Sufficiently Serious

- How clear must a Member State’s breach of Community law be to make it liable?
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List of Abbreviations and Definition of Terms

Abbreviations

CLJ  Cambridge Law Journal
CUP  Cambridge University Press
EC   European Community
ECJ  European Court of Justice
ELP  Europa Law Publishing
OUP  Oxford University Press

Definition of Terms

*Private import of alcohol* - Refers, in this paper, to importation of alcoholic beverages by a third party from a Member State to a consumer in Sweden.

*Systembolaget* – The Swedish state owned company designated to handle the retail sale of wine, strong beer and spirits in Sweden.

*Swedish Chancellor of Justice* – A Swedish authority, beside the ordinary courts, that is authorized to adjudicate in damage actions against the Swedish state.
1. Introduction

1.1. Background

In 1991, with the judgment in *Francovich*, the legal protection of rights conferred by the European Community substantially improved.\(^1\) A way to make damages available to individuals that had suffered losses due to a Member State’s failure to comply with Community law was introduced by the European Court of Justice. By giving the European citizens this right, the European Court of Justice added the number of supervisors of Community law with about 400 million, and thus, of course, put even more pressure on the Member States to refrain from acts that may be contrary to Community law.\(^2\)

In order for this legal remedy to work as sufficiently as possible, it is important that the rules governing it are clear and complied with. Case law of the European Court of Justice has over the years specified the conditions which must be fulfilled in order to be entitled “Francovich-damages”. The question has in most of these cases been whether the breach committed by the state is to be considered as a sufficiently serious breach to warrant restitution from the state. The seriousness of the breach was also the decisive question when an individual claimed damages from the Swedish state in 2007. This is the judgment which we interested in this issue (hereinafter referred to as the *Private importation of alcohol*, PIA, case).\(^3\) In this judgment, the Swedish Chancellor of Justice rejected the applicant’s claim, whose privately imported alcohol had been confiscated by the Swedish state, on the grounds that the breach was not sufficiently serious.\(^4\) The ground on which the Swedish state relied upon when confiscating the alcohol was an act that had been found to be contrary to Community law by the European Court of Justice.\(^5\) At the moment, another case concerning the same issue has been put before a District Court (Tingsrätt) in Sweden, and may work its way through the Swedish legal system and finally end up in the European Court of Justice.\(^6\)

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\(^1\) Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357.

\(^2\) The European Union had in 2005 a population of 459 million people.

\(^3\) Chancellor of Justice Decision 2007-08-28 (Hereinafter referred to as the “private import of alcohol” case).

\(^4\) In Sweden the Chancellor of Justice is authorized to handle state liability proceedings.

\(^5\) C-170/04 *Rosengren and others v. the Kingdom of Sweden* [2007] NYR

\(^6\) Stockholm District Court, Pending Case T 13125-05.
1.2. **Aim and Purpose**

This study seeks to examine the criterion of “sufficiently serious” within the Francovich doctrine, concerning state liability. The aim is to make an assessment whether the Swedish Chancellor of Justice made the right decision when claiming that the breach in the *PIA decision* was not to be considered sufficiently serious. This assessment will be done by reference to the guidelines that has been given by the European Court of Justice in the judgments concerning state liability. Finally, we intend to evaluate if there are reasons to change the current interpretation of the sufficiently serious criterion.

1.3. **Questions**

The study intends to answer the following questions:

- How has the criterion of “sufficiently serious” been interpreted by the European Court of Justice? What guidelines have been given to the courts of the Member States concerning this issue?

- Is the Swedish Chancellor of Justice’s reasoning in the ”PIA” decision in line with these guidelines?

- Is there a need for clarification or modification of the sufficiently serious criterion?

1.4. **Method**

To answer these questions, we will, by using traditional legal methods, analyze the case law of the European Court of Justice which is relevant for the application of the Francovich doctrine, as well as Swedish case law concerning the ”PIA” decision. We will compare the Swedish application of this principle with the guidelines that has been given by the European Court of Justice and then conclude the study by evaluate whether there is a need for a change of the current situation.
1.5. Delimitation

In order to answer the questions posed, we will need to examine the development of the sufficiently serious criterion. The other criteria under the Francovich doctrine will not be examined, as they fall outside the scope of this paper. The historical development or the current situation concerning Francovich damages will only be discussed when the need arises. We will also show how the sufficiently serious criterion, and the interpretation of it, has influenced other areas of liability doctrines, such as the proceedings under Article 288 EC.

Regarding the Swedish application of the sufficiently serious criterion in the PIA decision, only facts relevant to the Swedish Chancellor of Justice’s decision will be examined. Even though the main issue in the case concerns the legality of the Swedish alcohol monopoly under Community Law, this paper will not examine that particular question. Instead, the focus lies on the compatibility of the Chancellor of Justice’s application of the sufficiently serious condition with the European Court of Justice’s case law.
2. The “Sufficiently Serious” Criterion under the Francovich Doctrine

Chapter 3 will examine the Swedish Chancellor of Justice’s application of the sufficiently serious criterion. Before making this examination, it is necessary to describe some of the history behind the doctrine, and thereafter present the case-law of the ECJ (The European Court of Justice) that has shaped the sufficiently serious criterion to what it is today. This will be presented in this chapter.

2.1. The Francovich Case

Article 10 EC,\(^7\) which expresses the principle of solidarity, is one of the cornerstones of a functioning and effective European Community (hereinafter EC). Besides prohibiting the Member States from acting in ways that contradicts Community law, the principle of solidarity also places a responsibility for them, as well as for the EC institutions, to actively work for the aims of the Community.\(^8\) The ECJ has interpreted this Article (or principle) extensively. For example, in *Spanish Strawberry*, it made clear that Member States have a responsibility to hinder any activities that counteracts the realization of the Common Market.\(^9\) The ECJ has in other cases, by referring to the principle of solidarity, stated that the EC institutions has a responsibility to provide the national courts with relevant information when dealing with an EC related case.\(^10\) More importantly for this study, the ECJ has stated that the principle of solidarity also lays the ground for the Member State liability to make good for damages caused on individuals as a result of breaches of EC-law.

In 1991 the ECJ changed its line of case-law from having argued that it was a matter for the national legal order to handle state liability,\(^11\) to introducing the EC-based liability in its decision in *Francovich*.\(^12\) The case concerned the failure of the Italian government to implement an EC-directive that guaranteed salaries for employees if the

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7 Treaty establishing the European Community
10 See e.g. Case C-234/89 *Delimitis v. Henninger Bräu AG* [1991] ECR 1-935.
11 See e.g. Case 60/75 *Russo*, ECR [1976] 45.
employers became insolvent. The ECJ firstly declared that Mr. Francovich, who brought the claim, was unable to rely on the directive as being directly effective.\textsuperscript{13} However, by answering the Italian court’s question whether the Italian state could be liable for infringements of Community law, the ECJ continued by stating that “[t]he full effectiveness of Community rules would be impaired [...] if individuals was unable to obtain redress when their rights are infringed by a breach of Community law for which the Member State can be held responsible”.\textsuperscript{14} By referring to Article 10 EC, the ECJ argued that the principle of state liability was inherent in the system of the EC-treaty, and that the court therefore did not have to wait for legislative measures before recognizing the principle.\textsuperscript{15}

