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Recovery of unpaid funding by beneficiaries of EU funds

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Abstract. The purpose of the article is to analyze the issue of pursuing claims for payment by beneficiaries of EU funds. The author analyzed the jurisprudence of Polish courts in cases concerning EU funds, as well as literature devoted to these issues. Based on the article, the issue of legal bases of beneficiaries' claims related to the refusal to pay EU funds on the basis of co-financing agreements is analyzed. Attention was drawn to the important role of compensation and payment proceedings as legal instruments enabling the fulfilment of the Member State's tasks in the prevention of irregularities. The issue of the possibility of treating unpaid funding as damage in the sense of lost profits was also analyzed. The article discusses the grounds of causation between the improper operation of the institution refusing to pay the subsidy and the damage suffered by the beneficiaries. Beneficiaries on the basis of a co-financing agreement may pursue both claims for payment, i.e. for performance of the service, as well as claims for damages. Claims for damages require proof of damage and a causal link between the unlawful act of the institution and the damage. Damage may also be an amount equivalent to the value of the grant that the beneficiary would have obtained if it had not been for the improper performance of the contract by the institution.

Keywords: irregularity, damage, claim for co-financing, reimbursement of funds.

JEL Classification: K15, K33.

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INTRODUCTION

The General Regulation ('Regulation (EU) 2021/1060 of the European Parliament and of the Council') requires Member States to prevent, detect and correct irregularities. Reimbursement procedures are part of a Member State's task of protecting the EU's financial interests and detecting and correcting irregular spending. Failure to comply with that obligation gives rise to liability on the part of the Member State.

The finding of irregularities is multifaceted and results not only in the obligation of the competent institution to initiate and conduct proceedings aimed at correcting an irregular expenditure, but may also lead to the initiation of other proceedings, such as preparatory and criminal proceedings or civil proceedings. The finding of irregularities gives rise to the obligation to initiate proceedings for the correction of irregular expenditure (Article 103(1) of the general regulation). The fulfilment of this obligation under national law is carried out in the context of an administrative procedure initiated pursuant to Article 207 of the Public Finance Act ('UFP'). If irregularities are found, the institution should stop further financing of the project and immediately initiate a reimbursement procedure. Failure to initiate proceedings for reimbursement of funds – even if the institution initiates other proceedings, e.g. criminal or civil – should be considered as a breach of the obligations of a Member State leading to its liability towards the Commission (Voivodship Administrative Court in Olsztyn, 2019). Also in relations with an individual, failure to initiate proceedings should be considered a violation of the principle of trust in the state (Judgment of the Court of Appeal in Bialystok, 2018). The restitution procedure cannot be replaced by other proceedings.

The finding of irregularities may lead to the initiation of proceedings by the beneficiary itself if the disbursement of funds has not taken place or has occurred only partially. In such a situation, it is possible to conduct two proceedings simultaneously – administrative – aimed at recovering funds and civil – aimed at their further payment to the beneficiary. Civil proceedings in this case will be closely related to the irregularity, because its findings will directly aim at finding that there is no individual irregularity.

The possibility for a beneficiary to initiate civil proceedings to establish that no irregularity has occurred should be considered relevant to the tasks of the Member State defined in the General Regulation as the prevention of irregularities (Article 7(1)(d) of the General Regulation). It cannot be ruled out that an incorrect act on a Member State consisting in the incorrect finding of an irregularity, if it is repeated in relation to several operations, may itself be regarded as an irregularity of a systemic nature (Article 2(33) of the general regulation). This may be the case, in particular, when, on the basis of arrangements for one or more projects, the institution concerned e.g. withholds payments or refuses to sign contracts for other projects unrelated to the project in which the irregularities were identified[1]. Prevention of irregularities in other projects – where it concerns a wider group of them – should be preceded by a particularly careful analysis. Decisions such as the suspension of payments, especially for projects that are already underway, can lead to the frustration of the public objectives set out in the Partnership Agreement and may also fulfil the conditions for a systemic irregularity or a serious deficiency in the management system.

Individual entities – in connection with the concluded co-financing agreement – may raise claims against institutions of various types and based on different legal bases. For example, a possible type of claims are claims aimed at establishing that the co-financing agreement is being properly implemented or claims aimed at establishing the obligation to conclude a co-financing agreement. Important claims made by beneficiaries are claims for payment. In literature (Brysiewicz & Poździk, 2011, p. 49; Savchuk, 2011, p. 79; Karwatowicz & Zawiślańska, 2013, pp. 197-199; Talaga, 2019, pp. 186-187; Wyszomirski, 2013, pp. 77-93; Koziel, 2018; Szczepaniak, 2014, p. 116) and case law (Judgment and Supreme Court 2011, 2012, 2014) do not raise doubts about the civil law nature of the co-financing agreement and the possibility of deriving various types of claims from it.

