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The Claim for Elimination of Unlawful Consequences and the Claim for Compensation for Damage under Estonian State Liability Law

1. Introduction

Everyone's right to compensation for damage caused by unlawful action has been set forth in § 25 of the Constitution of the Republic of Estonia.¹ This rule represents a constitutional guarantee behind Estonian state liability law. The present article examines the principles that have been established in the Estonian State Liability Act for remedying unlawful actions of the executive. Primary attention in so doing has been paid to the claim for elimination of the unlawful consequences of acts of administrative authorities. The goal of this article is to delimit the claim for elimination of unlawful consequences and the claim for compensation for damage. The article sets out to investigate whether the elimination of unlawful consequences serves as simply a variation of the claim for compensation for damage or, rather, as an independent state liability claim, and it explores how the issue has been addressed in Estonian state liability law.

If we think about the obligation to economise on public resources and the principle of effective legal protection, it is clear that such a restitution claim plays at least as important a part in state liability law as the claim for monetary compensation does. Also the European Court of Human Rights — although being an international court — considers it increasingly necessary, in the interests of effective legal protection of individu-

¹ Põhiseadus (Constitution). – RT 1992, 26, 349; I 2003, 64, 429 (in Estonian).

als, to demand of the member states violating the convention not only compensation for damage but also the factual elimination of unlawful consequences.²

In Estonian court practice, the claim for elimination unlawful consequences has thus far been obviously overshadowed by the claim for monetary compensation for damage.

The procedural law problems of the claim for elimination of unlawful consequences cannot be discussed within the scope of this article.

2. The main features of Estonian state liability law

The principle of the rule of law obliges the state authority to act lawfully. This underlying principle of the Estonian legal order has been specified in § 3 (1) of the Estonian Constitution, according to which state authority shall be exercised solely pursuant to the Constitution and laws that are in conformity therewith. As may any other state authorities, the executive power may restrict persons' rights only if there is a legal basis for doing so and if the administrative activities are in accordance with a superior legal provision. The guarantee of persons' rights and freedoms is the duty of the legislative, executive, and judicial powers (Constitution §§ 13 (2) and 14). If a public authority nonetheless has violated a person's rights, the person has been guaranteed in § 15 (1) of the Constitution the right of recourse to the courts. The right to demand compensation has been provided in § 25 of the Estonian Constitution:

Everyone has the right to compensation for moral and material damage caused by the unlawful action of any person.

The right to compensation for damage has been regarded in the Estonian legal order as a fundamental right.³ The Estonian Supreme Court has considered the implementation of Constitution § 25 feasible even without more specific legal regulation in place.⁴

To guarantee the lawfulness of administrative activities, restoration of lawful situation and the protection of persons' rights, the Estonian parliament, the *Riigikogu*, has adopted several important legal acts: the Administrative Procedure Act⁵, providing for the principles of administrative procedure and prerequisites for the lawfulness of administrative activities; the Substitutive Enforcement and Penalty Payment Act⁶, which governs the procedure for imposition of coercive measures; and the State Liability Act⁷, aimed at the pro-

² For example, the Grand Chamber of the European Court of Human Rights, in two decisions made in 2004, for the first time obliged the countries who were respondents to release appellants who had been unlawfully detained. For details, see P. Leach. Beyond the Bug River — A New Dawn for Redress Before the European Court of Human Rights? — *European Human Rights Law Review* 2005/2, pp. 148–164.

³ M. Ernits. *Põhiõigused, vabadused ja kohustused. Sissejuhatus (Fundamental rights, freedoms, and obligations, Introduction)*. — Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Republic of Estonia Constitution, commented edition). Tallinn 2002, p. 74 (in Estonian); Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpparuanne (Final report of the Expert Commission on the Republic of Estonia Constitution). Chapter 2 of the Constitution, 'Fundamental rights, freedoms, and obligations', clause 1.1. Available at: <http://www.just.ee/10716> (in Estonian).

⁴ Constitution § 25 was directly applied for the first time by the Civil Law Chamber of the Supreme Court, which in a 1996 decision assumed the position that although the General Part of the Civil Code Act did not provide for compensation for moral damage in relation to causing of bodily injuries, it was to be compensated directly on the basis of Constitution § 25. See CCSCd 3-2-1-111-96. — RT III 1997, 4, 39 (in Estonian). The special panel of the Supreme Court involving the Administrative Law Chamber and Civil Chamber established later that based on Constitution § 25, the absence of a legal act governing compensation does not in itself deprive a person of the right to claim compensation for damage caused to him by imposition of unlawful punishment. See ruling 3-3-4-2-01 of the Special Panel of the Administrative Law and Civil Chambers of the Supreme Court, para. 7. — RT III 2001, 31, 327 (in Estonian). The Administrative Law Chamber of the Supreme Court has considered the direct application of Constitution § 25 necessary in cases concerning compensation of persons for non-proprietary damage caused by the local government in relation to delaying decision on restitution for property unlawfully expropriated during the Soviet annexation. See ALCSCd 3-3-1-27-02. — RT III 2002, 18, 204 (in Estonian).

⁵ *Haldusmenetluse seadus (Administrative Procedure Act)*. — RT I 2001, 58, 354; 2005, 39, 308 (in Estonian).

⁶ *Asendustäitmise ja sunniraha seadus (Substitutive Enforcement and Penalty Payment Act)*. — RT I 2001, 50, 283; 2005, 39, 308 (in Estonian).

⁷ *Riigivastutuse seadus (State Liability Act)*. — RT I 2001, 47, 260; 2004, 56, 405 (in Estonian). Before that time, the Civil Code dating from the Soviet era was applicable as a general-purpose act of general application. For discussion of court practice concerning state liability law at the time, see E. Vene. *Avaliku halduse kandja tekitatud kahju hüvitamine (Compensation for damage caused by public administrative authority)*. — *Juridica* 2000/5, pp. 330–335 (in Estonian). The Supreme Court still directly or additionally applied constitutional rules and general principles of law, if necessary. See Note 4 and also ALCSCd 3-3-1-14-02 (RT III 2002, 12, 124; in Estonian), in which the Supreme Court considered it possible to impose, additionally, the obligation to present primary legal remedies as a general principle of compensation for damage also in the case of damage caused before the entry into force of the State Liability Act. Nevertheless, CCSCr 3-2-1-59-04 (RT 2004, 15, 185; in Estonian) did not agree with this position.

tection and restoration of the rights violated in the performance of public duties and compensation for damage. All of these entered into force on 1 January 2002.^{*8}

The State Liability Act (hereinafter also ‘SLA’) is an act of general application in state liability law.^{*9} According to the legal definition of state liability, it comprises ‘the bases of and procedure for the protection and restoration of rights violated upon the exercise of powers of a public authority and performance of other public duties and compensation for damage caused’ (SLA § 1 (1)). The State Liability Act provides for — on different preconditions and to a different extent — the liability of the executive, legislative, and judicial powers for unlawful activities, and in certain cases also liability for the lawful activities of the executive.