2.2. Introduction and Development of the “Sufficiently Serious” Criterion

With the judgment in Francovich, the Francovich-doctrine was introduced as a new remedy to be used in order to enforce Community law, but the “sufficiently serious” condition was not yet laid down. This requirement was referred to by the ECJ for the first time in Brasserie du Pêcheur, when the Francovich-principle was extended to include also other types of infringements than breaches of directives, which was the case in Francovich.\textsuperscript{17} In Brasserie du Pêcheur, the ECJ also made the first connection between the Member States liability and the liability of the EC-institutions.\textsuperscript{18}

2.2.1. Brasserie du Pêcheur

The “sufficiently serous” criterion was introduced in the joined cases of Brasserie du Pêcheur and Factortame III (hereinafter referred to as Brasserie du Pêcheur) in 1996.\textsuperscript{19} In both cases, damages were sought for failure of the state to comply with EC law. In

\textsuperscript{13} Being able to rely on the directive even though it has not been implemented into national legislation. For more information, see e.g. Gordon, Richard, EC Law in Judicial Review, OUP, 2007, p 65.
\textsuperscript{14} Joined Cases C-6/90 and C-9/90 Francovich, para. 33.
\textsuperscript{15} van Dam, Cees, European Tort Law, OUP, 2006, p 31.
\textsuperscript{17} Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v Germany, and R. v Secretary of State for Transport, ex parte Factortame Ltd. and others [1996] ECR I-1029
\textsuperscript{18} Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur, para. 42.
\textsuperscript{19} Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur
Brasserie du Pêcheur, a French brewery had suffered losses due to the German purity laws on “bier”, which had been found to be in breach of Article 30 EC. In Factortame III the applicant correctly claimed that the United Kingdom’s Merchant Shipping Act of 1988 was contrary to EC law, in particular Article 43 EC and the common fisheries policy, as it prevented Spanish registered vessels from fishing against the United Kingdom quotas. Both the French and the Spanish applicants claimed damages against the respective states. The ECJ stated that the conditions under which the Member States can incur liability cannot differ from the conditions under which the Community can be held accountable.20 The Community’s non-contractual liability is regulated by Article 288 EC, which refers, in the absence of written rules, to the general principles common to the Member States.21 At least in cases where the Member States possessed a relatively wide discretion, as in these two cases, the ECJ stated that, among two other conditions, “the breach must be sufficiently serious”22 to make the state liable for the damages.23 The Court continued by stating that account should be taken to “the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question”24 when determining whether the breach is sufficiently serious or not. Other factors mentioned in the case were if the state’s error could be found excusable and involuntary or not and if there is clear case-law from the ECJ that indicates that the state’s deed is contrary to EC-law.25 This means that there is no strict form of liability, but rather one where the discretion awarded the institution and the precision or vagueness of the act is decisive.26 In general, the Member States do not have a wide discretion when acting within the field of Community law.27

An important statement of the ECJ concerning the evaluation of the discretion that the Member State possessed when committing a breach of EC-law, is that the assessment of the Member State’s discretion shall be done by reference to EC-law, and not national law. National law is in this case irrelevant. This means that a state’s liability for actions taken by one of its authorities will be evaluated with reference to the discretion that has been given to

20 Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur, para. 42
21 Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur, para. 41
23 The two other conditions were; [1] the rule of law infringed must have been intended to confer rights on individuals, and [3] there must have been a direct causal link between the breach and the damage sustained.
24 Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur, para. 43
26 Craig, Paul & Búrca, Gráinne, EU Law, Text, Cases and Materials, OUP, 2003, p. 264
27 Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur para. 46
the relevant Member State on the issue, and not the discretion that has been given to the authority by the state.28

2.2.2. ECJ Case law on the Interpretation of “Sufficiently Serious”

Subsequent to Brasserie du Pêcheur, several cases concerning the interpretation of the criterion would follow. In cases where the state has completely failed to take any measures in order to transpose an EC-directive, the ECJ has stated that such a failure constitutes by itself a sufficiently serious breach.29 However, there are cases where the assessments whether the state’s failure is serious enough have been much more complicated. In the following subsections we will present some of these cases to illustrate what may, and what may not, constitute a sufficiently serious breach according to the ECJ.

2.2.2.1. Lack of Discretion and Clear EC-Provision

In cases where the ECJ finds that the interpretation of the relevant EC provision is unquestionable and that the margin of discretion left to the Member State is limited, it has not hesitated to make the state liable for breaches. This is evident from the Rechberger case.30 This case concerned the Austrian transposition of an EC directive that provided security for buyers of package-travels in cases where the travel company became insolvent.31 The applicant claimed damages for losses due to incorrect implementation of the directive. The main reason for this claim was that the Austrian regulation only applied to package-travels with departure after 1 of May 1995, even though the EC directive provided that the rules should be applied from 1 of January 1995.

The ECJ came to the conclusion that there was nothing in the directive that may have implied that the Austrian state where allowed to make the provisions applicable later than what was stated in the directive. Neither did the Member States have any discretion regarding this Article in the directive. Consequently, the ECJ regarded this breach, by the Austrian state, as a sufficiently serious breach to constitute a ground for state liability.32

29 Case C-178/94 Dillenkofer and others v. Bundesrepublik Deutschland [1996] ECR I-4845
30 Case C-140/97 W Rechberger, R Greindl and others v. Republic of Austria [1999] ECR I-3499
32 Case C-140/97 W Rechberger and others, para. 51.
The case of Lindöpark\textsuperscript{33} concerned damage claims, made by Lindöpark AB against the Swedish state, based on the argument that Sweden had incorrectly transposed the Sixth VAT Directive.\textsuperscript{34} The ECJ had to rule on the guidelines given in Brasserie du Pêcheur and more specifically those concerning the measure of discretion left by the infringed rule to the national authorities. The ECJ found that the Swedish interpretation of the Sixth VAT Directive had no basis in the Directive. Since the Sixth VAT Directive had a clear and precise wording, the Swedish government had a significantly reduced or even no discretion when it came to making legislative choices. Furthermore, the Swedish legislation had been repealed from 1 January 1997 which showed that the Swedish government was aware that the national legislation was incompatible with Community law. The ECJ ruled that, in circumstances such as those at hand, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.\textsuperscript{35}

In the Larsy case, an authority under the Belgian state, the Institut national d'assurances sociales pour travailleurs indépendants (INASTI), had wrongfully calculated benefits (pension, old age- and death insurance) for migrant workers under two Council Regulations.\textsuperscript{36} The applicant was partially covered in another Member State for some of the benefits and there were national rules applicable against such overlapping. These national rules were incompatible with the two Council Regulations and should thus have been set aside.\textsuperscript{37} The ECJ stated that the Belgian authorities had no substantive choice in the matter of how to act and that the wrongful calculation of pension for the applicant was a clear breach of Community law. What constituted a clear breach of Community law was the fact that Belgian authorities precluded overlapping benefits when a person had worked in two Member States during the same period of time. The ECJ had in an earlier case, involving INASTI as well, found that persons working in two different Member States when obliged to pay insurance in