CLAIMS FOR PAYMENT UNDER A GRANT AGREEMENT

Pursuant to Article 353 § 1 of the Civil Code, the obligation consists in the fact that the creditor may demand performance from the debtor and the debtor must perform the obligation. The debtor should perform the obligation

[1] Cf. e.g. publications on withholding of funding for a number of projects by the National Centre for Research and Development, https://businessinsider.com.pl/prawo/firma/afera-w-ncbir-firmy-traca-miliony-zlotych-pojda-do-sadow/ctesf65.

in accordance with its content and in a manner corresponding to its socio-economic purpose and the principles of social coexistence, and if there are established customs in this respect - also in a manner corresponding to these customs. D the debtor is obliged to exercise the diligence generally required in relationships of a given type (due diligence). The debtor's due diligence in relation to his business activity is determined taking into account the professional nature of that activity.

In the event of default, the creditor has two claims. The first is a claim for performance of the contract and performance *in natura* (Article 354 § 1 of the Civil Code), while the second is a claim for compensation for damage resulting from non-performance or improper performance of an obligation (Article 471 of the Civil Code). Performance of the obligation in accordance with its content and in a manner corresponding to its socio-economic purpose and the principles of social coexistence, as well as in a manner corresponding to established customs, if such rules exist in this respect, is the basic obligation of the debtor (Article 354 § 1 of the Civil Code). The owner is entitled to count on the proper performance of this obligation, and in the opposite situation - to demand appropriate compensation in connection with non-performance of the obligation (Judgment of the Court of Appeal in Warsaw, 2019, VI ACa 888/18). The claim for performance of an obligation, due to the principle of real performance of obligations, is the basic performance of the debtor in a situation where there has been non-performance or improper performance of the obligation (Judgment of the Court of Appeal in Warsaw, 2019, VI ACa 129/19). On the other hand, the creditor's claim for compensation does not, in principle, eliminate, but complements the claim for performance of the obligation in *natura.*

On the basis of the above-mentioned provisions, it is possible to construct a claim arising from the relationship between the beneficiary and the competent institution, e.g. a claim for payment of co-financing by an intermediate or managing body. The beneficiary of the co-financing agreement may demand payment of funds as part of civil proceedings, as well as to establish that it properly exercises the rights arising from it, in a situation where the other party to this legal relationship, i.e. the institution, claims that the contract is performed improperly (due to an irregularity) and derives negative consequences from this fact, e.g. by suspending payments or calling for a refund of funds.

Grants concluded with beneficiaries on the part of the institution provide for an obligation to make payments in response to payment applications submitted by beneficiaries.[2]

The obligation described in the co-financing agreements, defined as the principle of indivisibility of payments, results directly from the provisions of general regulations. The current general regulation is included in Article 74(d) by indicating that the managing authority shall ensure, subject to the availability of funding, that the beneficiary receives the amount due in full and no later than 80 days from the date of submission of the payment claim by the beneficiary; the time limit may be interrupted if the information provided by the beneficiary does not allow the managing authority to establish, whether the amount is due.

As the Supreme Court rightly points out, the "*indicated principle of indivisibility of payments to beneficiaries does not apply to justified cases, when the deduction results, for example, from an irregularity found in the implementation of the project, failure to implement the project in full or within the required deadline in accordance with the co-financing agreement, from the submission of invoices for settlement including ineligible expenses or in a situation where a system error (error the entire management and control system in relation not only to this operation). The principle of indivisibility of payments is therefore not absolute and it seems that in the present case it suffers from exceptions due to – if the factual findings confirm it – irregularities in the implementation of the project and submission*

[2] E.g. § 9 model agreement Sub-measure 1.1.1 of the Smart Growth Operational Programme 2014-2020 "Fast Track" Model contract available at: https://www.gov.pl/web/ncbr/konkurs-11112021-szybka-sciezka, § 9 of the model agreement for Measure 2.1 Support for investments in R+D infrastructure of enterprises of the Smart Growth Operational Programme 2014-2020 (call for proposals 2/2.1/2019) model contract available at: https://www.poir.gov.pl/nabory/1-60/, § 8 of the model agreement for co-financing the project under Sub-measure 3.2.1 Research for the market of the Smart Growth Operational Programme 2014 2020, model contract available at: https://www.parp.gov.pl/component/grants/grants/badania-na-rynek-konkurs-ogolny-2.

for settlement of an invoice for ineligible expenditure" (Judgment of the Supreme Court, 2015, I CSK 741/13; Jankowska, 2009, p. 602). A contrario, therefore, if there was no irregularity in the project – which may be the subject of findings in the context of the payment procedure – the suspension of payments must subsequently be considered unjustified.

Choosing the correct legal basis for your claim is important. On the one hand, the application for payment resulting from the co-financing agreement does not require proof of all the conditions resulting from, for example, a claim for damages, on the other hand, it requires proof that the contractual grounds for payment of such a benefit have been fulfilled (Judgment of the Supreme Court, 2015, II CSK 232/14; Judgment of the Court of Appeal in Warsaw, 2014, VI ACa 1932/13).

