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Horizontal liability for damages and
acte clair doctrine in the light of the
Laval case

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Summary

The paper analyzes the national judgment in the *Laval* case and argues that horizontal liability for damages is possible. Additionally, the paper shows that state liability is usually possible in the case of horizontal liability. It also touches upon the question of whether there are community rights to damages arising from the ECJ case law. At the same time, it argues that the state liability requirements arising from the *Brasserie* case should not be extended directly to individual liability. Instead, it offers to use different and more appropriate criteria. In addition, it examines whether the individual can be released from liability when relying on the national law and what is the amount of compensation appropriate in case of horizontal liability according to the ECJ case law.

Taking into account the specifics of the *Laval* case, the possible solution for a clash between fundamental rights and fundamental freedoms is researched. Attention also is paid to the proportionality principle in trade union actions.

The second part of this paper analyzes CILFIT requirements, especially the *acte clair* doctrine as grounds for a national court of last instance to refuse to refer for preliminary ruling to the ECJ. It argues that *acte clair* criteria were absent in the *Laval* case and thus the Labour Court should have referred for one more preliminary ruling to the ECJ. Also, attention is paid to the consequences of re-writing CILFIT.

Preface

I would like to say thanks to Lund University for accepting me in European Business Law program and also for the great library. Thanks to my professors and lecturers. And special thanks to my thesis supervisor Xavier Groussot for help and guidance.

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Abbreviations

AG	Advocate General
EBLRev.	European Business Law Review
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECR	European Court Reports
ECtHR	European Court of Human Rights
EC Treaty	European Community Treaty
EHRR	European Human Rights Report
ELRev.	European Law Review
ELJ	European Law Journal
EPL	European Public Law
EU	European Union
EuConst Charter	European Constitutional Law Review Charter of Fundamental Rights of the European Union
CMLR	Common Market Law Reports
CMLRev.	Common Market Law Review
MJ	Maastrich Journal of European and Comparative Law
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty of European Union
YBEL	Yearbook of European Law

1 Introduction

The aim of this paper is to examine the consequences and impact of the famous *Laval*¹ case, especially the national court's judgment. On December 2009, the Swedish Labour court reached a decision in the *Laval* case. The result was somewhat expected due to a preliminary ruling from the European Court of Justice from 2007, but at the same time it was surprising. Even though the national judgment is long and well-reasoned, there are many gaps in reasoning which require closer examination. The fact that the case was decided 4 votes against 3 does not sound very convincing.

Even though *Laval* is a national judgment, its meaning is extremely important for numerous reasons. First, the Labor court was dealing with the question of whether rights to damages are possible in a case between individuals for breach of EC law – a question which has never been decided before the ECJ. Second, the trade unions relied on national legislation, thus arguing that the horizontal liability is not possible in this case, but the ECJ again has never ruled on a similar matter. Finally, the case law of the ECJ used by the Labor court as the reasoning for its judgment is not the strongest one (if applicable at all), thus leading to the question whether the Labor court has had enough information to decide on the matter and whether there had been a breach of Article 234 (TFEU 267), especially the *acte clair* doctrine.

Drawing inspiration from the *Laval* case, this paper will mainly analyze individual liability in damages for breach of EC law as well as possible state liability in the case of *Laval*. The discussion whether horizontal liability in damages for breach of directly effective EC law is possible is growing. There are many arguments for and against – both strongly motivated, but still it seems that the opinion on horizontal liability for damages is leading. The *Courage*² case has particularly strengthened this opinion. However, as there is no clear case law from ECJ on the matter, it is

¹ Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet*, [2007] ECR I-11767

² Case C-453/99 *Courage* [2001] ECR I-06297

not completely possible to affirm that there is horizontal liability for damages in a case between individuals for breach of EC law as well as which are the requirements for horizontal liability to arise. Taking into account the specific situation in *Laval*, it will be examined whether the trade unions are exempted from liability because they acted in accordance with the national law.

Also, the question whether state liability criteria arising from the *Brasserie du Pêcheur/Factortame*³ case can be extended to individual liability will be examined. Special attention will be provided to the “sufficiently serious breach” criteria and its applicability in cases of individual liability. The main argument of this paper is that it is not possible to apply state liability criteria to individual liability directly, thus some changes and adoption are necessary. Instead of “sufficiently serious breach,” more appropriate criteria for horizontal relationships shall be applied.

Special attention will be paid also to such problem as a clash between two fundamental concepts – fundamental rights and fundamental freedoms. This situation can arise in the case of horizontal liability, when one individual exercising his fundamental rights by these actions breaches another’s fundamental freedoms. Also, it will be examined whether the trade unions are acting according to their rights to collective actions, thus invoking the principle proportionality between their actions and the aim of them.

Further, taking into account the Swedish Labor court’s reference to the *Courage* case, the analysis of whether there is the Community right of damages will follow. As one of the arguments against it, the actual text of the judgment will be involved, thus showing that the Court’s intention was not to create community right of damages. The principle of effectiveness will be analyzed as contrary argument.

The second part of this paper will examine criteria from the *CILFIT*⁴ case, especially scrutinizing the *acte clair* requirement as a ground of national court’s of last instance rights to refuse to refer for preliminary

³ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029

⁴ Case 283/81 *CILFIT* [1982] ECR 1982 p. 3415

ruling to the ECJ. It will be argued that *acte clair* criteria were absent in the *Laval* case and thus the Labour Court should have referred for one more preliminary ruling to the ECJ. Also, attention will be paid to the consequences of re-writing the CILFIT criteria or at least applying them less stringently. This paper will mainly argue against a more flexible approach to CILFIT requirements, claiming that without strict application of CILFIT the uniformity of EC law as well as protection of individual rights will be weakened.

The case law of the European Court of Justice is used as a main source of reasoning in this paper as well as opinions of leading legal researchers and authors. Attention is paid also to the European Court of Human Rights case law. Furthermore, the European Charter of Fundamental Rights and its impact on Community rights is studied closer.

Since the Lisbon Treaty came into force, some terminological changes have arisen; for example, the European Community is called the European Union, the European Community Treaty is re-named Treaty on the Functioning of the European Union, and the European Court of Justice is named Court of Justice. For clarity reasons, as I am analyzing a legal situation before the Lisbon Treaty was in force, the “old” terminology is going to be used with one exception: article numbering, where the new numbers of the articles of TFEU are put in brackets.

In conclusion, it must be pointed out that on May 7, 2010, the trade unions have appealed the Labour court’s judgment to the Swedish Supreme Court. The Supreme Court has accepted the appeal. Thus the “*Laval saga*” continues. In general, the applicant argues that the national court has made a “manifest error” when deciding the *Laval* case at the national level. Trade unions argue that the guidance arising from the ECJ case law was not enough to establish the individual liability for damages, thus the Labour Court should have referred for one more preliminary ruling to the ECJ. As it did not do so, the national court is in breach of EC law. These are also the arguments I am using in my paper when providing the broader analysis of the Labour Court’s national decision in *Laval* case.

1. State liability or individual liability

In the famous *Francovich*⁵ case the ECJ established that the Member State can be liable in damages to an injured party for breach of Community law. The Court based its judgment on principle of effectiveness, holding that the full effectiveness of Community rules would be impaired and the protection of rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community law for which a Member State can be held responsible.⁶ The Court continued, establishing that the foundation for the obligation of a Member State to pay compensation is found in Article 10 (now TEU 4(3)), under which Member States are required to take all appropriate measures to ensure their obligations under Community law.

Later the concept of state liability was developed in the *Brasserie du Pêcheur/Factortame*⁷ judgment. The question raised in the *Brasserie* case was whether State liability also arises in the case of damage suffered by individuals for breaches of Community law that are the result of an act or an omission on the part of the national legislature. The Court affirmed that and listed a number of factors relevant for the Member State's liability to arise:

- 1) a sufficiently serious breach,
- 2) a rule intended to confer rights on individuals, and
- 3) a direct, causal link between breach and damage.⁸

It also held that the principle of state liability applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach.⁹

Is it possible to apply the state-liability concept in *Laval* situation? As the actions in breach of EC law were performed by trade unions, the

⁵ Case C-6 and 9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357

⁶ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 para 33

⁷ *Ibid.*

⁸ *Ibid.*, para 51

⁹ *Ibid.*, para 32; Case C-302/97 *Konle* [1999] ECR I-3099, para 62

question is whether the state or individual liability shall arise. The trade unions were acting in accordance with Swedish national law, but they are not governed by public law, thus they are not public bodies. But, at the same time, the state is still present. Maybe it is also possible to argue that trade unions are acting as quasi-public bodies, thus giving rise to state liability.

For public bodies, the basic criterion usually is that this body shall be governed by public law or shall have regulatory power. But also private bodies can be held liable for breach of EC law, even if it is EC Treaty provision. The ECJ, on many occasions, has concluded that Articles 39 (now TFEU 45), 43 (now TFEU 49) and 49 EC (now TFEU 56) do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at collectively regulating gainful employment, self-employment and the provision of services.¹⁰ Thus, an action imposed by an entity that is not governed by public law and does not have regulatory powers can also lead to the liability of this entity. The ECJ has stressed that abolition of obstacles to the freedom to provide services would be compromised if the abolition of state barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law.¹¹

Advocate General Mengozzi in *Laval* analyzes the way in which Sweden had delegated its regulatory powers to Swedish trade unions and concludes that those wide powers of Swedish trade unions and a collective effect of exercising them on the Swedish market allowed direct applicability of article 49 (now TFEU 56) in the case.¹² Therefore, also private associations such as Swedish trade unions can be held liable for the breach of EC law, even though they do not have regulatory powers nor are

¹⁰ Case 36/74 Walrave and Koch [1974] ECR 1405, para 17; Case 13/76 Donà [1976] ECR 1333, para 17; Case C-415/93 Bosman [1995] ECR I-4921 para 82; Joined Cases C-51/96 and C-191/97 Deliège [2000] ECR I-2549, para 47; Case C-281/98 Angonese [2000] ECR I-4139, para 31; and Case C-309/99 Wouters and Others [2002] ECR I-1577, para 120, Case C-438/05, International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti, [2007] ECR I-10779, para 33

¹¹ Case 36/74 Walrave and Koch [1974] ECR 1405 paras 17 and 18; Case C-415/93 Bosman [1995] ECR I-4921, paras 83 and 84 and case C-309/99 Wouters and Others [2002] ECR I-1577, para 120.

¹² Opinion of AG Mengozzi delivered on 23 May 2007 in case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet*, [2007] ECR I-11767, para 158-161

governed by public law, because they are “powerful” and can affect the market. The ECJ in *Laval* followed AG Mengozzi’s opinion and took into account the real power of the trade unions in the market. The same consideration was taken into account when the ECJ decided the *Viking* case. Supporting its reasoning with the case law from free-movement-of-goods cases (such as *Commission v. France*¹³ and *Schmidberger*¹⁴), the Court pointed out that restrictions of fundamental freedoms may be the result of actions by individuals or groups of such individuals and not always the state.¹⁵ Also, Advocate General Maduro, in *Viking*, pointed out that certain undertakings acting in collusion or holding a dominant position in a substantial part of the common market are able to intervene in the functioning of the common market by restricting the activities of market participants.¹⁶ Even though he was addressing this situation more to competition law, he agreed that fundamental freedoms are horizontally applicable depending on how much influence the individual has successfully to prevent others from enjoying their rights to freedom of movement.

Nowadays, non-public bodies are playing more and more important role in the market, and they have stronger powers than before. That leads to more notable effects of their actions. Even if non-public bodies are not established under public law and do not have regulatory powers delegated by public law, they still may play an important role in relationships in the market. The same is said about trade unions; they will not be bound by the freedoms of movement insofar as they assume a statal regulatory task but insofar as they behave as powerful social actors.¹⁷

The main accent is put on a private entity’s ability to influence the national market and its participants and, of course, how relevant and notable is this influence. Also, a private entity’s ability to impose collective

¹³ Case C-265/95 *Commission v. France* [1997] ECR I-6959

¹⁴ Case C-112/00 *Schmidberger* [2003] ECR I-5659

¹⁵ Case C-438/05, *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR I-10779, para 62

¹⁶ Opinion of AG Maduro delivered on 23 May 2007, in case C-438/05, *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR I-10779, para 34

¹⁷ Azoulai L. *The Court of Justice and the social market economy: the emergence of an ideal and the conditions for its realization*. [2008] 45 *CMLRev.*, p.1345.

regulations on a certain profession or service provided should be taken into consideration. Most likely, a single entrepreneur who has no dominant position in the market will not be capable of significant influence in the market, and the same would be said of some small labour unions, even if they have power to conclude collective agreements.

When talking about horizontal liability, some of the so-called “staff cases”¹⁸ shall be mentioned because in those the ECJ has concluded that a private employer is bound by rules of non-discrimination, and an employee can bring damage action against it. The principle of non-discrimination is the general principle of Community law and it is at the “same level” as fundamental rights and fundamental freedoms. Thus, the same by analogy shall be applied in a case of breach of fundamental freedoms. If the individual is in the breach of fundamental freedoms, the “injured” individual can bring damage claims against it. The problem arises, as it was in *Laval*, when an individual is in breach of fundamental freedoms because of exercising its fundamental rights. The solution for this is to balance those fundamental concepts in each situation because none of them can prevail the other (see further analysis below).

From the other side, it should be reminded that the state is always present, even if the liability arises from horizontal relationship, and especially if there is a breach of fundamental freedoms. The role of the state is indirect all the time because the state is adopting laws. Even if between individuals is so-called “contractual autonomy”, i.e., the individual is free to choose with whom he wants to establish a contractual relationship, the state is indirectly present because the individual anyway will have his autonomy according to the national laws and will act according to them. The state is liable for safeguarding the individual’s rights, especially fundamental freedoms. Thus, the individual has rights to ask the state to fulfill its obligations, and, if it does not succeed, the individual can ask for compensation from the state. For example, that was the situation in the

¹⁸ See for example, Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* [2010] ECR 00000; Case C-281/98 *Angonese* [2000] ECR I-4139

*Schmidberger*¹⁹ case. The actual breach of EC law was done by individuals, but the state was liable for that because it did not sufficiently safeguard the individuals' fundamental rights.²⁰ It is the state's obligation to protect individuals from the harmful conduct by other individuals. Thus also state liability is possible, especially in the *Laval* case, where trade unions gained their rights from national legislation and acted according to it.

