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Sufficiently Serious Breach Requirement for Obtaining Reparation of Damages in Union Law

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1. Introduction

Sufficiently serious breach is one of the requirements under Union law necessary for individuals to obtain reparation for violations of their rights conferred upon them by provisions of Union law. Both, Union and Member States can be held liable for damages caused to individuals by violations of Union law provided that the breach is deemed sufficiently serious. Founding Treaties of the EU contain only general provision relating to the EU's liability for damages in Article 340 of the TFEU,¹ while Art. 268 states that the Court of Justice of the European Union shall have jurisdiction in disputes relating to the compensation of damage in cases of non-contractual liability of Union and European Central Bank. This general provision only states that in cases of its non-contractual liability, the Union shall make good any damage in accordance with general principles common to the laws of the Member States. Obviously, Article 340 read together with 268 has left wide leeway to the Court of Justice to determine conditions under which the Union and its institutions can be held liable for breaches of Union law. Moreover, the right to reparation of damages caused is mentioned also in the Article 41 of the Charter of the Fundamental Rights of the EU.²

Action for damages is actually the other side of the coin of direct effect which was established by the Court in case *Van Gend & Loos*.³ In order for individuals to be able to claim rights or protection of their rights using action for damages, these rights must be conferred upon them by provisions of Union law. In *Van Gend & Loos* the Court stated that subjects of Union law are not only the Member States but also individuals and that this legal order confers upon them rights. "*These rights arise not only where they are expressly granted*

¹ Treaty on the Functioning of the European Union, Article 340 (ex Article 288 TEC)

The contractual liability of the Union shall be governed by the law applicable to the contract in question.

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.

² Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, p. 391–407

³ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1

by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way.”⁴ These obligations are imposed upon individuals as well as upon the Member States and upon the institutions of the Union.⁵

One of the most important cases in the Court’s early case law is *Aktien-Zuckerfabrik Schöppenstedt* in which the Court established the condition of “sufficiently flagrant violation of a superior rule of law for the protection of the individual”⁶ that was later known as *Schöppenstedt test*. *Schöppenstedt* conditions applied only in cases where unlawful conduct was made within legislative power in action involving measures of economic policy; it did not apply in cases where damage was caused by the action of administrative authorities as in the case *Stanley George Adams v Commission of the European Communities*.⁷ *Schöppenstedt* test was introduced only in cases involving liability of Union legislative authorities.

Only later, in 1992, it became evident that also Member States can be held liable for violations of Union law. In the case *Francovich*, the Court introduced non-contractual liability of the Member States as “inherent in the system of the Treaty”.⁸ In this case Member State was held liable due to failure to transpose in its national legislation a directive aiming to create rights for individuals. *Brasserie*⁹ case then gave the opportunity to the Court to clarify the conditions under which Member States can incur liability for violations of Union law; the sufficiently serious breach was also determined as one of the necessary conditions. The Court used the same expression of “sufficiently serious breach” as in the judgement *Bayerische HNL*¹⁰ which differs from the original expression of “sufficiently flagrant violation”¹¹ used by the Court in *Schöppenstedt*. Nonetheless, these different expressions are the same in the terms of content. Moreover, in *Brasserie* the Court stated that conditions under which Member States can incur non-contractual liability “cannot in the absence of particular justification, differ from those governing the liability of the Community in like circumstances.”¹² These

⁴ *Van Gend & Loos*, (n. 3), para.9

⁵ *Ibidem*, para.9

⁶ Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities*, ECLI:EU:C:1971:116, para.11

⁷ Case 145/83 *Stanley George Adams v Commission of the European Communities*, ECLI:EU:C:1985:448, para.53-55,

⁸ Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, (1991) ECLI:EU:C:1991:428, para.35

⁹ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur, Secretary of State for Transport, ex parte Factortame Ltd and Others*, (1996) ECLI:EU:C:1996:79

¹⁰ Joined cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and others v Council and Commission of the European Communities*, ECLI:EU:C:1996:79, para.4

¹¹ *Schöppenstedt*, (n. 6), para.11

¹² *Brasserie*, (n. 9) para.42

same conditions governing non-contractual liability of Member States were later in case *Bergaderm*¹³ applied also to the non-contractual liability of the Union. Member States can be held liable for breach of Union law due to actions of their authorities belonging to all branches of government provided that the breach committed can be deemed sufficiently serious. This also includes national courts which cause breach of Union law. Liability of national judicial authorities for breaches of Union law was established by the Court in case *Köbler*¹⁴ where the Court also applied, as condition for reparation of damages, the requirement of a sufficiently serious breach.

Action for damages arises where rights conferred on individuals were violated, but some rights, such as fundamental rights have special position in all contemporary legal orders. The same is also in the Union law where fundamental rights form general principles of Union legal order.¹⁵ Fundamental rights are becoming increasingly important in the Union law, especially in the light of the enactment of the Charter of Fundamental Rights¹⁶ and future accession of the Union to the ECHR.¹⁷ Precisely this is the new area in which case law of the Court has started to develop dealing with liability for damages caused by violations of fundamental rights from the Charter.

Throughout this paper, the author will try to answer to the questions how the case law of the Court of Justice relating to the condition of a sufficiently serious breach necessary to obtain redress in case of violation of Union law has changed. Particularly, I will try to find out whether the Court has sided with higher protection of injured party and facilitation of sufficiently serious breach requirement, or with shielding of Union and Member State institutions against liability. The author's position and the main thesis of this paper is that sufficiently serious breach condition restricts the chances of an individual who suffered damage to obtain reparation. Thus, it protects Union and Member State institutions from being held liable for violations of Union law. Even, if the very existence of liability is in favour of individuals, the way the Court has construed it makes it restrictive for individuals. Sequence of subjects discussed in this paper will chronologically follow development of the case law of the Court and the enactment of the most relevant judgements.

¹³ Case C-352/98 *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities*, (2000) ECLI:EU:C:2000:361, para.42

¹⁴ Case C-224/01 *Gerhard Köbler v Republik Österreich*, (2003) ECLI:EU:C:2003:513, para.51

¹⁵ Treaty On European Union, (TEU), Art. 6 (3)

¹⁶ Charter of Fundamental Rights of the European Union of 26.10.2012. OJ C 326, p, 391 – 407.

¹⁷ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13 of 4.11.1950, ETS 5.

2. Liability of the EU and Schöppenstedt test

Sufficiently serious breach requirement in order for individuals to obtain redress was applied by the Court already in its early case law in form of what later became known as *Schöppenstedt test*. In case *Aktien-Zuckerfabrik Schöppenstedt*,¹⁸ the undertaking Aktien-Zuckerfabrik Schöppenstedt started action for damages caused by the Union regulation which enacted measures necessary to offset the difference between national sugar prices and prices valid from 1 July 1968. The Court stated that in cases where legislative action involves measures of economic policy, the Union can incur liability only if there is sufficiently flagrant violation of a superior rule of law for the protection of individual and a causal link between the two.¹⁹ However, the Court has not clarified meaning of expression ‘superior rule of law’ and there were different views on its meaning in theory.²⁰ *Schöppenstedt test* was generally seen as application of German ‘*Schutznormstheorie*’²¹ based on Paragraph 34 of the German Basic Law.²²

The Court elaborated on its decision to impose such standard, which at that time applied only in cases involving liability of legislative authorities,²³ in case *Bayerische HNL*.²⁴

¹⁸ *Schöppenstedt*, (n. 6)

¹⁹ *Schöppenstedt*, (n. 6), para. 11

²⁰ - H G Schermers, T Heukels, J. P Mead, *Non-Contractual Liability of the European Communities*, 1st Edition, Martinus Nijhoff Publishers, (1988), pp.5 – „The Court has not, however, explicitly stated in all of these cases that the rule is higher ranking nor indicated the criteria that this is the case. It remains uncertain whether by its language the Court intends to indicate rules of particularly high rank within the Community law hierarchy, and if so, how this rank is to be determined; or whether it simply intends to refer to the Community law hierarchy itself.”