As part of the procedure for payment of benefits under the co-financing agreement, the conduct of both parties to the contract is also assessed in terms of due diligence criteria (Article 354 § 2 of the Civil Code in conjunction with Article 355 § 2 of the Civil Code) and contractual loyalty. The obligation to cooperate in the performance of the obligation is borne by both the debtor and the creditor. Each of them should therefore respect the legitimate interest of the contractor and not do anything that would complicate, inhibit or thwart the performance of the obligation (Judgment of the Court of Appeal in Krakow, 2019, I ACa 804/18).

CLAIM FOR COMPENSATION FOR NON-PERFORMANCE OF A GRANT AGREEMENT

Breach of certain contractual obligations by the parties to the co-financing agreement may be qualified in the light of Article 471 of the Civil Code as non-performance or improper performance of an obligation (Judgment of the Court of Appeal in Warsaw, 2013, VI ACa 281/13). The jurisprudence of common courts explicitly allows for the possibility of seeking payment from the competent institution in such a situation (Judgment of the Court of Appeal in Poznań, 2012, I ACa 801/12; Judgment of the Court Of Appeal in Szczecin, 2013; Judgment of the Regional Court in Łódź, 2014).

In the case law, one can also find cases of pursuing claims arising from a co-financing agreement also on other grounds. The District Court in Łódź heard a case in which the plaintiff claimed compensation related to the performance of the contract also on the basis of Article 415 of the Civil Code. The plaintiff in this case pointed out that in connection with the defendant's termination of the grant agreements, he suffered damage understood under Article 415 of the Civil Code, as the difference between the amount awarded and the amount not paid to the plaintiff under the project co-financing agreement. The court pointed out that, in principle, the application of this provision is possible, but it did not find that the conditions for the defendant's liability for damages were met (Judgment of the District Court in Łódź, 2018).

In case law, Article 417 § 1 of the Civil Code was also considered as the legal basis for claims related to the co-financing agreement, according to which the State Treasury or a local government unit or other legal person exercising this authority by virtue of law is liable for damage caused by an unlawful act or omission in the exercise of public authority (Judgment of the Regional Court in Warsaw, 2018; Judgment of the Court of Appeal in Warsaw, 2017, I ACa 2403/15; Judgment of the Court of Appeal in Białystok, 2018, I ACa 704/17). Taking into account the civil law nature of the co-financing agreement, the approach allowing for the possibility of pursuing claims based on this article cannot be considered appropriate. The performance of the duties of the institution on the basis of a grant agreement does not fall within the concept of exercising public authority – the state in this case does not act in the sphere of empire, because it itself decided to subject subsidy relations to civil law.

In the process for compensation for improper performance of the contract, in the event of refusal to make indirect payments, the institution, on the basis of Article 6 of the Civil Code in conjunction with Article 232 of the Code of Civil Procedure, will bear the burden of proving the facts justifying the refusal to perform the *obligation in natura* resulting from the co-financing agreement (Judgment of the Court of Appeal in Warsaw, 2012, VI ACa 568/12; Judgment of the Supreme Court, 2021, V CSKP 2/21).

On the other hand, as the Court of Appeal in Warsaw rightly notes, the plaintiff in the action for damages should prove which obligation arising from the contract between the parties was violated by the defendant, or which provisions of the law of obligations were violated by the defendant - which is necessary to attribute contractual liability to the defendant under Article 471 of the Civil Code (Judgment of the Court of Appeal in Warsaw, 2019, VII AGa 1092/18; Judgment of the Supreme Court, 2008, III CSK 211/08).

LACK OF FUNDING AS A DAMAGE

In the context of liability for damages under Article 471 of the Civil Code, an important legal issue is the issue of proving the remaining grounds for the claim, i.e. damage and causal link.

In the normal course of circumstances, the beneficiary may be harmed in the event of improper performance of the contract by the amount of aid due on payment claims already submitted and not paid by the institution. In that sense, that amount also corresponds to a benefit which may be claimed directly on the basis of the grant agreement itself, provided that the contractual conditions are satisfied. Regardless of this, the question arises whether the unpaid funding to the beneficiary can be treated as damage in the form of lost profits, or going further to the benefits that the beneficiary could obtain in the event that the project was implemented, can future profits from the project also be included?