\textsuperscript{33} Case C-150/99 Svenska Staten v Stockholm Lindöpark AB [2001] ECR I-00493
\textsuperscript{34} Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes Common system of value added tax
\textsuperscript{35} Case C-150/99 Lindöpark, para. 40-42
\textsuperscript{37} Case C-118/00 Gervais Larsy v Institut national d'assurances sociales pour travailleurs indépendants (INASTI) [2001] ECR I-05063
both states were entitled to overlapping benefits.\textsuperscript{38} The ECJ therefore found that the relevant provision of EC-law was both clear and precise and that there consequently should not have been a misinterpretation of how the pension for the applicant should have been calculated. The breach of Community law was thus clearly sufficiently serious.\textsuperscript{39}

2.2.2.2. Excusable Breach and Unclear EC-Provision

In \textit{British Telecom}, the ECJ examined whether the rule infringed by the United Kingdom was sufficiently clear and precise with reference to the guidelines given in \textit{Brasserie du Pêcheur}.\textsuperscript{40} \textit{British Telecom} concerned the United Kingdom’s failure to transpose a directive correctly into national law. Article 8(1) of the relevant directive stated that

\begin{quote}
"[t]his directive shall not apply to contracts which contracting entities [...] award for purchases intended exclusively to enable them to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions."\textsuperscript{41}
\end{quote}

The national provisions which transposed the directive into national law stated that

\begin{quote}
"These Regulations shall not apply to the seeking of offers in relation to a contract by a utility specified in Schedule 2 for the exclusive purpose of enabling it to provide one or more of the public telecommunications services specified in the Part of Schedule 2 in which the utility is specified."\textsuperscript{42}
\end{quote}

Since the wording of the directive was imprecise and difficult to interpret, the ECJ ruled that, even though the United Kingdom had failed to transpose the directive completely, the interpretation made by the United Kingdom was both plausible and made in good faith and could thus not warrant liability.\textsuperscript{43} The ECJ stated, after repeating its \textit{Brasserie du Pêcheur} formula, that

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{38} Case C-118/00 Larsy, para. 13
\item \textsuperscript{39} Case C-118/00 Larsy, para. 38-55
\item \textsuperscript{40} Case C-392/93 R v HM Treasury ex parte British Telecommunications plc [1996] ECR I-1631
\item \textsuperscript{41} Case C-392/93 British Telecom, para. 6
\item \textsuperscript{42} Case C-392/93 British Telecom, para. 8
\item \textsuperscript{43} Chalmers, p. 404
\end{itemize}
\end{footnotesize}
“in the present case, Article 8(1) is imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it by the Court in this judgment, the interpretation given to it by the United Kingdom in good faith and on the basis of arguments which are not entirely devoid of substance [...]. That interpretation, which was also shared by other Member States, was not manifestly contrary to the wording of the directive or to the objective pursued by it.”

Even though it is up to the national courts, in principle, to decide whether a breach is sufficiently serious the ECJ found that it had all the necessary facts needed to make the assessment. Furthermore, the breach could not be regarded as sufficiently serious because the United Kingdom was also left without guidance from the Case law of the Community Courts. ECJ thus found that even though a breach had been committed by the state, the circumstances made the breach excusable.

Another example of ECJ indulgence with a national failure to comply with Community law because of an unclear EC-provision can be found in the case of Denkavit. Denkavit was a Dutch company that partly owned a subsidiary in Germany. The German tax rules, based on an EC-directive, stated that a subsidiary which is owned at least 25% by a mother company in another Member State for an uninterrupted period of two years is to be given a tax reduction. Denkavit applied for this tax reduction, arguing that it intended to continue to be possessor of more than 25% of the subsidiary for at least two years. The German tax authorities denied this, arguing that the mother company must already by the time of application have owned the subsidiary for a period of two years to be granted the reduction.

The ECJ stated when the case was referred to it that the relevant EC-directive was to be interpreted in the way that Denkavit did, and then continued to examine if the German breach in this case were severe enough to constitute a ground for a damage claim against the German state. The court began to observe that the German interpretation had also been made in several other Member States which indicated that the directive obviously was able to be interpreted in different ways. It then pointed out that there was not any case-law from the ECJ that could have helped the German tax authorities with the interpretation. These

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44 Case C-392/93 British Telecom, para. 43
45 Case C-392/93 British Telecom, para. 41
46 Case C-392/93 British Telecom, para. 44
factors taken together made the ECJ to conclude that this breach cannot be regarded as a sufficiently serious breach.\textsuperscript{48}

\subsection*{2.2.2.3. Lack of Discretion and Unclear EC-Provision}

A question that has been debated is to what extent the Member States discretion is to be decisive when determining whether the breach committed is to be regarded as sufficiently serious or not.\textsuperscript{49} The ECJ indicated in \textit{Haim}, that when there is no, or a small margin of discretion left for the Member State, a plain breach may be enough to establish the existence of a sufficiently serious breach.\textsuperscript{50} However, the court continued by stating that this factor is not by itself decisive. It clarified that

\begin{quote}
\textbf{\texttt{\textquote[\textsuperscript{51}]{[i]n order to determine whether such an infringement of Community law constitutes a sufficiently serious breach, a national court hearing a claim for reparation must take account of all the factors which characterize the situation put before it\textsuperscript{51}.}}}
\end{quote}

after which the court listed all the indicating factors that were laid down in the \textit{Brasserie du Pêcheur} case. Thus, even if the discretion factor is indeed important, consideration must still be taken to the other factors. This fact is even more evident when examining the \textit{Brinkmann} case.\textsuperscript{52} Denmark had failed to implement an EC-directive, which by itself was a serious breach because of the lack of discretion regarding whether to implement EC-directives or not. However, the ECJ found, when looking at other factors, that Denmark was not liable. This was partly because Denmark, even if they had not implemented the directive, did apply the provisions of it, and partly because the directive could be misinterpreted, i.e. the directive was unclear.

\textsuperscript{48} Case C-283/94 \textit{Denkavit}, para 51.
\textsuperscript{49} See chapter 2.2.1.
\textsuperscript{50} van Dam, p 500. See also Case C-424/97 \textit{Haim}, para. 38.
\textsuperscript{51} Case C-424/97 \textit{Haim}, para 42.
\textsuperscript{52} Case C-319/96 \textit{Brinkmann Tabakfabriken v. Skatteministeriet} [1998] ECR I-5255
2.2.3. Further Development

In 2003, with the judgment in Köbler, an interesting amendment to the application of the Francovich doctrine was introduced.\(^53\) The ECJ stated in this case, that the Member States can be held liable for braches of Community law made by a national court adjudicating as last resort. The ECJ explained that, “since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights”.\(^54\) It went on by stating that the protection of rights which individuals have from Community law would diminish if individuals could not get reparation from the state based on a wrongful decision by a court adjudicating at the last instance.\(^55\)

Although the ECJ in Köbler stated that the conditions would be the same under liability for court decisions as under the regular state liability doctrine, the ECJ slightly modified the sufficiently serious condition. When the breach is made by the court adjudicating at the last instance, the ECJ explained, the state can only be liable in the exceptional case where the court has manifestly infringed the applicable law.\(^56\) Factors to be included when determining if the court has manifestly infringed the law are if the breach was intentional, if it is excusable or not and most importantly if the ECJ has taken a clear position on the matter in the Case law.\(^57\)

