

Compensation for non-material damage caused to legal entities in the decision-making practice of the CJEU and the ECHR

Researcher Ondřej PAVELEK¹
Researcher Drahomíra ZAJÍČKOVÁ²

Abstract

This article examines the recognition and compensation of non-material damage to legal entities by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR). Both courts acknowledge the moral dimension of legal entities, addressing non-material damage that is inherently intertwined with these entities and challenging to quantify. While neither court provides a precise definition of non-material damage, this ambiguity enables adaptable interpretations tailored to specific cases. The absence of a comprehensive definition results in a lack of a singular criterion for determining compensation amounts, given the multifaceted nature of non-material damage encompassing subjective and objective elements. Legal entities primarily seek compensation for harm to goodwill and associated intellectual property issues, as well as the frustration stemming from prolonged legal proceedings. The divergence between the CJEU and ECHR becomes evident in the awarded compensation, with the latter typically granting amounts four times smaller. This discrepancy can be attributed to the CJEU's focus on economic competition-related claims involving substantial sums. Notably, the analysis of court decisions reveals an escalating trend in cases related to non-material damage compensation for legal entities, particularly since 2010.

Keywords: CJEU, ECHR, non-material damage, legal entities, compensation, moral dimension.

JEL Classification: K13, K15

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1. Introduction

Compensation for non-material damage is one of the legal areas that are controversial to a certain extent. This controversy is primarily based on the difficulty of defining such compensation. This is especially true with compensation for non-material damage caused to legal entities although it is the Court of Justice of the European Union (further on referred to as „CJEU”) and the European Court for Human Rights (further on referred to as „ECHR”) that decide about the compensation for non-material damage to legal entities. The European Convention on Human Rights admits, in accordance with Article 41, the right to a just compensation in the event of a breach of an agreement. This just compensation can

¹ Ondřej Pavelek – Silesian University in Opava, Czech Republic, ondrej.pavelek1@gmail.com, ORCID 0000-0001-5329-4039.

² Drahomíra Zajíčková – Mendel University in Brno, Czech Republic, drahomira.zajickova@mendelu.cz, ORCID 0000-0002-2974-0948

be one for material as well as non-material damage being awarded to both legal entities and natural persons.³ Non-material damage that occurs, for example, in relation to damage to the goodwill of a legal entity is probably among the intangible assets that are the most difficult to grasp and it is also a very significant one. It is inherently connected not only with business and legal entities. The importance of goodwill is even greater in the online environment, where good reputation or, on the contrary, libel and untrue information spread very quickly.⁴ Damage to the reputation of a legal entity may have far-reaching consequences for the economic activities of a businessman as well as for the company management⁵ or the shareholders.⁶ Damage to the reputation does not only concern well-established businessmen. It may also cause damage to beginning ones.⁷ For these reasons it is suitable to analyse the decision-making practice of the CJEU and the ECHR in this area. The importance is even more considerable since the area of compensation for non-material damage in this context has not yet been sufficiently treated.⁸

There are decisions made by the CJEU and by the ECHR but, in comparison to the interference with other human rights (e.g., protection of privacy or damage to the health of a natural person), there are not so many. However, the CJEU and the ECHR formulate, in their decision-making practice, certain starting points based on which they decide about compensation for non-material damage caused to legal entities. These points then undoubtedly affect the decisions made by the courts in Member States.⁹

³ Altwicker-Hamori, Szilvia; Altwicker, Tilmann; Peters, Anne. „Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights“. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)/Heidelberg Journal of International Law (HJIL)* 76 (2016): 4-6. Accessed June 10, 2023, <http://dx.doi.org/10.2139/ssrn.2631404>.

⁴ Höflinger Patrick J.; Christian Nagel; Philipp Sandner. „Reputation for technological innovation: Does it actually cohere with innovative activity?“ *Journal of Innovation & Knowledge*, Volume 3, Issue 1 (2018): 26-39. Accessed 6 May, 2023, <https://doi.org/10.1016/j.jik.2017.08.002>. and Vanleenhove Cedric. „The European Court of Justice in Bolagsupplysningen: The Brussels I Recast Regulation's jurisdictional rules for online infringement of personality rights further clarified.“ *Computer Law & Security Review*, vol. 34, Issue 3, (2018): 640-646. Accessed 7 May 2023, <https://www.sciencedirect.com/science/article/pii/S0267364917303801>.

⁵ Peráček, Tomáš; Kassaj, Michal. „The influence of jurisprudence on the formation of relations between the manager and the limited liability company.“ *Juridical Tribune*, vol. 13, Issue 1 (2023): 43-62. Accessed 5 August 2023, <https://doi.org/10.24818/TBJ/2023/13/1.04>.