Two approaches can be distinguished on these issues. The first one, under which the courts consider that the grant not paid to the beneficiary may be treated as lost profits (Judgment of the District Court in Poznań, 2015, IX GC 1229/13; Judgment of the Court of Appeal in Szczecin, 2021, I ACa 426/20, Judgment of the Court of Appeal in Szczecin, 2019) and the second, under which the courts condition the treatment of the subsidy as a lost benefit by spending funds on purchases indicated in the project and the implementation of the project as such. Under the latter approach, there is an argument that the amount of co-financing as such cannot be treated as damage because it does not take into account what the beneficiary saved as a result of the lack of implementation of the project, and that the beneficiary did not make appropriate purchases in the project, which would only be refundable (Judgment of the District Court in Łódź, 2018, II C 114/15; Judgment of the Court of Appeal in Krakow 2018, I ACa 210/18). When discussing this issue, it is worth paying attention to the case law against the background of the concept of damage when non-public entities claim compensation for subsidies not granted to finance kindergartens. Cases brought for the payment of subsidies for non-public schools and institutions in the form of an award from the defendant municipalities of the amounts of the subsidy as the difference between the subsidy actually paid and the subsidy due are based on Article 90(2b) of the School Education Act of 7 September 1991.

In the judgment of 9.07.2020, the Supreme Court looked into the possibility of a broad interpretation of the concept of damage in the event of failure to obtain part of the agreed subsidy. Consequently, the Supreme Court confirmed that the claim for payment of the amount corresponding to the difference between the amount of the subsidy due and the amount of the subsidy paid is inherently compensatory in nature. *[The case-law] may suggest that the claim is effective only to the extent that the person running the nursery school proves that he has covered from his own resources expenses which could have been covered by the unpaid subsidy. In this view... the damage would be only a loss corresponding to such expenditure. Its disadvantage, however, is that it does not take into account the situation in which the person running the kindergarten did not incur higher expenses only because he did not have adequate funds and could not take out a loan (credit) for this purpose or did not decide on the risk associated with it, the higher the amount of subsidy between the parties is disputed. It is clear that the possibility of covering subsidies from the current expenditure of a nursery school in the field of education, upbringing and care, including social prevention, 'exempts' other funds at the disposal of the person running the nursery school and allows them to be used in other ways, also for the benefit of that person. Therefore, taking into account the direct impact of the subsidy on the property relations of the person running a non-public nursery school in his interest (private interest), the classification of the unpaid amount of the subsidy as spontaneous damage should be considered justified* (Judgment of the Supreme Court, 2020, V CSK 502/18).

The above view was accepted in the judgment of the Court of Appeal in Białystok. In the opinion of the above-mentioned court, *"the position of the plaintiff, who equated its damage with lost profit (lucrum cessans – Civil Code Art. 361 §2), may also merit some acceptance. It should be mentioned that the lost benefits include m. in, among other things, the value of assets that have not entered the assets as a result of the event giving rise to the damage. In this sense, in the opinion of the Court of Appeal, the plaintiff running a non-public kindergarten and meeting the necessary statutory requirements to receive a subsidy in a certain amount could legitimately expect that a given amount of money would be granted and paid to her, and since this amount – as a result of the action of a local government unit – ultimately did not enter the property, the damage understood in this way corresponds to the civil construction of the damage in the form of lucrum cessans"* (Judgment of the Court of Appeal in Białystok, 2021, I ACa 335/20; Judgment of the Supreme Court, 2021, V CSKP 45/21; Judgment of the Court of Appeal in Warsaw, 2021, V ACa 428/20).

A different position, in turn, was presented by the Supreme Court in its judgment of 15/06/2022, indicating that the failure of a "*public entity to pay the appropriate amount of subsidy is only a source of damage (harmful event), and therefore the injured party must still, on general principles, raise and demonstrate that he suffered damage in a certain amount. Therefore, the damage is not the mere failure to receive a public law benefit in the amount due. (...) As part of the compensation process, it is necessary to demonstrate, for example, that the person running a nursery school in order to carry out educational tasks that should have been financed from the grant, in the absence of payment of the subsidy in the due amount, engaged other means, which resulted in the person suffering specific material damage. The damage described above may usually result from the allocation of private funds of the nursery school operator to cover expenses related to this sphere of activity of the institution, which should be financed from the educational grant, or from incurring liabilities for these needs and costs incurred in connection with them. (...) In the ordinary (lawful) course of action, funds from the education subsidy that have not been used to perform public tasks do not become a source of profit for the rightholder. It would therefore not be justified to pay the equivalent of those funds - as compensation - to an entity which has not achieved part of the educational objectives normally covered by subsidies and, consequently, has not incurred the expenditure needed to finance them. As a result, an entity that was initially underestimated would ultimately be in a better situation than it would have been in if the local government unit had acted in accordance with the law from the beginning"* (Judgment of the Supreme Court, 2022, II CSKP 380/22).

The latter approach must be regarded as flawed. First, it does not take into account the essence of the concept of damage, which may have a non-pecuniary dimension. Secondly, this approach does not take into account the nature of projects implemented with EU funds. In addition, it is impossible not to notice that such a position in some way forces entities seeking compensation to take an additional risk in the form of self-financing of projects that were originally supposed to be financed from public funds, for example.