According to the ECJ's case law, in case of state liability the individual will need to prove that the state has committed "sufficiently serious breach". In case of horizontal liability, the individual will not need to prove "sufficiently serious breach". Then the question is, if the state is present indirectly all the time, why sue the individual if it is possible to sue the state directly? First, the individual will need to prove "sufficiently serious breach", which is not always so easy and clear. Second, why should an individual try to prove it if there is no "sufficiently serious breach" in the horizontal relationship and it does not exist in the realm of horizontal liability at all (see more detailed analysis below)?

Although trade unions have strong and notable powers and the ability to effect the Swedish labor market, they do not fulfill the requirements to be recognized as a public body. Trade unions are acting private bodies or maybe as quasi-public bodies. If it is possible to argue that trade unions are quasi-public bodies, it could also lead to state liability. According to the theory of administrative law, a quasi-public body is a private institution with certain delegated public power from the state. The state is liable for the actions of those "bodies" because it has created and delegated power to them. The state has trusted trade unions with such an important issue as the protection of workers, which is one of the state's social policy issues. Thus, it might be possible to argue that in the *Laval* case the state has delegated a part of its public powers to a private entity: trade unions. This will not be considered an authentically horizontal situation because it involves public power. But in this situation, in relation

¹⁹ Case C-112/00 *Schmidberger* [2003] ECR I-5659

²⁰ Opinion of AG Maduro delivered on 23 May 2007, in case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR I-10779, para 39

to other individuals, the private entity will be considered public (a state body). In such a case, general conditions of liability laid down in *Francovich* and *Bergaderm*²¹ will apply.²²

There is also an opinion that, as national authorities have a duty to prevent private parties from interfering with freedoms granted by Community law,²³ it seems that injured parties may be able to claim both authorities for failing to protect their rights and against companies or individuals who interfered with them.²⁴ It must be agreed, with Krzeminska, that the fact that state is a defendant is just a matter of a choice of legal action.²⁵

When it comes to the situation like in *Laval*, it is difficult to say whether there should be state liability or individual liability because both are possible. The situation is more complicated and ambiguous than in any other case of state or individual liability. As in *Laval*, the matter of state or individual liability is not so clear. It is most likely possible for an individual who is held liable for damages to bring a regress claim against the state. Also, *Laval* could have brought damage claims against both the trade unions and Sweden. However, for the purpose of this paper, individual liability for damages as the main possibility will be analyzed.

²¹ Case C-352/98 *Laboratoires Pharmaceutiques Bergaderm and Goupil v Commission* [2000] ECR I-5291

²² Tridimas Takis. *General principles of EC law*, Oxford: Oxford University Press., 2006., p.545

²³ Case C-265/95 *Commission v. France* [1997] ECR I-6959

²⁴ Temple Lang John. Article 10 – The Most Important “General Principle” of Community Law. eds. Bernitz U., Nergelius I., Cardner C. *General principles of EC law in a process of development*. The Hague: Kluwer Law International, 2008.

²⁵ Krzeminska-Vamvaka Joanna. Horizontal effect of fundamental rights and freedoms – much ado about nothing? German, Polish and EU theories compared after Viking Line. Jean Monnet Working Paper 11/09, p.28

2 Can trade unions be held liable for their acts if they were acting according to Swedish legislation?

Community competition case law has clearly established that a private party cannot rely on Member States rules to justify its actions if these rules violate the primary EU law.²⁶ Is the same applied in the *Laval* situation? Can trade unions invoke the principle of legitimate expectations as justification for breach of fundamental freedoms?

The ECJ has established that protection of legitimate expectations must always be examined in regard to the knowledge and information which is or should be available to the prudent and informed trader.²⁷ In *Land Rheinland v. Alcan*²⁸, the ECJ concluded even though the Community law cannot preclude the application of national law, the party cannot entertain the legitimate expectation if the right gained from national law is not in accordance with Community provisions. Also, the Court confirmed that diligent businessman should normally be able to determine whether national law is in breach of EC law. From the other side, in the *Courage* case, the ECJ concluded that the effectiveness of Community law would be hindered if the individual would not have rights to claim damages for loss caused to him even if he was part of those illegal actions, although the national court shall take into account an individual's responsibility for breach of EC law and whether he knew that his actions are illegal.²⁹

According to Swedish legislation, trade unions are allowed to use collective actions in case an employer refuses to sign a collective agreement

²⁶ Reich Norbert. Horizontal liability in EC law: Hybridization of remedies for compensation in the case of breaches of EC rights. [207] 44 CMLR, p. 716 referring to case 45/85 *Verband der Sachversicherer v. Commission* [1987] ECR 405, para 22 and Case C-24/95 *Land Rheinland Pfalz v. Alcan* [1997] ECR I-1591, para 25

²⁷ Case C-350/88 *Société française des Biscuits Delacre e.a. v Commission of the European Communities* [1990] ECR I-00395, para 37

²⁸ Case C-24/95 *Land Rheinland Pfalz v. Alcan* [1997] ECR I-1591, para 25

²⁹ Case C-453/99 *Courage* [2001] ECR I-06297, para 31

with trade union.³⁰ Swedish trade unions relied on national legislation, but did they know that national legislation is in breach of EC law? The president of the Swedish construction workers labor union, Hans Tilly, in a comment on the Swedish labor court's judgment, says it is incomprehensible that the union should pay compensation when it followed the current Swedish law.³¹ Taking into account the influence of trade unions in Sweden and their financial resources, they might have been able to at least consult with lawyers or to research whether their actions are in accordance with EC the law, but should they have done so? From the other side, they have relied on national legislation and also long-term practice in Sweden, where trade unions have had rights to collective actions already for many years. There is also a case law from the ECtHR that establishes that to boycott an employer, because of his unwillingness to conclude a collective agreement with trade unions, is allowed under ECHR even if that is why the employer needs to close his business.³² Of course, trade unions knew about ongoing discussion as to whether collective actions against foreign employers are acceptable according to the EC law, but at that time there had not been any case law from the ECJ. Is it actually possible to argue that the individual shall know when the national legislation goes contrary to EC legislation? One might say ignorance of the law does not release from liability. From the other side, states, when implementing directives, have wide margins of discretion; therefore, it is the state's liability and not the individual's to know how well and correctly a directive is implemented. Also, it is not for individuals to analyze whether its actions are proportional because if the legislation allows an individual to perform certain actions an individual can rely on it.

For this reason, it might be necessary to invoke the principle of legal certainty and legitimate expectations, which is a general principle of EC law. Although this principle varies from state to state, the main idea of this principle is that individuals can rely on the state's actions, which will be legal and consistent. Individuals should act reasonably and in good faith,

³⁰ See The Law on workers' participation in decisions of June 10, 1976 (Medbestämmandelagen)

³¹ „AD:s lavalldom får allvarliga konsekvenser” www.byggnads.se 2 December 2009.

³² Gustafsson v. Sweden (1996) 22 EHRR 409.

and thus should not suffer from disappointment of those expectations.³³ Usually, three requirements shall be fulfilled when applying the principle of legitimate expectations:

- 1) a specific expectation or assurance arising from legislation,
- 2) legitimate or justified expectations, and
- 3) balancing of interests.

If the individual does not have legitimate expectations, the individual cannot rely on this principle. The individual's interests and rights shall be legitimate, and he should know that they are legitimate. Therefore, if the trade unions knew that national legislation is in breach of the EC law and they still acted according to it, they cannot rely on national legislation when justifying their actions. However, even if trade unions were acting according to national legislation and relied on the principle of legal certainty and legitimate expectations, their actions should have been proportionate with the aim of their actions (see more detailed analysis below).

Also, when using the principle of legitimate expectations, the balancing of Community and national interests is necessary. Community interests are interests of free movement and a common market. National interests are interests of the state (protection of workers). As said before, the principle of legitimate expectations and legal certainty is not absolute. When Community and national interests collide, as in this situation, the priority shall be given to the Community's interests. They shall be put higher than national interests because they are interests of all Communities, not only one state, and these are interests on which a community is based – interests in having a common market with all freedoms. Thus, trade unions cannot rely on national legislation (invoking the principle of legitimate expectations) when justifying actions in breach of EC law.

At the end, it should also be mentioned that trade unions did not have the chance to check whether their actions were in accordance with EC law. Even if they wanted to do so, there is actually no procedure or mechanism to clarify that. The national court has rights to ask for a

³³ Raitio, J. The principle of legal certainty as a general principle of EU law. In Bernitz, U., Nergelius, I., Cardner, C. General Principles of EC law in a process of development. The Hague: Kluwer Law International, 2008, p.54

preliminary ruling when it is in doubt about the correct interpretation of EC law, but the individual has no similar rights. The only way the individual can know whether he is acting in accordance with EC law is if someone brings actions against the individual and then the national court asks for preliminary ruling. Basically, the individual needs to breach the law to discover whether or not his actions are in breach of EC law.

3 Individual's (horizontal) liability for breach of EC law.

3.1. Development and concept of individual liability.

After the *Francovich* and *Brasserie* cases, the question arose whether the liability for breach of Community law may be extended to individuals. At the time of the *Francovich* judgment, individual liability for damages resulting from a breach of Community law was only available where it was provided for under national law and subject to the principles of effectiveness and equivalence.³⁴ Some writers were concerned that an introduction of individual liability for breach of EC law could conflict with the principle of legal certainty by imposing liability for damages upon individuals where no such liability is incurred under national law.³⁵

Already in the *Banks* case, Advocate General Van Gerven pointed out that the general basis established by the Court in the *Francovich* judgment for State liability also applies where an individual infringes upon a provision of Community law to which he is subject, thereby causing loss and damage to another individual.³⁶ He also explained that the full effect of Community law would be impaired if the individual did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of Community law.³⁷ Moreover, in the event of infringement by individuals of EC law, and in the event of state liability for breach of EC law, liability arises for the same reasons: because of the binding legal nature of the EC Treaty provision and the general principle of

³⁴ Drake, S. Scope of Courage and the principle of individual liability, [2006] 31 ELRev., p.8

³⁵ Deards, E., 'Curiouser and Curiouser'? The Development of Member State Liability in the Court of Justice" [1993] 3 EPL 117 at p.143 read in Drake S. Scope of Courage and the principle of individual liability, [2006] 31 ELRev., p.9

³⁶ Opinion of Advocate General Van Gerven delivered on 27 October 1993 in Case C-128/92 *Banks* ECR [1994] Page I-01209, para 43

³⁷ W. Van Gerven, "Bridging the Unbridgeable: Community and National Tort Laws after *Francovich* and *Brasserie* " [1996] 45 The International and Comparative Law Quarterly, p.530

the full effectiveness of Community law. Therefore it would also be unacceptable were similar breaches of Community law to be governed by different rules depending on the identity of the author of the breach.³⁸

Soon after establishing the concept of state's liability, the ECJ dealt with the first case of possible individual liability for damages for breach of fundamental freedoms. In the *Bosman*³⁹ case, the ECJ decided that Mr. Bosman's rights to free movement (as a worker) have been breached, concluding that an organization not governed by public law can be held liable for breach of EC law.⁴⁰ But it did not talk about the rights to compensation, leaving this matter to the national court. Later, Mr. Bosman received his compensation from the Belgian Football Association, but not as a result of the judgment.

Later, the issue of liability of private parties arose in *Courage v Crehan*⁴¹, which dealt with a private party's liability for breach of competition law. The *Courage* case opened the real potential for liability in a host of other cases where Community norms impose obligations on private parties.⁴² Such obligations might be imposed by primary law or regulations.

In *Munoz*⁴³, the ECJ established that the individual may have rights of action against another individual if his interests are affected by the latter's failure to comply with an obligation imposed by Community law (in this case, it was a regulation). The Court based its judgment on objectives of the regulation and the principle of effectiveness. It also stated that the possibility of bringing civil proceedings strengthens the practical working of the Community's rules on quality standards.⁴⁴ To summarize, the ECJ concluded that a private party can bring an action against another private party based on the breach of Community rules, even though those rules do not contain specific individual rights. Therefore, the individual does not

³⁸ W. Van Gerven, "Bridging the Unbridgeable: Community and National Tort Laws after *Franovich* and *Brasserie*" [1996] 45*The International and Comparative Law Quarterly*, p. 531

³⁹ Case C-415/93 *Union Royale Belge de Soccer Association and others v. Bosman* [1995] ECR I-4921

⁴⁰ *Ibid.*, para 83-84

⁴¹ Case C-453/99 *Courage* [2001] ECR I-06297

⁴² Tridimas Takis. *General principles of EC law*, 2006, Oxford University Press, p.544

⁴³ Case C-253/00 *Munoz v. Frumar Ltd.* [2002] ECR I-7289

⁴⁴ *Ibid.*, para 31

need to satisfy the requirement of individual concern. It should be pointed out that in this case there is a wide potential class of beneficiaries, and it will depend on the range of interests that the certain Community rules intend to protect; thus, it might include not only competitors but also consumers, employees, representative associations, trade unions or pressure groups.⁴⁵

EC Treaty provisions concerning fundamental freedoms place obligations on private individuals because they are in the same position as the state to impede the exercise of fundamental freedoms and thereby obstruct the effective functioning of the market.⁴⁶ Of course, there are opinions that argue to the contrary, saying that it is the state's liability to provide fundamental freedoms and effective functioning of the market. Their main argument is because individuals should not be a subject to obligations which are too indefinite, therefore placing burden on them. But then again, the contrary argument is that individuals are not asked to do something that can cause burden on them but exactly the opposite: not to do anything that could cause restriction of another individual's fundamental freedoms. Thus, individual might not even have an "active" obligation to something, but he will however have a "passive" obligation to refrain from any action that can violate another individual's rights. Therefore, if the provisions on free movement apply to private individuals, then they have an obligation not to interrupt another person's rights to free movement and the right to ask for compensation if somebody else hindered their rights to free movement.

