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Sufficiently Serious Breach and Legitimate Expectations in European Union Non-Contractual Liability: Doctrinal Clarification and Case-Mapping

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Abstract

This article examines the threshold of a sufficiently serious breach within the European Union's non-contractual liability, focusing exclusively on public authorities – European Union institutions (Articles 268 and 340 of the Treaty on the Functioning of the European Union) and Member States under the Francovich/Brasserie–Factortame line of case-law. It clarifies the relationship between a sufficiently serious breach and the principle of legitimate expectations (as an expression of legal certainty) and distinguishes this principle from the Charter right to good administration (Article 41), which primarily binds European Union bodies. The analysis is guided by two questions: (1) how the Court of Justice has defined and refined SSB across leading judgments; and (2) which criteria it applies when determining whether the threshold is met. Methodologically, the study offers a structured, case-anchored framework that consolidates and systematises the Court's factors into a five-step test: clarity and precision of the rule; scope of administrative or policy discretion; excusability and complexity; persistence in the face of settled case-law or binding judgments; and systemic or institutional contribution. A mapped set of judgments, supported by short case studies, demonstrates how the test operates across domains and highlights points of alignment and divergence between Union and State liability (including the Bergaderm convergence and the stricter standard for judicial breaches in Köbler). The findings confirm that annulment is not, by itself, sufficient to establish liability; rather, the sufficiently serious breach turns on a context-sensitive assessment of discretion and institutional conduct. By integrating dispersed jurisprudence into an operational test and clarifying the interface with annulment actions, the article enhances predictability for courts and claimants and provides practical guidance for pleading and adjudication in European Union damages actions.

Keywords

Sufficiently serious breach of law; damage compensation; non-contractual liability; Court of Justice of the European Union; legitimate expectations.

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Introduction

Non-contractual liability for breaches of European Union (EU) law is an autonomous remedial avenue within the EU legal order[1]. It enables natural and legal persons to seek compensation from public authorities, either the Union and its institutions (Articles 268 and 340 of the Treaty on the Functioning of the European Union (TFEU)) or the Member States under the judge-made *Francovich*[2]/*Brasserie–Factortame doctrine*[3]. This article is confined to those public-law regimes[4]. Questions of private-party liability (e.g., competition damages between undertakings[5]) fall outside its scope and are mentioned, if at all, only by way of contrast[6]. By delimiting the analysis in this way, the paper addresses a core difficulty that recurs across both regimes: identifying when a breach of EU law is *sufficiently serious* (SSB) to trigger liability.

1 DAVIES, A. State liability for judicial decisions in European Union and international law. The International and Comparative Law Quarterly, 2012, vol. 61, no. 3, pp. 595–596.

2 As Lock said, it is still a debated issue even decades after the Francovich ruling whether private companies can successfully enforce EU law through the mechanism of state liability. Lock looks closely at this development and asks whether the idea of state liability has achieved its goals in practice. He decides that in many cases, it is not used enough or not used in the same way in different EU countries [Lock, T. (2012) Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after Francovich, Common Market Law Review, 49, 1675–1702, at p. 1697]. The way decisions are made in the Czech Republic is a good example of this problem. Between 2004 and 2020, the Supreme Court of the Czech Republic looked at whether a state administrative body had broken EU law in a serious way. They did these five times, and all of the rulings were made after 2015. These cases include: The cases that should be considered are 30 Cdo 3548/2019, 30 Cdo 1202/2018 (II.), 30 Cdo 2584/2016, 30 Cdo 3856/2017 and 30 Cdo 4733/2017.

3 COURT OF JUSTICE OF THE EUROPEAN UNION. 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). Judgment of 5 March 1996. ECLI:EU:C:1996:79.

4 A pivotal development in the Union's remedial architecture was the Court's recognition that Member States may incur liability in damages for breaches of EU law. In Francovich and Bonifaci, the Court held that the principle of state liability is inherent in the system of the Treaties and that individuals must be able to obtain compensation where their EU-law rights are infringed; it identified, in particular, the need for a rule intended to confer rights on individuals and a causal link between the breach and the damage (Joined Cases C-6/90 and C-9/90, Judgment of 19 November 1991, ECLI:EU:C:1991:428). Building on this foundation, Brasserie du Pêcheur/Factortame generalised the remedy across any type of breach attributable to the State (legislative, administrative, or judicial) and articulated the modern tripartite standard: (i) infringement of a rule of EU law intended to confer rights on individuals; (ii) a sufficiently serious breach – i.e., a manifest and grave disregard of the limits on the authorities' discretion; and (iii) a direct causal link (Joined Cases C-46/93 and C-48/93, Judgment of 5 March 1996, ECLI:EU:C:1996:79).
Subsequent case law has applied and refined these principles in varied regulatory settings, including situations involving omissions or failures to comply with procedural obligations. By way of illustration, in Jutta Leth, the Court examined a damages claim arising from alleged non-compliance with environmental-impact procedures and reiterated that state liability turns on the Francovich/Brasserie conditions, assessed in light of the purpose and precision of the EU rule invoked and the existence of a causal link (Case C-420/11, Judgment of 14 March 2013, ECLI:EU:C:2013:166). Taken together, these judgments confirm that breaches by action or omission attributable to a Member State may trigger liability, but only where the stringent conditions – most notably the sufficiently serious breach threshold – are satisfied.

5 GENERAL COURT OF THE EUROPEAN UNION. *Printeos, SA v European Commission* (T-201/17). Judgment of 12 February 2019. ECLI:EU:T:2019:81, at [1] and [52].

6 COURT OF JUSTICE OF THE EUROPEAN UNION. European Ombudsman v Frank Lamberts (C-234/02 P). Judgment of 23 March 2004. ECLI:EU:C:2004:174.

The SSB threshold is pivotal because it calibrates the balance between effective judicial protection and institutional discretion. In practice, its application has generated interpretative challenges for courts and litigants alike. The case-law reveals variations across policy domains (e.g., restrictive measures; free movement, public procurement, and judicial liability) and underscores that annulment of an act, by itself, does not establish liability. Rather, liability turns on a context-sensitive assessment that typically considers (i) the clarity and precision of the rule breached, (ii) the scope of discretion enjoyed by the authority; (iii) the excusability of the error considering complexity and available guidance, and (iv) any persistence in the face of settled case-law or binding judgments. At the same time, the analysis must avoid conflating the principle of legitimate expectations, a general principle rooted in legal certainty, with the right to good administration under Article 41 of the Charter, which primarily binds EU institutions; the two concepts interact but are not interchangeable.

The multi-level character of EU governance accentuates these difficulties. National courts remain the first forum for damages claims and frequently engage the preliminary-reference mechanism to clarify the content and effect of EU rules relevant to liability. Against this backdrop, a transparent and operational framework is needed to enhance predictability for claimants and adjudicators and to promote consistent reasoning across legal areas and levels of authority[7].

This article advances such a framework. It (i) delineates the legal bases and scope of public-law liability in the EU; (ii) systematises the Court of Justice's "sufficiently serious breach" (SSB) factors into a structured, case-anchored test; (iii) maps leading judgments to show how the threshold operates across policy domains[8] and where Union and Member State liability converge (including the *Bergaderm*[9] alignment and the stricter standard for judicial breaches in *Köbler*)[10]; and (iv) clarifies the interface between annulment actions and damages claims. Two research questions guide the analysis: (1) how the Court of Justice has defined and progressively refined the SSB threshold; and (2) which criteria it applies when

7 GENERAL COURT OF THE EUROPEAN UNION. Post Bank Iran v Council of the European Union (T-559/15). Judgment of 13 December 2018. ECLI:EU:T:2018:948, at [88] and [89].

8 COURT OF JUSTICE OF THE EUROPEAN UNION. Thomas Specht and Others v Land Berlin and Bundesrepublik Deutschland (C-501/12 to C-506/12, C-540/12 and C-541/12). Judgment of 19 June 2014. ECLI:EU:C:2014:2005, at [142]. COURT OF JUSTICE OF THE EUROPEAN UNION. Der Grüne Punkt – Duales System Deutschland v Commission (C-385/07 P). Judgment of 16 July 2009. ECLI:EU:C:2009:456, at [176]. GENERAL COURT OF THE EUROPEAN UNION. Kendrion NV v European Union, represented by the Court of Justice of the European Union (T-479/14). Judgment of 1 February 2017. ECLI:EU:T:2017:48, at [63].

9 COURT OF JUSTICE OF THE EUROPEAN UNION. *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities* (Case C-352/98 P). Judgment of 4 July 2000. ECLI:EU:C:2000:361.