⁶ Tauscher Karl. „Reputation and new venture performance in online markets: The moderating role of market crowding.“ *Journal of Business Venturing*, Volume 34, Issue 6 (2019), Accessed 4 May 2023, <https://doi.org/10.1016/j.jbusvent.2019.06.005>

⁷ Domenico Nicolò. „Towards a Theory on Corporate Reputation and Survival of Young Firms.“ *Procedia Economics and Finance*, Volume 22, (2015): 296-303. Accessed 8 April 2023, [https://doi.org/10.1016/S2212-5671\(15\)00289-0](https://doi.org/10.1016/S2212-5671(15)00289-0).

⁸ Havu, Katri. „Damages Liability for Non-material Harm in EU Case Law.“ *European Law Review* 44, (2019). <https://core.ac.uk/download/pdf/328855506.pdf>. Accessed 8 May 2023.

⁹ Emberland, Marius. „Compensating Companies for Non-Pecuniary Damage: Comingersoll s.a. v Portugal and the Ambivalent Expansion of the ECHR Scope.“ *The British Year Book of International Law*, Oxford Sv. 74, No. 1, (2004): 415. Accessed 8 May 2023, <https://doi.org/bybil/74.1.409>.

2. The date and methodology

The aim of this paper is to answer the following questions:

- What is the conception and characterisation of compensation for non-material damage caused to legal entities in the judicial decisions made by the CJEU and the ECHR (RQ1)?
- In which areas is compensation for damage caused to legal entities awarded (RQ2)?
- What are the criteria for determining the amount of such compensation (RQ3)?
- What is the average amount of compensation for non-material damage formulated in the complaint and that actually awarded by the CJEU and the ECHR (RQ4)?
- Is the number of decisions concerning compensation for non-material damage to legal entities increasing or not (RQ5)?

The questions will be mainly answered through an analysis of the decision-making practice of the CJEU and the ECHR.

3. Conception and characterisation of non-material damage to legal entities

Although non-material damage is often primarily associated with national law, typically involving compensation for death or personal injury,¹⁰ it is also relevant at the levels of European and international law.¹¹ Notably, the ECHR and the ECJEU play significant roles in this domain.¹² Particularly concerning the CJEU, there is a need for the stabilization of its case law in the area of non-material damage, given the impending requirement to address several questions within the context of the GDPR.¹³ The involvement of these international judicial institutions in matters of non-material damage is logical, as they adjudicate on damages suffered by

¹⁰ E. g. Pavelek, Ondřej. „Non-material damage on health and death (Czech: Náhrada nemajetkové újmy na zdraví a při umrscení)“, C.H.Beck, (2020). or Lahe, Janno; Irene Kull. „Compensation of non-pecuniary damage to persons close to the deceased or to the aggrieved person“, *International Comparative Jurisprudence*, Volume 2, Issue 1, (2016): 1-7. Accessed 8 June 2023, <https://doi.org/10.1016/j.icj.2016.03.001>; Mudrak, Inna; Podobnyi, Oleksandr; Vashchuk, Olesia. „Compensation of damages to victim of criminal offence under Criminal Procedure Code of Ukraine.“ *Juridical Tribune*. Volume 9, Issue 2 (2019): 385-391.

¹¹ Fikfak, Veronika. „Non-pecuniary damages before the European Court of Human Rights: Forget the victim; it's all about the state.“ *Leiden Journal of International Law*, 33(2), (2020): 335-369. Accessed 5 July 2023, <https://doi.org/10.1017/S0922156520000035>.

¹² Pavelek, Ondřej; Adamová, Hana. „Court of Justice of the European Union on Non-material Damage.“ *Časopis pro právní vědu a praxi*. sv. 30, n. 3, 2022: 547--571. Accessed 10 Max 2023, <https://journals.muni.cz/cpv/article/view/20844/28236>.

¹³ Knetsch, Jonas. "The Compensation of Non-Pecuniary Loss in GDPR Infringement Cases" *Journal of European Tort Law*, vol. 13, no. 2, (2022): 132-153. Accesed 5 July 2023, <https://doi.org/10.1515/jetl-2022-0008>.

individuals.¹⁴ The principle of full compensation for the victim aligns harmoniously with international law. In the context of the ECHR, reparation, including moral damages resulting from violations of fundamental human rights, holds a pivotal position within the concept of just satisfaction.¹⁵ This applies to both direct victims, including legal entities, and indirect victims.¹⁶ Therefore, it is only natural that numerous scholars have undertaken analyses of non-material harm before these courts, often employing empirical studies of case law.¹⁷ Furthermore, ongoing analyses are presently addressing the realm of compensation related to climate change.¹⁸ Undoubtedly, this will also intersect with considerations of non-material harm and its implications for legal entities.

