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Abstract This article analyses EU case law concerning damages liability for non-material harm. The focus here is on recent case law, most of which concerns EU liability. The contribution first provides an overview of cases that deal with non-material damage. Secondly, it explores important themes that emerge from the case law, such as the necessity of monetary reparation, the conditions for harm and causation, and the amounts of compensation granted. Particular attention is paid to the topical notion of reputational harm. Claims concerning damage to reputation or image have frequently emerged in EU liability cases, but compensation has not been readily awarded. The European Court of Justice has, however, relatively recently upheld a decision awarding damages for unjustified and prolonged inclusion on a "sanctions list" (C-45/15 P *Safa Nicu*). The problem of distinguishing between non-material and economic harm under EU law is also discussed.

Introduction

Sometimes—albeit not often—the European Court of Justice (ECJ) and the General Court (GC[1]) award damages for non-material harm. With respect to tort law or damages liability law generally, "non-material harm" or "non-material damage"[2] refers to harm that is challenging to quantify in monetary terms. This is because the damage itself is of a "qualitative" nature and not directly related to a person's assets, wealth or income.[3]

Relevant types of harm include, in the case of natural persons, pain and comparable suffering, as well as harm to emotional well-being. It is debatable whether non-material harm—which is typically experienced as discomfort or inconvenience—is even possible in the case of legal entities, such as companies. However, legal entities may, at least arguably, suffer non-material harm in the form of, for example, a state of pressure. Negative situations faced in the context of commercial or professional activities may also lead to both economic and non-material harm, with these types of damage often appearing intertwined.[4]

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[*] Assistant Professor of Private Law. The author wishes to thank Daniel Wyatt for language editing and Professor Erdem Büyüksagis for insightful discussions. Any errors remain those of the author.

[1] The abbreviation "GC" is used to refer to the General Court and the Court of First Instance.

[2] Also "non-pecuniary harm" or "non-pecuniary damage".

[3] See also W.V.H. Rogers, "Comparative Report of a Project Carried Out by the European Centre for Tort and Insurance Law" in W.V.H. Rogers (ed.), *Damages for Non-Pecuniary Loss in a Comparative Perspective* (Wien: Springer, 2001), pp.245, 246; Opinion of Advocate General (AG) Wahl in *Petillo and Petillo* (C-371/12) EU:C:2013:652 at [38]–[39].

[4] See also Opinion of AG Wahl in *EU v Kendrion NV* (C-150/17 P) EU:C:2018:612 at [112]–[116]. Wahl underlines the actually *pecuniary* nature of some harms that have been previously characterised as non-material damage. Note also, e.g. Rogers, "Comparative Report" in *Non-Pecuniary Loss* (2001), pp.288–289. Some economic damages are abstract and theoretical, and

Under EU law, compensation for non-material harm is possible according to particular legislation, but damages can also be awarded without any express provision addressing non-material harm. Pieces of EU secondary legislation that discuss non-pecuniary damage include the recent General Data Protection Regulation 2016/679, which provides that anyone who has "suffered material or non-material damage as a result of an infringement of this Regulation" shall have the right to compensation.[5] Moreover, Directive 2004/48 on the enforcement of intellectual property rights, for example, confirms the compensability of "moral prejudice",[6] as does Directive 2016/943 on trade secrets.[7] Additionally, Directive 2015/2302 on package travel sets out that compensation under the Directive should cover "non-material damage such as ... loss of enjoyment of the trip or holiday".[8] However, even where legislation does not expressly mention non-material harm, the ECJ has generally interpreted the concept of "damage" and other relevant notions broadly, including non-material harm in the process.[9]

A significant proportion of the existing non-material harm case law concerns EU liability, that is, non-contractual liability under art.340 of the Treaty on the Functioning of the EU (TFEU), and liability in staff cases. In this context, non-pecuniary damage is recoverable.[10] Non-material harm has also been discussed in preliminary rulings concerning, in particular, horizontal liability between private parties and the

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therefore similar to non-material harm. For example, lost profits are established using hypothetical scenarios where a particular event causing the alleged harm would not have taken place. See, e.g. M. Lehmann, "Where does Economic Loss Occur?" (2011) 7 *Journal of Private International Law* 527, 531.

[5] Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, art.82(1).

[6] Directive 2004/48 on the enforcement of intellectual property rights [2004] OJ L157/45, art.13, recital 26.

[7] Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L157/1, art.14, recital 30.

[8] Directive 2015/2302 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1, recital 34.

[9] See *Leitner* (C-168/00) EU:C:2002:163 at [19]–[24] (concerning Directive 90/314 on package travel, package holidays and package tours [1990] OJ L158/59); *Petillo* (C-371/12) EU:C:2014:26 at [34]–[35] (on several Directives concerning insurance against civil liability in respect of motor vehicles). See similarly *Walz v Clickair SA* (C-63/09) EU:C:2010:251 (on the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999). See also on harm covered by "further compensation" (under 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, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1) *Sousa Rodríguez and Others* (C-83/10) EU:C:2011:652 at [36]–[46]. The ECJ has nevertheless noted that non-material harm is not covered by the liability rules set out in Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products 1985 OJ L210/29, as the Directive explicitly notes, in defining relevant damage, that "[t]his Article shall be without prejudice to national provisions relating to non-material damage" (art.9; see also art.1): *Veedfald* (C-203/99) EU:C:2001:258 at [27]–[33].

[10] See also, e.g. Opinion of AG Wahl in *Petillo* (C-371/12) EU:C:2013:652 at [40].

interpretation of EU secondary law.[11] In cases heard by national courts, many of the aspects concerning the conditions for liability and determining the amount of compensation to be awarded are, pursuant to the principle of national procedural autonomy, typically left for "gap-filling" national systems. Further, particular fields may be governed by particular norms. Nonetheless, cases on EU liability can shed light on the recoverability of the types of non-material harm as well as on the interpretation of the conditions for liability as matters of EU law.[12]

In any event, there is no clear general EU law approach regarding how non-material harm should be addressed, for example as to the requirements necessary to sufficiently establish harm.[13] However, it is possible to argue that compensability of non-material harm can, in principle, be assumed, even in contexts where explicit confirmation of the fact is lacking. The principle of *full compensation* underpins EU damages liability law, and that notion leads to the assumption that non-material harm is recoverable where no clear signs indicating otherwise exist. Further, the fields where recoverability of non-material harm has been expressly affirmed are increasing.[14]

This article presents a concise overview of existing EU level case law on non-material harm, and explores selected substantive themes that are generally challenging in non-material harm disputes and/or which appear topical on the basis of recent cases. Reflecting the contours of the case law, most of the substantive analysis of this study is based on EU liability judgments. Overall, this contribution elucidates the treatment of non-material harm in EU level cases and fills a gap in the literature by systematising and commenting upon contemporary case law. Remarks are also made concerning prevailing ambiguities or inconsistencies, as well as possible future developments.

In order to deal with these aims in a methodical manner, the article adopts the following structure. First, an overall picture of the relevant EU level case law is sketched, beginning with preliminary remarks and then moving on to a discussion of specific case examples. The following section ("Analysis: central substantive issues") presents findings on the general treatment of non-material harm claims, and then special focus is given to issues that are particular to non-material harm cases or that require specific attention in the context

[11] See, e.g. fn.9 above.

[12] On the relevance of different lines of damages liability case law with respect to each other see, e.g. K. Havu, "Full, Adequate and Commensurate Compensation for Damages under EU Law: A Challenge for National Courts?" (2018) 43 E.L. Rev. 24, 40–41; I. Durant, "Causation" in H. Koziol and R. Schulze (eds), *Tort Law of the European Community* (Vienna: Springer, 2008), pp.47, 55–56. See also, e.g. P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials*, 6th edn (Oxford: OUP, 2015), pp.256–259.

[13] See also N. Reich, "The Interrelation between Rights and Duties in EU Law: Reflections on the State of Liability Law in the Multilevel Governance System of the Union: Is There a Need for a More Coherent Approach in European Private Law?" (2010) 29 *Yearbook of European Law* 112, 131–132, 148–149.

[14] In addition to the secondary legislation and cases discussed above, see C. Heinze, *Schadenersatz im Unionsprivatrecht* (Tübingen: Mohr Siebeck, 2017), pp.595–602, and further 226–228, 309–310, 355–359, 415–417, 473–478. See also, e.g. A. Vaquer, "Damage" in *Tort Law of the European Community* (2008), pp.23, 39–41.

of non-material harm. More particularly, this part explores questions such as when does non-material harm necessitate monetary compensation, how are the conditions of harm and causation applied in the context of non-pecuniary losses and how is damage quantified and the precise amounts of compensation determined. The second substantive analysis section ("Further analysis: harm to reputation and distinguishing non-material and economic damage") provides further insights into two specific themes that are topical but which involve unresolved questions. First, the notion of reputational harm, a highly relevant matter and one that is frequently argued by claimants in recent and pending cases. And, secondly, the related, though broader, issue of the classification of harms as either non-material or economic, particularly as regards the elusive "border" between their theoretical existences. The study ends with succinct concluding remarks.

Non-material harm in EU case law: an overview

Preliminary remarks

Some additional background with respect to EU law is necessary before discussing the case law in detail. EU law does not contain any general and exhaustive tort law regime. The only liability disputes governed solely by EU law are those relating to EU liability. In cases belonging to the jurisdiction of national courts (Member State liability and horizontal liability), the "gap-filling" national remedial and procedural rules play a significant role, and the existing EU law on harm compensation mainly serves the goals of substantive EU law and is a tool for strengthening its practical effects. The legislative competence of the EU in the field of private law is limited to the powers conferred in the Treaties, with art.114 TFEU—that allows harmonisation for the purposes of "establishment and functioning of the internal market"—being the most relevant basis for issuing (sector-specific) legislation dealing with damages liability. A complete EU tort law regime, that is, one that does not rely on national law, is not possible given the current EU competences, or indeed even sensible considering the practical concerns regarding the enactment and enforcement of such a regime. In fact, no truly self-sufficient EU legislation-based liability systems exist even in particular fields.[15]

However, the ECJ's judicial competence to address issues of private law remedies constitutes an avenue for EU law to cover even more liability questions in areas where national procedural autonomy otherwise prevails. In addition to interpreting EU legislation, the ECJ can discuss compensating harms as a part of guidance on ensuring the full effect of EU law or effective judicial protection,[16] and it therefore enjoys a broad "de facto competence" of developing EU law on damages liability. Previously, the ECJ has handed down landmark rulings indicating that the possibility to obtain damages must exist in particular situations

[15] See however, e.g. Directive 85/374 concerning liability for defective products 1985 OJ L210/29; Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU [2014] OJ L349/1. For further discussion regarding EU damages liability law see D. Leczykiewicz,"Compensatory Remedies in EU Law: The Relationship Between EU Law and National Law" in P. Giliker (ed.) *Research Handbook on EU Tort Law* (Cheltenham: EE, 2017), p.63; Heinze, *Schadenersatz* (2017), pp.16–106.

[16] See arts 4(3) and 19 of the Treaty on European Union, and art.47 of the EU Charter of Fundamental Rights (EUCFR).

even though the Treaties or other legislation has not expressly provided for this.[17] Further, detailed (although sporadic) guidance on what kind of national rules are compatible with EU law has also been provided, thereby developing EU law on damages liability in the process.[18]

EU level case law that is relevant for studying liability for non-material harm, therefore, consists of different kinds of cases. Moreover, EU law on non-material harm can develop in different ways, that is, by means of sectoral legislation or ECJ guidance in different types of cases. An additional issue is that while the ECJ is the most authoritative interpreter of EU law, a significant portion of existing EU level judgments that touch upon non-material harm are those of the GC (which evaluates facts and evidence in cases concerning EU liability, while appeals to the ECJ are limited to questions of law[19]). GC judgments are, therefore, interesting when it comes to investigating non-pecuniary harm, but they must be studied bearing in mind that the GC does not possess the same authority as the ECJ when it comes to explaining the meaning of EU law.

