# 2

# The Action for Damages as a Fundamental Rights Remedy

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## 2.1 INTRODUCTION

The EU has traditionally distinguished itself from international law by according the individual a central role within its legal system.[1] It is considered one of the idiosyncrasies of the EU that individuals can directly rely on provisions of EU law before domestic and EU courts and are protected through an extensive and, in many ways, progressive catalogue of fundamental rights – the Charter of Fundamental Rights of the EU (CFR, 'the Charter').[2] The protection offered through this catalogue of fundamental rights is reinforced by the right to an effective remedy guaranteed by Article 47 of the Charter. Yet, despite these legal safeguards, strong mechanisms to ensure effective protection of such rights vis-à-vis the EU remain elusive to individuals.

There are, in essence, three direct avenues for individuals to access the Court of Justice of the EU (CJEU, 'the Court'): the action for annulment (see Chapter 1), the action for failure to act, and the action for damages. Legal scholarship has focused on the downsides and promises of the action for annulment as the primary avenue to ensure remedies for fundamental rights violations in the EU legal order.[3] The action for damages has received much

[1] Sionaidh Douglas-Scott, 'The European Union and Fundamental Rights' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) 384. On the status of individuals in international (human rights) law more generally: Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 644.

[2] Charter of Fundamental Rights of the European Union [2016] OJ C202/389 (CFR).

[3] For an overview of literature on the topic, see Chapter 1 of this volume.

less attention.[4] In part, this is because it has often been perceived as a vehicle to recover economic loss and has thus been used predominantly by companies and other economic operators. Yet, the action for damages might prove essential to ensure full compliance with the right to an effective remedy within the EU legal order, especially considering the shortcomings of the other direct avenues to the CJEU.

This chapter explores the potential of the action for damages to offer a remedy for fundamental rights violations committed by the EU. While the action for damages is easily accessible to individuals, the conditions under which compensation is granted are strict. This chapter assesses how these conditions are, could be, and should be applied by the CJEU in the fundamental rights context.

First, the chapter explores the main functions of liability law in the context of fundamental rights protection (Section 2.2). Next, the chapter provides a quantitative perspective on the CJEU's case law involving fundamental rights in action for damages proceedings (Section 2.3). This is followed by a critical analysis of the particular challenges posed by the CJEU's strict interpretation of the condition of unlawfulness – a requirement for liability to arise – when applied to breaches of fundamental rights (Section 2.4). Finally, the chapter zooms in on the obstacles to establishing joint liability between the EU and its Member States for joint fundamental rights violations (Section 2.5). The chapter concludes by reflecting on the possibilities for better utilising the potential of the action for damages for fundamental rights protection in the EU, while remaining within the limits of the current constitutional framework set out in the Treaties (Section 2.6).

[4] Literature on the action for damages in the fundamental rights context: Clara Rauchegger, 'Article 47: Damages for Breach of the Charter as a Remedy under the First Paragraph of Article 47' in Steve Peers and Others (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart 2021); Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) 21 German Law Journal 532; Joyce De Coninck, 'Catch-22 in the Law of Responsibility of International Organizations: Systemic Deficiencies in the EU Responsibility Paradigm for Unlawful Human Rights Conduct in Integrated Border Management' (PhD Thesis, Ghent University 2020); Melanie Fink, *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (Oxford University Press 2018); Nina Półtorak, 'Action for Damages in the Case of Infringement of Fundamental Rights by the European Union' in Ewa Bagińska (ed), *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* (Springer 2016); Angela Ward, 'Damages under the EU Charter of Fundamental Rights' (2012) 12 ERA Forum 589.

## 2.2 DAMAGES LIABILITY AS A REMEDY FOR FUNDAMENTAL RIGHTS VIOLATIONS

This section examines the general functions of liability law[5] to explore its potential as a remedy for fundamental rights violations. It draws on domestic private law and public international law with the aim of gaining a better understanding of the role that damages liability can play as a vehicle for fundamental rights protection in the EU law context. The section is structured around the three core aims of liability law: compensating harm (Section 2.2.1), preventing undesired behaviour (Section 2.2.2), and vindicating rights (Section 2.2.3).

### 2.2.1 *Compensating Harm Caused by Fundamental Rights Violations*

The main function of liability law is to provide compensation for harm.[6] Harm arising from fundamental rights violations can be of a pecuniary (monetary, economic, financial) or non-pecuniary nature. Violations of the right to property are the most straightforward example of a fundamental rights violation leading to an economic loss. Other examples of pecuniary harm caused by fundamental rights violations include costs of medical treatment or loss of income because of a violation of the right to physical integrity. However, it is characteristic of fundamental rights violations that in many cases the non-pecuniary harm they cause is more significant than any immediate financial consequences. Non-pecuniary harm may consist of, for instance, physical or psychological pain, loss of dignity, embarrassment, or fear.

In EU liability law, the principle of full compensation suggests that non-pecuniary harm is generally recoverable.[7] Accordingly, the CJEU awards damages for both pecuniary and non-pecuniary harm arising from fundamental rights violations and it does so even when the victims are legal persons.[8]

[5] It is typically referred to as 'tort law' in common law jurisdictions and 'delict law' in civil law jurisdictions. For the purposes of this chapter, the broader term 'liability law' is used.

[6] Walter van Gerven, Jeremy Lever, and Pierre Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart 2000) 69; Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press 2004); Dorota Leczykiewicz, 'Compensatory Remedies in EU Law: The Relationship Between EU Law and National Law' in Paula Giliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar 2017) 63.

[7] Katri A Havu, 'Damages Liability for Non-material Harm in EU Case Law' (2019) 44 European Law Review 492, 494.

[8] For example: Case C-50/12 P *Kendrion v Commission* [2013] ECLI:EU:C:2013:771, para 100; Case C-40/12 P *Gascogne Sack Deutschland v Commission* [2013] ECLI:EU:C:2013:768,

The notion of non-pecuniary harm in EU liability law is broad, covering pain or physical suffering, harm to emotional well-being, or psychological suffering, reputational damage or other harm to personality rights as well as harm arising from a state of uncertainty.[9]

Like harm, compensation can be of a pecuniary or non-pecuniary nature. In modern liability regimes at the domestic level, both types of harm, pecuniary and non-pecuniary, tend to be compensated with money, typically ruling out other forms of substantive remedy, such as apologies or physical retaliation ('an eye for an eye').[10]

Beyond the national private law context, there is room for substantive remedies of a non-pecuniary nature. In public international law, suffering a wrong entitles the injured state to engage in conduct that would otherwise be wrongful.[11] In addition, non-pecuniary harm on the part of the state (as opposed to an individual) is generally considered not to be 'financially assessable' and is made good through 'satisfaction', such as an acknowledgement of the breach, an expression of regret, or a formal apology.[12]

In the international human rights context, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law specify that 'full and effective reparation' includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[13] Whereas 'compensation' is understood narrowly to mean only pecuniary compensation, satisfaction is much broader and includes remedies such as verification and publication of the truth, an official declaration restoring dignity or reputation, a public apology, or sanctioning perpetrators.[14]

para 95; Case C-58/12 P *Groupe Gascogne v Commission* [2013] ECLI:EU:C:2013:360, para 89; Case T-577/14 *Gascogne Sack Deutschland and Gascogne v EU* [2017] ECLI:EU:T:2017:1, paras 144–165; Case T-479/14 *Kendrion v EU* [2017] ECLI:EU:T:2017:48, paras 67–135.

9 Havu (n 7) 495–496.

10 Stephen D Sugarman, 'Tort Damages for Non-Economic Loss: Personal Injury' in Mauro Bussani and Anthony J Sebok (eds), *Comparative Tort Law: Global Perspectives* (Edward Elgar 2015) 324–325.

11 See especially International Law Commission, Report of the Fifty-Third Session: Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/ 56/ 10, 2001 (ASR), art 22 (countermeasures).

12 Ibid art 37 (satisfaction).

13 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, UN Doc A/RES/60/147, principles 19–235.