The bulk of the State Liability Act is concerned with the liability of the executive power for unlawful acts caused upon performance of public duties. State liability claims related to the activities of the executive can be divided into primary and secondary claims. The State Liability Act has accorded a central — yet liability-limiting — role to the primary claims or primary legal remedies, since, as a rule, a person may not demand of a public authority compensation for damage caused to him (or elimination of unlawful consequences) when he has not tried to avoid the damage through timely contestation of the acts of the public authority. This principle has been provided in SLA § 7 (1).^{*10} The Administrative Law Chamber of the Supreme Court has in its practice continually eased that strict requirement.^{*11} The secondary requirements claims for the executive are thus generally addressed only when damage has been caused to people person as a result of an unlawful act of the administration regardless of the implementation of the primary requirements claims. In such a case, a person may either demand either financial monetary compensation for the damage caused to him or elimination of the unlawful consequences of the administrative activity(s).

Estonian state liability law has used the model of direct state liability, according to which the state is liable to the injured party. The act of a natural person causing damage (e.g., an official) is ascribed to the public authority whose tasks the natural person was performing when the damage was caused. The natural person directly causing the damage is liable to the injured party personally only when this is prescribed by a specific law.^{*12} After compensating the injured party for damage, the state may file a claim of recourse against the official but only if the official was at fault in causing the damage (SLA § 19). The liability of the state depends on the fault of the activities of the public authority only in the case of compensation for loss of income and non-proprietary damage (SLA §§ 13 (2) and 9 (1)).

The model of direct state liability is significant as regards the restoration of rights violated in the performance of public duties. As the state assumes direct liability to the injured party, the injured party may demand of the state the implementation of all lawful measures falling within the state’s competence, including also elimination of unlawful consequences. Thus, the model of direct state liability creates more extensive legal protection options than does the model of indirect state liability.^{*13}

⁸ The Administrative Co-operation Act (RT I 2003, 20, 117; 2004, 89, 603; in Estonian) entered into force within the framework of the administrative law reform on 1.7.2003. The draft Maintenance of Law and Order Act is still in the preparation stage. For the principles of the Estonian administrative law reform and details on its implementation, see Ü. Madise. Eesti haldusõiguse reformi kandvatest ideedest (About underlying ideas of Estonian administrative law reform). – *Juridica* 2003/1, pp. 38–44 (in Estonian); K. Merusk. Administrative law reform in Estonia: legal policy choices and their implementation. – *Juridica International* 2004, pp. 52–62.

⁹ Additional state liability claims may be prescribed, and restrictions may be provided in the prerequisites for and extent of the claims covered in the State Liability Act by special law (SLA § 2 (2)).

¹⁰ SLA § 7 (1): ‘A person whose rights are violated by the unlawful activities of a public authority in a public law relationship (hereinafter ‘injured party’) may claim compensation for damage caused to the person if damage could not be prevented and cannot be eliminated by the protection or restoration of rights in the manner provided for in §§ 3, 4, and 6 of this act’. The claim for repeal of an administrative act is provided in SLA § 3, the claim for termination of a continuing measure in SLA § 4, and the claim for issue of an administrative act or taking of a measure in SLA § 6.

¹¹ According to the practice of the Administrative Law Chamber of the Supreme Court, the use of a primary legal remedy had to be actually possible for the injured party (ALCSCd 3-3-1-14-02, para. 19, Note 7); the possibility to avoid damage (‘elimination’) had to be understandable for the injured party; and there had to be good reason for failure to use a primary legal remedy (ALCSCd 3-3-1-11-02, para. 16. – RT III 2002, 12, 122; in Estonian). In addition, the Administrative Law Chamber of the Supreme Court has replaced its earlier position, according to which the injured party had to file the claim provided in SLA § 3, 4, or 6 in challenge or judicial proceedings (see Note 10), with the position that ‘a person may comply with the requirement for prevention of damage arising from SLA § 7 (1) not only in challenge and court proceedings but also through the use of any other appropriate legal remedies’. Compare ALCSCd 3-3-1-8-04, para. 10 (RT III 2004, 9, 100; in Estonian) and ALCSCd 3-3-1-33-04, para. 15 (RT III 2004, 32, 335; in Estonian).

¹² For example, personal liability has been prescribed for notaries, bailiffs, and sworn translators in Estonia. In order to ensure liability, these acts also govern the obligatory liability insurance.

¹³ For instance, for historical reasons, an indirect public administration model continues to apply in Germany because BGB § 839 provides for personal liability that is taken over by the state under GG § 34. That is why the literature is of the opinion that natural restitution is not possible under a public liability claim (*Amtshaftungsanspruch*) since the official can pay the injured party usually only monetary compensation outside the area of his professional competence and not issue administrative acts or perform measures. Thus, the state can take over only the obligation to pay monetary compensation. See, e.g., F. Ossenbühl. *Staatshaftungsrecht*. 5th ed. München 1998, pp. 10–12.

3. Delimitation of claim for elimination of unlawful consequences with regard to claim for compensation for damage

3.1. The need for delimitation of both claims

In private law, a claim for the compensation for damage is usually viewed as a single claim regardless of the different methods available for compensation for damage.¹⁴ The State Liability Act mentions in the legal definition of state liability only the notion of ‘compensation for damage’ (SLA § 1 (1)), and the list of state liability claims includes as the only secondary claim the right of the injured party to request ‘compensation for damage caused’ (SLA § 2 (1) 5)). Chapter 3 of the State Liability Act is titled ‘Compensation for Damage’. The section headings for the general provisions of the chapter most often mention only compensation for damage (e.g., § 8, ‘Compensation for proprietary damage’; § 9, ‘Compensation for non-proprietary damage’; § 10, ‘Compensation for damage to third parties’; § 12, ‘Person obligated to compensate for damage’). The only exceptions are § 11, titled ‘Elimination of consequences’, and § 13, titled ‘Restriction of liability’. The sections governing procedural issues (§§ 17 and 18) provide only for the procedure for and terms of filing an application or action for compensation for damage.

