

Court of Justice of the European Union on Non-material Damage

Ondřej Pavelek*, Hana Adamová**

Abstrakt

V mnoha případech rozhoduje o náhradě nemajetkové újmy Evropský soudní dvůr. Na základě analýzy současné zavedené praxe SDEU v oblasti náhrady nemajetkové újmy si tento příspěvek klade za cíl nalézt odpovědi na následující otázky: jaká je koncepce a formy nemajetkové újmy v současné zavedené praxi SDEU, tj. v ESD a GC, a jaký význam má pro rozhodnutí SDEU, jaké jsou různé druhy nemajetkové újmy v zavedené praxi SDEU a jaké jsou jednotlivé regulační oblasti rozhodování o náhradě nemajetkové újmy. Následně budou formulovány východiska pro rozhodování o nemajetkové újmě, aby se dospělo k závěru, zda je možné na základě současných soudních rozhodnutí formulovat obecné zásady soudních řízení před SDEU ohledně náhrady nemajetkové újmy. Tento příspěvek by rád přispěl k diskusi o otázkách týkajících se problematiky odškodnění za nemateriální věci, jak je uvedeno v soudních rozhodnutích SDEU.

Klíčová slova

Nemajetková újma; náhrada; Evropský soudní dvůr.

Abstract

In many cases, the European Court of Justice decides about compensation for non-material damage. Based on an analysis of the current CJEU established practice concerning compensation for non-material damage, the present paper aims to find answers to the following questions: what is the conception and forms of non-material damage in the CJEU current established practice, i.e., in ECJ and GC, and what meaning does it have for the decisions made by CJEU, what are the different types of non-material damage in the established practice of CJEU, and what are the individual regulatory areas of deciding on compensation for non-material damage. Subsequently, the points of departure will be formulated for decisions on non-material damage to conclude whether, based on the current judicial decisions, it is possible to formulate general principles of trials before CJEU concerning compensation for non-material damage. The present paper would like to contribute to a discussion on issues concerning problems of compensation for non-material as approached in the CJEU judicial decisions.

* Mgr. Bc. Ondřej Pavelek, Ph.D., Ústav práva a humanitních věd, Provozně ekonomická fakulta, Mendelova univerzita v Brně / Department of Law and Social Sciences, Faculty of Business and Economics, Mendel University in Brno, Czech Republic / E-mail: ondrej.pavelek@mendelu.cz / ORCID: 0000-0001-5329-4039 / Scopus ID: 0000-0001-5329-4039

** Mgr. Hana Adamová, Ph.D., Ústav práva a humanitních věd, Provozně ekonomická fakulta, Mendelova univerzita v Brně / Department of Law and Social Sciences, Faculty of Business and Economics, Mendel University in Brno, Czech Republic / E-mail: adamova.hanka@gmail.com / ORCID: 0000-0003-4322-623X

Keywords

Non-material Damage; Compensation; European Court of Justice.

Introduction

It would be a great error to think that issues concerning the compensation of non-material damage, receiving much attention in the legal orders of EU countries, have not appeared before the Court of Justice of the European Union (CJEU). It might seem surprising that the CJEU [the European Court of Justice (ECJ) or the General Court (GC)] should decide about, say, the compensation for non-material damage caused to the goodwill of legal entities¹ or the compensation in connection with psychic disorders of employees;² and even more unexpected could be the CJEU dealing with questions related to compensation for non-material damage in connection with a delay during writing a dissertation which has exposed the student to prolonged anxiety caused by the postponement of the start of his or her professional career due to the required documents being not available.³ On the other hand, much less surprising are the judicial acts that concern compensation for non-material damage related to the EU institutions being liable for wrongful decisions.

As part of its decision-making activity, the CJEU formulates relevant points of departure that should be taken into account by the national courts and participants. Due to the generally accepted opinion that the CJEU does not deal with such matters, the judicial decisions in this area are not much known and receive insufficient attention. In this way, some important principles that might influence the decisions of national courts and the related practice tend to be overlooked. By way of an exception, there are, however, much-cited partial decisions. In the Czech legal space, the Haasová decision⁴ or the TUI decision⁵ concerning the compensation for non-material damage caused by loss of holiday delight may be seen as such exceptions.⁶

The reason why the judicial decisions concerning this area do not receive sufficient attention may be the generally accepted conviction that the CJEU powers are related to areas not or only weakly related to non-material damage. This view, however, is due to partial ignorance as decisions concerning compensation for non-material damage are included in a number of cases. Another reason might be that dominant are the decisions by the European Court of Human Rights (ECtHR) whose judicial decisions concerning the human rights, closely

¹ See e.g. *Post Bank Iran vs. Council of the European Union*, T-559/15, EU:T:2018:948, at [117].

² See e.g. *KF vs. The European Union Satellite Centre*, T-286/15, EU:T:2018:718, at [258]–[261]. In case C-14/19 P non-material damage was confirmed.

³ *Athanasios Pitsiorlas vs. Council of the European Union and European Central Bank*, joined Cases T-3/00 and T-337/04, EU:T:2007:357 at [317]–[325]. Order of the Court (Second Chamber) of 3 July 2008, C-84/08 P, EU:C:2008:384: Inadmissibility.

⁴ *Katarína Haasová vs. Rastislav Petřík, Blanka Holingová*, C-22/12, EU:C:2013:692, at [50].

⁵ *Simone Leitner vs. TUI Deutschland GmbH & Co. KG*, C-168/00, EU:C:2002:163, at [21]–[22].

⁶ Case *Simone Leitner vs. TUI Deutschland GmbH & Co. KG*, C-168/00, EU:C:2002:163, affected Czech practice to such an extent that the legislator decided to enshrine it in the Civil Code (§ 2543).

related exactly to compensation for non-material damage, receive much more prominence. Even the participants⁷ and ECJ and GC⁸ directly refer, after all, to the ECtHR judicial decisions particularly in relation to personal rights. A certain neglect and insufficient expert framework of the judicial decisions concerning compensation for non-material damage is also corroborated by the fact that these issues have not yet been dealt with by professionals even if there are numerous expert papers on compensation for non-material damage in the national context. As the primary impulse in this connection may be seen the paper, *Damages Liability for Non-material Harm in EU Case Law* by Katri Havu published in *European Law Review* 44 in August 2019, which we would like to partially continue.

There are of course many reasons why these judicial decisions and particularly the principles they offer should be taken into account. Pursuant to art. 19 TEU, the CJEU monitors the observation and interpretation of the EU law, which also incorporates the compensation for non-material damage. In this way, the CJEU comments on questions relating to compensation for non-material damage such as in connection with the interpretation and application of the Rome II Regulation (particularly in relation to car accidents often having international aspects) or with the relevant regulations concerning the protection of customers. This may bring about situations in which it would be necessary to submit a preliminary question concerning the Euro-conform interpretation of harmonized legislation on non-material damage. No doubt, free movement of persons may lead to legal relationships with a European element containing also the right to compensation for non-material damage, which is clear in the cases of damage to health⁹ or of death,¹⁰ but less so at first sight such as in cases of damage to goodwill of a legal entity; it is by far not only the questions of interpretation of conflict rules that are dealt with but also the substantive law. The CJEU thus decides on compensation for non-pecuniary damage on two levels. Firstly, it decides on claims against the EU institution; typically, these are for work-related injuries or for non-pecuniary damages on account of the institution's liability. The latter decides on the interpretation of national law. Particularly in the first level, it decides on quite ordinary compensation cases in a similar way to the national courts.

It should not be ignored that, by making decisions, the CJEU generates important principles that form the EU law thus influencing the national legislations of the EU Member States. If the principles of decision-making are clear, the predictability of the decisions will improve. The basic function of the principles is gap-filling.¹¹ Pursuant to art. 340 TFEU, “in the case

⁷ *Kendrion NV vs. European Union*, T-479/14, EU:T:2017:48, at [111]. Appeal Case before the Court of Justice, C-150/17 P, EU:C:2018:1014. Or *Guardian Europe Sàrl vs. European Union*, T-673/15, EU:T:2017:377, at [142].

⁸ *Post Bank Iran vs. Council of the European Union*, T-559/15, EU:T:2018:948, at [117], in the field of good repute of legal persons or *Janusz Korwin-Mikke vs. European Parliament*, T-352/17, EU:T:2018:319, at [46]–[49], in the field of freedom of expression.

⁹ See e.g. well-known case *Ian William Cowan in Trésor public*, C-186/87, EU:C:1989:47, at [20], in connection with the prohibition of discrimination in the freedom to provide services.

¹⁰ *Stefano Missir Mamachi di Lusignano vs. European Commission*, T-502/16, EU:T:2019:795, at [164]–[172]. Appeal Case before the Court of Justice C-54/20 P. As of 15. 2. 2021, not yet decided.

¹¹ See e.g. GUTIÉRREZ-FONS, J. A., LENAERTS, K. The Constitutional Allocation of Powers and General Principles of EU Law. *Common Market L. Rev.* 2010, vol. 47, iss. 6, p. 1629–1669. DOI: <https://doi.org/10.54648/cola2010069>

of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.” Thus, this article assumes that the CJEU as well, through its judicial decisions, will generate principles based on or at least respecting the rule common to all legal orders. However, unequivocal application is still missing of such principles to decisions about compensation to non-material damage. An important deed in the field of common principles of the tort law including compensation for non-material damage is *Principles of European Tort Law* (PETL). However, as this is not an EU piece of legislation, it can only be regarded as a non-binding source of inspiration.¹² Thus the CJEU judicial decisions, which, being not yet numerous, grow in number especially concerning specific areas such as those related to compensation for non-material damage caused by a decision being discharged, are given a considerable leeway in the Europeization of non-material-damage-related law. This clearly implies that the CJEU has claimed allegiance to the concept of compensation for non-material damage stressing its importance.