10 In Köbler, the Court held that a Member State may be liable for a breach of EU law caused by a decision of a court of last instance, but only in exceptional cases where the court has committed a manifest infringement of the applicable law. Indicators include ignoring settled CJEU case-law, failing to make a reference under Article 267 TFEU despite the CILFIT criteria not being met, or otherwise manifestly and gravely misapplying EU law. The threshold remains high to preserve judicial independence, yet effective protection of EU rights is ensured where reliance and legal certainty are plainly frustrated. In COURT OF JUSTICE OF THE EUROPEAN UNION. *Gerhard Köbler v Republik Österreich* (Case C-224/01). Judgment of 30 September 2003. ECLI:EU:C:2003:513.

determining whether that threshold is satisfied. The resulting synthesis seeks to enhance the doctrinal precision of SSB review and to provide practical guidance for pleading and adjudication in EU damages litigation[11].

1 Theoretical Framework: Non-Contractual Liability in EU Law

1.1 Fundamental Principles

Non-contractual liability for breaches of EU law operates in two public-law regimes: the Union's own liability under Articles 268 and 340 TFEU for unlawful action or omission by EU institutions, bodies, offices or agencies; and Member State liability elaborated by the Court of Justice in the *Francovich*[12] and *Brasserie du Pêcheur*[13]/*Factortame* line of cases. Although grounded in different legal bases, the Court has progressively aligned their operative standards, most notably in *Bergaderm*[14], so that the analytical structure applied in practice is largely convergent.

Across both regimes, liability is exceptional and depends on cumulative conditions that the claimant must establish. In substance, the inquiry asks whether a rule of EU law intended to confer rights on individuals has been infringed, whether that infringement amounts to a *sufficiently serious breach* (SSB), whether actual damage, material or non-material, has occurred, and whether a direct causal link connects the breach to the alleged damage[15]. The SSB threshold is the pivotal control variable: it calibrates the balance between effective judicial protection and the discretion that EU and national authorities require to pursue policy choices. The Court assesses seriousness contextually, considering, inter alia, the clarity and precision of the rule in question, the breadth of the authority's discretion, the excusability of any error considering complexity and available guidance, and any persistence in maintaining an unlawful position despite settled case-law or binding judgments[16]. Where the authority enjoys no material discretion because a precise legal rule applies, *Bergaderm*[17] indicates that illegality may suffice without an additional showing of seriousness; conversely, the annulment of a measure is not,

11 FINK, Melanie. EU liability for contributions to Member States' breaches of EU law. Common Market Law Review, 2019, roč. 56, č. 5, s. 1227–1264. https://doi.org/10.54648/COLA2019101.

12 COURT OF JUSTICE OF THE EUROPEAN UNION. Andrea Francovich and Danila Bonifaci and Others v Italian Republic (Joined Cases C-6/90 and C-9/90). Judgment of 19 November 1991. ECLI:EU:C:1991:428.

13 COURT OF JUSTICE OF THE EUROPEAN UNION. 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). Judgment of 5 March 1996. ECLI:EU:C:1996:79, at [58].

14 COURT OF JUSTICE OF THE EUROPEAN UNION. Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities (Case C-352/98 P). Judgment of 4 July 2000. ECLI:EU:C:2000:361, at [43]–[44].

15 COURT OF JUSTICE OF THE EUROPEAN UNION. HTTS Hanseatic Trade Trust & Shipping GmbH v Council of the European Union (C-123/18 P). Judgment of 10 September 2019. ECLI:EU:C:2019:694, at [32].

16 COURT OF JUSTICE OF THE EUROPEAN UNION. Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue (C-446/04). Judgment of 12 December 2006. ECLI:EU:C:2006:774, at [210].

17 COURT OF JUSTICE OF THE EUROPEAN UNION. *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities* (Case C-352/98 P). Judgment of 4 July 2000. ECLI:EU:C:2000:361.

by itself, dispositive of damages, which still require an assessment of seriousness and causation. National courts remain the primary fora for these actions. They apply the Court's criteria to concrete facts, resort to the preliminary-reference mechanism when necessary, and thereby contribute to ensuring that the exceptional remedy of public-law damages neither undermines institutional autonomy nor renders EU rights ineffective.

While *Bergaderm* aligned the operative standards for Union and State liability, two differences persist in practice. First, judicial breaches concern Member States via *Köbler* and entail a particularly high threshold tailored to courts of last instance. Secondly, the institutional addressees of Article 41 CFR are EU bodies; by contrast, Member State administrations are bound by analogous general principles when acting within the scope of EU law. Procedural posture also differs: damages against the Union proceed under Articles 268 and 340 TFEU, whereas State liability remains judge-made under *Francovich/Brasserie–Factortame*, applied by national courts subject to the preliminary-reference mechanism.

1.2 Principle of Legitimate Expectations

The principle of legitimate expectations, closely connected to legal certainty, protects individuals who have reasonably relied on a public authority's conduct in circumstances where that reliance is objectively justified. In EU law, the protection typically presupposes *more than* a general hope that the legal framework will remain unchanged: the claimant must ordinarily be able to point to precise, unconditional and consistent assurances attributable to the competent authority, or to a settled administrative practice capable of generating legitimate reliance.[18] At the same time, the principle does not freeze regulatory action; rather, it disciplines unforeseeable or abrupt reversals by requiring adequate notice, coherent reasoning, and, where appropriate, transitional measures.

Two distinctions are essential for conceptual clarity. First, legitimate expectations should not be collapsed into the Charter of Fundamental Rights of the European Union (CFR) right to good administration (Article 41 CFR). Article 41 is, by its wording, directed to the institutions, bodies, offices and agencies of the Union, whereas the protection of legitimate expectations operates as a general principle that structures legality review and reliance-based reasoning within the EU legal order.[19] Second, legitimate expectations are analytically distinct from the principle of equal treatment. Although a single factual matrix may simultaneously raise issues of consistency (equal treatment) and reliance (legitimate expectations), the legal questions differ: the equal treatment asks whether comparable situations were treated differently without objective justification, while legitimate expectations focus on whether the authority induced and then frustrated protected reliance.

18 EUROPEAN SECURITIES AND MARKETS AUTHORITY (ESMA). Decision of the Board of Supervisors to adopt supervisory measures and impose fines in respect of infringements committed by REGIS-TR S.A. Reference ESMA43-857238790-1634 (TR-2024.06.17). Paris: ESMA, 17 February 2026. Available online (accessed 24 February 2026).

19 EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA). Fundamental rights: challenges and achievements in 2014 – Annual report. Luxembourg: Publications Office of the European Union, 2015 (published 25 June 2015). Available online (accessed 24 February 2026).

The principle also sits within a broader fundamental-rights environment shaped by the European Convention on Human Rights (ECHR). Under Article 52(3) CFR, corresponding Charter rights must, at a minimum, be given the same meaning and scope as their ECHR counterparts; in practice, the CJEU engages with ECHR reasoning as an important interpretive reference point.[20] This cross-fertilisation reinforces reliance- and foreseeability-based considerations, without displacing the autonomous conditions governing EU non-contractual liability. In the context of damages, legitimate expectations should be treated as a *structured* analytical lens, not as a free-standing appeal to fairness. Where an authority defeats well-founded reliance, particularly by reversing a settled position without adequate notice, justification, or transition, the resulting deficit in foreseeability and stability will often support a conclusion that the infringement is sufficiently serious[21], especially where the authority's discretion is narrow and the legal framework is clear. This aligns with the established SSB methodology, in which the clarity of the rule, the scope of discretion, and the excusable or inexcusable character of the error are central evaluative factors.[22]

Conversely, where the legal position is genuinely unsettled, or where the authority operates within a wide margin of policy discretion, interference with expectations may justify annulment yet still fall short of the SSB threshold, which is designed to exclude ordinary administrative error from damages liability. Even in legitimate-expectations cases, successful damages claim therefore continues to require a demonstration of seriousness and a direct causal link to the loss.

*Takeaway: Legitimate expectations strengthen the seriousness analysis *only when reliance is objectively justified and the authority's departure is unforeseeable and insufficiently managed, particularly in low-discretion settings, while leaving intact the discipline of the SSB threshold and causation requirements.*

2 Methodology and Research Questions

This article adopts a doctrinal–analytical research design, complemented by structured case-mapping of EU Courts' case-law on non-contractual liability. The analysis is confined to public-law liability: (i) the Union's liability under Articles 268 and 340 TFEU, and (ii) Member State liability in the *Francovich/Brasserie–Factortame* line. It expressly excludes private-party damages actions (for example, competition follow-on claims), because those regimes raise distinct causation and quantification logics and do not turn on the EU-law "sufficiently serious breach" threshold in the same way.

20 EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA). Charterpedia: Article 52 – Scope and interpretation of rights and principles. Vienna: FRA, n.d. (webpage). Available online (accessed 24 February 2026).

21 COURT OF JUSTICE OF THE EUROPEAN UNION. Ilona Baradics and Others v QBE Insurance (Europe) Ltd Magyarországi Fióktelepe and Magyar Állam (C-430/13). Judgment of 16 January 2014. ECLI:EU:C:2014:32, at [45].