14 Ibid principle 22.

Likewise, compensation for violations of the International Covenant on Civil and Political Rights can involve measures of satisfaction, such as public apologies, public memorials, or guarantees of non-repetition.[15]

Regionally, violations of the European Convention on Human Rights (ECHR) can also be remedied by affording 'just satisfaction'.[16] This means that remedies other than pecuniary ones can be awarded. Yet pecuniary compensation is the most common remedy for the European Court of Human Rights (ECtHR).[17] A quantitative analysis of the case law shows that the ECtHR has made monetary awards in 94% of all the cases in which it found a violation. In most of the cases in which no monetary award was made, the ECtHR held that a finding of a violation was sufficient to redress the breach. The award of other non-monetary remedies is extremely rare and only awarded in pilot judgments under Article 46 ECHR.[18]

In EU liability law, compensation can be of a pecuniary or non-pecuniary nature, including compensation in kind, if necessary in the form of injunctions to do or not to do something (Figure 2.1).[19] In cases concerning non-pecuniary harm, the CJEU frequently finds that the harm is sufficiently compensated without monetary reparation.[20] In particular, the CJEU often finds that the annulment or finding of illegality of the unlawful measure is sufficient to remedy non-pecuniary harm.[21] For instance, in the sanctions case *Abdulrahim*, the Court of Justice stated that the recognition of unlawfulness of the contested measure could constitute 'a form of reparation for the non-material harm'.[22] In other cases, the particular circumstances justified pecuniary reparation.[23]

[15] International Covenant on Civil and Political Rights, UNGA Resolution 2200A (XXI) of 16 December 1966, UN Doc A/6316, 999 UNTS 171 (ICCPR); Dinah Shelton, 'Reparations in Human Rights Law' in Rachel Murray and Debra Long (eds), *Research Handbook on Implementation of Human Rights in Practice* (Edward Elgar 2022) 36–58.

[16] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950 (ECHR), Article 41.

[17] This is different for the Inter-American Court of Human Rights, where emphasis is given to other remedies as opposed to pecuniary remedies. Veronika Fikfak, 'Compliance and Compensation: Money as a Currency of Human Rights' in Rachel Murray and Debra Long (eds), *Research Handbook on Implementation of Human Rights in Practice* (Edward Elgar 2022) 115.

[18] Ibid 103.

[19] Case T-279/03 *Galileo International Technology and Others v Commission* [2011] ECLI:EU:T:2006:121, para 63. Confirmed by Case T-19/07 *Systran and Systran Luxembourg v Commission* [2010] ECLI:EU:T:2010:526, para 121; Case T-88/09 *Idromacchine and Others v Commission* [2011] ECLI:EU:T:2011:641, para 81.

[20] Havu (n 7) 501.

[21] Ibid 501–502.

[22] Ibid 502. See Case C-239/12 P *Abdulrahim v Rat und Kommission* [2013] ECLI:EU:C:2013:331, paras 71-72.

[23] For an overview of the case law: Havu (n 7) 502.

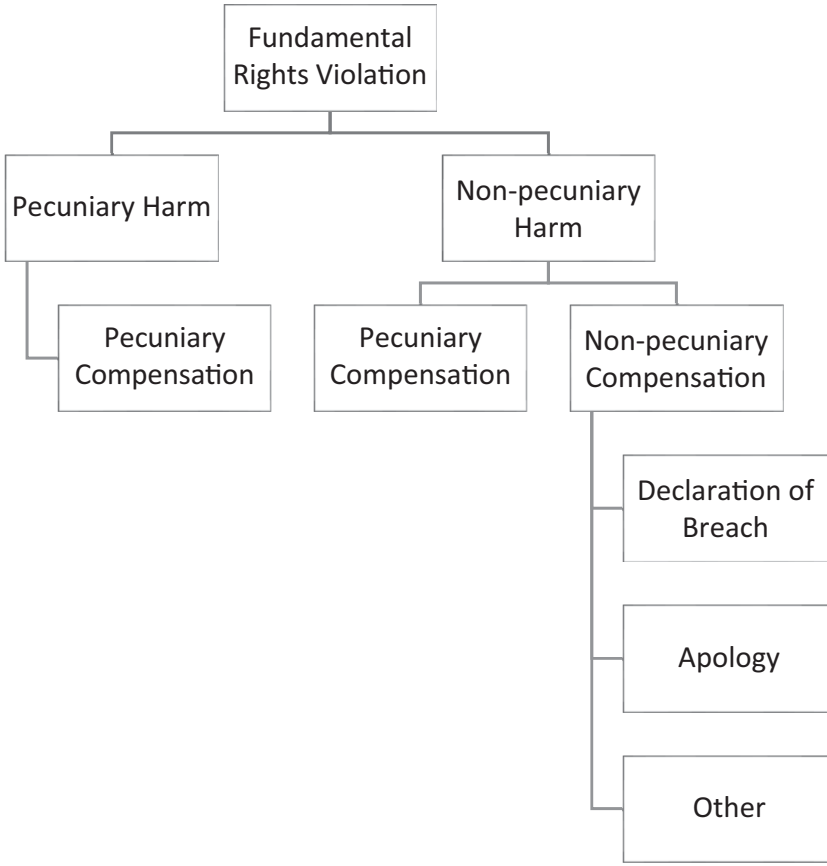


FIGURE 2.1 Types of harm and compensation

### 2.2.2 *Condemning and Preventing Undesired Behaviour*

Domestic liability law is primarily reactionary and focused on remedying past wrongs, whereas public law is concerned with improving the machinery of government.[24] Nevertheless, the impact of liability law goes beyond merely compensating harm. On the one hand, both victims and society more generally may perceive compensation, especially when it goes beyond the actual financial loss, as a form of condemnation or even punishment of the

[24] Ekaterina Aristova and Ugljesa Grusic, 'Introduction: Civil Remedies and Human Rights in Flux' in Ekaterina Aristova and Ugljesa Grusic (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart 2022) 21.

wrongdoer, even when it is – from a legal point of view – still strictly compensatory rather than punitive.[25]

On the other hand, damages liability may serve to deter wrongful conduct.[26] The preventive function of liability regimes is particularly important in the fundamental rights context. Harm arising from a fundamental rights violation can, by its very nature, often not be made good by financial means or indeed remedied at all.[27] For this reason, changing state behaviour to prevent future violations is important in international human rights law.[28]

### 2.2.3 *Vindicating Rights*

Beyond providing substantive remedies for fundamental rights violations, liability law is generally considered instrumental for states to comply with their obligations under the right to an effective remedy.[29] This is particularly the case for the EU. Under certain circumstances, especially when EU conduct under scrutiny is informal, factual, or preparatory in nature (see Chapters 12–14), the action for damages may be the only judicial mechanism available to individuals to challenge it. The requirement in Article 47 of the Charter that an effective judicial remedy must be available suggests that some form of compensation (pecuniary or non-pecuniary) should be provided under the action for damages, at least where other remedies are not available. Thus, the action for damages is instrumental for the EU to meet its obligations under Article 47 of the Charter.[30]

In this vein, the right to compensation has been qualified as a fundamental principle of EU law and the 'necessary extension of the principle of effective judicial protection and access to the courts'.[31] As held by Advocate General Mengozzi, 'the right to reparation of persons harmed by an infringement of

[25] Sugarman (n 10) 325.

[26] Ibid 325–326; Leczykiewicz (n 6) 63; Jason N E Varuhas, *Damages and Human Rights* (Hart 2016) 14–21; van Gerven, Lever, and Larouche (n 6) 69; Harlow (n 6) 10–41.

[27] Lewis A Kornhauser, 'Incentives, Compensation, and Irreparable Harm' in André Nollkaemper, Dov Jacobs, and Jessica N M Schechinger (eds), *Distribution of Responsibilities in International Law* (Cambridge University Press 2015) 121–123.

[28] Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 2, 22.

[29] Cees van Dam, *European Tort Law* (Oxford University Press 2013) 23.

[30] Rauchegger (n 4) 1316; Fink, 'The Action for Damages as a Fundamental Rights Remedy' (n 4) 536. See also: Case C-93/11 P *Verein Deutsche Sprache* [2011] ECLI:EU:C:2011:429, para 30; Opinion of AG Geelhoed in Case C-234/02 P *Mediator v Lamberts* [2003] ECLI:EU:3003:394, para 107.

[31] Case C-234/02 P *Mediator v Lamberts* [2004] ECLI:EU:C:2004:174, paras 82–83. See also: Case C-224/01 *Köbler* [2003] ECLI:EU:C:2003:513, para 33.

EU law is a specific variation on the principle of effective judicial protection', which is now enshrined in Article 47 of the Charter.[32]

The importance of the action for damages in remedying breaches of EU law is also recognised in Article 41(3) of the Charter by virtue of which the right to have the Union make good any damage it caused is a fundamental right in itself.[33] While Article 41(3) of the Charter only reproduces Article 340 (2) TFEU and does not modify the conditions under which liability arises,[34] it may form the basis for the CJEU to develop the conditions for liability in line with the requirements of fundamental rights law.[35] Section 2.6 makes suggestions as to what this development could and should entail.

