Compensation for non-material damage in EU enactments and in the case-law of the European Court of Justice[1]

Compensación por daños morales en la norma de la UE y en la jurisprudencia del Tribunal de Justicia de la Unión Europea

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Abstract: The article gives an overview over the EU enactments dealing with the compensation of non-material damage and how the relevant provisions are interpreted by the European Court of Justice. Some general conclusions can be drawn from this survey which are helpful for situations where either enactments or leading decisions are still lacking.

Keywords: Compensation of non-material damage, respective European enactments, their interpretation by the European Court of Justice,general conclusions for the compensation of non-material damage.

Resumen: El artículo ofrece una visión general de las normas de la UE relativas a la indemnización por daños morales y de cómo el Tribunal de Justicia de la Unión Europea interpreta las disposiciones pertinentes. De este estudio se extraen algunas conclusiones generales que resultan útiles para situaciones en las que aún faltan normas o decisiones importantes.

Palabras clave: Indemnización por daños morales, disposiciones europeas al respecto, su interpretación por el Tribunal de Justicia de la Unión Europea, Conclusiones generales para la indemnización por daños morales.

I. Introduction

1. There are many EU-enactments which provide for liability for damage suffered by natural or legal persons. Unless they expressly mention the compensation of non-material (immaterial, non-financial) damage, they pose the question whether such damage is or is not included. There is further a considerable number of decisions of the European Court of Justice (CJEU) that deal with compensation

[1] This article is written in honour of professor Alfonso-Luis Calvo Caravaca.

for immaterial damage of those persons.[2] In most cases the decisions interpret provisions of the respective enactments. The fields where this is the case are rather divers: they range from compensation for immaterial damage due to unjustified dismissal through damage caused by flight annulation, by loss of control over, or misuse or hacking of, personal data, by loss of holiday time to compensation for the death or severe injury of a close relative or for victims of violence or sexual assault and even further fields. Do the European enactments and does the European Court apply a uniform concept of immaterial loss or does this concept vary – sometimes, for certain fields only, slightly, dramatically – from field to field? In particular, is awarding, and assessing the extent of, damages for immaterial loss entirely left to the national law or does the CJEU formulate outer or inner limits which national legislators and judges must observe, and if so, how far do these limits range?

2. The following text tries to give some answers to these questions. It is dedicated with great appreciation and affection to Alfonso Luis Calvo Caravaca. He is one of the outstanding European scholars with an extremely broad range of scientific interests and deep research work in almost all areas of law. Dear Alfonso, ad multos annos!

II. Material and non-material damage in EU enactments

3. There are many enactments of the EU dealing with liability for damage either to persons or to goods or rights of persons. Most of the enactments merely use the term damage, leaving thereby open whether or not this term means material damage alone or also includes non-material damage. The use of the neutral but also ambivalent term 'damage' is for instance the case with the TFEU,[3] the Rome II-Regulation,[4] the Product Liability Directive of 1985,[5] and many, many more.[6] For all of these enactments it is open if the term includes non-material damage as well.

4. On the other hand, do some enactments expressly mention that material as well as non-material damage must be compensated, for instance the General Data Protection Regulation (GDPR). Art. 82 (1) GDPR provides: „Any person who has suffered material or non-material damage as a result of the infringement of this Regulation shall have the right to receive compensation … for the damage suffered." The Article has already aroused some case-law of the CJEU concerning non-material damage. This will be discussed below under VI.4.

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[2] The data base curia.europa.eu reports 63 judgments which at least mention the term immaterial or non-material loss or damage.

[3] Art. 340 (2) and (3) TFEU.

[4] In particular Art. 15 (c) Rome II-Regulation.

[5] Art. 9 (a) Product Liability Directive: "…'damage' means: (a) damage caused by death or by personal injuries;". The 2022 Proposal for a new Product Liability Directive is more explicit (Art. 4 (6): "'damage' means material losses resulting from: (a) death or personal injury, including medically recognized harm to psychological health; … (c) loss or corruption of data that is not used exclusively for professional purposes.")

[6] Only few further examples may be named which stand for many others. One of special practical importance is Directive 84/5/EEC on the approximation of the laws of the Member States relating to the insurance against civil liability in respect of the use of motor vehicles, as amended by Directive 2005/14/EC ('Second Directive') whose Art. 1 (1) states that compulsory motor vehicles insurance must cover "damage to property and personal injuries." Another example is Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union: its Art. 3 provides for a right to full compensation and its Art. 2 (5) defines: "'claim for damages' means a claim for compensation of harm caused by an infringement of competition law." Still another example is Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society whose Art. 8 (2) provides: "… rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages … ". A rather recent example is Directive 2024/1760/EU on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 whose Art. 29 (1) and (2) also provide for full compensation of damage caused by a breach of one of the obligations established by the Directive; full compensation shall be granted "in accordance with national law" but must avoid overcompensation.

5. A still other path is followed by the 2022 Proposal for an amended Product Liability Directive. It defines damage as meaning "material losses resulting from: (a) death or personal injury, including medically recognized harm to psychological health; … ." Thus, non-material damage is taken into account here; however, only material losses of medically recognizable immaterial harm caused by defective products would be recoverable if the Proposal becomes law.[7]

6. From the existence of instruments that expressly mention the compensability of non-material damage it could be inferred that instruments which only mention the term damage do not include redress for non-material loss. This, however, appears as too early a conclusion. Where the formulation, especially in older EU-enactments, uses the wide term damage the scope of the term is just open. Then, it should generally be a matter of interpretation of the respective provision whether or not it covers non-material damage, too.

III. Principle of full compensation and non-material damage

7. It is a widely accepted aim and principle of the law of liability for damage both in national law and EU law that damages have a primarily compensatory character and shall make good the ensued loss. This generally means that the damage that has been caused should be repaired in its entirety. From this principle of full compensation, it could be inferred that also non-material damage must principally be compensated.[8] For, where non-material damage has been caused, full restoration would only be achieved when this kind of damage is also fully made good. However, it would be a *petitio principii* that the principle of full compensation automatically includes compensation for immaterial harm. True, the principle may to a certain extent favour that non-material damage should be compensable. But the particular nature of non-material damage demands further justification if that kind of damage should be regularly recoverable.

8. The specialty of non-material damage requires some caution because of the following aspects: (1) Non-material damage can generally not be repaired like the repair of a damaged car or other tangible good. The healing of wounded emotions or feelings, if at all possible, is generally more complicated than the healing of corporeal wounds because the emotional wounds are invisible. Their existence depends on what the victim says or shows by his or her behaviour. (2) Non-material damage as such does not result in a diminution of the victim's financial/economic situation (unless costs for healing etc. were incurred). A diminution of the financial situation is generally rather easily determinable; it can be measured by an objective yardstick, regularly in terms of money or other market parameters. (3) For non-material damage no such objective yardstick exists. How hard a person is hit by damage to her/his feelings, even the degree how deep the pain through bodily injury is felt, varies from individuum to individuum. (4) There will therefore always be a certain degree of discretion how far the existence and extent of such damage should be recognized and compensated by a sum of money (restitution *in natura* is generally impossible except where, for instance, apologies, reinstatement into the former position etc. may be possible and sufficient). (5) Compensation for non-material damage cannot, and certainly not exclusively, depend on the personal assessment of the individual victim. Otherwise, the compensation would entirely depend on the victim's wishes. The border between justified compensation and the exclusion of any compensation would become untenable. (6) Thus, as far as possible, objective facts (in particular the gravity and duration of consequences of the injury), comparison with compensation of comparable cases etc. must be taken into account for the determination whether and to which extent the non-material damage should be recoverable. (7) Moreover, certain kinds of non-material damage belong to the risk of daily life which everybody is expected to stand without any compensation, for

[7] Art. 4 (6) of the Proposal.

[8] For a clear and detailed discussion of the compensability of non-material damages see in particular *Koziol*, Grundfragen des Schadensersatzrechts (2010) 112 et seq.

instance, the distant by-stander who observes a serious traffic accident or even only how another's pet is killed by a passing car; the exposition to bad smell, noise, smoke etc. (if reasonably high thresholds are not exceeded); harsh words just slightly below insult or defamation; small bruises in the bus, tram or train at rush-hour and many similar events. Damage of this kind remains – and must remain – uncompensated. Otherwise, the courts could be flooded with *petitesses* and usual ("normal") social behaviour would become a matter of continuous litigation.

9. In sum, non-material damage should be compensated as well as material damage, though with some cautious limitations. To become recoverable, the injury of feelings and emotions, bodily pain and other non-material damage must exceed what is a normal, socially accepted impairment in daily life. Since a single common standard for determining the existence and the extent of non-material damage does not exist – unlike money for material damage –, objective facts, comparison with comparable cases etc. must be used in order to reduce as far as possible the discretionary character of such determination.