1 The Date and Methodology

The present paper aims to find answers to the following questions: what is the conception and what are the forms of non-material damage in the CJEU judicial decisions, i.e., in ECJ and GC, and what meaning does it have in the established practice of CJEU, what are the different types of non-material damage in the established practice of CJEU, and what are the individual regulatory areas in decisions on the compensation for non-material damage. Subsequently, the basis will be formulated for decisions concerning non-material damage to subsequently conclude whether, based on the current judicial decisions, it is possible to formulate general principles of trials before the CJEU on compensation for non-material damage.

2 Conception of Non-material Damage

There are basically two forms of damage distinguished in the legal orders of the EU countries. Basically, the legal orders of the European countries distinguish between damage to a person's property and debts and non-material damage. The damage to property can be measured by the quantitative difference between the person's property before and after the damage.¹³

To express the non-material damage is difficult, albeit necessary, as the damaged person has to describe such damage at least in outline. There are many definitions of non-material damage. According to Section 253, para. 2 of BGB, for example, non-material damage is defined as one “that is not damage to property (... ein Schaden, der nicht Vermögensschaden ist...)”. The German doctrine defines non-material assets as ones that, due to their nature, cannot be separated from

¹² After all, the Czech Constitutional Court repeatedly referred to PETL in connection with compensation for non-material damage (e.g. Pl.ÚS 16/04; 4/5/2005).

¹³ E.g. material damage is thus defined in § 495 of the Czech Civil Code, in § 1293 of the Austrian ABGB or in § 294–254 of the German BGB. All these legal systems distinguish between compensation for material and non-material damage.

a person (such as health, privacy, and well-being);¹⁴ non-material damage then being one that is caused by such assets being interfered with. According to the Austrian judicial decisions and doctrine, non-material damage can be qualified as an interference with a person's integrity that is also manifested by the discomfort or stress it brings about.¹⁵ In the Czech judicial decisions, emphasis is also placed on the fact that non-material damage does not result in a decrease in the property but rather in an interference with a person's personal rights.¹⁶

In both theory and practice, however, to distinguish between the damage to property and the non-material damage is not much of a problem. The problems consist mainly in the objectivisation and quantification of non-material damage, that is, how much exactly should be paid and which part exactly is worth compensation and which is not.¹⁷ In the past, this difficulty led to some legal orders refusing to deal with this problem (for a long time, for instance, the Soviet legal science refused compensation for non-material damage arguing that this was a "bourgeois relic" and an effort to quantify something which is non-quantifiable)¹⁸ with some others taking a very restrained stance, the German legislation on compensation for the non-material damage caused in connection with the killing of a next of kin, for example, is rather new in BGB – being included in the legal order as late as 2018.¹⁹ Because of the complex and often equivocal nature of compensation for non-material damage and its definition, some legal orders opt for a restrictive approach. This is driven by a concern that the sum of such compensation could be inadequate (risk of sums that are exorbitant) and unpredictable (conflicting with the principle of legitimate expectation).

Although, for the above reasons, the position of compensation for non-material damage is not good, it has still its place in the legal orders of the European countries.²⁰ The national legislations inspire each other. The Czech Civil Code, for instance, was strongly influenced in the field of compensation for non-material damage by the German and Austrian legislation;²¹ with PETL²², the EU law, and the judicial decisions

¹⁴ German case law concluded that the destruction of human bodily integrity is also the destruction of sperm in the sperm bank; see e.g. MARKESINIS, B., UNBEARTH, H. *The German Law of Torts. A Comparative Treatise*. 4. ed. Hart Publishing, 2002, p. 46. See also PAVELEK, O. *Nábrada nemajetkové újmy na zdraví a při usmrcení*. Praha: C. H. Beck, pp. 14–17.

¹⁵ DANZL, K. H. *Das Schmerzensgeld in medizinischer und juristischer Sicht mit Entscheidungsteil*. 10. ed. Wien: Manz Verlags, 2013, pp. 99–116.

¹⁶ See e.g. Judgment of the Czech Supreme Court, 25 Cdo 5162/2008.

¹⁷ In this context, for example, the principle has emerged that petty non-material damage is not compensated.

¹⁸ LORENZ, E. *Immaterieller Schaden und „billige Entschädigung in Geld“*. Berlin: Duncker und Humboldt Berlin, 1981, pp. 56–57. DOI: <https://doi.org/10.3790/978-3-428-44913-2>. This concept was to some extent also reflected in the Czech (Czechoslovak) law.

¹⁹ JAEGER, L., LUCKEY, J. *Schmerzensgeld*. Luchterhand Verlag, 2018, pp. 143–144.

²⁰ DANZL, K. H. *Der Ersatz ideeller Schäden in Europa und im ABGB am Beispiel des Angehörigenschmerzensgeldes*, In: *Festschrift 200 Jahre ABGB*. Wien: Manzsche Verlags und Universitätsbuchhandlung, 2011.

²¹ Důvodová zpráva k občanskému zákoníku [Explanatory memorandum to the Czech Civil Code]: § 2894 a- 2899. *Ministry of Justice of the Czech republic* [online]. Available at: <http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf>. Other Eastern European EU Member States are also influenced mainly by German doctrine, such as Estonia; See e.g. LAHE, J., KULL, I. Compensation of non-pecuniary damage to persons close to the deceased or to the aggrieved person. *International Comparative Jurisprudence*. 2016, Vol. 2, no. 1, pp. 1–7. DOI: <https://doi.org/10.1016/j.icj.2016.03.001>

²² See e.g. Judgment of the Czech Constitutional Court sp. zn. Pl. ÚS 16/04.

by CJEU²³, however, being important sources of inspiration as well. Despite the EU law and the relevant judicial decisions of ECJ and GC having a major influence on the national legislations of the EU Member States, surprisingly, the judicial decisions related to compensation for non-material damage are being analysed very little even if the Europeization of national legislations could have a strong potential in their improvement. This trend is very strong, too. In the Czech Republic, for example, in connection with a reform of the Czech Private Law, the problem was dealt with of quantifying compensation for damage to health; As the CJEU decides on such matters as well, its established practice could have contributed to the efforts to improve the national legislation.

Compensation for non-material damage, as mentioned above, is a standard part of the legal systems of the EU Member States. EU law is not and cannot be an exception in this respect. However, compensation for non-material damage is not explicitly regulated in primary law, only in some regulations or directives in secondary law. This is mainly because compensation for non-pecuniary damage is related to protection of personality, which is mainly regulated in the civil law (Civil Codes) of the Member States. An exception is, for example, the protection of personal data (GDPR) or the prohibition of discrimination, which is regulated by EU law. There is also some indication, for example, in Article 340 TFEU, which deals with the harmonization of tort law. Then the non-material damage is regulated in some partial regulations. This is more or less discussed in Chapter VI. of this article. However, it is a question of what is meant by the term European tort law and how this term affects the private law of the Member States in the field of non-material damage. There are different views on this concept. We consider that this concept includes, in particular, the tort law of the EU and the tort law of the Member States. However, the case-law of the ECtHR cannot be left out because it significantly affects both the decision-making practice of the CJEU and the decision-making practice of the courts of the Member States. The highest courts in Germany and France also have an evident influence on the decision-making practice of courts in the Member States.²⁴ Europeanization of private law, as well as the importance of comparative law, is significantly accelerated by the process of European integration. Comparative law also has an undoubted influence on the law-making process in the EU and thus on tort law.²⁵

The law for non-material damage varies from one Member State to another. The principles on which it is based on differing, e.g. the application of punitive damages or the method of determining the amount of compensation, e.g. in the area of compensation for non-material damage to health.²⁶ One of the reasons why non-material damage is not yet fully unified or harmonized at the EU level is the fact that it is based on very individual circumstances.²⁷ However, the case-law of the Member States is not fully available, and therefore mutual inspiration

²³ E.g. compensation for non-pecuniary damage in connection with the loss of holiday pleasure.

²⁴ GILIKER, P. *Research Handbook on EU Tort Law*. Edward Elgar Publishing, 2017, pp. 1–23. DOI: <https://doi.org/10.4337/9781785365720>

²⁵ DAM, C. *European Tort Law*. Oxford University Press, 2014, pp. 15–16. DOI: <https://doi.org/10.1093/acprof:oso/9780199672264.003.0002>

²⁶ WAGNER, G. *Tort Law and Liability Insurance*. Springer, 2005, pp. 8–11. DOI: <https://doi.org/10.1007/3-211-30631-5>

²⁷ DAM, C. *European Tort Law*, Oxford University Press, 2014, p. 323.