## 2.3 A QUANTITATIVE GLANCE AT FUNDAMENTAL RIGHTS IN CJEU DAMAGES CASE LAW

Article 340(2) TFEU holds that the EU must make good any damage caused by its institutions or by its servants in the performance of their duties. The procedure that serves to establish whether the conditions for liability are met and award compensation is the action for damages, which the CJEU is exclusively competent to hear.[36] Within the CJEU, Article 256(1) TFEU allocates the competence to hear actions for damages at first instance to the General Court, with the Court of Justice hearing actions for damages only in the case of appeals on points of law.[37] In what follows, the action for damages will be analysed from a quantitative perspective, focusing on cases in which the Charter was mentioned.

Up to 2014, the action for damages had given rise to 39 successful cases in which the CJEU granted compensation to applicants.[38] Between 2015 and 2023, the body of case law grew incrementally, but rather slowly, amounting

[32] Opinion of AG Mengozzi in Case C-279-09 *DEB* [2020] ECLI:EU:C:2010:489, para 46.

[33] Kathleen Gutman, 'The Non-Contractual Liability of the European Union: Principle, Practice and Promise' in Paula Giliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar 2017) 47.

[34] Explanation accompanying the Charter; art 52(2); Paul Craig, 'Article 41: The Right to Good Administration' in Steve Peers and Others (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart 2021) 1130.

[35] Similarly Pekka Aalto, *Public Liability in EU law: Brasserie, Bergaderm and Beyond* (Hart 2011) 125; Gutman (n 33) 47.

[36] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU) arts 268, 274.

[37] This excludes disputes between the Union and its servants.

[38] Rafał Mańko, 'Action for Damages against the EU: European Parliament Briefing' (*European Parliamentary Research Service*, December 2018) 1 <www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf>.

to a total of 54 cases with a successful outcome during this period,[39] of which all but one judgment were delivered by the General Court.[40] The overall number of cases of damages proceedings during this period, that is, including successful and unsuccessful ones, is 172 for the Court of Justice and 745 for the General Court.[41] It is a common outcome of action for damages proceedings that no damages are awarded since most often claims are either not sufficiently substantiated with evidentiary support, or the conditions for liability, which will be discussed in Section 2.4, are simply not met.[42]

Out of the fifty-four successful damages cases since 2015, more than 80% included references to the Charter in the grounds of judgment. In these forty-five cases, the Charter rights that were most frequently mentioned were those enshrined in Articles 41 and 47.[43] This is not surprising as Article 41 guarantees good administration rights binding on the EU institutions, bodies, offices and agencies, including the right to have the Union make good any damage it has caused (see Section 2.2.3). Article 47 is closely related to Article 41. It guarantees general fair trial rights that are also binding on the Member States. These two rights provide for partly overlapping protection.[44] This protection is furthermore complemented by Article 48 of the Charter, which has also appeared in several of the successful damages cases and guarantees respect for the rights of the defence for anyone who has been charged.[45]

Another Charter provision that plays a prominent role in damages cases that have yielded a successful outcome, albeit significantly less than Articles 41 and 47, is Article 31, which affords fair and just working conditions.[46] Further Charter provisions that are referred to in several successful damages cases are, in order of importance in numbers: Article 7 (Respect for private and family

[39] These cases were found on the InfoCuria database of the CJEU, excluding the Civil Service Tribunal, using the search terms: Court = 'Court of Justice, General Court', Period = 'from 01/01/2015 to 01/06/2023', Procedure and result = 'Action for damages, Application granted'.

[40] The sole judgment with a successful outcome delivered by the Court of Justice was Case C-89/15 P *Riva Fire v Commission* [2017] ECLI:EU:C:2017:713.

[41] These cases were found on the InfoCuria database of the CJEU, excluding the Civil Service Tribunal, using the search terms: Court = 'Court of Justice, General Court', Period = 'from 01/01/2015 to 01/06/2023', Procedure = 'Action for damages'.

[42] Havu (n 7) 500–501.

[43] Article 41 of the Charter was referred to in 21 of the cases that were selected through the search described in n 39 and Article 47 of the Charter in 19 of these cases.

[44] Angela Ward, 'Article 47: Interrelationship with Other Provisions of the Charter' in Steve Peers and Others (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart 2021) 1250.

[45] Article 48 of the Charter was referred to in four of the cases that were selected through the search described in n 39.

[46] Article 31 of the Charter was referred to in six of the cases that were selected through the search described in n 39.

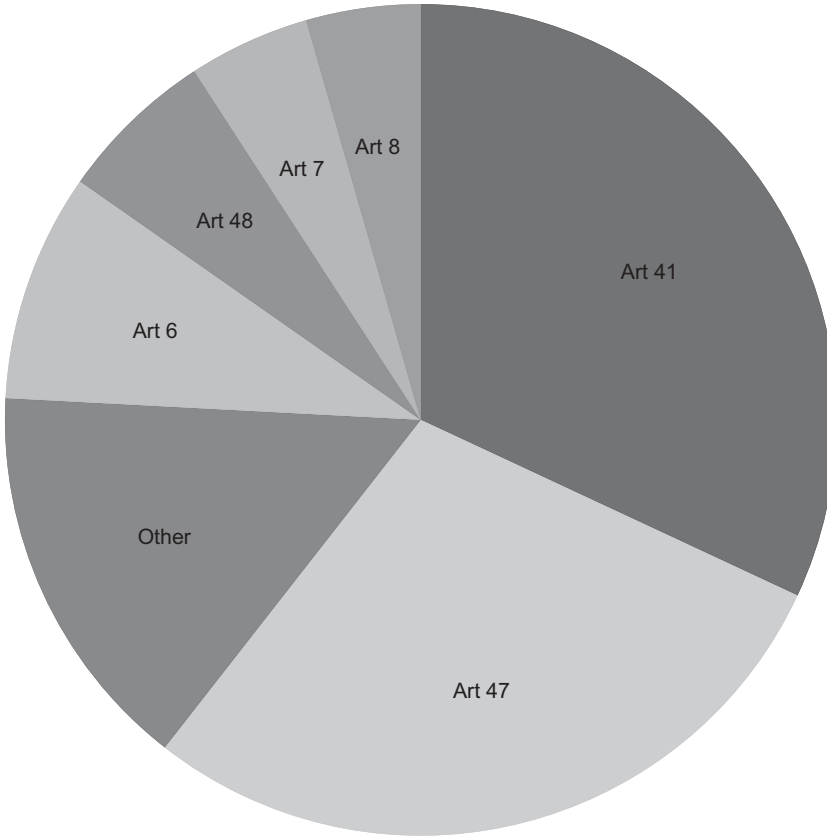


FIGURE 2.2 Charter rights in successful damages cases (1)

life), Article 8 (Protection of personal data), Article 21 (Non-discrimination), Article 16 (Freedom to conduct a business), and Article 17 (Right to property).[47] These are all fundamental rights that can effectively be claimed and enforced vis-à-vis the EU, by virtue of the EU's nature as a non-state actor and by virtue of the nature of the rights involved (Figures 2.2 and 2.3).

The large majority of the forty-five cases in which these Charter rights were applied concerned staff of the EU's civil service.[48] This explains the prominent role of the right to fair and just working conditions. Most of the remaining

[47] Articles 7 and 8 of the Charter were each referred to in three of the cases that were selected through the search described in n 39 and Articles 16, 17, and 21 of the Charter in two cases each.

[48] Thirty-three of the forty-five successful cases (see n 39) in which the Charter was mentioned were staff cases.

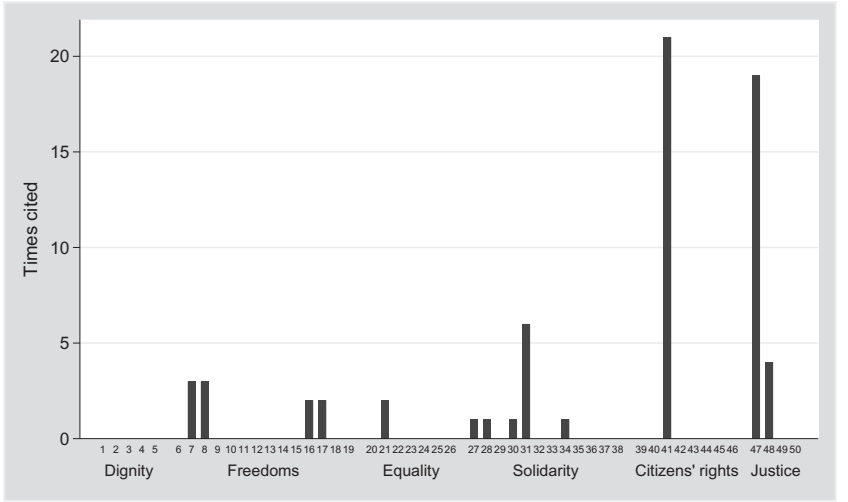


FIGURE 2.3 Charter rights in successful damages cases (2)

cases concerned either public procurement or competition law.[49] Articles 41 and 47 of the Charter were frequently mentioned in all three categories of case, that is, in staff, public procurement, and competition law cases. Only two of the damages cases with a successful outcome that mentioned the Charter regarded restrictive measures in the framework of the Common Foreign and Security Policy (CFSP).[50] They concerned the freedom to conduct a business and the right to property.