Finally, it should be noted that EU law concepts such as "non-material harm/damage" and "damage" must be given an autonomous and uniform interpretation based on EU law alone.[20] The concept of non-material harm/damage has been used by the EU Courts when discussing, for example, pain or physical suffering,[21] harm to emotional well-being and the like,[22] reputational damage and other harm to personality rights (of both natural persons and companies),[23] and a "state of uncertainty" (of both natural persons and companies).[24] Further, loss of chance is, at least in some situations, considered non-material harm under EU law.[25] Therefore, it is observable that even under EU law, the notion of non-material harm is broad and covers different "qualitative" damages. As regards the actual English expressions used, "non-material"

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[17] *Francovich v Italian Republic* (C-6/90) EU:C:1991:428; *Courage Ltd v Crehan* (C-453/99) EU:C:2001:465.

[18] E.g. *AGM-COS.MET Srl v Suomen valtio and Lehtinen* (C-470/03) EU:C:2007:213; *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04 to C-298/04) EU:C:2006:461. See also W. van Gerven, "The ECJ Case-Law as a Means of Unification of Private Law", in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron, and M. Veldman (eds), *Towards a European Civil Code*, 3rd edn, (Alphen aan den Rijn: Kluwer, 2004), p.101.

[19] See art.256 TFEU and art.58 of the Statute of the Court of Justice of the EU.

[20] See also *Nokia Corp v Wärdell* (C-316/05) EU:C:2006:789 at [21]; *Diamantis* (C-373/97) EU:C:2000:150 at [34]; *Pafatis* (C-441/93) EU:C:1996:92 at [68]–[70].

[21] E.g. *Vainker and Vainker v Parliament* (T-48/01) EU:T:2004:61. See also *Grifoni v EAEC* (C-308/87) EU:C:1994:38.

[22] E.g. *Ombudsman v Staelen* (C-337/15 P) EU:C:2017:256; *Chart v EEAS* (T-138/14) EU:T:2015:981.

[23] E.g. *Safa Nicu Sepahan Co v Council* (C-45/15 P) EU:C:2017:402; *Shevill and Others v Presse Alliance SA* (C-68/93) EU:C:1995:61; *New Europe Consulting Ltd and Others v Commission* (T-231/97) EU:T:1999:146.

[24] E.g. *Campogrande v Commission* (C-62/01 P) EU:C:2002:248 at [41]; *Campogrande v Commission* (T-136/98) EU:T:2000:281; *Council v De Nil and Impens* (C-259/96 P) EU:C:1998:224; *Curto v Parliament* (T-275/17) EU:T:2018:479 at [108]–[118]; *Kendrion* (C-150/17 P) EU:C:2018:1014; *Kendrion NV v EU* (T-479/14) EU:T:2017:48; *C v Council* (T-84/98) EU:T:2000:156 at [96]–[103].

[25] See *Farrugia v Commision* (T-230/94) EU:T:1996:40 at [42]–[46]; *Moat v Commission* (T-13/92) EU:T:1993:22 at [44]–[49]. See also *Castille v Commission* (173/82, 157/83 and 186/84) EU:C:1986:54 at [30]–[38]. Compare to *Commission v Girardot* (C-348/06 P) EU:C:2008:107; *Citymo SA v Commission* (T-271/04) EU:T:2007:128.

harm/damage and "non-pecuniary" harm/damage appear to be essentially synonyms.[26] Other nomenclature is also seen in the case law, such as "moral prejudice", which seems to appear in immaterial property rights (IPR) cases in particular.[27] In the French versions of judgments, the ECJ often utilises the concept "*préjudice moral*"[28] as well as, for example, "*préjudice immatériel*",[29] without there being any discernible legal difference between the phrases.

Below, we look first at EU liability cases involving non-material harm and then explore a number of preliminary rulings. Cases are discussed according to rough "categories" but these are not that relevant per se, with the categorisation adopted merely to facilitate discussion. Similarly, the case examples highlighted are selected in order to illustrate the variety of legal issues that emerge in non-material harm disputes, but the goal is not to present an exhaustive list of relevant cases. More elaborate analysis of the substantive questions follows this overview.

EU liability cases

Staff cases

Cases involving EU officials (or their recruitment procedures) often touch upon non-material harm such as harm to mental well-being or to career. In *Hectors*, for example, the claimant argued that they had suffered non-material harm due to the lack of transparency related to an appointment procedure. Nevertheless, the damages claim was dismissed because the annulment of the contested decision was considered adequate compensation for the damage.[30] Generally, the issue of whether the annulment of a decision or other measure suffices as compensation for non-material harm reoccurs in staff cases.[31]

There are also staff cases that, for example, particularly underline the obligation of the claimant to provide information and evidence on the nature and extent of the damage.[32] For example in *Girardot*, the claimant requested compensation for deterioration of mental health, depression, and physical harm caused by the

[26] See *Staelen* (C-337/15 P) EU:C:2017:256; *Safa Nicu* (C-45/15 P) EU:C:2017:402; *Girardot* (C-348/06 P) EU:C:2008:107; *Wood* (C-164/07) EU:C:2008:321; *Parliament v Reynolds* (C-111/02 P) EU:C:2004:265.

[27] E.g. *Liffers v Producciones Mandarina SL and Mediaset España Comunicación SA* (C-99/15) EU:C:2016:173; *Nikolajeva v Multi Protect OÜ* (C-280/15) EU:C:2016:467.

[28] *Staelen* (C-337/15 P) EU:C:2017:256; *Girardot* (C-348/06 P) EU:C:2008:107; *Wood* (C-164/07) EU:C:2008:321; *Reynolds* (C-111/02 P) EU:C:2004:265; *Liffers* (C-99/15) EU:C:2016:173.

[29] *Safa Nicu* (C-45/15 P) EU:C:2017:402.

[30] *Hectors v Parliament* (C-150/03 P) EU:C:2004:555 at [55]–[57], [61]–[62]; *Hectors v Parliament* (T-181/01) EU:T:2003:13.

[31] E.g. *Culin v Commission* (C-343/87) EU:C:1990:49 at [25]–[29]; *Alba Aguilera v EEAS* (T-119/17) EU:T:2018:183 at [50]–[51]; *PB v Commission* (T-609/16) EU:T:2017:910 at [97]–[98]; *CW v Parliament* (T-742/16 RENV) EU:T:2017:338 at [64]–[67]; *Campogrande* (C-62/01 P) EU:C:2002:248 at [40]–[44]; *François v Commission* (T-307/01) EU:T:2004:180; *C* (T-84/98) EU:T:2000:156 at [101]–[103].

[32] E.g. *Gordon v Commission* (T-175/04) EU:T:2007:38 at [41]–[44]; *Gordon v Commission* (C-198/07 P) EU:C:2008:761 at [60]–[63]. The claim for damages (harm to career, health and well-being) was inadmissible because it was unsubstantiated.

unlawful rejection of her applications. However, no evidence—such as a medical certificate—had been produced regarding the existence of the harm and therefore it was not possible to grant compensation.[33]

"Sanctions list" cases (foreign and security policy)

A noteworthy category of non-material harm case law is the so-called "sanctions list" cases, which concern EU non-contractual liability related to restrictive measures adopted in view of a problematic situation in a particular country.[34] In *Safa Nicu*, the GC found that the unlawful (unjustified) adoption and maintenance of the restrictive measures placed upon a company caused it recoverable non-material harm, marking the first time in which monetary compensation for such damage was awarded in a sanctions case. The claimant argued that they had suffered damage to personality rights and reputational harm. The GC stated that the annulment of the company's entry on the restrictive measures list was such as to limit the amount of compensation,[35] but could not represent full reparation for the harm suffered. The GC paid attention to, inter alia, the gravity of the breach of EU law, its duration, and how the unjustified measures affected the behaviour of third parties, and set the amount of compensation *ex aequo et bono* at €50 000.[36] The ECJ (Grand Chamber) confirmed the outcome.[37]

In *Bank Mellat*, the ECJ clarified that restrictive measures of general application (concerning an entire business sector) cannot be considered likely to cause, as regards an individual operator, clear non-material harm in the form of damage to reputation.[38] Further, in *Bredenkamp*, the claimants were lawfully included on a list of targeted persons and entities and, therefore, the conditions for damages liability of the EU were not met.[39]

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[33] *Girardot v Commission* (T-10/02) EU:T:2006:148 at [133]–[137]; *Girardot* (C-348/06 P) EU:C:2008:107 at [30], [87]–[92].

[34] Such as Iran (see Regulation 961/2010 on restrictive measures against Iran and repealing Regulation 423/2007 [2010] OJ L281/1), or Zimbabwe (see Regulation 314/2004 concerning certain restrictive measures in respect of Zimbabwe [2004] OJ L55/1). The restrictive measures meant in this context are those imposed on certain persons and entities and involve, e.g. the freezing of the funds or economic resources belonging to members of the government of a particular country as well as to any natural or legal persons or entities associated with them. The target persons and entities are listed in annexes to EU secondary legislation instruments. See, e.g. *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [1]–[5]; *Bredenkamp and Others v Council* (T-66/14) EU:T:2016:430 at [1]–[9].

[35] *Safa Nicu* (T-384/11) EU:T:2014:986 at [87]. See also *Abdulrahim v Council and Commission* (C-239/12 P) EU:C:2013:331 at [72]–[74], [83]; *Commission and Others v Kadi* (C-584/10 P, C-593/10 P and C-595/10 P) EU:C:2013:518 at [134].

[36] *Safa Nicu* (T-384/11) EU:T:2014:986 at [78]–[92].

[37] *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [47]–[54], [101]–[111]. Some non-material harm arguments were presented for the first time before the ECJ and were therefore inadmissible. The ECJ emphasised that once the GC has found the existence of damage, it alone has jurisdiction to assess the means and extent of compensation. See also *Commission v Brazzelli Lualdi and Others* (C-136/92 P) EU:C:1994:211.

[38] *Bank Mellat v Council* (C-430/16 P) EU:C:2018:668 at [54]–[61]. The ECJ cited *Abdulrahim* (C-239/12 P) EU:C:2013:331 distinguishing the factual circumstances of the cases (in *Abdulrahim*, the issue was being associated with terrorist activities).

[39] *Bredenkamp* (T-66/14) EU:T:2016:430. It should be noted that even the justified and legal inclusion of a person or company on a sanctions list can be harmful. Nevertheless, in case of legal and/or general measures, the harm is not prima facie recoverable. Whether the EU can in some situations incur damages liability for harm caused by a piece of legislation which in itself is not

Finally, a natural person argued in the case of *Jannatian* that certain unlawful restrictive measures deprived him of his right to property and freedom of movement, and that a travel ban imposed upon him denied him the possibility of visiting his daughter in another country, thereby infringing his right to private and family life. Additionally, it was impossible for him to carry out bank transactions in his own name. At the hearing, the claimant also stated that the restrictive measures had damaged his reputation. The GC did not find any actual damage, and underlined that a finding that the restrictive measures were unlawful is in any event capable of constituting a form of reparation for non-material harm.[40]

Cases concerning excessive duration of court or administrative proceedings

The EU Courts have recently decided some interesting cases concerning EU non-contractual liability for harm concerning the GC's failure to adjudicate in a reasonable time in competition matters. The GC has awarded, and the ECJ affirmed, damages for non-material harm related to the prolonged state of uncertainty in which company claimants found themselves during the excessive duration of court proceedings.[41] Compensation for harm to reputation has, however, not been granted in these cases.[42] There are also cases that discuss the excessive length of administrative proceedings and non-material harm.[43]

Other EU liability cases

Moving onto other cases, *Staelen* boiled down to the question of what counts as recoverable non-material harm in the context of EU liability. The European Ombudsman had mishandled a complaint, but the ECJ (Grand Chamber) stated that the alleged damage, such as loss of confidence in the office of the Ombudsman, could not be considered recoverable—the GC had erred in law in this respect. Nonetheless, the ECJ found

unlawful is not entirely clear. In any event, such liability would be subject to stringent conditions, such as the unusual and special nature of the harm. See *FIAMM and Others v Council and Commission* (C-120/06 P and C-121/06 P) EU:C:2008:476 at [164]–[188], and Craig and de Búrca, *EU Law* (2015), pp.595–597.