(EU – Member State) is problematic. I believe that if we were to strive for the unification of practice, the only solution would probably be the unification of case law through the CJEU case law, as is happening in the Member States; e.g. in Germany play an important role in determining the amount of non-material damage to health so-called Schmerzensgeldtabelle.²⁸

Another reason why the legislation of the Member States differs may also be the question of social development. Van Dam concludes that lower amounts to compensate for non-material damage in France than in Britain is why France prefers greater equality.²⁹ The reason why the EU does not intervene too much in these areas is that it leaves the legislation to the Member States.³⁰ An example could be compensation for non-material damage to health and death.³¹ However, there are also other areas of non-material damage, typically in the case of interference with human rights. A detailed analysis of EU Member States' legislation in this area is lacking. Indeed, it is very difficult to analyse detailed regulations in all Member States. Obstacles to the comparison of legal systems are, firstly, language and, secondly, insufficient publicity of domestic case law. The courts of the Member States do not publish their decisions in foreign languages. The comparisons then mainly concern only some Member States.³² Thus, there is more or less agreement between the Member States on the recognition of non-material damage to be compensated. There is also general conformity on the definition of non-material damage, which is mostly perceived as the opposite of material damage, i.e. interference with physical health, physical or mental integrity. However, they differ in other aspects, such as the method and form of its compensation, the criterias based on which it is to be decided and, of course, the amount of compensation. The reason for the absence of any more fundamental unifying principles may be precisely that non-material damage is, by its nature, so difficult to quantify that. Furthermore there is often no agreement on certain issues even in the Member State itself. In this case, there are often fundamental differences between courts in one Member State. Member States also take a different approach to the non-material damage compensation function and the possible use of so-called punitive damages. Similarly, Member States differ on issues concerning the inheritance of non-material damage. Although there are large differences in perceptions between Member States, harmonization efforts are emerging at EU level, for example because pain is felt by everyone, no matter where they come from.³³ We believe that harmonization or unification is not possible, precisely because of the still great differences in the regulations and practices of the Member States. It is now therefore not possible to force unification or harmonization in this area. The CJEU can thus play a key role through its case law, which, however, also to some extent takes over the principles of the decision-making practice of the

²⁸ Ibid., p. 324.

²⁹ Ibid., p. 342: „Low amounts for non-pecuniary loss in France and high amounts in England are an illustration of the French preference for the equality principle. It makes compensation available for many by keeping the threshold for liability low.“

³⁰ Ibid., p. 346.

³¹ DANZL, K. H. *Das Schmerzensgeld in medizinischer und juristischer Sicht mit Entscheidungsteil*. 10. ed. Wien: Manz Verlags, 2013, pp. 116–123.

³² HORTON ROGERS, W. V. (ed.). *Damages for Non-Pecuniary Loss in a Comparative Perspective*. Wien-New York: Springer, 2009, pp. 245–272.

³³ Ibid., pp. 245–272.

Member States. CJEU can try to unify the regulation in this area. At the moment, however, the CJEU seems to be reluctant, not activist, in the area of non-material damage. The CJEU can thus accelerate and consolidate European integration. Any disputes in this area can ultimately lead to the improvement of this area.³⁴ Thus, if the CJEU decides on non-material damage disputes, this may ultimately lead to the formulation of fundamental principles in this matter and, consequently, to the unification of principles in the Member States. In some cases, the CJEU goes even further, which is more or less an attempt to move practice in the Member States further. This is, for example, compensation for non-pecuniary damage in the event of the killing of relatives, where the CJEU is closer to the Leussink case.³⁵

It is very difficult to compensate for non-material damage in the Member States. This is due to the different principles that are applied in the Member States. The second reason is strong individualisation, i.e. it is not easy to unify in any way, because the non-material damage is always very individual and the practice, especially case law of all the Member States is not clear enough.

2.1 Non-material Damage as defined by CJEU

Both ECJ and GC emphasize (referring to ECtHR) that non-material damage includes objective and subjective elements that are difficult to quantify³⁶ being of intangible nature.³⁷ According to the established practice, non-material damage can be defined using concepts including the following: feeling of being wronged, frustration, and incomprehension,³⁸ legal uncertainty, and unjust handling stressing the injured person or causing to it anxiety³⁹, feelings of hopelessness or deep injustice, loss of opportunity⁴⁰ or professional integrity, depriving it of job opportunities,⁴¹ or damages to compensate for physical injury in the form of non-material damage to health,⁴² feeling of injustice and degradation, procrastinated expectation and uncertainty caused by the illegality of a contested decision.⁴³ Compensation for non-material damage has also appeared in connection with aesthetic problems⁴⁴ or with

³⁴ BERCUSSON, B. *European Labour Law*. 2. ed. Cambridge University Press, 2009, pp. 384–385. DOI: <https://doi.org/10.1017/CBO9780511609831>

³⁵ DAM, C. *European Tort Law*. Oxford University Press, 2014, p. 332.

³⁶ *Post Bank Iran vs. Council of the European Union*, T-559/15, EU:T:2018:948, at [117].

³⁷ *Iran Insurance Company vs. Council of the European Union*, T-558/15, EU:T:2018:945, at [128].

³⁸ *Georges Paraskevaïdis vs. European Centre for the Development of Vocational Training (Cedefop)*, T-601/16, EU:T:2017:757, at [84], or *Fernando De Esteban Alonso vs. European Commission*, T-138/18, EU:T:2019:398, at [131] and [133]; Appeal Case before the Court of Justice C-591/19 P.

³⁹ *Randa Chart vs. European External Action Service (EEAS)*, T-138/14, EU:T:2015:981, at [149] and [155].

⁴⁰ *East West Consulting SPRL vs. European Commission*, T-298/16, EU:T:2018:967, at [177] and [180].

⁴¹ *KF vs. The European Union Satellite Centre*, T-286/15, EU:T:2018:718, at [256–257] and [261]. Court (Second Chamber) dismisses the appeal, C-14/19 P, EU:C:2020:492; Or *Giovanni Barbi vs. Commission of the European Communities*, T-68/91, EU:T:1992:90, at [45]–[46].

⁴² *CH vs. European Parliament*, F-129/12, EU:F:2013:203, at [64]–[65].

⁴³ *Lucaccioni vs. Commission*, T-551/16, EU:T:2017:751, at [144], and *Robert McCoy vs. Committee of the Regions*, T-567/16, EU:T:2018:708, at [169].

⁴⁴ *Mario Berti vs. Commission of the European Communities*, C-131/81, EU:C:1982:341, at [64]–[65].

dignity at work and isolation⁴⁵ – in all the above situations, non-material damage is mentioned being decided on by the CJEU. However, the judicial decisions give no general definition of non-material damage. Thus, there are only particular decisions based on which a more concrete understanding can be arrived at of the way CJEU conceives non-material damage. Using these particular decisions, one could make a very general statement that non-material damage may be caused by encroachment upon a person's private rights, typically their right to life, health, privacy, honour or in connection with their right to due process and, in the event of a legal entity, in connection with damaging its goodwill or also in connection with its right to due process.

3 Methods of Compensation for Non-material Damage

Non-material damage can be compensated for by a payment, made good by an apology or, in the event of liability for an illegal decision by an EU body, by rescinding such a decision. In most decisions analysed, the plaintiffs demanded a compensation in the form of a payment. The highest compensation recorded in our research was a payment of 71,000 € in compensation for non-material damage to a natural person.⁴⁶ In cases of non-contractual liability of EU institutions, the GC decided that a compensation was not necessarily to take the form of a payment, but a reasonable satisfaction might consist of a mere admission that a wrongful act has been made by the EU institution in question, with a subsequent annulment thereof.⁴⁷ Sometimes, the annulment as such may constitute a satisfactory compensation for the entire non-material damage.⁴⁸ However, if the illegal act has been of an especially grave character with its annulment being unable to make it good (such as if it is deprived of any useful effect), it itself cannot be taken for an adequate compensation for any non-material damage caused by the wrongful act.⁴⁹ Thus, it is necessary to consider whether non-material damage is separable from the act of annulment.⁵⁰

4 Non-material Damage types in the CJEU Decisions

4.1 Encroachment upon the Right to Life and the Right to Protection of Health

In several of its decisions, the CJEU had to deal with the question of claim to compensation for non-material damage to health⁵¹ and in the event of death.⁵² Compensation for

⁴⁵ *Q vs. European Commission*, F-52/05, EU:F:2008:161, and F-52/05, EU:T:2011.

⁴⁶ *Fereydown Mahmoudian vs. Council of the European Union*, T-406/15, ECLI:EU:T:2019:468, at [230]. Appeal Case before the the Court of Justice C-681/19 P. As of 15/2/2021 not yet decided.

⁴⁷ See e.g. *Roberto Aquino vs. European Parliament*, T-402/18, EU:T:2020:13, at [90]–[94].

⁴⁸ See e.g. *Alain Schoonjans vs. European Commission*, T-79/17, EU:T:2018:531, at [53]–[54].

⁴⁹ See e.g. *L vs. European Parliament*, T-59/17, EU:T:2019:140, at [59], and case law there cited.

⁵⁰ See e.g. *PB vs. European Commission*, T-609/16, EU:T:2017:910, at [97], and *Culin vs. Commission*, C-343/87, EU:C:1990:49, at [27]–[29].

⁵¹ See e.g. *SQ vs. European Investment Bank*, T-377/17, EU:T:2018:478, at [162, 180 and 187], or *Fernando De Esteban Alonso vs. European Commission*, T-138/18, EU:T:2019:398, at [120, 124] and [134–136]. Appeal Case before the Court of Justice C-591/19.

⁵² *Stefano Missir Mamachi di Lusignano vs. European Commission*, T-502/16, EU:T:2019:795, at [164]–[172]. Appeal Case before the Court of Justice C-54/20 P. As of 15/2/2021, not yet decided.

non-material damage to health and in the event of death appears mostly in connection with legislation related to the rights of employees of EU institutions in conformance with the Staff Regulation.⁵³ The CJEU stressed the fact that an employee may claim from the employer compensation for damage to health consisting of a deterioration of his health, both physical and mental.⁵⁴ Considering that EU institutions are big employers, this logically entails claims related to accidents at work particularly in connection with art. 73 of Staff Regulation.