In Traghetti del Mediterraneo\(^58\) in 2006, the ECJ put further clarity to what extent national court decisions can lead to state liability. The Italian Supreme Court refused to refer a case concerning alleged breaches of EC-law to the ECJ for a preliminary ruling. The applicant, Traghetti, claimed liability damages from the state arguing that the Italian courts had misinterpreted the Community law and that the Supreme Court, as a court of last instance, had infringed its obligation to refer under Article 234 EC. The Italian state denied responsibility, claiming that state liability must be precluded when the infringement is done by a national court interpreting legal provisions or assessing facts and evidence. Furthermore, Italian provision stated that liability was limited to cases of intentional fault and/or serious

\(^{53}\) Case C-224/01 Köbler v Austria [2003] ECR I-10239

\(^{54}\) Case C-224/01 Köbler, para. 34

\(^{55}\) Case C-224/01 Köbler, para. 36

\(^{56}\) Case C-224/01 Köbler, para. 53

\(^{57}\) Case C-224/01 Köbler, para 55 and 56

\(^{58}\) Case C-173/03 Traghetti del Mediterraneo SpA v Repubblica Italiana [2006] ECR I-5177
misconduct of the national court. The ECJ rejected the Italian claim and restated its Köbler formula, under which liability for decisions made by a national court adjudicating at the last instance only can occur when the court has manifestly infringed the applicable law. This could for example be when a court gives a deliberately wrongful interpretation of Community law. Since the conditions set by the Italian legislator, e.g. that a fault must be intentional or that a serious misconduct must be at hand by the national court, is clearly stricter than the conditions stated in Köbler, the ECJ stated that they are incompatible with Community law. A breach, the ECJ continued, can thus give rise to state liability also when the national court is assessing facts and evidence. The development in Köbler and Traghetti del Mediterraneo is of interest concerning the future development of the state liability doctrine, even though it does not in any way effect the Swedish Chancellor’s decision in the PIA decision.

2.2.4. The Meaning of Flagrant Violation/Serious Breach under Article 288 EC

The ECJ stated in Brasserie du Pêcheur that the conditions under which the Member States shall incur liability cannot differ from those conditions under which the Community can be held liable. This means that not only the Case Law on “sufficiently serious breach” under the Francovich doctrine is of interest, but also the case law on “flagrant violation-serious breach” under Article 288 EC. Although the Case Law under Article 288 EC is more influenced by the Case Law concerning the Francovich doctrine than vice versa, there are some interesting novelties and some parallels to be drawn between the two actions.

In one of the first cases concerning the non-contractual liability of the Community under Article 288 EC, the Schöppenstedt case, the ECJ stated that the Community could be held liable if “a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred”. However, it was not clear what constituted a sufficiently flagrant violation. During the 1970’s the ECJ examined and clarified what constituted a flagrant violation under Article 288 EC. In the Bayerische case, the applicants

60 Case C-224/01 Köbler, para. 51
61 Albors-Llorens, p. 3. See also Case C-173/03 Traghetti del Mediterraneo, para. 39 & 40.
62 Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur, para. 42
based their damages claims on the fact that Council Regulation 563/76 imposed an obligation to purchase skimmed-milk powder under discriminatory distribution burdens which had in an earlier case been found null and void. The ECJ found that the fact that the Council Regulation 563/76 had been found null and void was in itself insufficient to constitute a sufficiently serious breach. The ECJ continued by stating that the Community would only in exceptional circumstances incur liability when the measure at hand involved choices of economic policy. It was further held by the ECJ that when, as in the matter at hand, the Community is implementing the Common Agricultural Policy, the institutions would only incur liability when they manifestly and gravely disregard the limits on the exercise of their powers. The breach was not held to be manifest and grave because its effects were not serious enough. In the Amylum case, which also concerned damages claims due to a Regulation found invalid because it was in breach of Article 40(3), the ECJ stated that the Community, while adopting Regulation 1111/77, were in an emergency situation and was thus awarded some discretion. The applicants were in this case denied damages, not because the effects of the breach was not serious enough, (on the contrary the losses were severe) but because the manner of the breach was found excusable. The aim pursued by the Community was legitimate and it was an emergency situation. The two cases read together show that an applicant, to be granted restitution, must show that the effects of the breach made was serious and that the manner of the breach was arbitrary. This has only occasionally been done.

The restrictive approach taken by the ECJ in the 1970’s has recently been somewhat liberalized. In the case of Stahlwerke the requirement of arbitrariness was dropped. Furthermore, in Bergaderm the ECJ explicitly drew on the factors mentioned in the Brasserie du Pêcheur, i.e. the relative clarity of the rule breached, the measure of discretion left to the relevant authorities, whether the error of law was excusable or not and whether the

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64 Craig, p. 552
66 Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 Bayerische, para. 3
67 Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 Bayerische, para. 5
68 Craig, p. 553
70 Craig, p. 554

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breach was intentional or voluntary. Regarding the condition that a breach must be serious, the ECJ repeated its formula laid down in Brasserie du Pêcheur, which states that a breach is serious when a Member State or a Community institution has manifestly and gravely disregarded the limits on its discretion. The requirement that the loss suffered has to be serious, i.e. the effect of the breach, has also been dropped which is evident from the Mulder case. Since this is not part of the test under Brasserie du Pêcheur, it is no longer of interest.

2.3. Member State’s Discretion when Applying “Sufficiently Serious”

The principle of state liability is without doubt one of the most controversial principles that the ECJ has recognized. The expansion of the liability to include also judicial decisions of national courts is only one controversial factor. It is also widely debated how far the Member States right to a judicial autonomy can be restricted in order to ensure EC-law. This issue will be handled in this subchapter.

The assessment whether a breach is serious or not is in the end up to the national courts to decide. This was first stated in Brasserie du Pêcheur, and then reaffirmed in Haim where the ECJ simply stated that “it is for the national court to examine whether or not, in the case before it, there is a serious breach of Community law”. This rule is however not unconditional. It is only when the national rules do not contradict the general principles of Community law that the national rules applies. In order to satisfy the principles of effectiveness and equivalence, the national court’s has in number of cases been obligated to set national rules aside in cases concerning state liability. In Rosalba Palmisani, the ECJ made clear that a national provision stating a one-year limitation period for damages claims

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74 Case C-352/98 Bergaderm, para. 43 and Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur, para. 55  
75 Case 120/86 Mulder v Minister van Landbouw en Visserij [1988] ECR 2321  
76 Craig, p. 557  
77 Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur, para 58.  
78 Case C-424/97 Haim, para. 48  
79 These principles states that Member States must not make it more difficult to enforce Community law than what it is to enforce national law (equivalence), and that procedural rules must not make it impossible or excessively difficult to enforce Community law (effectiveness). See e.g. Case 45/76 Comet BV v Produktschap voor Siegerwassen [1976] ECR 2043
for losses due to delayed transposition of EC-directives is invalid if the same time-limit is not applied on domestic claims.\textsuperscript{80} This would be a clear breach of the equivalence principle.\textsuperscript{81}

The ECJ has not hesitated to put aside the principle laid down in \textit{Brasserie du Pêcheur} which states that it is up to the national courts to do the assessment whether a breach is considered sufficiently serious or not. This is evident from subsequent ECJ case-law.\textsuperscript{82} In \textit{Brinkmann} for example, the ECJ ruled that it, in this particular case, had sufficiently information concerning the case which the preliminary ruling was based upon in order to make the sufficiently serious-assessment by itself.\textsuperscript{83}