If we examine a claim for compensation for damage more closely, it appears that the person whose rights the administrative authority has violated may demand compensation for both proprietary and non-proprietary damage. According to the wording of SLA § 8 (1), proprietary damage shall be compensated for only monetarily.¹⁵ SLA § 9 (1) provides for the cases in which a natural person may claim monetary compensation for non-proprietary damage.¹⁶ On the basis of these provisions, we could conclude that the law prescribes payment of monetary compensation as the only method of compensation for both proprietary and non-proprietary damage. Thus, SLA § 11 (1) may seem somewhat surprising, as it prescribes that ‘instead of monetary compensation’, an injured party may request from a public authority ‘the elimination of the unlawful consequences’ of a repealed administrative act or a partially amended administrative act.

The first sentence of SLA § 8 (1) appears to state clearly that ‘[p]roprietary damage shall be compensated for only in money’. The wording of SLA § 9 (1) as ‘[a] natural person may claim monetary compensation for non-proprietary damage upon fault-based degradation of dignity [...]’ can be interpreted such that in the case of non-proprietary damage one can claim only monetary compensation for damage. At the same time, it can also be interpreted such that the principle of *numerus clausus* provided in SLA § 9 (1) applies only to monetary compensation for non-proprietary damage, and not to compensation for non-proprietary damage in any other manner. As, according to SLA § 11 (1), the elimination of the unlawful consequences may be requested only ‘instead of monetary compensation’, it may be concluded that unless the prerequisites for monetary compensation for damage are met, elimination of the unlawful consequences may not be requested.

Does a claim for elimination of unlawful consequences in public law represent natural restitution as a method of compensation for damage (‘instead of monetary compensation’ — SLA § 11 (2)), in which the prerequisites for the claim are the same as with monetary compensation for damage, or does ‘elimination of the unlawful consequences’ imply a certain fundamental difference from a claim for compensation for damage?

This is a question that leads to several other questions. Are the notions of damage and unlawful consequences synonymous? Is the elimination of the unlawful consequences aimed at restoring the former (equivalent) situation or creating the sort of situation in which the injured party would be if his rights had not been violated? Does the claim for elimination of unlawful consequences include all the unlawful consequences that are in a causal relationship with the activity of the administrative authority, in the same way as the claim for compensation for damage, or only the direct consequences of the administrative authority action?

¹⁴ For example, as regards delictual liability in private law, the Estonian Law of Obligations Act (hereinafter also ‘LOA’; RT I 2001, 84, 487; 2004, 90, 616; in Estonian) provides for monetary compensation as the primary method of compensation for damage, with natural restitution possible only if it is prescribed by law or a contract or if it is reasonable in view of the circumstances (LOA § 136 (1) and (5)). The Law of Obligations Act does not provide for a general claim for the elimination of unlawful consequences; instead, a person may demand only that behaviour that causes damage be terminated or the making of threats of such behaviour be refrained from (LOA § 1055 (1)). The Law of Obligations Act tends to support a concept according to which the injured party himself eliminates the unlawful consequences caused to him, via the compensation. For example, if damage is caused to a thing, compensation for the damage shall cover, in particular, the reasonable costs of repairing the thing and the potential decrease in the value of the thing (LOA § 132 (3)).

¹⁵ SLA § 8 (1): ‘Proprietary damage shall be compensated for in money’.

¹⁶ SLA § 9 (1): ‘A natural person may claim monetary compensation for non-proprietary damage upon fault-based degradation of dignity, damage to health, deprivation of liberty, violation of the inviolability of home or private life or the confidentiality of messages, or defamation of the honour or good name of the person’.

It is important to furnish these notions with content also upon the implementation of specific laws. For example, according to § 9 of the Immovables Expropriation Act^{*17}, an expropriation applicant (that is a state or local government agency is required to compensate the owner of the immovable and any relevant third parties for all damage caused by the preliminary work for expropriation. Thus, in cases in which a specific law provides for a person's right to demand of the public authority compensation for damage, we need to know whether the person may claim only monetary compensation or also the elimination of the unlawful consequences.

The Administrative Law Chamber of the Supreme Court has not clearly delimited the claim for compensation for damage and the claim for the elimination of the unlawful consequences in its practice to date. In one of its recent decisions, that in *Malyshev v. Tartu Prison*, the Administrative Law Chamber of the Supreme Court took the position that elimination of the unlawful consequences presumed 'that the injured party has incurred proprietary or non-proprietary damage to be compensated for'.^{*18} The Supreme Court established the prerequisites for monetary compensation for non-proprietary damage in the decision and found that '[t]aking into account the circumstances of the case, the form and gravity of fault, and the effect of the compensation for non-proprietary damage and elimination of the unlawful consequences of the damage incurred by M. Malyshev and the public authority, the Administrative Law Chamber of the Supreme Court holds it justified to oblige the Tartu Prison to apologise in writing to M. Malyshev for unlawful search'.^{*19} The claim for monetary compensation for non-proprietary damage was not satisfied. We may infer that the Supreme Court considers the elimination of unlawful consequences to be a legal consequence of the claim for compensation for damage, not a separate secondary claim.

The wording of SLA § 11 (1) ('instead of monetary compensation'), the structure of the State Liability Act described above, and the position of the Supreme Court concerning the *Malyshev v. Tartu Prison* case together led to the conclusion that under applicable Estonian state liability law, the claim for monetary compensation for damage and the claim for elimination of unlawful consequences must be regarded as a single secondary state liability claim.

In order to examine whether they by nature constitute a single state liability claim or incorporate several and what relationship exists between the claim for compensation for damage and the claim for elimination of unlawful consequences under public law, we must scrutinise the nature of those claims, and examine the content, prerequisites, and extent of the two more closely.

3.2. The nature of a claim for compensation for damage

3.2.1. Content of a claim for compensation for damage

According to the State Liability Act, a public law claim for compensation for damage gives a person whose rights were violated by the unlawful activity of a public authority in a public law relationship the right to claim of the public authority compensation for damage caused to him (SLA § 7 (1)).^{*20}

Although SLA § 7 (1) mentions a public authority as the obligated party to the claim for compensation for damage, SLA §§ 7–13 above all govern the unlawful activities of an administrative authority in regulating and arranging individual cases.^{*21}

3.2.2. Prerequisites for a claim for compensation for damage

The elements of a claim for compensation for damage caused unlawfully by an administrative act or measure differ depending on the type of damage. The general prerequisites are:

- 1) an unlawful activity of an administrative authority (administrative act or measure);
- 2) incurrence of damage by a person (including the violation of a subjective right of a person^{*22}); and
- 3) a causal relationship between the measure and the damage.