22 COURT OF JUSTICE OF THE EUROPEAN UNION. Judgment of 5 March 1996, Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others (Joined Cases C-46/93 and C-48/93), ECLI:EU:C:1996:79 (CELEX 61993CJ0046). Luxembourg: Court of Justice of the European Union, 5 March 1996. Available online (accessed 24 February 2026).

2.1 Case corpus and selection strategy

The corpus was assembled through a targeted search of Court of Justice and General Court judgments addressing non-contractual liability under Articles 268 and 340 TFEU and the Francovich/Brasserie line, complemented by backward citation tracking from leading authorities and the identification of recurrent doctrinal "nodes" (legislative discretion, judicial liability, restrictive measures, and macro-policy domains). Decisions were included where they contain an explicit assessment of (i) the SSB threshold and/or (ii) legitimate expectations within the liability analysis. Purely procedural rulings, or judgments that do not engage substantively with seriousness (for example, disposing of claims on admissibility alone), were excluded.

2.2 Unit of analysis and reading protocol

The unit of analysis is the judgment (and, where materially illuminating, the Advocate General's Opinion). Each decision is read using a uniform protocol that records the governing liability rule and the court's articulation of seriousness; the scope of administrative, technical, or policy discretion attributed to the authority; the court's treatment of legitimate expectations (including the evidentiary basis for reliance and the authority's justification for change); the handling of causation and (where present) quantification; and the remedy structure (annulment, damages, or both), including any explicit separation between unlawfulness and seriousness.

The outputs of this protocol serve two functions. First, they populate Table 1, which provides a map of leading case-law and identifies the key pinpoint passages where courts state the operative criteria (thereby reducing citation dispersion in the main narrative). Second, they underpin two short mini-case studies selected to illustrate divergent applications of seriousness across doctrinally demanding contexts, judicial liability and restrictive measures, where the interaction between discretion, persistence, and reliance is particularly salient.

2.3 Coding framework: operationalising the SSB threshold

To enhance transparency and replicability, the study operationalises the sufficiently serious breach requirement through a five-factor coding framework that captures how courts, in practice, reason about seriousness across institutional settings: (i) Clarity and precision of the breached rule (including the degree of interpretive latitude); (ii) Breadth of discretion (narrow/no discretion versus broad policy/technical discretion); (iii) Excusability in light of complexity and available guidance (including prior case-law and institutional practice); (iv) Persistence in an unlawful position despite settled case-law or binding judgments; and (v) Institutional or systemic contribution to the breach (for example, structural deficiencies, repeated evidentiary failures, or organisational shortcomings).

Crucially, the coding does not treat these factors as mechanically additive. Rather, the framework records how and why particular circumstances are treated as aggravating or mitigating

in the court's reasons. That weighting logic is summarised in Box 1 and applied explicitly in each mini-case study through (a) the identified coded factors and (b) a short, reason-giving explanation tied to the judgment's operative reasoning.

Box 1. Weighting of SSB factors (aggravating vs. mitigating circumstances): coding and interpretation rule

Aggravating circumstances (↑ likelihood of SSB)

1. Clear and precise rule (low interpretive latitude).
2. Narrow or no discretion (authority bound by a specific obligation).
3. Inexcusable error (ignored authoritative guidance; manifest misreading; omission of essential safeguards in a low-discretion setting).
4. Persistence in an unlawful position despite settled case-law or binding judgments.
5. Systemic/institutional contribution (structural failure; repeated deficiencies; evidentiary neglect; organisational shortcomings).

Mitigating circumstances (↓ likelihood of SSB)

1. Genuine legal uncertainty or novelty at the material time.
2. Broad policy/technical discretion requiring complex assessments.
3. Good-faith interpretation in a difficult factual/legal environment.
4. Prompt correction after clarification (including after preliminary rulings or judicial guidance).
5. Isolated lapse within an otherwise coherent compliance framework.

Coding/interpretation rule: Weighting follows a reason-giving logic anchored in the case-law, not a tally. Each mini-case study specifies (i) the coded factors and (ii) the reasons, enabling replication by courts and counsel.

2.4 Analytical steps

The analysis proceeds in two steps. First, it systematises the jurisprudence to reconstruct an operational SSB test that remains faithful to the case-law yet is sufficiently structured to be usable by courts and counsel in new fact patterns. Second, it examines the interaction between seriousness and the principle of legitimate expectations, while maintaining clear conceptual boundaries between (i) legitimate expectations, (ii) the Charter right to good administration, and (iii) equal treatment. Throughout, the study keeps the annulment/damages interface in view: annulment may be evidentially and normatively relevant, but it does not – without more – satisfy the seriousness requirement.

2.5 Research questions

Two research questions (RQ) guide the discussion: RQ1: How have the EU Courts defined and refined the sufficiently serious breach threshold across the leading judgments mapped in Table 1? RQ2: Which criteria and weighting considerations do the courts apply when

deciding whether that threshold is met in concrete cases, particularly where reliance-based interests (legitimate expectations) intersect with administrative or policy discretion?

By addressing these questions through a consistent coding protocol and case-mapping, the article evaluates the coherence and predictability of current practice and assesses whether the courts' approach appropriately safeguards reliance-based interests without unduly constraining legitimate administrative and policy adjustment within the EU's multi-level governance structure.

Takeaway: The five-factor coding protocol operationalises SSB in a replicable way, allowing domain-specific weighting while preserving doctrinal fidelity and keeping the annulment/damages distinction analytically intact.

3 Analysis of CJEU Jurisprudence on the "Sufficiently Serious Breach"

3.1 Positive Delimitation of the Threshold

In both public-law regimes of EU non-contractual liability, the Union's liability under Articles 268 and 340 TFEU and Member State liability under the *Francovich/Brasserie du Pêcheur–Factortame*[23] line, the success of a damages action depends, inter alia, on whether the infringement amounts to a *sufficiently serious breach* (SSB)[24]. Two preliminary clarifications are therefore required: first, what counts as a rule intended to confer rights on individuals[25]; and second, how *seriousness* is assessed in this context[26]. The leading authorities and their operative passages are mapped in Table 1, which also identifies the key pinpoint paragraphs where the courts formulate the governing criteria.

As to the first, a rights-conferring rule is a norm that grants individuals a concrete, justiciable advantage or protection and is framed with sufficient specificity to be judicially enforced. In this sense, akin to the *Schutznormtheorie*[27] known from German doctrine, the rule's telos must include the protection of individual interests[28], not merely the organisation of administrative

[23] COURT OF JUSTICE OF THE EUROPEAN UNION. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others (Joined Cases C-46/93 and C-48/93). Judgment of 5 March 1996. ECLI:EU:C:1996:79, at [55]–[58].

[24] POTACS, M. and MAYER, C. Changes in Austrian state liability law under the influence of European law. European Public Law, 2013, vol. 19, pp. 51–60, p. 51.

[25] GENERAL COURT OF THE EUROPEAN UNION. Gap SA granen & producten NV v European Commission (T-437/10). Judgment of 16 May 2013. ECLI:EU:T:2013:248, at [22].

[26] GENERAL COURT OF THE EUROPEAN UNION. Cofradía de pescadores de "San Pedro" de Bermeo and Others v Council of the European Union (T-415/03). Judgment of 19 October 2005. ECLI:EU:T:2005:365, at [86] and the cited decisions.

[27] COLCELLI, V. Understanding of the built of European Union legal system: The function of individual rights. Journal of Social Sciences, 2012, vol. 8, no. 3, pp. 381–389, p. 382.

[28] GENERAL COURT OF THE EUROPEAN UNION. Jose Maria Sison v Council of the European Union (T-341/07). Judgment of 26 April 2011. ECLI:EU:T:2011:687.

action[29]. The Court has treated this inquiry in functionally similar terms across the two liability regimes, a convergence made explicit in *Bergaderm*[30], where the operative standards for Union and State liability were aligned[31]. In practice, the "rights-conferring" question is therefore best approached as a purpose-and-justiciability test: *does the rule, properly interpreted, protect an identifiable class of persons in a way that can be vindicated in judicial proceedings?*

As to seriousness, the Court has deliberately avoided a rigid definition. Instead, it applies a structured, context-sensitive standard that asks whether the authority manifestly and gravely overstepped the limits of its discretion[32]. That standard is operationalised through recurring factors, which this article codes and weights using Box 1: (i) the clarity and precision of the rule breached; (ii) the breadth of administrative or policy discretion; (iii) the excusability of the error in light of the legal and factual complexity and the guidance available; (iv) any persistence in maintaining an unlawful position despite settled case-law or binding judgments; and (v) any institutional or systemic contribution to the breach[33]. Where the authority enjoys no material discretion because a precise rule applies, *mere illegality may suffice* without an additional showing of seriousness (the *Bergaderm*[34] alignment). Conversely, the annulment of a measure is not dispositive for damages; claimants must still establish seriousness and causation.