[40] *Jannatian* (T-328/14) EU:T:2016:86. The impairment of freedom to travel was outside the scope of GC's jurisdiction, and the claim regarding reputation had been raised out of time.

[41] In *Kendrion*, €6000 was awarded: *Kendrion* (T-479/14) EU:T:2017:48 at [126]–[135]; *Kendrion* (C-150/17 P) EU:C:2018:1014. In *Gascogne*, the awarded sum was €5000 for each of the claimants: *Gascogne Sack Deutschland GmbH and Others v EU* (T-577/14) EU:T:2017:1 at [157]–[165]; *EU v Gascogne Sack Deutschland GmbH and Others* (C-138/17 P and C-146/17 P) EU:C:2018:1013.

[42] The GC found that the damage to reputation had not been proven and that in any event possible harm to reputation would be remedied by the finding of the breach of the obligation to adjudicate in a reasonable time: *Kendrion* (T-479/14) EU:T:2017:48 at [122]–[130]; *Gascogne* (T-577/14) EU:T:2017:1 at [151]–[154]. The decisions given on appeal did not affect the treatment: *Gascogne* (C-138/17 P and C-146/17 P) EU:C:2018:1013 at [57]–[60]; *Kendrion* (C-150/17 P) EU:C:2018:1014. Generally, significant reputational harm due to the excessive duration of court proceedings should be considered unlikely, since being involved in competition infringement proceedings in the first place is likely the issue that matters most in terms of company image. See also *Guardian Europe v EU* (T-673/15) EU:T:2017:377 at [42]–[43], [142]–[148], [108]–[115] (an appeal is pending before the ECJ).

[43] E.g. *Luccacioni v Commission* (T-551/16) EU:T:2017:751. See also *Curto* (T-275/17) EU:T:2018:479.

that €7000 was a suitable monetary compensation for psychological harm experienced as a result of the way in which the Ombudsman dealt with the complaint.[44]

Additional EU liability cases include *Idromacchine*, which concerned a state aid investigation by the Commission, breach of professional secrecy, and harm to the reputation of a company together with its shareholders and directors. The GC awarded a "fair compensation" of €20 000 for the non-material harm suffered by the company, but noted that the shareholders and directors did not prove any harm.[45] In *Sviluppo*, the ECJ noted that damage alleged to have resulted from a decision reducing regional development aid to a company was not unusual or special and therefore there was no need to rule on liability for them; the company had claimed compensation for economic and reputational harm.[46] Further, in the case *Agriconsulting*, for example, which concerned tendering for public service contracts, an allegedly unfairly excluded company claimed damages for "unfair pressure", but the claim was dismissed as unsubstantiated.[47] Non-material harm discussions can also be found in other EU public procurement cases.[48]

Preliminary rulings: examples and interesting questions

Some recent preliminary rulings by the ECJ discuss "moral prejudice" in the context of compensation for IPR infringements (horizontal liability). In *Liffers*, the ECJ affirmed that moral prejudice is relevant for determining full compensation under Directive 2004/48.[49] In *Nikolajeva*, it was noted that the narrower notion of "reasonable compensation" under art.9(3) of Regulation 207/2009 referred to recovering profits but excluded moral prejudice.[50] These rulings do not discuss the issues of determining or establishing non-material harm in detail and leave many matters for national laws and courts to resolve. IPR rulings can even be found that touch upon, for example, "damage to reputation" or "damaging reputation", but do not explore non-material harm from the standpoint of damages liability.[51]

In the consumer case *Leitner*, the ECJ confirmed that the general concept of "damage", as used in Directive 90/314 on package travel, encompassed non-material harm. The ECJ underlined that the purpose of the

[44] *Staelen* (C-337/15 P) EU:C:2017:256; *Staelen v Ombudsman* (T-217/11) EU:T:2015:238. See also the Opinion of AG Wahl in *Staelen* (C-337/15 P) EU:C:2016:823 at [112]–[114].

[45] *Idromacchine and Others v Commission* (T-88/09) EU:T:2011:641 at [63]–[76], [85]–[94]. Judgment given on appeal did not alter the outcome: *Idromacchine and Others v Commission* (C-34/12 P) EU:C:2013:552.

[46] *Sviluppo* (C-414/08 P) EU:C:2010:165 at [138]–[142].

[47] *Agriconsulting v Commission* (T-570/13) EU:T:2016:40 at [120]–[125]; *Agriconsulting v Commission* (C-198/16 P) EU:C:2017:784.

[48] E.g. *New Europe* (T-231/97) EU:T:1999:146; *Embassy Limousines & Services* (T-203/96) EU:T:1998:302.

[49] *Liffers* (C-99/15) EU:C:2016:173; Directive 2004/48 on the enforcement of intellectual property rights [2004] OJ L157/45, art.13(1). See also *Oławska Telewizja Kablowa* (C-367/15) EU:C:2017:36 at [30].

[50] *Nikolajeva* (C-280/15) EU:C:2016:467; Regulation 207/2009 on the European Union trade mark [2009] OJ L78/1.

[51] E.g. *Junek Europ-Vertrieb GmbH* (C-642/16) EU:C:2018:322; *Boehringer Ingelheim and Others* (C-348/04) EU:C:2007:249.

Directive was to offer protection to tourists, and non-material harm in the form of loss of enjoyment of holiday could not be excluded in the light of that goal.[52]

The case law also contains several motor vehicle insurance preliminary rulings that discuss secondary legislation and non-material harm. For example, the ECJ has confirmed that the notion of "(personal) injury" in Directive 72/166 and Directive 90/232 includes non-material harm, such as harm to psychological well-being.[53] Nevertheless, the rulings in this area focus on the harmonisation of liability insurance legislation and underline the relevance of national law in issues of civil liability related to traffic accidents,[54] with the result that the value of the existing traffic accident rulings for evaluating the recoverability of non-material harm under EU law is minor.

In principle, even Member State liability could encompass non-material harm. Prima facie, the fact that the conditions for EU non-contractual liability and Member State liability have converged—together with the justifications presented for this development—can be understood as pointing to this conclusion.[55] Nevertheless, EU level Member State liability cases touching upon non-material harm are few.[56] Notably, in his Opinion in *Schmidberger*, AG Jacobs stated that the issue of whether Member State liability could also extend to non-material harm has not been resolved.[57] To this author's knowledge, there are no rulings that explicitly provide that compensation must be provided for non-material harm.[58]

Moreover, the ECJ does not usually expressly and elaborately discuss the *protective scope* in the context of Member State liability. Some commentators have even pointed out that once the *Francovich* liability is, after

[52] *Leitner* (C-168/00) EU:C:2002:163 at [19]–[24]; Directive 90/314 on package travel, package holidays and package tours [1990] OJ L158/59. Inclusion of non-material harm was expressly noted in the new package travel Directive 2015/2302: see fn.8 above.

[53] *Drozdovs v Baltikums AAS* (C-277/12) EU:C:2013:685 at [36]–[48]; *Haasová* (C-22/12) EU:C:2013:692 at [46]–[59]; Directive 72/166 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability [1972] OJ L103/1; Directive 90/232 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (Third Directive) [1990] OJ L129/33. See also AG Jääskinen's Joint Opinion in *Haasová* (C-22/12) and *Drozdovs* (C-277/12) EU:C:2013:471.

[54] E.g. *Drozdovs* (C-277/12) EU:C:2013:6 at [31]. The rules on civil liability have not been harmonised.

[55] See *Laboratoires pharmaceutiques Bergaderm v Commission* (C-352/98 P) EU:C:2000:361 at [41]. The para. can be seen as suggesting that even the protective scope should be the same under EU liability and Member State liability.

[56] See also R. Rebhahn, "Non-contractual Liability in Damages of Member States for Breach of Community Law" in *Tort Law of the European Community* (2008), pp.179, 205; M. Wissink,"Overview" in *Tort Law of the European Community* (2008), pp.341, 358.

[57] Opinion of AG Jacobs in *Schmidberger* (C-112/00) EU:C:2002:437 at [34] (the AG's fn.16).

[58] See also M. Dougan, "Addressing Issues of Protective Scope within the *Francovich* Right to Reparation" (2017) 13 *European Constitutional Law Review* 124, 152–155. The author highlights, e.g. the economic harm-centred discussion in *Leth v Austria* (C-420/11) EU:C:2013:166, noting the absence of comments on non-material interests. Consider also *Wells* (C-201/02) EU:C:2004:12 at [65]–[70]: Member States are required to make good any harm caused by failure to carry out an environmental impact assessment, but the types of interests protected are not discussed.

a superficial analysis, found generally applicable, the protective scope can be defined "indirectly" through sporadic considerations related to the details of liability—although this is not particularly logical. Matters such as applying the causal link condition gain notable practical relevance, but are also significantly left for the national courts to resolve guided by the mere "outer limits" determined by EU law, for example the procedural autonomy principles of effectiveness and equivalence, and art.47 of the EUCFR.[59] Therefore, even though the recoverability of non-material harm under Member State liability can be seen as a reasonable starting point, EU law in this area is not entirely clear and may also develop by means of "secondary" clarifications concerning the limits related to the application of national law.

Generally in preliminary rulings, the ECJ could find, for example, that the obligations related to ensuring the full effect of EU law or effective judicial protection signify (under certain circumstances) that non-material harm must be compensated for—and even provide further guidance regarding the details of such liability. The existing preliminary rulings, however, mostly seem to deal with non-material harm as an issue related to interpreting the scope of particular secondary legislation provisions.[60]

Analysis: central substantive issues

Preliminary remarks

Preliminary rulings touching upon non-material harm illustrate significant reliance on Member State laws as regards resolving damages disputes. In EU liability cases, varying amounts of substantive reasoning can be found, but monetary damages not being awarded is in any event a common outcome. Numerous cases exist where claims are not substantiated or supported with sufficient evidence[61] or where the conditions of liability are not met.[62] One reason for denying compensation has been that what has been claimed to be non-material damage is mere "normal inconvenience", which does not constitute recoverable harm.[63] Moreover, monetary compensation is often not considered necessary to correct (possible) non-material harm.[64] Disputes have also

[59] See Dougan, "Protective Scope" (2017) *European Constitutional Law Review* 124. See also P. Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond* (Oxford: Hart Publishing, 2011), pp.158–176, 198–202. With respect to case law, see fn.58 above and, e.g. *Danfoss A/S* (C-94/10) EU:C:2011:674 at [30]–[39]; *AGM-COS.MET* (C-470/03) EU:C:2007:213 at [77]–[96].

[60] See also fn.9 above.

[61] E.g. *Buono and Others v Commission* (C-12/13 P and C-13/13 P) EU:C:2014:2284; *Inalca and Cremonini* (C-460/09 P) EU:C:2013:111 at [99]–[104]; *Girardot* (C-348/06 P) EU:C:2008:107 at [30], [87]–[92]; *Girardot* (T-10/02) EU:T:2006:148 at [133]–[137]; *Gordon* (C-198/07 P) EU:C:2008:761 at [60]–[63]; *Gordon* (T-175/04) EU:T:2007:38; *Agriconsulting* (T-570/13) EU:T:2016:40 at [120]–[125].

[62] E.g. *Trubowest Handel and Makarov v Council and Commission* (C-419/08 P) EU:C:2010:147; *USFSPEI v Parliament and Council* (T-75/14) EU:T:2017:813 at [41], [126]–[127]; *Paulini v ECB* (T-764/16) EU:T:2018:101; *CJ v ECDC* (T-692/16) EU:T:2017:894; *OZ v EIB* (T-607/16) EU:T:2017:495; *Oikonomopoulos v Commission* (T-483/13) EU:T:2016:421 at [244]–[247]; *TEAM v Commission* (T-13/96) EU:T:1998:254 at [77].