10. It should further be mentioned that, in certain fields of law, we are used to think that the occurrence and consequently the compensation of non-material loss is generally the exception, for instance in the field of contracts and particularly commercial and business contracts. For, it is said that contract law regularly protects mere economic interests of the parties unless the specific contract at hand directly aims at the protection of non-material interests as, for instance, contracts which concern holiday recreation. Damages for breach of contract will therefore only rarely include redress for non-material loss. In other fields like tort law the occurrence of non-material damage is frequent, in particular as a consequence of bodily injury or of a violation of personality rights. This frequency of such cases allows the forming of tables of compensation for similar injuries and helps equalize damages awards.

IV. Principle of full compensation in EU enactments

11. In EU legislation, the principle of total reparation of the suffered damage has been enshrined in some more recent enactments. A good example is Art. 3 Directive 2014/104/EU on damages for infringements of competition law. The Article provides as follows:

> "Art. 3 Right to full compensation
>
> 1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.
>
> 2. Full compensation shall place a person who has suffered harm in a position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.
>
> 3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages."

12. This Article states in legislative form what the CJEU expressed in 2006 in *Manfredi*.[9] The central contents are the following points: victims of harm that another caused by an infringement of a legal rule should be entitled to full compensation; full compensation shall put the victim in a position as far as possible equal or at least closely comparable to that in which the victim would otherwise have been; full compensation should further not result in overcompensation. True, the Article concerns exclusively damages for infringements of competition law. However, most of its content could probably be generalized and applied to grounds for liability in other fields of law. Whether the principle includes compensation of immaterial damage, is not self-evident and will be discussed below

[9] *Manfredi* (C-295/04 – 298/04) ECLI:EU:C:2006:461 para. 95, 99 et seq.

13. Also, other EU-enactments refer to the principle of full compensation, for instance Directive 2024/1760/EU on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. Its Art. 29 (1) and (2) use a formulation similar to that in Art. 3 Competition Damages Directive.

III. Non-material damage recoverable under Directive 2014/104/EU?

14. Thus far, Art. 3 Directive 2014/104/EU is the most explicit expression of the principle of full compensation. Nonetheless does Art. 3 not expressly state that also non-material damage should be recoverable. It is interesting to examine whether full compensation includes redress for non-material damage, too, especially in the field of competition where damage is typically an economic loss whereas the occurrence of immaterial damage is rare. The explanation in Recital 12 of the Directive merely mentions actual loss, loss of profit plus interest as recoverable damage under the Directive.[10] This formulation may rather exclude than include non-material damage; but nonetheless is its mere silence on the compensability of non-material damage no answer let alone a clear one. No wonder, that among scholars, different views are shared on how to deal with the problem. As will be seen infra at VI., the CJEU has not yet decided the issue.

15. A first line of argument refers therefore the decision of this matter to the applicable national law.[11] The relevant national law shall decide whether non-material damage caused by violations of competition law is recoverable. Consequently, the differences of the national laws of the Member States would prevail and eventually lead to different results for the compensation of immaterial harm. This stream of argument could further point to the fact that the method of assessing such harm and fixing its extent necessarily belongs to the realm of national, mainly procedural law. Moreover, a fair and just compensation of immaterial harm is difficult and may depend on still different cultural features and traditions concerning competition. Moreover, in many cases, in particular where consumers are victims of competition infringements, the extent of the possible damage – material and even more so immaterial damage – of each single victim may not be worth the time and money for pursuing such claims which in fact are rarely pursued by individual consumers, even if the remedy is theoretically available under national law.[12] The low, even negligible extent of the damage for the single victim and the complexity of competition suits make the remedy in practice almost useless or superfluous.[13] The European legislative answer to this observation is an increase in litigation possibilities by collective bodies, in particular by consumer associations, although these possibilities do not necessarily lead to damages for the individual consumer.

Others authors propagate an autonomous European answer to the question whether damages for competition infringements should principally include non-material damage.[14] This means that the EU-law, namely Directive 2014/104/EU itself, must answer whether or not non-material harm should

[10] „The Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law, particularly standing and the definition of damage, as stated in the case-law of the Court of Justice, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (damnum emergens), for gain of which that person has been deprived (loss of profit or lucrum cessans), plus interest, irrespective of whether those categories are established separately or in combination in national law."

[11] See, e.g., *Franck*, in: Immenga/Mestmäcker (eds.), Wettbewerbsrecht vol. 2 (7th ed. 2024) § 33 a GB note 58.

[12] *Franck*, in: Immenga/Mestmäcker (eds.), Wettbewerbsrecht vol. 2 (7th ed. 2024) § 33 a GWB note 59.

[13] See CJEU in *ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfahlen GmbH v. Land Nordrhein-Westfalen* (C-253/23) ECLI:EU:C:2025:40 para. 77: „…, although those persons <*sc. the individual victims of competition infringements*> have the possibility of bringing an action for damages in their own name and on their own behalf, such a possibility does not, however, enable them to exercise that right effectively. In the light of the particularly complex, long and costly nature of an individual action concerning an infringement of competition law, injured persons would tend to refrain from bringing such an individual action, in particular where harm equating to a low value is at issue."

[14] See in particular *Heinze*, Schadensersatz im Unionsprivatrecht (2017) 227 et seq.

be compensated and that this question should be answered positively. This view can refer to the pre-mentioned principle of full compensation; compensation would not be full if non-material damage were excluded. A further consideration is that the border between material and non-material damage is so important and sometimes difficult that a uniform answer for the Union appears necessary. In the since long constituted common and now internal market different cultures and traditions concerning competition should play no longer such a separating role that immaterial harm through competition infringements is deeply differently felt. Anyway, it depends on each single affected individuum how seriously he or she feels impaired by immaterial damage. As stated above, the individual reaction may be quite different. The individual feeling is however not the yardstick for compensation. In order to grant a fair and just compensation, especially in the field of non-material damage through competition infringements, it is necessary to rely in the very first line on facts and circumstances which can be objectified.

In this author's view, an autonomous European answer is necessary. This is not only the case with Directive 2014/104/EU but generally for all EU enactments which mention the term damage and provide for its compensation. Whether damage includes non-material harm is a core issue of the law of damages. Where EU-law provides for damages and uses the term damage or harm a uniform interpretation for the whole internal market is not only highly desirable but also possible. To leave the answer first to private international law and then, second, to the respective national law would uphold unnecessary separations.

16. A uniform and autonomous European understanding of the term damage does not necessarily mean that in all enactments the term must have the same meaning and must always include non-material damage. The respective enactment that uses the term may expressly exclude this kind of damage from compensation or the special purpose and aim of the enactment may support such an interpretation. However, besides these exceptions the term should in EU enactments generally include immaterial loss.

IV. The position of the European Court of Justice (CJEU) towards the compensability of non-material damage

17. The CJEU has dealt with the compensability of non-material damage not on a general and abstract level but in quite a number of diverse fields of law. A good number of them is reviewed below. It will be seen whether general consequences can be drawn also for provisions of EU law that grant a right to damages where the CJEU has not yet decided the question.

1. Competition law

18. As mentioned above, for Art. 3 Competition Damages Directive the CJEU has, as far as visible, not yet decided on the in- or exclusion of non-material damage caused by infringements of competition law. In *Courage and Crehan*,[15] *Manfredi*,[16] Otis,[17] *Kone*,[18] *Skanska*,[19] *Sumal*[20] and *ASG 2*[21] the Court always stated that the "full effectiveness <*sc. of the European competition law*> would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by

[15] *Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. a.o.* (C-453/99) ECLI:EU:C:2001:465 para. 26.
[16] *Manfredi* (C-295/04 – 298/04) ECLI:EU:C:2006:461 para. 95, 99 et seq.
[17] *Europese Gemeenshap v. Otis NV a.o.* (C-199/11) ECLI:EU:C:2012:684 para. 43.
[18] *Kone AG a.o. v. ÖBB-Infrastruktur AG* (C-557/12) ECLI:EU:C:2014:1317 para. 21 et seq.
[19] *Vantaan Kaupunki v. Skanska Industrial Solutions Oy a.o.* (C-724/17) ECLI:EU:C:2019:204 para. 25.
[20] *Sumal SL v. Mercedes Benz Trucks Espana SL* (C-882/19) ECLI:EU:C:2021:800 para. 34.
[21] *ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfahlen GmbH v. Land Nordrhein-Westfalen* (C-253/23) ECLI:EU:C:2025:40 para. 61.

conduct liable to restrict or distort competition."[22] But whether this formulation included or excluded non-material damage remained open although the principle of full effectiveness as well as the principle of full compensation may tend to favour the inclusion. In any event, the European Court did not refer to the applicable national law for the definition of damage. Implicitly, the Court considered this question as regulated by European law whereas the – in particular procedural – details of assessing the extent of damage must be left to the relevant national law unless the European law provides for specific regulations.[23] The national law must, however, provide for rules that do not make it "impossible or excessively difficult to exercise the right to compensation" nor deprive victims "of effective judicial protection."[24] In sum, it appears more likely than not that the CJEU will consider non-material damage as covered by Art. 3 Directive 2014/104/EU.