In the decision *Vitalijs Drozdovs vs. Baltikums AAS*, C-277/12, EU:C:2013:685,⁵⁵ the ECJ arrived at a conclusion that directives related to motor third party liability “*must be interpreted as meaning that compulsory insurance against civil liability in respect of the use of motor vehicles must cover compensation for non-material damage suffered by the next of kin of the deceased victims of a road traffic accident, in so far as such compensation is provided for as part of the civil liability of the insured party under the national law applicable in the dispute in the main proceedings.*” A principal decision concerning compensation of non-material damage in the event of death was the case, *Gerhardus Leussink and others vs. Commission of the European Communities*. In this case, the ECJ arrived at a conclusion that the next of kin of the deceased (employee of the institution) are entitled to an additional compensation beyond art. 73 Staff Regulation.⁵⁶ In the decision, *Stefano Missir Mamachi di Lusignano vs. European Commission*,⁵⁷ the Tribunal made a statement on compensation for non-material damage in the event of death and to compensation for the survivors. In this decision, the mother was awarded a compensation of 50,000 € for the murder of her son.⁵⁸ Similarly, the compensation was discussed for a sibling of the deceased person. This decision defines compensation for non-material damage in the event of death as indirect non-material damage in relation to the direct damage caused to the deceased person referring to art. 73 Staff Regulation. Initially, the Tribunal considered whether siblings are entitled to such compensation at all because this is not explicitly implied by art. 73 Staff Regulation. It then concluded that, even if this non-material damage is not directly implied by any of the EU regulation, by the principle common to all the Member States, this damage can be compensated for.⁵⁹ Each sibling was awarded a compensation of 10,000 € for indirect damage in the event of death;⁶⁰ however, this decision being not final, it is not

⁵³ Consolidated text: Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ P 045 14. 6. 1962. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20140501>

⁵⁴ *PD vs. European Investment Bank*, T-615/16, EU:T:2018:642, at [63]–[65].

⁵⁵ *Vitalijs Drozdovs vs. Baltikums AAS*, C-277/12, EU:C:2013:685, at [31].

⁵⁶ *Gerhardus Leussink and others vs. Commission of the European Communities*, joined cases 169/83 and 136/84, EU:C:1986:371, at [11]–[13].

⁵⁷ *T Stefano Missir Mamachi di Lusignano vs. European Commission*, T-502/16, EU:T:2019:795. This decision is challenged before the ECJ as a case of file no. C-54/20 P. A number of procedural decisions were passed on to this case, in which procedural issues related to the so-called indirect compensation for non-damage damage in case of death were resolved; see *Livio Missir Mamachi di Lusignano vs. European Commission*, F-50/09, EU:F:2011:55 and T-401/11 P-RENV-RX, EU:T:2017:874.

⁵⁸ *Stefano Missir Mamachi di Lusignano vs. European Commission*, T-502/16, EU:T:2019:795, at [87]–[88].

⁵⁹ *Ibid.*, at [164]–[165].

⁶⁰ *Ibid.*, at [172].

yet certain whether it will be rescinded, amended, or confirmed by the ECJ. Compared with the Czech established practice, the compensation is lower;⁶¹ as well as in the case of Austria.⁶² Note that, concerning compensation for non-material damage in the event of death, no unequivocal conclusion can be made whether this is a principle common to all Member States as it is not included in the legislation of all of them. Thus, by some legal orders, only the immediate injured person is awarded compensation.⁶³

In this connection, it would of course appear as very practical if the regulation of compensation for non-material damage to health and in the event of death were harmonized or even unified. It is not realistic to expect the compensation rate to be unified as the differences between the economies of the EU Member States are still considerable,⁶⁴ what could, however be harmonized or unified is the domain of compensation for damage to health and in the event of death, i.e., under all the EU Member State legislations, the injured parties would be entitled to compensation for damage to health and in the event of death. Health and family life are among the basic personal rights that can typically be affected in road traffic accidents, which, because of the free movement of persons, often include an international element and, as such, should be given unified protection.

The first attempt at harmonizing compensation for damage to health and in the event of death appeared as early as 1975 at the European Council (not an EU institution). In 2000, the so-called Trier group submitted a recommendation to the European Commission, Parliament and Council concerning harmonized legislation to regulate compensation for non-material damage. The submission was occasioned by a compensation for non-material damage being often mentioned in connection with road traffic accidents with international elements and by the major differences between the legislations of the Member States concerning such situations. This was also the reason why the Member States were recommended to adopt such a disability classification to be used when dealing with compensation to the injured persons. Compensation would then be calculated based on the percentage rate of disability both physical and mental and its influence on everyday life. The compensation rate should be set out by the court based on an opinion made by a forensic expert specifically instructed on this recommendation. The draft recommendation as a whole was, however, rejected.⁶⁵

⁶¹ See e.g. judgment of the Supreme Court of the Czech republic, 25 Cdo 894/2018.

⁶² Judgment of the Supreme Court of Austria, OGH 18. 4. 2002 2 Ob 237/01v.

⁶³ DANZL, K. H. Der Ersatz ideeller Schäden in Europa und im ABGB am Beispiel des Angehörigenschmerzensgeldes. In: *Festschrift 200 Jahre ABGB*. Wien: Manzsche Verlags und Universitätsbuchhandlung.

⁶⁴ Compensation for non-material damage would then have to be determined on the basis of, for example, the GDP of a particular Member State, which could lead to discrimination; See e.g. FIKFAK, V. Non-pecuniary damages before the European Court of Human Rights: Forget the victim; it's all about the state. *Leiden Journal of International Law*. 2020, Vol. 33, no. 2, pp. 335–369. DOI: <https://doi.org/10.1017/S0922156520000035>

⁶⁵ Draft report European Parliament 27. 4. 2003, 2003/2130(INI) [online]. Available at: <http://www.europarl.europa.eu/meetdocs/committees/juri/20040223/505310EN.pdf>, See also PAVELEK, O. *Nábrada nemajetkové újmy na zdraví a při usmrcení*. Praha: C. H. Beck, pp. 57–58.

4.2 Encroachment upon other Personal Rights of a Person or Goodwill of a Legal Entity

There is a number of cases in which the reputation of a natural person was encroached or allegedly encroached upon (such as in connection with an incorrect official procedure by the EC based on which the person was apprehended⁶⁶ or in connection with the person not advancing to a higher pay level⁶⁷ or because of an encroachment upon the integrity of a person⁶⁸). In judicial decisions, encroachment upon the right to the protection of personal rights is related with the employment or service relationship of an employee. For example, in the case, *XH in European Commission*,⁶⁹ the plaintiff claimed compensation for non-material damage in connection with defamatory statements about the plaintiff's mental condition, which was reported in a rolling report on the probationary period. The GC arrived at a conclusion that the plaintiff had been put in a state of concern about its good reputation and professional future and that non-material damage could not be made good by a mere cancellation of the decision on non-advancement; the compensation for non-material damage amounted to 2,000 €. Similarly, in the case of damaging integrity and professional future, a compensation for non-material damage was adjudicated of 10,000 €. ⁷⁰ In the cases of decisions on compensations for non-material damage in this area, the influence of the established practice of the ECtHR is evident.⁷¹

Judicial decisions also relate to the goodwill of a legal entity. In this area as well, the influence of ECtHR judicial decisions can be traced respecting the moral dimension of legal entities.⁷² This may include the publishing of untrue and misleading information on a legal entity.⁷³ In this connection, the GC was deciding on compensation for non-material damage being granted directly to the partners and managers of a company.⁷⁴ Thus, particularly cases of EU liability for damage in connection with the protection of economic competition are of crucial importance. Compensation for non-material damage related to encroachment upon the goodwill of a legal entity can also be claimed by a legal entity allegedly providing support for the proliferation of atomic weapons being publically accused of such activity endangering peace, which resulted in this person being

⁶⁶ *Richard Hamill vs. Commission of the European Communities*, C-180/87, EU:C:1988:474, at [19].

⁶⁷ See e.g. *V. R. vs. Commission of the European Communities*, C-75/85, EU:C:1986:347, at [29].

⁶⁸ *Janusz Korwin-Mikke vs. European Parliament*, T-352/17, EU:T:2018:319, at [36, 78 and 79].

⁶⁹ *XH vs. European Commission*, T-511/18, EU:T:2020:291. Appeal Case before the Court of Justice C-399/20 P.

⁷⁰ *KF vs. The European Union Satellite Centre*, T-286/15, EU:T:2018:718, at [258]–[261]. In case C-14/19 P, non-material damage was confirmed (Dismisses the appeal).

⁷¹ See e.g. *Janusz Korwin-Mikke vs. European Parliament*, T-352/17, EU:T:2018:319, at [49].

⁷² EMBERLAND, M. Compensating companies for non-pecuniary damage: *Comingersoll s.a. v Portugal* and the ambivalent expansion of the ECtHR scope. *The British Year Book of International Law*. 2004, vol. 74, No. 1, pp. 409–432. DOI: <https://doi.org/10.1093/bybil/74.1.409>

⁷³ See e.g. *Idromacchine Srl and others vs. European Commission*, T 88/09, EU:T:2011:641, at [70–76].