The Charter rights that were at issue in the aforementioned cases have overwhelmingly been clarified and concretised by the EU legislator in secondary legislation. This means that the abstract fundamental rights commitments found in the Charter had already been transposed into concrete and judiciable obligations for the EU through secondary legislation. Arguably the chances to hold the EU liable are greater where Charter rights have been concretised and articulated by the EU legislator in secondary legislation (see also Section 2.4.2).

Other cases concerned Charter rights that have not been fleshed out by the legislator. In these cases, the CJEU drew on its own previous case law and conducted a (more or less complete) fundamental rights balancing exercise in

[49] Eight of the forty-five successful cases (see n 39) in which the Charter was mentioned concerned competition law, while six concerned the public procurement context.

[50] Case T-405/15 *Fulmen v Council* [2019] ECLI:EU:T:2019:469; Case T-406/15 *Mahmoudian v Council* [2019] ECLI:EU:T:2019:468. In these cases, Articles 16 and 17 of the Charter were applied.

accordance with Article 52(1) of the Charter to determine whether a restriction to a fundamental right could be justified. In particular, a strand of case law has emerged assessing whether the Article 47 right to adjudication within a reasonable time was violated due to lengthy competition law proceedings before the General Court.[51] Furthermore, the CJEU balanced fundamental rights that were not substantiated through secondary legislation when determining whether CFSP restrictive measures violated the right to property and the freedom to conduct a business.[52]

However, none of the successful cases concerned interferences via omission, interferences in cases of shared (operational) conduct, or the positive (fundamental rights) obligations stemming from Charter provisions.

## 2.4 'UNLAWFULNESS' AS A CONDITION FOR EU FUNDAMENTAL RIGHTS LIABILITY

Article 340(2) TFEU does not define the conditions for EU liability but instead leaves it to the CJEU to do so. The Court has not developed an approach to the action for damages that is specific and tailored to fundamental rights violations but applies the same conditions as for any other breach of EU law.[53]

EU liability for fundamental rights violations is therefore subject to three explicit, cumulative conditions.[54] First, for EU damages liability to arise, there must be unlawful conduct on behalf of the EU. The condition of unlawfulness is qualified in two ways: the infringed rule must be intended to confer rights on individuals and the breach must be sufficiently serious. In addition, EU liability is predicated on the occurrence of damage on the part of the victim as a second condition and an uninterrupted causal relationship between the unlawful conduct and the damage as a third condition.

The particular challenges posed by the qualified condition of unlawfulness in establishing fundamental rights violations warrant further examination. This is why this section focuses on unlawfulness as a condition for EU

[51] Especially: *Kendrion v Commission* (n 8); *Gascogne Sack Deutschland v Commission* (n 8); *Groupe Gascogne v Commission* (n 8); *Gascogne Sack Deutschland and Gascogne v EU* (n 8); *Kendrion v EU* (n 8); Case C-150/17 P *EU v Kendrion* [2018] ECLI:EU:C:2018:1014; Case C-138/17 P *EU v Gascogne Sack Deutschland and Gascogne* [2018] ECLI:EU:C:2018:1013.

[52] *Fulmen v Council* (n 50); *Mahmoudian v Council* (n 50).

[53] Piotr Machnikowski, 'European Union' in Ken Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (Intersentia 2017) 574; Gutman (n 33) 47; Ward, 'Damages under the EU Charter of Fundamental Rights' (n 4) 590; Rauchegger (n 4) 1321; Fink, 'The Action for Damages as a Fundamental Rights Remedy' (n 4) 542.

[54] Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECLI:EU:C:2000:361, para 42.

fundamental rights liability. It first identifies the provisions of the Charter that are intended to confer rights on individuals (Section 2.4.1). It then turns to the sufficiently serious breach requirement, bringing forward three arguments against applying this requirement to fundamental rights violations (Section 2.4.2) and examining the CJEU's application of the requirement in its case law (Section 2.4.3).

### 2.4.1 *No Conferral of Rights by Charter Principles*

For EU liability to arise, there must be unlawful conduct on behalf of the EU in violation of a norm of EU law that is intended to confer rights on individuals. Whether an EU rule is intended to confer rights on individuals is to be determined in relation to whom the provision is addressed to or owed.[55] EU fundamental rights regulate the relationship between the Member States and the EU, on the one hand, and individuals, on the other hand, and have been developed first and foremost with the protection of the individual in mind.[56] This suggests that the fundamental rights enshrined in the Charter confer rights on individuals.

However, not all provisions of the Charter articulate rights. The Charter distinguishes between rights and principles and only violations of Charter rights engage the EU's damages liability. Article 52(5) of the Charter states that principles, as opposed to rights, require implementation by legislative or other acts taken by the EU or the Member States and 'shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'.[57] According to Advocate General Cruz Villalón in *AMS*, where principles have not been given specific expression through legislation, 'the possibility of directly relying on a "principle" so as to exercise an individual right based upon that principle' is excluded.[58] What this means is that principles are not automatically justiciable; their justiciability requires their prior implementation.[59]

Yet Charter principles are not simply 'truncated rights' that turn into fully fledged rights through implementation.[60] Rather, they are structurally

[55] Fink, *Frontex and Human Rights* (n 4) 200–202.
[56] Ibid 203, 206.
[57] The distinction between rights and principles is also mentioned in CFR, art 51(1).
[58] Opinion of AG Cruz Villalón in Case C-176/ 12 *Association de médiation sociale* [2013] ECLI:EU:C:2013:491, para 68.
[59] Tobias Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56 Common Market Law Review, 1222.
[60] Ibid 1218.

different from rights in that they merely entail duties but do not come with a corresponding claim right.[61] They impose a one-sided, non-relational duty on the EU or the Member States and therefore belong to the realm of objective law.[62] Rights, in contrast, are relational in that they provide subjective entitlements. Consequently, Charter rights fulfil the condition of conferring rights on individuals, whereas Charter principles do not.

Even though Charter principles can mainly be found in the broad domain of economic, social, and cultural rights, the characterisation of a Charter provision as belonging to this domain is not what determines its nature as a principle. To find out whether a Charter provision contains a right or a principle, one has to look at the wording of the provision. There are three types of wording that indicate Charter principles. First, the wording may be devoid of any rights language, as is the case for Articles 36 to 38 of the Charter. Second, the formulation 'the Union recognises and respects' seems determinative of a general principle. This formulation is found in Articles 25, 26, 34(1) and (3), and 36 of the Charter, all of which the Charter Explanations identify as principles. Third, Article 35 of the Charter only confers a right 'under the conditions established by national laws and practices'. Unlike the more general formulation 'in accordance with national laws and practices', the formulation of Article 35 indicates a principle.[63]

Following this approach in distinguishing between Charter rights and principles, all the Charter provisions that the CJEU has referred to in successful damages cases since 2015 contained Charter rights (see Section 2.3).[64] This further supports the argument that only Charter rights confer rights on individuals and can thus engage the EU's damages liability.