¹⁷ Kinnisasja sundvõõrandamise seadus (Immovables Expropriation Act). – RT I 1995, 30, 380; 2005, 40, 312 (in Estonian).

¹⁸ ALCSCd 3-3-1-30-05, para. 18. – RT III 2005, 21, 211 (in Estonian).

¹⁹ *Ibid.*, p. 22.

²⁰ See Note 10.

²¹ Thus, the discussion that follows excludes legislative activities of administration as well as any other legislative activities and administration of justice.

²² A vivid example of violation of a subjective right as causing of damage is a case in which the return of an unlawfully expropriated residential building has been found to be unlawful because, due to lack of legislation (international agreement), the building may not be returned or privatised. Although the privatisation of the building would be legally impossible by reason of acquisition in good faith following the unlawful return of the building even after the enactment of legislation, the subjective right of the person requesting privatisation has not been violated so far (due to lack of legislation) and he has thus not incurred damage. See ALCSCd 3-3-1-92-04, para. 12. – RT III 2005, 9, 80 (in Estonian).

In the case of the claim for compensation for the loss of profit and for non-proprietary damage, the public authority must prove that it was not at fault in causing the damage. In the case of the claim for compensation for direct proprietary damage, fault is not a prerequisite for liability. However, a public authority shall be relieved of liability for damage caused in the course of performance of public duties if the damage could not have been prevented even if the diligence necessary for the performance of public duties had been fully observed (SLA § 13 (3)).

3.2.3. The extent of a claim for compensation for damage

A claim for compensation for damage covers all losses that are in a causal relationship with the unlawful activities of the administrative authority. Thus, the extent of the compensation for damage largely depends on how the causal relationship is furnished with content.^{*23}

The goal of the compensation is based on the principle of full compensation for damage (*restitutio in integrum*), according to which compensation shall create the financial situation in which the injured party would be had his rights not been violated (SLA § 8 (1)). The Supreme Court has proceeded from this principle in settling claims for the compensation of damage.^{*24} At the same time, satisfaction of a claim for compensation for damage is not to lead to the enrichment of the injured party; that refers to a situation in which the injured party is in a better economic situation than that he would have been in without damage having been incurred.^{*25}

3.3. The nature of a claim for elimination of unlawful consequences

In many cases, the injured party is interested not in monetary compensation but in the factual (in kind) elimination of the unlawful consequences of the activities performed by the public authority. In a typical instance of response to a claim for elimination of unlawful consequences, the unlawful (burdensome) administrative act is repealed retroactively but the harmful consequences of the administrative act persist. In such a case, the executive power is, in addition to annulling the unlawful administrative act, obliged to eliminate also the unlawful consequences of the administrative act, as they should not be present without the administrative act. Such examples can be found in very different spheres of life. For example, if a building constructed on the basis of a building permit issued by the city administration violates neighbouring rights, the owner of the neighbouring plot may demand reconstruction or demolition of the building to the extent to which his subjective public rights have been violated. Similarly, a person who has been unlawfully released from public service may wish to receive not compensation but reinstatement.^{*26}

The public authority and public in general should definitely be as interested in the elimination of the unlawful consequences as the injured party is. Namely, the unlawful consequences of administrative activities are eliminated usually when the compensation payable for the violation of the rights of the injured party would significantly exceed the costs of eliminating the consequences. In this way, elimination of unlawful consequences allows for economising on public resources.

A disadvantage of the institution of elimination of unlawful consequences is that often the elimination of unlawful consequences may be factually or legally impossible or unreasonable, requiring that the violation of a person's rights be remedied by payment of monetary compensation.

3.3.1. Content of a claim for elimination of unlawful consequences

As stated above, the issues concerning compensation for damage have been discussed in Chapter 3 of the State Liability Act. The first subsection of § 11 in the same chapter provides: Instead of monetary compensation, an injured party may request from a public authority the elimination of the unlawful consequences of a repealed administrative act or a partially amended administrative act or a measure.

²³ See section 3.3.4 of this article.

²⁴ See, e.g., ALCSCd 3-3-1-33-02, para. 13. – RT III 2002, 20, 234 (in Estonian). In this decision, the Administrative Law Chamber of the Supreme Court also noted that the value of the property to be compensated for as of the making of the decision is to be taken into account in determining the amount of the compensation. The Civil Chamber of the Supreme Court assumed the same position earlier in CCSCd 3-2-1-14-00. – RT III 2000, 11, 123 (in Estonian).

²⁵ The Supreme Court has also emphasised this principle. See, e.g., ALCSCd 3-3-1-64-04, paras. 32, 34. – RT III 2004, 36, 364 (in Estonian).

²⁶ According to SLA § 1 (3), private law regulation shall be applied upon compensation for damage caused by a public authority in certain areas. For example, the public authority shall be liable on the basis of private law upon the violation of its obligations as the owner of an immovable, road, body of water, or other thing (SLA § 1 (3) 2)).

It would be wise to start the processing of a claim for elimination of unlawful consequences with a question: who may request the elimination of unlawful consequences? The State Liability Act, in § 11, points out that such a person may be an injured person — that is, the individual whose rights have been violated by the unlawful activities of a public authority in a public law relationship (SLA § 7 (1)).

The person from whom the injured party may request the elimination of unlawful consequences is a public authority, according to SLA § 11 (1). However, it derives from the content of such a request, which may cover only administrative acts and measures, that a request may be made only to the executive power pursuant to SLA § 11. As a rule, an application may be submitted to the administrative authority that caused the damage or to an administrative court (SLA § 17 (1)). If the issue of an administrative act or taking of a measure necessary for the elimination of consequences is not within the competence of the public authority whose activities gave rise to the unlawful consequences, a competent public authority is obliged to perform the activities necessary for the elimination of the consequences (SLA § 12 (1) and (5)). Thus, the obligation to eliminate unlawful consequences applies to all national executive bodies regardless of their more specific position in the administrative organisation of the state.