As already been stated, there is no room for the Member States to make damage-liability for infringements of EC-law dependent on more restrictive conditions as those laid down by the ECJ.\textsuperscript{84} But what about making the conditions less restrictive? It is clear from \textit{Brasserie du Pêcheur} that the principle of state liability implies a type of “minimum harmonization”, which means that the Member States are free to make damages more accessible. However, the ECJ has subsequently indicated that there are situations, e.g. if the accessibility would lead to an unnecessary increase of the number of damages-cases that was referred to the ECJ, where the right the make the conditions less restrictive is restricted. The ECJ has stated that, since this could jeopardize the proper functioning of the Court, the Member State’s may put itself in a position where it is in breach of the solidarity principle laid down in Article 10 EC if they were to make it too easy to claim damages.\textsuperscript{85}

\textsuperscript{80} Case C-261/95, Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS) [1997] ECR I-04025
\textsuperscript{81} Gordon, page 155 f.
\textsuperscript{83} Case C-319/96 \textit{Brinkmann}
\textsuperscript{84} Joined Cases C-46/93 and C-48/93 \textit{Brasserie du Pêcheur}, para 76-79.
\textsuperscript{85} Jans, p. 285, see also Case C-511/03 \textit{Ten Kate} [2005] ECR I-8979, para. 31.
3. The Swedish “Private importation of alcohol” Decision

The Swedish monopoly on alcohol has been the issue in number of legal proceedings, both before the ECJ and before Swedish courts.\textsuperscript{86} We have neither the intention of evaluating the legality of this monopoly, nor do we have the space to do it. However, it makes a good starting point to this third chapter, where the PIA decision will be examined.\textsuperscript{87}

In 2007, the ECJ made clear in its judgment in Rosengren that the Swedish prohibition of private importation of alcohol was contrary to Community law.\textsuperscript{88} The Swedish authorities had confiscated alcohol that was ordered by Swedish consumers, among them Mr. Rosengren, but transported into Sweden by other persons than the purchasers.\textsuperscript{90} The ECJ stated that this was a restriction of the free movement of goods, as stated in Article 28 EC, and that it could not be justified by reference to the public health (Article 30 EC) or as a rule inherent in the state monopoly on the distribution of alcohol in Sweden (Article 31 EC).\textsuperscript{91}

Relying on this judgment, a number of Swedish individuals who had got their alcohol confiscated brought damage actions against the state of Sweden because of the losses suffered by not receiving the alcohol. This claim was brought before the Swedish Chancellor of Justice, who is authorized to handle state liability proceedings in Sweden. The Chancellor rejected these claims, arguing that the breaches committed by the Swedish state were both unintentional and excusable. Firstly, since Sweden had reasons to believe that the Swedish rules prohibiting private importation were governed by Article 31 EC and therefore were legitimate restrictions of free movement. Secondly, the Chancellor continued, there were reasons to believe that the Swedish rules were in any case justified by Article 30 EC, if Article 31 EC was not applicable on this provision. The Chancellor thus found the breach not to be sufficiently serious. We will firstly show how the Chancellor of Justice has argued in the PIA decision and then examine the compatibility of the decision with Community law concerning the sufficiently serious criterion.

\textsuperscript{86} E.g. Chancellor of Justice Decision 2007-08-28, Case C-170/04 Rosengren and others v. the Kingdom of Sweden [2007] NYR, Case C-189/95 Franzén [1997] ECR I-5909
\textsuperscript{87} Chancellor of Justice Decision 2007-08-28
\textsuperscript{88} 4:2 Swedish Law on Alcohol (1994:1738)
\textsuperscript{90} When we hereinafter uses the term “private import of alcohol”, we refer to this and not imports by travelers who transport their own alcohol into Sweden.
\textsuperscript{91} Case C-170/04 Rosengren
3.1. Private Importation of Alcohol and Article 31 EC

The question whether the national provisions on the prohibition of private imports of alcohol should be regulated under Article 31 or under 28 EC was one of the main issues in Rosengren. The ECJ found that the relevant national provisions should be assessed in the light of Article 28 EC, and not Article 31 EC. The ECJ started by arguing in line with its previous judgment in Franzén, a case which concerned the Swedish rules on the wholesale of alcohol.\(^92\) The ECJ stated that

"the effect on intra-Community trade of the other provisions of the domestic legislation, which are separable from the operation of the monopoly although they have a bearing upon it, must be examined with reference to Article 28 EC".\(^93\)

The ECJ went on to determine that the relevant national provision in Rosengren regulated the private importation of alcoholic beverages and not the wholesale of these. For the provisions to fall under Article 31 EC, they must regulate the operation of the monopoly. In this case, they must relate to the methods of retail sale of alcoholic. As they fail to do this, the ECJ stated that the national provisions at hand must be assessed in the light of Article 28 EC.\(^94\)

On the question whether the national provisions constitutes a quantitative restriction on imports (Article 28 EC), the ECJ answered simply by restating its Dassonville formula that

"all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions".\(^95\)

The ECJ then concluded that the national prohibition on private importation was a restriction of the free movement of goods.

The Swedish Chancellor of Justice stated in its decision in the PIA decision that the breach committed by the Swedish state should not be regarded as sufficiently serious.

\(^92\) Case C-189/95 Franzén
\(^93\) Case C-170/04 Rosengren, para. 18
\(^94\) Case C-170/04 Rosengren, para. 15-27
\(^95\) Case 8/74 Dassonville [1974] ECR 837, para. 5
argued that it was a reasonable interpretation that the rules governing private importation of alcohol should be regulated by Article 31 EC. The breach should not be regarded as sufficiently serious because firstly there is a natural connection between wholesale imports and private import and secondly because the position taken by the Swedish government was shared by the Norwegian and Finnish governments as well as the Advocate General in the Rosengren case.

### 3.2. Restriction of the Free Movement of Goods and Article 30 EC

The Chancellor of Justice also argued that, in the case of this provision not being covered by Article 31 EC, it would nonetheless be reasonable for the Swedish state to believe that it was justified because of the aim of the provision, which was to protect the public health. Article 30 EC states that quantitative restrictions on the free movement of goods may be justified if the aim is to serve a public good, in this case the public health. The Chancellor did not specify on which grounds Sweden could have had reasons to rely on the public health-clause in his judgment. However, in the *Rosengren* case there was two grounds that were being evaluated:

- The general need to limit the consumption of alcohol
- Preventing young persons (under 20 years old) from becoming purchasers of alcohol

Regarding the first argument, the ECJ stated in *Rosengren* that there are other measures that would be more appropriate to achieve this objective. The court declared that there were nothing that prevented the consumers to ask *Systembolaget* (the company designated to handle the alcohol distribution in Sweden) to supply them with the alcohol. Thus, there was no reason to believe that the general consumption would increase without this prohibition on private importation.

The Swedish state argued in *Rosengren*, regarding the second argument, that the possibility to secure that age checks where made when alcohol is distributed in Sweden would vanish if consumers were able to order alcohol from other distributors than *Systembolaget*.

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96 The Private importation of alcohol case
97 Case C-170/04 *Rosengren*, para. 44-47.
The ECJ did not accept this argument, stating that there were less restrictive means that could achieve this objective. It has been accepted that age checks have been made by different agents outside of Systembolaget, such as food shops and service stations. A less restrictive method that not necessarily would be less effective, the ECJ continued, could be to make the consumers to declare to the distributor that they have reached 20 years of age. However, the Chancellor of Justice argued that the Swedish state could escape liability because of the uncertainty regarding this issue and the state’s good faith.