Many scientific publications – books or papers – focus on the conception of material and non-material damage and the differences.¹⁹ There are also many different decisions made by national courts defining the decision-making principles and formulating the criteria for determining the amount of the compensation.²⁰ The number of definitions and ways of determining the amount of the compensation is large. Basically, a generally widespread conclusion can be reached that material damage is defined as damage to property and can be, in comparison with compensation for non-material damage, determined using objective criteria and then expressed in money. Non-material damage is defined in various ways. Either by the property to which the non-material damage such as stress, discomfort, health, emotional harm or damage to other personality rights is related, or simply as the opposite to material damage.²¹ Regarding the quantification of non-material damage, it is usually quite complicated as it is a very individual type of damage and the specific circumstances of the case are always crucial. It is even more difficult with

¹⁴ Shelton, Dinah. „Compensation, Remedies in International Human Rights Law, 2nd edn (Oxford, 2006; online edn, Oxford Academic, 1 Jan. 2010. Accessed 5 July 2023.

¹⁵ Felix E. Torres. „Reparations: To What End? Developing the State’s Positive Duties to Address Socio-economic Harms in Post-conflict Settings through the European Court of Human Rights. *European Journal of International Law*, Volume 32, Issue 3 (2021): 807–834. Accessed 5 July 2023, <https://doi.org/10.1093/ejil/chab059>.

¹⁶ Practice Direction: Just satisfaction claims (Article 41 of the Convention). Accessed 5 August 2023, https://www.echr.coe.int/docu/ments/d/echr/pd_satisfaction_claims_eng.

¹⁷ Szilvia Altwicker-Håmori; Tilmann Altwicker; Anne Peters. Measuring Violations of Human Rights an Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights. Quant_Human.Rights. Available at: https://www.mpil.de/files/pdf4/Quant_Human.Rights1.pdf.

¹⁸ Keller, Helen. „Something Ventured, Nothing Gained? - Remedies before the ECtHR and Their Potential for Climate Change Cases.“ *Human Rights Law Review*, Volume 22, Issue 1 (2022). Accessed 10 May 2023, <https://doi.org/10.1093/hrlr/ngab030>.

¹⁹ Koziol, Helmut; Apathy, Peter; Koch, Bernhard A. *Österreichisches Haftpflichtrecht Bd 3*, 3. Auflage. Wien: Jan Šramek, 2014. p. 358.

²⁰ Danzl, Karl-Heinz. *Das Schmerzensgeld in medizinischer und juristischer Sicht*, 10. Auflage. Manz’sche Verlags- und Universitätsbuchhandlung. Wien. 2013, pp. 245-274. or Kerschner Ferdinand. *Schmerzensgeld Kommentar und Judikatur*. Verlag Österreich. 2013; or: Slyzik, Andreas. *Beck’sche Schmerzensgeld-Tabelle 2019 Mit praxisorientierter Kommentierung des Schmerzensgeldrechts*. C.H. Beck Verlag, 2018.

²¹ It is defined in this way for example by § 253 BGB.

legal entities as, by their nature, they have no „feelings“. Any generalized determination of the compensation for non-material damage is problematic. When determining the amount of the compensation, it is suitable to have a comprehensive overview of the facts that may affect the amount and thus provide the courts with sufficient scope for appropriate individualization. However, this approach can easily, although not necessarily, get in conflict with a principle that is adhered to by the Member State courts as well as the CJEU and the ECHR, the principle of legitimate expectation. The certain balancing of the principle of legitimate expectation with taking account of the circumstances of the case then results in restraint in relation to the amount of compensation for non-material damage, which is usually lower or considerably lower than in the case of material damage. It is not that non-material damage is less significant (it is, after all, often a decision concerning the assets protected by a legal entity) but its determination is not easy and the compensation proposed by the injured party is often very high. To balance these two principles, i.e., to determine a just (appropriate) amount of the compensation, is very difficult but also necessary. It is true that compensation for non-material damage can never really be quantified with money. It is always just a certain approximation to the ideal case.²²