The question of what the injured party may demand of the executive power is slightly more difficult. To that end, we first have to answer the question of whether the notion of unlawful consequence (SLA § 11) overlaps that of damage (SLA §§ 8 and 9). As noted above, the Supreme Court in its *Malyshev v. Tartu Prison* decision assumed the position that application of SLA § 11 (1) presumes that the injured party had incurred proprietary or non-proprietary damage subject to compensation.^{*27} Thus, the Supreme Court has treated the notions of unlawful consequence and damage as synonyms. However, we may still suspect that the notion of unlawful consequences is narrower than that of damage, encompassing not all damage that the injured party may incur in relation to the unlawful activities of the administrative authority but, rather, only the direct unlawful consequences of administrative acts. This directly links up with the extent of the claim for the elimination of unlawful consequences.^{*28} Not all unlawful consequences of administrative activities are to be eliminated. An unlawful administrative act that has not been repealed or amended continues to apply regardless of its unlawfulness, and the administrative act must be complied with. Thus, elimination of the unlawful consequences of the administrative act can be requested when the administrative act has (at least in part) been repealed retroactively. If an unlawful administrative act is repealed only proactively or only the unlawfulness of the applicable administrative act is established, SLA § 11 cannot be applied, as these cases concern only the so-called regularised unlawful consequences. At the same time, when the unlawfulness of the applicable administrative act is established, a claim for compensation of damage may be filed on the basis of SLA §§ 7–10.^{*29} Consequently, the damage to be compensated under SLA §§ 7–10 need not be subject to elimination on the basis of SLA § 11 (1).

Although, according to the wording of SLA § 11 (1), an injured party may request the elimination of the unlawful consequences of any repealed or amended administrative act, it derives from the above information that this still applies only to an administrative act that has been repealed (including amendment) retroactively (*ex tunc*).^{*30} The administrative act must also have been complied with, as only such an act can have factual consequences. In the case of elimination of the unlawful consequences of a measure, the unlawfulness of the measure serves as a prerequisite for a claim.

It is not entirely clear whether the requirement of unlawfulness applies only to the consequences of an activity performed by an administrative authority or to the activity itself. Although in the majority of cases, both the activity and its consequence are unlawful, there may be cases in which the legal regulation serving as the basis for the administrative act later ceases to exist, while the thing or money delivered under the administrative act continues to be in the possession of the administrative authority. German legal literature has convincingly substantiated the claim that one should proceed from the unlawfulness of the consequence of an activity of the administrative authority since it is the actual harm to the legal position of a person that is the deciding factor.^{*31}

The unlawful consequence must be permanent since if the unlawful consequence has ceased to exist or the situation has been regulated in the meantime, there is no unlawful consequence the elimination of which could be requested.

²⁷ See Note 18.

²⁸ See section 3.3.4 of this article.

²⁹ See, e.g., ALCSCd 3-3-1-14-02, para. 15 (Note 7).

³⁰ See also F. Ossenbühl (Note 13), pp. 312–314. The conclusion is confirmed also by § 69 (2) of the Administrative Procedure Act, according to which the State Liability Act applies to the return of and compensation for things and money transferred by a person on the basis of an administrative act that is repealed retroactively.

³¹ F. Ossenbühl (Note 13), pp. 312–313; S. Detterbeck, K. Windthorst, H.-D. Sproll. *Staatshaftungsrecht*. München 2000, pp. 229–230 (§ 12, para. 38); F. Schoch. *Folgebeseitigung und Wiedergutmachung im Öffentlichen Recht*. – *Verwaltungs-Archiv* 1988/1, p. 42.

3.3.2. Prerequisites for a claim for elimination of unlawful consequences

Thus, the prerequisites for a claim for elimination of unlawful consequences are the following:

- 1) a public law activity of an administrative authority (a retroactively repealed or amended administrative act, or unlawful measure),
- 2) violation of a person's subjective rights,
- 3) a causal relationship between the measure of the administrative authority and violation of the person's subjective rights, and
- 4) permanent unlawful consequence of the activity of an administrative authority.

3.3.3. The objective of a claim for elimination of unlawful consequences

Just as in the case of the claim for the compensation of damage, the principle that a person can request the elimination of unlawful consequences only to the extent to which the unlawful situation violates his rights applies also to the determination of the extent of the claim for the elimination of unlawful consequences.

One of the central questions in determining the extent of the claim for elimination of unlawful consequences is whether the claim for the elimination of consequences is aimed only at the restoration of the situation preceding the performance of the unlawful activity (*status ex ante*) or at creation of a situation as would occur if the unlawful activity of the administrative authority had never existed (*restitutio in integrum*³²). For example, if the police unlawfully removed a person's car and in addition to the loss of the car the person suffered any other harmful consequences (e.g., taxi fare and interests arising from failure to perform his contractual duties), the injured person is definitely interested in the elimination of all the negative consequences caused to him.

As it is the legislator's right and duty to specify the content of state liability claims, the objective of the elimination of unlawful consequences should derive from the text of the State Liability Act. Although SLA § 8 (1) provides that compensation shall create the financial situation in which the injured party would be had his rights not been violated, it is questionable whether the legislator considered that objective of monetary compensation for damage also to be the objective of the claim for the elimination of unlawful consequences.

For example, the Code of Administrative Court Procedure (hereinafter also 'CACP') gives the administrative court the authority to issue a precept for the 'reversal of the administrative act' if the administrative act is annulled (CACP § 26 (1) 1)). The provision directly refers to the restoration of the original situation although it is a procedural, not substantive law. The Administrative Procedure Act speaks about only the return of things and money transferred by a person to an administrative authority on the basis of an administrative act that is repealed retroactively (§ 69 (2) of the Administrative Procedure Act).

Estonian legal literature has so far been of the opinion that the objective of the elimination of unlawful consequences is the restoration of the situation preceding the violation.³³ Thus far, the Supreme Court has not discussed the issue in greater detail in its practice.³⁴ German court practice and legal literature, which have had a significant effect on the development of Estonian administrative law, have almost uniformly adopted the position that it is enough for the situation preceding the violation to be restored.³⁵ Yet we have to note that relevant explanations are hard to find in German legal literature.

³² P. Schlechtriem has furnished restitution with content as follows: 'restoration of a situation that would have existed without the violation of the interest' (p. 189), 'restoration of the full intact benefit situation' (p. 211), and 'restoration of the benefit situation transformed through a damaging event' (p. 180). P. Schlechtriem. *Võlaõigus. üldosa* (Law of obligations: general part). Tallinn 1999 (in Estonian). However, the European Court of Human Rights recognises only the restoration of the situation preceding the violation as *restitutio in integrum*. See, e.g., *Papamichalopoulos and Others v. Greece* (Article 50), judgement of 31.10.1995, Series A No. 330-B, pp. 58–59, § 34.