The case-law illustrates how these factors operate. In judicial liability, *Köbler*[35] recognises that a Member State may be liable for a decision of a court of last instance only in exceptional cases, notably where the court disregards settled CJEU case-law or fails to make a reference under Article 267 TFEU contrary to the *CILFIT*[36] criteria – paradigmatic instances of a manifest and grave excess. In the context of restrictive measures, the Court has found seriousness where institutions persisted over a protracted period in maintaining listings without adequate evidentiary support, despite clear judicial guidance. By contrast, in domains

29 GENERAL COURT OF THE EUROPEAN UNION. Gap Granen & Producten v Commission (T-437/10). Judgment of 16 May 2013. ECLI:EU:T:2013:248, at [28] and [31] above, and the cited decisions. GENERAL COURT OF THE EUROPEAN UNION. I. Schroeder KG (GmbH & Co.) v Council of the European Union and European Commission (T-205/14). Judgment of 23 September 2015. ECLI:EU:T:2015:673, at [46].

30 COURT OF JUSTICE OF THE EUROPEAN UNION. Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities (Case C-352/98 P). Judgment of 4 July 2000. ECLI:EU:C:2000:361, at [43]–[44].

31 COURT OF JUSTICE OF THE EUROPEAN UNION. 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). Judgment of 5 March 1996. ECLI:EU:C:1996:79, at [59].

32 BOBEK, M. The effects of EU law in the national legal systems. In: BARNARD, C. and PEERS, S., editors. European Union Law. 3rd ed. Oxford: Oxford University Press, 2020, pp. 154–190. Available at SSRN: https://ssrn.com/abstract=3726872 or https://doi.org/10.2139/ssrn.3726872.

33 COURT OF JUSTICE OF THE EUROPEAN UNION. Hochtief Solutions AG Magyarországi Fióktelepe v Fővárosi Törvényszék (C-620/17). Judgment of 29 July 2019. ECLI:EU:C:2019:630, at [34].

34 COURT OF JUSTICE OF THE EUROPEAN UNION. Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities (Case C-352/98 P). Judgment of 4 July 2000. ECLI:EU:C:2000:361, at [43]–[44].

35 COURT OF JUSTICE OF THE EUROPEAN UNION. *Gerhard Köbler v Republik Österreich* (Case C-224/01). Judgment of 30 September 2003. ECLI:EU:C:2003:513, at [51]–[53], [55]–[56].

36 COURT OF JUSTICE OF THE EUROPEAN UNION. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (Case 283/81). Judgment of 6 October 1982. ECLI:EU:C:1982:335.

characterised by wide policy discretion and genuine legal uncertainty[37], the Court is reticent to characterise errors as sufficiently serious, even where unlawfulness is established[38].

It is important, moreover, not to conflate legitimate expectations and the right to good administration with the SSB inquiry[39]. Legitimate expectations, as a general principle rooted in legal certainty, can weigh heavily in the seriousness analysis where well-founded reliance is frustrated, particularly if an authority reverses a settled practice without adequate notice or transitional arrangements and where the scope of discretion is narrow[40]. The Charter's Article 41 right to good administration primarily binds EU institutions and informs standards of administrative care, but a failure to exercise due care does not automatically meet the SSB threshold[41]. Similarly, infringements of equal treatment or proportionality may, depending on context, contribute to a finding of seriousness, yet they do not substitute for the structured assessment described above[42].

Taken together, the Court's approach yields a positive delimitation of SSB that is principled yet flexible[43]. It protects individual rights where reliance and clarity warrant heightened discipline, while preserving institutional space for reasoned policy judgment in areas of broad discretion[44]. The threshold thus functions as the system's calibrator: it filters ordinary

37 COURT OF JUSTICE OF THE EUROPEAN UNION. European Ombudsman v Claire Staelen (C-337/15 P). Judgment of 4 April 2017. ECLI:EU:C:2017:256, at [34].

38 LOCK, T. Is private enforcement of EU law through state liability a myth? An assessment 20 years after Francovich. Common Market Law Review, 2012, vol. 49, pp. 1675–1702, p. 1689.

39 COURT OF JUSTICE OF THE EUROPEAN UNION. HTTS Hanseatic Trade Trust & Shipping GmbH v Council of the European Union (C-123/18 P). Judgment of 10 September 2019. ECLI:EU:C:2019:694, at [43].

40 COURT OF JUSTICE OF THE EUROPEAN UNION. European Ombudsman v Frank Lamberts (C-234/02 P). Judgment of 23 March 2004. ECLI:EU:C:2004:174, at [50]–[52] and [60].

41 Article 41(1) of the Charter of Fundamental Rights enshrines the right to good administration, guaranteeing that every person has their affairs handled impartially, fairly and within a reasonable time by the Union's institutions, bodies, offices and agencies. Article 41(2) specifies three corollaries of this right: (a) the right to be heard before any individual measure adversely affecting a person is taken; (b) the right of access to the file, subject to legitimate confidentiality interests, including the protection of personal data and business secrecy; and (c) the administration's duty to state reasons for its decisions. While Article 41 principally binds EU bodies, analogous requirements may flow from the general principles of EU law when Member State authorities act within the scope of EU law.

42 GENERAL COURT OF THE EUROPEAN UNION. Frank Steinhoff and Others v European Central Bank (T-107/17). Judgment of 23 May 2019. ECLI:EU:T:2019:353, at [56].

43 COURT OF JUSTICE OF THE EUROPEAN UNION. Schindler Holding Ltd and Others v European Commission (C-501/11 P). Judgment of 18 July 2013. ECLI:EU:C:2013:522, at [31] and the cited decisions. COURT OF JUSTICE OF THE EUROPEAN UNION. Inuit Tapiriit Kanatami and Others v European Commission (C-398/13 P). Judgment of 3 September 2015. ECLI:EU:C:2015:535, at [22] and the cited decisions.

44 COURT OF JUSTICE OF THE EUROPEAN UNION. Holcim (Deutschland) AG v Commission of the European Communities (C-282/05 P). Judgment of 19 April 2007. ECLI:EU:C:2007:226, at [48]. COURT OF JUSTICE OF THE EUROPEAN UNION. Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities (C-352/98 P). Judgment of 4 July 2000. ECLI:EU:C:2000:361, at [46]. COURT OF JUSTICE OF THE EUROPEAN UNION. Commission of the European Communities v Fresh Marine Company A/S (C-472/00 P). Judgment of 10 July 2003. ECLI:EU:C:2003:399, at [27].

administrative error while signalling liability where public authorities manifestly and gravely transgress the limits set by EU law[45].

3.1.1 Boundary rule: "illegality-only" versus the full SSB matrix

A decisive dividing line runs between: (i) situations in which the authority has no, or only residual, discretion because EU law imposes a clear, precise, and unconditional obligation, and (ii) situations involving meaningful discretion (administrative, technical, or policy).

In the first category, seriousness is often effectively absorbed into illegality: once a rights-conferring rule is breached in a low-discretion setting, the breach will more readily qualify as sufficiently serious unless compelling mitigating circumstances are shown[46]. In the second category, the claimant must satisfy the full SSB matrix, because liability is reserved for conduct that constitutes a manifest and grave transgression of discretion limits[47].

3.1.2 Short contrast example

Zero/minimal discretion: An EU rule sets an unequivocal procedural safeguard (for example, a mandatory hearing or a fixed deadline in a tightly constrained procedure). Non-compliance is not merely unlawful; given the lack of meaningful discretion, it will more readily be characterised as sufficiently serious unless the authority demonstrates exceptional mitigating features (e.g., genuine legal novelty or prompt correction).

Wide discretion: A body adopts a measure in a macro-economic or sanctions context requiring complex assessments. Even if a court annuls the measure, damages still hinge

45 EU law accords the European Central Bank (ECB) a particularly wide margin of discretion in the exercise of its monetary-policy mandate. Under Article 127 TFEU, the ECB's primary objective is the maintenance of price stability; without prejudice to that objective, it supports the general economic policies of the Union with a view to contributing to the Union's broader objectives. Decisions in this domain rest on complex economic assessments made under rapidly evolving macro-financial conditions in the Eurosystem. Monetary aggregates, inflation dynamics, financial-market functioning, and the smooth operation of payment and credit transmission channels must all be weighed and reconciled. Against this backdrop, both judicial review and non-contractual liability apply a correspondingly stringent threshold. Review is limited to verifying compliance with procedural requirements and the duty to state reasons, the accuracy of the material facts, the absence of manifest error of assessment or misuse of powers, and respect for proportionality. For liability, the breadth of the ECB's discretion means that a claimant must establish a sufficiently serious breach – that is, a manifest and grave disregard of the limits on that discretion. Forecasting errors, contested methodological choices, or reasonable policy calibrations will not suffice. This approach has been underscored in litigation arising from the sovereign-debt crisis, where the General Court emphasised the ECB's broad discretion and rejected damages claims absent such a manifest and grave excess (see, e.g., Accorinti and Others v European Central Bank, T-79/13, ECLI:EU:T:2015:756).