Neither the CJEU nor the ECHR have chosen the path of providing a clear definition but rather a path from the specific to the general, i.e., based on specific cases, rather they define partial aspects of non-material damage and, based on these partial cases, they identify general bases for making decisions concerning the amount of compensation. It must be stressed that the comparison of the judicial decisions of the CJEU and the ECHR in this area is definitely not random because the CJEU often refers to the decisions of the ECHR.²³ In the case of non-material damage, it is more frequent and, in the case of compensation for non-material damage to legal entities, there is an evident inspiration since the ECHR laid the foundation of the CJEU's decisions concerning this matter. Both the CJEU and the ECHR basically define non-material damage on the basis of similar features - it is damage of intangible nature²⁴ that is difficult to quantify.²⁵

It is a fact that a legal entity can basically be awarded compensation for non-material damage²⁶ where the damage may consist in the impairment of the image or reputation of the person.²⁷ The CJEU has admitted the existence of a so-called moral

²² Altwicker-Hamori, Szilvia; Altwicker, Tilmann; Peters, Anne. „Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights“. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)/Heidelberg Journal of International Law (HJIL)* 76 (2016): 4-6. Accessed June 10, 2023, <http://dx.doi.org/10.2139/ssrn.2631404>.

²³ *Post Bank Iran v. Council of the European Union* (T-559/15) EU:T:2018:948.

²⁴ *Iran Insurance Company v. Council of the European Union* (T-558/15) EU:T:2018:945 at [128].

²⁵ *Post Bank Iran v. Council of the European Union* (T-559/15) EU:T:2018:948 at [117].

²⁶ *Bretagne Angleterre Irlande (BAI) v Commission of the European Communities* (T-230/95) EU:T:1999:11 at [37].

²⁷ *New Europe Consulting and Michael P. Brown v Commission of the European Communities* (T-231/97) EU:T:1999:146 at [53-69].

dimension of legal entities in its decision-making practice or as the starting point of its decision-making practice. The moral dimension of legal entities following from the decisions of the ECHR is also referred to by the injured parties, who often demand the protection of their reputation in their business activities. It is indisputable that business activities are significantly connected with goodwill. Maintaining goodwill is an important relevant factor, for example, in the insurance market.

Several decisions of the ECHR include comments on the conception of damage, which is not regarded only as material damage but also non-material one, which can have different forms, for example, uncertainty or stress. The judicial decisions of the ECHR regarding this matter have been developing since the 1990's. The first decision, in which the ECHR acknowledged that legal entities are also entitled to compensation for non-material damage, was the *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*,²⁸ decision, in which it awarded compensation for non-material damage to an association, i.e. a legal entity, and its members. A definite conclusion was reached by the ECHR in the frequently cited and well-known *Comingersoll s.a. v. Portugal*²⁹ decision, in which it was decided that compensation for non-material damage cannot be excluded in the case of legal entities. The non-material damage should be determined based on the circumstances of the case in question. This conclusion was also reached based on an analysis of practice, or judicial decisions of the Member State courts, when it is clear that some states award this compensation, including, for example, the Czech Republic. However, there is not complete agreement among the Member States that compensation for non-material damage should also be awarded to legal entities. Therefore, the first decision of the ECHR in this matter was rather based on a pragmatic view, when the ECHR intentionally used the most extensive interpretation possible with regard to effective protection of human rights.³⁰ It is paradoxical that the European Convention on Human Rights, which is supposed to protect human rights, i.e., the rights of a human, provides protection to legal entities, which are artificial constructs. Probably for this very reason, the interconnection of the bodies of such organization with the members, mostly natural persons, is emphasized. Thus, the ECHR does not regard non-material damage only as damage suffered due to interference with reputation but in a broader sense, including non-material damage caused to the members of a legal entity. This decision was the first one of its kind and laid the foundation of the today more or less settled decision-making practice of the ECHR regarding this matter. The ECHR still follows the conclusions based on this decision, which also became a model for the decision-making practice of the CJEU. In the following decisions, the ECHR acknowledged this decision-making practice and formulated more detailed criteria.³¹

²⁸ *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*. App. No(s). 15153/89.

²⁹ *Comingersoll s.a. v. Portugal* app. of 6 April 2000 no(s). 35382/97, at [31].

³⁰ Emberland, Marius. „Compensating Companies for Non-Pecuniary Damage: *Comingersoll s.a. v. Portugal* and the Ambivalent Expansion of the ECHR Scope“. *The British Year Book of International Law*, Oxford Sv. 74, No. 1, (2004): 415. Accessed 8 May 2023, <https://doi.org/bybil/74.1.409>

³¹ See e.g. *Karhuvaara and Iltalehti v. Finland* app. no(s). 53678/00, at [60].