The conditions for individual liability to arise remain uncertain, even though some inspiration can be drawn from the ECJ's so-called "Article 288 EC (now TFEU 340)" case law.⁴⁷ In regards to liability of the Community pursuant to article 288 (2) EC (now TFEU 340), the ECJ now draws upon its jurisprudence on Member State liability. Thus, in

⁴⁵ Tridimas Takis. *General principles of EC law*, Oxford: Oxford University Press, 2006, p.546

⁴⁶ Krzeminska-Vamvaka Joanna. *Horizontal effect of fundamental rights and freedoms – much ado about nothing? German, Polish and EU theories compared after Viking Line*. Jean Monnet Working Paper 11/09, p. 33

⁴⁷ Van Gerven. *Crehan and way ahead*. [2006] 17 *EBLRev.*, p.271

principle, the condition of a Member State's liability should also be applied in the case of liability of individuals unless a modification of these conditions has to be made.⁴⁸ Also, AG Gerven in *Banks* pointed out the same -- according to the article 288 EC (now TFEU 340), the conditions supporting the non-contractual liability of the national authorities represent general principles derived from the common legal traditions of the Member States; therefore, they could be extended over any kind of non-contractual liability.

So far, there is no case law yet dealing with a breach of Community freedoms by private parties where an individual has been recognized as liable for breach of Community freedoms and where compensation for the breach was claimed. When it comes to damage claims at the Community level, most of the cases deal with state's liability and damages claims against the state. There have been some cases concerning European private law where questions about horizontal liability arose, but those have been decided as "jurisdiction" cases, i.e., where the jurisdiction was established but not horizontal liability for damages.

But as the ECJ has concluded that private associations including social unions not governed by public law can be held liable for breach of EC law, and thanks to the *Courage* case, there is now a legal base in Community law to claim damages.⁴⁹ If the EC Treaty provision grants rights to individuals, that means it also imposes obligations. There are only some EC Treaty provisions clearly imposing obligations on individuals. Article 39 (now TFEU 45) and 49 (now TFEU 56) impose obligations on individuals.⁵⁰ The person is liable for fulfillment of these obligations; otherwise, the damage claim against this person can be brought. The damage will follow the obligation, which will follow the right. If there are rights arising from EC law, then it should be fair to claim damages for breach of that right.

⁴⁸ Kremer, C. Liability for breach of EC law: An analysis of the new remedy in the light of English and German law. [2003] 22 YBEL p. 224

⁴⁹ Van Gerven. Crehan and way ahead. [2006] 17 EBLRev., p.271

⁵⁰ Case 36/74 Walrave and Koch [1974] ECR 1405, para 17 and Case C-281/98 Angonese [2000] ECR I-4139, para 31-36

However, not always it is possible to establish that the individual will be liable for the breach of free movement provisions even if the person did hinder free movement. According to AG Maduro's opinion in *Viking*, the provisions on freedom of movement apply to private action that, by virtue of its general effect on the holder's rights of freedom of movement, is capable of restricting other persons from exercising those rights by raising an obstacle that they cannot reasonably circumvent.⁵¹ If the individual is actually able to hinder free movement because of having strong influence in market, he will have an obligation to respect free movement rules as well as pay damages in cases of breaching free movement rules. Anyway, the conditions and amount of damages in horizontal liability situations will be for the national law to decide. The national legislator shall take into account Community principles of equivalence and effectiveness when deciding the amount of compensation as well the fact that the compensation shall be adequate.

In most of the cases of state and individual liability, the ECJ found the reasoning in effectiveness of EC law, especially because the Court, mentioning Articles 6 and 13 ECHR and national constitutional traditions, has formulated the principle of effective judicial protection as a general principle of Community Law.⁵² As it is correctly pointed out, the principle of effectiveness cannot be less paramount in a horizontal context where Community rights are infringed by individuals causing loss to other individuals.⁵³ The principle of effectiveness is linked with a principle of equivalence. The principle of equivalence means that Community rights shall receive the same protection as domestic rights. In other words, if the national law provides a certain amount of protection to domestic rights (i.e., rights arising from national law), then this level of protection shall be extended to rights arising from Community law. A claim against a private

⁵¹ Opinion of AG Maduro delivered on 23 May 2007 in case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR I-10779, para 41

⁵² Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, para 18; Case 222/86, *Unectef v. Heylens*, [1987] ECR 4097, para 14.

⁵³ Winterstein A. *Community Right in Damages for Breach of EC Competition Rules?* [1995] 16 ECLR., p.51 see also AG Gerven in *Banks* case, para 42 and onwards.

party for breach of Community law must not be subject to more stringent conditions than those applicable to a comparable claim for breach of national law.⁵⁴ Thus, the national court shall ensure the effective protection of individual rights, and it might require national courts to award compensation for breaches of obligations prescribed by Community measures.⁵⁵

Also, according to the European Charter of Fundamental rights,⁵⁶ everyone whose rights and freedoms guaranteed by EC law are violated has rights to an effective remedy. The question still remains whether it is possible to apply the Charter in case of horizontal relationships. In other words, is the Charter binding to individuals? Article 51(1) of the Charter establishes that rights in the Charter are addressed to Community institutions and Member States when they implement EC law. Some authors point out that the list of the potential human rights violators provided in Article 51 of the Charter was intended to be exhaustive; thus, violations committed by individuals would fall outside the scope of application of the Charter.⁵⁷ However, there is nothing that limits these obligations to cases brought against public authorities (Community or national); thus, it might be argued that these obligations apply similarly when an individual seeks to rely on the Charter against other individuals.⁵⁸ It has been pointed out that the obligation of Union and Member States to “observe the principles” could be more far-reaching than it seems initially in the text of Charter because under certain conditions it could include the obligation to take action to secure the applicable principle on relations between individuals.⁵⁹ Therefore, it would be possible to argue that the Charter is horizontally applicable even though there is nothing explicitly said in the Charter. It should be also pointed out that for comparable rights in the EC Treaty (for example, free movement of workers), Article 15 in Charter and Article 43

⁵⁴ Tridimas Takis. *General principles of EC law*, 2006, Oxford University Press, p.545

⁵⁵ *Ibid.*, p.456

⁵⁶ Charter of fundamental rights of the European Union. OJ 2000/C 364/01, para 47

⁵⁷ Curtin, D., Van Ooik R. *The Sting is Always in the Tail. The Personal Scope of Application of the EU Charter*. [2001] 8 MJ., p. 112

⁵⁸ Craig, P. *EU administrative law*. Oxford: Oxford University Press, 2006, p.499

⁵⁹ Heringa, W.A., Verhey L. *The EU Charter: Text and Structure*. [2001] 8 MJ., p.21

EC (now TFEU 49) are horizontally applicable. Then why not apply the Charter in horizontal relations? Some rights in the Charter are perfectly capable of being invoked in disputes between individuals.⁶⁰ Also, there are many rights and freedoms addressed – though maybe not directly -- to individuals. Examples include equality between women and men in employment, work and pay (Art. 23), rights of children (Art. 24), workers’ rights to information and consultation within an undertaking (Art. 27), workers’ protection in the event of unjustified dismissal (Art. 30) and others. The horizontal effect of the Charter can also be achieved by assuming that the Union and the Member States have a positive obligation to take measures in order to protect principles, inherent to the rights laid down in Charter, in relations in the private sphere.⁶¹ Also, Article 6(1) TEU provides that the Charter is to have the same legal value as the Treaties. One can argue the distinction between rights in the Charter and rights in the EC Treaty is possible because EC Treaty articles will have a horizontal direct effect only when they are clear as to the obligation imposed on the private party. Then again, many Charter rights would satisfy this condition.⁶² ECJ has applied the Charter in horizontal situation as well. In the *Küçükdeveci* case⁶³, the ECJ pointed out the significance of the Charter also in a horizontal relationship – especially the principle of non-discrimination. Advocate General Bot in *Küçükdeveci* stressed that if the Charter becomes legally binding in the future, the Court will be inevitably confronted with other situations that raise the question of the right to rely, in proceedings between private persons, on directives that contribute to ensuring the observance of fundamental rights, as among the fundamental rights contained in that Charter are a number already part of the existing body of Community law in the form of directives.⁶⁴

⁶⁰ Curtin, D., Van Ooik R. The Sting is Always in the Tail. The Personal Scope of Application of the EU Charter [2001] 8 MJ., p.112

⁶¹ Heringa, W.A., Verhey L. The EU Charter: Text and Structure [2001] 8 MJ., p.22

⁶² Craig, P. EU administrative law. Oxford: Oxford University Press, 2006, p.500

⁶³ Case C-555/07 Seda Küçükdeveci v Swedex GmbH & Co. KG [2010] ECR 00000

⁶⁴ Opinion of Advocate General Bot delivered on 7 July 2009, in case C-555/07 Seda Küçükdeveci v Swedex GmbH & Co. KG [2010] ECR 00000, para 90

However, if the provisions of fundamental freedoms are horizontally applicable, they assign rights and duties; therefore, also horizontal liability for damages for breaching them is possible. The conditions of liability to arise remain uncertain even though some guidelines can be taken from the ECJ case law on state and Community liability. An individual is liable for fulfillment of his obligations and not the state's. Therefore, wherever there is an individual right, there must be an appropriate remedy for its realization and protection.⁶⁵ In other words, the right without a damage resembles a soul without a body.⁶⁶

3.2. Can the state's liability requirements be extended to an individual's liability?

As mentioned before, according to *Brasserie du Pêcheur*, the Member State's liability arises when there is a sufficiently serious breach of a rule intended to confer rights to individuals and a direct causal link between breach and damage. There are opinions that the state liability concept, i.e., requirements for establishing liability, shall be also applied in cases establishing an individual's liability for breach of EC law. According to Reich, criteria developed in Community and State liability shall be taken over by analogy.⁶⁷ At the same time, there are also many reasons the concept of state liability cannot be applied directly without any changes to the concept of individual liability.

Waelbroeck is of the opinion that though the judgments in *Francovich* and *Brasserie* are related to the liability of Member States only, these judgments clearly support the arguments that damages should also be available against individuals for the breach of directly effective Community

⁶⁵ Prechal, S. *Directives in European Community Law*. Oxford: Clarendon, 1995, p.143

⁶⁶ Alvizou A. *Individual Tort Liability for Infringements of Community Law*. [2002] 29 *Legal Issues of Economic Integration*, p. 187

⁶⁷ Reich, N. *Horizontal liability in EC law: Hybridization of remedies for compensation in the case of breaches of EC rights*. [2007] 44 *CMLRev.*, p.715

rules, mostly because it would provide effectiveness of Community law.⁶⁸ Also, it is supported with paragraph 82 of the *Brasserie* case, which creates in general “reparation for loss or damage caused to individuals as a result of breaches of Community law” without limiting it to the breaches by Member States. However, Dougan argues that *Francovich* case law should not be simply extended to actions of individuals because that would permit individuals to benefit from culpability requirements (such as manifest and grave disregard test), developed specifically to evaluate the conduct of public authorities exercising broad discretionary powers.⁶⁹ He suggests using Community law to tailor general liability conditions developed under *Francovich* case law to different circumstances – public and private law situations, vertical and horizontal disputes – in which EC Treaty obligations might be infringed and a Community remedy in damages is required.

It should be reminded that the key for Member States’ liability in damages was the primacy of EC law and the duty on domestic legislative bodies to respect the limits laid down by overreaching and superior legal principles.⁷⁰ Also, Member States are bound by obligation to ensure fulfillment of duties derived from the EC Treaty according to Article 10 of the EC Treaty (now TEU 4(3)), but there are no rules or principles placing the equivalent burden on private parties. So it would surely be more difficult for the Court of Justice to divine the justification for imposing a Community-standard-of-damages liability on private parties.⁷¹

In the following chapter, each criterion of establishing state’s liability and the possibility of transferring it to individual liability will be analyzed.

⁶⁸ Waelbroeck D.F. Treaty Violations and Liability of Member States: The Effect of the *Francovich* Case law., in Heukels T., McDonnell A. (eds.) *The Action for Damages in Community Law*. The Hague: Kluwer Law International, 1997., p.318

⁶⁹ Dougan, M. *National Remedies before the Court of Justice; Issues of Harmonization and Differentiation*. Oxford: Hart Publishing, 2004, p.375

⁷⁰ Opinion of AG Tesauo delivered on 28 November 1995 in joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029

⁷¹ Ward, A. *Judicial review and the rights of private parties in EC law*. 2nd ed. Oxford: Oxford University Press, 2007, p. 127

3.1.1 Rule intended to confer rights on individuals.

The ECJ in *Brasserie* indicated that the “grant of rights” requirement was to be constructed widely. The Court established that the rule in question “must be intended to confer rights to individuals”. It referred to the case law or Article 28 EC (now TFEU 34) and 49 (now TFEU 56). The capacity of these two internal market provisions to create individual rights was derived solely from their clear, precise and unconditional wording.⁷² When an individual claims his rights arising from Community law have been breached, he needs to prove that he has these rights. The Community rule providing rights to individuals cannot be excessively wide and abstract. The ECJ on multiple occasions has found that certain EC Treaty articles have direct horizontal effects when those rules are clear and unconditional and contain no reservation on the part of the Member States and do not depend on any national implementing measure.⁷³ According to the ECJ case law, Treaty articles such as Articles 12 (TFEU 18), 39 (TFEU 45), 43 (TFEU 49), 49 (TFEU 56) are directly applicable.

3.1.2 Sufficiently serious breach.

According to the *Brasserie* case, the breach of Community law is sufficiently serious if the Member State manifestly and gravely disregarded the limits on its discretion.⁷⁴ The factors that may be taken into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, and whether any error of law was excusable or inexcusable.

⁷² Eilmansberger, T. The relationship between rights and remedies in EC law. [2004] 41 CMLRev., p.1225

⁷³ Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. [1963] ECR I

⁷⁴ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para 55

The guideline of what is a “sufficiently serious breach” was also given in the cases *British Telecom*⁷⁵, *Denkavit*⁷⁶, *Norbrook*⁷⁷ and others. The ECJ case law declares that it is for the national court to decide whether the breach of Community law is serious. Of the three conditions of liability, only the first – whether the provision breached is intended to grant rights to injured party – will be decided by ECJ because the condition concerns the interpretation of Community law which falls squarely within the jurisdiction of the Court.⁷⁸ However, there are cases where the Court did not leave much freedom for the national court.