46 COURT OF JUSTICE OF THE EUROPEAN UNION. Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities (Case C-352/98 P). Judgment of 4 July 2000. ECLI:EU:C:2000:361, at [43]–[44].

47 COURT OF JUSTICE OF THE EUROPEAN UNION. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others (Joined Cases C-46/93 and C-48/93). Judgment of 5 March 1996. ECLI:EU:C:1996:79, at [55]–[58].

on whether the authority manifestly and gravely exceeded the boundaries of its discretion, taking account of complexity, guidance, excusability[48], and, where applicable, persistence[49].

3.1.3 Mini-case study 1: Judicial liability (Köbler)—what "exceptional" means

Köbler confirms that Member State liability for decisions of a court of last instance is exceptional, reflecting the systemic interests of judicial independence and legal certainty[50]. "Exceptional" is not mere statistical rarity; it denotes a qualitative threshold: only a breach that is manifest and grave in light of the court's role and the state of EU law at the material time can satisfy SSB.

Applying the weighting logic in Box 1, the coding is as follows:

Aggravating (↑):

- Clarity/precision: EU law and its interpretation were sufficiently settled at the material time (including through established case-law).
- Inexcusability: disregard of readily available guidance, including the logic of Article 267 TFEU and the conditions under which non-referral can be justified.
- Persistence/defiance: an explicit departure from settled CJEU authority, or a clear failure to engage with binding guidance.

Mitigating (↓):

- Genuine uncertainty/novelty: credible interpretive difficulty at the material time, not merely a later-disproved reading.
- Complexity: a difficult factual/legal environment that plausibly renders the error excusable.

Operational implication: Köbler-type liability is driven by a particular combination of aggravating circumstances – settled law + inexcusable departure + failure to respect the Article 267 logic – and mitigating factors must be demonstrably strong to prevent the breach from being characterised as sufficiently serious.

3.1.4 Mini-case study 2: Restrictive measures (Safa Nicu Sepahan/ Bank Refah), persistence and evidentiary failure

In the restrictive-measures context, the case-line demonstrates how persistence and institutional contribution can dominate the seriousness weighting. The courts have treated prolonged maintenance (or re-listing) of sanctions without adequate evidentiary support,

48 GENERAL COURT OF THE EUROPEAN UNION. Alessandro Accorinti and Others v European Central Bank (Case T-79/13). Judgment of 7 October 2015. ECLI:EU:T:2015:756, at [65].

49 COURT OF JUSTICE OF THE EUROPEAN UNION (Grand Chamber). Bank Refah Kargaran v Council of the European Union and European Commission (Case C-134/19 P). Judgment of 6 October 2020. ECLI:EU:C:2020:793, at [25], [43].

50 COURT OF JUSTICE OF THE EUROPEAN UNION. Gerhard Köbler v Republik Österreich (Case C-224/01). Judgment of 30 September 2003. ECLI:EU:C:2003:513, at [51]–[53], [55]–[56].

especially after judicial guidance has identified defects, as a paradigmatic aggravating pattern[51]. At the same time, Bank Refah is methodologically decisive: even post-annulment, the claimant must still prove seriousness and causation because annulment does not automatically satisfy SSB[52].

Applying the weighting logic in Box 1, the coding is as follows:

Aggravating (↑):

- Persistence: maintenance/re-listing after judicial clarification, without remedying the identified evidentiary defects.
- Systemic/institutional contribution: repeated verification failures and organisational shortcomings in substantiating listings.
- Inexcusability (context-specific): continued reliance on an insufficient evidentiary basis despite clear guidance.

Mitigating (↓):

- Prompt correction: effective remedial action following judicial clarification (where present).
- Complexity/discretion: recognition that sanctions may involve sensitive assessments – yet that does not immunise manifest evidentiary neglect.

Figure 1. Persistence in sanctions listings: typical timeline (how persistence aggravates SSB)

t0: Initial listing adopted (evidentiary basis asserted).

t1: First judicial annulment / guidance (defects identified).

t2: Re-listing / maintenance without adequate remedial evidence.

t3: Further judicial finding confirming persisting defects.

t4: Damages phase: persistence and institutional contribution dominate the SSB weighting.

How to read: The figure isolates temporal persistence as an aggravating circumstance. Each subsequent re-listing or maintenance after judicial guidance increases the likelihood that the breach will be characterised as sufficiently serious, because it shifts the case from potentially excusable error toward manifest and grave disregard of discretion limits.

51 COURT OF JUSTICE OF THE EUROPEAN UNION (Grand Chamber). Safa Nicu Sepahan Co. v Council of the European Union (Case C-45/15 P). Judgment of 30 May 2017. ECLI:EU:C:2017:402, at [33].

52 COURT OF JUSTICE OF THE EUROPEAN UNION (Grand Chamber). Bank Refah Kargaran v Council of the European Union and European Commission (Case C-134/19 P). Judgment of 6 October 2020. ECLI:EU:C:2020:793, at [25], [43].

Table 1. Map of Leading EU Courts case-law (CJEU and General Court) on the "Sufficiently Serious Breach" Threshold (SSB)

Case	Regime	Key pinpoint paragraphs/ points	Core criteria/ holding	Outcome on SSB	Note on discretion
Brasserie du Pêcheur / Factortame (Joined Cases C-46/93 & C-48/93), ECLI:EU:C:1996:79[53]	Member State liability	paras 55, 56, 58	Decisive test: whether the Member State manifestly and gravely disregarded the limits of its discretion; indicative factors include clarity/ precision, discretion, excusability, persistence, etc.	Test articulated	Higher bar where policy discretion is broad
Bergaderm (C-352/98 P), ECLI:EU:C:2000:361[54]	EU non-contractual liability (Art 340 TFEU)	paras 43–44	Aligns EU and Member State liability standards; where the institution has considerably reduced or no discretion, mere infringement may suffice to establish SSB.	Standard aligned; lower threshold possible when discretion is absent	Discretion is the central differentiator
Köbler (C-224/01), ECLI:EU:C:2003:513[55]	Member State liability (judicial breaches)	paras 51–53, 55–56	State liability for a court of last instance only exceptionally; SSB particularly where there is a manifest breach of case-law / clear EU law, including misuse of the Art 267 duty to refer under the CILFIT logic.	SSB possible, but exceptional	Very high threshold for judicial breaches (legal certainty concerns)
Safa Nicu Sepahan (C-45/15 P), ECLI:EU:C:2017:402 (plus underlying annulment: T-384/11, ECLI:EU:T:2014:986)	EU non-contractual liability (restrictive measures)	C-45/15 P: paras 31–35, 40; T-384/11: paras 59–69 (esp. 69)	In sanctions listings, evidentiary failure and insufficient verification may support SSB; persistence and failure to substantiate allegations weigh heavily.	SSB found under the restrictive-measures case-law	"Complex domain" does not immunise manifest evidentiary failure
Bank Refah Kargaran (C-134/19 P), ECLI:EU:C:2020:793[56]	EU non-contractual liability (restrictive measures / post-annulment damages)	para 25; para 43	Confirms availability/ structure of a damages action post-annulment; annulment is not dispositive of SSB – unlawfulness and SSB remain analytically distinct.	Framework confirmed; SSB not automatic	Explicit separation: illegality ≠ SSB

53 COURT OF JUSTICE OF THE EUROPEAN UNION. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others (Joined Cases C-46/93 and C-48/93). Judgment of 5 March 1996. ECLI:EU:C:1996:79, at [55]–[58].

54 COURT OF JUSTICE OF THE EUROPEAN UNION. Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities (Case C-352/98 P). Judgment of 4 July 2000. ECLI:EU:C:2000:361, at [43]–[44].

55 COURT OF JUSTICE OF THE EUROPEAN UNION. Gerhard Köbler v Republik Österreich (Case C-224/01). Judgment of 30 September 2003. ECLI:EU:C:2003:513, at [51]–[53], [55]–[56].

56 COURT OF JUSTICE OF THE EUROPEAN UNION (Grand Chamber). Bank Refah Kargaran v Council of the European Union and European Commission (Case C-134/19 P). Judgment of 6 October 2020. ECLI:EU:C:2020:793, at [25], [43].

Case	Regime	Key pinpoint paragraphs/ points	Core criteria/ holding	Outcome on SSB	Note on discretion
Schöppen stedt (Case 5/71, Aktien-Zuckerfabrik Schöppen stedt v Council), ECLI:EU:C:1971:116[57]	EU non-contractual liability (legislative/economic policy)	para 11	In economic-policy legislation: liability only for a sufficiently flagrant violation of a superior rule of law protecting individuals.	High threshold	Broad legislative discretion
Lütticke (Case 57/65), ECLI:EU:C:1966:34	Rights-conferring rule / direct effect (supports element (i))	Operative part, point 1 (direct effect; individual rights)	Illustrates that a clear and unconditional obligation may confer enforceable individual rights (useful for the "rule intended to confer rights" condition).	Supports element (i), not SSB itself	Not a discretion case; doctrinal support for "rights-conferring rule"
Accorinti and Others v ECB (T-79/13), ECLI:EU:T:2015:756[58]	EU non-contractual liability (monetary policy)	para 65	In monetary policy, ECB enjoys broad discretion involving complex assessments; SSB requires a manifest and serious failure to respect discretion limits.	SSB not established	Macro-financial complexity → high bar

Source: Authors' compilation based on CJEU case-law (Francovich and Bonifaci, Joined Cases C-6/90 & C-9/90; Brasserie du Pêcheur/Factortame, Joined Cases C-46/93 & C-48/93; Bergaderm, C-352/98 P; Köbler, C-224/01; Safa Nicu Sepahan, C-45/15 P; Bank Refah Kargaran, C-134/19 P; Schöppenstedt, Case 5/71; Lütticke, Case 57/65; and related judgments cited in the text).