### 2.4.2 *Three Arguments against Applying the 'Sufficiently Serious Breach' Test to Fundamental Rights*

A breach of Union law does not lead to liability, 'however regrettable that unlawfulness may be', unless it qualifies as 'sufficiently serious'.[65] Thus, there is conduct of the EU that is unlawful and leads to damage but is not 'unlawful

[61] Ibid 1220.
[62] Ibid 1203.
[63] Ibid 1218–1219.
[64] The reference to Article 34(1) of the Charter in Case T-462/17 appears in the part of the judgment that relates to the action for annulment, Case T-462/17 *TO v EEA* [2019] ECLI:EU:T:2019:397, para 91.
[65] For example, Case T-384/ 11 *Safa Nicu Sepahan v Council* [2014] ECLI:EU:T:2014:986, para 50.

enough' for liability to arise. The decisive criterion is whether the Union body concerned 'manifestly and gravely disregarded the limits on its discretion'.[66] A number of factors are hence relevant to establish the seriousness of the breach: the extent of discretion the authority in question enjoys, the obviousness ('manifestly') of the breach, and the reprehensibility of committing it ('gravely').[67]

If this logic is translated to the fundamental rights context, it means that there are fundamental rights breaches that are unjustified under fundamental rights law yet are not obvious or reprehensible enough for liability to arise. The General Court implied this when it noted that neither the Charter nor the ECHR 'preclude that the Community's non-contractual liability be made subject ... to the finding of a sufficiently serious breach of the fundamental rights invoked by the applicant'.[68] However, applying the'sufficiently serious breach' test to the fundamental rights context may be problematic for three reasons.

The first reason concerns the right to an effective remedy (see Section 2.2.3). Article 47 of the Charter requires the Union to make a complaints mechanism available for any rights violation, regardless of whether it is 'simple' or 'serious'. In circumstances where the action for damages is the only possibility for individuals to seek redress for fundamental rights violations committed by an EU body, the right to an effective remedy may thus require the Court to refrain from applying the sufficiently serious breach requirement altogether. Given the CJEU's exclusive jurisdiction over EU unlawful conduct, there is otherwise no remedy available for cases concerning 'simple' breaches of fundamental rights by the EU.

A notable example where judicial remedies beyond the action for damages are virtually absent is so-called factual conduct (see also Chapter 12) or soft law (see also Chapter 14). Neither of these forms of administrative action are considered by the CJEU to have 'binding legal effect' and they therefore largely escape judicial review under Article 263 TFEU. In this context, Rademacher argues for a loosening of the conditions for the EU's damages liability on the basis of Article 47 of the Charter by refraining from applying the sufficiently serious breach requirements under certain circumstances.[69] If the sufficiently serious breach requirement is applied, factual conduct and

[66] *Bergaderm* (n 54) para 43.
[67] Discussing each in detail: Fink, *Frontex and Human Rights* (n 4) 207–228.
[68] Case T-341/07 *Sison v Council* [2011] ECLI:EU:T:2011:687, para 81.
[69] Timo Rademacher, 'Factual Administrative Conduct and Judicial Review in EU Law' (2017) 29 European Review of Public Law 399, 430–435.

soft law may escape judicial scrutiny altogether since they escape judicial review by the CJEU under alternative procedures.

Second, the overarching rationale for the 'sufficiently serious breach' requirement is unsuitable for the fundamental rights context. Making liability contingent on fault or a sufficiently serious breach requirement may be necessary to ensure that public authorities can exercise discretion in the public interest and to prevent them becoming 'overcautious'.[70] Indeed, in the CJEU's case law, the reason for the sufficiently serious breach requirement is tied to avoiding a 'chilling effect' on the exercise of discretion.[71] In the words of the Court, it serves the purpose of securing the 'room for manoeuvre and freedom of assessment' that public authorities need to fulfil their functions in the general interest whilst ensuring that third parties do not 'bear the consequences of flagrant and inexcusable misconduct'.[72]

Leaving aside whether these policy considerations against lowering the liability threshold are supported by empirical evidence,[73] they do not fit when fundamental rights are at issue. In the case of fundamental rights, the balance between the interests of the individual and society at large is already struck in the context of the determination of whether a breach of a fundamental right has effectively occurred. It forms not only part of the proportionality analysis for qualified fundamental rights[74] but is also taken into account in formulating the positive obligations public actors may incur to prevent breaches of fundamental rights.[75] Accordingly, the requirement of a sufficiently serious breach should not be applied in an action for damages when the rule of EU law that is breached is a fundamental right since this requirement

[70] Van Dam (n 29) 531–532; Ken Oliphant, 'The Liability of Public Authorities in Comparative Perspective' in Ken Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (Intersentia 2017) 860–863; Jane Wright, 'The Retreat from *Osman*: Z *v United Kingdom* in the European Court of Human Rights and Beyond' (2002) International & Comparative Law Quarterly 55, 56. More broadly: Jef de Mot and Michael Faure, 'The Liability of Public Authorities: An Economic Analysis' in Ken Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (Intersentia 2017).

[71] Rademacher (n 69) 431.

[72] For instance Case T-351/03 *Schneider Electric SA v Commission of the European Communities* [2007] ECLI:EU:T:2007:212, para 125; similarly, Case C-392/93 *The Queen v H.M. Treasury, ex parte British Telecommunications* [1996] ECLI:EU:C:1996:131, para 40.

[73] Wright (n 70) 56. See also (contrasting the English with the French approach): van Dam (n 29) 532.

[74] For a discussion on different types of fundamental rights: Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2023) 19–30.

[75] CFR, art 52(1); Tom R Hickman, 'Tort Law, Public Authorities, and the Human Rights Act 1998' in Duncan Fairgrieve, Mads Andenas, and John Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (The British Institute of International and Comparative Law 2002) 44.

unnecessarily replicates the balancing exercise that is inherent in the fundamental rights analysis.[76] Besides, if non-pecuniary forms of compensation are more extensively relied on by the CJEU than pecuniary ones, this also contributes to preventing a 'chilling effect' for public authorities (see Section 2.2.1).[77]

Third, the factors that the CJEU uses to determine a sufficiently serious breach are unsuitable when the rule of EU law that is violated is a fundamental right. In establishing a sufficiently serious breach, the CJEU considers a number of factors, including the discretion retained by the EU, the complexity of the case, the clarity of the (concrete) binding legal obligations on the EU, and the intentional character of the act or omission.[78] The clearer the rule that is violated, the more likely that a breach is considered sufficiently serious by the CJEU.

The requirement of clarity in particular poses a significant obstacle to EU liability for fundamental rights violations arising from EU conduct. To be applicable to concrete situations, abstract fundamental rights must generally be 'translated' into concrete negative or positive, procedural, or substantive fundamental rights obligations. This process of concretisation of abstract fundamental rights has largely taken place in relation to the Member States. The CJEU itself has predominantly interpreted EU fundamental rights in relation to the Member States as duty-bearers. Furthermore, the rich case law of the ECtHR on the interpretation of the ECHR, which is relevant for the Charter due to its Article 52(3), is currently exclusively concerned with Member State obligations. Similarly, also the case law of domestic (constitutional) courts that, by virtue of Article 52(4) of the Charter, can guide the interpretation of Charter rights that result from the constitutional traditions common to the Member States is also exclusively concerned with Member State obligations.

Some fundamental rights obligations, such as those resulting from the rights to good administration guaranteed by Article 41 of the Charter, can obviously be discharged by the EU's (administrative) bodies in the same way as they could be by Member State bodies. However, it is unclear whether this is the case for

[76] Fundamental rights that do not permit a balancing exercise on account of their absolute nature (e.g., the prohibition of torture) should in any case – by nature of the implicated right – automatically be considered sufficiently serious.

[77] Rademacher (n 69) 431.

[78] Concerning the clarity of the obligation: *The Queen v H.M. Treasury, ex parte British Telecommunications* (n 72) para 43. Case C-283/94 *Denkavit Internationaal and Others v Bundesamt für Finanzen* [1996] ECLI:EU:C:1996:387, paras 51–52. Concerning the complexity of the case and the intentional character of the breach: Case T-364/03 *Medici Grimm KG v Council of the European Union* [2006] ECLI:EU:T:2006:28, para 87; Case C-282/05 P *Holcim (Deutschland) v Commission* [2007] ECLI:EU:C:2007:226, para 50. See also (and sources cited therein): Koen Lenaerts and Others (eds), *EU Procedural Law* (Oxford University Press 2014) 11, 60.

other fundamental rights obligations too. The positive (substantive) obligation under the right to life, for example, requires action by states to prevent industrial and environmental disasters.[79] The EU simply does not always have the means or competences to meet such types of positive obligation, particularly where such competence is retained by or shared with Member States. As a functionally tailored non-state actor, the EU is thus constrained as to its competences, power, and budget in manners that Member States are not. Consequently, concrete obligations stemming from abstract fundamental rights commitments might differ between the EU and its Member States and there is a need for more conceptual clarity as regards the EU itself as a duty-bearer.[80]

To sum up, three arguments militate against applying the 'sufficiently serious breach' test to fundamental rights. First, where no alternative remedies are available to challenge EU action, excluding damages on the basis that the breach of EU law was not sufficiently serious can have the consequence that the breach of EU law escapes judicial review altogether, which is problematic from the perspective of the right to an effective remedy guaranteed by Article 47 of the Charter. Second, it is not necessary to apply this test to fundamental rights cases to ensure a degree of discretion for public authorities since a balancing exercise is already inherent in the fundamental rights analysis. Third, the criterion of clarity of the violated rule is generally at odds with the abstract formulation of fundamental rights and their need to be concretised by courts. More specifically, there is a lack of case law on the EU as a duty-bearer of Charter rights that could provide clarity.