As regards the argument referring to savings for the beneficiary due to the non-implementation of the project, it should be noted that it is based on a narrow interpretation of the concept of damage – reducing the latter only to a monetary dimension. It should be remembered that the co-financing is not a free benefit for a given entity, but it is actually conditioned by the implementation of the project. Funds from the Funds finance – in a certain percentage depending on the intensity of support – expenses planned under the project. When assessing the project as a whole, in those cases where the project involves, for example, the purchase of fixed assets (e.g. land, machinery or equipment) and intangible assets, these assets are included in the beneficiary's assets, increasing the beneficiary's assets.

Nevertheless, it can be assumed that as a result of the implementation of the project, the beneficiary's assets increase by at least the equivalent of the grant intended to finance the purchased assets. Therefore, if the beneficiary assumed the implementation of a project with a total value of PLN 100 million, under which it planned to purchase assets for the equivalent of this amount, where the project was to be financed in 50% from EU funds, and in the remaining scope from own funds (cash, loans or other instruments), then the lack of implementation of the project will result in the beneficiary's assets in balance sheet terms not increasing by PLN 50 million – and thus by the value corresponding to the equivalent of the amount Grant.

The funding received is used to cover specific expenses in a certain percentage. At the same time, in place of funds involved in the purchase of given items of expenditure, a specific fixed asset will enter the assets of the former beneficiary, the initial value of which corresponds to the value of the co-financing. In such a situation, the carrying

amount of the assets of the former beneficiary will always increase by the amount corresponding to the value of the subsidy – even if it was immediately spent on specific purchases. In practice, this amount usually reimburses already incurred expenses on assets, the value of which undoubtedly increases the value of the assets of the beneficiary concerned.

The amount that the beneficiary "saved" will in no way affect the value of the harm so determined – in the context of adequate causality, one can at most talk about the implementation by the beneficiary of other alternative projects resulting from the use of this amount as an alternative to the implemented project – however, the argument in this respect is borne by the entity claiming that such an alternative would be possible in the existing state of affairs.

In this context, however, it is worth noting the view presented in the literature, according to which it is impossible to apply the construction of hypothetical causality and the problem of determining the scope of tort liability in the situation of the so-called reserve cause *causa superveniens*: "*taking into account the construction of legal alternative behaviour would lead to a situation in which the unlawful act is not sanctioned. This would amount to an implied consent to non-compliance with legal regulations and, consequently, would lead to a weakening of the entire legal system. The fact that a lawful act would lead to the same damage cannot justify a breach of legal norms, especially in the case of culpable action on the part of the perpetrator of the damage. (...) What is important here is the awareness of the violation of the legal order by the perpetrator of the damage, which cannot be excluded by adopting the construction of legal alternative conduct. The perpetrator of the damage at the time of the actual harmful event was not aware that the damage would also occur in the case of a lawful action. Accepting the concept of hypothetical causality cannot in concreto lead to undermining the guarantee function of legal norms violated by the perpetrator of damage"* (Wilejczyk, 2016, p. 77; Borys, 2019 p. 133; Machnikowski, 2023, p. 396; Judgment of the Supreme Court, 2005, III CK 193/04). This view applies to cases involving EU funds – the institution demonstrating that the project would not have been implemented anyway if it had not been for its unlawful action should also be subject to the above-mentioned qualifications. This is important because the suitability of the project has been confirmed by a positive assessment of the application for co-financing by the institution. The institution's arguments regarding inadequacy should therefore be treated with great caution.

As for the second argument of the Supreme Court, i.e. linking the loss of benefits only to the fact that the project was carried out by the beneficiary, i.e. all purchases were made and the grant was not received, this argument does not take into account the essence of the implemented projects, as well as the essence of adequate causality, in which the absence of damage is determined by the lack of action on the part of the beneficiary despite the harmful event. Pursuant to Article 361 § 2 of the Civil Code, the limits of material damage are determined by: loss and lost profits. The concept of losses (*damnum emergens*) is understood as a decrease in assets or an increase in liabilities. Lucrum *cessans*, on the other hand, includes the value of assets that have not entered the assets as a result of the harmful event and the value of liabilities that have not decreased as a result of that event. There is a consensus that only those benefits that would be likely to be included in the victim's assets should be taken into account (Karaszewski, 2023). Damage in the form of lost profits (*lucrum cessans*) is inherently hypothetical (Olejniczak, 2014). Doctrine and jurisprudence unanimously indicate the differential (differential) method as a way of determining the amount of material damage. The application of this method consists in comparing two values, namely the state of the injured party's assets existing after the event from which the damage resulted with the hypothetical state of the injured party's assets, which would have existed if that event had not occurred. The amount of damage is the difference between the value of these assets (Karaszewski, 2023). The starting point of the comparison described here is the entirety of the property relations of the injured party, and not only the good against which the harmful event was directly directed.