When applying the established criteria – clarity and precision of the rule infringed and the discretion left to the national authorities by that rule, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable -- it seems that they more likely will be applied only in the case of state liability, especially when it comes to analyzing the discretion left to the Member State, which has been as the number one criterion when establishing whether the breach is sufficiently serious. It is not possible to measure the level of discretion when it comes to individual’s actions because the individual has no discretion left because it has no legislative or administrative powers. It is the state or state institution who has or has no discretion left by the rule. And it is even not important who exercises the discretion, but the nature of discretion is important.⁷⁹

When taking into consideration the clarity and precision of the rule breached, the court shall also take into account how clear and identified are the consequences arising from that particular rule. The ECJ case law has showed that if the consequences arising from freedom of movement guaranteed by the EC Treaty have been made clear only gradually, that

⁷⁵ Case C-392/93 R. v. HM Treasury, ex.p. British Telecommunications plc [1996] ECR I-1631

⁷⁶ Cases C-283, 291 and 292/94 Denkavit International v. Bundesamt für Finanzen [1996] ECR I-5063

⁷⁷ Case C-127/95 Norbrook Laboratories Ltd. V. Ministry of Agriculture Fisheries and Food [1998] ECR I-1531

⁷⁸ Tridimas Takis. General principles of EC law, Oxford: Oxford University Press, 2006 p.520.

⁷⁹ Craig, P. EU administrative law. Oxford: Oxford University Press, 2006, p.819

might be possible to exclude the existence of a sufficiently serious breach.⁸⁰ Even if the rule has been long enforced, its application still can be unclear.⁸¹ And it seems that in the case of state's liability, the state can escape from liability of sufficiently serious breach if it can prove that it was acting under the belief that it is necessary and also objectively reasonable.⁸²

The condition of "sufficiently serious breach" is not based on fault or negligence, which has been the traditional standard in tort law, but on the violation of a duty under EC law, which however must meet a certain threshold, in the end to be defined by the Court on a case-by-case basis.⁸³ The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law.⁸⁴

There is yet no precedent to apply condition of "sufficiently serious breach" to horizontal liability situation. But there is an opinion that this could and should be a uniform standard to be applied Community law-wide whenever matters of compensation for violations of EC provisions intending to give rights to individuals is before national courts.⁸⁵ However, as it was stated above, requirements to create state liability (manifest and grave disregard test) were developed specially to evaluate actions of public

⁸⁰ The ECJ has decided this in cases of direct taxation, for example see opinion of Advocate General Geelhoed delivered on 29 June 2006, in case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue*, [2007] ECR p. I-02107, para 121; case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue*, [2006] ECR p. I-11753, para 210 and following paragraphs.

⁸¹ See for example case C-470/04 *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* [2006] ECR p. I-07409, para 55

⁸² See for example opinion of AG Fenelly delivered on 12 September 2000 in joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd and Others (C-397/98), Hoechst AG and Hoechst (UK) Ltd (C-410/98) v Commissioners of Inland Revenue and HM Attorney General*, [2001] ECR p. I-01727, para 56 and following.

⁸³ Reich Norbert. Rights without duties? Reflections on the state of liability law in the multilevel governance system of the Community: Is there a need for a more coherent approach in European private law? European University Institute working papers. Law 2009/10 p.12

⁸⁴ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para 79

⁸⁵ Reich Norbert. Rights without duties? Reflections on the state of liability law in the multilevel governance system of the Community: Is there a need for a more coherent approach in European private law? European University Institute working papers. Law 2009/10 p.12

authorities.⁸⁶ Similarly, Tridimas is arguing that there is no reason why the requirement of “sufficiently serious breach” must be a general condition for the liability of private parties because the requirement of “sufficiently serious breach” originates from the “sovereign nature of the State and serves public interest purposes”.⁸⁷ He points out that this requirement safeguards the decision making of the “imperium” and limits the exposure of public authorities to potential claims in damages and therefore does not apply in relation to the liability of private parties.⁸⁸ Thus, the requirement that the breach shall be “sufficiently serious” can be applied only in the case of state’s liability because it has special meaning only in that situation, but loses its importance in the case of individual’s liability. The need to prove a sufficiently serious breach is based on the idea of protecting public authorities from minor and unfounded damage claims against them. Otherwise, the functions of public authorities might be hindered if they all the time need to defend themselves. Therefore, the burden of proof put to claimant in cases of state liability is higher than it would be in horizontal contractual relationship. In situations of actions against private parties, these considerations do not apply. Therefore, it is not necessary to prove that the damage was “sufficiently serious”.

Taking into account that private individuals have no legislative or administrative powers like Member States or Communities and that they do not encroach upon other individual’s rights and freedoms as much as public authorities do, it would not be reasonable to establish a standard of individual’s liability higher than that of Member State’s liability.⁸⁹ As also confirmed in ECJ case law on state liability, when it concerns damages, it is not enough to establish “just” a breach of EC law; the breach should be sufficiently serious,⁹⁰ and thus there should be a similar requirement in case of individual’s liability. Otherwise, the level of liability will differ.

⁸⁶ Dougan, M. *National Remedies before the Court of Justice; Issues of Harmonization and Differentiation*. Oxford: Hart Publishing, 2004, p.375

⁸⁷ Tridimas Takis. *General principles of EC law*, 2006, Oxford University Press, p. 544

⁸⁸ *Ibid.*

⁸⁹ Kremer, C. *Liability for breach of EC law: An analysis of the new remedy in the light of English and German law* [2003] 22 YBEL, p.223

⁹⁰ Opinion of AG Jacobs delivered on 11 July 2002 in Case C-112/00 Schmidberger [2003] ECR I-5659, para 113

However, in the *Courage* case, the ECJ did not explicitly apply the “sufficiently serious breach” criterion; actually, the Court did not analyze it at all. The ECJ found reasoning separately arising from Article 81 and referred to the principle of effectiveness of Community law and any individual’s rights to claim damages for breaching his rights established in EC Treaty. Basically, the conclusion of the ECJ was that Article 81 confers rights to individuals and that the breach of Article 81 is “sufficiently serious to trigger the damages”⁹¹. Taking into account the above mentioned, that the individual’s liability cannot be “higher” or “lower” than state’s liability, it should be necessary to replace the requirement of “sufficiently serious breach” with some requirement more appropriate for establishing individual’s liability.

One of the options is to analyze how substantial the breach of individual’s rights is, i.e., how restricted is the individual: Can he use some of his rights under EC law or can he not? If there is still a possibility for the individual to use his rights, then obviously the liability of the “intruder” should not be as high as if the individual cannot use his rights at all. Thus, the level of responsibility of the individual makes all the difference. It might be possible to use a similar concept and wording as the ECJ is using in cases on breach of EC fundamental freedoms – an individual is liable for breach of EC law if he is “making the use of rights practically impossible or excessively difficult”.

Kremer also offers to use the criteria which were mentioned by ECJ in *Brasserie* for situations where the Member State has broad discretion, especially the criteria of clarity and precision of rule breached and whether any error of law was excusable.⁹² Thus, not only the level of responsibility as mentioned before shall be checked but also how clearly the rule has granted rights to the individual. If the rule is abstract and no clearly established rights arise from it, then also clear obligation cannot arise from it because it will not be clear which right should be respected. And, of

⁹¹ Jones, A., Beard, D. Co-contractors damages and article 81. The ECJ finally speaks. [2002] ECLR, p.251

⁹² Kremer, C. Liability for breach of EC law: An analysis of the new remedy in the light of English and German law. [2003] 22 YBEL, p.223

course, individual shall have true belief that he is not in the breach of law; otherwise, the error of law would not be excusable.

Even though free movement rules are clear and directly effective, thus clearly granting rights to individual (and also obligations), the situation in *Laval* is more complicated because trade unions breach their obligation to respect free movement rules when they were exercising fundamental rights. Chapter 4 will deal with this matter.

3.1.3 Causal link

As well as in cases of state liability, individuals need to prove that there has been causal link between breach of EC law and damage occurred. The plaintiff needs to prove a “simple” fact – would the damage have occurred if the breach had not happened? Early case law, such as *Francovich*, does not talk about direct causal link, but later in *Brasserie* the court strictly points out that the individual must show that the breach was the direct cause of the loss.⁹³ Even if the breach was probably causative of the loss, the state will escape liability if the damage was also caused by another fact of importance.⁹⁴ EC case law does not explicitly say whether causal link shall be direct or indirect in the case of horizontal liability. It is also seen in the *Courage* case, where the ECJ did not talk or analyze a causal link at all. Therefore, it means if there are no Community rules on causal link in cases of individual’s liability for breach of Community law, then national rules on causation shall be applied.

⁹³ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para 51

⁹⁴ Breal Mark, Hoskins Mark. *Remedies in EC law. Law and practice in the English and English courts.* 2nd ed. Sweet & Maxwell 1998., p.139

4. Balancing fundamental rights and fundamental freedoms.

The situation in *Laval* is especially complicated because trade unions breached an individual's ("Laval un parnteri") fundamental freedoms when exercising their fundamental rights. The question arises: Which one of these rights will prevail? It is important to understand it because the trade union's liability as well as undertakers' rights to damages depend on that. Also, it shall be analyzed whether trade unions had a legal base for their actions, i.e., whether they acted according to what is necessary to reach their aim.

4.1. Balance of fundamental concepts.

When the individual gains rights from legislation, these rights are not absolute but shall be balanced with other individual rights. In the *Laval* case, the company "Laval un Partneri" gained rights from Article 49 (now TFEU 56), but also trade unions gained their rights from legislation. If trade unions would have gained rights only from national law, then Community interests to common market and free movement of persons would have been higher because Community interests prevail national interests.

However, in this situation the trade union has rights to collective actions arising from ECHR and EU Charter as well as other international documents. Therefore, the *Laval* case is not so easy to immediately say which rights will prevail because there is the clash between two fundamental concepts, fundamental freedoms and fundamental rights. Of course, none of them is absolute, but at the same time they both are the same-level rights. Trade union actions, as fundamental rights, are restricted as any other fundamental rights because their exercise should take into account other fundamental rights and freedoms recognized by the EU legal

system.⁹⁵ Also, it is possible to restrict fundamental freedoms for reasons such as public policy, public security, protection of health and others.⁹⁶

There have been cases where the ECJ chose to give priority to one of the fundamental concepts. Also, in *Laval* and *Viking*, the Court could have chosen to make one of the two fundamental elements prevail over the other as well, but it decided to take the contradiction seriously and not to sacrifice either of the two opposing demands.⁹⁷ The decision which right will prevail in each situation shall be reached on a case-by-case basis. The only way to reach a decision in case of a clash of two fundamental and same-level concepts is trying to balance them. The ECJ has concluded that interests involved must be weighted in regard to all the circumstances of the case in order to determine whether the fair balance was struck between those interests.⁹⁸ In the process of balancing, the Member States enjoy wide margins of discretion, and the ECJ plays a supervisory role in controlling and determining whether the fair balance was struck between the competing interests.⁹⁹ Therefore, some authors had expressed the opinion that the scope of protection of particular rights and the scope of restrictions which can be imposed upon those rights shall be defined at the Community level in order to enjoy uniform application of Community law.¹⁰⁰ However, Azoulai points out that it is possible to find a balance for fundamental rights and fundamental freedoms where the collision of those principles is not destructive.¹⁰¹ And, as Blanke correctly highlights, that should actually lead to “mutual optimization” of the social and economic objectives of the EC Treaty.¹⁰² Thus, balancing fundamental rights and fundamental freedoms

⁹⁵ Orlandini Giovanni. Trade union rights and market freedoms: the European Court of Justice sets out the rules. [2008] 29 *Comparative Labour Law and Policy Journal*, p.596

⁹⁶ See for example Article 36 TFEU (ex 30 EC), 45 TFEU (ex 39 EC), 52 TFEU (ex 46 EC), 65 TFEU (ex 58 EC).

⁹⁷ Azoulai, L. The Court of Justice and the social market economy: the emergence of an ideal and the conditions for its realization. [2008] 45 *CMLRev.*, p.1347.

⁹⁸ Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 81

⁹⁹ *Ibid.*

¹⁰⁰ Krzeminska J. Free speech meets free movement – how fundamental really is fundamental. ZERP Diskussionspapier 3/2005., p.21.

¹⁰¹ Azoulai, L. The Court of Justice and the social market economy: the emergence of an ideal and the conditions for its realization. [2008] 45 *CMLRev.*, p.1348.

¹⁰² Blanke, Observations and opinions of Advocates General Maduro and Mengozzi delivered on May 23, 2007 in the *Viking* and *Laval* cases, ETUI-REHS, Transfer 3/07, read

should not be considered some kind of restriction but the other way around – it should lead to mutual benefit and better operation of the common market. However, Advocate General Stix-Hackl in the *Omega* case is of a different opinion. She has pointed out that the need “to reconcile” the requirements of the protection of fundamental rights cannot therefore mean weighing up fundamental freedoms against fundamental rights, per se, which would imply that the protection of fundamental rights is negotiable.¹⁰³ Similarly, other authors argue that when the fundamental right is seemingly fully applicable along with the conflicting fundamental freedom, then the role of the Court is balancing interests and not that of balancing conflicting principles of law.¹⁰⁴ Thus, the balancing of fundamental rights and fundamental freedoms are not actually necessary because the court shall decide which interests will prevail in each situation on a case-by-case basis. And that is much easier task to do then weighing two fundamental elements.

4.2. Legal base.

Taking into account the above-mentioned, it might be necessary also to analyze how trade unions are interpreting the legal rules that give them the power to act collectively and whether they have rights to act collectively, as in *Laval*. Trade unions were acting according to Swedish legislation, but should there be some reasonable limit as to how far collective actions can go? The limits of collective actions are not clearly written in law. It should be something a reasonable person would understand as not going too far and too extreme. Basically, the proportionality test should be invoked, establishing whether the actions of trade unions do not go beyond what is allowed by law. The limits of trade union actions arise indirectly from the idea and aim of collective actions. Therefore, it is necessary to understand the aim of collective action in

in Azoulai, L. The Court of Justice and the social market economy: the emergence of an ideal and the conditions for its realization. [2008] 45 CMLRev., p.1348.

