time, it seemed that most of the people that had paid this tax were not going to recover it. When the judgment of the SCC was published, the four-years limitation period established for requesting the refund of overpaid taxes had already expired, and many courts and administrative authorities had enacted decisions (erroneously) declaring that such law was not unconstitutional and, therefore, the plaintiffs were not entitled to refund. These decisions had become unappealable before the SCC's Judgment was published and consequently could not be reviewed anymore. Article 40.1 of Organic Law 2/1979 of the Constitutional Court establishes that judgments declaring the unconstitutionality of laws shall not provide grounds for review cases in which the unconstitutional provisions were applied if these cases ended with final judicial decisions, save criminal proceedings where a criminal or an administrative sanction was imposed (if, as a consequence of the nullity of the unconstitutional law, the sanction would be reduced, limited or excluded). Moreover, under the case law of the Spanish Supreme Court, this rule usually applies to cases concluded with administrative decisions, if they were not challenged in good time.[2]

Despite (or precisely because of) that, many taxpayers brought civil liability actions against the State for the losses they have suffered as a result of such unconstitutional law. Surprisingly enough, the Supreme Court upheld their claims, even though they had gotten

[1] Judgment of the SCC No. 173/1996, of 31 October.
[2] See, for instance, Judgment of the SSC of 13 June 2000 (ES:TS:2000:4836).

an unappealable decision rejecting the overpayment refund or not even applied for refund within the established deadlines. The Supreme Court argued that the action for damages was different from, and did not depend on, the action for refund. Affected taxpayers thus had one year, from the date of publication of the judgment annulling the unconstitutional provision, to file a claim for damages.[3]

This case law was heavily criticized by several scholars.[4] They argued that it (i) de facto offset the legal effects of administrative and judicial decisions that were unappealable and to be preserved for the sake of legal certainty; (ii) de facto eliminated the four-years limitation period established, in the interest of legal certainty, for requesting the refund of overpaid taxes; (iii) contravened the spirit of abovementioned Article 40(1) of Organic Law 2/1979; and (iv) gave the opportunity to obtain a legal remedy to individuals that did not avail themselves in due time of the legal remedies at their disposal.

### 2.2. Subsequent case law

Afterwards, the SSC restricted the potential scope of this case law in three ways. The SSC declared that it did not apply to: (i) cases where the legislative provision at issue was annulled by the SCC with only prospective effects, as the non-retroactivity of the constitutional judgment would be undermined if the State was liable here;[5] nor to (ii) cases where the unlawful legal rule under consideration was an administrative regulation;[6] or (iii) where EU law was breached.[7] In these three cases, the State was not liable for the losses caused by an administrative decision made in application of an unlawful legal rule if the interested party had not exhausted all available legal remedies against such decision.

The reason for distinguishing between damages caused by unlawful regulations or breaches of EU law and damages caused by unconstitutional legislation was as follows.[8] In the latter case, under Spanish law, neither the administrative authorities nor the 'ordinary' courts may annul the decisions made in application of unconstitutional legislation, unless this legislation has been previously quashed by the SCC. In these circumstances, the 'prior exhaustion of all available remedies rule' would place on individuals the disproportionate burden of exhausting all available remedies against such

[3] See, for instance, Judgments of the SSC of 29 February 2000 (ES:TS:2000:1574), 13 June 2000 (ES:TS:2000:4836), and 15 July 2000 (ES:TS:2000:5880).
[4] G Doménech Pascual, 'Responsabilidad patrimonial de la Administración por daños derivados de una ley inconstitucional' (2001) 110 Revista Española de Derecho Administrativo, 269-299; MC Alonso García, 'La reciente jurisprudencia sobre la responsabilidad patrimonial del Estado legislador frente a daños derivados de leyes inconstitucionales' (2002) 157 Revista de Administración Pública 215-240; E García de Enterría, 'Sobre la responsabilidad patrimonial del Estado como autor de una ley declarada inconstitucional' (2005) 166 Revista de Administración Pública 99-147.
[5] Judgments of the SSC of 1 July 2003 (ES:TS:2003:4614), 8 July 2003 (ES:TS:2003:4821 and ES:TS:2003:4830), 18 September 2003 (ES:TS:2003:5560), 2 February 2004 (ES:TS:2004:552), 14 June 2004 (ES:TS:2004:4069), 25 February 2011 (ES:TS:2011:1032), 27 May 2011 (ES:TS:2011:3183), and 11 October 2016 (ES:TS:2016:4498 and ES:TS:2016:4499).
[6] Judgments of the SSC of 24 May 2005 (ES:TS:2005:3340), 17 June 2005 (ES:TS:2005:3961), 12 July 2005 (ES:TS:2005:4712), 23 June 2022 (ES:TS:2022:2640), and 27 June 2022 (ES:TS:2022:2708).
[7] Judgments of the SSC of 29 January 2004 (ES:TS:2004:442) and 24 May 2005 (ES:TS:2005:3321).
[8] See case C-118/08 *Transportes Urbanos y Servicios Generales SAL v. Administración del Estado* EU:C:2010:39, paras 15-20.