2. Personal injury/bodily harm through traffic accidents

19. In the field of personal injuries and bodily harm, the view of the CJEU appears to be rather clear: compensation must include immaterial loss. In 1994, the CJEU held in broad terms: "The victim of an accident must be compensated, irrespective of any financial loss, for any personal damage which may cover physical or mental suffering."[25] The judgment concerned a case of extra-contractual liability of the European Community (the claimant suffered severe corporeal damage through a fall from the flat roof of a meteorological station run in Italy by the European Atomic Energy Community which was represented by the EC-Commission). According to the then Art. 188 (2) EAEC and EC Treaty (now Art. 340 (2) TFEU) the judgment had to be based on "the general principles common to the laws of the Member States." Without further discussion or comparison of the laws of the Member States, the Court simply held that the damage which the claimant suffered also included non-material damage (mental suffering). The Opinion of Advocate General *Tesauro* was only slightly more explicit on this point and stated "that, regard being had to the applicable law in the other Member States, the only practicable solution is to grant to Mr Grifoni, to compensate him for the physical and mental suffering resulting from his accident, a lump-sum amount on the basis of equitable criteria."[26]

20. In a road traffic accident insurance case, the CJEU likewise acknowledged that mental harm is recoverable even by third persons who are close to the actual victim.[27] In that case the wife and the daughter of the victim of a traffic accident claimed their non-material damage from the insurer of the person who had caused the accident. The Court first stated that compensation for personal injuries must include compensation for "psychological suffering."[28] Although, regularly, the applicable national law governs the question whether a person is civilly liable for a traffic accident and which heads damages cover,[29] the Member States must ensure, so the Court, that their national law complies with the – three – Directives on mandatory insurance for road accidents by motor vehicles. EU law

[22] See the preceding fn.

[23] See, for instance, *Kone AG a.o. v. ÖBB-Infrastruktur AG* (C-557/12) ECLI:EU:C:2014:1317 para. 24: „In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, including those on the application of the concept of ``causal relationship', provided that the principles of equivalence and effectiveness are observed."; in the same sense, e.g., *Manfredi* (C-295/04 – 298/04) ECLI:EU:C:2006:461 para. 64.

[24] See Art. 4 and Art. 17 Directive 2014/104/EU; see also *ASG 2 Ausgleichsgesellschaft für die Sägeindustrie Nordrhein-Westfahlen GmbH v. Land Nordrhein-Westfalen* (C-253/23) ECLI:EU:C:2025:40 para. 82.

[25] *Grifoni* (C-308/87) ECLI:EU:C:1994:38 para. 37.

[26] AG *Tesauro* in *Grifoni* (C-308/87) ECLI:EU:C:1993:362 para. 21. The AG observed that Italian law – contrary to the laws of the other Member States – distinguished between physiological and moral damage and would have denied compensation of non-financial loss in the present case because of a lack of a criminal offence. He regarded and neglected the Italian position therefore as an outsider-position.

[27] *Katarina Haasová v. Rastislav Petrik a.o.* (C-22/12) ECLI:EU:C:2013:692.

[28] *Katarina Haasová v. Rastislav Petrik a.o.* (C-22/12) ECLI:EU:C:2013:692, para. 47: „the notion of ‚personal injuries' covers any type of damage … resulting from an injury to physical integrity, which includes both physical and psychological suffering."

[29] *Katarina Haasová v. Rastislav Petrik a.o.* (C-22/12) ECLI:EU:C:2013:692, para. 40.

therefore requires that the domestic law covers non-material damage of victims of those accidents.[30] In addition, the Court inferred from the mentioned Directives that the Member States have to ensure that their domestic law allows the next of kin of the direct victim to claim compensation for their non-material harm from the (mandatory) road accidents insurer.[31] However, the Court appears to be of the opinion, that this should be only the case where the applicable domestic law already allows for such next of kin-claims.[32]

21. In the rather recent case *HUK-COBURG*,[33] the CJEU had to determine whether the German law on compensation for non-material damage of indirect (third) victims of serious traffic accidents complied with EU law. By that time, German law still required that the immaterial damage could be compensated only if, among other conditions, the indirect victim had suffered a "pathological damage" to its mental health that exceeded the psychic impairment a person normally feels if a close relative dies.[34] Recently, the German Federal Court of Justice (BGH) lowered this threshold somewhat: the higher than normal impairment is no longer required.[35] In the concrete case, the Bulgarian mother of two girls aged 4 and 8, was killed in a traffic accident in Germany which her Bulgarian husband had caused when driving intoxicated while his wife was sitting on the front passenger seat, not wearing the seatbelt. The German motor vehicle insurer paid the daughters 5.000.- € as compensation for their immaterial harm. The father, representing them, brought in Sofia a claim for an amount of ca. 153.000,- € for the non-material damage of each daughter. The CJEU was asked to decide whether the German "pathological damage"-condition was in line with the respective EU law.[36] Although the Court did not in detail examine what "pathological damage" exactly means, it confirms that this special condition does not compromise the aims of the underlying Directive provision.[37] The decision shows the interplay between domestic and EU law. EU law obliges the Member States to introduce compulsory insurance for road accidents that covers the compensation also for non-material damage, but the Member States remain free to define the exact limits of the extent of compensation for that kind of damage.[38] However, these limits must not strip the Directive provision of its effectiveness[39] – namely to effectively protect victims of road accidents – and must not be disproportionate.[40] EU law thus determines the outer limits of the range of compensation while the Member States may detail the inner limits of this range and may insofar introduce reasonable and adequate conditions. Also, the inner limits must respect the overarching aims of the Directive. In this context, the CJEU places weight on the point that German law uses an objective criterion ("pathological state of psychic illness value exceeding the normal psychic reaction to the death or severe injury of a close family member").[41] In the Court's view, this criterion does neither impair the Directive's effectiveness nor is it disproportionate.

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[30] See *Katarina Haasová v. Rastislav Petrik a.o.* (C-22/12) ECLI:EU:C:2013:692 paras. 38 – 50.

[31] *Katarina Haasová v. Rastislav Petrik a.o.* (C-22/12) ECLI:EU:C:2013:692, para. 54 and 55.: „[54] It cannot be concluded from any part of the First, Second and Third Directives <*sc. on mandatory motor vehicle insurance*> that the European legislature wished to restrict the protection ensured by those directives exclusively to persons directly involved in an event causing harm. [55] Consequently, the Member States are required to ensure that compensation payable, under their national civil liability law, for non-material harm suffered by the next of kin of victims of road traffic accidents are covered by compulsory insurance of at least the minimum amounts laid down in Article 1 (2) of the Second Directive."

[32] *Katarina Haasová v. Rastislav Petrik a.o.* (C-22/12) ECLI:EU:C:2013:692, para. 55 (preceding fn.); see also *Vitalijs Drozdovs v. Baltikums AAS* (C-277/12) ECLI:EU:C:2013:685, para. 48.

[33] *LM a.o. v. HUK-COBURG-Allgemeine Versicherung AG* (C-577/21) ECLI:EU:C:2022:992.

[34] See, e.g., BGH NJW 2012, 1730; BGH NJW 2015, 1451; see also *LM a.o. v. HUK-COBURG-Allgemeine Versicherung AG* (C-577/21) ECLI:EU:C:2022:992, para. 46.

[35] BGH NJW 2023, 983.

[36] The relevant provision was Art. 3 (para. 4: "The insurance … shall cover compulsorily both damage to property and personal injuries.") of Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability. This Directive consolidated, slightly amended, and repealed the First, Second and Third Compulsory Motor Insurance Directive. The provision on the covered damage remained unchanged.

[37] See *LM a.o. v. HUK-COBURG-Allgemeine Versicherung AG* (C-577/21) ECLI:EU:C:2022:992, para. 49.

[38] *LM a.o. v. HUK-COBURG-Allgemeine Versicherung AG* (C-577/21) ECLI:EU:C:2022:992, para. 35.

[39] *LM a.o. v. HUK-COBURG-Allgemeine Versicherung AG* (C-577/21) ECLI:EU:C:2022:992, para. 43, 44.

