PUBLIC AUTHORITIES’ LIABILITY 
FOR DAMAGE CAUSED AS A RESULT OF A BREACH OF EU LAW

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Public authorities’ liability for damage caused as a result of a breach of EU law

This edition of insight examines Denmark’s liability for damages to enterprises and private individuals where public authorities have failed to comply with EU law. We explain what the basic conditions are and review some of the type cases, and we also offer practical examples of cases against non-compliant EU Member States. You will find here also a step-by-step guide to help establish if there is basis for a liability claim.

Public authorities’ liability for damages – an introduction

Public authorities, like private individuals, may incur liability for damages for their acts and omissions. Denmark being an EU Member State, its public authorities are bound by both national and EU law and may incur liability for damages for breach of EU rules, subject to fulfilment of the relevant criteria.

Under national law, public authorities are subject to the ordinary Danish law of torts. That means a public authority may be liable for damages if by act or omission causing damage and inflicting a loss on any enterprise or individual. For example, if a decision by the authority is contrary to the law.

What does it take for a state to violate EU law?

Denmark is a part of the legal cooperation in the European Union, and as a member of the EU, Denmark is subject to EU rules. This means first and foremost that Denmark is bound by EU law and must comply with, implement and enforce EU rules, while also observing the principles of EU law as developed by the Court of Justice of the European Union (CJEU) and other bodies.

In Denmark, EU rules impact considerably at different levels in the public administration and government bodies. Danish politicians, officials and administrative authorities must implement and enforce EU law in Denmark, and Danish courts are obliged to rule in accordance with EU law. Generally, this is not a problem, but incorrect implementation or enforcement of the rules and acts made in violation of EU law, may cause damage to citizens and businesses. In such cases, Denmark, like all other Member States, can incur liability for damages.

Whose breach will give rise to state liability?

The first thing to establish, if one considers to claim compensation from the state, is whether it was, in fact, the state that violated EU law.

The state will be liable only where the violation was made by a public authority and where the general requirements for liability are met. For these purposes the term “public authority” covers any public administration body, whether state, regional or municipal. National courts are also comprised and may be held to violate EU law when issuing last-instance judgment, and also the Danish Parliament (as legislator) may act in breach of EU law.

It is not only when public bodies are acting in their capacity as administrative authority, etc., that the state may be held liable for damages. The same goes for acts and omissions by a public authority acting as a contracting party for private purposes, e.g. as an employer.

What constitutes a breach of EU law?

Breaches of EU law can take many forms. One might be where national law or case law is found to impede the free movement of goods, services, labour, etc., in the EU’s internal market. This type of violation is not uncommon, and the CJEU has in several cases found Denmark to be in breach of EU law.
Failure to implement a directive on time always constitutes a breach of EU law, regardless of the reason. Wrong implementation - for example, where implementation is done in a manner inconsistent with the provisions of a directive or regulation - will also qualify as breach of EU law.

See more on “over-implementation”, etc., in our previous insight: How does your company prevent and manage over-implementation of EU law (only available in Danish).

If in their enforcement of EU law, a public authority or a court does not apply EU law correctly, this, too, will constitute a breach of EU law. This will be the case, for example, where an authority or a court misinterprets the rules.

When will the state be liable for a breach?

There are some basic criteria that must be met in order for a Member State to incur liability for damages for a loss sustained by a business as a result of any misapplication of EU law by the state. But before checking to see if these criteria are met, it should first be clarified if there was, in fact, a loss and if that loss can be documented. If not, the conduct of the state cannot lead to compensation, since there will be nothing to compensate.

The Danish Frazzes øl case may serve to illustrate:

Frazzes øl (UfR 2010.1098.H)

A distributor of beer had claimed compensation from the Danish state because a Danish prohibition on the sale of canned beverages had, he alleged, caused him a loss of profit. The prohibition was in conflict with EU law and had for that reason been repealed before the action was brought. The distributor had claimed compensation in the amount of DKK 1 million, based on assumptions about the amount of profit he had lost.