Damage in the form of lost profits should not be equated with possible damage, which is characterized by the fact that the probability of an advantage occurring is low, it results from exceptionally favorable circumstances and independent of the entity claiming compensation. Possible damage is the result of a harmful event in the sphere of the "*injured person's interests, which is not subject to indemnification due to the negligible probability of obtaining an advantage in the absence of the harmful event. The comparison of the definition of lucrum cessans and possible damage leads to the conclusion that the*

difference between these two categories of damage can be seen only in the probability of the hypothetical state of the injured party's goods reconstructed for the purposes of the differential" method (Karaszewski, 2023).

Even in the case of contracts of chance, there are no grounds for automatically disqualifying, even at first sight, unlikely damage as falling outside the scope of *lucrum cessans*. Only "*a detailed analysis of the specific case makes it possible to assess how the differential hypothesis develops and, therefore, whether the damage suffered by the injured party is sufficiently certain to be regarded as damage to* be compensated. *(...) The fact that winning a lottery is an objectively unlikely event does not mean that a particular claimant in a particular trial would not be able to demonstrate with a sufficient degree of probability that its ticket would be successful.*" (Sieczych-Drzewiecka, 2020). Consequently, even in the case of advantages which initially appear unlikely due to their nature, it is only after the taking of evidence in the case that it can be established whether, in a particular situation, the damage suffered by a party was too unlikely to be regarded as compensable.

It should be stressed that EU projects are projects that are based on the principle of co-financing and, in addition, are financed because the incentive effect has been met. In other words, the EU legislator assumes that public funding will be provided only for projects that would never have been implemented or would have been implemented in a different form without public funding.

As Phedon Nicolaides points out "*the incentive effect is established at three levels of assessment that may be termed 'standard', 'additional', and 'detailed'. (…) At the 'standard' level, which applies to all cases, state aid lacks an incentive effect and it is therefore unnecessary when it is granted after a project or investment has been initiated. This has been confirmed by the Court of First Instance in the recent Kronoply case, where it is said that aid has no incentive effect when the project has already been started, or even completed, by the undertaking concerned prior to the application for aid being submitted to the competent authorities (…) Fifth, at the 'detailed' level of assessment (for aid amounts above certain thresholds), undertakings (primarily large) must further show that in the absence of aid they would not carry out the project or investment. That is, not only must they go beyond normal or benchmark behaviour but they must also demonstrate that the project or investment itself is uneconomic or too risky. In other words, it is not enough that they do something extra with the aid. They have to prove that without the aid the project or investment would not have been realized. This means, for example, that an undertaking that is planning to carry out investment in order to increase output cannot receive aid if the expansion would be profitable without the aid*" (Nicolaides, 2009). Judicature emphasizes the momentousness of the incentive effect to such an extent that, in the absence of its fulfilment, the grant agreement should be treated as an invalid legal act (Judgment of the Court of Appeal in Warsaw, 2017, I ACa 544/17).

Therefore, making the assumption that damage in the form of lost profit can only be said if the beneficiary, e.g. despite the termination of the grant agreement, implements and completes the project from its own resources would at the same time contradict the existence of an incentive effect for a given project and would render the grant agreement invalid. Therefore, unlike subsidies for financing kindergartens, in the case of projects financed from EU funds, it is explicitly assumed that such investments will be financed, which in the absence of these funds would never have been implemented.

The issue of the incentive effect and the adopted model of financing EU projects, expressed in principle of co-financing, is related to a specific way of participation of public funds in the project. The assay adopted as part of project settlements is the cyclicality of payments made on the basis of settlement applications. Payments are made as advance payments or reimbursement payments, while projects are implemented on the basis of material and financial schedules defining the material and financial progress of projects. The beneficiary is to provide funds to cover its own contribution and the public body is obliged to make intermediate payments. In simple terms, therefore, the financial model of EU projects assumes that the beneficiary submits applications for indirect payments, documenting the expenditure already incurred, and then from the refunds received can partially finance further expenses, in the remaining scope providing financing from own resources.

As a rule, especially in the case of larger projects, the beneficiary's own contribution is financed partly or entirely from the commercial financing obtained, which complements part of the funds needed to implement the project on the part of the beneficiary. With such a financing model, the condition for the proper implementation of a project co-financed from EU funds is the payment of tranches of funds in accordance with the submitted applications for

intermediate payments in the amount and deadlines specified in the co-financing agreement. Failure to make these payments within the specified deadlines usually results in the discontinuation of the project.

CAUSAL LINK BETWEEN THE DAMAGE AND IMPROPER PERFORMANCE OF THE CO-FINANCING AGREEMENT BY THE INSTITUTION

The law does not specify how highly probable the impact on the hypothetical state of the injured party's assets must be, which would authorize the court to award damages in the scope of *lucrum cessans*, and the theses formulated by the case-law on this subject take on an extreme character. However, this "high probability" is most often used to determine the caesura between *lucrum cessans* and possible damage (Pajor, 1982, p. 152; Kocot, 2013, p. 85), the interpretation of this probability is not clear-cut.