4. Areas of compensation

Legal persons may be entitled to compensation only for such non-material damage that they can, by the nature of the matter, actually suffer. Therefore, for example, compensation for non-material damage related to the health of a legal entity cannot be awarded since health is only connected with a human being. Nevertheless, a legal entity can claim compensation for damage that they have suffered or that they might suffer, for example, in relation to unlawful use of their name or if a wrongdoer unlawfully attacks their reputation or privacy. There are a large number of areas where decisions are made about rights that used to belong exclusively to human beings. Compensation for non-material damage awarded to legal entities is actually a proof of a shift in the protection of human rights.³² The judicial decisions of the CJEU stress that non-material damage that could be suffered by a legal entity often takes the form of legal uncertainty (e.g., in the case of inappropriately long proceedings or the diminishing of the prospects for the future)³³ and frustration, especially in connection with damage to their reputation.³⁴ Regarding the compensation for non-material damage, both the CJEU and the ECHR award financial compensation or, typically in the case of the liability of a state or an EU institution, they cancel the challenged decision, which is sufficient satisfaction.³⁵ However, the injured parties usually demand financial compensation as it is more attractive for them.

The CJEU has produced the following definition of goodwill: non-material nature, inseparable from the legal entity, impossibility to determine precisely the market value.³⁶ In the decision-making practice of the CJEU it appears in connection with the trust of the public in the quality of work of such legal entity.³⁷ Goodwill is connected with the quality of the product presented by the legal entity³⁸ being also

³² Lafont, C. „Should we take the "human" out of human rights? human dignity in a corporate world.“ *Ethics & International Affairs*, 30(2), (2016): 233-252. Accessed 5 May 2023, doi:http://dx.doi.org/10.1017/S0892679416000101. Or: Augenstein Daniel. „To Whom It May Concern: International Human Rights Law and Global Public Good.“ *Indiana Journal of Global Legal Studies*, Vol. 23, No. 1 (2016): 225-248. Accessed 2 May 2023, https://www.jstor.org/stable/10.2979/indjglolegstu.23.1.225.

³³ As M. Bobek states, there is a wide range of factual intangible interests about which the Court of Justice has decided that they establish a legal interest in filing an action, such as good reputation, ethics or prospects (see the decisions of 27 June 1973, Kley v. the Commission, 35/72, EU:C:1973:73, bod 4), and of 28 May 1998, W v. the Commission (T-78/96 and T-170/96, EU:T:1998:112, item 47).

³⁴ Opinion of Advocate General Bot (C-220/13 P) Kalliopi Nikolaou v Court of Auditors of the European Union at [50].

³⁵ *PB v European Commission* (T-609/16) EU:T:2017:910 at [97] and *Annibale Culin v. Commission of the European Communities* (C-343/87) EU:C:1990:49 at [27]-[29].

³⁶ *Hellenic Republic* (T-415/05), *Olympiakes Aerogrammes AE* (T-416/05) and *Olympiaki Aeroporia Ypiresies AE* (T-423/05) v. European Commission ECLI:EU:T:2010:386 at [297].

³⁷ *A and Intervening party: Patentti- ja rekisterihallituksen tilintarkastuslautakunta* (C-950/19) ECLI:EU:C:2021:230 at [62].

³⁸ *Caseificio Cirigliana Srl and Others v Ministero delle Politiche agricole, alimentari e forestali and Others* (C-569/18) ECLI:EU:C:2019:873.

related to the use of a trademark.³⁹ It is a fact that the support for good reputation of certain products is logically also connected with their producer. Therefore, if a trademark is used with its use causing damage, this is unlawful and the right to compensation for non-material damage arises.⁴⁰ Goodwill of a trademark depends on the image that this trademark evokes with consumers. This image depends primarily on the special characteristics of the product and, generally, on its quality. Quality builds the good reputation of a product. From the point of view of the consumer, the connection between goodwill of producers and the quality of products depends, among other things, on their belief that the products sold under a trademark are of certain quality.⁴¹ Good reputation of a legal entity is often connected with a trademark. If the reputation of a trademark is damaged, this is usually also connected with the reputation of the company that owns the trademark. However, the reputation of a trademark is strongly connected with the psychological perception and attitude of the company as such.⁴² Good reputation is also associated with the person of the managing director and other persons involved in the management of the legal entity as a company.⁴³

5. Criteria for determining the amount of compensation

There are a great number of criteria based on which compensation for non-material damage is evaluated.⁴⁴ The ECHR has, in its decision-making practice, admitted that non-material damage includes both objective and subjective factors. When determining the amount of compensation, the following should be taken into consideration: ... *account should be taken of the company's reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team.*⁴⁵ The ECHR considers the circumstances of the specific case, based on which the amount of compensation is determined.⁴⁶ Therefore, there are no instructions or tables based on which the compensation could be determined.