²¹ Opinion of Mr Advocate General Léger, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd*, (1995), ECLI:EU:C:1995:193, para. 133; H G Schermers, T Heukels, J. P Mead, *Non-Contractual Liability of the European Communities*, 1st Edition, Martinus Nijhoff Publishers, (1988), pp.6 – “The requirement that liability be preconditioned on the breach of a higher ranking rule protecting the individual comes close to a statement of the German ‘*Schutznormstheorie*’ which concerns the liability of the State, the so-called ‘*Amtshaftung*’ under §839 BGB (Bürgerliches Gesetzbuch) and Article 34 GG (Grundgesetz). According to this theory, the State is liable only when, in addition to causing an injury, it breaches a *Schutznorm*, which is a legal norm protecting a subjective public right of the injured party and which is intended not only to protect individuals in general, but also to protect a specific circle of individuals to which the injured party belongs. The requirement of protection of a specific circle of individuals has often been liberally interpreted.

²² Grundgesetz für die Bundesrepublik Deutschland, Artikel 34 - Verletzt jemand in Ausübung eines ihm anvertrauten öffentlichen Amtes die ihm einem Dritten gegenüber obliegende Amtspflicht, so trifft die Verantwortlichkeit grundsätzlich den Staat oder die Körperschaft, in deren Dienst er steht. Bei Vorsatz oder grober Fahrlässigkeit bleibt der Rückgriff vorbehalten. Für den Anspruch auf Schadensersatz und für den Rückgriff darf der ordentliche Rechtsweg nicht ausgeschlossen werden. (Article 34, [Liability for violation of official duty] - If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity.)

²³ P Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond*, (2011) Hart Publishing, pp.82 – „Having established the three basic conditions for liability (illegal conduct by a Community institution, actual damage, and a causal connection between the two), the Court distinguished in its case-law between different

The Court found a reason for this strict liability condition of sufficiently flagrant violation of superior rule of law in the present article 340 TFEU and general principles common to the laws of Member States. It stated that according to the principles common to the laws of Member States, public authorities can only exceptionally incur liability for legislative measures that are result of choices of economic policy.²⁵ The aim was obviously to protect legislative authorities that could be hindered in exercising their duties by the prospect of actions for damages. Furthermore, the Court expressly stated that individuals are required to suffer damage to the certain extent without being able to obtain compensation in the cases where legislative authorities have wide discretion. Sufficiently serious violation will appear only in case where the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.²⁶ In Court's later case law, the discretion became the key element for determining whether the breach of Union law was sufficiently serious.

The Court has, while deciding about requirements governing liability of Union, taken into account the legal principles governing liability of legislators in Member States and could have decided according to them to exclude completely the liability of Union authorities for legislative measures. Instead, the Court has decided to establish liability of Union authorities for legislative measures, but it also needed to strike a balance with the aim to protect legislative authorities. Sufficiently serious breach requirement is result of balancing these two aims. The attitude of protecting the public authorities of Union can also be read between the lines from the fact that even the annulment of the contested act did not suffice for an individual to obtain reparation of damages caused by this act, what Court expressly stated in *Bayerische HNL*.²⁷ As a result, most cases for damages were lost precisely due to the high threshold of the requisite burden of proof that was necessary for the finding of a sufficiently serious violation.²⁸ All these facts prove that sufficiently serious breach requirement is very strict and can be established only in exceptional situations.

types of illegal conduct. Thus in the case-law, different liability criteria were established for legislative action and administrative action of the Community. The first category related to legislative action. In this sector the Schöppenstedt case (ECJ 1971) became the cornerstone. “, pp.83 – „The second category established in the case-law related to damages action in respect of administrative action. [...] For administrative action any infringement of the law in principle constituted illegality which could give rise to liability on the part of the Community.”

²⁴ Joined cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and others v Council and Commission of the European Communities*, ECLI:EU:C:1996:79

²⁵ *Ibidem*, para.5

²⁶ *Bayerische HNL* (n.10), para.6

²⁷ *Ibidem*, para.4

²⁸ S Peers, T Harvey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, (2014) Hart Publishing, para.47.123

3. Liability of Member States for violations of Union law

Liability of Member States for violations of Union law was for the first time introduced by the Court in case *Francovich and Bonifaci*,²⁹ where the Court held that liability of Member States for breaches of Union law is inherent in the system of Treaty.³⁰ The aim the Court wanted to foster is the full effectiveness of the Union law. The Court found that the basis for liability of the Member States was the principle of sincere cooperation, which requires Member States to take all appropriate measures to ensure fulfilment of obligations arising from the Treaties or resulting from the acts of the institutions of the Union.³¹

In this case, Italy failed to transpose into its national legislation a directive that guaranteed employees a minimum protection in cases of insolvency of their employer. Conditions for liability of the Member States were defined as following: result prescribed by the directive should entail the grant of rights to individuals; the content of the rights should be identifiable on the basis of the directive and there had to be causal link between the violation on the side of the State and damage suffered by the individual.³²

It seemed that the Court applied less strict condition relating to the non-contractual liability of the Member States than those governing liability of legislative authorities of the Union because sufficiently serious breach was not among the listed requirements. This should have been a step forward towards a higher protection of individuals whose rights were violated. However, in *Brasserie*,³³ the Court introduced the test of ‘sufficiently serious breach’ in all situations in which a state enjoyed discretion when enacting a measure that harmed an individual. In the later judgement *Dillenkofer*,³⁴ the Court clarified reasons why sufficiently serious violation condition was not included in *Francovich* ruling. The case dealt with Germany’s failure to transpose a directive governing package travels and holidays. The Court formulated that there is only one set of conditions that have to be satisfied in order for an individual to obtain redress. Sufficiently serious breach was not expressly mentioned in the *Francovich* test, but the Court considered it implied therein due to the fact that the Member State did not have any discretion whether or not to transpose a directive in national law, thus

²⁹ *Francovich*, (n. 8)

³⁰ *Ibidem*, para.35

³¹ *Ibidem*, para.36

³² *Francovich* (n. 8), para.40

³³ *Brasserie du Pêcheur*, (n.9)

³⁴ Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland*, ECLI:EU:C:1996:375

every breach of that kind should be qualified as sufficiently serious.³⁵ The Court confirmed this case law in case *Rechberger*,³⁶ where it stated that the fact that the Member State has transposed a directive with effect on a later date than the one prescribed by the directive in issue suffices to establish a sufficiently serious breach since the Member State did not have discretion to postpone the effect of the transposed rules.³⁷

3.1. Sufficiently serious breach within *Brasserie* conditions

One of the most important cases concerning liability of the Member States for breaches of Union law is *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*³⁸ in which the Court finally clarified three necessary conditions in order for individuals to obtain reparation of damages. One of these conditions is a sufficiently serious breach. The Court developed this condition from the *Schöppenstedt test*³⁹ and introduced discretion available to the national authority as a key element in determining whether there was a breach of sufficient seriousness or not. These were two joined cases, one German and one British.

Facts of the first German case were the following. *Brasserie du Pêcheur*, a French brewery, was forced to discontinue exports of beer to Germany since its beer did not comply with purity requirements that were required by the German *Biersteuergesetz*. German law was considered as contrary to Union law, being an unjustified restriction to trade prohibited by the Treaties.⁴⁰ Germany caused the damage, and the Court was called to establish conditions under which liability is going to be incurred.

In the second British case violation of Union law occurred due to British *Merchant Shipping Act 1988* which provided for the introduction of a new register for British fishing boats. Registration of such vessels was made subject to certain conditions relating to the nationality, residence and domicile of the owners. Fishing boats ineligible for registration in the new register were deprived of the right to fish.