Among other things, he alleged he would have been able to seize market shares from the dominant players on the market, including Carlsberg and Unibrew. The Danish Supreme Court, however, did not find that his assumptions about market shares and possible deals and the estimated profit had been sufficiently proven. The Supreme Court thus was not satisfied that there was proof of any loss.

As this case shows, compensation will be payable only where the claimant proves on a balance of probabilities to have suffered a loss. Further, there are additional three conditions – listed in established CJEU case law – that must be fulfilled:

1. The rule infringed must be intended to confer rights on the company

2. The infringement must be sufficiently serious

3. The damage must be caused by the infringement

1. The rule infringed must be intended to confer rights on the company

It must be a rule of EU law which confers rights on the company (e.g. entitlement to national equal treatment), protects it against intervention, etc.

2. The infringement must be sufficiently serious, i.e. it must not be “excusable”

An assessment will be made, on a case-by-case basis, to see if the Member State concerned manifestly and gravely disregarded the limits on its power of discretion. Among the factors that may be taken into consideration are the clarity and precision of the rule infringed and the margin of discretion left to the national authorities.

Any breach of EU law qualifies as sufficiently serious if it manifestly contravenes CJEU case law on the relevant area. It is for the national court to decide if the criteria for state liability for breach of EU law are met. In practice, however, the CJEU - if it has all requisite information - will decide if the infringement of EU law can be said to be sufficiently serious.

Where there is doubt as to whether any rule has in fact been breached, this criterion will most likely not be met. The Danish Supreme Court confirmed this in its decision in the Århus Købmandsskole case (UfR 2018.1734.H), where the state was not held to be responsible because legitimate doubt as to the interpretation of a directive rendered any misinterpretation of it excusable.

3. The damage must be caused by the infringement

The loss must have been caused by the breach of EU law. If the loss was attributable to factors other than the infringement, there can be no liability.
The relationship between Danish rules and EU law

The CJEU has laid down that the above EU law conditions for Member State liability constitute the threshold for an award of compensation: Compensation will and must be payable whenever these conditions are (all of them) met, and national law must not prescribe higher standards than these for successfully claiming compensation from the state. Nothing, however, prevents Member States from prescribing less strict conditions for pursuing a claim for compensation.

Compensation under national law must not be contingent on, say, the state having displayed a level of intent or negligence which goes beyond a “sufficiently serious breach of EU law”.

EXAMPLES

The German beer and UK fishing quotas cases (CJEU joint cases C-46/93 and C-48/93)
The cases brought before national courts in Germany and the UK, both concerned breach of the EU Treaty rules on free movement. In the German case, a French brewery was claiming compensation for lost profit on the grounds that German law had unlawfully prevented foreign producers of beer from using the term “Bier”. The British case concerned the unlawful restriction of access to fishing quotas, with a group of Spanish fishermen claiming compensation for lost profit.

In both cases, the problem was that there would be no compensation due if national law was applied, because the national rules prescribed gross negligence and concrete infringement of individual rights as prerequisites for compensation. The CJEU was asked if such requirements were in line with EU law and it found that they were not. It was held that a requirement of gross negligence was incompatible with EU law, and that fulfilment of the above three criteria for compensation sufficed for compensation to be payable.

The Köbler case (CJEU case C-224/01)
The case concerned an Austrian citizen by the name of Köbler, who had been denied a length-of-service salary increment on the grounds that he had not attained 15 years of service at an Austrian university. Köbler believed this to be against EU law, arguing that he did have more than 15 years of service if the duration of his service at universities in other Member States was included.

He brought his case before the Austrian courts, which upheld the university’s refusal to grant the salary increment. It was only when the CJEU had tried a similar case, in which a refusal to grant a length-of-service increment in similar circumstances had been found to be contrary to EU law, that Köbler succeeded with his claim.