[63] See *Sviluppo* (C-414/08 P) EU:C:2010:165 at [139]–[142]; *Idromacchine* (T-88/09) EU:T:2011:641 at [91]–[93]. See also *Staelen* (C-337/15 P) EU:C:2017:256 at [91]–[95]; *Kendrion* (T-479/14) EU:T:2017:48 at [126]–[128].

[64] See also the following section.

arisen where damages have been claimed for harm suffered by others—such as employees of company claimants—without officially representing, in procedural terms, those other actors, with the compensation being declined for this reason.[65]

The cases reviewed suggest that certain key issues related to finding liability and awarding compensation are worthy of further analysis. Generally, the notions of defining, valuating and correcting recoverable non-material harm are necessarily difficult to deal with, and EU level judgments illustrate that the legal state regarding these issues remains relatively open. The EU Courts' detailed considerations of whether and when financial reparation is necessary are, therefore, explored below. Following this, the interpretation and application of the conditions of harm and causation and the reasoning of the EU Courts as regards these elements of liability is dealt with. Lastly, attention is paid to the assessment or quantification of damage as well as decisions regarding the amount of compensation—inherently tricky matters in cases involving non-pecuniary damage and which are, interestingly, discussed only superficially by the EU Courts.

When is monetary compensation required?

Under EU law, non-material harm is often considered sufficiently compensated without monetary reparation. This applies, in particular, to staff cases, but similar reasoning can also be seen in other (EU liability) cases. The frequent finding that financial compensation is unnecessary is a particular feature of non-material harm case law,[66] and therefore explored here in detail.

The ECJ stated in the staff case of *Culin* that non-material harm is normally remedied by the annulment of the contested measure so that a claim for damages "serves no purpose", but in the circumstances of this particular case, a symbolic compensation of one French franc was appropriate. The decision contested in the case had rejected the claimant's candidature for a promotion. A related document drafted by the Commission had contained an unfavourable assessment of the claimant's abilities, and the remarks proved to be incorrect. The assessment—which the ECJ considered to be offensive in itself—had been disseminated within the Commission. According to the ECJ, the non-material harm caused could be considered independent of the

[65] E.g. *Holistic Innovation Institute v Commission* (T-468/14) EU:T:2016:296; *Gascogne* (T-577/14) EU:T:2017:1 at [145]–[150]; *Kendrion* (T-479/14) EU:T:2017:48 at [117]–[120]. It should be noted that the European Court of Human Rights (ECtHR) has been willing to consider, e.g. the stress and pressure caused to employees and members of management while contemplating compensation for non-material harm to legal entities. See *Comingersoll SA v Portugal* (35382/97, 6 April 2000). Note also *Freedom and Democracy Party (ÖZDEP) v Turkey* (23885/94, 8 December 1999). The approach adopted by the ECtHR may be a reason for including arguments on employees' and directors' psychological pressure when companies claim damages before the EU Courts. More broadly, there are also numerous other EU cases where procedural issues have led to a denial of compensation, e.g. *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [108]–[109]; *Jannatian* (T-328/14) EU:T:2016:86 at [61]. See also *Buono* (C-12/13 P and C-13/13 P) EU:C:2014:2284.

[66] Compensation other than monetary may also be sufficient in other cases (see fn.78 below), but non-material harm appears to be the only type of damage that the EU Courts repeatedly find sufficiently corrected without financial reparation.

mere contested decision, and could not be fully remedied either by the publication of a correction or by quashing the rejection.[67]

In the case of *M*, the GC found that a Commission official's rights had been breached and reputation, including professional image, tarnished by the publication of a European Ombudsman decision containing his name—compensation of €10 000 was therefore necessary.[68] Compensation of €8000 was also awarded in *François*, where the claimant argued having suffered damage to reputation and honour and of prolonged state of uncertainty in the context of lengthy disciplinary proceedings. Several accusations made against the claimant proved to be incorrect, and the conduct of the Commission, the defendant, had not been entirely appropriate.[69]

The case law illustrates that (incorrect) assessments concerning a person's abilities or conduct that are likely to cause harm and are widely distributed can constitute a particular circumstance that justifies monetary compensation.[70] In contrast, where the alleged harm does not appear serious and relates directly to the contested measure itself, and where there are no other particular circumstances that would justify compensation, the sufficiency of the mere annulment of an unlawful measure is the main rule.[71] Accordingly, staff cases where claims for monetary reparation have been rejected are numerous.[72]

The mere annulment or finding of illegality has also been deemed sufficient in other areas.[73] The ECJ underlined in the sanctions case *Abdulrahim* that the recognition of unlawfulness of the contested measure could constitute "a form of reparation for the non-material harm".[74] *Safa Nicu* clarified that monetary compensation is not, however, automatically excluded. Because the allegation that the claimant was involved in nuclear proliferation affected the way that third parties behaved towards it, a state of affairs that lasted for years, the eventual finding of unlawfulness of the restrictive measures was considered insufficient to fully

[67] *Culin* (C-343/87) EU:C:1990:49 at [25]–[29]. Compare to, e.g. *Hectors* (C-150/03 P) EU:C:2004:555 at [55]–[61].

[68] *M v Ombudsman* (T-412/05) EU:T:2008:397 at [146]–[158].

[69] *François* (T-307/01) EU:T:2004:180. Monetary reparation was also considered necessary in, e.g. *C* (T-84/98) EU:T:2000:156; *CW* (T-742/16 RENV) EU:T:2017:338.

[70] See also *Josefsson v Parliament* (T-566/16) EU:T:2018:278 at [53]–[57] (an appeal is pending before the ECJ); *Dejaiffe v OHIM* (T-223/99) EU:T:2000:292 at [91]–[94].

[71] See also *DD v FRA* (T-742/15 P) EU:T:2017:528 at [72]–[94]; Opinion of AG Wahl in *Staelen* (C-337/15 P) EU:C:2016:823 at [108]–[112].

[72] E.g. *Campogrande* (C-62/01 P) EU:C:2002:248 at [20]–[22], [40]–[44]; *Campogrande* (T-136/98) EU:T:2000:281; *Neirinck v Commission* (C-17/07 P) EU:C:2008:134 at [95]–[98]; *Alba Aguilera* (T-119/17) EU:T:2018:183 at [50]–[51] (an appeal is pending before the ECJ); *Hochbaum and Rawes v Commission* (44/85, 77/85, 294/85 and 295/85) EU:C:1987:348 at [22].

[73] See *European Dynamics Luxembourg and Others v OHIM* (T-299/11) EU:T:2015:757 at [155]; *EUIPO v European Dynamics and Others* (C-677/15 P) EU:C:2017:998; *Gascogne* (T-577/14) EU:T:2017:1 at [151]–[159]; *Gascogne* (C-138/17 P and C-146/17 P) EU:C:2018:1013 at [60]–[62]. Note also *Staelen* (C-337/15 P) EU:C:2017:256 at [129]–[131].

[74] *Abdulrahim* (C-239/12 P) EU:C:2013:331 at [71]–[72].

remedy the harm.[75] The GC also pointed out that the annulment of the measures is likely to receive less attention than their original adoption, which signifies that the annulment would not necessarily affect the attitude of third parties.[76]

Overall, the EU Courts evaluate the need for financial compensation on a case-by-case basis, and it can therefore remain somewhat unclear to future claimants whether the circumstances of their case warrant monetary reparation. However, the successful award of damages is likely facilitated by arguments and possible evidence that emphasise: a) the exceptional and severe nature of the non-material harm; b) that the harm goes beyond that caused by the mere existence of the contested measure[77]; and c) that the annulment of the contested measure is in any case incapable of entirely undoing the negative effects suffered.

In the current state of EU law, when monetary reparation should or could be considered unnecessary in cases heard by national courts cannot be exhaustively determined. It is possible that clarifications made in the context of EU liability have implications for other types of cases, but in the absence of express statements to that effect, any impacts will remain unclear. Interestingly, some preliminary rulings not dealing with non-material harm do indicate that monetary compensation is not always necessary. Nonetheless, guidance by the ECJ on this theme is minimal and leaves many matters to be resolved by national courts.[78]

Relevant harm and causation

The issue of how the conditions of harm and causation are applied in the context of non-material damage deserves particular attention. Due to the abstract nature of non-pecuniary damage, it is often ambiguous how the existence and extent of relevant harm should be shown and what suffices for finding liability. Under EU law generally, the claimant must establish harm, a causal link between the wrongful conduct and the harm, and the extent of the harm.[79] Additionally, the damage must be actual and certain (or the like) and specific.[80]

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[75] *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [47]–[53], [86]–[92], [101]–[107]; *Safa Nicu* (T-384/11) EU:T:2014:986.

[76] *Safa Nicu* (T-384/11) EU:T:2014:986 at [88]. Also in, e.g. *Jannatian* (T-328/14) EU:T:2016:86, the GC particularly focused on the reactions of third parties (at [62]–[66]).

[77] See *Culin* (C-343/87) EU:C:1990:49 at [25]–[29]; *PB* (T-609/16) EU:T:2017:910 at [97]–[98]. However, it should be noted that the requirements of a sufficiently direct causal link and of harm that is relatively independent of the contested measure might not be easily met simultaneously.

[78] E.g. *Fuß v Stadt Halle* (C-429/09) EU:C:2010:717; *Palmisani v INPS* (C-261/95) EU:C:1997:351; *Maso v INPS* (C-373/95) EU:C:1997:353. For discussion see Havu, "Commensurate Compensation" (2018) E.L. Rev. 41–42; M. Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Oxford: Hart Publishing, 2004), pp.256–258.

[79] E.g. *Giordano v Commission* (C-611/12 P) EU:C:2014:2282 at [35]–[36]; *Blackspur DIY and Others v Council and Commission* (C-362/95 P) EU:C:1997:401 at [31].

[80] E.g. *Giordano* (C-611/12 P) EU:C:2014:2282 at [36]; *Agraz and Others v Commission* (C-243/05 P) EU:C:2006:708 at [26]–[27]; *Hansson v Jungpflanzen Grünewald GmbH* (C-481/14) EU:C:2016:419 at [35]; *De Nil* (C-259/96 P) EU:C:1998:224; *Münchener Import-Weinkellerei Binderer v Commission* (147/83) EU:C:1985:26; *Roquette Frères v Commission* (26/74) EU:C:1976:69; *SA Métallurgique Hainaut-Sambre v High Authority* (4/65) EU:C:1965:130.

In some cases, it is also expressly provided that the damage must be quantifiable.[81] With respect to details of causation, EU law is to some extent obscure. Cases on EU liability and on Member State liability illustrate the requirements of a "direct causal link" (or the like), but not consistently. Further, what is meant by "direct" is not entirely clear.[82] Whether and what kind of directness is required is also debatable in other contexts.[83] In any event, (direct) causal link means, roughly, that the wrongful conduct is an immediate and exclusive, or at least necessary, cause of the harm alleged.[84]

Establishing the conditions for liability is necessary even when the dispute concerns non-material harm and the amount of *compensation* could be, in the end, decided based on fair evaluation.[85] Confirmation of the amount of compensation occurs only after a finding of liability to pay damages in the first place. Nevertheless, the difficulties that arise when deciding upon a suitable amount of compensation for non-material harm are already present in proving and evaluating the presence of the conditions for liability. This is because the issues of whether there is actual and relevant harm and how to quantify it or value it in monetary terms are closely related. The EU Courts recognise this and balance the challenges of establishing abstract harm against the general conditions for liability. As a result, the Courts accept that no precise or scientific proof of non-material harm is necessarily available, and may be, at least in some cases, relatively lenient in their evaluation of whether harm and a causal link are established. Nonetheless, a mere allegation of having suffered non-pecuniary damage does not suffice.[86]

The EU Courts evaluate the sufficiency of information and proof of non-material harm on a case-by-case basis, and the extent of the judicial reasoning in the judgments varies. In some EU liability cases, damages claims for non-material harm are dismissed summarily because of a lack of information and proof regarding

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[81] E.g. *Brazzelli Lualdi* (C-136/92) EU:C:1994:211 at [42]; *Brazzelli Lualdi v Commission* (T-17/89) EU:T:1992:25.