³³ I. Pilving. *Riigivastutuse dogmaatika ja Eesti kehtiv riigivastutusõigus* (State liability dogmatics and state liability law applicable in Estonia). – *Juridica* 1999/8, p. 384 (in Estonian).

³⁴ Some of the positions of the Administrative Law Chamber of the Supreme Court indicate that also the Supreme Court may regard as elimination of unlawful consequences only the restoration of the situation preceding the violation. For example, the Supreme Court has noted in a decision that '[a]nnulment of the orders serving as the basis for privatisation in itself would not lead to the restoration of the pre-privatisation situation and remedy of damage if the privatisation has been completed. The situation could be restored only by reversal of the privatisation decisions. The possibility of reversal of an administrative act in itself does not preclude the requirement for monetary compensation.' See ALCSCd 3-3-1-14-02, para. 19 (Note 7).

³⁵ See, e.g., F. Ossenbühl (Note 13), pp. 301–302; H. Maurer. *Allgemeines Verwaltungsrecht*. Vol. 13. München 2000, pp. 791–792 (§ 29, paras. 1–2). For criticism, see, e.g., F. Schoch (Note 31), pp. 47–49; M. Redeker. *Was beseitigt das Folgenbeseitigungsanspruch? – Die Öffentliche Verwaltung* 1987/5, pp. 197–198.

The principles of constitutional and administrative law allow for setting both the restoration of the situation preceding the violation and full restitution as the objective of the elimination of unlawful consequences. It is important to understand that restoration of the previous situation does not usually eliminate all unlawful consequences; the unlawful consequences of an activity created between the beginning of the misconduct and the commencement of the elimination of its consequences remain for the injured party to bear. In other words, the person is 'taken back to the past', with no regard for the events following the misconduct and in the causal relationship with it.

Proceeding from the central principle of the state based on the rule of law, according to which the executive must act lawfully, and the corresponding duty of the executive to liquidate the unlawful consequences of its activities, an important justification arising from the Constitution should be present to limit the duty to eliminate unlawful consequences. However, taking into account that in the case of monetary compensation for damage caused by administrative activities the principle of full compensation for damage applies, it is difficult to find a reason it should be different in the case of the elimination of unlawful consequences in kind. A person requesting the elimination of unlawful consequences should not be in a worse position than a person seeking monetary compensation for damage caused by the same unlawful activity. The elimination of all unlawful consequences caused by administrative activities may not be factually or legally possible or reasonable — above all, the executive power may lack a legal basis for the elimination of the consequences and the procedure may be too expensive — however, such limiting conditions apply also to other cases of elimination of unlawful consequences, so restriction of liability cannot be justified with these arguments alone.

The position that the elimination of consequences should serve to restore the situation preceding the unlawful acts would entail for the injured party an obligation to file a claim for the compensation for damage for the full remedy of the harmful consequences in the causal relationship with the unlawful activity and violating his rights. Thus, the person should in most cases file both a claim for the elimination of unlawful consequences and a claim for compensation for damage. In accordance with the principle of effective legal protection, a person must have the opportunity to protect his rights in relation to one event at costs as low as possible and within reasonable time.³⁶ In such a situation, the injured party would prefer to file only a claim for the compensation for damage, and thus, as a result of the claim for compensation for damage, such a situation should be created for the person as he would have been in if his rights had not been violated. Consequently, such a position (limitation of the claim for elimination of unlawful consequences to the restoration of the situation preceding the misconduct) in state liability law favours submission of a claim for the compensation of damage and evasion of the principle of restitution.

The opinion that elimination of unlawful consequences is aimed at the creation of such a situation as would obtain if the administrative authority had not committed the unlawful activity does not mean that the claim for the elimination of unlawful consequences overlaps with the claim for the compensation of damage, both claims have different prerequisites and different conditions preclude their satisfaction.

There exists at least one disadvantage to the complete elimination of unlawful consequences. Namely, it is difficult to avoid the enrichment of the injured party since, compared to the calculations made upon the assignment of monetary compensation (e.g., the amount of loss of profit), taking account of the expenditure that the injured party has saved upon the issue of an unlawful administrative act or measure is more difficult. In such cases, the same principle should apply as in the case of the shared fault of the injured party: the injured party should pay the administrative authority an amount that conforms to the expenditure saved by him via the unlawful activity, and if he does not do that, the unlawful consequences will not be eliminated, while the injured party retains the claim for compensation for damage.³⁷

3.3.4. Extent of the claim for elimination of unlawful consequences

The extent of implementation of the elimination of unlawful consequences depends on whether the person may request only the elimination of the direct unlawful consequences of the administrative authority or, by contrast, the elimination of all unlawful consequences that have a causal (i.e., also indirect) relationship with the activity of the administrative authority. For example, when the police unlawfully remove a person's car and on the way to the parking lot a third party causes an accident in which the removed car is damaged, the owner still wishes to get his car back unscathed.

The answer to this question depends, above all, on the furnishing of the criterion of the causal relationship with the content. It is uniformly clear that with an adequate causal relationship between the activity of the administrative authority and the violation of the subjective right of a person, the claim for the elimination of unlawful consequences ceases to exist. However, at the moment it is unclear how the Administrative Law

³⁶ See, e.g., ALCSCd 3-3-1-13-04, para. 10. – RT III 2004, 11, 130 (in Estonian).

³⁷ As in SLA § 13 (4).