⁷⁴ *Idromacchine Srl; Alessandro Capuzzo; Roberto Capuzzo vs. European Commission*, T-88/09, EU:T:2011:641, at [85]–[93].

disgraced and mistrusted.⁷⁵ Encroachment upon the goodwill of a legal entity is also relevant in terms of application of conflict rules, when rumours, especially in the online space, propagate quickly, which necessitates a judicious legal order by which an injured party may seek protection.⁷⁶

5 Particular Regulatory Areas of Decisions by the CJEU on Compensation for Non-material Damage

Non-material damage and the compensation for it can be encountered in a national legislation in a number of different areas – related to the private and family law, compensated for can be encroachment upon the natural human rights such as damage to health, privacy, dignity, the causing of death. In the case of a legal entity, this may include damage to goodwill. A specific example of compensation for non-material damage is one for loss of holiday enjoyment or for damage caused by unfair competition such as in relation to sponging off someone else's goodwill or copyright. In all the above cases, compensation for non-material damage must be dealt with, particularly the criteria used to calculate the compensation of non-material damage and the actual amount of compensation. In connection with regulation related to public law, a right may be exercised for the compensation of non-material damage in connection, for instance, with the commitment of a crime.

Listed below are areas in which the CJEU decides the most often on compensation for non-material damage.

5.1 Liability for the Decision by an EU Institution

The most frequent were the CJEU decisions on compensation for non-material damage in connection with the liability of an EU institution. This is, thus, the most extensive part of judicial decisions dominating all others. However, even these decisions deal with the question of encroachment upon the personal rights of an individual or upon other basic human rights, particularly with respect to the compensation for non-material damage caused by the violation of a right to due process (such as unreasonably prolonged process).⁷⁷ The judicial decisions also defined the assumptions of liability, *as regards the claim for compensation for the non-material damage allegedly suffered by the applicant, it must be recalled that, according to settled case-law regarding civil service matters, the European Union can be held liable for damages only if a number of conditions are satisfied as regards the illegality of the allegedly wrongful act committed by the institution, the actual harm suffered and the existence of a causal link between the act and the damage alleged*

⁷⁵ Council Regulation 423/2007 concerning restrictive measures against Iran [2007] OJ L 103 (No longer in force) and *Safa Nicu Sepahan Co. v Council of the European Union* (T-384/11) EU:T:2014:986 at [78]-[88]. Confirmed (C-45/15 P) EU:C:2017:402 at [104]-[107].

⁷⁶ See e.g. *Bolagsupplysningen OÜ, Ingrid Ilsjan v Svenske Handel AB* (C-194/16) EU:C:2017:766 at [49].

⁷⁷ See e.g. *European Union v Kendrion NV* (C-150/17 P) EU:C:2018:1014 at [111].

to have been suffered.⁷⁸ Those conditions are cumulative which means that if one of them is not satisfied the European Union cannot be held non-contractually liable.⁷⁹

The amount of compensation should be then defined taking into consideration that “the General Court ruled that, for the purposes of determining the amount of compensation to be awarded for non-material damage in the case, it was appropriate to take account, in particular, of the gravity of the breach identified, its duration, the Council’s conduct, and the effects [...] on third parties.”⁸⁰ A decision concerning the liability of EU institutions for non-material damage concerns mostly the European Commission (typically, in connection with the protection of economic competition), but also in connection with the office of the Ombudsman,⁸¹ Council,⁸² and the European Parliament.⁸³

5.2 Compensation in Connection with Service Relationship

Other conditions are in force for the liability arising from a service relationship than those in the case of non-contractual liability by the TFEU. Here, art. 73 and 78 Staff regulations are the key ones. Most of the disputes are related to a service relationship and compensation for non-material damage suffered in consequence of accidents at work,⁸⁴ requiring specific criteria. In an effort to ensure compliance with the basic principles of good administration, the EU institutions have set up a number of codes improving the quality of the services provided. These codes regulate the behaviour of employees defining illegal acts such as sexual abuse.⁸⁵ If the rules set by a code have been violated, the injured person is entitled to compensation.⁸⁶ Compensation for non-material damage can also be claimed in the event of uncertainty or concern for a person’s professional future. If the person’s advancement is in play, for instance, the GC came to a conclusion that the nature of the opportunity and the date should be ascertained, evaluating the financial consequences for the person involved of losing the opportunity. However, by the judicial decisions, the loss of an opportunity can be ascertained objectively using a mathematical coefficient based on an in-depth analysis.

⁷⁸ See e.g. *Commission of the European Communities v Augusto Brazzelli Lualdi and others* (C-136/92 P) EU:C:1994:211 at [42] and *QB v European Central Bank* (T-827/16) EU:T:2018:756 at [117].

⁷⁹ See e.g. *Georges Paraskevaidis vs. European Centre for the Development of Vocational Training*, T-601/16, EU:T:2017:757, at [78].

⁸⁰ *Safa Nicu Sepaban Co. vs. Council of the European Union*, T-384/11, EU:T:2014:986, at [88]–[91] and C-45/15 P, EU:C:2017:402, at [52].

⁸¹ See e.g. *European Ombudsman vs. Claire Staelen*, C-337/15 P, EU:C:2017:256, at [89]–[95] and [130]–[131].

⁸² *Safa Nicu Sepaban Co. vs. Council of the European Union*, C-45/15 P, EU:C:2017:402.

⁸³ See, e.g., the European Parliament has been criticized for being contemptuous and obstructive; *CN vs. European Parliament*, T-343/13, EU:T:2015:926, at [113] and [121].

⁸⁴ See, e.g. *Livio Missir Mamachi di Lusignano vs. European Commission*, C-417/14 RX-II, EU:C:2015:588, at [29]–[53].

⁸⁵ See e.g. Guidelines on Ethical Standards for the Participation of the Members of the European Commission in the Election Campaign. Available at: https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/ethics-and-good-administration/commissioners-and-ethics/code-conduct-members-european-commission_cs

⁸⁶ *PY vs. EUCAP Sabel Niger*, T-763/16, EU:T:2018:181, at [6], [122], [130].

However, if the loss of opportunity cannot be quantified in this way, it must be determined *ex aequo et bono*.⁸⁷ Compensation for non-material damage also tends to be claimed to cover the costs of treatment and aesthetics⁸⁸ or to make up for isolation or loss of opportunity in connection with pay level⁸⁹ or damage caused by concern about the future career or for the anguish suffered. A student claimed compensation for being denied access to the documents needed to finish his dissertation.⁹⁰

5.3 Victims of Crimes

Compensation for mental harm as a result of a crime is regulated by Directive 2012/29/EU.⁹¹ Pursuant to art. 2 (1) of this Directive, “for the purposes of this Directive the following definitions shall apply: (a) ‘victim’ means: (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; (ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person’s death.” Thus, this directive explicitly refers to the victims’ emotional harm and efforts to protect the victims of criminal offences. The Member States are supposed to adopt legislation to make good emotional harm.⁹² The state, being liable for violation of the EU law, must compensate for the consequences of the damage caused in accordance with the national legislation regulating liability, with the compensation eligibility criteria being at least as favourable as the criteria for similar compensation given the national law (principle of equality). The following case may serve as an example. Having been kidnapped and unable to seek assistance due to the emergency call number 112 not working, a girl aged seventeen subsequently died. Thus, the girl and her parents, suffered non-material loss because the Member State, having not updated its legislation accordingly, failed to make sure that the emergency number was constantly available.⁹³

5.4 Air transport and tourism

In its decisions, the CJEU has repeatedly concluded that harm and loss referred to in Chapter III of the Montreal Convention must be regarded as including both the proprietary and the non-material parts of damage, which was subsequently reflected in Regulation

⁸⁷ *AK vs. European Commission*, F-91/10, EU:F:2013:34, at [85], [91]–[93]. The appeal was rejected (T-288/13 P).

⁸⁸ *Mario Berti vs. Commission of the European Communities*, C-131/81, ECLI:EU:C:1982:341.

⁸⁹ See e.g. *Q vs. European Commission*, F-52/05, EU:F:2008:161 and F-52/05, EU:T:2011.

⁹⁰ *Athanasios Pitsiorlas vs. Council of the European Union and European Central Bank*, joined Cases T-3/00 and T-337/04, EU:T:2007:357, at [317]–[325].

⁹¹ Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315.

⁹² See e.g. *TG, UF vs. Úrad špeciálnej prokuratúry Generálnej prokuratúry Slovenskej republiky and others*, C-603/19, EU:C:2020:774.

⁹³ *AW, BV, CU, DT vs. Lietuvos valstybė*, C-417/18, EU:C:2019:671, at [13], [24].

261/2004.⁹⁴ The basic decision concerning non-material damage was then *Simone Leitner vs. TUI Deutschland GmbH & Co. KG* (C-168/00) EU:C:2002:163., which extends the claims of the customers of travel agencies.

5.5 Discrimination

Pursuant to art. 17 Directive 2000/78/EC,⁹⁵ the “Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.” Related to every discrimination is particularly an encroachment upon the personal rights (honour, dignity, privacy etc.) resulting in compensation for non-material damage.⁹⁶

5.6 Defective Product

Pursuant to art. 9 Directive 85/374/EEC,⁹⁷ damage also includes one caused by death or injury. The ECJ confirmed that compensation for non-material damage related to death or health cannot be limited.

6 Basic Principles of Deciding on Non-material Damage

Although the CJEU has repeatedly stated that it is not its aim to harmonize the compensation of damage, in particular to harmonize the set of conditions of civil liability of the Member States,⁹⁸ certain “harmonizing” is no doubt taking place of exercising rights to compensation for damage based on judicial decisions claiming. The GC claimed allegiance to the common principles related to compensation for non-material damage, for example, in its case *Stefano Missir Mamachi di Lusignano vs. European Commission*,⁹⁹ in which it infers that, concerning the compensation for non-material damage in the event of death, compensation can also be awarded to siblings as it follows from the common principles

⁹⁴ Regulation 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 [2004] OJ L 46 and *Aurora Sousa Rodríguez and others vs. Air France SA*, C-83/10, EU:C:2011:652, at [41], or *Axel Walz vs. Clickair SA*, C-63/09, EU:C:2010:251, at [29].