3.3. Discussion on the Compatibility of the Chancellor of Justice’s Decision with Community Law

After having presented the arguments given by the Swedish Chancellor of Justice in the PIA decision (chapters 3.1. - 3.2.), a comparison between this judgment and the Case law of the ECJ will now be presented. Is the Chancellors judgment in line with the guidelines given by the ECJ?

3.3.1. Reason to Believe That the National Provisions Were Regulated by Article 31 EC

The Swedish Chancellor of Justice rejected the applicants claim in the PIA decision on the grounds that the breach of Community law committed by the Swedish state was to be considered both excusable and unintentional. He argued that it was reasonable to interpret the prohibition of private imports of alcohol in line with the Franzén98 case, as did both the Advocate General and the Finnish and Norwegian governments in the Rosengren99 case, since there is a natural connection between private imports and wholesale imports of alcohol. In the Franzén case, the ECJ had stated that “it is necessary to examine the rules relating to the existence and operation of the monopoly with reference to Article 37 (now

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98 Case C-189/95 Franzén
99 Case C-170/04 Rosengren
Article 31) of the Treaty”. In the Franzén case the ECJ found that rules regulating imports at a wholesale level should be regulated by Article 31 EC.

The Swedish Chancellor of Justice argues that the breach is excusable since the ECJ had stated in Franzén that rules governing the Swedish alcohol monopoly should be regulated by Article 31 EC. It seems that the Chancellor of Justice chooses to ignore the fact that the ECJ also stated that rules effecting intra-community trade which can be separated from those regulating the operation of the monopoly should instead be examined with reference to Article 28 and 30 EC, even though they might have bearing upon the monopoly. Rules regulating the private imports of alcohol clearly fall outside the scope of “rules governing the Swedish alcohol monopoly” and falls within the exception stated in Franzén. The excuse that rules on private imports actually falls within rules which has as an objective to govern the Swedish alcohol monopoly does not seem plausible. This was also the finding of the ECJ in the Rosengren case.

There is a difference between wholesale imports of alcohol and private imports of alcohol. This is in contrast with the claim made by the Swedish Chancellor of Justice that there is a natural connection between rules concerning wholesale imports of alcohol, as was the case in Franzén, and private imports of alcohol, as was the case in Rosengren. The difference arises from the fact that wholesale imports has a commercial character and falls within rules governing the monopoly because it regulates who can sell and storage alcohol. While private imports, on the other hand, clearly lacks all commercial character and has no connection whatsoever with wholesale imports. However, the interpretation made by the Swedish state and the claim by the Chancellor of Justice that the breach is excusable, is somewhat strengthened by the fact that the two Advocate Generals and the Finnish and Norwegian governments sided with the Swedish state in the Rosengren case.

The Swedish Chancellor of Justice’s decision and the Swedish state’s breach of Community law should also be examined and judged based on the discretion awarded the Swedish state concerning the question whether the breach is to be considered sufficiently serious. The Swedish state was acting within a neither wide nor narrow margin of discretion. Although there were previous case law, in the form of Franzén, on the matter, which,

100 Case C-189/95 Franzén, para 35
101 The Private importation of alcohol case
102 See chapter 3.1
according to the *Larsy*\(^{103}\) case, limits the Member States discretion. Other Member States, as well as two Advocate Generals, had come to the same conclusion as the Swedish state did, which, according to the *Denkavit*\(^{104}\) and *British Telecom*\(^{105}\) cases, indicates that the breach could be found to be excusable. In *British Telecom* the ECJ also stated that a breach could be excusable if it was made in good faith.

The Swedish state’s discretion must be weighed against what has been mentioned above concerning how clear and precise the rule breached is. This would in this case also include the ECJ’s previous case law on the matter, which would be the *Franzén* case, and the interpretation made by the Swedish state that there is a natural connection between rules regulating wholesale imports and private imports. All in all the Swedish Chancellor of Justice’s decisions seems somewhat difficult to reconcile with the ECJ’s case law on the sufficiently serious criteria.

3.3.2. *Reason to Believe That the Restrictions Were Justified Under Article 30 EC*

The Chancellor of Justice stated in his judgment that even though the relevant national provision was not regulated by Article 31 EC, the state of Sweden still had reasons to believe that it would be justified with reference to the protection of public health. Firstly, it must be stated that it is remarkable that the Chancellor in his decision states this without presenting any supporting arguments. When arguing that there were reasons to believe that the provision should fall under Article 31 EC, the Chancellor, as can be seen above, draws parallels to previous Case Law of the ECJ, which could give support to the state’s defense. However, when discussing this issue, the Chancellor just states that the state in fact did have arguments to claim that the provision was justified under Article 30 EC by the objective to protect the public health. The reasons that the Chancellor has in mind is most likely the ones which the Swedish state presented, and the ECJ rejected, in the *Rosengren* case.

The Swedish state first argued that the prohibition would be justified under Article 30 EC on the ground that it would limit the general consumption of alcohol in

\(^{103}\) Case C-118/00 *Gervais Larsy v Institut national d'assurances sociales pour travailleurs indépendants (INASTI)* [2001] ECR I-05063

\(^{104}\) Case C-283/94 *Denkavit Internationaal and others v. Bundesamt für Finanzen* [1996] ECR I-5063

\(^{105}\) Case C-392/93 *R v HM Treasury ex parte British Telecommunications plc* [1996] ECR I-1631
Sweden. It is evident from cases such as *British Telecom*, that an infringement of Community law may be excusable if it is done in good faith and if the interpretation of the relevant Community provision is uncertain, which, according to the Swedish state, is the case here. The use of the derogation from Article 28 EC laid down in Article 30 EC has been strictly regulated by the ECJ. Firstly, the restriction must be effective, and secondly, it must be the least restrictive measure to secure its objective. In this case, one must agree with the ECJ in *Rosengren* when it stated that there is nothing that indicates that the general consumption of alcohol in Sweden would increase if consumers where allowed to import alcohol. They could just as well order the alcohol via *Systembolaget*. This fact is even more evident because of the fact that consumers that import alcohol still must pay Swedish taxes for the imported goods. The economic reason to import alcohol is thus insignificant. With these factors taken into consideration, our opinion is that the Swedish state had no reason to believe that the prohibition would be an effective measure to limit the general consumption of alcohol.

When it comes to the argument that there were reasons to believe that the national provision was justified because it prevented youngsters under 20 years of age to buy alcohol, the situation is more complex. This was, according to the ECJ in *Rosengren*, a justified objective to restrict the free movement of goods. However, this argument was rejected by the ECJ because of two reasons. Firstly, the relevant restriction goes manifestly beyond what is necessary to achieve the objective, and secondly, there were other less restrictive measures that could have been equally effective. The decisive question regarding this is if there were excusable reasons for the Swedish state to believe that the prohibition on imports of alcohol in fact was the least restrictive measure and that it did not go beyond what was necessary in order to prevent teenagers to get access to alcohol.