### 2.4.3 *The CJEU's Approach to the 'Sufficiently Serious Breach' Test in Fundamental Rights Cases*

While the CJEU has never explicitly pronounced itself on the question whether the 'sufficiently serious breach' test applies to fundamental rights,[81] there is case law that suggests that it might not. In some cases, the Court seemed to base this approach on the lack of discretion enjoyed by public authorities when fundamental rights are at issue.[82]

[79] For example: *Öneryildiz v Turkey*, App no 48939/99 (ECtHR, 30 November 2004); *Budayeva and Others v Russia*, App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008).

[80] Also arguing for a need for more conceptual clarity of EU fundamental rights law: Douglas-Scott (n 1) 386–387.

[81] See also: Fink, 'The Action for Damages as a Fundamental Rights Remedy' (n 4) 542.

[82] Case T-48/05 *Franchet and Byk v Commission* [2008] ECLI:EU:T:2008:257, para 219; Case T-138/14 *Chart v EEAS* [2015] ECLI:EU:T:2015:981, para 114. It should be noted, however,

In other cases, the CJEU, namely the Court of Justice, indicated that it would apply the test but then seemed to consider a breach of a qualified fundamental right as automatically meeting it. In these cases, the Court conducted a fundamental rights balancing exercise to determine whether the Charter right was infringed and stopped the analysis there. Although the Court noted in these cases that a serious breach of EU law was required, it did not actually examine the seriousness of the breach of the Charter right.[83] For instance, in *Kendrion*, *Gascogne Sack Deutschland*, and *Groupe Gascogne v Commission*, the Court examined the circumstances of the specific case, such as the complexity of the dispute and the conduct of the parties. Concluding that the right to adjudication within a reasonable time had been breached, it simply held that this constituted a sufficiently serious breach of a rule of law that is intended to confer rights on individuals.[84] It can be speculated that this approach indicates that any breach of a qualified Charter right – where the Court has already found the limitation to be disproportionate – is sufficiently serious to lead to the EU's damages liability.

Conversely, there is also case law of the General Court that suggests that fundamental rights violations falling below a threshold of 'seriousness' do not lead to liability. In *Sison*, for example, the General Court established that the sanctions imposed on the applicant were incompatible with EU law and thus illegal, but the breach did not qualify as sufficiently serious due to the complexity of the situation, the difficulties in interpreting and applying the relevant rules, and the lack of well-established precedent on the topic.[85] Next, the General Court turned to the question of whether the illegality of the sanctions breached Sison's fundamental rights in a manner capable of triggering EU liability, holding that the alleged breach of fundamental rights was

that the Court in these cases seems to (incorrectly) derive the lack of discretion from the obligation not to act in breach of fundamental rights. It is also unclear to what extent the Court of Justice would agree with the General Court on this aspect, see the discussion in Case T-217/11 *Staelen v European Ombudsman* [2015] ECLI:EU:T:2015:238, para 86; Case C-337/15 P *European Ombudsman v Staelen* [2017] ECLI:EU:C:2017:256, paras 31–45.

[83] Indications of this approach may be found in cases dealing with the right to property and the freedom to conduct a business, where the Court held that disproportionate interferences with (i.e., violations of) fundamental rights, are 'intolerable', 'unacceptable', or otherwise equivalent to a sufficiently serious breach. For example, Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECLI:EU:C:2008:476, paras 183–184.

[84] *Kendrion v Commission* (n 8) para 106; *Gascogne Sack Deutschland v Commission* (n 8) para 102; *Groupe Gascogne v Commission* (n 8) para 96. See also: Case C-603/13P *Galp Energia España* [2016] ECLI:EU:C:2016:38, para 58; Case C-604/13P *Dornbracht* [2017] ECLI:EU:C:2017:45, paras 97–100; Case C-608/13 *CEPSA* [2016] ECLI:EU:C:2016:414, paras 67–68.

[85] *Sison v Council* (n 68).

'inseparable' from the illegality previously established. For that reason, it concluded that even if a breach of fundamental rights existed, 'that breach is also not sufficiently serious, in the particular circumstances of the case, to incur the non-contractual liability of the Community'.[86] Similarly, in other cases, the General Court examined the obviousness and reprehensibility of the fundamental rights breaches alleged, which suggests that the relevant authorities would not have incurred liability for a 'simple' violation.[87]

The foregoing demonstrates that the CJEU is not explicit about whether the 'sufficiently serious breach' requirement applies to fundamental rights and that it is inconsistent in its approach. This has significant implications for the principles of legal certainty, legitimate expectations, and the effectiveness of EU fundamental rights law. In light of the concerns set out in Section 2.4.2, the Court should clarify that breaches of fundamental rights are not subject to the sufficiently serious breach test.

## 2.5 JOINT LIABILITY BETWEEN THE EU AND ITS MEMBER STATES

In the EU's multi-level administration, the EU and its Member States more often than not are jointly responsible for ensuring that fundamental rights are guaranteed. This joint responsibility can result from shared exercise of public power, for instance in joint decision-making procedures (see also Chapter 13), or from the parallel exercise of public power by the EU and one or more Member States over the same situation, for instance, in the context of operational cooperation. When fundamental rights are violated in the context of EU law, there is thus often a combined failure of several actors at the EU and Member State level.

The assumption may be that these types of failures lead to joint liability.[88] However, in the EU legal system, joint liability is the exception, rather than

[86] *Sison v Council* (n 68) para 80.

[87] *Schneider Electric SA v Commission of the European Communities* (n 72) paras 154–156. This was not objected to by the Court of Justice upon appeal: Case C-440/07 P *Commission v Schneider Electric* [2009] ECLI:EU:C:2009:459, para 173. See also: *Safa Nicu Sepahan* (n 65) paras 32–36, 60–67. This was upheld on appeal: Case C-45/15 P *Safa Nicu Sepahan v Council* [2017] ECLI:EU:C:2017:402, paras 29–42.

[88] For a discussion of different aspects of joint liability: Joyce De Coninck, 'Effective Remedies for Human Rights Violations in EU CSDP Military Missions: Smoke and Mirrors in Human Rights Adjudication?' (2023) 24 German Law Journal 342; De Coninck, 'Catch-22 in the Law of Responsibility of International Organizations' (n 4); Melanie Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (2019) 56 Common Market Law Review 1227; Fink, *Frontex and Human Rights* (n 4); Peter Oliver, 'Joint Liability of the Community and the Member States' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997); Wouter Wils, 'Concurrent

the rule. This section outlines the various factors that contribute to this reality, both in relation to the establishment (Section 2.5.1) and the implementation (Section 2.5.2) of joint liability.

### 2.5.1 *Establishing Joint Liability: Attribution and Causation*

When more than one actor is involved in causing damage, two concepts are used to determine whether one or all of them are liable: attribution and causation. The two concepts each fulfil different roles in the allocation of liability.

Attribution links the unlawful conduct to the responsible actor, that is, to its 'true author'. Only the entity considered the 'author' of a violation will incur liability for its consequences. For example, when a 'pushback' during a Frontex-coordinated joint border control operation violates fundamental rights, it might be difficult to establish the actual 'author' (or 'authors') of the violation since the actions of the EU and Member State authorities were intertwined.[89]

In contrast, causation is the link between the unlawful conduct and the damage that occurred. For example, when the EU has failed to prevent a fundamental rights violation by a Member State even though it would have been obliged to do so, the question arises whether this inaction was a sufficiently direct cause for the damage that occurred.

The questions of attribution and causation are sequential.[90] The 'true author' of an unlawful act must be identified before it can be assessed whether the unlawful conduct by this author was a sufficiently direct cause for the damage. At the CJEU, attribution and causation are assessed at different stages of liability proceedings. Attribution of conduct to either the EU or a Member State must occur at the admissibility stage of the proceedings, as the CJEU is only competent to rule on the liability of the Union. Attribution of the relevant unlawful conduct to the Union is thus a precondition for the competence of the Court to adjudicate on the substance of the case.[91] In contrast, it is to be determined at the merits stage of the proceedings whether or not unlawful conduct is causally linked to the damage that occurred.

