

Judgment of 23<sup>rd</sup> September 2003, [K 20/02](#)  
**LIMITING COMPENSATION FOR THE EFFECTS OF DEFECTIVE  
ADMINISTRATIVE DECISIONS TO “ACTUAL HARM”**

<b>Type of proceedings:</b> <a href="#">Abstract review</a> ; <b>Question of law referred by a court</b> <b>Initiators:</b> Commissioner for Citizens' Rights; Court of Appeal for Rzeszów	<b>Composition of Tribunal:</b> 5-judge panel	<b>Dissenting opinions:</b> 0
Legal provisions under review		Basis of review
Limiting the scope of compensation claims by persons injured in consequence of a defective decision, issued by a public authority organ, to so-called actual harm ( <i>damnum emergens</i> )  [Administrative Procedure Code 1960: Article 160 § 1; Tax Ordinance Act 1997: Article 260 § 1]		Right to compensation for harm caused by a public authority organ  [Constitution: Article 77(1)]

The operative 1997 Constitution states that “everyone” having suffered harm, in consequence of public authority action contrary to the law, shall have the right to “compensation” for such harm (Article 77(1)). The cited provision constituted the basis of Constitutional Tribunal review of statutes regulating compensation claims by private individuals against the State Treasury and units of local self-government. In its judgment of 4<sup>th</sup> December 2001, [SK 18/00](#) (summarised separately), the Tribunal ruled on the basis of Article 77(1) of the Constitution for the first time, concerning Articles 417 and 418 of the Civil Code in their operative wording at that time.

Within the system of statutory regulation of liability for harm caused by public authority action, Article 417 of the Civil Code has the nature of a general provision (*lex generalis*). In its wording operative on the day the judgment summarised herein was pronounced, this provision envisaged State Treasury liability for “harm caused by a State functionary in the performance of the duties entrusted to them”; the liability of units of local self-government for harm was analogous (Article 420<sup>1</sup> of the Civil Code).

The provisions of a series of other statutes contain special norms (*lex specialis*) applicable to specific areas of public authority activity. The following provisions, challenged in the present case, fell within this category: Article 160 § 1 of the Administrative Procedure Code (concerning the effects of various administrative decisions) and Article 260 § 1 of the Tax Ordinance Act (concerning the effects of tax decisions). According to the first of these provisions, a party having suffered harm as a result of an administrative decision which was later declared invalid, or as a result of declaring the administrative decision invalid, was entitled to compensation for the “actual harm” suffered. The second provision concerned tax decisions that were subsequently quashed in consequence of re-opening proceedings or were declared invalid; in such cases, the right to compensation was also limited to the “actual harm” suffered. In legal parlance, the latter term signifies the existence of effective damage to the injured person’s property, also known as loss (the Latin *damnum emergens*), as opposed to so-called hypothetical harm (loss of profit), i.e. profits which the

injured person could have obtained had the harm not occurred (*lucrum cessans*). The aforementioned statutory limitations represented a departure from the principle expressed in Article 361 § 2 of the Civil Code, according to which compensation encompasses both *damnum emergens* and *lucrum cessans*.

The initiators of the constitutional review in the present case alleged that the discussed limitations failed to conform to Article 77(1) of the Constitution.

## RULING

**1. The challenged provisions do not conform to Article 77(1) of the Constitution, in the parts limiting compensation for contrary to the law actions of public authority organs to “actual harm”.**

**2. Point 1 of the ruling is applicable to harm occurring from 17<sup>th</sup> October 1997, i.e. since the entry into force of the Constitution.**

## PRINCIPAL REASONS FOR THE RULING

1. Article 77(1) of the Constitution envisages the constitutional right to compensation for any harm caused by unlawful public authority action. Nevertheless, this provision does not specify the components and extent of the “harm” to be compensated. Similarly, it fails to precisely define the requirement of unlawfulness and fails to determine the means by which enjoyment of this right may occur. These issues must be regulated by ordinary statutes.
2. Despite reference in Article 77(1) of the Constitution to the civil law concept attaching fundamental importance to the principle of full compensation (cf. Article 361 § 2 of the Civil Code), the Constitution does not establish an individual’s right to fully-compensatory compensation. Constitutional notions are autonomous in nature and may not be interpreted with reference to concepts existing within ordinary legislation; the basic assumptions of a branch of law, within which there exist terms corresponding to constitutional notions, may only indicate general reference points for constitutional solutions. Even on the basis of the principle of full compensation, it is not possible *a priori* to exclude the permissibility of various mechanisms for moderating compensation on the basis of universally recognised and necessary ways for differentiating the extent of compensation for harm. Nevertheless, any statutory limitations on the scope of compensation in situations mentioned in Article 77(1) of the Constitution are subject to review from the perspective of the criteria of proportionality (Article 31(3) of the Constitution) and rationality.
3. In the former constitutional state, the forms of unlawful harm caused by public authorities were regulated by ordinary legislation. The provisions of the Civil Code, primarily Articles 417 and 418, fulfilled the role of a general regime (*lex generalis*) and assumed full compensation as the starting principle (Article 361 § 2 of the Civil Code). Concomitantly, other statutes, being *lex specialis* in nature, regulated some compensation claims in a manner different to the aforementioned model, also as regards the extent of compensation for harm. At that time there was no basis for challenging the dissimilarity of such provisions vis-à-vis the Civil Code norms. Only the entry into force

of Article 77(1) of the Constitution signified the constitutionalisation of the right to compensation for harm caused by public authority action contrary to the law; this right extends to all areas where public authority is exercised, and not merely those explicitly indicated within ordinary statutes. The fact that the general regime of compensating harm caused by public authority action, based on the Civil Code, assumes full compensation as the starting principle is – given the universal nature of Article 77(1) of the Constitution – significant for reviewing the proportionality and rationality of the limitation expressed in Article 160 § 1 of the Administrative Procedure Code and Article 260 § 1 of the Tax Ordinance Act, according to which compensation for defective decisions of public authority organs extends only to “actual harm” (*damnum emergens*). The fact that the reviewed provisions are of a *lex specialis* nature vis-à-vis the solutions envisaged in the Civil Code no longer constitutes sufficient justification, since the *lex specialis derogat legi generali* principle refers to norms of the same status (equiponderant norms) and is inapplicable to the relationship between an ordinary statute and the Constitution.

4. Since the unconstitutionality relates only to those fragments of the challenged provisions limiting the extent of compensation to “actual harm”, the present judgment does not deprive the remaining scope of these provisions of their binding force. Accordingly, the obligation to compensate for harm in situations indicated therein is preserved, while the extent of compensation for harm is determined in accordance with the principle of full compensation.
5. Since constitutionalisation of the right to compensation for harm unlawfully caused by public authorities occurred on the day the 1997 Constitution entered into force, no basis exists for challenging the reviewed limitations insofar as they apply to harm occurring prior to this date (cf. point 2 of the ruling and point 3 above).

#### Provisions of the Constitution

**Art. 7.** The organs of public authority shall function on the basis of, and within the limits of, the law.

**Art. 21.** [...] 2. Expropriation may be allowed solely for public purposes and for just compensation.

**Art. 31.** [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

**Art. 77.** 1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.