

Sufficiently Serious Breach in EU Law: Balancing Vagueness and Legal Certainty

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Summary: The concept of a “sufficiently serious breach of law” is critical in EU law for determining non-contractual liability and securing compensation for damages. As a legally vague term, it allows for broad interpretive leeway, granting courts the flexibility to consider individual circumstances, but simultaneously introduces challenges in predictability and the principle of legitimate expectations—a cornerstone of EU law. This article examines the term’s ambiguity and how it enables both adaptability within the EU’s complex legal system and a degree of legal uncertainty. Through an analysis of the Court of Justice of the European Union (CJEU) case law, the article seeks to clarify the methodological approach to identifying a sufficiently serious breach. The study identifies criteria such as the scope of discretion, clarity of regulations, and excitability, all pivotal in determining the term’s applicability and ensuring the consistent, fair treatment of Member States’ obligations. Additionally, the article addresses gaps in current literature, specifically the need for a comprehensive view that extends beyond isolated case analyses, aiming to offer clarity on the term’s evolving interpretation and its impact on the CJEU’s decision-making.

Keywords: EU law, sufficiently serious breach, non-contractual liability, Court of Justice of the European Union (CJEU), legitimate expectations, vagueness in legal terms, scope of discretion, legal certainty, Member State obligations, EU compensation

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1. Introduction

The notion of a sufficiently serious breach of law as a vague legal concept is of fundamental importance for the enforcement of a claim for damages for breach of European Union law. This legal category is a vague term, the broad interpretation of

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which allows for adaptation to the specific circumstances of the case. Vague legal concepts, such as good morals or public policy, have their own meaning in law and make it possible to take account of different legal traditions and differences between Member States. Nevertheless, they bring with them the disadvantage of legal uncertainty and the problem of meeting the principle of legitimate expectations, which is one of the fundamental principles of EU law. This article seeks to provide a comprehensive overview of the concept of a sufficiently serious breach of law, as the existing literature analyses this concept in a rather fragmentary manner. Given this, the case law of the CJEU is crucial, offering guidance on how to further understand how a sufficiently serious infringement is interpreted, while also contributing to increasing the predictability of judicial decisions.

2. The conception of a sufficiently serious breach of law as a vague legal term

The interpretation of the term “sufficiently serious breach of law” is crucial for an action for damages caused by a breach of the Union law to be successful.⁷⁰ It is a vague legal term which allows a very wide interpretation. Vague terms are common in the law, typical examples being good manners, public order, good faith etc.⁷¹ This vagueness has considerable advantages as well as disadvantages. An advantage of such a vague term is the possibility of individualisation or consideration of the circumstances of a particular case. It allows the courts to consider very carefully the individual circumstances and then make a just decision about a possible damage compensation.⁷² As well as to consider adaptability is particularly valuable in the EU’s multi-level legal system, where diverse national legal traditions must be accommodated.⁷³ A disadvantage is the legal uncertainty and the related concern about fulfilling the principle of legitimate expectation, which is one of the fundamental principles of the EU law and a general legal principle of the Member States.⁷⁴ A crucial question is how to make sure that the interpretation of a vague term, in this case “a sufficiently serious breach”, will be used to the maximum extent but at the same time that it will be clear for the participants in the proceedings, including the potentially injured, what

⁷⁰ E. g. TRIDIMAS, T. *The General Principles of EU Law*. Cambridge: Cambridge University Press, 2006.

⁷¹ E. g. CRAIG, P. *EU Law: Text, Cases, and Materials*. Oxford: Oxford University Press, 2011. Or ENDICOTT, T. A. Vagueness and Legal Theory. *Legal Theory*. 1997, vol. 3, p. 37.

⁷² VAN DAM, C. *European Tort Law*. Oxford: Oxford University Press, 2013, p. 565.

⁷³ WEATHERILL, S. *Law and Values in the European Union*. Oxford: Oxford University Press, 2016.

⁷⁴ E. g. HARTLEY, T. C. *The Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union*. 7th ed. Oxford: Oxford University Press, 2014. Or PORTUESE, A., GOUGH, O., TANEGA, J. The Principle of Legal Certainty as a Principle of Economic Efficiency. *European Journal of Law and Economics*. 2017, vol. 44, pp. 131–156.

this term means, i. e. how it will be interpreted and how the principle of legitimate expectation will be fulfilled, so that the decision-making practice of the CJEU and therefore of the Member State courts would be predictable. Of course, this term cannot be defined and its content cannot be specified precisely because it would then become a definite term losing its justification. However, even the criteria for the term have not yet been fully specified. The ambition of this article is to make the view of this concept comprehensive as there are currently primarily only studies dealing with sub-areas of knowledge, not the overall current overview. Therefore, from this point of view, the previous decision-making practice of the CJEU appears to be crucial.⁷⁵ Moreover, the literature analysis performed clearly shows that the topic, fulfilment of the principle of legitimate expectation in this area, has not been properly covered. There are comments on individual decisions, or literature (e. g. Aalto, 2011),⁷⁶ which is, however, from 2011 and, logically, does not reflect the current shift.