Chamber of the Supreme Court will furnish the criterion of the causal relationship with the content. In its many years of practice, the Supreme Court has been of the opinion that the claim for the compensation of damage is subject to a usual requirement for an adequate causal relationship, according to which not only the damage caused directly by the administrative authority but also any other damage that has an adequate causal relationship with the unlawful activity of the administrative authority is compensated.^{*38} For example, the Supreme Court has found that increase in the obligations to third parties, if caused by an unlawful administrative act, must also be regarded as damage, since it causes the person's financial status to deteriorate.^{*39} In its most recent decision concerning the causal relationship, which concerned the appellant's expenditure on legal assistance in voluntary challenge proceedings, the Supreme Court assumed the position that '[t]he requirement for a causal relationship means that the activity had to cause damage directly and inevitably'.^{*40} The court did not set forth reasoning for its possible change of opinion, and it is most likely not a change of the opinion at all. However, if the Supreme Court were to retain this position in settling claims for the compensation for damage, it would be a very important change in Supreme Court practice, and it is likely that the same position would be adopted with regard to the claim for the elimination of unlawful consequences. In such a case, only the direct unlawful consequences of the activity of an administrative authority would be eliminated under SLA § 11. So far, such Supreme Court practice does not exist.^{*41}

The terms 'direct' and 'indirect' in connection with damage or unlawful consequence are certainly ambiguous. Therefore, the area of protection of the specific violated rule, above all, should be taken as the basis in the establishment of the causal relationship.^{*42} It should be assessed to that end whether it is just to ascribe the change of situation related to the activity of the administrative authority to the injured party as a result of the area of protection of the rule on which the creation of liability is based.^{*43} For example, if a person complied with an administrative act voluntarily and according to the prescribed procedure but a similar administrative act was complied with by the administrative authority with regard to another person, the later annulment of the administrative act would probably cause an unjust situation in which only the unlawful consequences caused directly by the administrative authority would be eliminated in the first person's case, whereas all unlawful consequences would be eliminated in the case of the other person.

Thus, it would be more just if all unlawful consequences that have a causal relationship with administrative acts were eliminated. Obviously, there are few such cases in practice, on account of factual or legal impossibility; however, with no conditions restricting or precluding liability there are no significant reasons that the criterion of the causal relationship should be more limited in the claim for the elimination of unlawful consequences than it is in relation to the claim for compensation for damage.

3.4. Relationship between claim for elimination of unlawful consequences and claim for compensation for damage. Conditions restricting elimination of consequences

Besides the first subsection, which has thus far been discussed in greater detail by comparison, SLA § 11 also contains two other provisions concerning the elimination of unlawful consequences. Let us provide, for the sake of clarity, SLA § 11 (2) and (3) here:

- (2) A public authority is required, upon the elimination of consequences, to take all lawful measures, including the issue of administrative acts, taking of measures, and filing of claims in private law against third parties, if legal basis therefor exists and if the costs of elimination of consequences would not substantially exceed monetary compensation.

³⁸ See, e.g., ALCSCd 3-3-1-17-02, para. 15. – RT III 2002, 11, 110 (in Estonian); ALCSCd 3-3-1-14-02, para. 20 (Note 7); ALCSCd 3-3-1-33-02, para. 10 (Note 24). I. Pilving. Põhiseadusvastase määruse alusel tasutud maksuintressi tagasinõudmine (Recovery of tax interest paid under unconstitutional regulation). – *Juridica* 2002/10, pp. 704–705 (in Estonian); E. Vene (Note 7), p. 332.

³⁹ ALCSCd 3-3-1-32-02, para. 24. – RT III 2002, 20, 232 (in Estonian).

⁴⁰ ALCSCd 3-3-1-93-04, para. 12. – RT III 2005, 11, 107 (in Estonian). The Supreme Court established in the matter that, as the appellant could choose between challenge and court proceedings and the possibility of sharing legal costs in court proceedings is generally known, the appellant can avoid costs. As the damage caused by the unlawful administrative act was not inevitable, the Supreme Court found that there was no causal relationship between the administrative act and damage.

⁴¹ For example, it is an established position in German court practice that only direct unlawful consequences of administrative activities are eliminated. See, e.g., F. Ossenbühl (Note 13), pp. 302–305 and S. Detterbeck, K. Windthorst, H.-D. Sproll (Note 31), pp. 237–238 (§ 12, para. 54). For criticism, see F. Schoch. Der Folgenbeseitigungsanspruch. – *Jura* 1993/9, p. 484; F. Schoch (Note 31), p. 49.

⁴² According to LOA § 127 (2), damage shall not be compensated for to the extent that prevention of damage was not the purpose of the obligation or provision due to the non-performance of which the compensation obligation arose. This principle of compensation for damage is also applicable in state liability law (see SLA § 7 (4)).

⁴³ For details, see B. Bender. Zum Recht der Folgenbeseitigung. – *Verwaltungsblätter für Baden-Württemberg*. 1985/6, p. 203.

- (3) A public authority may, regardless of the request of the injured party, eliminate consequences in the manner provided for in subsection (2) of this section if monetary compensation would substantially exceed the costs of the elimination of consequences, unless the person has good reason for claiming monetary compensation.

These provisions reveal both the relationship between the claim for the compensation for damage and the claim for the elimination of consequences and the conditions precluding the elimination of unlawful consequences. The aim of both regulations is to protect the public interest. The public interest lies, above all, in seeing that violations are not remedied in a manner that is too burdensome on public resources.^{*44}

In the relationship between the claim for compensation for damage and the claim for the elimination of unlawful consequences, the injured party may, according to SLA § 11 (1), principally choose on his own account whether to claim monetary compensation or claim the elimination of unlawful consequences.

The law does not give the injured party the right to request the elimination of unlawful consequences in any case. SLA § 11 (2) provides for two conditions in the presence of which a claim for the elimination of unlawful consequences ceases to be valid:

- 1) if no legal basis exists for the elimination of unlawful consequences or
- 2) if the costs of elimination of consequences would substantially exceed those of monetary compensation.

Besides these two bases, SLA § 13 (4) also provides for a third option:

- 3) If the injured party cannot bear the costs corresponding to the part the injured party had in causing the damage, the unlawful consequences are not eliminated, but the injured party is entitled to claim monetary compensation corresponding to the public authority's part in it.

Although the State Liability Act does not provide that in place of the claim for the elimination of unlawful consequences the person retains the right to file a claim for the compensation of damage in the first two scenarios, the right must still be recognised by analogy (based on SLA §§ 11 (3) and 13 (4)). Also, the Supreme Court has noted in one of its decisions that '[t]he possibility of reversal of an administrative act in itself does not rule out a claim for monetary compensation'.^{*45} However, the Supreme Court did not satisfy the claim for the elimination of unlawful consequences in its *Malyshev v. Tartu Prison* decision because '[a]pology would not contribute in any way to the elimination of the unlawful consequence indicated by M. Malyshev', while not explaining why it did not consider it justified to replace the claim for the elimination of unlawful consequences with the claim for the compensation of damage. At the same time, a claim for compensation for damage concerning another instance of the same unlawful activity by the same appellant was satisfied, but instead of monetary compensation, the administrative authority was obliged to eliminate the consequences of the activity recognised as unlawful by means of a written apology.^{*46}

In its earlier practice, the Administrative Law Chamber of the Supreme Court established that if the administrative authority considers the claim for compensation for damage filed by the injured person justified and finds that monetary compensation would considerably exceed the cost of elimination of the consequences and the injured person does not have good reason to claim monetary compensation, it may settle with the injured party during the proceedings for the remedy of damage in any other manner.^{*47} Such a proposal can be made to the participants in the proceeding also by the court (CACP § 21 (2)). If the participants in the proceedings settle, the person may not have recourse to the courts in the same matter anymore (CACP § 24 (1) 6)). Thus, one secondary claim for state liability may be replaced by another secondary claim also during the proceedings. No such settlement was made in the *Malyshev v. Tartu Prison* decision.