The Member States have admittedly a rather wide margin of discretion when using the derogations under Article 30 EC. This discretion does not, however, mean that the Member States are allowed to contravene the conditions under which the derogations must be made according to the ECJ. Accordingly, if it is obvious that the Swedish state could have achieved the objective by less restrictive means, this would in our opinion mean that the state has gone

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106 Case C-392/93 *British Telecom*
108 Case C-170/04 *Rosengren*, para. 49.
109 Case C-170/04 *Rosengren*, para. 51 and 57.
beyond its discretion and that the infringement would constitute a sufficiently serious breach. When examining this, one must take account to other possible solutions to the age problem. In *Rosengren*, the possibility of making the importers verify their age to the deliverer was discussed. This is definitely a measure that is much less restrictive to the free movement of goods. There is furthermore nothing that stipulates that this measure would be less effective in order to achieve the objective, unless one regards distributors from other states than Sweden as less reliable to handle the age check, than for example the Swedish food shops which are agents to *Systembolaget*. 
4. Analysis and Conclusion

In this chapter, the facts presented above will be analyzed, so that we, in the end of the chapter, are able to present our conclusions.

4.1. Sufficiently Serious as it is Interpreted by the ECJ

4.1.1. The Decisive Conditions

The ECJ has given clear guidelines concerning the assessment whether a Member State’s breach of Community law is to be considered as sufficiently serious. However, after examining the case law given by the ECJ on the Francovich doctrine, it seems evident that there are two factors that the ECJ has deemed as more essential than the others. These are the margin of discretion awarded to the Member State in the field where the breach is committed, and the clarity and precision of the Community provision infringed.

4.1.1.1. The Margin of Discretion Awarded to the Member States

When a breach of Community law is made by states in areas where the Member States is awarded a wide margin of discretion, it is evident that the risk of states being liable for that breach is distinctly reduced. When there, on the other hand, is no discretion given to the Member States, the ECJ have stated that the mere breach may result in state liability. As can be seen in the cases presented in this study, there are few circumstances in which the Member States enjoy a wide margin of discretion when it comes to implementing EC provisions. When implementing an EC directive there is for example no room for national rules that contradict the directive.\(^{110}\) The clearer the EC provision is in its wordings or if there has been a statement from the Community regarding the interpretation of the provision, the harder it is for the Member State to argue that it enjoys a wide margin of discretion and therefore not should be held liable for a breach.\(^{111}\)

\(^{110}\) See chapter 2.2.2.1.
\(^{111}\) See chapters 2.2.2.1.
4.1.1.2. The Clarity and Precision of the EC-rule breached

The ECJ has often in state liability cases evaluated whether the breach is excusable or not, or if there is settled case-law on the matter etc., when concluding whether a sufficiently serious breach is committed. However, it seems, in our opinion, like the court, in these cases, gives the highest amount of consideration to whether the relevant EC provision is clear or not. The reason for this is rather obvious. If the court finds that the provision was unclear it is most likely because there was no previous judgment by the ECJ that could have facilitated the interpretation. Consequently, this often makes the breach excusable. If the provision on the other hand was clear, a breach must almost always be inexcusable. It is the same situation concerning if the breach was voluntary or not. In order to evaluate whether the breach was voluntary, the court must make an assessment whether the EC-provision was clear, and consequently, if there was any room for misinterpretation.

There are of course reasons for the high importance that is given to the clarity condition. A state should for example not be held liable for a breach of an EC provision that was next to impossible to interpret. However, we are also prepared to agree with Professor Cees Van Dam in his fear that this condition to a large extent could be a loophole for the Member States in order to escape liability. The provisions within the Community are often created rather unclear, in order for the ECJ to in a teleological way make them suit different situations. This has of course its advantages. The disadvantage, on the other hand, is that unclear provisions, before they have been more clearly specified by the Commission or the ECJ, do not have much power to make the Member States liable for breaches against them.

4.1.2. The Impact of Article 288 EC

In the Schöppenstedt case, which was given 25 years earlier than Brasserie du Pêcheur, the ECJ set out the requirement that a breach must be sufficiently serious to warrant restitution from the Community, but it was at the time defined as a flagrant violation. The Case Law on Article 288 EC is interesting because the ECJ only exceptionally gets to determine if a sufficiently serious breach of EC law has occurred under the Francovich

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112 Van Dam, p. 501.
doctrine, as this is, in principle, for the Member States to determine. Under Article 288 EC, on the other hand, the ECJ is the one who determines the seriousness of the breach. This means that there is greater chance that the ECJ expands the Case law concerning the question if the actual breach at hand constitutes a sufficiently serious breach under Article 288 EC than under the Francovich doctrine. Although the cases under the Francovich doctrine have received most attention, the case law under Article 288 EC is equally important and have been somewhat liberalized in the latest decade. If this development continues, it will affect the Case Law concerning the sufficiently serious condition under the Francovich doctrine as well. Notwithstanding the possible future development on Article 288 EC and its impact on the state liability doctrine, it is the Case law under the Francovich doctrine which has been most useful in order to determine if a breach is to be considered sufficiently serious.

4.1.3. Köbler and the Modification of the “Sufficiently Serious” Criterion

In Köbler, the ECJ introduced the groundbreaking novelty of state liability when a national court of last instance infringes Community law. The ECJ recognized the fact that lack of such remedy against the national court adjudicating at the last instance would seriously deprive individuals of protection of rights which derive from Community law. Although the ECJ introduced this particular form of state liability, it did so by limiting the conditions to be granted damages compared to the normal sufficiently serious condition. Liability of national courts adjudicating at last instance can only incur in the exceptional case where the court has manifestly infringed the applicable law.

The reason for the wide margin of discretion which the ECJ awarded the national courts adjudicating at the last instance can only be explained by fear, fear of non compliance by national courts if the ECJ is seen to be engaged in judicial activism which is considered to progressive. The question of liability of the court adjudicating at last instance is by its very nature a controversial question which the ECJ by its Köbler judgment only left partially answered, and in all probability left all parties involved feeling unsatisfied. The Member States, since they now have to answer in state liability cases for the judgments of a, possibly, constitutionally independent Supreme Court, and individuals, because the number of cases where the national court is adjudicating as last instance manifestly infringes the

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114 Case C-224/01 Köbler v Austria [2003] ECR I-10239
applicable law must be next to non-existent. Compared to the traditional Francovich doctrine, this means that the sufficiently serious condition is elevated to an almost impossible level.

There are only two justifiable reasons for the ECJ to restrict the sufficiently serious criterion within this field. Firstly, some supreme courts are constitutionally independent. Secondly, it would put, for example, the Swedish Supreme Court (Högsta Domstolen) in a peculiar situation if it would have to pass judgment on a ruling by the highest administrative court (Regeringsrätten) or vice versa to determine if they had manifestly infringed the applicable law. Even if these reasons are plausible it still does not change the fact that the half way approach taken by the ECJ in Köbler still left the possibility of the state answering for the breach committed by a constitutionally independent supreme court. Most importantly, it has left individuals in a position where the possibility of getting restitution from the state on the grounds of an infringement made by the national court adjudicating at the last instance is almost non-existent.