decisions until one of the ordinary courts hearing the matter raises the question of the unconstitutionality of that legislation before the SCC.

In the first two cases, by contrast, ordinary courts may annul the administrative decisions under review without the need to ask for a ruling of the SCC or the Court of Justice of EU. They may immediately disapply both unlawful administrative regulations and legislation contrary to EU law. Here, individuals can, therefore, apply directly to these courts for annulment of the harmful administrative measures and thus obtain complete redress.

### 2.3. *Transportes Urbanos* and the subsequent case law

The SSC, nevertheless, ended up making a preliminary reference on whether its case law was contrary to the principles of effectiveness and equivalence. In *Transportes Urbanos,*[9] the Court of Justice found that the abovementioned distinction violated the latter principle, which requires that conditions imposed by national law, in relation to actions for damages, are not less favourable where the action is based on EU law than where it is based on national law, all other things being equal. In the Court's view, actions based on breaches of EU law were subject to a requirement that did not apply to *similar* actions based on national law: the plaintiff had to have previously exhausted all domestic remedies for challenging the validity of the harmful administrative measure adopted on the basis of the unlawful legislation. The Court of Justice also considered that it was not necessary to examine this rule requiring prior exhaustion of such remedies in the light of the principle of effectiveness.

After *Transportes Urbanos*, the SSC extended its case law on State liability for unconstitutional legislation to legislation contrary to EU law, albeit with a relevant modification. It subjected this liability to the same conditions established under the settled case law of the Court of Justice regarding State liability for breaches of EU law: (i) the legal rule infringed must be intended to confer rights on individuals; (ii) the breach of this rule must be sufficiently serious; and (iii) there must be a direct causal link between the breach and the loss sustained by the injured person.

The SSC overlooked the fact that, under its own case law, the first two conditions do not apply to actions for damages caused by unconstitutional legislation. Some legal scholars argued that such a divergence violated the principle of equivalence, as the conditions imposed by Spanish law in relation to State liability actions for unlawful legislation were less favourable where the action was based on EU law than where it was based on national law.[10]

### 2.4. 2015 legislation

[9] ibid; C Plaza Martín, 'Member States Liability for Legislative Injustice' (2010) 3 Review of European Administrative Law 27.

[10] E Cobreros Mendazona, 'La exigibilidad del requisito de la violación suficientemente caracterizada al aplicar en nuestro ordenamiento el principio de la responsabilidad patrimonial de los Estados por el incumplimiento del Derecho de la Unión Europea' (2005) 196 Revista de Administración Pública 11-59.

Said divergence has been enshrined in Article 33 of Law 40/2015 on the legal rules governing the public sector.

Laws 39/2015 and 40/2015, which codify the current Spanish law on civil liability of public authorities, have subjected State liability for damages caused by unlawful legislation (i.e. legislation contrary to either the Spanish constitution or EU law) to stricter conditions than before. First, there must be a previous decision of either the SCC or CJEU declaring that the legislative provision at issue is incompatible with the Spanish Constitution or EU law, respectively. Second, the claimants have to have previously obtained, before any court, a final decision dismissing an action brought against the administrative decision that caused the loss. Third, they also have to have relied on the breach of the Constitution or EU law that was subsequently recognized. Fourth, there is a limitation period of one year from the publication in the *Spanish Official Gazette* or the Official Journal of the European Union of the decision of the SCC or the Court of Justice of the EU declaring that the legislative provision at issue is incompatible with the Constitution or EU law respectively. Fifth, compensation may be awarded only in respect of losses which occurred within five years preceding the date of that publication, unless otherwise provided for in the decision of the SCC or the Court of Justice of the EU.