³⁵ *Dillenkofer*, para.23

³⁶ Case C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v Republik Österreich*, (1999) ECLI:EU:C:1999:306

³⁷ *Ibidem*, para.51

³⁸ *Brasserie du Pêcheur*, (n.9)

³⁹ *Schöppenstedt*, (n. 6), para.11

⁴⁰ Art. 34, Treaty on the Functioning of the European Union

Sufficiently serious breach was one of the conditions necessary to establish the liability of Member State for breaches of Union law.⁴¹ The Court stressed that in determining conditions governing liability, account should be taken of the principles inherent in the Union law - its full effectiveness and effective judicial protection of individuals' rights which stem from Union law.⁴² Furthermore, the Court established that the same conditions, including the sufficiently serious breach, should apply on the liability of the Member States regardless whether violation is attributable to the legislature, the judiciary or the executive bodies.⁴³ It took this concept from the liability of the States in international law. Moreover, the Court clarified that the conditions under which Member States can incur liability cannot, in the absence of a particular justification, differ from those governing the non-contractual liability of the Union.⁴⁴ The Court had the opportunity and later applied this in *Bergaderm*.⁴⁵

It may be questioned whether such approach ensures full effectiveness of Union law and effective judicial protection of individuals' rights that stem from it.⁴⁶ Firstly, the Court uses a modified version of the *Schöppenstedt test*⁴⁷ which was created to limit the liability of Union legislative authorities and widens it also to acts attributable to the judiciary and administrative actions. This is regressive practice since in cases where violation is attributable to the administrative action of the Union a sufficiently serious breach was not required as in the above-mentioned case *Adams*.⁴⁸ However, the Court also widened liability on the judiciary that was before not included - this was later clarified in the case *Köbler*.⁴⁹ It may also be questioned whether sufficiently serious breach requirement represents a proportionate restriction of the right to effective judicial protection.⁵⁰ In the case *Schecke*,⁵¹ the Court stated that no automatic priority can be conferred upon one of the objectives of the restriction over a fundamental right. In case of the requirement of sufficiently serious breach, as established in

⁴¹ *Brasserie du Pêcheur* (n.9), para.51

⁴² *Brasserie du Pêcheur* (n.9), para.39

⁴³ *Ibidem*, para.34

⁴⁴ *Ibidem*, para.42

⁴⁵ *Bergaderm*, (n.13)

⁴⁶ Thus, also N Poltorak: "Taking into account both the number of damages claims against the EU and their success rate, the liability in damages of the EU can hardly be treated as an effective remedy protecting individuals.", N Póltorak, 'Action for damages in the case of infringement of fundamental rights by the European Union' in *Damages for Violations of Human Rights*, (2015), pp.427-441

⁴⁷ *Schöppenstedt*, (n. 6), para.11

⁴⁸ *Stanley George Adams*, (n.7)

⁴⁹ *Köbler*, (n.14)

⁵⁰ Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, (2007) ECLI:EU:C:2007:163, para.37

⁵¹ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, (2010) ECLI:EU:C:2010:662, para.85

Brasserie, the objective is the same as one stated by the Court in *Bayerische HNL*⁵² - that is limiting liability of public authorities which could be hindered by the prospect of actions for damages. Precisely this is the aim that has been used to justify the restriction on the exercise of the right to an effective judicial protection. However, the Court has never conducted proportionality test and assessed sufficiently serious breach requirement in the light of fundamental right to effective judicial protection.

Although the Court stated that the requirement of a sufficiently serious breach is necessary in order for Member States to incur liability for violations of Union law, in *Brasserie* it left the possibility that Member States can incur liability under less strict conditions on the basis of national law.⁵³ Here the Court showed *favor laesi* attitude and full effectiveness of Union law as purpose whenever possible.

Nonetheless, the Court stated in *Brasserie*⁵⁴ that obligation to make damages good cannot depend upon a condition based on any concept of fault beyond that of a sufficiently serious breach. It further mentioned that this would call into question the right to reparation as one of the essential values of the Union legal order. This statement of the Court could also be interpreted in a way that sufficiently serious breach actually presents a threshold that strikes fair balance between effectiveness and effective judicial protection on the one hand, and objective of protecting public authorities from being hindered by the prospect of actions for damage on the other hand, since it forbids any stricter conditions than sufficiently serious breach to be applied.

However, in the above-mentioned *Brasserie* judgement, the Court emphasized why it was necessary to introduce the requirement of sufficiently serious breach. Non-contractual liability for damages is in the most legal systems connected with the requirement of fault, but this requirement varies from one legal system to another. In order to ensure uniform application of Union law, the Court determined a sufficiently serious breach as the necessary requirement which contains also some elements of fault. The Court stressed that some objective and subjective factors connected with the concept of fault may be relevant for determining whether the breach is sufficiently serious.⁵⁵ The Court probably intended to assess whether the breach of sufficient seriousness would more easily exist for national courts

⁵² *Bayerische HNL* (n.10), para.5

⁵³ *Brasserie du Pêcheur* (n.9), para.66

⁵⁴ *Ibidem*, para.79

⁵⁵ *Brasserie du Pêcheur* (n.9), para.78

since only national courts have the competence to decide whether this requirement is satisfied in cases involving liability of Member States.⁵⁶

3.1.1. Discretion

The Court established that a decisive test for finding whether the breach of Union law is sufficiently serious is whether the Member State manifestly and gravely disregarded the limits of its discretion.⁵⁷ Further, the Court clarified in case *Hedley Lomas*⁵⁸ that where a Member State was not called upon to make any legislative choices, a mere infringement of the Union law may suffice to establish the existence of a sufficiently serious breach. Discretion was mentioned already in the early case *Bayerische HNL*, where the Court stated that sufficiently serious breach applies in the legislative field where there is a wide discretion, but also that Union institutions cannot incur liability unless they manifestly and gravely disregarded the limits on the exercise of their powers.⁵⁹ From the latter, it may be concluded that a sufficiently serious breach test should have been applied only in cases with wide discretion, while in the case when there is very limited or no discretion, *Hedley Lomas* condition should be applied and violation should be thus qualified as sufficiently serious, without conducting a sufficiently serious breach test. It is important also to emphasise that scope and existence of discretion are determined exclusively by reference to Union law.⁶⁰

However, as the Court stated in *Brasserie*, the national legislator does not usually have a wide discretion when it acts within the area of Union law.⁶¹ In *Brasserie*, for example, Germany had the same wide level of discretion⁶² as the Union institutions, due to the fact that there was no Union harmonisation which laid down standards for beer production. Breadth of the discretion available both to German as well as to the Union authorities did not allow them to enact legislation contrary to the founding Treaties.