¹⁰³ Opinion of AG Stix-Hackl delivered on 18 March 2004 in case C-36/02 *Omega Spielhallen* [2004] ECR I-09609, para 53

¹⁰⁴ Skouris Vassilios. Fundamental rights and fundamental freedoms: the challenge of striking a delicate balance. [2006] 17 EBLRev., p.239

general, i.e., why the legislature has given rights to act collectively to trade unions at all. And the methods trade unions are using shall be the most appropriate ones for reaching their aim.

Article 11 of the ECHR states that everyone has the right to form and to join trade unions for the protection of his interests. The ECtHR has interpreted the words “for the protection of his interests” with meaning “freedom to protect occupational interest of trade union members by trade union actions”.¹⁰⁵ In *Laval*, Swedish trade unions are taking action against a foreign undertaking to protect the interests of its employees, which are not members of this trade union. It is lawful to strike to defend one’s interests, but not if the restriction to the free movement of an enterprise is caused by an action that is not supported by the trade union to which the enterprise’s workers belong.¹⁰⁶ The only situation where trade unions can be expected to take action in the name of non-members might be if the national trade union is not able or willing to protect its members, but they are asking for help from other trade union. This did not happen in the *Laval* case.

Even if it is possible to imagine that Swedish trade unions were willing to protect Latvian workers, it should be reminded that the main aim of collective actions is to *protect*. By protecting, it is understood to mean pushing the employer to conclude collective agreement, but not to destroy its business. Otherwise, then the workers who work there will lose their jobs. Also, trade unions will not have collective agreement anyway. It seems that Swedish trade unions were acting disproportionately and going too far beyond their powers. Instead of just warning the employer and showing their power, the trade unions completely destroyed the employer. It should be noted that the nature of trade union actions should be protectionist means -- to protect, not to attack. According to the case law of ECHR Article 11

¹⁰⁵ Swedish Engine Drivers’ Union v. Sweden, judgment of February 6, 1976, Series A no. 20, para 4; Schmidt and Dahlstrom v Sweden, judgment of February 6, 1976, Series A no. 21, para 34; Gustavsson v Sweden, judgment of April 25, 1996, Reports of Judgments and Decisions 1996-II, p.637, para 45; Wilson, National Union of Journalists and Others v. The United Kingdom, judgment of July 2, 2002, Reports of Judgments and Decisions 2002-V, para 42.

¹⁰⁶ Orlandini, G. Trade union rights and market freedoms: the European Court of Justice sets out the rules. [2008] 29 Comparative Labour Law and Policy Journal, p.589

does not necessary mean rights to strike, as the interests of members of the trade union can be protected in different ways.¹⁰⁷

Also, Reich was arguing that there are certain limits to this kind of trade union actions as in *Laval*, and if an action is excessive and non-proportional then this “manifest” and “grave” breach of the free movement rules will give rise to civil liability as well as actions by private individuals shall be a subject to compensation which might be particularly necessary in cases where states do not take action against illegal behavior by private entities, especially if they have tolerated or even allowed such behavior.¹⁰⁸ If clearly disproportionate industrial actions were allowed and were not subject to any compensation, the Community freedoms would become a hollow symbol in the future. The grant to unlimited, uncontrolled and disproportionate action against the fundamental freedoms by private associations will set aside the developments of Community law, as *Walrave* and *Bosman*, and only encourage other collective entities to do the same, with the Member State hiding behind such a misunderstood concept of autonomy.¹⁰⁹

It would be possible to balance fundamental rights and fundamental freedoms in the *Laval* case. But as trade unions have acted disproportionately, the aim of their actions have gone beyond their actual “rights”, and there is no need to balance those two fundamental concepts. The rights of free movement will prevail.

¹⁰⁷ Schmidt and Dahlstrom v Sweden, judgment of February 6, 1976, ECHR Series A no. 21, Para 36

¹⁰⁸ Reich, N. Horizontal liability in EC law: Hybridization of remedies for compensation in the case of breaches of EC rights. [2007] 44 CMLRev., p.718 and see for example case C-265/95 Commission v. France [1997] ECR I-6959.

¹⁰⁹ Ibid. p.718

5. Is there a Community right to damages? Does *Courage* prove it, or is it applicable only in the situations of breach of competition law?

Competition law has always regulated the relationship between private parties, and therefore horizontal liability has usually been invoked. It is also easier to see how horizontal liability can arise in competition law. That is different in cases about Community freedoms because those freedoms are usually provided and secured by the state. It is each Member State's obligation to ensure that Community freedoms are "real" and usable. And if some person restricts fundamental freedoms of another person, it is the state's liability and obligation to stop it.¹¹⁰

If the state breaches an individual's rights, the individual has a mechanism to enforce his rights, and he can bring a damages claim against the state. If the EC law provision is directly applicable, the state has an obligation to provide that this provision is effective and to protect individual rights arising from it. But if the individual breaches another individual's rights granted in a directly applicable EC provision, the individual has no real mechanism to enforce his rights. It seems that individual rights are arising directly from EC rules, but it is not the same with individual obligations. The only exception is competition rules, which directly impose rights and obligations to the individual.

When deciding the *Laval* case, one of the cases the Labor court based its decision on damages was the *Courage* case¹¹¹. In *Courage*, the ECJ stated that the full effectiveness of Article 85 (now TFEU 101) of the EC Treaty would be put at risk if it were not open to any individual to claim

¹¹⁰ For example, see case C-265/95 Commission v. France [1997] ECR I-6959 and case C-112/00 Schmidberger [2003] ECR I-5659

¹¹¹ Case C-453/99 *Courage* [2001] ECR I-06297

damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.¹¹² This was the first horizontal liability case where the ECJ stated that the individual has rights to damage claims from another individual for breach of EC law. Consequentially, the question arises whether it is possible now to use the *Courage* case as a legal base for Community rights for damages.

There are multiple opinions whether the *Courage* case introduces Community rights to damages or not. In the *Courage* case, the ECJ did not explicitly apply state liability requirements, thus not giving an answer whether the state liability criteria can be applied in cases of individual liability. The Court also did not create any individual liability criteria. Therefore, it is not clear whether the *Courage* case confirms that there is a Community right to damages or whether this case is applied only in specific situations of breach of competition law.

Dougan suggests deciding this question simply by looking into actual text of the judgment.¹¹³ The English court did not ask whether a remedy in damages for breach of Article 81 (now TFEU 101) is possible. It asked whether the party of the prohibited agreement can rely on Article 81 (now TFEU 101) seeking relief of the other contracting party and whether that party can obtain compensation for loss as a result from being subject to a contractual clause contrary to Article 81 (now TFEU 101). It seems as if the ECJ even did not intend to create a united Community liability system, thus extending state liability criteria to private person's liability. Thus, Dougan, supporting his opinion with AG Mischo's opinion in *Courage* and the Court of First Instance case *Atlantic container line*¹¹⁴, argues that this was just an ordinary application of the Court's case law. Also, AG Mischo in *Courage* pointed out that even if rights to damages constitute an effective means to protect individual rights, it does not automatically mean that the individual has rights to claim damages from another individual.¹¹⁵

¹¹² Case C-453/99 *Courage* [2001] ECR I-06297, para 26

¹¹³ Dougan, M. *National Remedies before the Court of Justice; Issues of Harmonization and Differentiation*. Oxford: Hart Publishing, 2004, p. 379

¹¹⁴ Case T-395/94 *Atlantic container line* [2002] ECR II-875, para 414

¹¹⁵ Opinion of Advocate General Mischo delivered on 22 March 2001 in case C-453/99 *Courage* [2001] ECR I-06297, para 54.

Other authors think that the Court in *Courage* introduces the principle that there is under Community law a right in damages as such because the existence of a right entails that there must also be a remedy corresponding to that right, i.e., damages.¹¹⁶ Advocate General Jacobs in the case *AOK Bundesverband* also thinks that both damages and injunctive relief would, as a matter of Community law, be available to anyone suffering loss as a consequence of that conduct, subject to such national procedural rules as were compatible with the principles of equivalence and effectiveness.¹¹⁷ Thus, it seems that the principle of individual liability in damages as established by the Court in *Courage* is extended to parties suffering loss as a result of a breach by another individual, of any horizontal and directly effective provision, whether a EC Treaty Article or a Regulation.¹¹⁸ The horizontal direct effect of the EC Treaty competition rules is a precondition of the Community principle of civil liability of individuals for breach of those rules.¹¹⁹ It would follow from the Court's reasoning in *Courage* that EC Treaty provisions with the same characteristics as Article 81 EC (now TFEU 101) should also give rise to an action for damages as against a private party. It should be stressed that the Court in *Courage* has created a Community remedy which lacks any necessary connection to the enforcement of the EC Treaty's competition rules¹²⁰, thus it can be applicable to any situation where the issue about individual's liability for breach of EC law arises.

In *Courage*, the Court stressed the necessity of protection of any individual and their rights for damages in Community law because the judgment was based on the effectiveness of the Community law and the

¹¹⁶ Komninos, A. New Prospects for Private Enforcement of EC Competition Law: *Courage v Crehan* and the Community Right to Damages. [2002] 39 CMLRev., p.480

¹¹⁷ Opinion of Advocate General Jacobs on 22 May 2003 in joined Cases C-264/01, 306/01, 354/01, 355/01 *AOK Bundesverband* [2004] ECR I-2493, para 105

¹¹⁸ Drake, S. Scope of *Courage* and the principle of "individual liability" for damages: further development of the principle of effective judicial protection by the Court of Justice. [2006] 31 ELRev., p.21 and Waelbroeck D.F. Treaty Violations and Liability of Member States: The Effect of the Francovich Case law., in Heukels T., McDonnell A. (eds.) *The Action for Damages in Community Law*. The Hague: Kluwer Law International, 1997., p.319

¹¹⁹ Komninos, A. New Prospects for Private Enforcement of EC Competition Law: *Courage v Crehan* and the Community Right to Damages. [2002] 39 CMLRev, p. 472

¹²⁰ Dougan, M. *National Remedies before the Court of Justice; issues of harmonization and differentiation*. Oxford: Hart Publishing, 2004., p.386

protection of the individual's rights in general and not just in competition law. Therefore, where a EC Treaty provision grants a horizontal and directly effective right on a private individual, a right to damages is essential in the event of a breach of a EC Treaty provision in order to ensure its effectiveness and practical effect. Basically, the ECJ in *Courage* recognized a right to damages as a matter of Community rather than of national law.¹²¹ Although there is an opinion that it is for national law to define the conditions of individual's liability for breach of EC law, Kremer argues if it were left for national law to establish conditions of liability, it would lead to a different standard of protection of the individual's rights within the Community.¹²² Thus, it is preferable to take some minimum conditions from Community law. Also, the recognition of a Community right to damages will also mean that many national rules of procedure and substance may have be tested for their compatibility with Community law (protection of the rights of defense, principle of legal certainty, proper conduct of procedure etc).¹²³

As it is not clear whether there are Community rights to damages in a horizontal liability situation, as well as there are no well-established criteria for horizontal liability, it is not clear how the Labor court could decide the *Laval* case without referring to one more preliminary ruling from the ECJ. It seems that the Labor court took a very broad and authoritative interpretation of EC case law (see more detailed analysis below).

¹²¹ Komninos, A. New Prospects for Private Enforcement of EC Competition Law: *Courage v Crehan* and the Community Right to Damages. [2002] 39 CMLRev, p. 466

¹²² Kremer, C. Liability for breach of EC law: An analysis of the new remedy in the light of English and German law. [2003] 22 YBEL, p. 224

¹²³ Jones, A., Beard, D. Co-contractors damages and article 81. The ECJ finally speaks. [2002] ECLR, p.253

6. Amount of compensation.

The other question which should be looked upon in light of *Laval* is the amount of compensation for breach of EC law. The Company “Laval un partneri” was asking for compensation from the trade unions of 2,77 million Swedish kronor (roughly €280.000) plus litigation costs. The trade unions were arguing that they were acting according to Swedish law and denied liability for damages and litigation costs. The Swedish labor court ordered Swedish trade unions to pay around 50.000 EUR in general damages for breach of Article 49 EC Treaty and around 200.000 EUR for reimbursement of the judicial costs, leaving damages for economic loss outside. The Labour Court concluded that there is no right to compensation for economic loss suffered because the Laval did not prove such economic loss. After failure to provide construction services in Sweden, “Laval and partneri” stopped construction works and lost the construction contract. Soon after that, the company closed its branch in Sweden entirely. According to the latest publicly available information in Latvia, the “Laval and Partneri” in 2009 has started insolvency procedures in Latvia.¹²⁴ Latvian newspapers are writing that this is due to the company’s inability to pay salaries to its workers.

In *Von Colson*, the ECJ pointed out that in order to ensure that national remedy is effective, the compensation must be adequate in relation to damages sustained and must therefore amount to more than purely nominal compensation.¹²⁵ The amount of reparation cannot be just symbolic but it must correspond to damages actually suffered. Therefore, the main idea of damages is to put an individual in the same situation as it was before the loss occurred and to restore the previous situation, at least financially. It is also confirmed in the case of *Mulder and Others*, where the ECJ established that compensation for loss suffered is intended to restore victims to the situation in which they would have found themselves if the harmful

¹²⁴ Zviedru arodbiedrībām piespriesto sodu "Laval un partneri" nesaņems, newspaper “Diena”, 3 December 2009.

¹²⁵ Case 14/83 Von Colson and Kamann . Land of Norderhein-Westfalen [1984] ECR 1891, para 28

act had not been perpetrated.¹²⁶ Thus, the Court concluded that loss of earnings must be assessed, as far as possible, on the basis of the individual data and figures reflecting the actual situation of each applicant.