### 2.5. Subsequent case law

The SSC has interpreted these conditions flexibly, i.e., in a manner very favourable to State liability. It has indeed declared that:

(i) The first condition does not apply to cases where EU law is breached. The incompatibility with this law may be declared not only by the CJEU, but also by every national court.[11]

(ii) The abovementioned second condition does not apply to cases where the loss was directly caused by a self-executing legislative provision, without the intervention of any administrative measure.[12]

(iii) The abovementioned limitation period of one year is to be extended if the final judicial decision dismissing an action brought against the administrative decision that caused the loss was issued after the official publication of the judgment declaring that EU law was breached.[13]

(iv) Individuals harmed do not need to have alleged before the court that dismissed the action brought against the harmful administrative decision that the legislative provision at issue was unconstitutional or contrary to EU law.[14]

(v) The abovementioned five years limitation period starts to run when such final judicial decision was issued.[15]

[11] Judgment of the SSC of 18 November 2020 (ES:TS:2020:3936).
[12] Judgment of the SSC of 27 October 2020 (ES:TS:2020:3324).
[13] Judgment of the SSC of 18 November 2020 (ES:TS:2020:3936).
[14] Judgment of the SSC of 18 November 2020 (ES:TS:2020:3936).
[15] Judgments of the SSC of 25 June 2020 (ES:TS:2020:2353) and 14 September 2020 (ES:TS:2020:2922).

## 3. The Judgment of the European Court of Justice

### 3.1. Incompatibility of Spanish law with the principle of effectiveness

The Commission claimed that those legal requirements violated the principle of effectiveness, as they made it practically impossible or excessively difficult for individuals to exercise their right to be compensated for damages caused by breaches of EU law.

The Kingdom of Spain put forward two arguments to contest the claim.[16] First, the rules under consideration could not be viewed in isolation. Spanish law provides for other procedures and remedies that allow individuals to be effectively protected and eventually compensated for the losses and harm caused by the application of legislation contrary to EU law. Taken as a whole, the Spanish legal system of compensation for these losses and harm did comply with the principle of effectiveness.[17] Second, the SSC, as we have seen, had flexibly interpreted the legal provisions at issue, in order to ensure that affected individuals can exercise their rights conferred by EU law in accordance with this principle.[18]

The Court rejects both arguments. On the one hand, it finds that none of those other procedures and remedies 'actually allows individuals to establish the liability of the State legislature in order to obtain compensation for loss or harm caused to them by infringements of EU law attributable to that State'.[19] On the other hand, the Court recalls that, 'although the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts... the existence of case law, even from a supreme court, cannot, in view of the fundamental nature of the principle of State liability for infringement of EU law attributable to it… suffice to ensure, with the requisite clarity and precision', that the legal rules under consideration were compatible with EU law.[20]

The Court declares that the Kingdom of Spain has failed to fulfil its obligations under the principle of effectiveness insofar as its legislation makes compensation for the loss or harm caused to individuals by the Spanish legislature as a result of an infringement of EU law subject to: (i) 'the condition that there is a decision of the Court of Justice declaring that the statutory provision applied is incompatible with EU law'; (ii) 'the condition that the individual harmed has obtained, before any court, a final decision dismissing an action brought against the administrative act which caused the loss or harm, without providing for an exception for cases in which the loss or harm stems directly from an act or omission on the part of the legislature, contrary to EU law, without there being any administrative act open to challenge'; (iii) 'a limitation period of one year from the publication in the Official Journal of the European Union of the decision of the Court of Justice declaring

[16] In a similar vein, see G Fernández Farreres, 'Una nueva incidencia en el tortuoso proceso de configuración legal de la responsabilidad patrimonial del Estado legislador. La Sentencia del Tribunal de Justicia de la Unión Europea (Gran Sala) de 28 de junio de 2022 (C-278/20)' (2022) 221 Revista de Española de Derecho Administrativo 11-59, who has heavily criticized the judgment of the Court of Justice on this case.
[17] Case C-278/20 *Commission v Spain*, EU:C:2022:503, paras 37-52.
[18] ibid paras 80, 121, 131 and 137.
[19] ibid paras 82 and 86.
[20] ibid para 81.

that the statutory provision applied is incompatible with EU law, without covering cases in which such a decision does not exist', (iv) 'and the condition that compensation may be awarded only in respect of loss or harm which occurred within five years preceding the date of that publication, unless otherwise provided for in that decision'.