That issue essentially reduces the issue of damage in the form of lost funding to an adequate causal link between the event in question and such damage. Pursuant to Article 361 § 1 of the Civil Code, the person liable for compensation is liable only for the normal consequences of the act or omission from which the damage resulted.

The causal link is objective in the context of the connection between the causative event and its effect, independent of the entities, it is objectively determined by the factual circumstances of the specific case. Causation encompasses all forms of objective relationship between the event giving rise to liability and the damage. These are relationships separate from subjective conditions, in particular from the issue of guilt and predictability, associated with the person of the perpetrator or with the model of the average observer (Czub, 2022).

The adequacy of the consequences of certain events giving rise to liability for damages is linked to the probability of the occurrence of the consequences in question, which in the case of a normal causal relationship is to be increased each time the cause indicated as the source of the damage occurs. That relationship shall be examined *ex post* on the basis of objective regularities and facts. Therefore it is not a normal consequence to have an unusual, atypical event, which is not within the limits of life experience, a consequence which, on average, is out of the question in the ordinary course of things.

As argued in the legal literature, in order to establish an adequate causal link in a given factual situation, it is necessary to: 1) determine whether the event is a necessary condition for the occurrence of damage (test *conditio sine qua non*); 2) determine whether the damage is a normal consequence of the event (selection of consequences). The test of the necessary condition, characteristic of the theory of equivalence of conditions (equivalence), makes it possible to determine whether there is an objective relationship between the event and the damage. To that end, it is necessary to examine whether the absence of the event would have resulted in the damage not also occurring. An individual situation is analyzed, in particular a specific effect (damage), and not an effect of a given type. The causality of a specific event for a specific damage is examined and the result of the test is not affected by possible other events that may affect the existence and amount of damage (Olejniczak, 2014).

As B. Fuchs points out, the "*contracting authority's accession to the contract shapes the new legal status between the parties in such a way that the contract between them ceases to bind the parties, and the parties may pursue each other's claims only under Civil Code Art. 494, and those withdrawing from the contract also under Civil Code Art. 471 §1. Civil Code Art. 361 §1 refers to normal, and not the direct consequences of the harmful event. Therefore, the indirect nature of the causal link does not negate its normality. It is necessary to establish whether the causal link between the different links in the causal chain can be considered normal. If it is positive, then the link between the initial cause and its effect in the sphere of the victim's interests also corresponds to this criterion. As a rule, a direct causal link will always be normal, whereas an indirect link is considered normal if an external cause that cannot be attributed to the debtor is not included in its course. It is crucial to determine whether the causal relationship has not been interrupted by a bystander cause*" (Fuchs, 2018).

According to the view of the Supreme Court, "only such consequences in the property of the injured party should be considered sufficiently *probable, which, judging the matter reasonably, according to life experience, in the circumstances of the case could be predicted that they would enrich the property of the injured party"* (Judgment of the Supreme Court, 2008, II

CSK 377/07). It is worth emphasizing that in this judgment, although the Supreme Court considered it unlikely enough that the plaintiff would receive a subsidy from EU funds, the case concerned the stage of applying for EU funds, and the Supreme Court pointed out that after meeting the formal requirements, the application was subject to substantive and financial assessment according to a certain scale and only projects that obtained at least 40% of points were recommended for co-financing. Therefore, the plaintiff has not properly demonstrated that, had it not been for the formal errors, his application would have been qualified for funding. Thus, the Supreme Court generally accepted that demonstrating the possibility of such a causal link is admissible, and in this case the plaintiff's initiative was necessary (similarly, Judgment of the Supreme Court, 2005, III CK 101/05; Judgment of the Court of Appeal in Białystok, 2014, I ACa 104/14).

In the judgment of 9.10.2013 The Court of Appeal in Warsaw, in turn, pointed out that there *should be no doubt that the termination of the contract, which only after three years from its execution was considered ineffective, had previously caused certain effects in the form of cessation of further implementation of the project and this was for reasons not attributable to the plaintiff. It was the defendant's behaviour that prevented the plaintiff Foundation from performing the contract during its term and, consequently, from achieving the assumed effects of the project. The lack of payment by the defendant, resulting from the termination of the contract, resulted in depriving the plaintiff of financial resources to continue the project in accordance with the adopted schedule. It should be emphasized that despite the termination of the contract, the plaintiff did not interrupt the implementation of the project until February 7, 2007. It is difficult to expect that the plaintiff, not being sure what the final result of the court proceedings to determine the ineffectiveness of the termination of the contract will be, on his own, without appropriate subsidies from the defendant, financed the implementation of the project, especially since he did not have the necessary funds for this purpose* (Judgment of the Court of Appeal in Warsaw, 2013, VI ACa 1444/12).