Köbler gave the impression that the Member States had an almost endlessly wide discretion when it came to state liability for national courts adjudicating at the last instance. This is most evident from the case of Traghetti del Mediterraneo, where the applicable national law stated that a court could incur liability only in the case of intentional fault and/or serious misconduct. Since these were more stringent conditions than under Köbler, although not by much, the ECJ struck down the national provisions. Traghetti del Mediterraneo shows that the ECJ, although hesitant to expand state liability too far concerning the national court adjudicating at the last instance, will not let non-complying Member States evade their obligations under the Treaty. Köbler gave the Member States a wide discretion when it comes to a breach committed by a court adjudicating at the last instance, but it also set an outer boundary for the sufficiently serious condition.

115 Case C-173/03 Traghetti del Mediterraneo SpA v Repubblica Italiana [2006] ECR I-5177
116 It is important to note that the criterion under Köbler does not in any way effect the Swedish Chancellor of Justice’s decision in the Private importation of alcohol case.
4.2. A Need for Clarification or Modification?

4.2.1. State Liability on Infringements of the Fundamental Freedoms

The guidelines given by the ECJ on the interpretation of the sufficiently serious criterion has without exemption been given in cases where the alleged infringement has been made on a secondary legislation of Community law. However, the case evaluated in the third chapter of this study, the PIA decision, concerned infringements of Treaty provisions. The difference between Treaty provisions and secondary legislation is that the former is often much more generalized, which makes it in many cases unclear. Should the Member States thus have even more discretion to claim that the provision is unclear and therefore escape liability when it comes to infringements of the fundamental freedoms established in the Treaty? On the other hand, Case law on Treaty provisions is often more comprehensive than what is the case on secondary legislation. Consequently, it can be stated that the interpretation of Treaty provisions, in many cases, should be less complicated than what it is on secondary legislation. Some clarification by the ECJ would though be welcomed when it comes to this question. The question was raised before the ECJ in Schmidberger in 2003. The case concerned a state’s failure to interrupt a demonstration which hindered the free movement of goods. Unfortunately, the question regarding the sufficiently serious assessment remained unanswered even in this case, since the ECJ found the breach in this case justified by a public good.117

4.2.2. Unreasonable Difficulties to Obtain Redress in Certain Areas

The ECJ has stated in the Bayerische case that the Community would only incur liability in exceptional circumstances when the measure involved choices of economic policy. The ECJ further stated that when implementing the Common Agricultural Policy the Community would incur liability only when they manifestly and gravely disregard the limits on the exercise of their powers.118

The similarity with the reasoning in Köbler is evident. The ECJ here stated that a national court of last instance would only incur liability in the exceptional case where the court has manifestly infringed the applicable law.  

The restriction of the right to reparation in both these cases seems difficult to justify. Köbler has been discussed above and what has been said there applies here. Regarding the restriction concerning the Community’s decreased liability when a measure involves choices of economic policy, it will be remembered that since Brasserie du Pêcheur the Community incurs liability on the same grounds as the Member States. When a measure involves choices of economic policy, the Community enjoys a substantial margin of discretion. Consequently, the need to expand the protection of the Community against liability damages from individuals should be none existent. Since the Community enjoys a substantial margin of discretion they already are in a position where damage claims from individuals would most likely go in their favor. This modification of the right to redress from the Community collides with the individual’s right to reparation. The protection of the individual’s right to reparation is hampered by the fact that the current situation does not present an effective judicial remedy because it is nearly impossible to overcome the hurdles offered by the ECJ. Concerning the Common Agricultural Policy, the Community yet again enjoys a substantial margin of discretion and the elevated criterion, that the Community must manifestly and gravely disregard the limits on the exercise of their powers, only puts the individual in a position where he lacks an effective judicial remedy.

4.3. Conclusion

The Francovich doctrine has developed over the years since the ECJ introduced it in the early 1990’s, not least when it comes to the sufficiently serious criterion. The field of the doctrines application has increased from just being applicable on situations of unimplemented directives to being applicable on such complicated issues as a national court decisions. How the criterion, sufficiently serious, shall be interpreted has been the question in

119 Case C-224/01 Köbler v Austria [2003] ECR I-10239
120 See also 4.1.3.
121 See also 4.1.3.
123 Note that the criteria under Köbler and Bayerische does not in any way effect the Swedish Chancellor of Justice’s decision in the Private importation of alcohol case.
The indicators that the national courts have to take into consideration when assessing this is mainly the following:

- How clear the rule that has been breached was,
- The margin of discretion left to the Member State on the issue,
- If the breach was voluntarily or not,
- If the breach was excusable or not,
- If there is previous case-law of the ECJ that indicated that the relevant act contradicts EC-law

Two of these conditions have been found to be more influential than the others, namely the conditions concerning the discretion awarded to the Member States and the clarity and precision of the rule breached. These two conditions are interdependent. When the rule breached is clear and precise the Member States often enjoys a reduced margin of discretion and on the other hand, when the rule is unclear the Member States often enjoys a wide margin of discretion. This could be seen as a problem because of the often generalized wording of the EC provisions.

We conclude that the Chancellor of Justice’s decision in the PIA decision is not compatible with the guidelines given by the ECJ concerning the assessment of the sufficiently serious criterion. When taking the above mentioned guidelines into consideration, the breach by the Swedish state should, in our opinion, be considered as sufficiently serious.

Firstly, we find that the interpretation made by the Swedish state that rules on private imports of alcohol should be read in light of Article 31 EC is not excusable. Even though the Swedish state was awarded some discretion, the misinterpretation of Franzén is clear enough to constitute a sufficiently serious breach. The alleged connection, made by the Swedish state, between rules on wholesale imports and private imports of alcohol is too far-reaching to constitute an excusable justification. The fact that the Advocate Generals sided with the Swedish state regarding this issue is, in our opinion, not enough to escape liability.

Secondly, we do not agree with the Chancellor that it was excusable for the Swedish state to rely on the protection of the public health in order to justify the restriction of the free movement of goods. The argument that there were excusable reasons to believe that the prohibition could be justified in order to limit the general consumption of alcohol falls on the fact that that there is clearly no reasons why this objective would be achieved by a
prohibition. Neither were there excusable reasons to believe that the prohibition would be justified in order to hinder persons under 20 years of age to purchase alcohol. The prohibition could not be justified, partly because a total prohibition manifestly goes beyond this objective, and partly because there are other more suitable measures that likely would have been equally effective. There was no reason why the Swedish state could not have come to this conclusion when imposing the prohibition on private imports, why the infringement is to be considered sufficiently serious to warrant liability.

There is in our opinion some uncertainty concerning the interpretation of the sufficiently serious criterion when the infringed rule is a Treaty provision, mostly because this question has not been evaluated by the ECJ yet. What margin of discretion does the Member State enjoy in order not to become liable for infringements of Treaty provisions? The PIA decision will, if it will be referred to the ECJ by a Swedish court, possibly clarify this issue. Finally, there is in our opinion no need for the more stringent criteria under Köbler and Bayerische. The normal test under Brasserie du Pêcheur should suffice. In both these cases, a substantial margin of discretion already exists and the individual is in a difficult position without this additional safeguard for the Member States and the Community.

\[124\] Both under Köbler (liability for wrongful decisions by a national court of last instance) and Bayerische (The Community institutions liability when acting under a manifest margin of discretion), the ECJ has stated that the infringement must have been manifest to incur liability.

\[125\] Note that the removal of the criteria under Köbler and Bayerische does not in any way effect the Swedish Chancellor of Justice’s decision in the Private importation of alcohol case.
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