By contrast, the Court declares that the condition that individuals have pleaded the infringement of the EU law that was subsequently recognized does not violate the principle of effectiveness. This is the only point where the Court's ruling substantially deviates from the opinion of Advocate General Szpunar.[21] Both the Commission and the Advocate General considered that such condition was contrary to said principle, insofar as it limited the possibility of obtaining redress to cases in which the provision of EU law infringed had direct effect. In other cases, it could not reasonably be required of harmed individuals that they relied on provisions lacking direct effect, even though such reliance would have had no impact on the outcome of the action.

The Court rejects this argument for two reasons. On the one hand, it points out that a provision of EU law that has no direct effect may also be eventually relied on to obtain an interpretation of national law that is in conformity with EU law. On the other hand, it accepts the argument of the Kingdom of Spain that Spanish law does not limit the right to compensation to cases in which the infringed provision of EU law has direct effect, i.e., that the powers of Spanish courts in that regard do not vary depending on whether the provision of EU law at issue has direct effect or not.[22]

Nevertheless, the Court also notes that this requirement 'may amount to an excessive procedural complication, contrary to the principle of effectiveness', insofar as 'at such a stage, it may be excessively difficult, or even impossible, to anticipate what infringement of EU law will ultimately be recognized by the Court'.[23]

### 3.2. Compatibility of Spanish law with the principle of equivalence

Let us recall that under current Spanish law, State liability actions based on breaches of EU law are subject to two substantive conditions that do not apply to similar actions based on infringements of the Constitution. In the first case, the legal rule infringed must be intended to confer rights on individuals and this infringement must be sufficiently serious.

The Commission claimed that this divergence was contrary to the principle of equivalence. In the Commission's view, it follows from the Court's case law that the principle of equivalence is relevant for the purpose of assessing both the *procedural and substantive* conditions governing the commencement of civil liability actions against the State for the loss or harm which it causes in breach of EU law.[24]

The Court of Justice points out that, according to its previous case law, 'both the formal and material conditions laid down by national legislation on compensation for loss or harm caused by Member States as a result of an infringement of EU law cannot, in

[21] ibid Opinion of AG Szpunar, paras 92-104.
[22] ibid para 143.
[23] ibid para 144.
[24] ibid para 172.

particular, be less favourable than those relating to similar domestic claims'.[25] However, the Court now 'clarifies' that this rule 'relates to the conditions laid down by national legislation on compensation for loss or harm once the right to compensation has arisen on the basis of EU law'.[26] 'The principle of equivalence thus seeks to set limits on the procedural autonomy enjoyed by the Member States when they implement EU law and when the latter does not make provision in that regard. It therefore follows that, as regards State liability for infringement of EU law, that principle is intended to apply only where that liability is established on the basis of EU law'.[27]

## 4. Analysis

### 4.1. On the principle of effectiveness

The doctrine established in this judgment with respect to the principle of effectiveness is far from being revolutionary, especially when it comes to the condition of the Court of Justice having previously declared that the statutory provision applied was incompatible with EU law. The Court had already established in several occasions that 'to make the reparation, by the Member State, of loss or harm which it caused to an individual in breach of EU law conditional upon the requirement that there must have been a prior finding by the Court of an infringement of EU law attributable to that Member State is contrary to the principle of the effectiveness of that law'.[28]

Given this well-established case law, it is also obvious that the above referred one year limitation period violates the principle of effectiveness if it only starts after the Court of Justice has declared said infringement.[29] Since State liability for breaches of EU law may not be subject to the condition that there must be a decision of the Court of Justice finding has not fulfilled its obligations under EU law, the publication of such decision may not be the *only starting point* of that limitation period.

Let us note that the judgment of 28 June 2022 does not consider the *dies ad quem* of this term, but only its *dies a quo*. The Court does not put into question when the limitation period explicitly provided for by the Spanish legislature expires (one year after the publication of the decision of the Court of Justice finding the infringement of EU law), but only when it starts to run (the date of this publication) in those cases where the Court of Justice has not declared that the State has failed to comply with EU law. In fact, one can argue that the rule governing the expiry date of this period under current Spanish legislation is usually more favourable for the claimants than other analogous rules that the Court of Justice has already considered as compatible with the principle of effectiveness. In *Palmisani*, for instance, the Court declared that Member States may require any action for reparation of the loss or damage sustained as a result of the belated transposition of a directive to be brought within a limitation period of one year from the date of its transposition into national law.[30] This limitation period would obviously be

[25] ibid para 184.
[26] ibid para 184.
[27] ibid para 178.
[28] Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame*, EU:C:1996:79, para 95. See also case *Transportes Urbanos* (n 8) para 38.
[29] *Commission v Spain* (n 17) para 159.
[30] Case C-261/95 *Palmisani*, EU:C:1997:351.

even longer and, therefore, more favourable to the victims if it ended on the date on which the decision of the Court of Justice finding the belated transposition was officially published.