[40] *LM a.o. v. HUK-COBURG-Allgemeine Versicherung AG* (C-577/21) ECLI:EU:C:2022:992, para. 50.

[41] *LM a.o. v. HUK-COBURG-Allgemeine Versicherung AG* (C-577/21) ECLI:EU:C:2022:992, para. 47.

22. In *Petillo*,[42] the CJEU had already in 2014 held that Member States by their domestic legislation may provide for specific rules for the quantification of non-material damage caused by road accidents as long as these rules comply with the minimum amounts fixed by the relevant Compulsory Motor Insurance Directives as well as with the principles of effectiveness and proportionality. Such assessment rules must therefore not "automatically exclude or disproportionally limit the victim's right to compensation."[43] It is, however, no infringement of the Directives if the compensation amounts, in the concrete case only for minor physical road accident injuries, are mandatorily lower than under general national liability law.[44] Under national constitutional law the different compensation of victims of road traffic accidents and of victims of other damaging events may be problematic but that is not a matter for EU law.

3. Victims of crime

23. Victims of crime are particularly prone to suffer, in addition to the injury or loss caused by the crime, non-material harm such as accompanying fear and horror, mental trauma etc. The EU had therefore introduced a system of state support for such victims which the Member States had to implement. The EU has formulated minimum standards for the protection of those victims in Directive 2012/29/EU establishing minimum standards on the rights, support and At least indirectly in this sense Presidenza del Consiglio dei Ministri (C-129/19) ECLI:EU:C:2020:566: omission of Italy to establish a compensation system for inner-Italian victims of crime protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Art. 2 (1) (a) (i) of that Directive defines the term 'victim' as meaning "a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence"[45] and includes as further – indirect – victims the spouse, the life-partner, relatives in direct line, siblings and dependents of a killed person if they suffered harm from that death.[46]

24. Thus, already the Directive itself takes express account of mental and emotional harm and, based on Art. 12 (2) Directive 2004/80/EC,[47] makes it compensable. Although the Member States and their courts have discretion as to the amount of compensation, the compensation must be "fair and appropriate." This border limits the discretion of the Member States and their courts.

Interpreting the mentioned provisions, the CJEU declared, first, an Italian regulation as violating the Directive 2012/29/EU provisions, that widely restricted the circle of close persons entitled to compensation: namely Italy excluded the parents of a killed victim from compensation for (regularly purely emotional) harm where the direct victim had a spouse or child, and excluded siblings where the victim had parents.[48] The CJEU stated that Member States are not allowed to exclude anyone of the close family members from compensation "where they suffer, indirectly, the consequences of that crime."[49] Second, with regard to Art. 12 (2) Directive 2004/80/EC, the Court held that a compensation is "'fair and appropriate' only if it compensates, to an appropriate extent, the suffering to which those victims have been exposed."[50] Generally, the national law can determine the extent of compensation. However,

[42] *Enrico Petillo a.o. v. Unipol Assicurazioni SpA* (C-371/12) ECLI:EU:C:2014:26.

[43] *Enrico Petillo a.o. v. Unipol Assicurazioni SpA* (C-371/12) ECLI:EU:C:2014:26, para. 44.

[44] In *Enrico Petillo a.o. v. Unipol Assicurazioni SpA* the special Italian compensation scheme for road accidents provided for significantly lower amounts for pain and suffering due to minor injuries and excluded a redress to the higher amounts under general Italian liability law.

[45] Art. 2 (1) (a) (ii) Directive 2012/29/EU.

[46] Art. 2 (1) (b) Directive 2012/29/EU.

[47] Art. 12 (2) of Directive 2004/80/EC relating to compensation to crime victims runs as follows: "All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims."

[48] *UD a.o. v. Presidenza del Consiglio dei Ministri a.o.* (C-126/23) ECLI:EU:C:2024:937.

[49] *UD a.o. v. Presidenza del Consiglio dei Ministri a.o.* (C-126/23) ECLI:EU:C:2024:937 para. 55.

[50] *UD a.o. v. Presidenza del Consiglio dei Ministri a.o.* (C-126/23) ECLI:EU:C:2024:937 para. 60.

a "purely symbolic or manifestly insufficient compensation"[51] would exceed the margin of discretion of which the Member States and their courts insofar principally dispose. EU law therefore draws outer limits to the national discretion. The compensation award must correspond to the situation at hand and take into account the type and nature of violence, the seriousness of the consequences for the victim, the extent of the victim's suffering as well as all further special circumstances of the specific case.[52] Where a Member State provides for fixed rates, these rates must pay due regard to the different situations.[53] It can be inferred that the Court would deny the Directive-conformity of a regulation that provides for one rate for all situations of non-material harm or for few strict rates only.

25. In the prior case *Presidenza del Consiglio dei Ministri v. BV*[54] the CJEU had already held that 4.800 € as fixed compensation for any kind of sexual violence which the national Italian compensation scheme for victims of crimes provides for is no fair and appropriate amount. In the case at hand the perpetrators of the crime were sentenced to imprisonment and payment of 50.000 € but since the whereabouts of these persons were unknown the sum could not be recovered. Although that sum was not the decisive yardstick for the compensation scheme amount,[55] the compensation award must take into account the seriousness of the crime's consequences for the victim and the circumstances of the particular case. Any fixed compensation scale must therefore be "sufficiently detailed" to avoid that the amount is – in the light of those circumstances – "manifestly insufficient."[56]

The field of state-organised compensation for victims of crime recognizes that also the non-material harm of such victims must be appropriately compensated. That does not mean a full reparation of the damage but a substantial contribution to it.

4. Compensation for "digital non-material damage"

26. The developments in the field of telecommunication and data-transfer have caused cases of illegal or even criminal use of personal data. The EU had reacted with the General Data Protection Regulation and in particular with its already mentioned Art. 82 (1). This provision expressly declares non-material damage recoverable that is caused by an infringement of the GDPR. In recent years, quite a number of cases concerning that provision reached the CJEU.

27. A central decision is *Österreichische Post*.[57] In that case, the defendant, the private Austrian company Österreichische Post, used an algorithm to collect from different sources data on the affinity of people to Austrian political parties. It sold the personalised data to organisations which in turn used them to send these persons specific advertising. The claimant became aware that Österreichische Post had qualified him as a person with great affinity to a certain Austrian political party. Although Österreichische Post had not communicated his data to third persons, the claimant feared that the company might do so and claimed, first, an injunction to stop that practice of data processing and, second, based on Art. 82 GDPR, 1.000 € as compensation for his non-material damage (great upset, loss of confidence and feeling of exposure). Material loss had not occurred. The first two instances rejected the compensation claim whereas the Austrian Supreme Court (Oberster Gerichtshof) asked the CJEU whether the mere infringement of the GDPR was sufficient or whether further requirements must be fulfilled for a successful compensation claim. The CJEU inferred from the necessary autonomous interpretation of

[51] *UD a.o. v. Presidenza del Consiglio dei Ministri a.o.* (C-126/23) ECLI:EU:C:2024:937 para. 59.

[52] *UD a.o. v. Presidenza del Consiglio dei Ministri a.o.* (C-126/23) ECLI:EU:C:2024:937 para. 59 et seq.

[53] *UD a.o. v. Presidenza del Consiglio dei Ministri a.o.* (C-126/23) ECLI:EU:C:2024:937 para. 61: "… the compensation scale must nevertheless b sufficiently detailed …".

[54] *Presidenza del Consiglio die Ministri v. BV* (C-129/19) ECLI:EU:C:2020:566.

[55] *Presidenza del Consiglio die Ministri v. BV* (C-129/19) ECLI:EU:C:2020:566 para. 60: „… that compensation is not necessarily required to ensure the complete reparation of material and non-material loss suffered by that victim.".

[56] *Presidenza del Consiglio die Ministri v. BV* (C-129/19) ECLI:EU:C:2020:566 para. 66.

[57] *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2023:370.