Takeaway: The EU Courts' positive delimitation of SSB is both principled and flexible: it imposes heightened discipline where clear, rights-conferring rules and objectively justified reliance are frustrated in low-discretion settings, while preserving space for reasoned institutional judgment in domains of broad discretion – thereby filtering ordinary administrative error but signalling liability where discretion limits are manifestly and gravely transgressed.

3.2 Negative Delimitation: What Does Not Amount to a Sufficiently Serious Breach

The EU Courts have repeatedly clarified, often implicitly, through careful separation of analytical steps, what does not satisfy the threshold of a sufficiently serious breach (SSB). This "negative delimitation" matters because SSB is frequently conflated with other elements of liability, most commonly (i) the existence of damage, and (ii) the mere unlawfulness of the contested measure. Properly understood, SSB functions as a filter: it reserves damages for conduct that manifestly and gravely exceeds the limits of discretion, rather than for every illegality producing loss.[59]

57 COURT OF JUSTICE OF THE EUROPEAN UNION. Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities (Case 5/71). Judgment of 2 December 1971. ECLI:EU:C:1971:116, at [11].

58 GENERAL COURT OF THE EUROPEAN UNION. Alessandro Accorinti and Others v European Central Bank (Case T-79/13). Judgment of 7 October 2015. ECLI:EU:T:2015:756, at [65].

59 COURT OF JUSTICE OF THE EUROPEAN UNION. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others (Joined Cases C-46/93 and C-48/93). Judgment of 5 March 1996. ECLI:EU:C:1996:79, at [55]–[58].

3.2.1 SSB is not "proved" by the existence (or magnitude) of damage

First, SSB and damage are distinct in both nature and temporal focus. SSB evaluates the quality of the unlawful conduct at the time it occurred (adoption of the act or omission), whereas damage is a subsequent and evolving phenomenon that may arise later, accumulate over time, and vary in magnitude independently of the seriousness of the original breach. Accordingly, the claimant must establish separately: (i) a rights-conferring rule; (ii) SSB (unless the "no-discretion" boundary applies); (iii) actual damage; and (iv) a direct causal link. The fact that loss (including loss of profit) has occurred, even substantial loss, does not, by itself, demonstrate seriousness.[60]

3.2.2 Annulment is not dispositive for damages—and the absence of annulment is not automatically fatal

Second, annulment and damages are remedially distinct. Annulment (Article 263 TFEU) establishes illegality; damages (Articles 268 and 340 TFEU, and the Francovich/Brasserie line) require a further showing that the authority manifestly and gravely exceeded the bounds of discretion. The annulment of a measure may therefore be evidentially relevant, but it is not dispositive of SSB. Conversely, the absence of an annulment judgment does not, as a matter of principle, preclude liability where the cumulative conditions are otherwise satisfied; what matters is whether unlawfulness, seriousness, damage, and causation can be established within the liability framework.[61]

3.2.3 Formal attributes of the conduct are not determinative

Third, formal characteristics of the underlying conduct are not, in themselves, decisive for liability. Non-contractual liability is not conceptually confined to a narrow class of "binding" acts: it may arise from unlawful conduct attributable to a public authority, including omissions (failures to act) and defective administrative behaviour, provided a rights-conferring rule is breached and the remaining conditions are met. The decisive question remains substantive: whether, in the circumstances, the authority's conduct reaches the SSB level as operationalised by the factors in Box 1.[62]

60 COURT OF JUSTICE OF THE EUROPEAN UNION. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others (Joined Cases C-46/93 and C-48/93). Judgment of 5 March 1996. ECLI:EU:C:1996:79, at [51].

61 COURT OF JUSTICE OF THE EUROPEAN UNION (Grand Chamber). Bank Refah Kargaran v Council of the European Union and European Commission (C-134/19 P). Judgment of 6 October 2020. ECLI:EU:C:2020:793, at [43].

62 EUROPEAN UNION. Treaty on the Functioning of the European Union (consolidated version). Official Journal of the European Union, C 202, 7 June 2016, Arts 263, 268 and 340.

3.2.4 Ordinary administrative error, including excusable mistakes in complex, high-discretion contexts, falls short

Fourth, ordinary error does not meet the threshold. Where the legal position is genuinely unsettled, the regulatory framework complex, or the authority enjoys a wide margin of policy discretion, unlawful mistakes will typically not qualify as sufficiently serious. Similarly, good-faith misinterpretation in a novel context, a prompt correction after clarification, or a procedural irregularity without material impact on protected interests will ordinarily weigh against a seriousness finding. By contrast, SSB is not presumed: it must be demonstrated by reference to the structured factors (clarity, discretion, excusability, persistence, systemic contribution) and their reasoned weighting (Box 1).[63]

The boundary rule remains central: where discretion is considerably reduced or absent, the courts accept that mere infringement may suffice to establish seriousness; where discretion is meaningful, the claimant must satisfy the full seriousness matrix.[64] In sum, the SSB threshold excludes damages claims founded solely on harm, on illegality simpliciter, or on the formal label of the underlying conduct. Only where the claimant shows, by reference to the relevant factors and their weighting, that the authority manifestly and gravely exceeded the limits of discretion does the breach attain the seriousness required for non-contractual liability.[65]

Table 2. Actions for Annulment vs. Damages in EU Law: a structured comparison

Feature	Annulment	Damages
Aim	Invalidate an unlawful act	Compensate loss caused by unlawful conduct
Temporal focus	Legality at the time of adoption	SSB assessed at the time of conduct, plus proof of damage & causation
Threshold	Illegality (no SSB)	SSB required unless discretion is absent/reduced
Form of conduct	Typically binding acts open to review	Any unlawful conduct attributable to a public authority, incl. omissions
Interplay	Annulment may inform subsequent damages	Not dispositive; separate proof of seriousness, damage, causation required
Evidentiary emphasis	Defects of competence/procedure/reasons, manifest error, proportionality	Box 1 factors: clarity, discretion, excusability, persistence, systemic contribution + quantification + causal chain

Source: Authors' compilation based on the TFEU (Articles 263, 268, 340) and CJEU case-law

63 COURT OF JUSTICE OF THE EUROPEAN UNION. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others (Joined Cases C-46/93 and C-48/93). Judgment of 5 March 1996. ECLI:EU:C:1996:79, at [55]–[56].

64 COURT OF JUSTICE OF THE EUROPEAN UNION. Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities (C-352/98 P). Judgment of 4 July 2000. ECLI:EU:C:2000:361, at [43]–[44].

65 COURT OF JUSTICE OF THE EUROPEAN UNION. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others (Joined Cases C-46/93 and C-48/93). Judgment of 5 March 1996. ECLI:EU:C:1996:79, at [55]–[58].

Figure 2. Annulment vs. Damages: analytical sequence and evidentiary focus

ANNULMENT (Article 263 TFEU):

1. Is the act unlawful? → legality review (competence, procedure, statement of reasons, proportionality, manifest error).
2. Outcome: act annulled / upheld.

   → *Note:* unlawfulness may inform, but does not decide, damages.

DAMAGES (Articles 268 & 340 TFEU/*Francovich–Brasserie* line):

A) Rights-conferring rule breached? (identify the rule + protective purpose).
B) SSB? (apply Box 1 / five-factor matrix; seriousness assessed at the time of conduct).
C) Damage? (material/non-material; quantification).
D) Causation? (direct causal link; intervening causes).
E) Procedural/time limits: limitation periods and admissibility requirements.

→ Outcome: compensation granted / dismissed.

How to read: Follow the arrows. Each step specifies (i) the legal question, (ii) the typical evidentiary focus, and (iii) whether SSB is assessed.

Takeaway: SSB is a qualitative filter – distinct from damage and from unlawfulness – whose core function is to reserve compensation for manifest and grave transgressions of discretion limits, while excluding ordinary administrative error from damages liability.

3.3 Substantive and Procedural Implications

The s*ufficiently serious breach* (SSB) requirement performs a dual function in the Union's system of non-contractual liability. Substantively, it calibrates the balance between effective judicial protection and the discretion necessary for EU and national authorities to design and implement policy. Procedurally, it structures the burden of pleading and proof, ensuring that damages actions target manifest and grave excesses rather than ordinary administrative error[66].