[82] See *Francovich* (C-6/90) EU:C:1991:428; *Perillo v Commission* (T-7/96) EU:T:1997:94; *Dillenkofer v Bundesrepublik Deutschland* (C-178/94) EU:C:1996:375; *Bergaderm* (C-352/98 P) EU:C:2000:361; *Trubowest* (C-419/08 P) EU:C:2010:147; *Safa Nicu* (C-45/15 P) EU:C:2017:402. See also M. Weitenberg, "Terminology" in *Tort Law of the European Community* (2008), pp.309, 335–340; Durant, "Causation" in *Tort Law of the European Community* (2008), pp.64–67, and, e.g. A. Biondi and M. Farley, *The Right to Damages in European Law* (Alphen aan den Rijn: Kluwer, 2009), pp.55–60.

[83] See *Kone AG v ÖBB-Infrastruktur AG* (C-557/12) EU:C:2014:1317. Compare to *Europese Gemeenschap v Otis NV* (C-199/11) EU:C:2012:684 at [65].

[84] E.g. *Brinkmann Tabakfabriken GmbH v Skatteministeriet* (C-319/96) EU:C:1998:429; *Trubowest* (C-419/08 P) EU:C:2010:147 at [53]–[64]. See further on causation and relevant damage Havu, "Commensurate Compensation" (2018) E.L. Rev. 37–41; C. Van Dam, *European Tort Law*, 2nd edn (Oxford: OUP, 2013), pp.321–324, 359–360, 371–372. See also K. Oliphant, "The Nature and Assessment of Damages" in *Tort Law of the European Community* (2008), pp.241, 256–271.

[85] See also Opinion of AG Mengozzi in *Safa Nicu* (C-45/15 P) EU:C:2016:658 at [61]–[66]; *RX-II M v EMEA* (C-197/09) EU:C:2009:804 at [58]–[59]; Vaquer, "Damage" in *Tort Law of the European Community* (2008), pp.27–31, 39–42; Oliphant, "Damages" in *Tort Law of the European Community* (2008), pp.243–244.

[86] In addition to the examples discussed below, see *De Nil* (C-259/96 P) EU:C:1998:224 at [25]–[27]; *Idromacchine* (C-34/12 P) EU:C:2013:552 at [97]; Opinion of AG Wahl in *Staelen* (C-337/15 P) EU:C:2016:823 at [108], [114]; *Kendrion* (T-479/14) EU:T:2017:48 at [122]–[125].

the existence of actual and certain harm.[87] Nonetheless, and importantly, some judgments illustrate that in situations where proving the fact and extent of the alleged harm is not possible, it is sufficient to show that the wrongful conduct was, because of its gravity, of such a nature that it was prone to cause non-material harm.[88]

The EU Courts and AGs often emphasise the idea that the causal connection to non-material harm should be (sufficiently) direct or the alleged non-material damage a (sufficiently) direct consequence of the wrongful conduct.[89] There are also, however, non-material harm cases where the directness of the causal link does not receive particular attention.[90] In any event, the EU Courts have famously declined compensation for indirect and "distant" non-material harm, such as that suffered by family members of an accident victim (EU liability).[91] Receiving compensation for "distant" non-pecuniary harm is unlikely in other contexts as well. Even though the recoverability of consequential and indirect non-material damage would in principle be accepted, proving sufficient or likely causation would constitute a considerable practical challenge.

Requiring a clear and simple link between wrongful conduct and non-pecuniary damage is understandable. Other solutions would easily encourage opportunistic litigation.[92] Nevertheless, the fact that the alleged harm is non-material in nature does not necessarily signify that the evaluation concerning the sufficiency of a causal link or existence of relevant damage would be stricter than is the case with, for example, economic

[87] E.g. *Girardot* (C-348/06 P) EU:C:2008:107 at [30], [87]–[92]; *Girardot* (T-10/02) EU:T:2006:148 at [133]–[137] (no medical statements); *Agriconsulting* (T-570/13) EU:T:2016:40 at [121]–[123]; *Agriconsulting* (C-198/16 P) EU:C:2017:784 (the claimant company merely stated it had suffered "unfair pressure"). See also *Idromacchine* (T-88/09) EU:T:2011:641 at [87]–[94]; *Idromacchine* (C-34/12 P) EU:C:2013:552; *Jannatian* (T-328/14) EU:T:2016:86 at [59]–[66]; *CJ* (T-692/16) EU:T:2017:894 at [128]–[129] (an appeal is pending before the ECJ); *Farrugia* (T-230/94) EU:T:1996:40 at [40]–[46].

[88] E.g. *SELEX Sistemi Integrati v Commission* (C-481/07 P) EU:C:2009:461 at [37]–[38]; *Castille* (173/82, 157/83 and 186/84) EU:C:1986:54 at [30]–[38]; *Guardian* (T-673/15) EU:T:2017:377 at [144]–[147]; *BAI v Commission* (T-230/95) EU:T:1999:11 at [29]–[40]; *Embassy* (T-203/96) EU:T:1998:302. See also S.L. Kalėda, "Claims for Damages in EU Procurement and Effective Protection of Individual Rights" (2014) 39 E.L. Rev. 193, 202–206; Vaquer, "Damage" in *Tort Law of the European Community* (2008), p.29.

[89] E.g. *Trubowest* (C-419/08 P) EU:C:2010:147; *Staelen* (C-337/15 P) EU:C:2017:256 at [127]; *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [61]–[62]; *Kendrion* (C-150/17 P) EU:C:2018:1014 at [52]; Opinion of AG Wahl in *Staelen* (C-337/15 P) EU:C:2016:823 at [119] (citing *CAS Succhi di Frutta v Commission* (C-497/06 P) EU:C:2009:273); Opinion of AG Wahl in *Kendrion* (C-150/17 P) EU:C:2018:612 at [54]–[61]; *Chart* (T-138/14) EU:T:2015:981; *TEAM* (T-13/96) EU:T:1998:254 at [74]–[77]; *Oikonomopoulos* (T-483/13) EU:T:2016:421 at [244]–[247].

[90] E.g. *CJ* (T-692/16) EU:T:2017:894 at [124]–[128].

[91] *Leussink and Others v Commission* (169/83 and 136/84) EU:C:1986:371 at [21]–[22]. See similarly *Vainker* (T-48/01) EU:T:2004:61 at [206]–[212]. See also Opinion of AG Mengozzi in *Safa Nicu* (C-45/15 P) EU:C:2016:658 at [112]; *Trubowest* (C-419/08 P) EU:C:2010:147 at [53]–[64]. For discussion see Van Dam, *Tort* (2013) pp.371–372; Durant, "Causation" in *Tort Law of the European Community* (2008), pp.65–66; W. Van Gerven, J. Lever and P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford: Hart Publishing, 2000), pp.894–899.

[92] See also Opinion of AG Wahl in *Staelen* (C-337/15 P) EU:C:2016:823 at [108]. Consider also comparative remarks: C. von Bar, *The Common European Law of Torts, Volume Two* (Oxford: Clarendon Press, 2000), pp.169–170.

harm. Indeed, there are EU liability cases where compensation is awarded for non-material harm but denied for other types of alleged damage.[93] One reason contributing to this could be that evaluating the presence of non-material harm is highly casuistic, while in the context of other damages it is generally clearer what one must prove in order to be successful in a compensation claim. Moreover, presenting proof is feasible in the context of (more) material harms,[94] while this is often not the case with non-material harm.[95] Therefore, the EU Courts may be convinced by the information provided concerning non-material harm, as well as the relevant causal link, but find proof of other harms and their connection to the wrongful conduct insufficient.[96]

Overall, the manner in which the EU Courts will interpret and apply the conditions of harm and causation in a particular case can be challenging to foresee as hints of both stringent and lenient approaches to evaluating the presence of these conditions emerge from the case law. A matter that further complicates the analysis of non-material harm judgments, as well as the issue of their broader relevance, is that the Courts "mix" or intertwine the issues of conditions for liability, existence and recoverability of harm, need for monetary compensation, and assessing the final amount of reparation. The conclusions concerning these matters are often presented in such a manner that it is difficult or impossible to discern what the detailed evaluations related to each of the individual matters are.[97] This is a problem from the standpoint of legal certainty and predictability.

Quantifying the harm and the amount of compensation

Particularly relevant issues in the context of non-pecuniary damage are those of quantifying or assessing the harm and deciding upon the amount of compensation. This is because the harm is, by definition, not easy to value in terms of money. There are at least two interesting questions in this area: first, how do the EU Courts treat the parties' quantification attempts (or the lack of them); and, secondly, how do the Courts justify the compensation amounts awarded. The relevance of these questions is magnified by the fact that the notion of

[93] E.g. *Kendrion* (C-150/17 P) EU:C:2018:1014; *Gascogne* (C-138/17 P and C-146/17 P) EU:C:2018:1013; *Safa Nicu* (T-384/11) EU:T:2014:986; *Safa Nicu* (C-45/15 P) EU:C:2017:402; *Chart* (T-138/14) EU:T:2015:981. See also *Evropaïki Dynamiki v EIB* (T-461/08) EU:T:2011:494 at [208]–[213].

[94] However, e.g. loss of profit is typically "proven" using hypothetical scenarios, estimations and statistics.

[95] Evidently, this underpins the EU Courts' discussions regarding the *likelihood* that particular events or documents cause non-material harm: see *Bank Mellat* (C-430/16 P) EU:C:2018:668 at [59]–[60]; *Castille* (173/82, 157/83 and 186/84) EU:C:1986:54 at [30]–[38]; *Idromacchine* (T-88/09) EU:T:2011:641 at [48]–[49], [73], [92]; *Guardian* (T-673/15) EU:T:2017:377 at [144]–[147]; *Josefsson* (T-566/16) EU:T:2018:278 at [53]–[57]; *Dejaiffe* (T-223/99) EU:T:2000:292 at [91]–[94]. Nonetheless, medical statements or the like can be required instead of mere likelihood: *Girardot* (C-348/06 P) EU:C:2008:107 at [30], [87]–[92].

[96] Consider also Dougan, "Protective Scope" (2017) *European Constitutional Law Review* 142.

[97] See *Staelen* (C-337/15 P) EU:C:2017:256 at [127]–[131]; *Jannatian* (T-328/14) EU:T:2016:86 at [59]–[66]; *Chart* (T-138/14) EU:T:2015:981 at [151]–[155]; *Oikonomopoulos* (T-483/13) EU:T:2016:421 at [244]–[247]; *Embassy* (T-203/96) EU:T:1998:302 at [108]–[109]. See also Kalėda, "Damages in EU Procurement" (2014) E.L. Rev. 203.

relevant non-material harm is not clear-cut or easy to apply to particular facts. Investigating these matters is challenging because reasoning in the case law is sporadic and often vague. Nevertheless, it is still possible to offer some remarks on the topic.

Despite the main rule that the claimant should quantify the harm allegedly suffered, the ECJ has acknowledged that, in certain disputes, particularly where it is difficult to express the harm in figures, it is not absolutely necessary to particularise the exact extent of the harm in the application or to calculate the amount of the compensation.[98] The claimant is, nonetheless, under an obligation to explicitly justify why quantifying the harm or presenting an exact amount for the compensation claimed is not feasible.[99] The EU Courts have dismissed or found inadmissible non-material harm claims that have been presented without sufficient quantification attempts or justifications for the lack of quantification.[100] Nevertheless, there are numerous cases where the presented tentative quantifications are (implicitly) found sufficient, or the claimants are considered to have sufficiently indicated the facts and evidence on the basis of which the Court hearing the case could assess the nature and extent of the harm.[101]

In practice, it appears wise for the claimants to provide as much information as possible concerning the "mechanism" causing the harm, as well as the type of the harm and how in practice it manifests itself, in addition to stating that exact monetary quantification is impossible. Moreover, it is prudent to present a preliminary suggestion for the amount of compensation.[102]

When it comes to compensation sums awarded, the EU Courts base the awards of damages, for example, on a "fair evaluation *ex aequo et bono*",[103] or fix the amount of compensation "on an equitable basis".[104] Generally, the amounts of compensation granted for non-material harm are significantly lower than the sums claimed. This phenomenon is common in damages liability cases generally, but in non-material harm case law, the difference between the amounts of reparation claimed and awarded can be striking.