Art. 82 (1) GDPR that an infringement of the Regulation alone does not entitle to compensation for immaterial harm. Based on the wording and context of Art. 82 (1) GDPR, the Court stated that, besides the infringement, the victim must also have suffered – material or non-material – damage and a causal link between the damage and the infringement must exist, "those three conditions being cumulative."[58] With respect to the concept of non-material damage, the CJEU held that it "must be given an autonomous and uniform definition specific to EU law, in the absence of any reference to the domestic law of the Member States."[59] This definition does not require any specific threshold of seriousness[60] although the victim must demonstrate, actually prove,[61] his or her non-material damage.[62] The precise assessment of the non-material damage is, so the Court, left to national law, because the GDPR does not contain specific rules on that matter.[63] However, the principles of equivalence and effectiveness must be observed.[64] As far as national law on immaterial damage is applied, the principle of equivalence (that the application of EU law must not be less favourable than that of domestic law in similar situations) will probably rarely be at stake. The principle of effectiveness has considerable importance: it forbids, that national rules "make it impossible in practice or excessively difficult to exercise the rights conferred by EU law."[65] The compensatory character of – material as well as non-material – damage requires "full and effective" compensation for "the damage in its entirety," however without any need for punitive damages.[66] In his Opinion, Advocate General *Sánchez-Bordona* had drawn "a fine line between mere upset (which is not eligible for compensation) and genuine non-material damage (which is eligible for compensation)," which the national courts must fix.[67] The CJEU did not react to this comment but, as stated above, it is clear from the Court's reasoning that the mere infringement of the GDPR is not sufficient to justify a compensation claim.[68] And although the Court rejected the requirement of a certain threshold of seriousness,[69] the concept of non-material *damage* demands a damage to the victim. The mere – and 'normal' – anger about the fact that another person violated the law will, probably also for the CJEU, not suffice as recoverable damage.

28. In *MediamarktSaturn*[70] the claimant bought on credit an electrical household appliance at the defendant's shop (Saturn). For the sales and the credit contract the claimant had to give his name, address, employer, income and bank details and then went with the documents which contained all these data to the counter. There, by an error of the shop's employee, the claimant's appliance as well as the documents were given to another customer. The error was almost immediately discovered and within half an hour after the other customer had received the appliance and documents but not read them, the claimant received the appliance and the documents back. The claimant brought an action for compensation of his non-material damage under Art. 82 (1) GDPR. In interpreting this provision, the CJEU stated that the loss of control and the fear of a misuse of personal data can constitute non-material damage, however "[68] … a purely hypothetical risk of misuse by an unauthorised third person cannot give rise to compensation. This is so where no third party became aware of the personal data at issue. [69] … if a document containing personal data was provided to an unauthorised third party and it was established that that person did not become aware of those personal data, 'non-material damage' … does not exist due to the mere fact that the data subject fears that, following that communication having made possible the making of a copy of

[58] *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2023:370 para. 32.
[59] *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2023:370 para. 44.
[60] *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2023:370 para. 45 et seq.
[61] See the Opinion of AG *Campos Sánchez-Bordona* in *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2022:756 para. 77.
[62] *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2023:370 para. 50.
[63] *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2023:370 para. 54.
[64] *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2023:370 para. 53 et seq.
[65] *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2023:370 para. 56.
[66] *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2023:370 para. 58, see also Recital 146.
[67] Opinion of AG *Campos Sánchez-Bordona* in *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2022:756 para. 116; in the same sense AG *Pitruzzella* in *VB v. Natsionalna agentsia za prihodite* (C-340/21) ECLI:EU:C:2023:353 para. 83.
[68] See *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2023:370 para. 42.
[69] *UI v. Österreichische Post* (C-300/21) ECLI:EU:C:2023:370 para. 51.
[70] *BL v. MediamarktSaturn Hagen-Iserlohn GmbH* (C-687/21) ECLI:EU:C:2024:72.

that document before its recovery, a dissemination, even abuse, of those data may occur in the future."[71] The loss of control and the accompanying fear of misuse does therefore not entitle to compensation if it is clear that no unauthorised third person got knowledge of the respective personal data.

29. In the similar case *GP v. Juris GmbH*[72] a German company for legal information, Juris GmbH, had sent by email advertisements to a lawyer using the latter's personal data. The lawyer revoked all prior consents given to Juris and objected to the processing of his data except for sending him the Juris newsletter. Since Juris sent further three personalized advertisements, the lawyer brought an action claiming compensation of his material and non-material damage. In the preliminary reference procedure before the CJEU the Court confirmed that the mere infringement of the GDPR is as such no damage.[73] But since Recital 85 expressly mentions "loss of control" as possible non-material damage, "the loss of control over such data, even for a short period of time, can constitute 'non-material damage' … provided that the data subject can show that he or she has actually suffered such damage, however slight."[74] How strict a short loss of control over the own personal data in fact must be proven leaves the decision somewhat open. In the light of *MediamarktSaturn* and *Natsionalna agentsia za prihodite*[75] it is necessary that the fear of misuse due to a loss of control must be well-founded. As the Court said in *PS*[76]: "Thus, a mere allegation of fear, with no proven negative consequences, cannot give rise to compensation under that provision <sc. Art. 82 (1) GDPR>."[77] The burden of proof rests on the person claiming compensation of non-material damage.[78]

30. In *Natsionalna agentsia za prihodite*[79] one of the questions was also whether already the fear that the victim's data could be misused, was a recoverable non-material damage. In that case the Bulgarian National Revenue Agency (NAP) was hacked by unknown hackers who captured personal data of over 6 million people and published the data of several of them on the internet.[80] The claimant's data were also captured and published. Based on Art. 82 GDPR she claimed compensation for her non-material damage fearing that her data could be misused in the future. The CJEU when seized with the case held that the mere "loss of control" over the own data does constitute non-material damage, however only if "that fear can be regarded as well founded, in the specific circumstances at issue and with regard to the data subject."[81] The Court relied for its solution on the objectives of the Regulation and on Recital 85 of the GDPR which illustratively lists "loss of control over their personal data" as possible non-material damage of victims.[82] Depending on the concrete circumstances of the Bulgarian case the fear of future misuse of the published data over which the claimant had already lost her control therefore

[71] *BL v. MediamarktSaturn Hagen-Iserlohn GmbH* (C-687/21) ECLI:EU:C:2024:72 para. 68 et seq.

[72] *GP v. Juris GmbH* (C-741/21) ECLI:EU:C:2024:288.

[73] *GP v. Juris GmbH* (C-741/21) ECLI:EU:C:2024:288 para. 37, 40.

[74] *GP v. Juris GmbH* (C-741/21) ECLI:EU:C:2024:288 para. 42.

[75] See below.

[76] *AT, BT v. PS GbR et al.* (C-590/22) ECLI:EU:C:2024:536. In that case, a tax consultancy firm, the defendant, had sent tax papers to its clients, the claimants, however to the latters' old address although it was informed of the claimants' new address. At the old address the envelope was opened and sent to the claimants who feared that relevant tax papers with personal data were removed and that some people might have seen these data although it remained open which papers the envelope had originally contained and whether anybody had taken knowledge of the papers allegedly contained in the envelope.

[77] *AT, BT v. PS GbR et al.* (C-590/22) ECLI:EU:C:2024:536 para. 35.

[78] *AT, BT v. PS GbR et al.* (C-590/22) ECLI:EU:C:2024:536 para. 27, 34.

[79] *VB v. Natsionalna agentsia za prihodite* (C-340/21) ECLI:EU:C:2023:986.

[80] Whether NAP had fulfilled all security obligations against the danger of hacking was still open; the burden of proof rested on NAP; see *VB v. Natsionalna agentsia za prihodite* (C-340/21) ECLI:EU:C:2023:986 para. 74.

[81] *VB v. Natsionalna agentsia za prihodite* (C-340/21) ECLI:EU:C:2023:986 para. 85.

[82] Recital 85 sent. 1 runs as follows: „A personal data breach may, if not addressed in an appropriate and timely manner, result in physical, material or non-material damage to natural persons such as loss of control over their personal data or limitation of their rights, discrimination, identity theft or fraud, financial loss, unauthorized reversal pseudonymisation, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage to the natural person concerned."

could justify her compensation claim. Again, 'normal' annoyance or upset about the lost data control as such will probably not suffice.[83]

31. Rather similar was the situation in *Scalable Capital*.[84] The claimants had opened accounts at the defendant, given it several personal data such as their names, birth dates, addresses etc. and paid several thousand euro for the account opening. When unidentified third persons stole the data, the claimants brought an action for compensation of their non-material damage due to the theft of their personal data. So far, their data were not misused. The CJEU confirmed that, under Art. 82 GDPR, damages for non-material damage fulfill an exclusively compensatory function with no punitive nor satisfying function.[85] Because of the compensatory function, elements like intent or negligence of the liable person must be left aside for the assessment of damages.[86] Further, the Court stated that "damage caused by a personal data breach is not, by its nature, less significant than physical injury."[87] Where damage is established but is not serious, the national court is allowed to award a minimal or symbolic compensation "provided that that compensation is such as to compensate in full for the damage suffered."[88] Finally, the Court held that the mere theft of personal data may justify damages for non-material damage where such damage is established even if the stolen data have not (yet) been misused.[89] In the light of the prementioned decisions this should be understood in the sense that the risk of misuse must be "well-founded" in the concrete circumstances.