To understand this concept better, and therefore achieve better predictability of the decision making in the area, we asked ourselves the questions analysed below.

3. The procedure for assessing the seriousness of a breach

In the decision-making practice, the following methodological procedure has become established for examining whether an EU institution or a Member State committed a sufficiently serious breach in relation to their non-contractual liability. First of all, if the injured party objects that an EU law has been breached, the court must first deal with the question whether the allegedly breached law grants a right to an individual. If so, it must be assessed whether it really is a sufficiently serious breach of the law as specified by the decision-making practice of the CJEU. If a conclusion is reached that a sufficiently serious breach of the law was committed, the court must examine whether the authority in question had enough room for discretion and how much room there was. If there was little room for discretion, it still need not be a sufficiently serious breach of the law, although this is rather rare. An example of such little room for discretion is when the European Commission had to pay interest on default based on a final court decision. Since the Commission did not do that, it committed a sufficiently serious breach of the law. Another option, which is more common, is broad room for discretion. In such case, it is necessary to consider other important aspects – the complexity of the situation being treated,⁷⁷ how difficult it is to apply or interpret the provisions of

⁷⁵ LENAERTS, K., GUTIÉRREZ-FONS, J. A. To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice. *Columbia Journal of European Law*. 2013, vol. 20.

⁷⁶ AALTO, P. *Public Liability in EU Law: Brasserie, Bergaderm and Beyond*. Oxford: Hart Publishing, 2011.

⁷⁷ *Holcim (Romania) SA v European Commission* (T-317/12) ECLI:EU:T:2014:782 at [87].

the legal rules, the level of clarity and accuracy of the rule breached and the deliberateness or inexcusability of the error,⁷⁸ the fact that the behaviour of an EU institution or a Member States may have contributed to the error, adopting or preserving national measures or conventions which are in contradiction with the EU law.⁷⁹

What must be primarily assessed is the situation as a whole, not only its parts.⁸⁰ All the facts characterizing the situation introduced to the national court must be considered.⁸¹ The CJEU does not establish clear criteria or their exhaustive list. They are only guidelines. Nor is there a sole criterion to be met, for example the scope of discretion. Other criteria must also be considered.⁸²

All the criteria established by the decision-making practice that must be considered when assessing a sufficiently serious breach of an EU law are related to the date when the authority concerned made the decision in question or when it commenced the proceedings.⁸³ This is why the condition for a sufficiently serious breach is always assessed in relation to a specific date.

The criteria mentioned are elaborated on by the CJEU in its decision-making practice as follows.

3.1. The scope of discretion

The scope of discretion as the most important criterion is described by the decision-making practice the most minutely. The decision-making practice of the Court of Justice suggests that a breach is sufficiently serious if an authority or a Member State⁸⁴ apparently and seriously acted beyond its normative powers. It is centred around the principle that trivial damage is not compensated for. Mere disagreements related to reasonable discretion are essentially not qualified as a sufficiently serious breach of law, which is often characterized by an apparent excess of jurisdiction.⁸⁵ If an EU institution is granted

⁷⁸ See, e. g. *Jose Maria Sison v Council of the European Union* (T-341/07) ECLI:EU:T:2011:687., or *Laurent Gbagbo v Council of the European Union* (T-348/11) ECLI:EU:T:2011:371 at [53].

⁷⁹ See, e. g. *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport* (C-46/93 and C-48/93) ECLI:EU:C:1996:79 at [56].

⁸⁰ *MyTravel Group plc v Commission of the European Communities* (T-212/03) ECLI:EU:T:2008:315 at [38].

⁸¹ See, e. g. *The Test Claimants in the CFC and Dividend Group Litigation v Commissioners of Inland Revenue* (C-201/05) ECLI:EU:C:2008:239 at [123–123] and the decisions *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* (C-446/04) ECLI:EU:C:2006:774 at [214], and *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* (C-524/04) ECLI:EU:C:2007:161 at [120].

⁸² See, e. g. *Laurent Gbagbo v Council of the European Union* (T-348/11) ECLI:EU:T:2011:371 at [53].

⁸³ *HTTS Hanseatic Trade Trust & Shipping GmbH v Council of the European Union* (C-123/18 P) ECLI:EU:C:2019:694 at [44].

⁸⁴ *Artegodan GmbH v European Commission* (C-221/10 P) ECLI:EU:C:2012:216 at [51].