³⁹ Opinion of Advocate General Campos Sánchez-Bordona on *ÖKO-Test Verlag GmbH v Dr. Rudolf Liebe Nachf. GmbH & Co.KG* (C-690/17) ECLI:EU:C:2019:39 at [84].

⁴⁰ See, e. g. Opinion of Advocate General Campos Sánchez-Bordona on *ÖKO-Test Verlag GmbH v Dr. Rudolf Liebe Nachf. GmbH & Co.KG* (C-690/17) ECLI:EU:C:2019:39 at [81].

⁴¹ *Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH*. (C-478/07) ECLI:EU:C:2009:521 at [110].

⁴² Agmeka, Fanni, Ruhmaya Nida Wathoni, Adhi Setyo Santoso. „The Influence of Discount Framing towards Brand Reputation and Brand Image on Purchase Intention and Actual Behaviour in e-commerce.“ *Procedia Computer Science*, Volume 161. (2019) 851-858. Accessed 25 May 2023, <https://doi.org/10.1016/j.procs.2019.11.192>.

⁴³ Peráček, Tomáš; Kaššaj, Michal. „A Critical Analysis of the Rights and Obligations of the Manager of a Limited Liability Company: Managerial Legislative Basis.“ *Laws* 12, 56, (2023). Accessed 5 August 2023, <https://doi.org/10.3390/laws12030056>.

⁴⁴ García-Meca, Emma; Carlos J. Palacio. „Board composition and firm reputation: The role of business experts, support specialists and community influentials.“ *BRQ Business Research Quarterly*, Volume 21, Issue 2, (2018): 111-123. Accessed 8 May 2023, <https://doi.org/10.1016/j.brq.2018.01.003>.

⁴⁵ *Comingersoll s.a. v. Portugal* app. No(s). 35382/97, p. 35.

⁴⁶ *Meltex Ltd and Movsesyan v. ARMENIA* App. No(s). 32283/04, p. 105.

The ECHR has also come to the conclusion that a reason worthy of compensation for non-material damage is the fact that the company has been in uncertainty for a long time in relation to its business having had the feeling of helplessness and frustration.⁴⁷ It keeps referring to this over twenty-year old practice in its decisions.⁴⁸ The ECHR also clearly inclines to the conclusion that it is necessary to take into account the fact that non-material damage has also been suffered by the managing directors or shareholders.⁴⁹ However, it cannot be automatically concluded that the reputation of a legal entity is strictly connected with the moral dimension of a natural person. It is a fact that the interest of a legal entity is related to their business interests, whereas the reputation of an individual is related to their social status.⁵⁰ There are special criteria by which compensation for non-material damage is awarded to companies. What has to be taken into account in this context is the goodwill of the company, uncertainty in decision-making, interference with the management of the company (the consequences of which cannot be quantified precisely) and finally, albeit to a lesser extent, anxiety and trouble caused to the members of the company's management.⁵¹

The joint responsibility of the injured party is regarded as a reason for decreasing the amount of compensation.⁵² In relation to determining the amount of compensation for non-material damage itself, the ECHR has come to the conclusion that if, for example, the management of a company have caused, at least partly, the uncertainty themselves, it is a reason for decreasing the amount of compensation.⁵³ Another criterion that the CJEU takes into consideration is publication. Compensation for non-material damage is increased if there is a causal connection between unlawful action and non-material damage that occurs, for example, when a press release falsely informs about the fact that the injured party has participated in illegal activities.⁵⁴

6. Numbers of decisions and the amount of compensation

The ECHR has decided about compensation for non-material damage in 22 cases. Most of them were decided after the year 2000. The first mention, however, appeared in 1994. Graph 1 clearly shows an increase in the number of decisions made in relation to this matter. As with compensation for non-material damage, also in other cases, for example, demand for compensation for non-material damage to the health of a natural person, it is clear that the demand for compensation is usually

⁴⁷ *Centro europa 7 s.r.l. and di Stefano v. Italy* App. no(s). 38433/09, p. 221-222.

⁴⁸ see, e.g. *Sandu and others v. the Republic of Moldova and Russia* app. no(s). no. 21034/05, pp. 114-116.

⁴⁹ *Skyropiia yialias ltd v. Turkey* (application no. 47884/99) (2010), p. 37.

⁵⁰ *Magyar tartalomszolgáltatók egyesülete and index.hu zrt v. Hungary* (application no. 22947/13) (2016). pp. 84-85.