32. In *A v. Patērētāju tiesību aizsardzības centrs* the CJEU further held that instead of a money award an apology can suffice as compensation for non-material damage.[90] In that case the Latvian Consumer Rights protection Centre (PTAC) had published on internet sites a video where a person imitated the claimant, a well-known Latvian journalist and automotive expert. The purpose of the video was to warn consumers of risks of the purchase of second-hand cars. The claimant had not consented to the video; he claimed a stop of the distribution of the video, an apology and 2.000 € as compensation. In interpreting Art. 82 (1) GDPR, the CJEU stated that an apology can be sufficient as compensation, however, "provided that that form of redress is such as to compensate in full the damage suffered by the data subject."[91] An apology and a money award for the non-material damage may thus be coupled if the principle of full compensation so requires.[92] The CJEU further held that the (positive, altruistic etc.) attitude and motivation of the person liable for the infringement of the GDPR cannot be taken into account in order to reduce the sum that is necessary to compensate the non-material damage in full.[93] The compensatory nature of this kind of damages would contradict such a reduction, but also an increase in case of bad intention etc. of the perpetrator.[94] The CJEU inferred this solution also from the fact that Art. 83 GDPR on administrative fines and penalties allows the taking into account of the gravity of the infringement as well as its intentional or negligent commission and "any other aggravating or mitigating factor."[95] Since Art. 82 GDPR does not contain a like list of aggravating or mitigating factors, the Court interpreted this as a deliberate prohibition to take those factors into account.[96] The Court did, however,

[83] See the remarks of AG *Pitruzzella* in *VB v. Natsionalna agentsia za prihodite* (C-340/21) ECLI:EU:C:2023:353 para. 83.

[84] *JU, SO v. Scalable Capital GmbH* (C-182/22 and C-189/22) ECLI:EU:C:2024:531.

[85] *JU, SO v. Scalable Capital GmbH* (C-182/22 and C-189/22) ECLI:EU:C:2024:531 para. 21 et seq. A "satisfying" function of damages for pain and suffering is known in German tort law.

[86] *JU, SO v. Scalable Capital GmbH* (C-182/22 and C-189/22) ECLI:EU:C:2024:531 para. 30.

[87] *JU, SO v. Scalable Capital GmbH* (C-182/22 and C-189/22) ECLI:EU:C:2024:531 para. 39.

[88] *JU, SO v. Scalable Capital GmbH* (C-182/22 and C-189/22) ECLI:EU:C:2024:531 para. 46.

[89] *JU, SO v. Scalable Capital GmbH* (C-182/22 and C-189/22) ECLI:EU:C:2024:531 para. 57 et seq.

[90] *A v. Patērētāju tiesību aizsardzības centrs* (C-507/23) ECLI:EU:C:2024:854.

[91] *A v. Patērētāju tiesību aizsardzības centrs* (C-507/23) ECLI:EU:C:2024:854 para. 37.

[92] See *A v. Patērētāju tiesību aizsardzības centrs* (C-507/23) ECLI:EU:C:2024:854 para. 38.

[93] *A v. Patērētāju tiesību aizsardzības centrs* (C-507/23) ECLI:EU:C:2024:854 para. 45.

[94] *A v. Patērētāju tiesību aizsardzības centrs* (C-507/23) ECLI:EU:C:2024:854 para. 42: "…the exclusively compensatory function of the right to compensation provided for in Article 82 (1) of the GDPR precludes the taking into account of the severity and possible intentional nature of the infringement of that regulation … ."

[95] See Art. 83 (2) lit. a, b, k GDPR and Recital 148.

[96] *A v. Patērētāju tiesību aizsardzības centrs* (C-507/23) ECLI:EU:C:2024:854 para. 41.

not address that the extent of non-material damage, in particular injured feelings such as fear, may depend on aggravating circumstances like intent or specifically ruthless conduct. A cautious analogy to Art. 83 (2) GDPR for cases of bad intent would have been more convincing.

33. A particularly explosive case of an unlawful disclosure of personal data was *Kočner v. Europol*[97] because of *Kočner's* suspected involvement in the murder of a Slovak journalist and his fiancée.[98] In that case, Europol had, while asked by the Slovak authorities for cooperation, transmitted data of *Kočner's* mobile phone (intimate talks with his girlfriend) without justification to third persons from where they were published in Slovakian newspapers. *Kočner* claimed 50.000 € as damages for non-material damage based on Art. 268 and 340 TFEU as well as on Art. 50 (1) of Regulation 2016/794.[99] He further alleged that it was Europol which had placed his name on a "mafia list" which was also published. The competent General Court of the EU dismissed *Kočner's* action because the claimant had not sufficiently proven Europol's causal involvement in the disclosure of his personal data and his inclusion in the mafia list. The CJEU reversed on appeal the judgment of the General Court in part insofar as the transmission of the intimate talks on the mobile phone to unauthorized persons was a sufficiently serious infringement of Europol's duties towards involved persons that justified a compensation award of 2.000 €.[100] This amount shows the CJEU's assessment of an unjustified disclosure of intimate personal data.

5. Discrimination and non

34. EU law prohibits discrimination in employment and occupation[101] and generally of persons because of their racial or ethnic origin.[102] Anti-discrimination law is a densely regulated part of EU law with some particularities. Directives 2000/43 and 2000/78 both provide that the sanctions which the Member States must implement "may comprise the payment of compensation to the victim, <*sc. and*> must be effective, proportionate and dissuasive."[103] Directive 2006/54 contains a similar provision.[104] Contrary to what one would expect, the number of CJEU decisions is relatively small which interpret the compensation for non-material damage through discrimination. What seems clear is that non-material damage can be recoverable under these Directives provided that such damage is caused by a violation of a commandment of one of the Directives and that the circumstances call for a compensation in money.[105] This was the CJEU's

[97] *Marián Kočner v. European Union Agency for Law Enforcement (Europol)* (C-755/21 P) ECLI:EU:C:2024:202.

[98] The Slovak court of first instance acquitted *Kočner* for having ordered the killing of the journalist and his fiancée. The Supreme Court, when seized, set aside this judgment and referred the case back to the first-instance court which again acquitted him.

[99] Art. 50 (1) of Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol) … runs as follows: "Any individual who has suffered damage as a result of an unlawful data processing shall have the right to receive compensation for damage suffered, either from Europol in accordance with Article 340 TFEU or from the Member State in which the event that gave rise to the damage occurred, in accordance with its national law. The individual shall bring an action against Europol before the Court of Justice of the European Union, or against the Member State before a competent national court of that Member State."

[100] *Marián Kočner v. European Union Agency for Law Enforcement (Europol)* (C-755/21 P) ECLI:EU:C:2024:202 para. 111 et seq., 140.

[101] See Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

[102] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[103] Art. 15 sent. 2 Directive 2000/43 and Art. 17 sent. 2 Directive 2000/78.

[104] Art. 18 Directive 2006/54 provides: "Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration."

[105] As to this latter condition see, e.g., the appeal decision of the General Court in *DD v. European Union Agency for Fundamental Rights (FRA)* (T-742/15 P) of 19 July 2017. In that case, the appellant argued that the decision of his employing agency to terminate his employment had caused him "psychological trauma and affected his reputation and dignity" (para. 79).

position already prior to the mentioned Directives.[106] Where financial compensation for non-material damage appears adequate, in particular, because true restoration is impossible, unacceptable or insufficient, the damage sustained must be made good in full; a purely symbolic sanction would not comply with Art. 15 Directive 2000/43[107] or Art. 17 Directive 2000/78 and Art. 18 Directive 2006/54 respectively. Moreover, "[t]he severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed… ."[108] However, compensation for discrimination damage does not include punitive damages, unless national law provides for such a possibility.[109] EU law neither obliges nor prohibits the Member States to introduce punitive damages.[110] That the compensation under EU law must be "dissuasive" merely means that the total loss and harm must be compensated.[111] Compensation for damage including immaterial damage can even be claimed by an association (whose objective is the protection of – for instance, sexually – discriminated persons) if an injured individuum cannot be identified.[112] But if a person claims compensation for non-material damage caused by discrimination with the sole purpose to receive compensation without any real interest in the position offered in a discriminatory way this will be, depending on the precise circumstances, an abuse of rights.[113]

6. State liability and non-material damage

35. The general basis for the extra-contractual liability of the EU or its organs for wrongs are Art. 340 (2) and (3). The CJEU has held from early on that the damage that under these provisions and their predecessors can be claimed includes non-material damage.[114] According to the famous *Francovich*

Furthermore, he was of the opinion, that the annulment of the termination had not remedied his immaterial harm. The General Court as appeal tribunal rejected the argument: "…the annulment of an unlawful act may constitute, in itself, appropriate and, in principle, sufficient compensation for any non-material harm which that measure may have caused, unless the appellant shows that he has sustained non-material harm that can be separated from the illegality on which the annulment is based that cannot be compensated in full by that annulment." (para. 83). The mere allegation of a "deep psychological trauma", "a total shock", "a lot of pain, stress and anxiety" and that the termination "affected his reputation, dignity and self-esteem" as well as a doctor's certificate of them were not sufficient proof because they did not show "the existence of non-material harm that can be separated from the illegality on which the annulment is based … ." (para. 91 and 92). The General Court's threshold for the substantiation and proof of immaterial damage was evidently very high.