3.3.1 Substantive implications

First, the SSB requirement operates as a gravity filter[67] within EU public-law liability. Illegality *simpliciter* is insufficient: compensation is reserved for situations in which the authority manifestly and gravely exceeded the limits of its discretion. The practical intensity of that threshold is context dependent. Where institutions or Member States exercise a wide margin of policy discretion – for example in macro-economic governance, monetary policy, or legislative choices, the bar is correspondingly high, reflecting the courts'

66 GENERAL COURT OF THE EUROPEAN UNION. Artegodan GmbH v European Commission (T-429/05). Judgment of 26 January 2010. ECLI:EU:T:2010:60, at [55].

67 GENERAL COURT OF THE EUROPEAN UNION. Jose Maria Sison v Council of the European Union (T-341/07). Judgment of 26 April 2011. ECLI:EU:T:2011:687, at [31].

reluctance to convert legality review into routine compensatory liability. By contrast, where EU law imposes a clear, precise, and unconditional obligation leaving no material discretion, the seriousness element is, in functional terms, closer to illegality[68]: once a rights-conferring rule is breached in a low-discretion setting, liability becomes more plausible unless strong mitigating features are shown.

Second, the seriousness standard contributes to institutional stability and legal predictability[69]. It reinforces the expectation that public authorities will act consistently with settled law and established practice, and it gives weight to reliance-based interests where clarity, foreseeability, and consistent administrative conduct support legitimate expectations. At the same time, it preserves the necessary space for justified policy adjustment. The key is not immobility, but *governed change:* where legal or policy shifts are reasoned, adequately communicated, and, where appropriate, accompanied by transitional measures, the seriousness threshold helps ensure that the liability regime does not penalise legitimate governance choices merely because they are contested or later refined.

Third, SSB mitigates the risk of over-deterrence. Automatic damages liability for every unlawful act or omission would distort administrative behaviour, especially in complex, technically dense domains where authorities must act under uncertainty and time pressure. The case-law therefore screens out ordinary administrative error: routine mistakes, good-faith misinterpretations amid genuine legal uncertainty, and promptly corrected errors will typically fall short of the seriousness threshold. Conversely, certain patterns carry distinctive aggravating weight. In particular, persistence in an unlawful position despite settled case-law or binding judgments, and institutional/systemic deficiencies (for example, repeated evidentiary neglect or organisational shortcomings), tend to move the assessment decisively toward SSB, because they signal not merely an error, but a failure to respect the discipline of legality once the boundaries of discretion have become clear.

In domains marked by broad discretion – notably sanctions policy and macro-financial governance, the seriousness assessment typically proceeds through a reasoned calibration of opposing considerations. On the one hand, complexity and excusability often operate as mitigating factors, reflecting the need for institutions to make predictive judgments and technically demanding assessments under conditions of uncertainty. On the other hand, persistence in an unlawful position and systemic or institutional contribution to the breach function as aggravating factors, signalling a failure to respect the constraints of legality once those constraints have become ascertainable. As a practical heuristic, genuine uncertainty and complexity will usually weigh against a finding of SSB at adoption. Yet this equilibrium may shift, sometimes decisively, after judicial guidance has clarified the relevant defects. Continued reliance on an evidentially unsupported position in the wake of such clarification

68 GENERAL COURT OF THE EUROPEAN UNION. Artegodan GmbH v European Commission (T-429/05). Judgment of 26 January 2010. ECLI:EU:T:2010:60, at [55]. GENERAL COURT OF THE EUROPEAN UNION. Post Bank Iran v Council of the European Union (T-559/15). Judgment of 13 December 2018. ECLI:EU:T:2018:948, at [95].

69 GENERAL COURT OF THE EUROPEAN UNION. Industrial Química del Nalón, SA v European Commission (T-635/18). Judgment of 16 December 2020. ECLI:EU:T:2020:624, at [53].

can convert what might initially have been an arguable error into a manifest and grave overstepping of the limits of discretion.

Two contrasting patterns illustrate how the seriousness matrix tends to operate across domains. In macro-financial governance, where the courts emphasise both the breadth of institutional discretion and the technically demanding character of the underlying assessments, illegality alone will rarely rise to the level of a sufficiently serious breach in the absence of clear persistence in error or a demonstrable organisational failure that undermines the decision-making process. By contrast, in the field of restrictive measures, the likelihood of SSB increases markedly where listings are maintained or renewed over time without an adequate evidentiary basis, particularly once prior judgments have identified the relevant deficiencies; in such circumstances, persistence and institutional contribution typically become the dominant aggravating considerations within the seriousness analysis.

Takeaway: The SSB threshold calibrates EU public-law liability by reserving compensation for manifest and grave transgressions of discretion limits, thereby protecting reliance and legal certainty where clarity and persistence warrant it, while preventing over-deterrence and preserving legitimate policy space in complex, high-discretion domains.

3.3.2 Procedural implications

Damages actions are distinct from actions for annulment and carry a cumulative burden that lies with the claimant. Four consequences follow:

1. Separate elements, separate proofs. The claimant must plead and prove: (i) a rule of EU law intended to confer rights on individuals[70]; (ii) an SSB of that rule; (iii) actual damage (material and/or non-material); and (iv) a direct causal link. Damage, often dynamic and evolving, cannot substitute for seriousness, which is assessed at the time of the impugned conduct.
2. Annulment is supportive, not dispositive. The annulment of a measure establishes illegality but does not automatically establish seriousness or causation. Conversely, the absence of a binding act or of a prior annulment does not preclude liability: omissions and other unlawful conduct may suffice where the SSB and causal link are shown.
3. Evidentiary focus and standard of review. Given the role of administrative and policy discretion, courts review for procedural regularity, accuracy of material facts, proportionality, and manifest error or misuse of powers. Persuasive pleading therefore marshals evidence on the clarity and precision of the rule, the scope of discretion, the excusability of the error (complexity, guidance available), and any persistence contrary to case-law or judgments.

[70] THANOU, S. Individual restrictive measures and actions for damages before the General Court of the European Union. ERA Forum, 2020, vol. 20, pp. 599–614. https://doi.org/10.1007/s12027-019-00592-8.

4. Remedial coherence. The SSB threshold aligns damages with the exceptional character of public-law liability, avoiding a drift towards automatic compensation while maintaining the effectiveness of EU rights. Where legitimate expectations are engaged, their reliance-based criteria (clarity of assurances, consistency of practice, and adequacy of transitional measures) inform the seriousness analysis but do not collapse it into a general fairness test[71].

Taken together, these implications show why the SSB requirement is not a mere technicality but the system's calibrator. It screens out claims based solely on harm or formal illegality, channels litigation towards the most egregious breaches, and sustains the capacity of EU and national authorities to govern effectively, without foreclosing liability where rights-protective norms have been manifestly and gravely transgressed.

Takeaway: In wide-discretion domains, seriousness typically turns on whether initial complexity is later "converted" into a manifest breach by persistence despite clear judicial guidance.

4 Discussion

4.1 Impact on Legal Certainty and the Principle of Legitimate Expectations

The Court of Justice's doctrine on the sufficiently serious breach (SSB) seeks to reconcile two imperatives: safeguarding effective judicial protection for individuals and preserving the discretion necessary for EU and national authorities to govern. By design, the standard is open-textured and context-sensitive, permitting judicial individualisation across heterogeneous regulatory settings. Yet precisely these virtues generate costs for legal certainty. For claimants and counsel, the *ex ante* predictability of damages actions remains limited: illegality does not suffice, annulment is not dispositive, and the decisive inquiry – whether an authority has manifestly and gravely exceeded the limits of its discretion turns on factors whose relative weight is case-specific and only intermittently articulated in the case-law.

This uncertainty has consequences for reliance interests protected by the principle of legitimate expectations. Properly understood, that principle is not a free-standing fairness test; it is a reliance-based constraint rooted in legal certainty. When clear assurances or settled administrative practices are frustrated without adequate notice or transitional measures, the legitimacy deficit may support a finding of seriousness, especially where discretion is narrow. Conversely, in domains characterised by broad policy latitude or genuine legal indeterminacy, breaches, though unlawful, may appropriately fall short of the SSB threshold. The current jurisprudence thus privileges institutional stability and administrative autonomy, particularly in areas such as macro-economic management, sanctions, and complex market regulation, while leaving some uncertainty for rights holders about the conditions under which their reliance will translate into compensable harm[72].

71 BRAND, Oliver. Schadenersatzrecht. München: C.H. Beck, 2010, p. 98.

72 COURT OF JUSTICE OF THE EUROPEAN UNION. Andrea Francovich and Danila Bonifaci and Others v Italian Republic (C-6/90 and C-9/90). Judgment of 19 November 1991. ECLI:EU:C:1991:428.