⁵⁶ *Brasserie du Pêcheur* (n.9), para.58

⁵⁷ *Brasserie du Pêcheur* (n.9), §55; Case C-452/06 *The Queen, on the application of: Synthon BV v Licensing Authority of the Department of Health*, (2008) ECLI:EU:C:2008:565, para.39; Case C-278/05 *Carol Marilyn Robins and Others v Secretary of State for Work and Pensions*, (2007) ECLI:EU:C:2007:56, para.72

⁵⁸ Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd*, (1996), ECLI:EU:C:1996:205, para.28

⁵⁹ *Bayerische HNL* (n.10), para.6

⁶⁰ Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein*, (2000) ECLI:EU:C:2000:357, para.40

⁶¹ *Brasserie du Pêcheur* (n.9), para.46

⁶² *Brasserie du Pêcheur* (n.9), para.48

On the contrary, in *British Telecommunications*⁶³ the Court ruled that Member State had wide discretion also in the case of incorrect transposition of directive, i.e. also in the case the Union harmonisation in an area already exists, and that sufficiently serious breach test applies. This was obviously a different type of discretion. It was not the same discretion like in *Brasserie* when its scope and breadth were determined solely by the founding Treaties, but narrower discretion in the implementation of the directive. In those cases scope and breadth of direction are determined both by the founding Treaties and by provisions of relevant directive which is being implemented. Thus, the Court further continued to narrow the non-contractual liability of Member States. Moreover, in *British Telecommunications* the Court took the place of competent national court and carried out the sufficiently serious breach test⁶⁴ which was exclusively within the competence of the national court.⁶⁵

It can be concluded from the above-mentioned case *British Telecommunications* that the Court used sufficiently serious breach requirement also in the case not involving discretion as wide as what was originally its purpose as established in *Bayerische HNL*.⁶⁶ Thus, the Court's case law is regressive since it makes even harder for individuals to obtain reparation of damages than required by the restrictive *Schöppenstedt test*.⁶⁷ Notwithstanding, sufficiently serious breach test applies not only, as originally, in cases involving legislative measures, but also in cases involving measures of national administrative bodies contrary to Union law, which further hinders the effectiveness of Union law.

Furthermore, the Court further restricted conditions governing liability of Member States in *Haim*.⁶⁸ The Court stated that sufficiently serious breach, in cases where State has limited or even no discretion, does not occur automatically whenever there is a mere infringement. As the Court stated, other elements that characterise the situation have to be taken into account.

3.1.2. Second part of the sufficiently serious breach test

Second part of the sufficiently serious breach test, which includes various criteria that could be used in order to excuse a wrongful act of the State which is contrary to the Union

⁶³Case C-392/93 *The Queen v H. M. Treasury, ex parte British Telecommunications plc*, (1996) ECLI:EU:C:1996:131, paras.39, 40

⁶⁴ *Ibidem*, paras.43-45

⁶⁵ *Brasserie du Pêcheur* (n.9), para.58

⁶⁶ *Bayerische HNL* (n.10), para.6

⁶⁷ *Schöppenstedt*, (n. 6), para.11

⁶⁸ *Haim* (n.60), paras.38, 41

law, was for the first time ever mentioned in *Brasserie* and then repeated and applied in later judgements involving State liability.⁶⁹ The factors that have to be taken into account are clarity and precision of the rule infringed, measure of discretion left to national or Union authorities, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by the Union institutions may have contributed towards adoption or retention of measures contrary to the Union law.⁷⁰ In *British Telecommunications* the Court also added as relevant factors: the fact that the rules of Union law were imprecisely worded and capable of bearing the interpretation given by the State in good faith, the fact that the same wrongful application was accepted also by the other Member States, and the fact that there was no guidance available from the case law of the Court.⁷¹ These additional criteria could be linked with the elements the Court has taken into account in *Brasserie* while determining conditions that govern liability of Member States. Those are: complexity of the situations to be regulated and difficulties in the application or interpretation of the texts.⁷²

Some of the most important criteria in the second part of the test are the clarity and precision of the rule that was infringed. As the Court established in *Robins*, the key element for determining whether there is a broad or only limited or no discretion is clarity and precision of the rule.⁷³ Furthermore, elements of fault in the concept of sufficiently serious breach could be found in the criteria whether the damage caused was intentional or involuntary and whether the error of law was excusable or inexcusable. The last criterion dealing with the conduct of Union institutions is specific only for cases involving liability of Member States. All these criteria are actually narrowing non-contractual liability of Member States and make it harder for individuals whose rights have been violated to obtain redress.

Furthermore, the Court emphasized in *Brasserie*⁷⁴ that the breach of Union law will be sufficiently serious in any case where it has persisted despite the judgement of the Court by which the infringement was found, or a preliminary ruling or settled case law from which it is clear that the conduct in question constituted an infringement. The Court accentuated these cases because they are manifestly violating Union law, as in these situations the discretion of

⁶⁹ *Brasserie du Pêcheur* (n.9), para.56; *Haim* (n.60), para.43

⁷⁰ *Brasserie du Pêcheur* (n.9), para.56

⁷¹ *British Telecommunications*, (n.63), paras.43, 44

⁷² *Brasserie du Pêcheur* (n.9), para.43

⁷³ Case C-278/05 *Carol Marilyn Robins and Others v Secretary of State for Work and Pensions*, (2007) ECLI:EU:C:2007:56, para.73; Case C-150/99 *Svenska staten (Swedish State) v Stockholm Lindöpark AB and Stockholm Lindöpark AB v Svenska staten (Swedish State)*, (2001) ECLI:EU:C:2001:34, para.40

⁷⁴ *Brasserie du Pêcheur* (n.9), para.57

public authorities is non-existent. Here, the Court tried to give guidelines and facilitate the assessment, which lies on the national court, whether sufficiently serious breach occurred.

4. Liability of Union institutions for violations of Union law

After *Schöppenstedt* and *Bayerische HNL*, the most important case in the area of non-contractual liability of Union institutions for violations of Union law is *Bergaderm*.⁷⁵ In *Bergaderm*, the Court aligned the conditions under which Union institutions incur liability with conditions for liability of Member States as it already announced few years before in *Brasserie*.⁷⁶ Moreover, the Court aligned also different systems of rules that governed non-contractual liability of Union administration and Union legislative authorities.⁷⁷

Court of Justice was originally the only one competent to decide about actions for damages against Union institutions. After its creation in 1991, the General Court became exclusively competent to decide in damage disputes against Union institutions, while Court of Justice became the appellate court that can decide only about legal matters and cannot ascertain the facts already established by the General Court.⁷⁸

4.1. Bergaderm judgement

In *Bergaderm*⁷⁹ judgement, the Court modified *Schöppenstedt* test⁸⁰ which was used in cases involving non-contractual liability of the Union institutions for breaches of Union law and aligned the system of conditions governing liability of Union with one governing liability of Member States established in *Brasserie*.⁸¹ Facts of the case were as follows - Laboratoires Pharmaceutiques Bergaderm, a company that carried business in the field of cosmetic products, started proceedings due to selling ban on its sun oil that contained excessive amounts of substances that have harmful effect on human health. After the first instance

⁷⁵ *Bergaderm* (n.13)

⁷⁶ *Brasserie du Pêcheur* (n.9), para.42

⁷⁷ *Bergaderm* (n.13), para.46

⁷⁸ P Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond*, (2011) Hart Publishing, pp. 103; Article 256 (ex Article 225 TEC)

1. The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.

Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute. (Article 268 governs the jurisdiction of Court of Justice in the proceedings for reparation of damages)

⁷⁹ *Bergaderm* (n.13)

⁸⁰ *Schöppenstedt*, (n. 6), para.11

⁸¹ *Brasserie du Pêcheur* (n.9), para.51

proceedings, the company appealed against the judgement of the General Court and the case came before the Court of Justice, which created an opportunity to clarify conditions for liability of Union institutions.

The basis for non-contractual liability of the Union is, as already mentioned, article 340 TFEU which has not prescribed conditions under which the Union can incur liability, but has established only the obligation of Union to make good damages caused. The damage has to be repaired in accordance with general principles common to the laws of the Member States. It was, thus, on the Court to establish conditions necessary in order for the Union to incur liability.