[106] See *Helen Marshall v. Southampton and South-West Hampshire Area Health Authority* (C-271/91) ECLI:EU:C:1993:335 para. 4, where 1000 UKL as compensation for injury to feelings by an unjustified dismissal were not disputed.

[107] *Discrimineringsombudsmannen v. Braathens Regional Aviation AB* (C-30/19) ECLI:EU:C:2021:269 para. 39.

[108] *Discrimineringsombudsmannen v. Braathens Regional Aviation AB* (C-30/19) ECLI:EU:C:2021:269 para. 38; see also Art. 18 Directive 2006/54: "compensation … proportionate to the damage suffered."

[109] See *Maria Auxiliadora Arjona Camacho v. Securitas Seguridad Espana SA* (C-407/14) ECLI:EU:C:2015:831 para. 33 et seq.

[110] *Maria Auxiliadora Arjona Camacho v. Securitas Seguridad Espana SA* (C-407/14) ECLI:EU:C:2015:831 para. 40 and 43.

[111] *Maria Auxiliadora Arjona Camacho v. Securitas Seguridad Espana SA* (C-407/14) ECLI:EU:C:2015:831 para. 37 et seq.

[112] *NH v. Associazione Avvocatura per I diritti LGBTI – Rete Lenford* (C-507/18) ECLI:EU:C:2020:289. In that case, the claimant, a lawyer, had said in a radio interview that he would not employ homosexual staff in his law firm. The defendant association had brought proceedings in Italy and reached a decision in the first and second instance which sentenced the claimant to pay 10.000 € as damages to the defendant. The Italian Supreme Court to which the case went asked the CJEU whether it complies with the Directive that an association like the defendant has standing to initiate respective proceedings including claim damages. The CJEU gave a positive answer which corresponded to the position of the defendant; see also the very similar case *Asociaţia Accept v. Consiliul Naţional pentru Combaterea Discriminării* (C-81/12) ECLI:EU:C:2013:275 (a mere warning by the competent institution may be an insufficient sanction and therefore a violation of Art. 17 Directive 2000/78 if a football club shareholder announces in an interview that he would close down the club before accepting a homosexual on the team; see para. 60 et seq.).

[113] *Nils-Johannes Kratzer v. R+V Allgemeine Versicherung AG* (C-423/15) ECLI:EU:C:2016:604 para. 44. The decision lists the preconditions (an objective and a subjective element) for the judgment of an abuse of law (para. 37 et seq.).

[114] See *Alfred Willame v. Commission of the European Atomic Energy Community* (110/63) ECLI:EU:C:1965:71 (European Court Reports, English special edition 1965, 649 [667]); not discussed and therefore upheld in *Alfred Williame v. European Atomic Energy Commission* (110/63 bis) ECLI:EU:C:1966:40 (case of wrongful dismissal without giving fair opportunity to applicant to defend; 20.000 Belgian francs awarded as damages for immaterial harm); see also, e.g., European Union v. Gascogne Sack Deutschland GmbH, Gascogne SA and *Gascogne Sack Deutschland GmbH, Gascogne v. European Union* (C-138/17 P and C-146/17 P) ECLI:EU:C:2018:1013 (see the discussion of this case below under VI.9).

decision[115] and the following case-law of the CJEU, in particular *Brasserie du Pêcheur*,[116] also Member States which violate or do not correctly or not at all implement EU law can – under certain conditions – become liable towards their citizens if the latter have thereby suffered damage. Again, non-material damage can be recoverable also under this doctrine.[117] In *Brasserie du Pêcheur* the CJEU explicitly referred to its "case-law on non-contractual liability on the part of the Community."[118] Since the Court under Art. 340 (2) TFEU and the predecessors of this provision allowed compensation for non-material damage, this has to be transposed to the Francovich doctrine, too.[119] With respect to the extent of compensation, primarily the national law of the seised court determines the details. However, the standard principles of EU law, that of equivalence and that of effectiveness, which always set limits to the legislative autonomy of the Member States, must be observed also here: the national solution under implemented or directly applicable EU law must not be less favourable than that for similar domestic claims nor make it impossible or excessively difficult to obtain compensation.[120] A national rule that excludes the recovery of litigation costs as part of the damage caused by a violation of EU law – even if a final, non-appealable court decision violates EU law – can render full compensation excessively difficult or even impossible.[121] The person who suffered this damage can therefore nonetheless hold the responsible Member State also liable for the litigation costs.

7. Loss of holiday enjoyment

36. The question whether the loss of enjoyment of the holiday could be recoverable non-material damage had to be answered in *Leitner*.[122] In this well-known case, the CJEU had to interpret Art. 5 of the Package Travel Directive of 1990[123] which provided that the Member States must ensure that organisers of package holidays be liable for damage caused to customers by the non-performance or improper performance of the contracted services. In that case, 10 years old Simone Leitner contracted a salmonella poisoning resulting from the food in the holiday club which her parents had booked for the family at the defendant. Besides the 'normal' damages for pain and suffering due to the illness she claimed additional compensation for loss of holiday enjoyment. Based on the objectives of the Directive, the CJEU held that the term "damage" included the non-material harm caused by a loss of enjoyment of holidays: „ … the Directive, and in particular Article 5 thereof, is designed to offer protection to consumers and, in connection with tourist holidays, compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance to consumers."[124] The case is one of the examples where damages for non-material harm are awarded in the field of contract law. The purpose of the contract to provide holiday enjoyment explains and justifies the Court's solution.

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[115] *Andrea Francovich v. Italian Republic; Danila Bonifaci a.o. v. Italian Republic* (C-6/90 and C-9/90) ECLI:EU:C:1991.428.

[116] *Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd a.o.* (C-46/93 and C-48/93) ECLI:EU:C:1996:79.

[117] See, at least indirectly, *Helen Marshall v. Southampton and South-West Hampshire Area Health Authority* (C-271/91) ECLI:EU:C:1993:335: it was not disputed that under the *Francovich* principle the state agency for health was obliged to pay compensation (including 1000 UKL for injury to feelings) to the illegally dismissed claimant.

[118] *Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd a.o.* (C-46/93 and C-48/93) ECLI:EU:C:96:79 para. 40. In para. 41 et seq. the Court expressly mentions Art. 215 of the Maastricht Treaty which preceded the present Art. 340 TFEU.

[119] In the same sense *Machnikowski*, The Liability of Public Authorities in the European Union, in: *Oliphant* (ed.), The Liability of Public Authorities in Comparative Perspective (2016) 585 para. 72. Probably also, though only indirectly in this sense *Presidenza del Consiglio dei Ministri v. BV* (C-129/19) ECLI:EU:C:2020:566; see to this case already supra under VI.3. If a Member State omits to correctly implement Directive provisions which foresee compensation for non-material damage, the *Francovich* liability must certainly include compensation for this kind of damage, too.

[120] *Hochtief Solutions AG Magyarországi Fióktelepe v. Fővárosi Törvényszék* (C-620/17) ECLI:EU:C:2019:630 para. 45.

[121] *Hochtief Solutions AG Magyarországi Fióktelepe v. Fővárosi Törvényszék* (C-620/17) ECLI:EU:C:2019:630 para. 47.

[122] *Simone Leitner v. TUI Deutschland GmbH & Co. KG* (C-168/00) ECLI:EU:C:2002:163.

[123] Directive 90/314/EEC on package travel, package holidays and package tours.

[124] *Simone Leitner v. TUI Deutschland GmbH & Co. KG* (C-168/00) ECLI:EU:C:2002:163 para. 22.