In the *Manfredi* case¹²⁷, the ECJ also talked about the amount of remuneration laying down that reparation for loss or damages caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained in order to provide effective protection. While reasonable restrictions may be imposed on the amount of damages available, they must satisfy the conditions of equivalence and effectiveness.¹²⁸ According to the *Marshall* case, effective and real judicial protection is the one that has a deterrent effect on the employer.¹²⁹ The Advocate General in this case also pointed out that “adequate” compensation should provide for amounts which are “effective, uniform and deterrent” in nature and in relation to damage sustained.¹³⁰ Many authors are also drawing parallels with cases on sex discrimination, even though they seem to be more oriented toward contract law than tort law.¹³¹ Member States are free to set sanctions for infringement of prohibition of sex discrimination. If the Member States choose to do so, then the amount of compensation shall be adequate in relation to damages sustained.¹³²

As it arises from the *Marshall* case, if the damage has occurred an individual can ask to restore the previous situation as it was before the harmful event or ask for compensation for the loss and damage

¹²⁶ Joined cases C-37/90 and C-104/89 *Mulder and Others v Council and Commission* [2000] ECR p. I-00203, para 63

¹²⁷ Joined cases C-295/04 to C-298/04 *Manfredi* [2006] ECR p. I-06619

¹²⁸ Craig, P., De Búrca, G. *EU Law: text, cases and materials*. Oxford: Oxford University press, 4th ed., 2008., p.339

¹²⁹ Case 271/91 *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR p. I-4367, para 24.

¹³⁰ Opinion of Advocate General Van Gerven in Case 271/91 *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR p. I-4367, delivered on 26 January 1993.

¹³¹ See Reich, N. *Horizontal liability in EC law: Hybridization of remedies for compensation in the case of breaches of EC rights*. [2007] 44 *CMLRev.*, p. 731 and Opinion of Advocate General Teasuro delivered on 28 November 1995 in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA and Factortame* [1996] ECR p.I-01029, para 110

¹³² Case 14/83 *Von Colson and Kamann* [1984] ECR p. 1891, para 23

sustained.¹³³ Usually, it will not be possible to restore the previous situation; thus, it leads to an obligation to pay compensation. The amount of compensation should be sufficient to restore the previous situation, at least financially, presuming how much money the person would have otherwise had. Also, the monetary impact of the damage must be measured. Thus, the compensation must make the “injured” person feel as if the damage never happened. Therefore, the compensation must also include the loss of profit. Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law because, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.¹³⁴ The action for damages is not only intended to repair existing damages, but also to prevent future damages, such as in *Van Colson*, where the Court decided that compensation should not only concern “positive interest” but also the “negative interest” or loss of profit.¹³⁵

Often, damage claims include claim for interest. The question usually is whether the person also has rights to interest under EC law in cases of non-contractual liability. Reich is of the opinion that claims under EC law shall be equal to claims under national law, but if under national law adequate compensation is not possible, it may have to be upgraded by EU law for instance to cover full economic loss plus interest.¹³⁶ In the *Ireks-Arkady* case, the ECJ accepted that in cases of non-contractual liability the entitlement of interest derives from general principles common to the laws of Member States.¹³⁷ Later, in *Marshall*, the ECJ pointed out that the award of interest, in accordance with the applicable national rules, must therefore

¹³³ Case 271/91 M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority [1993] ECR p. I-4367, para 25.

¹³⁴ See also joined cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-01029, para 87, and joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, para 91

¹³⁵ Waelbroeck D.F. *Treaty Violations and Liability of Member States: The Effect of the Francovich Case law*, in Heukels T., McDonnell A. (eds.) *The Action for Damages in Community Law*. The Hague: Kluwer Law International, 1997, p.331

¹³⁶ Reich, N. *Horizontal liability in EC law: Hybridization of remedies for compensation in the case of breaches of EC rights*. [2007] 44 *CMLRev.*, p.731

¹³⁷ Case 238/78 *Ireks-Arkady v Council and Commission* [1979] ECR 2955, para 20

be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.¹³⁸ Also in the *Manfredi* case, the ECJ concluded it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss but also for loss of profit plus interest.¹³⁹

According to the ECJ case law, the compensation for loss shall be full and adequate, not symbolic, thus providing efficient protection of individual and restore the previous situation at least financially. Compensation shall be regulated by national law, but it still needs to fulfill these criteria.

¹³⁸ Case 271/91 M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority [1993] ECR I-4367, para 31

¹³⁹ Joined cases C-295/04 to C-298/04 Manfredi [2006] ECR I-06619, para 95

7. Preliminary ruling procedure in Laval.

The Swedish Labor court decided the *Laval* case 4 votes to 3, therefore casting doubt on the confidence of the decision. Should the Labor court have asked for one more preliminary ruling on an individual's horizontal liability and rights to damages?

Article 234 EC (TFEU 267) establishes preliminary ruling procedure. In its third paragraph, Article 234 (TFEU 267) lays down when the national court is obliged to ask for preliminary ruling. The paragraph establishes that the national court against whose decisions there are no appeal procedures when there are questions about the interpretation or validity of Community law is required to resolve the dispute before it is obliged to make a reference for preliminary ruling. The Swedish Labor court is the last instance court within the meaning of Article 234 (TFEU 267), therefore it is obliged to ask for preliminary ruling.

In the *CILIFT*¹⁴⁰ case, the ECJ laid down the only possible exceptions from the aforementioned rule when national courts of last instance are not forced to ask for preliminary ruling. According to the judgment in *CILFIT*, the national court is not obliged to refer a preliminary question to the ECJ if a question is irrelevant, if an identical question has been answered in the Court's jurisprudence ("acte éclairé") or if it is convinced that the answer is obvious and the matter is equally obvious to the courts of the other member states and to the Court of Justice ("acte clair").¹⁴¹

According to Lagrange, the aim of this system is to ensure the uniform interpretation of the EC Treaty and the measures of the Community institutions while avoiding the multiplicity of proceedings.¹⁴² Also, Capotorti comes to a conclusion that the third paragraph of Article 234

¹⁴⁰ Case 283/81 *CILIFT* [1982] ECR 1982 p. 3415

¹⁴¹ *Ibid.*, paras 10, 13, 14, 16

¹⁴² Lagrange, M. The theory of acte clair: a bone of contention or a source of unity? [1971] 8 CMLR p.316

(TFEU 267) makes preliminary ruling references mandatory, and the purpose clearly is to ensure that they take place regularly, as that is the only way in which the uniformity and certainty of interpretation at Community level can be achieved entirely.¹⁴³ The Court itself has frequently noted that the preliminary ruling procedure is the real keystone securing the Community character of the law established by the Treaties because it preserves its unity and enables it to produce the same effects throughout the Union while at the same time ensuring that individuals are effectively protected by the courts.¹⁴⁴

As the purpose of Article 234 is to ensure that Community law is interpreted and applied in a uniform manner in all Member States,¹⁴⁵ the national court, when interpreting Community law, must reach an interpretation which can be uniform and commonly understandable in other Member States. Moreover, it shall be general and abstract enough to be applied in other similar but not identical situations. It has been confirmed with ECJ case law already in 1977, in the case *Hoffmann-La Roche v Centrafarm*, where the ECJ concluded that the particular objective of the third paragraph of Article 177 (TFEU 267) is to prevent a body of national case law not in accordance with the rules of Community law from coming into existence in any Member State.¹⁴⁶ Later, it was quoted in Advocate General Jacobs' opinion in the *Wiener* case concluding that the reference to "a body of national case law" shows that the Court had in mind a general question of interpretation going beyond the confines of a single case.¹⁴⁷

All three criteria established in CILFIT will be analyzed separately in following chapters.

¹⁴³ Opinion of Advocate General Capotorti delivered on 13 July 1982 in Case 283/81 CILFIT [1982] ECR 1982 p. 3415, point 8

¹⁴⁴ see for example the Report of the Court of Justice on some aspects of the application of Treaty on Union, Luxembourg, May 1995, p.6 and Opinion of AG Tizzano in case C- 99/00 Lyckekog, [2002] ECR I-4839, para 69

¹⁴⁵ See Broberg, M. Acte Clair revisited: adapting the Acte Clair criteria to the demands of times [2008] 45 CMLRev., p.1388 and case 107/76 Hoffmann-La Roche, 1977, para 5

¹⁴⁶ Case 107/76 Hoffmann-La Roche v Centrafarm [1977] ECR 957, para 5

¹⁴⁷ Opinion of AG Jacobs delivered on 10 July 1997, in case C-338/95 Wiener S.I. GmbH v Hauptzollamt Emmerich [1997] ECR I-6495, para 55.

7.1. The question is irrelevant.

The criteria “the question is irrelevant” shall be understood that the answer to the question is irrelevant for national court to decide the case. It should also be noted that Article 234 EC (TFEU 267) does not provide that the reference must be necessary, but that a decision on the question be necessary to enable the national court to give judgment.¹⁴⁸ Basically, it is left for national courts to decide whether it is necessary to receive an answer to this question from ECJ to actually decide the case. The national court is aware of the complexity of the case, and also all necessary information is available to it; therefore, it is the most competent court to decide the necessity of preliminary ruling in certain situation. Also, the national court shall consider if the answer to this question will affect the outcome of the case. If it will, then it might be better to refer for preliminary ruling. If not, this question is not relevant when deciding the case. However, if the national court thinks that the answer from ECJ is necessary, it still has the right to refer any question to ECJ.

7.2. Identical question has already been answered.

Sometimes the interpretation of EC law might be clear from previous case law of the ECJ. The second requirement (“acte éclairé”), releasing the national court from obligation to refer for preliminary ruling to ECJ, was set already in the *Da Costa en Schaake and Others* case.¹⁴⁹ According to that decision, the Court allowed national courts not to refer to ECJ where the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.¹⁵⁰ If the Community provision has already been interpreted by the Court, the obligation to refer further questions on the interpretation of the same

¹⁴⁸ Craig, P., De Búrca, G. *EU Law: text, cases and materials*. Oxford: Oxford University press, 4th ed., 2008, p. 480

¹⁴⁹ Joined cases 28 to 30/62 *Da Costa v Netherlandse Belastingadministratie* [1963] ECR 31

¹⁵⁰ *Ibid.*, para 38

provision would be deprived of substance.¹⁵¹ This requirement was established to protect the ECJ from enormous numbers of references for preliminary rulings which might compromise its proper functioning and even more prevent delays or increase costs in national proceedings as a result of the submission of preliminary questions which are unfounded.¹⁵²

The Advocate General Lagrange in *Da Costa* generously explains “the rule of good sense and wisdom”: If a national court is faced with the question of interpretation of the EC Treaty, but the question has already been applied by ECJ, then there is no question, and the case must be compared with the proceeding one; a provision which is obscure in itself but has been interpreted in the same way by the ECJ is equivalent to a provision which has no need of interpretation.¹⁵³

Even though the national court is not obliged to refer for a preliminary ruling in the situation that has already been decided by ECJ, it still has the right to do so. In most of the cases, when answering to already answered questions the ECJ will refer to relevant case law and will not provide any specific answer. If the national court is not sure about clarity of previous case law or the situation is slightly different which might affect the outcome of the case, the national court shall make a new reference. Also, the national court might ask for a new preliminary ruling if the question arises in the same case after the ECJ has given the first preliminary ruling. It is acceptable if the additional questions arise, but then again the national court shall start preliminary ruling procedure from the beginning. There have been situations when the national court has not been satisfied with the ECJ’s answer and referred similar questions in the same case again.¹⁵⁴ In some cases, the ECJ has offered the national court to withdraw its questions to

¹⁵¹ Joined cases 28 to 30/62 *Da Costa v Nederlandse Belastingadministratie* [1963] ECR 31, para 38

¹⁵² Opinion of AG Capotorti delivered on 13 July 1982 in case 283/81 *CILIFT* [1982] ECR 1982 p. 3415, point 6.

¹⁵³ Opinion of AG Lagrange delivered on 13 March 1963 in joined cases 28 to 30/62 *Da Costa v Nederlandse Belastingadministratie* [1963] ECR 40.

¹⁵⁴ See for example, case 21-24/72 *Third International Fruit Company* [1972] ECR 1219; case 176/78 *Schaap* case [1979] ECR 1673; case 3/80 *Milchfutter* [1980] ECR 3449; case C-10/89 *Hag* [1990] ECR I-11307 etc.

ECJ because of recent case law which gives answers to those questions.¹⁵⁵ Also, the ECJ in some situations has held that answer to question is obvious and no preliminary ruling will be given. For example, in the *Welthgrove* case¹⁵⁶, the ECJ established that necessary answers are clear from the previous case law.

Some authors are of the opinion that the ECJ sometimes entertains a very optimistic view on the clarity of its case law, because, for example, the *Welthgrove* case was about VAT taxation and particularly murky areas of application of the sixth VAT Directive, where this murkiness is mostly a product of the case law of the ECJ.¹⁵⁷ Therefore, it is even more unclear how Swedish Labor court found such “easy” answers to a complex and new concept of individual liability and rights to damages in horizontal situation for breach of fundamental freedoms basing its decision on a couple of not-s-strong cases.

7.3. Acte Clair doctrine

The *acte clair* is one of the fundamental jurisprudential principles of the Court.¹⁵⁸ The Court demonstrated the *acte clair* principle in Paragraph 16 of the *CILFIT* case, explaining that sometimes “the correct application of community law may be as obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.” Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied may the national court or tribunal refrain from submitting the question to the court of justice and take upon itself the responsibility of resolving it”.¹⁵⁹

¹⁵⁵ Order of 12 July 2001, in Case C-102/00, *Welthgrove*, [2001] ECR I-5679.

¹⁵⁶ Case C-102/00 *Welthgrove* [2001] ECR I-5679.

¹⁵⁷ Wattel, J. Peter. Kobler, *CILFIT* and *Wealthgrove*: we can't go on meeting like this. [2004] 41 CMLRev., p.183.