The Court established that non-contractual liability of the Union institutions depends upon three necessary conditions which were reiterated in *Brasserie*⁸² - the rule of law infringed must be intended to confer rights on individuals, the breach must be sufficiently serious and there must be a direct causal link between the breach of the obligation resting on the State and the damage.⁸³ As the Court established in *Bergaderm* and *Fresh Marine*,⁸⁴ these conditions take into account the complexity of situations to be regulated and difficulties in application and interpretation. The key element for determining the existence of sufficiently serious breach is also discretion and in the cases involving limited or even no discretion a mere infringement may suffice to establish violation as sufficiently serious.⁸⁵ However, there is no automatic link between the lack of discretion of the institution concerned, on the one hand, and classification of a sufficiently serious breach of Community law on the other.⁸⁶ The Court abandoned the requirement that there must be sufficiently serious violation of superior rule of law. Thus, individuals could now rely also on rules of secondary legislation.⁸⁷

Moreover, the other important element of the *Bergaderm* judgement is the alignment of different systems of rules that were governing non-contractual liability of various Union

⁸² *Brasserie du Pêcheur* (n.9), para.51

⁸³ *Bergaderm*, (n.13), para.42

⁸⁴ *Ibidem*, para.40, Case C-472/00 P *Commission of the European Communities v Fresh Marine Company A/S*, (2003), ECLI:EU:C:2003:399, para.24

⁸⁵ *Bergaderm*, (n.13), paras.43-44

⁸⁶ Case T-429/05 *Artogodan GmbH v European Commission*, (2010) ECLI:EU:T:2010:60, para.59

⁸⁷ Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law*, 1st Edition, Oxford University Press (2014), pp.517, para. 11.49 - "Following *Bergaderm*, it is not important whether or not the rule of law infringed constitutes a 'superior' or 'higher-ranking' rule of law, as had been the case under the *Schöppenstedt* formula. The rules of law that may constitute the basis for Union non-contractual liability include the provisions of the Treaties, the general provisions of Union law, and the Union measures on which the alleged unlawful act or conduct is based. In other words, a rule of law intended to confer rights on individuals may constitute a provision of primary or secondary Union law (legislative as well as non-legislative acts)."

institutions.⁸⁸ Sufficiently serious breach as a requirement for reparation of damages after *Bergaderm* applies also in cases involving administrative actions, which was not the case in older judgements such as *Adams*.⁸⁹ This is again regressive case law of the Court, since it widened the requirement of sufficiently serious breach originally used as a part of *Schöppenstedt* test,⁹⁰ which applied only in cases involving legislative actions, also to administrative actions making it thus harder for individuals to obtain reparation of damage.

5. Sufficiently serious breach and liability of national courts

In the case *Köbler*,⁹¹ the Court of Justice established liability of national courts for violations of Union law. The Court actually continued where it started in *Brasserie* where it stated that under international law States can be held liable irrespective of whether the violation that caused the damage is attributable to legislature, the executive or the judiciary and that those same conditions governing State liability should be applied also in Union law.⁹² The only courts which can be held liable for breach of Union law are national courts adjudicating at last instance.⁹³ Infringement of Union law which confers rights on individuals by these courts cannot be corrected, thus in these cases individuals should have the possibility to obtain reparation of damages caused. Again, the Court points out full effectiveness of Union law as an argument for introducing liability of the judiciary.⁹⁴ Moreover, it also emphasizes that the application of principle of State liability for judicial decisions has been accepted by most of the Member States but in various forms.⁹⁵ Interestingly, the Court does not state that liability of the judiciary forms general principle of Union law which is inherent to the legal systems of the Member States. The Court also stresses that similar situation occurs in cases where European Court of Human Rights (further: ECtHR) finds that national courts have violated rights contained in the European Convention on Human Rights⁹⁶ (further:

⁸⁸ *Bergaderm*, (n.13), para.46

⁸⁹ *Adams*, (n.7), paras.53-55

⁹⁰ *Schöppenstedt*, (n. 6), para.11

⁹¹ *Köbler*, (n.14)

⁹² *Brasserie du Pêcheur* (n.9), para.34; *Köbler*, (n.14), para.32

⁹³ *Köbler*, (n.14), para. 34

⁹⁴ *Ibidem*, para.33

⁹⁵ *Köbler*, (n.14), para. 48

⁹⁶ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13 of 4.11.1950, ETS 5

ECHR). In these cases ECtHR has the possibility to grant just satisfaction due to violation of Convention right, pursuant to article 41 of the Convention, to the injured party.⁹⁷

5.1. Köbler judgement

Facts of the case *Köbler*⁹⁸ were the following. Under Austrian law, University professors were entitled to the special length-of-service increment after 15 years of service. Mr Köbler had completed 15 years of service, but parts of his service on Universities of Member States other than Austria have not been taken into account. According to Mr Köbler, this was contrary to Union law. Proceedings were started before *Verwaltungsgerichtshof* which referred the question to the Court of Justice for preliminary ruling; meanwhile the Registrar of the Court asked *Verwaltungsgerichtshof* whether is it necessary to maintain the request in the light of *Schöning-Kougebetopoulou*⁹⁹ case which allegedly dealt with the same legal situation. *Verwaltungsgerichtshof* withdrew its request for preliminary ruling and in the end dismissed the claim of Mr Köbler who then started proceedings against Republic of Austria claiming reparation of damages.

With regard to the conditions governing liability of Member States for judicial decisions, the Court reiterated standard conditions already mentioned before in *Brasserie*,¹⁰⁰ including the sufficiently serious breach. With respect to the sufficiently serious breach requirement, the Court stressed that regard must be taken of the specific nature of the judicial function and principle of legal certainty. Member States can incur liability only in cases the national court has manifestly infringed the applicable law.¹⁰¹ Then the Court further clarified this statement in one of the following paragraphs – stating that the sufficiently serious breach condition would be satisfied in case the decision of the national court concerned was in manifest breach of the case law of the Court in the matter.¹⁰²

Thus, the Court of Justice has limited the liability of Member States for judicial decisions only to exceptional cases. Amongst such cases, the Court accentuated the situation where national court of last instance applied Union law contrary to the interpretation already given by the Court of Justice. However, to cover all the situations when national courts of last

⁹⁷ *Köbler*, (n.14), para. 49

⁹⁸ *Köbler*, (n.14)

⁹⁹ Case C-15/96 *Kalliope Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg*, (1998), ECLI:EU:C:1998:3

¹⁰⁰ *Brasserie du Pêcheur* (n.9), para. 51

¹⁰¹ *Köbler*, (n.14), para. 53

¹⁰² *Köbler*, (n.14), para.56

instance could circumvent the Court or its interpretation of Union law, the Court also mentioned non-compliance by the national court in question with its obligation to make a reference for a preliminary ruling as one of the criteria that have to be taken into account while assessing whether the breach was sufficiently serious. But, in these cases other criteria also have to be taken into account - such as whether the infringement was excusable, inexcusable or intentional. In *Köbler*, the fact that the national court withdrew request for preliminary ruling did not suffice to establish the breach as sufficiently serious.¹⁰³ Excusable reason for the Court was the fact that the violation on the side of national court was involuntary since it erred in reading of *Schöning-Kougebetopoulou* judgement and, thus, wrongly applied *acte éclairé* doctrine established in the case *Da Costa*.¹⁰⁴ Moreover, the reason why the Court held that *Verwaltungsgerichtshof* was not liable was probably also due to the fact that national court referred question for preliminary ruling and it withdrew it later on the suggestion of the Registrar of the Court of Justice, which falls within the scope of the criteria relating to the position taken by Union institutions.