Divergences in national implementation compound these dynamics. Although *Francovich* and *Brasserie du Pêcheur/Factortame* establish a uniform remedial template, practice across Member States reveals variable engagement with the SSB matrix and with legitimate expectations as a structuring consideration. The result is a degree of fragmentation that risks diluting the protective function of state liability[73] and, by extension, the effectiveness of EU rights[74]. The analysis in this article addresses those concerns by proposing a transparent, five-factor SSB test and by urging courts to make the weighting of those factors explicit in damages judgments. Clear signposting of the clarity of the rule, the breadth of discretion, excusability, persistence contrary to case-law or judgments, and any institutional contribution, would enhance foreseeability without unduly constraining justified policy change, thereby better aligning the SSB doctrine with both legal certainty and the principled protection of legitimate expectations.

As a practical matter, legitimate expectations tend to raise the likelihood of SSB where the claimant can point to (i) clear assurances or a settled administrative practice, and (ii) the authority's narrow discretion, because frustration of reliance then signals a more serious disregard of legal certainty. Conversely, in contexts of broad policy discretion (notably macro-economic governance or sanctions policy), the same reliance arguments will more often support annulment than damages, unless additional aggravating factors – especially persistence despite judicial guidance or systemic evidentiary neglect – are present. Article 41 CFR, while relevant to administrative quality for EU bodies, should be treated as conceptually distinct: deficiencies in good administration do not automatically translate into SSB, but may operate as an aggravating circumstance where they amount to an inexcusable failure in a setting of limited discretion.

Takeaway: Legitimate expectations most strongly support SSB where reliance is clear and discretion is narrow; in high-discretion contexts, they more often ground annulment than damages absent persistence/systemic failure.

4.2 The Need for Clearer Criteria and Judicial Consistency

The Court's reluctance to crystallise a single, rigid definition of the *sufficiently serious breach* (SSB) is understandable given the heterogeneity of regulatory settings and the need to preserve institutional discretion. Nonetheless, the present open-textured formulation leaves claimants and national courts with limited ex-ante guidance. Greater articulation, without abandoning flexibility, would enhance legal certainty, promote uniform application across Member States, and strengthen the protective function of state and Union liability.

A constructive way forward is to develop, within the existing doctrinal framework, a set of illustrative, yet non-exhaustive, categories that recurrently satisfy the SSB threshold. In practice, seriousness is most likely where an authority disregards a clear and precise EU rule that leaves no material discretion, especially where the rule has been consistently interpreted by

73 LOCK, T. Is private enforcement of EU law through state liability a myth? An assessment 20 years after Francovich. Common Market Law Review, 2012, vol. 49.

74 FINK, M. EU liability for contributions to Member States' breaches of EU law. Common Market Law Review, 2019, vol. 56, no. 5.

the Court. The threshold is also commonly met where an authority persists in an unlawful position despite binding judicial guidance – for example, after an infringement judgment or a preliminary ruling addressing the same point. In the realm of judicial liability, exceptional cases arise where a court of last instance fails to make a reference under Article 267 TFEU contrary to the *CILFIT* criteria or manifestly misapplies settled EU law.[75]

Finally, procedural violations that go to the essence of rights-protection – such as denial of the right to be heard, unjustified refusal of access to the file, or an absence of reasons in contexts of narrow discretion – can, depending on the circumstances, support a finding of seriousness, particularly where legitimate expectations have been frustrated without adequate notice or transitional arrangements. These patterns do not replace case-specific assessment; they provide a principled starting point that channels judicial reasoning toward salient features of gravity.

Complementing such categories, courts would benefit from an explicit weighting of aggravating and mitigating considerations. Aggravation typically follows from the clarity and precision of the applicable rule, the narrowness of the authority's discretion, the inexcusability of the error (including disregard of readily available guidance or facts), persistence contrary to settled case-law or judgments, and evidence of an institutional or systemic deficiency. Mitigation, by contrast, is associated with genuine legal indeterminacy, broad policy latitude requiring complex assessments, good-faith interpretation in novel contexts, prompt self-correction upon clarification, and the isolated character of the lapse within an otherwise sound compliance framework. Making this balancing exercise explicit would not constrain judicial independence; it would render the SSB analysis transparent and replicable.

Takeaway: Judgments could adopt a concise reasoning structure that improves signposting without formalism: identify the rights-conferring EU rule and the scope of discretion; state the state of the law at the material time; assess excusability and any persistence contrary to guidance; weigh the foregoing factors and explain their relative importance; and only then conclude on seriousness, addressing damage and causation as distinct elements. Such disciplined exposition would reduce divergent national approaches, guide administrative practice, and better align the SSB standard with the twin objectives of legal certainty and the principled protection of legitimate expectations, while preserving the necessary space for justified policy choice within the EU's multi-level governance.

4.3 The Wider Implications of Policy

The liability regime's policy implications are forward-looking: the law must preserve the capacity of public institutions to decide and to adapt, while ensuring effective reparation where rights-protective norms are manifestly and gravely breached. Striking this balance is especially salient in high-stakes, expertise-intensive domains, public procurement, restrictive measures, financial and competition regulation, where legal error can have immediate distributive effects on individuals and undertakings, yet decision-makers necessarily operate under complexity and time pressure.

[75] TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION. Consolidated version, OJ C 326, 26. 10. 2012, p. 47–390, art. 267.

The Court's flexible SSB standard helps to avoid over-deterrence and respects institutional discretion. However, flexibility without transparent criteria and explicit weighting can erode legal certainty and, by extension, confidence in adjudication. Under-articulated reasoning – particularly in cases that turn on broad policy assessments risks obscuring why some breaches are deemed insufficiently serious while others cross the threshold. Greater reason-giving discipline would mitigate these risks: judgments should identify the rights-conferring rule, delineate the scope of discretion, state the legal landscape at the material time, and explain, openly and proportionately, the relative weight of clarity, excusability, persistence, and institutional contribution. Such signposting would guide administrative practice ex ante and foster consistent application across Member States.

At the administrative level, the same logic counsels anticipatory governance. Where legitimate expectations are at stake, authorities should communicate change through clear notices, transitional measures, and documented impact assessments; where discretion is wide, internal guidance and control mechanisms should aim to prevent systemic lapses rather than remedy isolated mistakes after the fact. National courts, for their part, can reinforce coherence by using the SSB matrix as a structured lens and by making targeted preliminary references when clarity or convergence is at a premium.

Takeaway: The normative trade-off at the heart of EU non-contractual liability – between institutional autonomy and effective judicial protection – can be managed without sacrificing either value. The SSB threshold should remain context-sensitive, but its application ought to be predictable in method: clearer criteria, consistent reasoning, and attention to reliance interests will enhance legitimacy while preserving the policy space necessary for sound public decision-making.[76]

Conclusion

The *sufficiently serious breach* (SSB) threshold is a central, yet deliberately flexible, feature of the EU's regime of non-contractual liability. While the Court of Justice has refrained from reducing SSB to a rigid formula, its jurisprudence delineates three recurrent settings in which the analysis unfolds. At one end lie situations governed by clear and precise rules that leave no material discretion: in such cases, illegality may suffice, particularly where the rule has been consistently interpreted by the Court. At the other end is the negative delimitation: SSB is not established by the mere existence of damage nor by the annulment of a measure; damages actions pursue distinct aims and require separate proof of seriousness and causation. Between these poles lies a broad intermediate zone in which context and discretion matter. Here, seriousness must be determined by reference to the Court's recurring factors – clarity and precision of the rule, breadth of discretion, excusability considering complexity and guidance, persistence contrary to settled case-law or binding judgments, and any institutional or systemic contribution.

[76] COLCELLI, V. Understanding of the built of European Union legal system: The function of individual rights. Journal of Social Sciences, 2012, vol. 8, no. 3.

Against this background, two conclusions follow. First, the SSB standard should not be converted into a single, universally applicable definition. Its function is to calibrate effective judicial protection with the space necessary for public decision-making at Union and national levels, including in domains that demand complex assessments and rapid adaptation. Second, however, the current open-textured approach generates predictability costs. Without more explicit articulation of the relevant factors and their relative weight, the *ex-ante* assessment of liability remains difficult for claimants and counsel, and national practice risks divergence.

The way forward is not conceptual closure but operational clarity. Courts, Union and national, can preserve flexibility while enhancing legal certainty by (i) identifying the relevant rights-conferring rule and the authority's scope of discretion; (ii) stating the state of the law at the material time; (iii) assessing excusability and any persistence contrary to guidance; and (iv) expressly weighing aggravating and mitigating considerations before concluding on seriousness, then addressing damage and causation as distinct elements. Such reason-giving discipline would also better protect legitimate expectations, whose reliance-based logic is served when judgments transparently explain why a breach does, or does not, cross the SSB threshold.

Takeaway: SSB is not amenable to a single definition, but it is amenable to consistent operationalisation. By applying a structured factor analysis and making its weighting explicit, adjudication can remain sensitive to context while delivering the clarity and consistency necessary for the effective enforcement of EU rights without unduly constraining institutional discretion.

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