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[98] *Inalca* (C-460/09 P) EU:C:2013:111 at [99]–[104]. See also *Hectors* (C-150/03 P) EU:C:2004:555 at [62]; *CNTA SA v Commission* (74/74) EU:C:1975:59; *Granaria v Council and Commission* (90/78) EU:C:1979:85.

[99] *Hectors* (C-150/03 P) EU:C:2004:555 at [62]. See also, e.g. *Gordon* (T-175/04) EU:T:2007:38 at [43]–[46]; *Affatato v Commission* (T-157/96) EU:T:1998:12 at [38].

[100] E.g. *Inalca and Cremonini v Commission* (T-174/06) EU:T:2009:306; *Inalca* (C-460/09 P) EU:C:2013:111 at [99]–[104]; *Gordon* (C-198/07 P) EU:C:2008:761 at [60]–[63]; *Gordon* (T-175/04) EU:T:2007:38 at [43]–[46].

[101] E.g. *Safa Nicu* (C-45/15 P) EU:C:2017:402; *Safa Nicu* (T-384/11) EU:T:2014:986 at [87]–[92]; *Kendrion* (T-479/14) EU:T:2017:48; *François* (T-307/01) EU:T:2004:180. See also *TEAM* (T-13/96) EU:T:1998:254 at [27]–[30]; *Idromacchine* (T-88/09) EU:T:2011:641 at [59]–[76].

[102] See *Inalca* (C-460/09 P) EU:C:2013:111 at [88]–[94]; *Inalca* (T-174/06) EU:T:2009:306. As regards cases heard by the EU Courts, Rules of procedure of the GC [2015] OJ L105/1 require that applications are sufficiently precise (art.76).

[103] E.g. *Safa Nicu* (T-384/11) EU:T:2014:986 at [92]; *Kendrion* (T-479/14) EU:T:2017:48 at [135]; *M* (T-412/05) EU:T:2008:397 at [158].

[104] E.g. *François* (T-307/01) EU:T:2004:180 at [111]; *Chart* (T-138/14) EU:T:2015:981 at [151]–[155].

For example in *Safa Nicu*, the sum claimed for non-material harm was €2 000 000, with €50 000 ultimately awarded.[105] In *Idromacchine*, the claimants argued that suitable compensation could be €1 637 892–2 729 820 (based on a percentage of compensation claimed for material harm), but the GC considered the sum of €20 000 to represent fair compensation.[106] In recent judgments concerning failure to adjudicate in a reasonable time, hundreds of thousands and millions of euros were claimed for non-material harm, but sums in the amount of €6000 and €5000 were granted.[107] Differences in the amounts claimed and awarded can also be significant in staff cases.[108] In any event, there are also cases where the awards are, in terms of percentages, significantly closer to the compensation claimed,[109] and even cases where the amount claimed is awarded.[110] In the judgments reviewed here, express reasoning concerning the amount awarded is often extremely concise and therefore does not include detailed justifications.[111]

It is noteworthy that EU liability case law entails both judgments where the damages are clearly of a symbolic nature as well as decisions where more significant awards are made.[112] The nominal nature of reparation is visible particularly in staff cases, such as *Culin* (one French franc).[113] In some judgments this stems from the fact that the claims presented were based on an idea of mere symbolic correction.[114]

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[105] *Safa Nicu* (T-384/11) EU:T:2014:986 at [92]; *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [53], [104]–[107].

[106] *Idromacchine* (T-88/09) EU:T:2011:641 at [71]–[76]. Not affected by appeal: *Idromacchine* (C-34/12 P) EU:C:2013:552.

[107] Compensation was not awarded for all the heads of damages claimed. See *Kendrion* (T-479/14) EU:T:2017:48 at [112]– [135]; *Kendrion* (C-150/17 P) EU:C:2018:1014; *Gascogne* (T-577/14) EU:T:2017:1 at [157]–[165]; *Gascogne* (C-138/17 P and C-146/17 P) EU:C:2018:1013.

[108] E.g. in *Reynolds v Parliament* (T-237/00) EU:T:2002:11, the claimed amount for non-material harm was €250 000 but a nominal compensation of one euro was awarded. On appeal, the ECJ did not deal with the amount of compensation because it was unnecessary after finding that the GC should not have annulled the contested decision: *Reynolds* (C-111/02 P) EU:C:2004:265 at [62]–[63]. One euro was also awarded in *Dejaiffe* (T-223/99) EU:T:2000:292 (€10 000 was claimed). See also the non-contractual liability case *M* (T-412/05) EU:T:2008:397 (€150 000 was claimed and €10 000 was awarded; some of the claimant's statements concerning the harm were found to be incorrect).

[109] E.g. *Chart* (T-138/14) EU:T:2015:981 at [149]–[155] (€50 000 was claimed and €25 000 awarded).

[110] E.g. *Camós Grau v Commission* (T-309/03) EU:T:2006:110 at [162]–[164]; *Curto* (T-275/17) EU:T:2018:479 at [118]. In these, the claims were relatively modest (€10 000).

[111] See also earlier remarks by Oliphant, "Damages" in *Tort Law of the European Community* (2008), p.268.

[112] In terms of earlier discussion, see Vaquer, "Damage" in *Tort Law of the European Community* (2008), p.28; Oliphant, "Damages" in *Tort Law of the European Community* (2008), pp.243–244; Wissink, "Overview" in *Tort Law of the European Community* (2008), p.358; A.G. Toth, "The Concepts of Damage and Causality as Elements of Non-Contractual Liability" in H.G. Schermers, T. Heukels and J.P. Mead (eds), *Non-Contractual Liability of the European Communities* (Dordrecht: Martinus Nijhoff Publishers, 1988), pp.23, 30; Aalto, *Public Liability* (2011), p.37.

[113] *Culin* (C-343/87) EU:C:1990:49 at [25]–[29]. See also *Reynolds* (T-237/00) EU:T:2002:11 at [154] (one euro); *Dejaiffe* (T-223/99) EU:T:2000:292 (one euro); *V v Commission* (18/78) EU:C:1979:154 (one ECU).

[114] E.g. *Culin* (C-343/87) EU:C:1990:49 at [25]–[29]. See also *Barbi v Commission* (T-73/89) EU:T:1990:65 at [40]–[50]. Compare to *Reynolds* (T-237/00) EU:T:2002:11.

Additionally, the compensation is, arguably, to some extent symbolic in cases regarding, for instance, the failure to adjudicate in a reasonable time where the awards for non-material harm remain modest.[115]

The idea of a nominal reparation—intended as a message regarding the recognition of unjust harm—could perhaps relate to the notion that it is impossible to translate properly the damage suffered into euros.[116] Further, even where the nature and gravity of the harm have apparently had some impact on the compensation granted, an underlying idea of "essentially symbolic" reparation can affect the awards. The EU Courts' emphasis on the "corrective power" of recognising the unjustness of the wrongful conduct is visible in the approach explored above, according to which the annulment of a contested measure or a finding of unlawfulness is a central means of remedying non-material harm. Nevertheless, the Courts have awarded considerable damages in individual cases.[117] Additionally, the amount of compensation fluctuating from case to case could indicate genuine efforts to truly remedy the harm.[118]

Ultimately, the circumstances where only nominal compensation is granted and those where more significant sums are awarded do not appear to be clearly explained by the case law.[119] Moreover, and as noted by commentators, the relationship between nominal awards and the principle of full compensation is potentially problematic.[120] However, the EU Courts appear to just essentially combine harm quantification and compensation reasoning, rather than first quantifying the harm and then discussing appropriate compensation. This, in theory, eliminates the full compensation controversy, as no harm found goes without compensation.[121] However, this also brings us back to the ambiguity and unpredictability that surrounds the finding of relevant harm in the first place.

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[115] E.g. *Kendrion* (T-479/14) EU:T:2017:48; *Kendrion* (C-150/17 P) EU:C:2018:1014; *Gascogne* (T-577/14) EU:T:2017:1; *Gascogne* (C-138/17 P and C-146/17 P) EU:C:2018:1013. See also Opinion of AG Wahl in *Gascogne* (C-138/17 P and C-146/17 P) EU:C:2018:620 at [97].

[116] See also Opinion of AG Wahl in *Kendrion* (C-150/17 P) EU:C:2018:612 at [108]–[110], [125].

[117] E.g. *Safa Nicu* (C-45/15 P) EU:C:2017:402; *Safa Nicu* (T-384/11) EU:T:2014:986 (€50 000 awarded for non-material harm); *Vainker* (T-48/01) EU:T:2004:61 at [178]–[180] (€60 000 awarded for non-material harm); *Chart* (T-138/14) EU:T:2015:981 (€25 000 awarded for non-material harm).

[118] See also the discussion regarding the factors affecting the amounts awarded: M. Honoré and N. Eram Jensen, "Damages in State Aid Cases" (2011) 10 *European State Aid Law Quarterly* 265, 284. The authors cite the cases *Casini v Commission* (T-132/03) EU:T:2005:324; *Morello v Commission* (T-181/00) EU:T:2002:313; *Allo v Commission* (T-386/94) EU:T:1996:123.

[119] See however, e.g. *V* (18/78) EU:C:1979:154 at [19]: "it must be acknowledged that the applicant is entitled to a *gesture* from the Commission" (emphasis added).

[120] See, e.g. Vaquer, "Damage" in *Tort Law of the European Community* (2008), p.28.

[121] E.g. *Kendrion* (T-479/14) EU:T:2017:48 at [125]–[135]; *Kendrion* (C-150/17 P) EU:C:2018:1014 at [108]–[112]; *Gascogne* (T-577/14) EU:T:2017:1 at [155]–[165]; *Gascogne* (C-138/17 P and C-146/17 P) EU:C:2018:1013 at [44]–[62]. See also Opinion of AG Wahl in *Gascogne* (C-138/17 P and C-146/17 P) EU:C:2018:620 at [91], "the mere fact that the [GC] found the amount of compensation requested ... not justified, and thus awarded ... a lower sum, does not mean that the [GC] failed to compensate the damage in full. It only means that [the claimants] did not provide sufficient evidence to corroborate all the heads of damage". Note also *V* (18/78) EU:C:1979:154 at [19] (with the Court expressly noting, nevertheless, that the award is symbolic).

Further analysis: harm to reputation and distinguishing non-material and economic damage

Preliminary remarks

This main section addresses two interrelated, more specific themes: reputational harm, and the borderline between economic and non-material damage. As seen above, EU level cases on sanctions address the effect of restrictive measures on reputation or image. Additionally, reputation or professional reputation is discussed in a number of staff cases, and even disputes concerning, for example, financial aid or EU public procurement touch upon reputational harm. Many of the intricacies of the non-material harm case law expounded above—such as the ambiguity related to defining and finding relevant harm—are clearly observable in reputation cases. Moreover, in the era of fake news and automatised journalism, the legal treatment of harm to reputation is per se interesting and increasingly relevant. From a tort law standpoint, reputational harm raises tricky questions, not least because reputation itself is a matter of perception.[122]

Reputational harm is also an example of damage where the non-material and economic "parts" of the harm are challenging to separate from each other. Under EU law, the border between non-pecuniary and economic harm appears generally elusive, but seems to have practical relevance as regards the requirements for showing damage and in terms of determining compensation. Below, we first analyse the EU Courts' reasoning concerning the compensation of reputational harm, and then briefly explore the broader issue of the classification of harms as non-material or economic.