Obviously, the Court modified sufficiently serious breach requirement taking into account that liability conditions must be applied according to each type of situation, as stated before in *Dillenkofer*.¹⁰⁵ In the current case, the situation was characterized by the special nature of judicial function and legitimate requirements of legal certainty. Manifest infringement of Union law is, thus, necessary in order for Member State to incur liability for a judicial decision. In determining whether there was a manifest infringement, the Court has excluded discretion as relevant criterion, although its influence can be still felt through criteria regarding the degree of clarity and precision of the rule breached¹⁰⁶ which is essential in deciding about the margin of discretion available to the national authorities.¹⁰⁷ Moreover, pursuant to the aforementioned, the Court excluded the formula stated before in *Hedley Lomas* that mere infringement may suffice to establish breach as sufficiently serious in cases where national authorities have considerably reduced or even no discretion,¹⁰⁸ “The judicature is thus privileged insofar as in its case the breach has always to be manifest, so that the degree of discretion has not the same function of a ‘switch’ as in the cases of the legislature and the

¹⁰³ *Köbler*, (n.14), paras.123-124

¹⁰⁴ Joined cases 28 to 30-62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*, (1963) ECLI:EU:C:1963:6, para.3

¹⁰⁵ *Dillenkofer*, (n.30), para.24

¹⁰⁶ *Köbler*, (n.14), para.55

¹⁰⁷ *Robins*, (n.73), para.40

¹⁰⁸ *Hedley Lomas*, (n.58), para.28

executive.”¹⁰⁹ There are only few examples in which liability of national courts was established, one of the most important is case *Gestas* decided by the *Conseil d’État*.¹¹⁰

5.2. Traghetti judgement

Manifest infringement is a much stricter condition than a sufficiently serious breach. Still, the Court stated in *Traghetti* that excluding all State liability because the infringement of Union law arises from interpretation of provisions or assessment of the facts and evidence by the national court would render meaningless the principle of judicial liability laid down by the Court in *Köbler* case.¹¹¹ Furthermore, in *Traghetti* the Court stated that national legislation that defines the criteria relating to the nature or degree of infringement, which is necessary for Member State to incur liability for judicial acts, may under no circumstances impose criteria that could be stricter than manifest infringement of the applicable law.¹¹² The Union law thus precludes any further limitation of State liability, since in the view of the Court manifest infringement condition strikes fair balance between, on the one hand, special nature of judicial function and legal certainty, and the principle of liability of Member States for infringements of Union law and full effectiveness of Union law, on the other hand.

As regards the facts of the case, in *Traghetti* the Court dealt with liability of Italy due to the judgement of *Corte Suprema di Cassazione* in case involving unlawful state aid.

In *Traghetti*, the Court further found that limiting liability of the judiciary to intentional fault and serious misconduct does not comply with the standard of manifest infringement if such limitations were to lead to exclusion of liability of Member State

¹⁰⁹ B Beutler, 'State Liability for breaches of Community law by national courts: Is the requirement of a manifest infringement of the applicable law an insurmountable obstacle?' (2009) 46 *Common Market Law Review*, Issue 3, p.798

¹¹⁰ Ibidem, pp.16 – “In the *Gestas* judgment delivered by the French *Conseil d’Etat* the plaintiff had claimed compensation for the damage he sustained due to the excessive length of the proceedings as well as grave mistakes made by the administrative courts. His claim was partially successful but only with regard to the fact that the proceedings had lasted for 15 years and 8 months. In this respect the *Conseil d’Etat* held that based on general principles governing the functioning of the administrative courts Mr Gestas was entitled to compensation. Yet it repudiated his allegation that the administrative courts had made grave mistakes when applying the law. The *Conseil d’Etat* denied in particular that the principles of legitimate expectations and legal certainty as guaranteed by Community law had been infringed. It is not the purpose of this article to decide whether that outcome was correct. Yet it can be retained that even though the *Conseil d’Etat* contradicted Mr Gestas' contention that there had been a manifest breach of Community law, the judgment can still be perceived as a landmark decision. For the *Conseil d’Etat* acknowledged that in principle it is possible to obtain damages when the content of a judgment is in manifest breach of Community law. It thus departed from its longstanding *Darmont* case law in which it had held that the content of such a judicial decision could not be challenged by way of a State liability action once it had become final.”

¹¹¹ Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica Italiana*, (2006), ECR I-05177, paras.36, 37

¹¹² Ibidem, para.44

concerned in other cases where manifest infringement occurred.¹¹³ Nothing was stated about the fact whether limiting State liability only to fault and serious misconduct complies with the manifest infringement and about what concept of fault in national law could be equivalent to a manifest infringement. The Court actually reiterated this paragraph of *Traghetti* judgement from *Brasserie* where it established that State liability cannot be made conditional upon any concept of fault going beyond that of a sufficiently serious breach of Union law.¹¹⁴ The aim of the Court was obviously to move further from any of national concepts of fault and to create a new concept of manifest infringement in order to ensure uniform application of Union law. Reason for that is the fact that national laws of Member States contain different concepts of fault that could interfere with the new concept under Union law.

6. Sufficiently serious breach condition and fundamental rights violations

Fundamental rights form the cornerstone of the Union legal order. According to Opinion 2/13 and case law of the Court established in *Kadi* measures incompatible with fundamental rights are not accepted in the EU.¹¹⁵ In the early case *Nold*, the Court stated that fundamental rights form the general principles of Union law, the observance of which it ensures.¹¹⁶ Moreover, the Court pointed out that in safeguarding these rights, it draws inspiration from constitutional traditions common to the Member States; as guidelines it also uses international treaties on which the Member States have collaborated or of which they are signatories. In newer case law, after the enactment of the Charter of Fundamental Rights of the European Union,¹¹⁷ the Court defined the scope of fundamental rights application in *Hans Åkerberg Fransson*.¹¹⁸ Fundamental rights guaranteed in the Union legal order are applicable in all situations within the scope Union law. Further, the applicability of Union law entails applicability of the fundamental rights guaranteed by the Charter.

As the Court clarified in *Alassini*, fundamental rights do not constitute unfettered prerogatives and may be restricted.¹¹⁹ However, distinction must be made between, on the one

¹¹³ *Traghetti*, (n. 111), para.46

¹¹⁴ *Brasserie du Pêcheur* (n.9), para.79

¹¹⁵ Opinion 2/13, (2014) ECLI:EU:C:2014:2454, para. 169; Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, (2008) ECLI:EU:C:2008:461, para. 284

¹¹⁶ Case 4-73 J. *Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, (1974) ECLI:EU:C:1974:51, para.13

¹¹⁷ Charter of Fundamental Rights of the European Union of 26.10.2012. OJ C 326, p, 391 – 407.

¹¹⁸ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, (2013), ECLI:EU:C:2013:105, paras.19-21

¹¹⁹ Joined Cases C-317/08 to C-320/08 *Rosalba Alassini and Others v Telecom Italia SpA and Others*, (2010) ECLI:EU:C:2010:146, para.63

hand, rights such as right to life, prohibition of slavery and prohibition of torture that cannot be limited, and on the other hand, rights such as right to property and freedom to conduct business which can be subject to limitations¹²⁰ provided that there is legitimate objective and that these restrictions do not present a disproportionate and intolerable interference which infringes the very substance of the rights guaranteed.¹²¹ Furthermore, the Charter contains, besides fundamental rights, also principles whose application is clarified in the Art. 52 (2). In order for the rights contained in the Charter to be fully effective, dispositions containing them must be sufficient in itself to confer on individuals an individual right which they may invoke as such.¹²²

Actions for reparation of damages in cases of violations of fundamental rights under Union law form a new area in which the Union law develops, especially in the light of future accession of European Union to the ECHR and necessity for better protection in order to comply with the level of protection offered by the ECtHR. So far, there were several cases in which the Court and the General Court have decided about damages for violations of fundamental rights. They applied the same *Brasserie* conditions¹²³ which could prove to be too stringent and inappropriate when read in the light of ECtHR case law.¹²⁴

6.1. Sufficiently serious breach requirement and case law of the ECtHR

ECHR is still not a binding instrument for the Union institutions, but it must be taken into consideration while interpreting and applying fundamental rights that are contained in the Charter. This obligation ensures the same level of protection as one offered by the ECHR, as required under Article 52 (3) of the Charter. Further, fundamental rights from ECHR constitute general principles of the Union law.¹²⁵ Moreover, all Member States of the Union are members of the Council of Europe and, thus, parties to the ECHR. The ECtHR should refrain from examining whether Union law is in conformity with rights guaranteed by the

¹²⁰ Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, (2003) ECLI:EU:C:2003:333, para.80

¹²¹ *Allassini*, (n. 119), para.63, Art. 52 (1), Charter

¹²² Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others*, (2014) ECLI:EU:C:2014:2, para.47

¹²³ *Brasserie du Pêcheur* (n.9), para.51

¹²⁴ Case T-341/07 *Sison v Council*, (2011) ECLI:EU:T:2011:687, para.80; Case C-40/12 P *Gascogne Sack v Commission*, (2013) ECLI:EU:C:2013:768, para.102; Case C-50/12 P *Kendrion v Commission*, (2013) ECLI:EU:C:2013:771, para.106; Case C-611/12 P *Giordano v Commission*, (2014) ECLI:EU:C:2014:2282, para.44

¹²⁵ Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13–390, (further TEU), Art.