Liability of the Community and a Member State' (1992) 17 European Law Review 191; Christopher Harding, 'The Choice of Court Problem in Cases of Non-Contractual Liability under E.E.C. Law' (1979) 16 Common Market Law Review 389.

[89] Fink, *Frontex and Human Rights* (n 4).

[90] In more detail: Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (n 88) 1235–1237.

[91] Explicitly: Case T-277/97 *Ismeri Europa v Court of Auditors* [1999] ECLI:EU:T:1999:124, para 49.

While attribution of conduct is a familiar concept in public international law, this is less so in EU law generally and EU liability law more specifically.[92] Accordingly, significant gaps exist in research regarding the role and interpretation of this concept in EU (liability) law.[93]

Furthermore, the CJEU has not developed a coherent approach to attribution in its case law. In some instances, the Court uses the concept in its damages case law, occasionally even listing it as a fourth condition for a successful claim.[94] However, the CJEU is inconsistent in its terminology. It uses 'attribution of conduct' interchangeably with 'attribution of damage' or 'imputation' and sometimes simply describes a specific course of conduct as being 'in fact the responsibility of [the Union]'.[95] More fundamentally, it sometimes conflates the meaning of attribution and causation.[96]

Apart from these terminological inconsistencies, the case law indicates that the CJEU uses multiple and sometimes overlapping tests of attribution, which are applied differently depending on the substantive area of EU law at stake, the implicated parties, and the applicable procedure.[97] While there is little case law on the issue and the terminological inconsistencies complicate a clear assessment, a rule appears to emerge in EU liability law whereby unlawful conduct is attributed to the authority competent to make legal

[92] See especially ASR, chapter II; International Law Commission, Report of the Sixty-Third Session: Articles on the Responsibility of International Organizations, UN Doc A/66/ 10, 2011 (ARIO), chapter II.

[93] For recent contributions to this field of study: Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (n 88); De Coninck, 'Catch-22 in the Law of Responsibility of International Organizations' (n 4).

[94] For instance: Case T-317/12 *Holcim (Romania) v Commission* [2014] ECLI:EU:T:2014:782, para 86. In Case T-250/02 *Autosalone Ispra v EAEC* [2005] ECLI:EU:T:2005:432, paras 42, 68–98, the lack of attribution to the Community led to the dismissal of the action. See also: Joined Cases C-89/86 and C-91/86, *Étoile commerciale and CNTA v Commission* [1987] EU:C:1987:337, para 18; Case T-279/03 *Galileo International Technology and Others v Commission* [2006] ECLI:EU:T:2006:121, para 129. In literature: Lenaerts and Others (n 78) 11, 81; Alexander Türk, *Judicial review in EU law* (Edward Elgar 2009) 241; Francette Fines, 'A General Analytical Perspective on Community Liability' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997) 16–18.

[95] Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (n 88).

[96] Ibid 1238–1239.

[97] De Coninck, 'Catch-22 in the Law of Responsibility of International Organizations' (n 4) 154–167; Simone Vezzani, 'The International Responsibility of the European Union and of Its Member States for Breaches of Obligations Arising from Investment Agreements: Lex Specialis or European Exceptionalism?' in Mads Adenas and Others (eds), *EU External Action in International Economical Law: Recent Trends and Developements* (T. M. C. Asser Press/ Springer 2020) 314–315.

choices, that is, to the authority enjoying legal decision-making power.[98] This test seems to be applied relatively strictly, with very little margin to take into account other forms of influence, power, or pressure outside the ambit of the competence to act in a legally binding manner.[99]

As a result of the CJEU's incoherent approach to attribution, it is unclear how exactly EU liability law deals with situations where more than one actor may have been involved in fundamental rights violations. The ex post determination of attribution (explicit or implicit) without any ex ante clarification as to the applicable threshold is particularly detrimental to applicants, who need to decide on the forum for their claim for compensation (CJEU or national courts), since to date no forum exists that could allocate joint responsibility and the subsequent burden of compensation in tandem.

With respect to causation, the CJEU has repeatedly held that a causal link exists when an infringement of the law was a necessary and sufficiently direct condition for damage to occur.[100] A breach is too remote or indirect if an intervening event 'breaks' the chain of causation. This may be the occurrence of exceptional or unforeseeable events, or imprudent conduct by the applicant, but also imprudent conduct by other public (Member State) authorities, if that proves to be the determinant cause of the damage.[101] In some cases, the CJEU indicates that 'exclusive' causation might be required for liability to arise, thus excluding joint liability at the substantive level.[102] In other cases, however, the Court seemed more open to allowing for several determining causes that may all have contributed in a sufficiently decisive manner to the occurrence of the damage for liability to arise.[103] This particular question is one of the main points of contention in *Kočner v EUROPOL*, a case recently

[98] Fink, *Frontex and Human Rights* (n 4) 232–266, in particular 263–266; Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (n 88) 1240–1244.

[99] Two notable exceptions in this respect are Case C-146/91 *KYDEP v Council and Commission* [1994] EU:C:1994:329, paras 24–27; Case T-786/14 *Bourdouvali and Others v Council and Others* [2018] EU:T:2018:487, para 99. In more detail: Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (n 88) 1244–1245.

[100] On the threshold for causation: A G Toth, 'The Concepts of Damage and Causality as Elements of Non-contractual Liability' in Ton Heukels and Alison McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997) 192.

[101] Case C-419/08 P *Trubowest* [2010] ECLI:EU:C:2010:147, paras 59, 60–61; Joined Cases C-64 and C-113/76 *Dumortier v Council* [1979] ECLI:EU:C:1979:223, para 21.

[102] E.g., *Trubowest* (n 101) para 61.

[103] Case F-50/09 *Missir Mamachi di Lusignano v Commission* [2011] ECLI:EU:F:2011:55, para 181, citing in particular Case C-308/87 *Grifoni v EAEC* [1990] ECLI:EU:C:1990:134, paras 17–18; Case T-178/98 *Fresh Marine v Commission* [2000] ECLI:EU:T:2000:240 paras 135–136.

decided by the Court of Justice.[104] Whereas the General Court had dismissed the action due to the absence of an 'exclusive' causal link between Europol and the alleged damage,[105] the Court of Justice followed Advocate General Rantos' suggestions and held that Europol and the Member State jointly and severally incur liability for the non-material damage stemming from the violations of the applicant's fundamental rights.[106] While in the case of Europol, the founding regulation specifically envisages that the agency and national authorities can be jointly liable, the decision of the Court of Justice on this matter may have broader consequences for joint liability between the EU and its Member States more generally.

It is safe to conclude that joint conduct and subsequent joint responsibility of the EU and its Member States in safeguarding fundamental rights does not ipso facto translate into joint liability. If not excluded at the admissibility stage through the application of a high and uncertain attribution threshold, a strict causation test will often prevent joint liability at the merits stage of the proceedings.[107] In any event, joint liability – while theoretically possible – remains the exception to the rule.

### 2.5.2 *Implementing Joint Liability: Court Competence and Parallel Proceedings*

Even where the EU and a Member State are exceptionally jointly liable, the procedural implementation of this joint liability in the EU's remedies system presents a significant obstacle. In the case of *Kampffmeyer*, the Court had in principle recognised the Community's liability for the Commission's approval of an unlawful measure taken by Germany.[108] However, since the applicants had brought parallel actions against Germany concerning the same damage, the Court held that in order to 'avoid the applicants being insufficiently or excessively compensated for the same damage', it was 'necessary for the national court to have the opportunity to give judgment on any liability on

[104] Case C-755/21 P *Kočner v EUROPOL* [2024] ECLI:EU:C:2024:202.

[105] Case T-528/20 *Kočner v EUROPOL* [2021] ECLI:EU:T:2021:631.

[106] Opinion of AG Rantos in Case C-755/21 P *Kočner v EUROPOL* [2023] ECLI:EU:C:2023:481, para 55; *Kočner v EUROPOL* (n 104).

[107] De Coninck argues that in cases of joint conduct between the EU and its Member States resulting in fundamental rights violations, more often than not liability will be avoided altogether, leaving victims without access to an effective remedy vis-à-vis any of the implicated actors: Coninck, 'Catch-22 in the Law of Responsibility of International Organizations' (n 4); Coninck, 'Effective Remedies for Human Rights Violations in EU CSDP Military Missions' (n 88).