For the same reason, the five-year limitation period is also contrary to EU law. Moreover, this condition makes it impossible or excessively difficult for individuals to obtain a full compensation for the losses or harm caused by an infringement of EU law, given the length of the procedure at the end of which the Court delivers said decision.[31] It must be pointed out that this condition has a feature that makes it particularly unacceptable, which the Court of Justice did not underline. The victims are not able to interrupt such a limitation period –and subsequently to be fully compensated– by taking any legal action.

The ruling of the Court on the condition that the claimants have previously obtained a final judicial decision dismissing an action brought against the administrative decision that caused the loss was also predictable in the light of its previous case law.

Indeed, other Member States have established a 'prior-exhaustion-of-all-available-remedies-rule', according to which individuals are not entitled to compensation if they have not shown reasonable diligence in order to avoid the loss or harm, or limit its extent and, in particular, if they have not availed themselves in good time of all the legal remedies available to them.[32] The Court had established that this rule is compatible with EU law, unless the exhaustion gives rise to excessive difficulties or could not reasonably required of the victims.[33]

The said condition provided for by the Spanish legislation is, therefore, unproblematic in those cases where the loss or harm has been caused by an administrative decision made in application of a legislative provision that breaches EU law. Let us note that, in such cases, it is easier to obtain a compensation under Spanish law than under other European legal systems. On the one hand, as the Court points out, the Spanish legislation does not require the individual to have exhausted *all* the remedies available, 'but only that a final decision has been obtained in an action brought against that administrative act, before any court, which is likely to make it easier to satisfy that condition'.[34] On the other hand, Spanish law provides for compensation even when a last instance court has (erroneously) dismissed the action brought against the administrative decision that caused the loss, given that the breach of EU law was 'sufficiently serious'. By contrast, in such cases, according to *Köbler* and the legislation of other Member States, the conditions for State liability are much stricter. The individual is entitled to compensation 'only in the exceptional case where the court has manifestly infringed the applicable [EU] law'.[35]

The condition at issue becomes obviously problematic when the loss or harm has been immediately caused either by a self-executing legislative provision or by an omission of

[31] *Commission v Spain* (n 17) para 166.
[32] See, for instance, paragraph 839(3) of the German Civil Code.
[33] See, for instance, case C-445/06 *Danske Slagterier*, EU:C:2009:178, paras 60-62; case C-571/16, *Kantarev*, EU:C:2018:807, paras 140-142. See also P J Wattel, 'National Procedural Autonomy and Effectiveness of EC Law: Challenge the Charge, File for Restitution, Sue for Damages?' (2008) 35(2) Legal Issues of Economic Integration 109-132.
[34] *Commission v Spain* (n 17) para 126.
[35] Cases C-224/01 *Köbler*, EU:C:2003:513, para 53; C-173/03 *Traghetti del Mediterraneo*, EU:C:2006:391, paras 32 and 42; C-168/15 *Tomášová*, EU:C:2016:602, para 24. See also Z Varga, *The Effectiveness of the Köbler Liability in National Courts* (Hart 2020).

the legislature and, subsequently, there is no administrative decision that the victims may challenge to be compensated. In these cases, it is impossible for them to meet that condition, which obviously violates the principle of effectiveness.

Finally, it seems contradictory for the Court to declare that the condition that individuals have pleaded the infringement of the EU law that was subsequently recognized does not violate the principle of effectiveness, in spite of finding that this condition 'may amount to an excessive procedural complication, contrary to the principle of effectiveness', insofar as 'at such a stage, it may be excessively difficult, or even impossible, to anticipate what infringement of EU law will ultimately be recognized by the Court'.[36]

However, the ruling of the Court on this point is arguably consistent with its previous case law on the abovementioned 'prior exhaustion of all available remedies rule'. If this rule is compatible with the principle of effectiveness, one can argue *a fortiori* that said condition is also compatible with it. Let us note that such rule prevents individuals from obtaining redress for breaches of EU law in cases where they would be compensated if the Spanish legislation under consideration and, in particular, that condition applied. This would be the case, for instance, if the individual had pleaded the infringement of EU law before a national court and obtained a judgment dismissing an action brought against the harmful administrative measure, but he or she had not filed the available appeal against this judicial decision.