The Danish Holiday Act case (UfR 2017.1243.H)
The Danish Supreme Court, in 2017, established that the state of Denmark was liable for damages for having failed to align the Danish Holiday Act with the rules of an EU directive in due time. The case concerned an employee who had fallen ill while on holiday in 2010 and whose request for replacement holiday had been denied by his employer. A CJEU decision from 2009 had laid down, however, that replacement holiday is a required entitlement under the EU directive, and the employee therefore claimed compensation from the state of Denmark on the grounds that the Danish Holiday Act then in force, was not consistent with the directive. The Act was amended in 2012. The Danish Supreme Court held that the state of Denmark had breached EU law and should have amended the Danish Holiday Act by 1 January 2011 at the latest. The infringement was found sufficiently serious, and therefore the state was liable. The specific employee was not awarded compensation, though, since his illness during holiday had occurred in 2010, before expiry of the time allowed for the state to amend the Act.

The Dillenkofer case (CJEU case C-178/94)
The case concerned the question whether the state of Germany had acted so as to incur liability by failing to ensure timely transposition of a directive on package travel. The failure caused a loss to Dillenkofer, depriving him of the protection he would have enjoyed if the directive had been implemented within the prescribed period.

The CJEU found in this connection that any failure to ensure timely transposition of a directive will give rise to a right of compensation, subject to fulfilment of the other criteria for awarding such compensation. The CJEU found further that for liability purposes it did not matter that the state of Germany believed the German rules already in force to offer the requisite protection already.
Danish case law shows that even though there are two separate sets of rules, Danish rules on damages and their EU law counterparts are not all that different in terms of substance - in fact, they are quite alike. Danish law assesses authorities’ responsibility on a traditional fault-based standard, under which liability for damages is contingent on the authority having committed an act or error or negligence which is directly connected to the damage suffered. Under EU law, as explained, it is a requirement that there was a breach of a rule intended to confer rights on individuals, and that the breach was sufficiently serious. It is possible, though, that there may be concrete instances where a company may successfully claim compensation under Danish law even though the EU law requirements are not met.

**Pursuing the claim in Denmark**

When a company chooses to bring a claim for compensation against the state, the action will be heard by the Danish courts and will be subject to Danish law. That means that, among other things, the Danish rules on statute-barring and method of calculating damages will apply.

The Danish court will determine if the state has infringed EU law, if any damage was suffered, and if the conditions for compensation are met. If in doubt as to whether there has been a breach of EU law or not, or as to whether the conditions for compensation are met, the court may ask the CJEU for guidance. In principle, Danish courts of last instance are obliged to do so (by means of a so-called preliminary reference) if there is reasonable doubt as to whether an infringement of EU law has occurred.

Further, as previous CJEU judgments have shown, the conditions for successfully claiming compensation from the state must not be less favourable than under Danish rules, and that the rules must not in practice, make it excessively difficult to pursue the claim. Denmark, therefore, must not apply national rules restricting the access to successfully claim compensation as fulfilment of the three criteria set out above must suffice in every instance.
Step-by-step guide to assessing possible state liability

Companies who believe to have suffered a loss due to a breach of EU law by the Danish state may consider bringing a claim for compensation. The following step-by-step guide offers a preliminary indication:

- **Was there a breach of EU law, and was it committed by “the state”?**

- **Was there a financial loss, and can it be proven?**

- **Was the breached rule intended to confer rights on the company?**

- **Was the breach sufficiently serious, i.e. not excusable?**

- **Was there a direct link between the breach and the damage suffered?**

If when going through the step-by-step assessment you can answer “Yes” to each step, it should be examined more closely if your company is entitled to compensation from the state.

Kromann Reumert’s advice

Kromann Reumert offers highly specialised advice on EU law within a broad range of industries, sectors and practice areas. We represent companies in relation to relevant authorities and court instances, both in the Danish and in the European judicial systems. The cases often concern complex pilot cases and cases that raise questions of principle, and require in-depth knowledge of the interrelationship between Danish law and EU laws. We also organise conferences and seminars on current EU law issues, and our lawyers participate as EU experts in various committees, associations and European federations. Moreover, we regularly publish books and articles in Danish and foreign journals.

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Kromann Reumert’s vision is “We set the standard”. Good is not enough - we want to be the best. We provide value-adding solutions and advice with full involvement and commitment. We get there by focusing on quality, business know-how, spirited teamwork, and credibility.

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