¹⁵⁸ Bebr, G. The Rambling Ghost of “Cohn Bendit”. *Acte Clair* and the Court of Justice [1983] 20 CMLR p.450

¹⁵⁹ Case 283/81 *CILIFT* [1982] ECR 1982 p. 3415, para 16

For a better and more genuine understanding of the *acte clair* doctrine, it is necessary to look into its historical origin. This theory is originated in French law because of the principle of the separation of powers between two organs of jurisdiction, judicial and executive, a principle derived from French Revolution.¹⁶⁰ The French doctrine has been developed in order to help respect the separation of jurisdiction called upon to apply different branches of French law, governed by different principles.¹⁶¹

According to Lagrange, the purpose of the *acte clair* system is to ensure the observance of the rules of jurisdiction *ratione materiae* established by law without disrupting the unity of proceedings.¹⁶² However, Bebr is arguing that the Community preliminary ruling procedure is different because its aim is to ensure the uniform interpretation and application of Community law by national courts of different Member States in their different legal systems. Thus, the *acte clair* doctrine is not transposable to the Community legal system.¹⁶³

Advocate General Lagrange in *Da Costa* explains the theory of *acte clair* very simply: The question before the preliminary ruling procedure must be relative to the interpretation of the provision involved; otherwise, if the provision is perfectly clear, there is no longer any need for interpretation but only for application, which belongs to the jurisdiction of the national court whose very task is to apply the law.¹⁶⁴ He argues that this is simply a question of a demarcation line between the two jurisdictions. Advocate General Capotorti, referring to this AG Lagrange statement, points out that it actually means that a fresh interpretation by the ECJ was superfluous if

¹⁶⁰ Lagrange, M. The theory of acte clair: a bone of contention or a source of unity? [1971] 8 CMLRev., p.314

¹⁶¹ Bebr, G. The Rambling Ghost of "Cohn Bendit". Acte Clair and the Court of Justice. [1983] 20 CMLRev., p.455

¹⁶² Lagrange, M. The theory of acte clair: a bone of contention or a source of unity? [1971] 8 CMLRev., p.314

¹⁶³ Bebr, G. The Rambling Ghost of "Cohn Bendit". Acte Clair and the Court of Justice. [1983] 20 CMLRev., p.455

¹⁶⁴ Opinion of AG Lagrange delivered on 13 March 1963 in Joined cases 28 to 30/62 *Da Costa v Nederlandse Belastingadministratie* [1963] ECR 40.

the same question has already been resolved by the Court in a previous decision.¹⁶⁵

The Court of Justice has emphasized three characteristics of Community law and its interpretation which must be taken into consideration.¹⁶⁶ First, the interpretation of a provision of Community law requires a comparison of the different language versions of that provision, which are all equally authentic. Even where those language versions are entirely in accordance with one another, it must be borne in mind, second, that Community law uses terminology which is peculiar to it and that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. Third, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being given to the objectives thereof and its state of evolution at the date on which the provision in question is to be applied. Moreover, the question as to whether the conditions to be satisfied in order to be under no obligation to make a reference for a preliminary ruling must be assessed "on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise."¹⁶⁷

However, in Paragraph 39 in the *Intermodal* case, the ECJ laid down that the national court was not required to ensure that the matter was equally obvious to bodies of a non-judicial nature, such as administrative authorities.¹⁶⁸ After laying down this argument, the ECJ still affirmed the CILIFT judgment.

When deciding if the question is *acte clair*, the national court shall take into account that the same legal concepts might have different meanings in different languages, and their interpretation might differ because of various legal systems. One should be especially careful when it

¹⁶⁵ Opinion of AG Capotorti delivered on 13 July 1982 in case 283/81 CILFIT [1982] ECR 1982 p. 3415, point 4

¹⁶⁶ Opinion of Advocate General Stix-Hackl delivered on 12 April 2005 in case C-495-03 *Intermodal* [2005] ECR I-8151 and the case 283/81 CILIFT [1982] ECR 1982 p. 3415, para 18-20

¹⁶⁷ Case 283/81 CILIFT [1982] ECR 1982 p. 3415, para 17

¹⁶⁸ Case C-495/03 *Intermodal* [2005] ECR I-8151, para 39

comes to interpretation of very wide legal concepts, such as “force majeure,” “public policy,” etc. Rasmussen points out that in the judgment the Court called on the highest national courts to exercise caution when addressing issues arising from the interpretation or application of Community law.¹⁶⁹ The conditions in CILFIT help to ensure that national courts will not regard cases as “*acte clair*” unless they are free from interpretative doubt, although it is doubtless true that national courts can interpret these conditions rather differently.¹⁷⁰

The ECJ, when it adopted “*acte clair*,” apparently wanted to warn national courts to be very careful when interpreting EC law and also to show that it does not trust the national court’s ability to interpret EC law. The ECJ wanted to keep control on uniform application of EC law correctly. It must be agreed with Advocate General Capotorti in CILFIT that the intention of the authors of the EC Treaty was to avoid any risk of distortions at that level by entrusting to the Court the main burden of creating a body of case law on questions concerning the interpretation of provisions of Community law so as to avoid the inconsistencies, differences and the resultant uncertainties.¹⁷¹ Keeling and Mancini point out that by granting supreme courts to do lawfully that which they could do in any case unlawfully, but by subjecting that power to stringent conditions, the Court hoped to induce supreme courts to use willingly the mechanism for judicial cooperation.¹⁷²

From other side, if the national court applies the *acte clair* doctrine and applies it correctly, it helps the ECJ to reduce the number of cases before it, therefore leaving only complex cases to be decided before the ECJ. Some authors are of the opinion that there are anyway “safety devices” built into the CILFIT judgment, and the question even if not referred to ECJ because of wrong application of *acte clair*, still might come

¹⁶⁹ Rasmussen, H., ‘The European Court’s Acte Clair Strategy in C.I.L.F.I.T. (Or: Acte Clair, of Course! But What does it Mean?)’, [1984] 10 ELRev., p. 259

¹⁷⁰ Tridimas Takis. Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Ruling Procedure. [2003] 40 CMLRev., p.41-44

¹⁷¹ Opinion of AG Capotorti delivered on 13 July 1982 in case 283/81 CILFIT [1982] ECR 1982 p. 3415, point 6.

¹⁷² Mancini, F., Keeling, D. From Cilfit to ERT: the Constitutional Challenge facing the European Court. [1991] 11 YBEL, p.4

before ECJ.¹⁷³ If the national court breaches Article 234 (TFEU 267), it might be held liable for damages, according to *Köbler*, or it might be subject to an enforcement action under Article 226 (TFEU 258).

¹⁷³ Craig, P., De Búrca, G. EU Law: text, cases and materials. Oxford: Oxford University press, 4th ed., 2008, p.479.

8. Applying CILFIT requirements

Applying *acte clair* is not so simple and obvious because national courts should consider that judicial concepts might have different meanings in different EU countries. According to the CILFIT judgment, the national court must be sure that the matter is equally obvious to the all court of other Member States and also ECJ. Is it actually possible to go with CILFIT requirements?

First, even if the national court is analyzing whether the matter will be equally obvious to all the courts of Member States, it is still going to be the subjective opinion of the court because there are no means for this court to make sure that other courts have the same understanding of the matter. However, Bebr points out that the importance of the purpose of this criterion is to prevent the risk of divergent judicial decisions and thus should be interpreted strictly.¹⁷⁴ Accordingly, this requirement must include not only courts of Member States, but also ECJ. If the ECJ has not disclosed its views, the condition would not be met, and the court of last instance would therefore be obliged to refer for preliminary ruling.¹⁷⁵ Therefore, he actually stresses the meaning of the criteria established in *Da Costa* – only if there is case law on a matter can the national court refuse to refer for preliminary ruling. The same opinion is expressed by the Advocate General in the *Traghetti* case, arguing that where the provision of law infringed is unclear and imprecise, the national court shall refer a question for a preliminary ruling, especially if there is no case law of the Court which might give it guidance on that point.¹⁷⁶

Second, according to the wording of CILFIT, “an interpretation of a provision of Community law involves a comparison of the different

¹⁷⁴ Bebr, G. The Rambling Ghost of “Cohn Bendit”. *Acte Clair and the Court of Justice*. [1983] 20 CMLRev., p.468

¹⁷⁵ Bebr, G. The Rambling Ghost of “Cohn Bendit”. *Acte Clair and the Court of Justice*. [1983] 20 CMLRev., p.468

¹⁷⁶ Opinion of Advocate General Léger delivered on 11 October 2005 in Case C-173/03 *Traghetti del Mediterraneo SpA v Repubblica italiana*, ECR [2006] p. I-05177, para 72

language versions,”¹⁷⁷ which means that the national court shall analyze certain Community law provisions in all languages of Member States. It must be agreed this would create an incredible amount of work for national courts.¹⁷⁸ It was already pointed out in Advocate General Capotorti’s opinion in *CILFIT* that the reason courts and tribunals of last instance must always refer questions to the ECJ for preliminary ruling is supported by specific technical and formal characteristics of Community law – different language versions, novelty of the content and terminology of Community law and that there are inevitable differences between the methods of interpretation adopted by ECJ and those on which national courts rely.¹⁷⁹

Lastly, it must be pointed out that the *acte clair* criteria shall be fulfilled objectively. That means there should be objective reasons why the national court can presume that they can invoke *acte clair*. Again, this leads to the conclusion that *acte clair* is basically possible only when there already is previous case law on the matter. Another option might be if there is some authoritative interpretation on the matter done by the Commission or other EU institution. However, Advocate General Tizzano in *Lyckeskog* correctly stressed there is no extra limb or qualification of the third condition laid down in *CILFIT*, which is based simply on the national court's conviction that it is in a position to resolve a question independently insofar as it presents no problems of interpretation and the answer is therefore clear.¹⁸⁰ If there were, that would cause a “strong element of uncertainty, subjectivity and confusion into the application of that provision”. In the *Lyckeskog*¹⁸¹ case, the Swedish national court was asking whether a court or tribunal within the meaning of the third paragraph of Article 234 EC (TFEU 267) may decline to request a preliminary ruling where it considers it clear how the questions of Community law in point

¹⁷⁷ Case 283/81 *CILFIT* [1982] ECR 1982 p. 3415, para 18

¹⁷⁸ See the Opinion of Advocate General Jacobs in Case C-338/95 *Wiener* [1997] ECR I-6495, para 65, and the Opinion of AG Tizzano in case C- 99/00 *Lyckeskog*, [2002] ECR I-4839, para 75.

¹⁷⁹ Opinion of AG Capotorti delivered on 13 July 1982 in case 283/81 *CILFIT* [1982] ECR 1982 p. 3415, point 6.

¹⁸⁰ Opinion of AG Tizzano delivered on 22 February, 2002 in case C- 99/00 *Lyckeskog*, [2002] ECR I-4839, para 62.

¹⁸¹ Case C-99/00, *Lyckeskog* [2002] ECR I-4839.

must be decided, even if those questions are not covered by the doctrine of *acte clair* or *acte éclair*. In this case, the ECJ escaped this “sensitive” question by concluding that the court asking for a preliminary ruling was not the court of last instance within the meaning of Article 234 (TFEU 267). Advocate General Tizzano was more daring and analyzed the meaning of the concept of “reasonable doubt.” He especially stressed that the obligation to refer questions to ECJ must be waived only in cases when there is “obvious reasonable doubt,” not simply “reasonable doubt,” because obviousness is a qualification of reasonable doubt intended to emphasize that the doubt must really exist and must not be merely subjective.¹⁸² In conclusion, it must be pointed out that the *acte clair* criterion has an objective and not a subjective nature. Thus, the court when applying *acte clair* must check whether this requirement is fulfilled based on objective reasons and not the national court’s subjective opinion.

According to Advocate General Stix-Hackl in the *Intermodal* case, “requirements set out in CILFIT cannot be regarded as a type of instruction manual on decision-making for national courts of last instance which is to be rigidly adhered to.”¹⁸³ The Advocate General argues that interpretation of a provision always involves a process of understanding which, as such, cannot be turned into a mathematical formula. This is particularly true of Community law, with its many variables of interpretation, which themselves include the dynamic evolution of that system of law. At the end, the AG concludes that it is ultimately impossible, or possible only to a limited extent, to determine objectively when the interpretation of a provision is so obvious as to leave no scope for any reasonable doubt.¹⁸⁴

Advocate General Colomer points out that there is absolutely no possibility of adopting the CILFIT approach because it seems preposterous and on the few occasions when it has subsequently relied on that judgment, the Court has restricted itself to reminding the referring court of the case law and to state merely that the correct application of Community law is so

¹⁸² Opinion of AG Tizzano delivered on 22 February, 2002 in case C- 99/00 Lyckekog, [2002] ECR I-4839, para 71

¹⁸³ Opinion of Advocate General Stix-Hackl delivered on 12 April 2005 in case C-495/03 *Intermodal* [2005] ECR I-8151, para 100

¹⁸⁴ *Ibid.*, para 101.

obvious as to “leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved.”¹⁸⁵

There is also ongoing discussion that CILFIT criteria shall be more open and maybe the ECJ shall overview and rewrite them. AG Jacobs in the *Wiener* case is suggesting re-ruling the CILFIT judgment. Also, AG Colomer in *Gaston Schul* is strongly arguing for adopting CILFIT criteria less strictly. He points out that the CILFIT test nowadays is not so important because it has lost its main historical aim, to end misapplication of the *acte clair* doctrine by national courts of last instance in some Member States.¹⁸⁶ So basically, AG Colomer stresses that the *acte clair* doctrine was only temporarily important during a certain period of time, and as that period of time has ended there is no need to continue the strict application of the *acte clair* doctrine. Some other authors are of the same opinion, that CILFIT was representative of, on the one hand, the Court’s ambition to have a say in as many cases as possible and, on the other, a certain belief that the national judiciaries would do harm to the unity of Community law, and not only inadvertently so, if they were left to decide too many interpretative questions on their own,¹⁸⁷ thus trying to show that the CILFIT judgment is not so actual anymore and should be reconsidered.

It might be possible to review CILFIT if the time when CILFIT was decided is taken into account. After so many years, the ECJ has developed broad and explicit case law, and national courts have gained more knowledge. Maybe it is not necessary to have a strict *acte clair* requirement to release national courts from obligations to refer for preliminary ruling. As AG Colomer correctly points out, only less stringent interpretation of CILFIT requirements would satisfy the principle of judicial cooperation between national courts and the ECJ.¹⁸⁸ It might be logical if the obligation

¹⁸⁵ Opinion of Advocate General Colomer delivered on 30 June 2005 in case C-461/03 *Gaston Schul Doouane-expediteur BV* [2005] ECR I-10513, para 52, 53, referring to cases C-340/99 *TNT Traco* [2001] ECR I-4109, para 35, and C-224/01 *Köbler* [2003] ECR I-10239, para 118.