[108] Joined Cases C-5/66, 7/66, 13/66–24/66 *Kampffmeyer and Others v Commission* [1967] EU:C:1967:31, page 262.

the part of the Federal Republic of Germany' before the damage for which the Community should be held liable could be determined.[109] The Court thus stayed the proceedings awaiting the decision of the national court on the matter.[110]

This approach has been widely criticised.[111] First, it can make it particularly lengthy and complicated for applicants to obtain compensation when more than one actor is involved, which raises concerns from the perspective of the right to an effective remedy. In *Kampffmeyer*, for instance, the proceedings remained stayed for almost twenty years before they were removed from the Court's register.[112] Second, it renders EU liability substantively subsidiary to Member State liability. From a fundamental rights perspective especially, this is problematic. Given that many of the EU's activities require some form of participation by the Member States, this may significantly impact the chances of holding the EU liable for its contribution to fundamental rights violations that have directly been committed by Member State authorities.

In the absence of an adjudicatory mechanism to consider questions of joint fundamental rights responsibility between the EU and its Member States in tandem, the institutional design of the EU significantly complicates joint liability in practice. Hence, not only are there legal obstacles to establishing joint liability in substance, there are equally significant institutional obstacles to establishing joint liability in the procedural set up and practice.

## 2.6 CONCLUSION

The action for damages has the potential to provide redress to individuals who have experienced violations of their fundamental rights by an EU entity, thanks to several distinguishing characteristics it possesses. The admissibility threshold is significantly lower than with respect to the action for annulment. Obtaining a verdict on substance requires neither a particular form of EU conduct, such as a legally binding act, nor proof of a specific interest on the

[109] Ibid page 266.

[110] The same approach was followed in more recent cases: Case T-138/03 *É.R. and Others v Council and Commission* [2006] ECLI:EU:T:2006:390, para 42; *Holcim (Romania) v Commission* (n 94) paras 78–83.

[111] Oliver (n 88) 288; Uwe Säuberlich, *Die Außervertragliche Haftung im Gemeinschaftsrecht: Eine Untersuchung der Mehrpersonenverhältnisse* (Springer 2005) 242–243; Ulf F Renzenbrink, *Gemeinschaftshaftung und Mitgliedstaatliche Rechtsbehelfe: Vorrang, Subsidiarität oder Gleichstufigkeit?* (Peter Lang 2000) 161–162, 176–183; Harding (n 88) 403–405. See also: AG Darmon in Case C-55/90 *Cato* [1992] ECLI:EU:C:1992:52 (Opinion 2), para 18.

[112] Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (n 88) 1262.

part of the applicant to have the EU measure assessed as to its legality.[113] Moreover, at the substantive level, the action for damages is exceptionally flexible.[114] Article 340 TFEU merely states that the EU is to make good damage it causes 'in accordance with the general principles common to the laws of the Member States', without specifying the precise conditions. This provides room for the CJEU to develop a liability regime suitable for the EU, including in relation to its commitments under fundamental rights law.[115]

Yet the action for damages is currently not very effective as an avenue for a fundamental rights remedy. As the analysis in this chapter has shown, this is largely due to two factors.

First, the core obstacle encountered by individual victims in lodging a successful action for damages concerns the Court's insistence on the 'sufficiently serious breach' test. This chapter has argued that it is problematic to apply this test to the fundamental rights context for three main reasons. The first reason is that it would be incompatible with the right to an effective remedy if no remedy were available for fundamental rights violations that do not meet this threshold. Given the CJEU's exclusive jurisdiction over EU bodies and the restrictions pertaining to other direct actions, there is EU conduct that can only be challenged through an action for damages. If such conduct violates fundamental rights in a manner that does not pass the 'sufficiently serious breach' threshold, there is no remedy at all for those affected. The second reason is that the balance between individual and societal interests that the 'sufficiently serious breach' test serves to strike by preserving a degree of discretion to public authorities is already built into the fundamental rights balancing exercise. The third reason why the 'sufficiently serious breach' test should not be applied to fundamental rights is that the criterion of clarity employed by the Court to establish whether the threshold is met proves near impossible to meet when fundamental rights violations by the EU are at issue. To date, there is a significant lack of certainty regarding the scope of concrete fundamental rights obligations as they apply to the EU specifically.

The second major obstacle is that the limits to the establishment and enforcement of joint liability sit uneasily with the fact that due to the EU's multi-level administration, safeguarding fundamental rights is in many situations a joint responsibility between the EU and its Member States. The

[113] Dominik Hanf, 'EU Liability Actions' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) 914–918.

[114] Ibid 911.

[115] Rademacher (n 69).

existing framework not only carries considerable uncertainty but also subjects applicants to prolonged litigation spanning years or even decades. It also risks making EU liability subsidiary to the liability of its Member States. In other words, despite the theoretical possibility to establish joint responsibility, substantive and institutional obstacles significantly prevent findings of joint responsibility in practice.

The first of these two obstacles, the 'sufficiently serious breach requirement', is not pre-determined by the Treaties but has been developed by the CJEU. It could thus in principle be dropped or reinterpreted, altogether or for specific areas, especially if there is evidence that national liability regimes do so too. Liability law is deeply embedded in the attitudes of a society towards the notions of injury, sanction, and conflict resolution.[116] As a result, national regimes for compensation of damages resulting from fundamental rights violations vary significantly.[117] While a comparative analysis of national fundamental rights liability regimes is beyond the scope of this chapter, research has shown that it is not uncommon among EU Member States to opt for special approaches to liability regarding fundamental rights, for instance, by reinterpreting the requirements of fault, causation, or damage in public liability regimes.[118]

To close the gap that arises in the EU's remedies system, especially when fundamental rights are violated through conduct that is not reviewable under Article 263 TFEU (see Chapter 1), the CJEU may rely on Article 47 of the Charter and the approaches adopted in national liability laws to develop a fundamental rights–specific regime for damages liability. This may involve disapplying the 'sufficiently serious breach' requirement altogether, establishing a (rebuttable) presumption of seriousness when (certain) fundamental rights are concerned, or applying criteria to establish seriousness that are better suited to the nature of and types of fundamental rights law as they apply to the EU. To accommodate concerns regarding any possible 'chilling effect' that more leniency might have, a distinction could be made between claims that involve monetary compensation and those that only seek termination, declarations, apologies, or other forms of non-monetary compensation.[119] As Section 2.2.1 has shown, the CJEU already grants non-monetary

[116] Mauro Bussani and Marta Infantino, 'The Many Cultures of Tort Liability' in Mauro Bussani and Anthony J Sebok (eds), *Comparative Tort Law: Global Perspectives* (Edward Elgar 2015).
[117] For a general overview: Ewa Bagińska (ed), *Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems* (Springer 2016).
[118] Ibid.
[119] See also: Rademacher (n 69).

compensation under appropriate circumstances, so relying on these more extensively would not be a structural departure from existing case law.

Alternatively, a fundamental rights–specific liability regime may also be achieved through secondary legislation.[120] A recent example of such an approach is the 2022 Commission proposal for an Artificial Intelligence Liability Directive with the aim to adapt non-contractual liability rules to the specific challenges posed by AI.[121] Given that the EU has no general competence to adopt fundamental rights–specific legislation that would apply horizontally, it may be possible to develop such instruments for specific policy areas, particularly where the effective judicial protection gap is particularly obvious, such as in the Area of Freedom, Security and Justice. Notably, the founding regulation of the EU agency Europol envisages joint liability between the agency and national authorities.[122] In addition, in the realm of EU trade agreements, the absence of a horizontally applicable approach to fundamental rights clauses does not prevent convergence in the language, method, and objectives of fundamental rights clauses in different EU trade agreements. Hence, the absence of an overarching, horizontal competence to develop a fundamental rights liability framework that spans across various domains of substantive EU law in the interest of ensuring (individual) access to an effective remedy does not impede a common, albeit sectoral, approach to fundamental rights liability.

The second factor identified in this chapter that hampers effectiveness of the action for damages as a fundamental rights remedy concerns the limits to the establishment and enforcement of EU liability when the EU cooperates with Member States. This is more complex to resolve. The ideal solution is a combination of clear rules on attribution and causation that govern cooperative scenarios and a common forum to establish and enforce joint liability between the EU and its Member States. Given that the competences of the CJEU are delimited in the Treaties, the common forum is difficult to achieve. However, clear attribution and causation rules that reflect the respective fundamental rights obligations of the EU and its Member States and the interaction between them can, and should, be developed by the CJEU.

[120] A similar proposal is made in relation to the judicial protection gap arising with respect to factual conduct by ibid.

[121] Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual liability rules to artificial intelligence (AI Liability Directive), 28 September 2022, COM(2022) 496 final.

[122] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) [2016] OJ L135/53.