⁵¹ See, E.G. Case of Rodinná Záložna, Spořitelni a Úvěrní Družstvo and others V. The Czech Republic (Application no. 74152/01) (2012), p. 18.

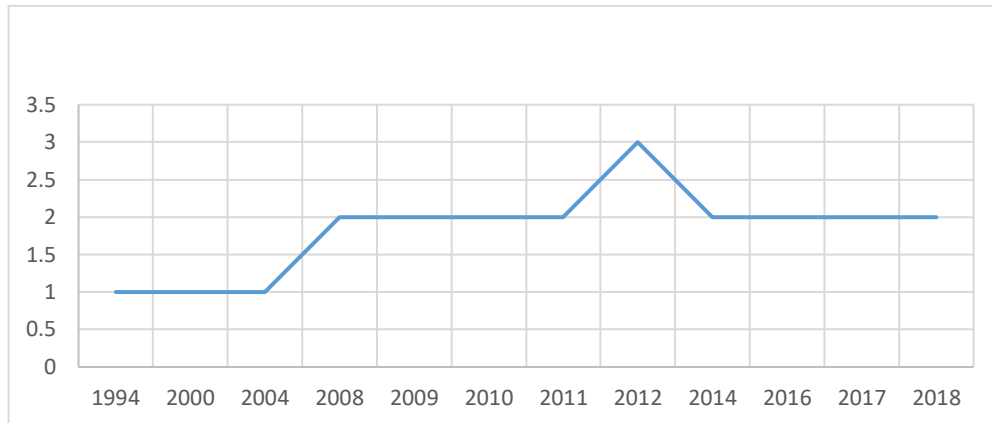
⁵² *Business Si Investitii Pentru Toti v. Moldova* App. No(s). 39391/04, p. 36-38.

⁵³ *Si Investitii Pentru Toti v. Moldova* app. no(s). 39391/04, p. 36-38.

⁵⁴ *Land Baden-Württemberg v. Metin Bozkurt* (C-303/08) ECLI:EU:C:2010:800 at [102].

higher than the compensation actually awarded by the ECHR. On average, the petitioners demand approx. 52,000 EUR in compensation for non-material damage. The average amount of compensation for non-material damage awarded to the injured companies is significantly smaller - only approx. 7,000 EUR.⁵⁵ It is not exceptional that no financial compensation for non-material damage is awarded⁵⁶ and the cancellation of a decision is a sufficient satisfaction.⁵⁷ Therefore, the above mentioned decisions clearly show that the ECHR does not provide large amounts to legal entities and non-material damage is really only a certain addition, albeit entirely equal, to material damage.

Graph 1



Number of decisions made by the ECHR about claims to compensation for non-material damage from 1994 to 2019

Source: author's own; N=22.

The number of decisions made by the CJEU about compensation for non-material damage to legal entities is smaller than that made by the ECHR. The total number of decisions related to compensation of non-material damage to legal entities was 12 (Graph 2). As with the ECHR, most of the cases were decided after the year 2008. The first decision was made in 1999. An increase in the number of decisions related to this matter is evident. As with the ECHR, the demand for compensation for non-material damage presented by the petitioner is higher than the amount actually awarded. On average, the petitioners demand approx. 3.5 million EUR but the average amount awarded is approx. 29 000 EUR. As with the ECHR, it is possible that financial compensation is not awarded and the compensation takes the form of cancelling the unlawful decision.⁵⁸ The average amount awarded to legal

⁵⁵ In some decisions it was not possible to determine the amount of compensation for non-material damage because it was awarded together with compensation for material damage.

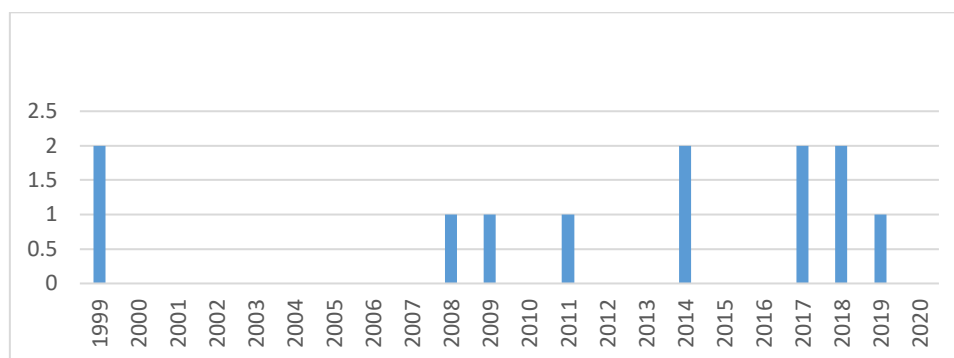
⁵⁶ See, e.g. *Karhuvaara and Iltalehti v. Finland* no. 53678/00) (2004), pp. 57-60.