⁹⁵ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303.

⁹⁶ See e.g. *TK (C-773/18)*, *UL (C-774/18)*, *VM (C-775/18) vs. Land Sachsen-Anhalt*, EU:C:2020:125, at [55], or *Maria Auxiliadora Arjona Camacho vs. Securitas Seguridad España SA*, C-407/14, EU:C:2015:831, at [45].

⁹⁷ Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210.

⁹⁸ E. g. *Vitalijs Drozdovs vs. Baltikums AAS*, C-277/12, EU:C:2013:685, at [31].

⁹⁹ *Missir Mamachi di Lusignano vs. European Commission*, T-502/16, EU:T:2019:795. This case is challenged before the ECJ as a case C-54/20 P. A number of procedural decisions were passed on to this decision, in which procedural issues related to the so-called indirect compensation for non-material damage were resolved; see *Livio Missir Mamachi di Lusignano vs. European Commission*, F-50/09, EU:F:2011:55 and T-401/11 P-RENV-RX, EU:T:2017:874.

of the EU countries. Such principles, however, are difficult to trace in this area because not all EU Member State do recognize this specific principle compensation. Looking for principles common to all the EU countries may thus be rather problematic. Despite the difficulty in an unequivocal forming of principles inferred in this way, one can identify in the decisions by the CJEU the acceptance of the below basic principles in deciding on claims for the compensation of non-material damage.

6.1 Distinction between material damage and non-material damage.

Distinction between material damage and non-material damage can be seen in a number of regulations such as Regulation 261/2004¹⁰⁰ or Directive 2012/29¹⁰¹ or in judicial decisions. Non-material damage in this directive is defined as physical, sexual, emotional or psychological harm. The distinction is then evident from such decisions (e.g., *SL vs. Vueling Airlines SA*, C-86/19, EU:C:2020:538, at [31]).¹⁰²

6.2 Joint liability of the injured party and breach of duty of care

If the injured party participates in causing the damage, the amount of compensation may be reduced.¹⁰³ This includes, e.g., a situation in which the aggrieved party neglects the general duty of care; the compensation is then reduced accordingly.

6.3 Method of Calculating the Amount of Compensation

The method of calculating the amount of compensation of non-material damage is understood as the set of criteria based on which the compensation is to be calculated. It is, however not possible to find unequivocal criteria to be used, only general recommendations can be formulated based on the established judicial practice for the court to take into consideration when deciding about the compensation. As in the case of national courts, also the CJEU decisions are substantially based on similar cases to which the court refers in the justification. However, the CJEU also emphasizes that the particular circumstances should be taken into consideration of the case in question¹⁰⁴ as non-material damage includes both objective and subjective elements. This meets the principle of legitimate expectation,

¹⁰⁰ Regulation 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 [2004] OJ L 46.

¹⁰¹ Point 17 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 31: “Violence that is directed against a person because of that person’s gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim.” Confirmed in Case *Axel Walz vs. Clickair SA*, C-63/09, EU:C:2010:251, at [29].

¹⁰² “The Court has also held that the limitation of compensation laid down in Article 22(2) of the Montreal Convention must be applied to the total damage caused, regardless of whether that damage is material or non-material.”

¹⁰³ E.g. *Ernst Bauer vs. Commission of the European Communities*, C-299/93, EU:C:1995:100, at [23]–[24].

¹⁰⁴ *Post Bank Iran vs. Council of the European Union*, T-559/15, EU:T:2018:948, at [115], [119], [120] and [122].

which is also very substantial in the CJEU decisions.¹⁰⁵ Concerning personal rights, the CJEU refers to the numerous decisions by the ECtHR and the principles it formulates. Compared with the Czech, Austrian, and German judicial practice, however, the references are less frequent, with the Czech courts often referring to similar decisions in the case particularly if deciding about the amount of compensation for damage to health. In the German or Austrian judicial practice, the decisions on the compensation for non-material damage is even based directly on what is called a *Schmerzensgeld-Tabelle* based on similar decisions, which classifies pain types.¹⁰⁶

In many CJEU decisions, sufficient criteria are not included, with the court only stating that the compensation should be determined on the *ex aequo et bono* principle.¹⁰⁷ Such reference to these principles is not exceptional by any means as, by numerous national regulations as well, non-material damage should be determined by the circumstances of a case (ABGB) or on the principle of fairness (Czech Civil Code).

In addition to this method of determination, however, the CJEU also decides based on a list of particular criteria. Even a relationship is admitted between the compensation for material damage and non-material damage in the sense that non-material damage is a percentage of damage to property. As a typical example of this may be taken the determination of the compensation for non-material damage based on the penalty imposed in connection with protecting economic competition.¹⁰⁸ Also lump-sum compensation is admitted for non-material damage,¹⁰⁹ which is also known to the Czech labour code.

However, the currently established practice of the CJEU does not imply that such clearly defined decision criteria should exist as seen, for instance, in the decision practice of the national courts or that of the ECtHR. Often, the CJEU simply states that non-material damage has been caused by an illegal act without giving a more detailed substantiation of the damage. The reason for this may be the still small number of judicial decisions in this area.

In the case of non-material concerning damage to health, such as one caused by occupational disease, the GC admits using an expert's opinion.¹¹⁰ This is given by the nature of damage to health, which, at least on the basis of an expert's opinion, can be objectivised. However, since the cases of compensation for damage to health tried before the CJEU are

¹⁰⁵ The principle of legitimate expectations is firmly enshrined in the case law of the CJEU, e.g. *Fotios Nanopoulos vs. European Commission*, F-30/08, EU:F:2010:43, at [193].

¹⁰⁶ SLYZIK, A. *Beck'sche Schmerzensgeld-Tabelle 2019 Mit praxisorientierter Kommentierung des Schmerzensgeldrechts*. C. H. Beck Verlag, 2018.

¹⁰⁷ See e.g. *Dominique Noëlle Oberthür vs. Commission of the European Communities*, C-24/79, EU:C:1981:207, at [15]; *Council of the European Union vs. Lieve de Nil and Christiane Impens*, C-259/96 P, EU:C:1998:224, at [32]–[33]; *Stefano Missir Mamachi di Lusignano vs. European Commission*, T-502/16, EU:T:2019:795, at [171].

¹⁰⁸ *European Union vs. Kendrion NV*, C-150/17 P, EU:C:2018:1014, at [106], and *Kendrion NV vs. European Commission*, C-50/12 P, EU:C:2013:771, at [77]–[108] and [132].

¹⁰⁹ EEC/EAEC Council: Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ 45; art. 73.

¹¹⁰ *PD vs. European Investment Bank*, T-615/16, EU:T:2018:642, at [74].

less numerous than those before national courts, not even the judicial decisions are processed in much detail concerning the nature of an expert's opinion in this area. Thus, clearly specified criteria are still missing. In partial decisions, however, the CJEU has defined some of them. It has admitted, for example, that regard may be paid for age as a criterion, which is usual in the national judicial decisions, for example, in the event of damage to health.¹¹¹ However, a certain inconsistency should not be overlooked in the established decision practice of the ECJ where, as mentioned above, compensation is only admitted on the *aequo et bono* principle; nevertheless in its case *Kendrion NV vs. European Union*,¹¹² it laid down a requirement that GC, when judging a claim for the compensation for damage, should list the criteria applied to determining compensation; however, it can be assumed that, having regard for the relevant criteria in a decision on the compensation is necessary for its proper justification.¹¹³ Similarly to the national decision practice, the criteria for determining the compensation for non-material damage are only exceptionally listed in the regulation (exceptions in this regard include the Czech Civil Code¹¹⁴ and Penal Code, where the criteria are explicitly given) being mostly formulated in judicial decisions. The influence of the ECtHR decisions can then be observed towards a possibility of the encroachment being intensified by external publication.¹¹⁵

The CJEU has repeatedly stated that it respects the established practice of national legislations, with non-material damage being compensated for by lump sums; in this respect, a national court has much leeway (such as a lump-sum compensation in the event of encroachment upon personal rights during discrimination¹¹⁶). It stressed, however, that it is up a particular legal order of each Member-State to define appropriate process conditions with such conditions being not less favourable than those concerning similar proceedings based on the national law (principal of equality) and not excessively encroaching upon the course of exercising the rights awarded by the EU legal order (principle of efficiency).¹¹⁷ Thus, the ECJ has not rejected a lump-sum compensation for non-material damage,¹¹⁸ but emphasized that the compensation determined in this way should not weaken the position of the aggrieved party. In this connection, the ECJ also emphasized that it is admissible

¹¹¹ *Andrew Macrae Moat vs. Commission of the European Communities*, T-13/92, EU:T:1993:22, at [49].

¹¹² *Kendrion NV vs. European Union*, C-150/17, EU:C:2018:1014, at [110].

¹¹³ See e.g. *Safa Nicu Sepahan Co. vs. Council of the European Union*, C-45/15 P, EU:C:2017:402, at [103] and [107].

¹¹⁴ § 2957 CC: “The manner and amount of adequate satisfaction must be determined so as to also compensate for the circumstances deserving special consideration. These circumstances shall mean causing intentional harm, including, without limitation, causing harm by trickery, threat, abuse of the victim's dependence on the tortfeasor, multiplying the effects of the interference by making it publicly known or as a result of discriminating the victim with regard to the victim's sex, health condition, ethnicity, creed, or other similarly serious reasons. Account is also taken of the victim's concerns of loss of life or serious damage to health if such concerns were caused by the threat or other causes.”

¹¹⁵ See e.g. *Manel Camós Grau vs. Commission of the European Communities*, T-309/03, EU:T:2006:110, at [160].