An interesting example of the analysis of the causal link between the damage caused and the omission of the institution in the form of the lack of timely payment of the subsidy was presented by the District Court in Sieradz, which in its judgment of 27.07.2015 indicated that the late payment of part of the subsidy affected the financial situation of the plaintiff's enterprise, and by not receiving the amount awarded by the judgment of the Regional Court in Sieradz in *case I C 186/09 on time, the plaintiff lost the chance to the success of the feed project without recovering the equity capital involved and not achieving the planned profits. There are no sufficient grounds for assuming that the situation is affected by other factors beyond the defendant's responsibility. A contario, if payment had been made in October 2007, or even in March 2008, the applicant would have been able to carry out the planned project and would therefore have had an undertaking with a market value of PLN 12 877 125.84 which reflects its damage in that respect. Therefore, there is an adequate causal relationship between improper performance of the contract by the defendant and damage in this amount* (Judgment of the District Court in Sieradz, 2015).

The views expressed above in the case-law should be concurred. Taking into account the principle of co-financing of projects, as well as the above-mentioned principle of indivisibility of payments, the interruption of payments by the institution will almost always lead to the interruption and subsequent frustration of the project and will therefore in most cases be the main reason for its non-implementation. At the same time, public funding is included in the payment schedule annexed to the grant agreement and it is difficult to assume that this schedule is non-binding or indicative. Suspension of payments may take place only in justified cases, however, in the context of the payment procedure, the role of the court is to determine whether the circumstances could indeed justify the suspension of payments or were unjustified (Judgment of the Supreme Court, 2015, I CSK 741/13).

Therefore, the view that the beneficiary is obliged to implement the implementation of such a situation from its own resources should be rejected. To adopt such a view would call into question the sense and purpose of the public support granted to it. From the nature of the incentive effect, it follows that support is directed to projects that would not have been created without its participation. Projects are implemented as part of a joint undertaking assuming their joint financing.

In addition, it should be pointed out that the existence of an adequate causal link between the lost funding and the institution's behaviour is supported by the fact that the evaluation of the project is carried out by experts appointed by the institution itself. It is the institution that assesses, m.in, such issues as the credibility of the project

objectives, eligibility and purposefulness of the expenditure indicated in the application, possible project risks as well as the possibilities of counteracting them, the ability to co-finance the project by the beneficiary.

Therefore, as part of a reserve reason, without serious arguments in the form of, for example, an expert opinion who will present new, previously unknown arguments, it cannot be claimed that the project, despite the lack of financing from EU funds, would not have succeeded anyway. Such a claim would call into question the positive assessment of the project carried out by the institution. It is on the basis of the experts' assessment that the project is qualified for co-financing and on this basis the contract is signed. If the possibility of implementing the project is really treated only as a certain opportunity, the institution's action involving the involvement of public funds should be considered irrational and the project evaluation process unnecessary. It is difficult to accept that projects financed from EU funds can be treated as an element of gambling

CONCLUSIONS

Individual entities that have concluded a grant agreement may derive various types of claims from the co-financing agreement against the institution that is a party to it. In the first place, a typical claim pursued by beneficiaries is a claim for payment, but it may be a claim covering payments resulting directly from the contract itself, i.e. indirect payments on the basis of submitted payment applications (Judgment of the Court of Appeal in Gdańsk, 2014, V ACa 850/13), as well as various types of compensation claims based on Article 471 of the Civil Code, and in some cases also, for example, Article 405 of the Civil Code or Article 415 of the Civil Code.

The beneficiary's damage related to the improper implementation of the grant agreement should be understood broadly, it may be losses incurred as well as lost benefits in the form of amounts of unpaid grant or profits that the entity was to achieve in the event of the implementation of the project. In particular, there are no grounds for limiting the amount of damage *a limine* only to a negative contractual interest or treating unpaid funding only as an opportunity to obtain a benefit. The grant agreement is not a preliminary agreement, it is a definitive agreement in which both parties incur certain obligations towards each other, and the obligation to make indirect payments by the institution may not be implemented only in certain circumstances. If, in a given case, it is established that there were no grounds for withholding intermediate payments, such action by the institution should be considered as improper performance of the contract.

An important issue in compensation proceedings is the issue of causation. It should be accepted that, as a general rule, the cessation of intermediate payments by an institution which subsequently proves to be unjustified may be the cessation of its further implementation. Individual entities are not obliged to seek additional financing for the project in such a situation. In the absence of public funding – such action could also indicate the lack of incentive effect in the project, and thus cause the invalidity of the co-financing agreement. Itis difficult for the institution to demonstrate that, despite the unjustified lack of public funding, the project would not have been implemented anyway – but this requires building evidence-based hypotheses of an alternative course of events. The burden of proving the above circumstances shall be borne by the affirmative party. It should be taken into account that the application for funding has been positively assessed by the institution – therefore any claims about the subsequent impossibility of its implementation should take into account these assessments, as well as the content of the application for co-financing.

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