⁸⁵ *Industrial Química del Nalón, SA v European Commission* (T-635/18) ECLI:EU:T:2020:624 at [96].

with the power of discretion, only an apparent and serious excess of this power by the authority can be considered a sufficiently serious breach of the Union law.⁸⁶ The discretion of a Member State is thus an important criterion for establishing the existence of a sufficiently serious breach of a Union law.⁸⁷ When assessing this criterion, a national court must take into consideration whether the EU legislation gives the Member States a leeway for adjusting the measure or for choosing and specifying a measure suitable for reaching a partial goal in the area of social and employment policies.⁸⁸

On the other hand, however, it is true that if an authority only has a very limited power of discretion or none at all, a mere breach of a Union law may be sufficient to prove the existence of a sufficiently serious breach.⁸⁹ They may be, for example, duties assigned to an EU institution and these duties are absolute and unconditional.⁹⁰

3.2. The clarity and accuracy of a breached regulation

The clarity and accuracy of a regulation must be considered when assessing whether a breach of an EU law is sufficiently serious, i. e., *especially the complexity of the situation that had to be dealt with and the level of difficulty of applying or interpreting the legal rules* must be considered.⁹¹ It is therefore necessary to verify in each case whether a particular regulation is clear and accurate enough in terms of its interpretation. One of these cases could be a situation in which an EU institution fails to comply with its clearly defined obligation to gather information and evidence justifying a measure restricting the activity of a specific person, for example, a businessman. If an EU institution does not provide a sufficient justification of a restrictive measure to make it possible to review and, subsequently, either refute or accept it, it is a sufficiently serious breach of the law. The obligation to justify such restrictive measure explicitly arises from the established decision-making practice of the CJEU. Moreover, if this obligation is violated for a longer period of time, for example, for three years, it is a sufficiently serious breach of the law.⁹² The level of clarity must be assessed based on the interpretation of the specific regulation. Therefore, there is no clear and generally applicable answer to what is and is not sufficiently clear and accurate. Determining the

⁸⁶ European Ombudsman v Claire Staelen (C337/15 P) ECLI:EU:C:2017:256 at [37].

⁸⁷ Carol Marilyn Robins and Others v Secretary of State for Work and Pensions (C278/05) EU:C:2007:56 at [72].

⁸⁸ Thomas Specht and Others v Land Berlin and Bundesrepublik Deutschland (C-501/12 to C-506/12, C-540/12 and C-541/12) ECLI:EU:C:2014:2005 at [103] and [104].

⁸⁹ Commission of the European Communities v Fresh Marine Company A/S (C472/00 P) EU:C:2000:3:399 at [26].

⁹⁰ Printeos, SA v European Commission (T-201/17) ECLI:EU:T:2019:81 at [69] and European Commission v Printeos, SA (C-301/19 P) ECLI:EU:C:2021:39 at [103] and [104].

⁹¹ HTTS Hanseatic Trade Trust & Shipping GmbH v Council of the European Union (C-123/18 P) ECLI:EU:C:2019:694 at [42].

⁹² Safa Nicu Sepahan Co. v Council of the European Union (C-45/15 P) ECLI:EU:C:2017:402 at [31]–[32] and [40].

level of clarity and accuracy of a specific legal act is the subject of some preliminary questions.⁹³ However, within this general vagueness, it is possible to reach at least a partial conclusion that a regulation is clear if there are judicial decisions related to it or if it concerns one of the fundamental human rights. In other words, if a measurement restricting the fundamental human rights is not sufficiently justified, it is obvious that such situation is in contradiction with the fundamental human right to a fair trial.

3.3. The importance of the form of fault

The CJEU pointed out that the term fault differs in each Member State and that is why it cannot be considered a condition for liability as such but only as a criterion that may suggest whether it is or is not a sufficiently serious breach of law. The above mentioned indicates that the obligation to compensate for damage that arose for an individual cannot be subject to the condition based on the term fault going beyond a sufficiently serious breach of law.⁹⁴ Fault can thus be taken into consideration only as a criterion for whether a breach is sufficiently serious or not.⁹⁵

3.4. Excusability

If a Member State keeps effective a legal regulation that is in clear contradiction with the EU law in regard to the CJEU decision-making practice, it cannot be regarded as an excusable error.⁹⁶ Therefore, if a Member State keeps in effect a legal regulation that is in contradiction with the EU law (e. g., the legal regulation is based on direct discrimination) or with the CJEU decision-making practice, it cannot be an excusable reason. In relation to the liability of a Member State, the CJEU has come to the conclusion that it is a sufficiently serious and inexcusable breach of law when a national court does not present a preliminary question according to par. 3 of Article 267 of the TFEU.⁹⁷ In any case, a breach of the EU law is sufficiently serious if it was commit-

⁹³ See, e. g. *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* (C-112/00) ECLI:EU:C:2003:333 at [21].

⁹⁴ See, e. g. *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (C-46/93 and C-48/93) ECLI:EU:C:1996:79 at [75]–[80].