ECHR since EU has not yet acceded to the Convention.¹²⁶ But, in the recent judgements in the cases *Dhahbi v. Italy*¹²⁷ and *Schipani and others v. Italy*¹²⁸ the ECtHR established as contrary to the Article 6 of the ECHR the fact that Italian *Corte di Cassazione* has not made reference for a preliminary ruling to the Court without stating reasons for its refusal. This case law of the ECtHR can adversely affect consistency and uniformity of the Union law. Taking into account Opinion 2/13, the Court has held that an international agreement cannot affect the allocation of powers fixed by the Treaties, or consequently, the autonomy of Union legal system, observance of which is being ensured by the Court itself.¹²⁹ The Court of Justice is solely competent to decide on interpretation of Union law.¹³⁰ Judgements of ECtHR could cause existence of different standards of fundamental rights protection and, thus, undermine uniform application of Union law which the Court ensures. Furthermore, the Court has held that decision-making powers of the ECHR must not have the effect of binding Union or its institutions in exercise of their internal powers, to a particular interpretation of the rules of Union law.¹³¹ However, the ECtHR recognises the necessity of international cooperation while applying the Convention.¹³² Precisely due to this fact, and also taking into account the fact that EU has not yet acceded to the ECHR, ECtHR refrains from examining compatibility of Union law with Convention and applies presumption that Union ensures the same level of fundamental rights protection as the one provided for by the Convention.¹³³ Nevertheless, this presumption may be rebutted and contracting party may be held liable for breach of the Convention even in cases involving implementation of Union law measures if the protection of Convention rights was found to be manifestly deficient.¹³⁴

Sufficiently serious breach requirement presents limitation of right to effective judicial protection contained in the Article 47 of the Charter, Article 13 of ECHR and clarified in the case law of the Court.¹³⁵ It may be questioned whether such limitation is in conformity with principle of proportionality, since the ECtHR stated in its case *Ananyev* that remedies not offering reasonable prospects of success in obtaining compensation for breaches of

¹²⁶ Opinion 2/13, (2014) ECLI:EU:C:2014:2454, para.184

¹²⁷ *Dhahbi v. Italy*, n. 17120/09, ECHR 2014

¹²⁸ *Schipani v. Italy*, n. 38369/09, ECHR 2015

¹²⁹ Opinion 2/13, (2014) ECLI:EU:C:2014:2454, para.201

¹³⁰ *Ibidem*

¹³¹ *Ibidem*, para.184

¹³² *Bosphorus Hava Yollari Turizm v. Ireland*, n. 45036/98, ECHR 2005, para.150

¹³³ *Ibidem*, para.155

¹³⁴ *Ibidem*, para.156

¹³⁵ *Unibet*, (n.50), para.37

fundamental rights are not to be considered as effective and are contrary to ECHR.¹³⁶ Taking into account the fact that there have been so far only about 20 cases in which damages were awarded against Union institutions,¹³⁷ the effective judicial protection of fundamental rights under Union law may not be in accordance with standards accepted by the ECtHR. Furthermore, the ECtHR stated in case *Hatton* that remedies available to ensure enforcement of the ECHR must not be as weak as to fail to ensure its effectiveness.¹³⁸ However, in *Bosphorus*¹³⁹ ECtHR clarified that EU offers the same level of fundamental rights protection as the one offered by the Convention system, but it has not assessed effectiveness of action for damages and its compliance with ECHR. Thus, it seems that there is necessity to facilitate stringent requirement of sufficiently serious breach in order to ensure the effectiveness of action for damages in cases involving fundamental rights violations, since the current state of the Court's case law does not seem to satisfy the threshold of effectiveness which is required by the ECtHR case law.

6.2. Case law of the Court of Justice and the General Court

It may be disputed whether sufficiently serious breach requirement is suitable to ensure effective protection of fundamental rights. Sufficiently serious breach requirement, as established in *Schöppenstedt*, dealt with legislative measures in the areas involving economic policy where the Union institutions had wide discretion.¹⁴⁰ As the Court stated in *Dillenkofer*,¹⁴¹ conditions giving rise to liability of Member States for damages caused by breaches of Union law must depend on the nature of breach, meaning that they have to be applied according to each type of the situation. This requires the Court to take into consideration the special position of fundamental rights, which are cornerstone of Union legal order,¹⁴² in determining what conditions should be applied in cases of actions for damages due to fundamental rights violations.

In recent case law of the Court and the General Court, the same *Brasserie* conditions¹⁴³ were applied to the cases involving violations of fundamental rights, among

¹³⁶ *Ananyev and others v. Russia*, nos. 42525/07 and 60800/08, ECHR 2012, para.113

¹³⁷ Excluding staff cases, see P Aalto (n.66), pp.148

¹³⁸ *Hatton v. United Kingdom*, no. 36022/97, ECHR 2003, paras.137 - 142

¹³⁹ *Bosphorus Hava Yollari Turizm v. Ireland*, n. 45036/98, ECHR 2005, para.165

¹⁴⁰ *Bayerische HNL* (n.10), paras.4-5; *Schöppenstedt*, (n. 6), para.11

¹⁴¹ *Dillenkofer*, (n.34), para.24

¹⁴² TEU, Art. 3 (5)

¹⁴³ *Brasserie du Pêcheur* (n.9), para.51

them also the sufficiently serious breach condition. In *Gascogne Sack Deutschland*,¹⁴⁴ the Court dealt with action for damages due to excessive length of proceedings before General Court, after examining conditions it established the existence of sufficiently serious breach. It is interesting that the Court did not mention sufficiently serious breach among requirements that have to be satisfied in order for the Union to incur liability. The Court only found, at the end of his observations after conducting a sufficiently serious breach test, the existence of sufficiently serious breach.¹⁴⁵ In case *Sison*¹⁴⁶ dealing with sanctions imposed to individual due to his involvement in terrorist activities, the General Court stressed that sufficiently serious breach requirement is completely in accordance with level of fundamental rights protection under the Charter and ECHR. However, the General Court did not conduct further analysis and this statement fails to state the reasons behind this conclusion.

In case *Giordano*,¹⁴⁷ which dealt with fishing quotas and measures resulting in ending of fishing seasons before the normal date, the Court decided about action for damages due to restriction of freedom to pursue a trade or profession. The Court held that measures that result in fishing seasons to end before the normal date comply with the principle of proportionality and, thus, existence of sufficiently serious breach requirement cannot be established.¹⁴⁸ It remained unclear whether restrictions of fundamental rights which are not in accordance with principle of proportionality can automatically be regarded as sufficiently serious, or the fact that restriction violates the principle of proportionality still may not suffice to establish the existence of sufficiently serious breach. If the measure restricting fundamental rights is in accordance with principle of proportionality it cannot be regarded as breaching Union law.