¹¹⁶ § 15 Allgemeines Gleichbehandlungsgesetz (AGG) and *TK (C-773/18)*, *UL (C-774/18)*, *VM (C-775/18) vs. Land Sachsen-Anhalt*, EU:C:2020:125, at [56], [63].

¹¹⁷ *Susanne Bulicke vs. Deutsche Büro Service GmbH*, C-246/09, EU:C:2010:418, at [35]–[36], and *TK (C-773/18)*, *UL (C-774/18)*, *VM (C-775/18) vs. Land Sachsen-Anhalt*, EU:C:2020:125, at [56]–[63].

¹¹⁸ *Lucaccioni vs. Komise*, C-257/98 P, EU:C:1999:402, at [22]; or *Q vs. Commission of the European Communities*, F-52/05, EU:F:2008:161, at [240]; partially canceled in T-80/09 P.

for national legislation, which lays down a specific compensation scheme for non-material damage resulting from minor physical injuries caused by road traffic accidents, limiting the compensation payable for such damage in comparison with the compensation allowed for identical damage arising from causes other than those accidents.

Concerning this, the ECJ also noted that national legislation can lay a specific compensation scheme for non-material damage resulting from minor physical injuries caused by road traffic accidents. Compensation for such damage can be limited in comparison with the compensation allowed for identical damage arising from causes other than those accidents.

In this respect, the so-called Milan Tables would also comply.¹¹⁹

Concerning the compensation for non-material damage in the event of death, the GC also takes into consideration such circumstances as emotional bonds.¹²⁰ In a similar way, this is also approached by the Austrian¹²¹ and Czech¹²² judicial decisions in the event of bonds between siblings whose intensity exceeds the usual ones also taking into consideration dramatic circumstances of an accident.¹²³ Next, in its decisions, the GC formulates certain criteria such as age when judging the compensation for damage caused to the aggrieved party.¹²⁴

6.3.1 Burden of Proving

The burden of proving lies on the plaintiff. The plaintiff must prove all the presumptions of liability including the decisive cause of the damage.¹²⁵ In non-material damage, it may be particularly difficult to prove its occurrence as well as its causal nexus to an illegal act. Therefore, judicial decisions provide certain reliefs as far as the compensation is considered. Under special circumstances, it is sufficient, for example, to set only a potential, i.e., which non-material damage could have potentially been caused and, at least approximately, calculate the amount of non-material damage.¹²⁶ Thus, an approximate calculation or estimate will do.¹²⁷ (*“The Court of Justice has, admittedly, accepted that, in certain special cases, particularly where the alleged loss is difficult to calculate, it is not absolutely necessary to particularise its exact extent in the*

¹¹⁹ *Enrico Petillo, Carlo Petillo vs. Unipol Assicurazioni SpA*, C-371/12, EU:C:2014:26, at [9] and [47].

¹²⁰ *Stefano Missir Mamachi di Lusignano vs. European Commission*, T-502/16, EU:T:2019:795, at [169] and [172].

¹²¹ Judgment of the the Supreme Court of Austira, OGH 12/07/2007 2 Ob 263/06z.

¹²² Judgment of the Czech Constitutional Court, I. ÚS 2844/14.

¹²³ *Stefano Missir Mamachi di Lusignano vs. European Commission*, T-502/16, EU:T:2019:795, at [169].

¹²⁴ *Andrew Macrae Moat vs. Commission of the European Communities*, T-13/92, EU:T:1993:22, at [49].

¹²⁵ E.g. *Idromacchine Srl, and others vs. European Commission*, T-88/09 DEP, EU:T:2017:5, at [22].

¹²⁶ E.g. *Post Bank Iran vs. Council of the European Union*, T-559/15, EU:T:2018:948, at [109]–[117].

¹²⁷ *Donal Gordon vs. Commission of the European Communities*: T-175/04, EU:T:2007:38, at [45], and C-198/07 P, EU:C:2008:761, at [19]: *“In addition, in relation to the non-material damage, it should be pointed out that quite apart from the complete absence of any quantification of that damage, the applicant has not placed the Court in a position to assess the extent or character thereof. However, where compensation of non-material injury, whether as symbolic reparation or as true compensation, is sought, it is for the applicant to specify the nature of the non-material damage alleged in connection with the conduct of the Commission complained of and to quantify the whole of that damage, even if approximately.”*

application nor to calculate the amount of the compensation claimed”)¹²⁸ However, the plaintiff must then prove the existence of special circumstances that account for not precisely specifying the compensation.¹²⁹ In other words, the plaintiff, rather than giving precise specification of the compensation, can just describe the circumstances that were to cause non-material damage or¹³⁰ estimate the compensation (this applies both to damage to property and non-material damage).¹³¹

6.4 Emphasis on the EU Liabilities for Non-material Damage

The judicial decisions sufficiently specify the assumptions of non-contractual liability of the EU institutions. This may be an illegal act, such as an incorrect or delayed decision, next material or non-material damage as well as what is called casual nexus. In the role of an employer, the EU has an increased responsibility towards its employees and, as such, must be held responsible for any unlawful activity.¹³² If it is an EU institution that contravenes a legal regulation, this breach of law must be of a sufficient importance and the damage caused must be real and sufficiently specified.¹³³ From the legal point of view, it should also be noted that specific rules apply to actions for the compensation of damage caused by an EU institution to an officer or employee brought pursuant to art. 270 TFEU and art. 90 and 91 Staff Regulation, which are different from the rules of non-contractual liability pursuant to art. 268 and 340 TFEU.¹³⁴ The assumption is that an incorrect decision has been made causing non-material damage. In some cases, the compensation consists of a mere annulment of such a decision.

6.5 Function of the Compensation for Non-material Damage

In deciding about the compensation for non-material damage, its function is among the key points as well. In the established practice of the Czech,¹³⁵ German,¹³⁶ and Austrian¹³⁷ courts, this problem occurs repeatedly and it is, therefore, not surprising that its solution is also expected in the decision practice of the CJEU. Basically, the compensation of non-material damage may have three functions – compensatory, punitive, and preventive. Discussions

¹²⁸ *Chantal Hectors vs. European Parliament*, C-150/03 P, EU:C:2004:555, at [62].

¹²⁹ See e.g. *Inalca SpA – Industria Alimentari Carni and Cremonini SpA vs. European Commission*, C-460/09 P, EU:C:2013:111, at [104].

¹³⁰ *Donal Gordon vs. Commission of the European Communities*, T-175/04, EU:T:2007:38, at [45].

¹³¹ Např. *Bassam Sabbagh vs. Council of the European Union*, T652/11, EU:T:2015:112, at [65].

¹³² *SQ vs. European Investment Bank*, T-377/17, EU:T:2018:478, at [166].

¹³³ E.g. *Culin vs. Commission of the European Communities*, C-343/87, EU:C:1990:49, at [27].

¹³⁴ *Robert McCoy vs. Committee of the Regions*, T-567/16, EU:T:2018:708, at [164].

¹³⁵ Judgment of the Czech Constitutional Court, Pl. ÚS 16/04.

¹³⁶ KERSCHNER, F. *Schmerzengeld Kommentar und Judikatur*. Verlag Österreich, 2013, p. 93; RÜGGEMEIER, G. *Prinzipien des Haftungsrechts*. Nomos Verlagsgesellschaft, 1999, p. 3.

¹³⁷ FUCHS, M., PAUKER, W., BAUMGÄRTNER, A. *Delikts- und Schadenersatzrecht*. 9. ed. Springer, 2016, pp. 375–378. DOI: <https://doi.org/10.1007/978-3-662-52665-1>

are held to determine whether its nature should be punitive or compensatory. It follows from the Czech, Austrian, and German practice as well as from the expert's discourse that this question is not unequivocal. The basic question that needs to be answered is whether the compensation for non-material damage should also be of punitive nature and, if so, in which particular cases. This tendency to emphasize the punitive nature of compensation for non-material damage is evident mostly in cases of wilful encroachment upon personal rights or intentional damage to health or intentional impairment of the honour and dignity of a person in media. In such cases, the courts tend to prefer the punitive function of the compensation for damage.

Concerning the compensation of non-material damage, the EU legislation is not quite unequivocal – neither the legal regulations nor the judicial decisions do arrive at a clear conclusion. For example, pursuant to art. 17 Directive 2000/78/ES¹³⁸ providing a general framework for equal treatment at work, the sanctions have to be discouraging albeit reasonable. It is not required that the person damaged as a result of sex discrimination should be awarded a repressive compensation for damage that exceeds the full compensation for the actual damage caused representing a punitive measure.¹³⁹ Neither the principle of full compensation for the damage caused nor the one of proportionality do impose a duty of repressive compensation for damage. In connection with non-material damage then, the CJEU rejects punitive compensation for damage.¹⁴⁰

The purpose of compensation for non-material damage is to protect the injured party or the victims as the weaker participants, by which the interpretation should be guided of a particular piece of legislation.¹⁴¹ The CJEU decisions are based on the principle of process autonomy. Within the scope of non-existent legislation concerning the compensation for damage with the nature of a sanction as it is, it is the right of every national legal order to set criteria defining the scope of compensation, again respecting the principles of equality and efficiency.¹⁴² Concerning compensation for damage and possible awarding of a compensation having the nature of a sanction, if there is no relevant EU legislation in this respect, each national legal order can lay down criteria defining the scope of such compensation, given that the principles of equality and efficiency are complied with.¹⁴³

¹³⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303.

¹³⁹ *María Auxiliadora Arjona Camacho vs. Securitas Seguridad España SA*, C-407/14, EU:C:2015:831, at [33]–[35].