⁹⁵ See, e. g. *Artogodan GmbH v European Commission* (C-221/10 P) ECLI:EU:C:2012:216 at [67].

⁹⁶ See, e. g. *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (C-46/93 and C-48/93) ECLI:EU:C:1996:79 at [59].

⁹⁷ *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (C-46/93 and C-48/93) ECLI:EU:C:1996:79 at [56]; of 30th September 2003, *Gerhard Köbler v Republik Österreich* (C224/01) EU:C:2003:513 at [54] and [55], as well as of 28th July 2016, *Milena Tomášová v Slovenská republika – Ministerstvo spravodlivosti SR and Pohotovosť s.r.o.* (C168/15) EU:C:2016:602 at [25].

ted in obvious contradiction with the judicial decisions of the CJEU in the particular area.⁹⁸

The CJEU has implied that an excusable reason could be the evolving, and therefore not clear, decision-making practice in the area or judicial decisions gradually defining certain parameters.⁹⁹ This is, in fact, a certain form of protection of the Member State, typically of the national court, which often decides disputes for which the decision-making practice is still evolving. An example from the present day could be the judicial decisions related to personal data protection – a whole range of questions are still expected.

A national court must also take into account the ongoing legal disputes or the attitude of the European Commission.¹⁰⁰ Anyhow, the Court of Justice has specified that a breach of the EU law is apparently serious if it persisted even after the failure to meet the obligation was reproached by the judgement made in the preliminary question procedure. It is also an apparently serious breach if it is committed in spite of the established decision-making practice of the Court of Justice in the area suggesting the unlawful nature of the conduct in question.¹⁰¹

4. The importance of the annulment of a decision

The annulment of a decision is a typical example of satisfaction of damages caused by the issuance of an unlawful decision and it may, by itself, be a compensation for non-material damage caused by the decision being annulled. The annulment of a decision by itself does not automatically mean that a sufficiently serious breach of law was committed by an EU institution.¹⁰² In cases of non-contractual liability of EU institutions, the European General Court ruled that compensation need not always be financial. Sufficient satisfaction may consist in a mere statement saying that an EU institution has committed an unlawful act and in the subsequent annulment of the unlawful decision¹⁰³. The mere annulment may be a sufficient compensation for

⁹⁸ Gerhard Köbler v Republik Österreich (C224/01) EU:C:2003:513 at [56]; of 25th November 2010, Günter Fuß v Stadt Halle (C429/09) EU:C:2010:717 at [52], and of 28th July 2016, Gerhard Köbler v Republik Österreich (C224/01) EU:C:2003:513 at [26].

⁹⁹ Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue (C-446/04) ECLI:EU:C:2006:774 at [215].

¹⁰⁰ See, e. g. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others (C-46/93 and C-48/93) ECLI:EU:C:1996:79 at [63] and [64].

¹⁰¹ Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue (C-446/04) ECLI:EU:C:2006:774 at [214], and Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue (C-524/04) ECLI:EU:C:2007:161 at [120].

¹⁰² Export Development Bank of Iran v Council of the European Union (T553/15), unpublished, EU:T:2019:308 at [55].

¹⁰³ E. g., Roberto Aquino and Others v European Parliament (T-402/18) EU:T:2020:13 at [90]–[94].

all the non-material damage.¹⁰⁴ If, however, the unlawful act was particularly serious, and even the annulment of the unlawful act cannot be regarded as compensation (e. g., if it is deprived of any useful effect), it cannot, by itself, be an appropriate and sufficient compensation for any non-material damage caused by the act annulled.¹⁰⁵ It is therefore necessary to consider whether non-material damage can be separated from the act establishing the annulment.¹⁰⁶

5. Conclusion

Sufficiently serious infringement in the context of liability for breach of EU law is a complex legal concept that allows for the uniqueness of each case to be taken into account. The interpretation of this concept is based on the case law of the CJEU, and the criteria for its assessment are not fixed but rather serve as guidelines for individual court cases. However, despite the risk of legal uncertainty, the concept is essential for fair adjudication in cases involving liability for breach of EU law. While it is not possible to establish a completely uniform and specific interpretation of the concept, the case law of the Court of Justice and its dynamic evolution contributes to better understanding and predictability in this complex legal environment.

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¹⁰⁴ E. g., *Alain Schoonjans v European Commission* (T-79/17) EU:T:2018:531 at [53]–[54].

¹⁰⁵ E. g., *L v European Parliament* (T-59/17) EU:T:2019:140 at [59] and the judicial decisions cited here.

¹⁰⁶ E. g., *PB v European Commission* (T-609/16) EU:T:2017:910 at [97] and *Annibale Culin v Commission of the European Communities* (C-343/87) EU:C:1990:49 at [27]–[29].

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