6.3. Future development

As stated above, it may be questioned whether sufficiently serious breach requirement complies with standard of effectiveness required by the ECtHR. Thus, to resolve this problem the Court should do the same it did while introducing the liability of the national judicial authorities when it took account of the special nature of the judicial authorities and modified

¹⁴⁴ Case C-40/12 P *Gascogne Sack v Commission*, (2013) ECLI:EU:C:2013:768, para.102

¹⁴⁵ *Gascogne Sack*, (n.144), para. 102 - „In the light of the foregoing, it must be found that the procedure in the General Court breached the second paragraph of Article 47 of the Charter in that it failed to comply with the requirement that it adjudicate within a reasonable time, which constitutes a sufficiently serious breach of a rule of law that is intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 42).”

¹⁴⁶ Case T-341/07 *Sison v Council*, (2011) ECLI:EU:T:2011:687, para.81

¹⁴⁷ Case C-611/12 P *Jean-François Giordano v European Commission*, (2014) ECLI:EU:C:2014:2282

¹⁴⁸ *Ibidem*, paras.49-53

the original *Brasserie* sufficiently serious term.¹⁴⁹ With regard to fundamental rights, the Court should take account of their special position in the Union legal order, since they form general principles of Union legal order, and modify sufficiently serious breach requirement in order to take account of their particularities. This means especially to ensure the differentiation between the fundamental rights which could be derogated from and those that could not since the Charter itself does not make any distinction, but contains only general clause in the Art. 52 (1), which, when literally read, allows derogations to be posed even on exercise of rights that cannot be derogated from.

Concerning the rights that cannot be derogated from, Member States and Union authorities do not have discretion at all to limit them, since rights such as right to life and prohibition of torture cannot be limited, while in the cases involving rights that can be derogated from there is much wider discretion and proportionality test applies. Therefore, in cases involving rights that cannot be derogated from, a sufficiently serious breach test should not be applied since every breach should be regarded sufficiently serious and entail the existence of non-liability of Union and State authorities.

In other cases involving rights that can be derogated from, a sufficiently serious breach test should be adjusted to reflect the proportionality test which is being applied by the ECtHR while deciding on the admissibility of fundamental rights derogations. The Court should here adopt *favor laesi* attitude and accept standard according to which every restriction of fundamental rights which does not comply with principle of proportionality should be regarded as sufficiently serious. Adopting an approach that would require even larger level of fundamental rights violation severity in order for individual to obtain reparation of damages could prove to be contrary to the Article 52 (3) of the Charter and case law established by the Court.¹⁵⁰

7. Conclusion

Case law of the Court of Justice concerning non-contractual liability of the Union and Member State authorities evolved throughout the time. The founding Treaties have contained only basic general clause that Union institutions must repair the damage caused, meaning it was up to the Court to create conditions which will be governing non-contractual liability of

¹⁴⁹ *Köbler*, (n.14), paras.51-55

¹⁵⁰ See above 115

the Union. The beginning was the restrictive *Schöppenstedt test*¹⁵¹ by which the Court introduced sufficiently flagrant violation as one of the requirements for reparation of damage, but only in cases involving legislative authorities that acted in area of wide discretion in making decisions concerning choices of economic policy. The main aim of the *Schöppenstedt test*¹⁵² was protection of Union legislative authorities. In other words, the aim was thus not to create an effective legal remedy that could allow individuals to obtain redress. To illustrate the stringency of the *Schöppenstedt test*,¹⁵³ it suffices to mention that even in cases when legislative measure is declared as invalid and thus contrary to the Union law, individuals were not automatically entitled to obtain redress.¹⁵⁴ Sufficiently flagrant violation as a standard had not applied in cases involving administrative acts which made the reparation of damage easier for the individuals.

The change came with *Francovich*¹⁵⁵ when the Court introduced for the first time ever the liability of Member States for violations of Union law and applied, what seemed to be at that time, much softer conditions for Member States to incur liability, thus avoiding sufficiently serious breach. Application of *Schöppenstedt test*¹⁵⁶ was at that time subject to criticism, most notably by the judge Mancini as an eminent member of the Court, who in his speech criticised the attitude of the Court towards the damage liability of the Union.¹⁵⁷ In *Brasserie*¹⁵⁸ and further cases, the Court finally created a complete system of rules governing non-contractual liability of Member States by incorporating part of *Schöppenstedt test*,¹⁵⁹ namely sufficiently serious breach, among the conditions necessary in order for Member States to incur liability. These conditions narrowing the liability for damages apply without any differentiation to all acts of Member States, since the sufficiently serious beach condition, developed in order to protect legislative authorities, now applies also to administrative acts.

Further example of the Court's regressive case law was *British Telecommunications*¹⁶⁰ case where the Court applied sufficiently serious breach condition also in the cases where Member State does not have such wide margin of discretion as the one which was exercised

¹⁵¹ *Schöppenstedt*, (n. 6), para.11

¹⁵² *Ibidem*

¹⁵³ *Schöppenstedt*, (n. 6), para.11

¹⁵⁴ *Bayerische HNL* (n.10), para.4

¹⁵⁵ *Francovich*, (n. 8), para.35

¹⁵⁶ *Schöppenstedt*, (n. 6), para.11

¹⁵⁷ P Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond*, (2011) Hart Publishing, pp.86

¹⁵⁸ *Brasserie du Pêcheur*, (n.9)

¹⁵⁹ *Schöppenstedt*, (n. 6), para.11

¹⁶⁰ *British Telecommunications*, (n.63), paras.39-40

in cases such as *Brasserie* or *Schöppenstedt*. The Court, thus, narrowed the liability of Member States to the even larger extent than in *Schöppenstedt test*.¹⁶¹

The Court continued with regressive case law also in *Bergaderm*¹⁶² where it applied the same *Brasserie* conditions,¹⁶³ including sufficiently serious breach, also to liability of the Union institutions without any differentiation as to the nature of act. Thereby, the Court disregarded the older concepts governing reparation of damages in cases of administrative acts where sufficiently serious breach was not required and, thus, individuals could obtain reparation under much easier conditions.

The only step towards higher protection of individual were judgements in cases *Köbler*¹⁶⁴ and *Traghetti*¹⁶⁵ where the Court introduced for the first time the liability of Member States for violations of Union law committed by the national courts of last instance. However, the Court applied in these cases even more stringent version of sufficiently serious breach condition and narrowed liability of national court, thus leaving only a very little space to establish their liability.

The area of damages in cases of fundamental rights violations is still developing. The Court is currently applying the same *Brasserie* conditions¹⁶⁶ also to these violations, although sufficiently serious breach condition as applied in the cases from the area of internal market law proves to be inappropriate, especially in the light of the level of fundamental rights protection as accepted by the ECtHR.

To sum up, the case law of the Court regarding sufficiently serious breach condition is regressive since it does not move towards higher protection of individuals. The Court still maintains and even tightens conditions that have to be satisfied in order for injured party to obtain redress. The only exception is introduction of liability for violations of Union law committed by the national courts of last instance, although even in this area the Court established a standard of manifest infringement, which seems to be almost an insurmountable obstacle despite the Court's statements in *Traghetti*¹⁶⁷ judgement. In future development, it is

¹⁶¹ *Schöppenstedt*, (n. 6), para.11

¹⁶² *Bergaderm*, (n. 13), para.42

¹⁶³ *Brasserie du Pêcheur*, (n. 9), para.51

¹⁶⁴ *Köbler*, (n.14)

¹⁶⁵ *Traghetti*, (n.111)

¹⁶⁶ *Brasserie du Pêcheur*, (n.9), para.51

¹⁶⁷ *Traghetti*, (n.111), para.46

necessary to adjust sufficiently serious breach condition in order to ensure more substantive and meaningful protection of individuals.

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