Reputational harm

Receiving monetary reparation for reputational harm under EU law is not common. In the case law of the EU Courts, this kind of harm is often deemed corrected by the finding of a breach of law or the annulment of a decision or measure. For example, in the excessive duration of proceedings cases *Gascogne* and *Kendrion*, it was indicated that even if proven (which was not the case), reputational harm would not require monetary damages.[123] A similar finding was made in *Guardian*,[124] and can also be seen in other strands of case law.[125]

[122] See on company reputation, e.g. R.G. Eccles, S.C. Newquist, and R. Schatz, "Reputation and its Risks" (February 2007) *Harvard Business Review*, *https://hbr.org/2007/02/reputation-and-its-risks* [accessed 5 April 2019].

[123] *Gascogne* (T-577/14) EU:T:2017:1 at [151]–[154]; *Gascogne* (C-138/17 P and C-146/17 P) EU:C:2018:1013; *Kendrion* (T-479/14) EU:T:2017:48 at [122]–[125], [130].

[124] *Guardian* (T-673/15) EU:T:2017:377 at [42]–[43], [142]–[148], [108]–[115].

[125] E.g. *European Dynamics* (T-299/11) EU:T:2015:757 at [155] (an appeal did not affect the treatment: *EUIPO* (C-677/15 P) EU:C:2017:998). See also Opinion of AG Sharpston in *Gul Ahmed Textile Mills* (C-100/17 P) EU:C:2018:214 at [105].

Only exceptionally, such as in the sanctions case *Safa Nicu*, is monetary compensation considered necessary.[126]

When discussing reputational harm in detail, the EU courts often understand it to be a type of non-material damage. However, it remains somewhat ambiguous as to what exactly non-material harm to reputation refers. In several cases, non-material harm to reputation is expressly distinguished from economic harm, such as loss of profits,[127] but exhaustive explanations of what non-economic harm to reputation entails are lacking. According to the EU Courts, non-material harm to company reputation occurs, for example, when a company is "publicly associated with conduct which is considered a serious threat to international peace and security", as a result of which "it becomes an object of opprobrium and suspicion", the behaviour of third parties towards the company is affected, and the effects of these developments go beyond the company's "current commercial interests".[128] Similarly, non-economic reputational harm of natural persons can manifest itself as opprobrium and suspicion, and can be observed on the basis of how third parties behave towards the person in question.[129] Open issues nevertheless include the question of what, precisely, harm to "professional reputation" of an individual refers to—and when harm to professional reputation is of an economic nature and when it is a non-material one. Additionally, the question of what kind of harm can be compensated as harm to professional reputation and what as harm to the ("general") reputation of natural persons is also relevant.[130]

Additional issues include those of when does recoverable non-material harm to reputation occur and how long can it continue, things that the EU Courts have not addressed in an exhaustive manner. In *Guardian*, the GC noted that harm to reputation could be a continuing type of damage, which signifies that it occurs all the time for as long as, for example, a press release containing negative information is publicly available.[131] Nonetheless, it should be noted that the elimination of the original cause of the damage, or even the publication of a correction, does not necessarily "correct" company reputation because those third parties who have seen only the original harmful information will not subsequently change their views.[132] Accordingly, harm to reputation or image could continue to occur, and even "expand", endlessly. This theme was touched upon, but not resolved from the standpoint of the extent of liability, in *Safa Nicu*, a case in

[126] *Safa Nicu* (C-45/15 P) EU:C:2017:402; *Safa Nicu* (T-384/11) EU:T:2014:986 at [87]–[91] (underlining the seriousness of the unjustified allegations, the long duration of their effects, and the fact that the incorrect information was made public as an official statement of position by an EU body).

[127] E.g. *Sviluppo* (C-414/08 P) EU:C:2010:165; *Safa Nicu* (C-45/15 P) EU:C:2017:402; *Safa Nicu* (T-384/11) EU:T:2014:986 [72]–[85].

[128] *Safa Nicu* (T-384/11) EU:T:2014:986 at [80], [82], [88]; *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [52]–[53], [104]–[105]. See also *Bank Mellat* (C-430/16 P) EU:C:2018:668 at [59].

[129] *Abdulrahim* (C-239/12 P) EU:C:2013:331 at [72]–[83]; *Jannatian* (T-328/14) EU:T:2016:86 at [62]–[66].

[130] See, e.g. the vague discussions in *M* (T-412/05) EU:T:2008:397 at [150]–[158]; *Camós Grau* (T-309/03) EU:T:2006:110.

[131] *Guardian* (T-673/15) EU:T:2017:377 at [38]–[42].

[132] A point implied in *Safa Nicu* (T-384/11) EU:T:2014:986 at [88].

which information regarding restrictive measures and allegations on nuclear proliferation remained publicly available on third party websites even after the annulment of the measures.[133] In practice, EU liability for "distant" non-material harm created by a "chain" of negative publicity appears unlikely.[134]

More generally, compensation for reputational harm is frequently declined because causation and/or legally relevant damage have not been sufficiently shown. The threshold for finding harm to reputation is often high, and negative developments that can be considered to be, for example, normal business risks do not constitute recoverable harm. With respect to EU procurement cases, damages for harm to reputation have been generally declined where there has not been any specific reason for assuming that a tenderer's reputation was particularly harmed. Merely losing the contract, or the fact that the procedure was unlawfully halted, does not prima facie tarnish the reputation of tenderers, and negative assessments by contracting authorities will not cause recoverable harm if the views are expressed in a neutral manner and are factually correct.[135] Recoverable damage can nevertheless be found, for example, where factually questionable and significantly harmful assessments (that for instance state that the tenderer is not a reliable commercial partner) are made public.[136] Similarly, in cases concerning financial aid to companies, the mere fact that aid is reduced is not considered to tarnish the reputation of the recipient.[137] Clearly harmful comments concerning an undertaking combined with a breach of professional secrecy in the context of a state aid investigation have, however, resulted in damages liability.[138]

In sanctions cases in particular, the EU Courts have underlined the significance of the (visible) reactions of third parties.[139] However, it is not clear what kind of reactions and what kind of proof are then sufficient in order to establish non-material harm. In case of economic harm, such as lost profits, a claimant may seek to show that its commercial contractual relationships ended or that it did not receive new orders, but do factors like these also prove that there was, in addition to economic harm, non-material harm? Further, while visible reactions or actions of third parties can tell something about company image or reputation, it is also possible

[133] *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [108]–[109].

[134] The existing case law suggests that the scope of recoverable harm is likely very limited. See also Opinion of AG Mengozzi in *Safa Nicu* (C-45/15 P) EU:C:2016:658 at [112].

[135] See *European Dynamics* (T-299/11) EU:T:2015:757 at [155] (not affected by appeal: *EUIPO* (C-677/15 P) EU:C:2017:998); *TEAM* (T-13/96) EU:T:1998:254 at [77]–[78] (not affected by appeal: *TEAM Srl* (C-13/99 P) EU:C:2000:329); *Icuna.Com SCRL* (T-383/06 and T-71/07) EU:T:2008:148 at [97]–[98]; *Embassy* (T-203/96) EU:T:1998:302 at [108]; Order of the President of the GC in *Computer Resources International v Commission* (T-422/11 R) EU:T:2011:566 at [39]–[42]; Order of the President of the GC in *Communicaid Group v Commission* (T-4/13 R) EU:T:2013:121 at [40]–[41].

[136] See *New Europe* (T-231/97) EU:T:1999:146 at [5], [53]–[56]. For more on EU procurement cases, see Kalėda, "Damages in EU Procurement" (2014) E.L. Rev. 201–202.

[137] *Sviluppo* (C-414/08 P) EU:C:2010:165 at [139]–[142]. See also *Holistic Innovation* (T-468/14) EU:T:2016:296 at [83]–[84]; *Holistic Innovation Institute v Commission* (C-411/16 P) EU:C:2017:445.

[138] *Idromacchine* (T-88/09) EU:T:2011:641 at [48], [63]–[76]; *Idromacchine* (C-34/12 P) EU:C:2013:552.

[139] E.g. *Safa Nicu* (T-384/11) EU:T:2014:986 at [87]–[91]; *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [52]–[53], [104]–[105]; *Jannatian* (T-328/14) EU:T:2016:86 at [62]–[66].

that reputation is harmed without there being immediate and demonstrable reactions from others. For instance, negative company image may affect the willingness of potential employees to work at a particular company, but this is not necessarily observable before the company attempts to hire new staff. Proving a causal connection between the original wrongful conduct (alleged cause) and action or inaction of third parties is generally challenging, and even more so when the harm manifests itself after a period of time. Moreover, establishing that reputational harm is sufficiently actual and certain, and not just purely speculative, is difficult.[140] In fact, actual and certain non-material harm to reputation, which extends beyond current economic interests, is nearly an oxymoron.

Notably, it seems that the EU Courts can be willing, at least in some cases, to (implicitly) accept *likely* causally connected harm without truly requiring harm and causation to be established. For example, in *Safa Nicu*, the EU Courts' discussion about the presence of causally connected non-pecuniary damage is concise. Causation and relevant harm are seemingly assumed; however, no statement is made to the effect that establishing these conditions is unnecessary because unlawful restrictive measures are, due to their gravity, inherently likely to cause non-material harm.[141] Considering the fact that some cases illustrate a high threshold for finding recoverable harm to reputation, it is striking how bluntly and simply relevant harm is found in *Safa Nicu*.

While the EU Courts' reasoning regarding harm to reputation is not extremely detailed, an obvious question that arises is what, in practice, distinguishes those cases where monetary compensation for reputational harm is awarded, despite the apparently cautious overall approach to granting damages. Although the judgments do not tend to involve elaborate explanations regarding the application of the conditions of harm and causation, in many cases the outcomes "seem just".[142] It seems as though the EU Courts abstain from

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[140] See also *Safa Nicu* (T-384/11) EU:T:2014:986 at [70]–[85]; *Jannatian* (T-328/14) EU:T:2016:86 at [62]–[67].

[141] In *Safa Nicu* (T-384/11) EU:T:2014:986, the GC started by trying to distinguish economic and non-material harm, and noted that non-material harm extends beyond "current commercial interests". The finding of non-material harm is not explained in length (at [72]–[85]). At [80], "when an entity is the subject of restrictive measures because of the support it is has allegedly given to nuclear proliferation, it is publicly associated with conduct which is considered a serious threat to international peace and security, as a result of which it becomes an object of opprobrium and suspicion (which thus affects its reputation) and is therefore caused non-material damage." At [85]: "In view of the foregoing ... the restrictive measures concerning the applicant caused it non-material damage, distinct from any material loss resulting from an impact on its commercial relations." See also *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [50]–[53], [103]–[107]. Compare to, e.g. *SELEX* (C-481/07 P) EU:C:2009:461 at [38]; *Jannatian* (T-328/14) EU:T:2016:86.