¹⁴⁰ *Kendrion NV vs. European Union*, T-479/14, EU:T:2017:48, at [113]: “It points out that it falls to the applicant to provide evidence of the alleged damage. The damage alleged is described in extremely vague terms, reflects an underlying confusion between the non-material damage and the material damage, and is not substantiated by any evidence at all. Moreover, the applicant is claiming punitive damages.” Appeal Case before the Court of Justice (C-150/17 P) EU:C:2018:1014. However, that part of the decision was not called into question in the statement of reasons in case C-150/17 P.

¹⁴¹ *Katarína Haasová vs. Rastislav Petrik, Blanka Holingová*, C-22/12, EU:C:2013:692.

¹⁴² See e.g. *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* (C-46/93) EU:C:1996:79 at [89] and [90].

¹⁴³ *Vincenzo Manfredi (C-295/04) vs. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito (C-296/04) vs. Fondiaria Sai SpA, and Nicolò Tricarico (C-297/04), Pasqualina Murgolo (C-298/04) vs. Assitalia SpA*, EU:C:2006:461, at [84]–[86] and [92]. And AFFERNI, G. Case: ECJ – Manfredi v Lloyd Adriatico. *European Review of Contract Law*. 2007. Vol. 3, no. 2. DOI: <https://doi.org/10.1515/ERCL.2007.011>

It follows from the above that the CJEU provides the Member States with a leeway to determine whether they require a punitive compensation or not. If, however, it is up to the ECJ or GC alone to decide about questions concerning the compensation for non-material damage, in view of the above mentioned decision ref. T479/14, it is our opinion that, in the event of compensation determined by the EU legislation alone, such as for employees, it rejects the concept of punitive compensation of damage.

6.6 Petty Non-material Damage

Concerning compensation for non-material damage, such as one to health, both the theory and the decision practice tend to favour the idea that not every non-material damage, that is, not every feeling of frustration, wrong, or damage to health should be compensated for based on the *minima non curat praetor* principle. No unequivocal criteria can be laid down to define how intensive an encroachment must be upon the private rights of a natural person or the goodwill of a legal entity. It is also clear from the decisions of national courts¹⁴⁴ that this doctrine is being applied. The German doctrine and judicial decisions, for example, still maintain that damage should be compensated for only if its intensity or duration is not irrelevant¹⁴⁵ or if it is evident in a particular case that the damage is not negligible.¹⁴⁶ According to the Czech judicial decisions then, mild or short-term mental discomfort need not be compensated for.¹⁴⁷ A principle formulated in this way, does have its practical meaning because, if it did not exist, the group would be increased of people somehow affected and claiming excessive compensation for negligible damage. The problem is exactly which damage should still remain uncompensated for and which not. The national doctrine and judicial decisions tend to prefer the restrictive interpretation meaning that the concept of seriousness should not in fact be applied to damage which, by its nature (intensity and duration) is negligible.

Two tendencies can be found in the CJEU decisions. The first one is obvious in the liability of the EU institutions. Thus, not in all the cases in which a wrongful decision has been made, an entitlement to compensation for non-material damage is created „According to settled case-law, a finding of the unlawfulness of a legal measure is not enough, however regrettable that unlawfulness may be, for it to be held that the condition for the incurring of the Community’s non-contractual liability relating to the unlawfulness of the institutions’ alleged conduct has been satisfied.”¹⁴⁸ From the ECJ decisions, it follows that the occurrence of a non-contractual EU liability is conditioned by the fulfilment of a number of conditions. One of such conditions is sufficiently grave violation of a legal regulation, aiming to acknowledge the rights of individuals, that is, an institution has committed not only a wrongful act but also seriously violated a legal

¹⁴⁴ E.g. Judgment of the Czech Supreme Court, 30 Cdo 3849/2014.

¹⁴⁵ BRAND, O. *Schadenersatzrecht*. München: C. H. Beck, 2010, p. 98.

¹⁴⁶ WALTER, W. Nová právní úprava náhrady škody v německém právu. *Evropské právo*. 2003, no. 1, p. 16.

¹⁴⁷ E.g. Judgment of the Czech Supreme Court, 30 Cdo 3849/2014.

¹⁴⁸ *Jose Maria Sison vs. Council of the European Union*, T-341/07, EU:T:2011:687, at [31].

regulation, related to the admission of rights to individuals.¹⁴⁹ This means that an act, in addition to being regretful, must also be grave. “*The decisive test for finding that a breach is sufficiently serious is whether the EU institution or organ concerned manifestly and gravely disregarded the limits on its discretion. Where that institution or body has only a considerably reduced discretion, or even none at all, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach.*”¹⁵⁰ Similarly also: As regards the decision to terminate the contract, it must be borne in mind that any dismissal is by nature likely to generate in the person dismissed feelings of rejection, frustration and uncertainty as to the future. Thus it is only where there are special circumstances that it may be declared that the unlawful conduct of an employer has had a psychological impact on the staff member beyond what a dismissed person normally feels, and that that person is entitled to the payment of a compensation for non-material damage.¹⁵¹ Another trend is that, although the personal rights of a natural person or the goodwill of a legal entity have been encroached upon, such encroachment is so small that it is not worth a compensation. Thus, if the plaintiff requires compensation for non-material damage that is not out-of-the-ordinary or that can be expected, this is a reason for such action to be dismissed.¹⁵²

Conclusion

Under the EU law, the decisions on non-material damage are mostly related to the liability of the EU institutions for possible deviations in their activities, next to the liabilities of the same institutions as employers and next to specific areas of regulation in which directives or orders assume compensation for damage caused by encroachments upon the rights of persons involved. Non-material damage, although seen as a separate category distinguishable from material damage, is not unequivocally defined by the EU law or decision by the CJEU. From the decision practice formed on the basis of the above areas, it can then be inferred that non-material damage is regarded not just as damage to life and health but also one to all other human rights such as to honour, family life, good reputation or to some other similar assets of legal entities (goodwill, reputation), which is similar to what is known in the national legislations.

The following basic principles can be observed in its decisions on non-material damage:

Flexibility in viewing the concept itself of non-material damage and its compensation – EU gives the Member States a leeway in determining non-material damage; this leeway can especially be observed concerning the compensation for non-material damage to health or in the event of death. Even if the EU gives the Member States freedom in setting the amount of compensation, it is still interested in harmonizing the regulations reasoning

¹⁴⁹ *HTTS Hanseatic Trade Trust & Shipping GmbH vs. Council of the European Union*, C-123/18 P, EU:C:2019:694, at [32]–[55].

¹⁵⁰ *Randa Chart vs. European External Action Service*, T-138/14, EU:T:2015:981, at [51].

¹⁵¹ *VE vs. European Securities and Markets Authority*, T-77/18 and T-567/18, EU:T:2020:420, at [227].

¹⁵² *Sviluppo Italia Basilicata SpA vs. European Commission*, C-414/08 P, EU:C:2010:165, at [141].

that, if in some Member States, particularly concerning the protection of consumers, compensation for non-material damage is awarded and in others not, this leads to disorders in EU internal market.¹⁵³ The compensation may also be awarded as reimbursement or in the non-monetary form (an excuse, annulment of decision) where adequate and sufficient. Concerning the amount of compensation, the CJEU does not provide exorbitant compensations. However, as in the national practice, the claim for compensation is higher than the actual sum awarded.¹⁵⁴ The method for calculating the compensation is significantly contingent on the particular circumstances of a case. Similar decisions should also be taken into consideration (not just by the CJEU, but also those by ECtHR). Nevertheless, no unequivocal guide can be traced in the judicial decisions. Accentuated are the *aequo et bono* principles, in further decisions also exact evaluation of the relevant criteria of the possibility of using an expert's opinion, particularly related to damage to health, or the importance of some circumstances (such as the age of the injured person, the publication of an encroachment). Clear-cut criteria, however, are not defined, which is of course understandable due to the diversity of the areas in relation to which the question is to be resolved and the range of the potential damage types. Concerning the application of national regulations, it is emphasized that the principles of equality and efficiency should be observed. In the CJEU interpretation, compensation for non-material damage is not regarded as a punishment of the perpetrator even if it accepts the possibility of such approach as part of applying national regulations, given that the principles of equality and non-discrimination are complied with. Although a person claiming compensation for non-material damage must state and prove material facts concerning the existence of obligation to compensate, in relation to the amount of the compensation, it accepts that an estimate is sufficient. The amount of compensation may also be reduced by the proportion in which the injured person itself participated in causing the damage.

It may be expected that the approach to non-material damage will develop along with the legal relations under which it is considered and that the above will also be reflected in the existing judicial decisions. Currently, the established decision practice is by no means united and the predictability of a decision in this area is less than, for example, for the decisions by ECtHR.¹⁵⁵ As is evident from the results of our analysis, the case law of the CJEU finds inspiration in the ECtHR, undoubtedly due to the longer and more diverse decision-making practice of the ECtHR in this area. This is evident in the example of compensation for non-pecuniary damage in the case of interference with the goodwill of a legal entity.

¹⁵³ E.g. *Simone Leitner vs. TUI Deutschland GmbH & Co. KG*, C-168/00, EU:C:2002:163.

¹⁵⁴ E.g. *Gascogne Sack Deutschland GmbH and Gascogne vs. European Union*, T-577/14, EU:T:2017:1.

¹⁵⁵ FIKFAK, V. Non-pecuniary damages before the European Court of Human Rights: Forget the victim; it's all about the state. *Leiden Journal of International Law*. 2020, vol. 33, No. 2, pp. 335–369.