⁵⁷ *Kendrion v European Union* (T-479/14) ECLI:EU:T:2017:48 at [123-124].

⁵⁸ *Export Development Bank of Iran v. Council of the European Union* (T-553/15), not published, EU:T:2019:308 at [55].

entities as compensation for non-material damage, however, is four times larger with the CJEU than with the ECHR. The reason is the legal areas in which the CJEU makes decisions. Most of the decisions are related to the non-contractual liability of the EU, where decisions are made about large amounts, especially in connection with the decision-making practice of the European Commission related to the protection of economic competition and liability in the case of an unlawful decision or the liability of a Member State.⁵⁹

Graph 2



Number of decisions made by the CJEU about claims to compensation for non-material damage from 1999 to 2019

Source: author's own; N=12.

The decision-making practice of the CJEU clearly shows references to the judicial decisions of the ECHR. The CJEU adopts conclusions reached by the ECHR or the conclusions following especially from the *Comingersoll S. A. v. Portugal* decision.⁶⁰ The amount of compensation is often determined *ex aequo et bono* and the quantification is then based on the reference to another decision.⁶¹ It follows from the judicial decisions that, if the petitioner does not produce evidence proving the existence of the moral or non-material damage or determining its extent, they must at least prove that the action in question could cause such damage because of its seriousness.⁶² The existence of goodwill is basically proved especially by producing evidence about business and advertising activities and customers' accounts. Evidence of real business activities resulting in earning good reputation and building a clientele is usually sufficient for proving goodwill.⁶³

⁵⁹ *Société nationale maritime Corse-Méditerranée (SNM) SA and French Republic v. Corsica Ferries France SAS* (C-533/12 P) ECLI:EU:C:2014:2142 at [40-42] and Opinion of Advocate General Wathelet at [87-94].

⁶⁰ *Iran Insurance Company v. Council of the European Union* (T-558/15) EU:T:2018:945 at [123-135].

⁶¹ *Iran Insurance Company v. Council of the European Union* (T-558/15) EU:T:2018:945 at [123].

⁶² *SELEX Sistemi Integrati SpA v. Commission of the European Communities* (C-481/07 P) ECLI:EU:C:2009:461 at [38].

⁶³ *Land Baden-Württemberg v. Metin Bozkurt* (C-303/08) ECLI:EU:C:2010:800 at [102].

7. Conclusion

Both the CJEU and the ECHR award compensation for non-material damage to legal entities. Both the courts thus recognize the moral dimension of a legal entity. Non-material damage, which can be suffered by legal entities, is characterized by them as damage of non-material nature that cannot be separated from the legal entity and is difficult to quantify. A legal entity can only be awarded compensation for interference with such right that, by the nature of the matter, can be claimed by the person, typically damage to goodwill or interference with privacy. However, neither the CJEU nor the ECHR provide a clear definition of non-material damage, which allows them to accept the interpretation that is suitable with regard to the circumstances of the case. Thus, sufficient flexibility is ensured. There are only certain criteria based on specific decisions, not a single compact and generally applicable definition (RQ1). Legal persons typically demand compensation for non-material damage in relation to damage to goodwill, which is also often related to the intellectual property law, but also in connection with legal uncertainty caused by the length of the proceeding and the related frustration (RQ2). There is no precise general criterion based on which the amount of compensation for non-material damage to legal entities could be determined since non-material damage, by its nature, includes both subjective and objective aspects. One of the many criteria is, for example, uncertainty, which affects the legal entity as well as its members. A reason for increasing the amount of compensation for non-material damage can also be publishing in the media, which can contribute to spreading bad reputation of the legal entity. A reason for decreasing the amount is usually the joint responsibility of the legal entity (RQ3).

The conceptions of non-material damage or its characterisation are, more or less, not different at the CJEU and the ECHR. What is, however, considerably different, is the amount of compensation awarded. The amount of compensation for non-material damage awarded by the ECHR is four times smaller than that awarded by the CJEU. The reason is the fact that the CJEU mostly reviews the decisions of the European Commission related to the protection of economic competition where decisions are made about claims to large amounts (RQ4). The analysis of the decisions made by the courts clearly shows an increase in the number of decisions related to compensation for non-material damage to legal entities, especially since 2010, when the frequency of the decisions on this matter increases (RQ5).

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