8. Loss of travel baggage

37. In *Walz v. Clickair*[125] the claimant brought an action against the air carrier Clickair because his checked baggage got lost on his flight from Barcelona to Oporto in Portugal. In addition to the material loss of 2.700 €, he requested also 500 € for his non-material damage. The CJEU had to decide whether the liability limit of Art. 22 (2) Montreal Convention[126] (1.000 €) for baggage damage includes also non-material damage. The Convention is directly applicable in all EU Member States via Art. 1 and 3 (1) of Regulation 2027/97.[127] Since its entry into force on 28 June 2004 in the EU, the Convention is "an integral part of the European Union legal order … on which … the Court has jurisdiction to give a preliminary ruling concerning its interpretation."[128] The interpretation method has, however, to follow the interpretation of rules of general international law, not of special EU law.[129] Interpreting the term 'damage' in Art. 22 (2) Montreal Convention, the CJEU deduced from the literal meaning, the comparison of the different language versions, the context and the objectives of the Convention that the term "must be interpreted as including both material and non-material damage."[130] Although Art. 22 (2) limits the carrier's liability for damage to baggage on a rather low level and the protection of passengers could speak for a contrary solution, the limitation of liability was the clear aim of the provision which "enables passengers to be compensated easily and swiftly, yet without imposing a very heavy burden of damages on air carriers … ."[131] Even with respect to an international convention, the Court thus favours a broad notion of damage which includes immaterial loss, too. The CJEU thus recognized that in suitable cases loss of or damage to baggage may result in recoverable non-material damage.

9. Flight annulation, delay or denied boarding and compensation for immaterial damage

38. Art. 7 of Directive 261/2004[132] provides for a table of standardised compensation if air passengers face serious problems with their air transport (annulation, long delay, rejection). The extent of the compensation primarily depends on the distance of the flight (e.g., 400 € for flights over 1500 km within the EU and 1500-3000 km outside). The CJEU stated that the compensation is "intended to compensate, in a standardised and immediate manner, for the damage constituted by the inconvenience that, inter alia, … denied boarding in the carriage of passengers by air causes … ."[133] "Such fixed amounts are intended to provide compensation only for the damage that is almost identical for every passenger concerned."[134] Any further individual damage can be claimed on the basis of the applicable national or international law, in particular the Montreal Convention.[135] Already in *Air France SA*[136] the CJEU held that Art. 12 Regulation 261/2004 which allows for "further compensation" does include compensation for further immaterial damage caused by the annulment, delay or rejection. However, it is not very likely that the inconvenience caused by these events will often exceed the inconvenience already compensated by the standardised amounts under Art. 7 Regulation 261/2004.

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[125] *Axel Walz v. Clickair SA* (C-63/09) ECLI:EU:C:2010:251.

[126] Montreal Convention for the Unification of Certain Rules for International Carriage by Air of 1999.

[127] Regulation (EC) 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air, as amended by Regulation (EC) 889/2002.

[128] *Axel Walz v. Clickair SA* (C-63/09) ECLI:EU:C:2010:251 para. 20 with further references.

[129] *Axel Walz v. Clickair SA* (C-63/09) ECLI:EU:C:2010:251 para. 21 et seq.

[130] *Axel Walz v. Clickair SA* (C-63/09) ECLI:EU:C:2010:251 para. 39.

[131] *Axel Walz v. Clickair SA* (C-63/09) ECLI:EU:C:2010:251 para. 36.

[132] Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) 295/91.

[133] *Radu-Lucian Rusu, Oana-Maria Rusu v. SC Blue Air – Airline management Solutions SRL* (C-354/189 ECLI:EU:C:2019:637 para. 28.

[134] *Radu-Lucian Rusu, Oana-Maria Rusu v. SC Blue Air – Airline management Solutions SRL* (C-354/189 ECLI:EU:C:2019:637 para. 30.

[135] *Radu-Lucian Rusu, Oana-Maria Rusu v. SC Blue Air – Airline management Solutions SRL* (C-354/189 ECLI:EU:C:2019:637 para. 36.

[136] *Aurora Sousa Rodriguez et al. v. Air France SA* (C-83/10) ECLI:EU:C2011:652 para. 46.

10. Excessive duration of proceedings

39. Art. 47 (2) of the Charter of Fundamental Rights provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law." In connection with Art. 320 (2) TFEU (non-contractual liability of EU organs) parties can claim compensation for damage caused by overlong proceedings before EU courts.[137] The damage includes non-material damage, too.[138] In *Gascogne Sack Deutschland* the General Court found that a period of three years and ten months between the written and the oral part of the proceedings was "in no way justified by the adoption of measures of organisation of procedure or measures of inquiry or the occurrence of procedural incidents." Since the claimants merely alleged loss of reputation without any further proof, the General Court awarded each of the two claimants 5.000 € instead of their at least claimed 500.000 €.[139] The award was mainly based on the "prolonged state of uncertainty in which they <*sc. the claimants*> were placed."[140] In the appeal proceedings before the European Court of Justice this award was upheld.[141]

V. Conclusions

40. The survey over EU enactments on the compensation for damage and over the respective CJEU case law shows that in principle each field of law is treated separately. Rarely is an analogy drawn from a solution in one field to that in another. Nonetheless, the preceding survey appears to enable the formulation of certain overarching principles which apply generally wherever civil liability for wrongs between private law subjects requires compensation for the suffered damage. Wherever EU law provides for such liability for damage, the survey revealed that the term 'damage' generally includes non-material damage, too. EU law may provide differently, but unless it clearly so does, damage comprises non-material damage. This is supported by the main aim of compensation in this field of law, namely to make good the whole – material and immaterial – damage. Because of this generally compensatory character of damages, EU law does in principle not allow for punitive damages. The present attitude of the CJEU is that drastic deterrent effects that may exceed the caused damage may be pursued by state sanctions towards perpetrators but not by civil actions between private law subjects.

41. Unless EU law provides for details for the assessment of the compensation of non-material damage – which it very rarely if at all does – it is for the seised court and its national law to determine these details. However, two fundamental principles of EU law, that of equivalence and that of effectiveness, set significant limits to the legislative or judicial autonomy of the Member States: equivalence requires that the national solution under implemented or directly applicable EU law must not be less favourable than the solution under national law for similar domestic claims; effectiveness requires that the national law, irrespective whether legislation or judge-made law, must not make it impossible or excessively difficult to obtain the full compensation that the EU law provides for.[142] National law can only fill the parts within these outer limits. Although both principles leave some room for discretion, in particular the effectiveness principle must not be underestimated. It requires that the objective of the respective enactment or legal rule, in particular its protective aim, must be recognized and implemented. The CJEU is insofar rather strict.

42. The survey over the case law of the CJEU gives a broad impression what may count as 'non-material damage.' In case of direct bodily injury, it is clear, that the acute pain and suffering, their

[137] See, e.g., *Gascogne Sack Deutschland GmbH, Gascogne v. European Union* (T-577/14) ECLI:EU:T:2017:1.

[138] See *Gascogne Sack Deutschland GmbH, Gascogne v. European Union* (T-577/14) ECLI:EU:T:2017:1 para. 144 et seq.

[139] *Gascogne Sack Deutschland GmbH, Gascogne v. European Union* (T-577/14) ECLI:EU:T:2017:1 para. 165.

[140] *Gascogne Sack Deutschland GmbH, Gascogne v. European Union* (T-577/14) ECLI:EU:T:2017:1 para. 158.

[141] *European Union v. Gascogne Sack Deutschland GmbH, Gascogne SA* etc. (C-138/17 P and C-146/17 P) ECLI:EU:C:2018:1013 para. 49 et seq., 54 et seq.

[142] *Hochtief Solutions AG Magyarországi Fióktelepe v. Fővárosi Törvényszék* (C-620/17) ECLI:EU:C:2019:630 para. 45.

strength and duration are immaterial harm and as such recoverable. The same is true for long-lasting or permanent impairments or restrictions due to corporeal damage. Even persons close to the primary victim who was killed or very seriously injured may be entitled to compensation for their pain and suffering. But also, loss of reputation, loss of holiday enjoyment, prolonged uncertainty due to overlong proceedings, injured feelings through discrimination, inconvenience resulting from annulled, delayed or denied air transport are covered. The CJEU does apparently not demand a specific threshold of severity of the non-material damage. Redress for minor immaterial harm if sufficiently proven and based on objective facts can be claimed although the compensation may be very small. Even mere fear of further possible damage following from the violation of EU law may in extraordinary situations entitle to money compensation (to the proof of such damage see below).

43. EU law further prescribes that the assessment of the compensation for non-material damage must be proportionate. Money awards must therefore correspond to the extent of the immaterial harm in the individual case. Strict and inflexible compensation limits of national law thus violate EU law whereas tables of compensation with sufficient differentiation between the different situations are admitted. The CJEU does not tend to specifically high levels of compensation but rather to moderate ones. Unreasonably low compensation does however offend EU law and its effectiveness principle.

44. EU law even penetrates the procedural side of compensation for non-material harm. The proof of a violation of EU law alone will generally not be sufficient proof of the occurrence of non-material harm. The CJEU requires further substantiation and proof of such harm. The mere fear that the violation can result in further damage is therefore insufficient proof unless there are reliable proven facts that in the circumstances certain severe damage is rather likely to happen. Only then, the fear alone may justify compensation in terms of money.