### 4.2. On the principle of equivalence

The Court's argumentation on this point deserves four criticisms. First, it contradicts the well-settled case law that 'both the formal and *material conditions* laid down by national legislation on compensation for loss or harm caused by Member States as a result of an infringement of EU law cannot… be less favourable than those relating to similar domestic claims'.[37]

Second, in order to avoid such contradiction, the Court now retrospectively clarifies this rule by stating that it 'relates to the conditions laid down by national legislation on compensation for loss or harm *once the right to compensation has arisen on the basis of EU law*'.[38] However, this clarification makes that 'no-less-favourable rule' entirely pointless when it comes to the 'material conditions' laid down by national legislation on compensation for loss or harm caused by Member States as a result of an infringement of EU law.[39] Indeed, these substantive conditions determine the cases where the State is liable as a result of an infringement of the law. The 'no-less-favourable rule' prohibits material conditions provided for with respect to similar cases from being less favourable for infringements of EU law than for infringements of national law. That is, there may not be similar cases where the State is liable for a breach of the constitution but not for a

[36] *Commission v Spain* (n 17) para 144.
[37] See, for instance, cases C-6/90 and C-9/90, *Francovich and Others*, EU:C:1991:428, para 43; *Factortame* (n 28) paras 98 and 99. This contradiction has been noted by S Iglesias, 'The narrow(er) scope of equivalence (and effectiveness) in State liability actions: what if I told you that they are not real principles (Commission v Spain (C-278/20))', EU Law Live, 27 July 2022.
[38] *Commission v Spain* (n 17) para 184, emphasis added.
[39] In a similar vein, see E Cobreros Mendazona, 'La responsabilidad patrimonial del Estado legislador por su incumplimiento del Derecho de la Unión Europea tras la intervención del Tribunal de Justicia' (2022). 219 Revista de Administración Pública 47.

breach of EU law. If the 'no-less-favourable rule' only applies when the right to compensation has already arisen on the basis of EU law, such rule becomes completely irrelevant, as in this scenario the State is liable no matter the national legislation provides for.

Third, the referred clarification contradicts the case law recently established in *AW and others.*[40] The Court declared in this case that, from the 'no-less-favourable rule', it follows that 'where, in accordance with the domestic law of a Member State, the existence of an *indirect* causal link between the unlawful act committed by the national authorities and the damage sustained by an individual is regarded as sufficient to render the State liable, such an *indirect* causal link between a breach of EU law attributable to that Member State and the damage sustained by an individual must also be regarded as sufficient for the purposes of rendering that Member State liable for that breach of EU law'.[41] In other words, the Court applied the 'no-less-favourable rule' to one of the material conditions laid down by the national legislation in one case where the right to compensation had not arisen on the basis of EU law yet. Let us recall that, according to the Court's case law, this right arises on the basis of EU law only if there is a *direct* causal link between the infringement of EU law and the loss or harm sustained by the claimants.[42]

Fourth, the Court ought to have clarified the rationale for both the principle of equivalence and the 'no-less-favourable rule', as interpreted in this judgment. If such rationale lied in the principle of equality or non-discrimination, the interpretation established in this judgment would be questionable.

According to the principle of equality, equal (sufficiently similar) cases must be treated equally. This could thus justify the principle of equivalence, i.e., why 'all the rules applicable to actions apply without distinction to actions alleging infringement of European Union law and to similar actions alleging infringement of national law'. This could also justify not to make any distinction between procedural and material rules with that regard. According to this interpretation of the principle of equivalence, the distinction made under Spanish law between State liability actions based on infringements of EU law and analogous actions based on infringement of the constitution would violate this principle. Let us recall that in *Transportes Urbanos*, the Court of Justice declared that both actions may be regarded as similar in the light of the principle of equivalence.[43]

If the *raison d'être* of the principle of equivalence did not lie in the principle of equality, the Court should identify the rationale of the former, and explain why it does not apply to material conditions laid down by national legislation, i.e., it only applies when the right to compensation has already arisen on the basis of EU law. The Court ought to explain, in particular, why there is and should be a distinction between procedural and material rules with that regard.

[40] Iglesias (n 29).
[41] Case C-417/18, *AW and others*, EU:C:2019:671, paras 39-41.
[42] See, for instance, *Factortame* (n 28) paras 51, 65 and 74; and *Commission v Spain* (n 17) para 31.
[43] *Commission v Spain* (n 17) paras 35-45.