As to the wording 'monetary compensation' used in § 11, it should be understood as a legal consequence of the claim for compensation for damage.^{*48} Excess costs for elimination of the consequences should also be

⁴⁴ This has been established also in the explanatory memorandum on the State Liability Act, clause 1. Available at: <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003672916&login=prov&password=&system=ems&server=ragne1>.

⁴⁵ ALCSCd 3-3-1-14-02 (Note 7).

⁴⁶ See ALCSCd 3-3-1-30-05, paras. 18–22 (Note 18). In that case, lawyer Malyshev filed with the administrative court a complaint in which he requested that the court oblige the Tartu Prison administration to apologise for its refusal to let him as counsel meet with an imprisoned person and to compensate for the moral costs caused in relation to the search in the amount of 10,000 krooni. The Supreme Court established that Malyshev had participated in the meeting with the imprisoned person as his counsel and that since the search was not justified, it was unlawful. It is a matter of question why the Supreme Court handled the claims separately, as the lawyer's meeting with the imprisoned person had taken place in fact and essentially only one unlawful act was involved, the search of the lawyer.

⁴⁷ ALCSCd 3-3-1-8-04, para. 22 (Note 11).

⁴⁸ Also the Administrative Law Chamber of the Supreme Court has referred to it in its decision 3-3-1-25-02, para. 25: 'Therefore, the Supreme Court considers it necessary to refer to the regulation of SLA § 11 (2) as the general principle of compensation for damage, according to which the elimination of consequences cannot be sought if the costs of elimination have exceeded the damage caused to the appellant.' – RT III 2002, 15, 172 (in Estonian). See also the wording of SLA § 11 (2): 'would not substantially exceed monetary compensation'.

applicable in instances in which the elimination of consequences is factually impossible (e.g., the case of destruction of an unlawfully expropriated irreplaceable thing or the death of a person).

The determination of the costs of elimination of unlawful consequences is not a simple task in practice. It is particularly difficult in situations in which elimination of unlawful consequences is precluded because of the presence of conditions that restrict the claim. We have to agree with the position expressed in the law of delict that in such a case, the amount of monetary compensation should be based on the value of the damaged benefit.⁴⁹ The value of the damaged benefit must certainly be accounted for also in those cases in which elimination of unlawful consequences is possible but costly. For example, an administrative authority may not refuse to refute false information purely on grounds of the costliness of the relevant announcement.

It may be generalised that on the basis of SLA § 11, the claim for the elimination of unlawful consequences is precluded in cases where the elimination of consequences is factually impossible, legally impermissible, contrary to the public interest (primarily economically unreasonable), or unacceptable for the injured party. In addition to that, another reason precluding state liability also arises from SLA § 13 (3), according to which a public authority shall be relieved of liability if the damage could not have been prevented even if the diligence necessary for the performance of public duties had been fully observed.

We must emphasise with regard to SLA § 11 (3) that the provision constitutes one of the most important public law provisions for compensation for damage, and one whose vigorous implementation in practice is hopefully to come. Although the rule is contained in the section concerning the elimination of unlawful consequences, it is actually applicable to cases in which the person has filed a claim for compensation for damage. To elaborate, SLA § 11 (3) imposes on an administrative authority the obligation to consider the elimination of unlawful consequences in every case of a claim for compensation for damage that is levelled against it, and the administrative authority may provide monetary compensation for the damage only if the elimination of consequences would be factually impossible, legally impermissible, considerably more costly, or unacceptable for the injured party and/or administrative authority for any other important reasons. Thus, the priority of natural restitution over monetary compensation for damage may be derived from SLA § 11 (3).⁵⁰

4. Conclusions

Present Estonian state liability law recognises the claim for compensation of damage as comprising both a claim for monetary compensation for damage and a request for the elimination of unlawful consequences. The purpose of this article was to show that the elimination of unlawful consequences cannot be regarded as simply a possible legal consequence of the claim for the compensation of damage. The prerequisites for a claim for the elimination of unlawful consequences do not coincide with the preconditions for a claim for monetary compensation for damage. E.g., when an administrative act need not be repealed upon monetary compensation for damage, the elimination of unlawful consequences is possible only when the administrative act has been repealed retroactively. Consequently, they should form independent secondary state liability claims.

However, the claim for the elimination of unlawful consequences as a restitution claim should not be identified with the general request for remedy. The main reason is that the unlawful consequences of administrative activities need not constitute all of the damage caused to a person by the violation of his rights. It is not always possible for a public authority to eliminate unlawful consequences. In such cases, damage can be relieved by monetary compensation. Proceeding from public interests, restitution should be preferred to compensation in state liability law. Thus, the administrative authority should first consider the possibility and reasonability of eliminating the unlawful consequences and only after the possibility of elimination of the consequences ceases to exist should the damage caused by violation of the person's right be compensated for monetarily.

Like the claim for compensation for damage, the claim for the elimination of unlawful consequences should be aimed at creation of the situation that would occur if the unlawful act of the administrative authority had never existed. Also, the injured party should have an opportunity to request the elimination of all unlawful consequences that have an adequate causal relationship with the activity of the administrative authority. In addition to the other arguments provided above, the restrictions on the claim for the elimination of unlawful consequences show that restrictions on the claim ensure sufficient consideration of the public interest and equal division of liability, so there is no need to fear that the implementation of the above principles would have a paralysing effect on state administration. Besides specific restrictions on claim, the obligation to present primary legal remedies and the regulation that takes account of the part of the injured party have their own effect of precluding or restricting liability.

⁴⁹ P. Schlechtriem (Note 32), p. 80.

⁵⁰ The same has been noted by I. Pilving (Note 33), p. 385.