¹⁸⁶ *Ibid.*, para 52

¹⁸⁷ Rasmussen, H. *Remedying the crumbling EC judicial system*. [2000] 37 *CMLRev.*, p.1108

¹⁸⁸ Opinion of Advocate General Colomer delivered on 30 June 2005 in case C-461/03 *Gaston Schul Doouane-expediteur BV* [2005] ECR I-10513, para 58

to refer to ECJ would be only in the situations when the question is significant enough, connected with important EC law matters and there is a doubt of a possible answer.

Anyway, less stringent application of CILFIT might cause serious consequences which are going to be analyzed in the next chapter.

9. Consequences of rewriting CILFIT.

As for the discussion on making CILFIT conditions more flexible for national courts, some authors have expressed considerable doubt that the national court will interpret and apply Community law in a disparate manner and that the body of case law may be created that is not in accordance with the rules of Community law.¹⁸⁹ It must also be agreed that even though less strict application of the CILFIT judgment will decrease the number of ECJ preliminary rulings, in the long term it might restrict uniform application of EC law. However, AG Colomer is confident about only good effects of not-so-strict CILFIT application, saying that it will help the Court to focus on only important cases and really be beneficial to ECHR case law.¹⁹⁰ In this situation, Advocate General Capotorti's opinion in CILFIT shall be accented. He pointed out that even the *acte clair* doctrine might not be strict enough to attain the objective of Article 117 (TFEU 267), to ensure uniformity and certainty in the application of Community law, because if the national court will refer a question to the ECJ only when a reasonable and interpretative doubt has arisen, it will lead to the introduction of a subjective and uncertain factor in the application of Community law.¹⁹¹ It also must be kept in mind that the national courts of last instance give final judgments, and there is no option of judicial review of those decisions, and they cannot really be amended. Lower national courts draw influence from these judgments, which can lead to non-uniform interpretations of Community law and maybe even wrong interpretations of Community law. If the *acte clair* doctrine will not be applied strictly, it must be noted that France still uses this doctrine. Thus, it means that French national courts, using national *acte clair* as a cover, can avoid preliminary ruling procedure,

¹⁸⁹ Broberg, M. Acte Clair revisited: adapting the Acte Clair criteria to the demands of times [2008] 45 CMLRev., p. 1387.

¹⁹⁰ Opinion of Advocate General Colomer delivered on 30 June 2005 in case C-461/03 Gaston Schul Doouane-expediteur BV [2005] ECR I-10513, para 89

¹⁹¹ Opinion of AG Capotorti delivered on 13 July 1982 in case 283/81 CILIFT [1982] ECR 1982 p. 3415, point 7.

keeping rights to themselves to decide relevant questions. It might challenge the exclusive interpretative jurisdiction of the Court.¹⁹² Also, in the long term, that will effect uniform applications of Community law as well as further development of Community law.

Advocate General Tizzano, in the *Lyckeskog* case, correctly points out that the principle of the obligation on courts of last instance to refer questions for a preliminary ruling is not the outcome of an extempore decision by the Court but to set out directly in precise and formal terms in the EC Treaty and is thus, by its aims and implications, one of the fundamental and essential principles, almost a structural principle of the Community legal system.¹⁹³ He also stresses that any derogation from that principle must be interpreted strictly. Thus, it might be better if the CILFIT requirements, especially the *acte clair* criteria, are read strictly and narrowly and be left “untouched.” Also, there is an opinion that more flexible CILFIT requirements will reduce the protection of individuals who no longer can be guaranteed indirect access to the ECJ.¹⁹⁴ From the other side, Bebr points out that the use of the *acte clair* doctrine also protects breaches of Community obligations by Member States to the harm of the Community rights of individuals¹⁹⁵ because the state can use *acte clair* as an excuse not to refer for preliminary ruling to the ECJ.

Even if the CILFIT is to be considered as very restrictive nowadays, still the question remains how it will be possible (if at all) to decide which cases deserve ECJ attention and which cases should be left for national courts to decide. This task might be slightly difficult if not impossible. As mentioned before, some authors believe that only generally important questions should be referred to the ECJ; thus, interpretation of them will bring genuine benefit for the Community, and the Court will not need to spend time with deciding minor cases. The idea, of course, is very welcome,

¹⁹² Bebr, G. The Rambling Ghost of “Cohn Bendit”. *Acte Clair and the Court of Justice*. [1983] 20 CMLRev., p.457

¹⁹³ Opinion of AG Tizzano delivered on 22 February, 2002 in case C- 99/00 *Lyckeskog*, [2002] ECR I-4839, para 64

¹⁹⁴ Schermers, G.H., Waelbroeck ,F.D. *Judicial protection in the European union*. 6th ed. The Hague: Kluwer Law International, 2001., p.282

¹⁹⁵ Bebr, G. The Rambling Ghost of “Cohn Bendit”. *Acte Clair and the Court of Justice*. [1983] 20 CMLRev., p.459

but this would end up with having exactly the same subjective and unclear application as application of the *acte clair* doctrine. National courts would be left on their own to decide whether a case is important enough to refer for a preliminary ruling. It is exactly the same subjective evaluation as in the *acte clair* doctrine when the national court decides if the answer to the question is equally obvious to all other courts. Second, it should be mentioned that overruling CILFIT might cause possible risks that national courts will take advantage of their freedom not to refer preliminary questions to the ECJ and possibly abuse it. As we see from the *Laval* ruling, even though the CILFIT ruling still exists and the ECJ has not overruled it, the national court still has a possibility no to refer preliminary questions to the ECJ.

The Swedish Labor court might have had an obligation to refer one more preliminary reference to the ECJ because the judgment in *Laval* was not even close to a unanimous decision, and also because this kind of matter on individual rights to damages for breach of EC law has never been reviewed before the ECJ. Taking this into account -- and that according to Article 10 EC (TEU 4(3)), national courts have an obligation to cooperate with the ECJ when deciding on EC law matters and ensure homogeneous interpretation of EC law. If the same kind of situation will arise in future, there will be no guidelines in ECJ case law. The Swedish Labour court refused to ask for a preliminary ruling, therefore not giving a chance to the ECJ to give interpretation of EC law in such an important matter as individual liability and rights to damages for breach of EC law. Taking into account all CILFIT criteria, it does not seem that the application of Community law and the answers to the questions arising in the *Laval* case were obvious or did not cause any reasonable doubt.

Even if the criticisms of the CILFIT judgment are taken into account and it is agreed that the question referred to the ECJ should be only questions of Community general interest or those causing "serious doubt," this is not the case. Questions arisen in the *Laval* case were definitely questions of Community general interest or at least caused serious doubt about their answers. It does not seem that the national court in the *Laval*

case should question whether or not it shall refer for preliminary ruling of ECJ.

One of the possible reasons why the Swedish labor court did not refer for one more preliminary ruling to the ECJ might be the length of time needed for one preliminary ruling procedure. On average, one case before ECJ is pending for 2 years, a considerably long period of time. This places national courts of last instance in a dilemma between interests of parties to the main action and interests that are reflected in the CILFIT ruling.¹⁹⁶ It might seem the Labor court was trying to reach some sort of balance between interests of all parties. It was clear from the ECJ preliminary ruling that Swedish trade unions have breached EC law, and they shall be liable for their actions. The company “Laval un partneri” was asking for compensation for all the damages it suffered because of the Swedish trade union’s actions. If the national court would have referred for one more preliminary ruling, it would have, first, taken a long time and, second, caused uncertainty between parties without knowing the actual outcome of the case. As trade unions knew they are held liable for breach of EC law, they most likely assumed they would also be liable for caused damages, and thus the Swedish Labor court reached probably the best possible solution in this situation.

However, it must be pointed out that the national court of last instance which does not refer for preliminary ruling from the ECJ can be in breach of Article 234 (TFEU 267), especially when the use of the *acte clair* doctrine has been confusing and unfounded. Also, according to the European Commission of Human rights, it may not be excluded that, under certain circumstances, the refusal by a highest national court to refer a question to the ECJ could affect the right to a fair hearing, as established in Article 6(1) of the ECHR.¹⁹⁷ Anyway, it is not really possible to know whether the national court in Laval would be held liable for breach of Article 234 EC (TFEU 267) because of the sometimes surprising and

¹⁹⁶ Broberg, M. Acte Clair revisited: adapting the Acte Clair criteria to the demands of times [2008] 45 CMLRev., p. 1386.

¹⁹⁷ Schermers G.Henry, Waelbroeck F.Denis. Judicial protection in the European union. 6th ed. The Hague: Kluwer Law International, 2001., p.272 and 576.

varying case law of the ECJ, who dares to uphold that something is “manifest” or would have been “obvious” to the ECJ, had it been consulted.¹⁹⁸

¹⁹⁸ Wattel, J. Peter. Kobler, CILFIT and Wealthgrove: we can't go on meeting like this. [2004] 41 CMLRev., p. 179.

Conclusion

According to ECJ case law, private bodies with the ability to significantly influence the market can be held liable for breach of directly effective EC provision. In most of the situations when horizontal liability arises, also state liability is possible, because the state is indirectly present all the time. It adopts laws, regulates individual relationships and safeguards individual rights.

The reasons individual liability for damages for breach of the Community law is possible are as follows:

1. To provide effective protection of individual's rights at the Community level. If there are rights arising from the EC law, then there should also exist a remedy for their realization.
2. According to the EU Charter of Fundamental Rights, every individual has rights to effective remedies. Although the Charter is binding only to Community institutions and Member States, it can also be applied in horizontal situation. The rights secured by the Charter are horizontally applicable, and the Charter's nature is similar to the EC Treaty.
3. As state liability for damages for breach of directly effective EC rules is possible, there is no reason why this could not be extended to individual liability. The liability arises from the same reasons – the binding nature of the EC Treaty and the principle of effectiveness of the Community law.

However, it is disputable whether Community rights to damages arise from the *Courage* case. Although it seems that this case gives legal basis for it, from the actual text of the judgment it does not seem as if the ECJ had any intention to create Community rights to damages. From the other side, the ECJ in *Courage* did not connect rights to remedy specifically to the competition law, thus by analogy this case theoretically can be applied in any horizontal liability situation where the rule breached is with the same characteristics as Article 81 (TFEU 101).

In the case of state liability, the individual will need to prove that the breach is sufficiently serious. State liability requirements can serve as a base and as guidelines for establishing criteria for individual liability, because the liability arises from the same reasons. But they cannot be taken over directly. “Sufficiently serious breach” criteria can be used only in cases of state liability because its nature is to evaluate the margin of discretion of the state. The individual has no margin of discretion because he has no administrative or legislative powers.

As the liability level in cases of state and horizontal liability cannot differ, as different levels of protection of rights would arise, similar criteria as “sufficiently serious breach” shall be applied in the case of horizontal liability. Instead, the level of responsibility of the individual and his actual powers to restrict other individuals’ rights shall be measured. Also, the clarity of the rule intended to grant rights to individuals shall be taken into account. If the provision does not clearly and precisely grant rights to the individual then a clear obligation to respect those rights cannot arise from this rule.

In *Laval*, the undertaking “Laval un Partneri” should have brought damage claims against both trade unions and the state. As it did not, trade unions can invoke the principle of legitimate expectations at the national level and bring the regress claim against the state. At the same time, trade unions cannot rely on national legislation when they are in the breach of EC law because Community interests of free movement should be held higher than national interests.

It is more complicated in the *Laval* case because trade unions gained their rights not only from the national legislation but also from exercising fundamental rights to act collectively arising from international documents such as ECHR and EU Charter. Thus, there was a clash between two fundamental concepts – fundamental freedoms and fundamental rights. It is not possible to simply make a hierarchy between them because they both are rights of the same level. Therefore, the only way to decide which one of those fundamental elements will prevail in each situation is to balance them on a case-by-case basis.

As none of the fundamental social rights are absolute, they can be restricted, especially with using the principle of proportionality, i.e., analyzing whether the action goes beyond what is necessary for its aim. In the *Laval* case, trade unions are acting beyond their actual rights, thus losing the legal basis of their actions. The content of rights to act collectively includes protection of workers, and that means trade unions cannot go beyond what is necessary to protect the workers. In *Laval*, the trade unions were acting disproportionately and actually destroyed the foreign undertaking, thus not protecting *Laval* workers at all. According to the case law of ECHR, the interests of member of trade unions can be protected in different ways not only with strike action.

The compensation for damages shall be effective and include not only purely nominal compensation but also loss of profit and interest. The amount of compensation cannot be just symbolic but should put the “harmed” person in the previous situation as he or she was before the damage occurred, at least financially. Thus, the possible profit shall also be compensated because if the damage had never happened, the individual would have profited, therefore total exclusion of profit is unacceptable.

The aim of preliminary ruling procedure is to ensure uniform interpretation and application of the Community law and also indirect protection of individual rights. Only if the national court refers for preliminary ruling to ECJ can it be achieved.

The principle of *acte clair* is one of the fundamental jurisprudential principles of the ECJ, which originated in the French legal system, and its aim is to ensure uniform interpretation and application of Community law. The application of *acte clair* is ambiguous and complicated because it involves comparison of different languages, legal concepts and conviction that the matter is equally obvious to courts of the Member States and also the ECJ. Thus, there are no actual means for the national court to fulfill the *acte clair* requirement. The *acte clair* criterion shall be fulfilled objectively, but taking into account its nature, the result of it still will be the subjective opinion of the national court. Also, it will lead to huge numbers of preliminary ruling procedures before the ECJ. Therefore, there are ongoing

discussions whether the CILFIT criteria should be applied in a more flexible way.

Even though less stringent application of CILFIT seems like a good idea because it would reduce the number of preliminary ruling procedures before the ECJ, it will not work in the long term. First, it would restrict the uniform interpretations and application of the Community law. Second, if only the “most important” questions of “general interest” will be referred to the ECJ, it would introduce subjectivity and uncertainty in the application of the EC law. Third, more flexible application of CILFIT requirements would lead to national courts avoiding referring for preliminary ruling to the ECJ, using *acte clair* as a cover, thus restricting indirect protection of individuals and uniform application of the Community law.

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