[142] E.g. compensation was granted in *Safa Nicu* (C-45/15 P) EU:C:2017:402, but reparation for reputational harm has been denied in cases concerning failures to adjudicate in a reasonable time (*Gascogne* (T-577/14) EU:T:2017:1; *Gascogne* (C-138/17 P and C-146/17 P) EU:C:2018:1013; *Kendrion* (T-479/14) EU:T:2017:48), and in EU procurement cases where nothing particularly "reputation-harming" occurs (e.g. *European Dynamics* (T-299/11) EU:T:2015:757 at [155]; *EUIPO* (C-677/15 P) EU:C:2017:998). Similarly, the EU courts have been generally reluctant to award compensation in staff cases but nevertheless have awarded reparation in situations that involve factually incorrect and per se offensive, widely distributed comments on a person's abilities or conduct (e.g. *François* (T-307/01) EU:T:2004:180, see also *M* (T-412/05) EU:T:2008:397, compare to e.g. *PB* (T-609/16) EU:T:2017:910 at [95]–[98]; *CJ* (T-692/16) EU:T:2017:894 at [128]–[129]).

awarding monetary damages for non-material harm to reputation where the claim is far-fetched, but are willing to provide reparation where the factual circumstances point to obvious detrimental effects to reputation/image and the negative effects are clearly related to the breach of EU law identified.[143] This is, in itself, a reasonable overall logic. However, more explicit reasoning from the EU Courts regarding the factors underpinning awards of monetary compensation would be welcome. Particularly valuable would be a detailed discussion concerning the application of the conditions of harm and causation as well as regarding the issue of when relevant harm can prima facie be presumed to have occurred.[144]

The border between non-material and economic harm and the relevance of distinguishing these

A broader topical issue is that of which harms should be considered non-pecuniary and which economic. Rarely discussed explicitly in the case law, the classification of harms and the use of the label of non-material harm are nevertheless of practical relevance. The preceding review suggests that whether a harm is considered non-pecuniary or economic in nature can potentially affect the application of the conditions for liability, whether monetary damages will or will not be awarded, and the amount of compensation. Moreover, the EU Courts often appear to adopt a particularly strict approach to establishing actual and certain, causally connected harm and its extent when a claim concerns economic damage.[145] In theory, non-material harm cases are not the only ones where some kind of facilitations (claimant-friendly presumptions) could be applied due to the nature of the harm and objective difficulty of presenting conclusive proof.[146] Nevertheless, the (occasional) more lenient treatment as regards establishing the fact and extent of relevant harm appears to take place solely with respect to non-material harm, not other losses.[147]

[143] To illustrate this point, the excessive duration of court proceedings does not inherently significantly affect the reputation of the parties involved, but an official statement alleging connections to reprehensible nuclear proliferation does. See also the reasoning in *Bank Mellat* (C-430/16 P) EU:C:2018:668 at [54]–[61].

[144] There are partially inexplicable differences in the considerations visible in different cases, e.g. while rejecting compensation because of a procedural reason in the sanctions case *Jannatian* (T-328/14) EU:T:2016:86, the GC nonetheless indicated that there is no actual damage that would require monetary reparation (at [61]–[66]). It seems that here the GC is more reluctant to find relevant harm than in *Safa Nicu* (T-384/11) EU:T:2014:986.

[145] E.g. *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [64]–[67], [71]–[80], [94]–[99]; *Safa Nicu* (T-384/11) EU:T:2014:986; *Kendrion* (C-150/17 P) EU:C:2018:1014; *Gascogne* (C-138/17 P and C-146/17 P) EU:C:2018:1013; *SELEX* (C-481/07 P) EU:C:2009:461 at [37]–[38].

[146] See *Inalca* (C-460/09 P) EU:C:2013:111 at [104]; *Hectors* (C-150/03 P) EU:C:2004:555 at [62].

[147] In addition to cases cited in fn.145 above, see, e.g. the discussion in *Guardian* (T-673/15) EU:T:2017:377; *European Union v ASPLA and Armando Álvarez* (C-174/17 P and C-222/17 P) EU:C:2018:1015. Generally, the apparently strict treatment of causally connected economic harm can relate to the argumentation advanced by the parties. It is possible that claimants do not, e.g. discuss the difficulties of establishing the quantum of economic harm in that much detail, whereas in the context of non-material harm this can be a more "inherent" part of the argumentation. Detailed justifications for not indicating the exact quantum of, e.g. lost profits, could be accepted if presented.

However, the border between non-material and economic harm can be hazy,[148] this being the case even under EU law. It can be unclear, for instance, whether the harms discussed in a particular case are of a non-material or pecuniary nature. Further, harms that in reality are best characterised as potential future economic losses can generally be referred to as non-material harm.[149] Moreover, there are EU level cases which treat loss of chance or opportunity as non-material harm and cases which classify it as economic harm.[150] With respect to damages suffered in the context of commercial or professional activities, non-material and economic harm may be difficult to distinguish from each other, even at the level of theory.[151]

The difference in treatment or classification in EU level cases suggests that the border between non-material and economic harm, or the relevant desirable solutions in this respect, are not self-evident to the EU Courts. An additional possibility is that, in some situations, the EU Courts do not find distinguishing between non-material and economic harm important. Nevertheless, because the classification of harm can affect its treatment (intentionally or not), the categories of harm and the use of the notion of non-material harm should be well thought through. Moreover, it appears practically and theoretically problematic to utilise the concept of non-material harm while meaning hypothetical future economic harm *and* simultaneously hold on to the starting point that only actual and certain harm is recoverable under EU law. It seems, therefore, that EU law in this area exists in a state of flux.

Concluding remarks

Overview

This article has provided a brief overview of EU level judgments concerning non-material harm. Further, it has explored selected substantive issues that either deserve special attention in the context of non-pecuniary damage (such as the practical application of the conditions of harm and causation), or can be characterised as particular features of non-material harm cases (such as finding monetary compensation unnecessary, or awarding merely nominal compensation). Also investigated was the notion of reputational harm and the border between non-material and economic harm.

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[148] See, e.g. conclusions based on comparative work: Rogers, "Comparative Report" in *Non-Pecuniary Loss* (2001), pp.288–289.

[149] See, e.g. *Kendrion* (T-479/14) EU:T:2017:48 (state of uncertainty, reputational harm); *Camós Grau* (T-309/03) EU:T:2006:110 (professional reputation, professional situation). See also *Oikonomopoulos* (T-483/13) EU:T:2016:421 at [244]–[247]; *Idromacchine* (T-88/09) EU:T:2011:641 at [63]–[69]; Opinion of AG Wahl in *Kendrion* (C-150/17 P) EU:C:2018:612 at [112]–[116]. With respect to other European liability regimes see Rogers, "Comparative Report" in *Non-Pecuniary Loss* (2001), pp.288–289; V. Wilcox, *A Company's Right to Damages for Non-Pecuniary Loss* (Cambridge: CUP, 2016), pp.62–79.

[150] See, e.g. *Farrugia* (T-230/94) EU:T:1996:40 at [42]–[46]; *Moat* (T-13/92) EU:T:1993:22 at [44]–[49], compare to *Girardot* (C-348/06 P) EU:C:2008:107; *Citymo* (T-271/04) EU:T:2007:128. See also *Evropaïki Dynamiki* (T-461/08) EU:T:2011:494 at [207]–[213], and further Vaquer, "Damage" in *Tort Law of the European Community* (2008), pp.42–43; Kalėda, "Damages in EU Procurement" (2014) E.L. Rev. 203–206.

[151] See also, e.g. discussions by Heinze, *Schadenersatz* (2017), pp.220–226, 309–310; Oliphant, "Damages" in *Tort Law of the European Community* (2008), p.260.

EU law does not encompass any generally applicable, coherent tort law regime, and the existing EU legislation that mentions non-material harm is sector-specific. Both "sectoral" and more general EU law on damages liability is nevertheless developed by the ECJ. Overall, the flow of new EU level cases touching upon non-material harm appears constant.[152] Non-pecuniary harm is frequently addressed in various EU liability disputes. Further, EU liability judgments can also have implications with respect to other kinds of damages cases. In particular, the interpretation of central notions of EU law, particularly as regards their application to different non-pecuniary loss situations, is of clear broader relevance. Judicial reasoning concerning non-material harm does not appear highly field-specific,[153] which increases the likelihood of its relevance even in other types of cases.

Preliminary rulings on horizontal liability have also discussed non-material harm, although these leave the details to be resolved by national courts and mostly provide comments regarding the principal question of whether this type of harm is covered by damages liability or the concept of "damage" in a particular field. Member State liability is an area where issues of non-material harm have not yet been significantly explored. Generally, in preliminary rulings, matters related to recoverability of non-material harm, or to the issue of how easy obtaining compensation for this kind of damage should be, could surface as a part of considerations related to guaranteeing the full effect of EU law or effective judicial protection. If the ECJ addresses non-material harm in this kind of context, the guidance could be relevant in different types of cases heard by national courts. However, it remains to be seen whether, when and how the ECJ will embrace these matters.

Central substantive issues

Overall, recoverability of non-material harm under EU law appears a valid presumption where no clear indications regarding the alternative are visible. The most detailed substantive reasoning concerning the compensation of non-pecuniary loss is currently found in EU liability cases, which are heard by the EU Courts in their entirety, whereas preliminary rulings only deal with the selected questions of law that are submitted to the ECJ. Even under EU liability, central questions such as the details of the application of the conditions of harm and causation, and establishing these preconditions in a sufficient manner, remain partially obscure. It is likely that the case law further evolves, bringing, bit-by-bit, more clarity regarding the considerations related to finding liability. Nonetheless, the evaluation of harm and causation will conceivably always remain, to some extent, casuistic because of the fact-intensity of these issues.

[152] E.g. a Curia database (*http://curia.europa.eu/juris/recherche.jsf?language=en*) search of closed GC and ECJ cases from the years 2017–2018 with the free text search term "non-material harm" produces 51 hits (as of 29 December 2018).

[153] Having said that, the ECJ nevertheless often cites case law from the same area, that is, staff cases in staff cases and so on. See, however, e.g. *Staelen* (C-337/15 P) EU:C:2017:256; Opinion of AG Wahl in *Kendrion* (C-150/17 P) EU:C:2018:612 at [103]–[116]: in these, different types of cases are recalled.

A particularity of non-material harm cases is that financial reparation is often considered unnecessary. An observable starting point, which applies to different strands of EU liability case law, is that harm closely related to an unlawful measure or other breach of EU law is remedied primarily by the annulment of the said measure or by a finding of unlawfulness.

The obligation upon a claimant to quantify the harm and present the specific amount of compensation claimed applies, prima facie, even in non-material harm cases. Nonetheless, the EU Courts can find claims sufficiently precise even in the absence of exact quantification, as long as the claimant explicitly argues that measuring the harm or objectively valuing it in monetary terms is not possible. The claimant must in all instances, however, provide information on the nature of the harm suffered. The amounts of reparation granted by the EU Courts for non-material harm often remain modest and, in some cases, even nominal. It is difficult to envision how the case law will evolve in the future, but one relatively safe prediction is that it will remain unlikely that the EU Courts award hundreds of thousands of euros or more.

Topical themes

The EU Courts have recently tackled reputational harm in contexts such as failures to adjudicate in a reasonable time and foreign and security policy sanctions. Previously, cases regarding EU procurement, EU officials and financial aid, for example, have often included claims for reputational harm. Nonetheless, many details regarding addressing harm to reputation are still open under EU law, and even the concept of non-material reputational harm itself remains blurry.

A related issue is the generally unclear nature of the borderline between non-material and economic harm. There is some ambiguity, and even inconsistencies, in the classification of harms in EU level judgments. The distinction between economic and non-material harm does, however, seem to matter in terms of case outcomes. For instance, merely nominal damages awards appear in non-material harm cases but not elsewhere. Non-material harm cases also involve a particular (occasional) willingness of the EU Courts to accept that it is likely that wrongful conduct caused harm.

Liability for non-material harm has the potential to become increasingly relevant in the near future, for instance as regards horizontal liability. New preliminary rulings on the interpretation of recent pieces of EU secondary legislation, such as those relating to data protection[154] or trade secrets,[155] will likely be seen in the coming years. Notably, although several contemporary secondary laws mention non-material harm, details regarding liability and determining the amount of compensation are, significantly, left for national systems

[154] General Data Protection Regulation [2016] OJ L119/1, see art.82(1).

[155] Directive 2016/943 on the protection of trade secrets [2016] OJ L157/1, see art.14, recital 30.

that are required to operate within the "outer limits" set out by EU law. Case law on EU liability on the one hand, and on full effect, effective judicial protection and national procedural autonomy on the other, can provide hints as to what kind of decisions by Member State courts are EU law compatible, but further guidance by the ECJ is also likely needed. In areas where there is no legislation expressly mentioning non-material harm, the role of the ECJ in clarifying the law is even more important. For instance, it will be interesting to see whether the ECJ will expressly state at some point that ensuring the right to compensation for non-material harm is generally required in Member States as a part of guaranteeing effective judicial protection in cases of breach of EU law.