Horizontal Liability for ‘EU-unlawful’ Collective Actions

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Horizontal liability for ‘EU-unlawful’ Collective Actions

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This is a draft version of chapter 7 (according to briefing note no 3).

The European Court of Justice (ECJ) has made it clear that collective actions taken by trade unions under certain circumstances might violate the freedom of services and the right of establishment under the Treaty (Articles 49 and 56 TFEU). However, the Court has not addressed the issue of which remedies are to be available against a trade union arranging such an ‘EU-unlawful’ collective action. This question was dealt with by the Swedish Labour Court (Arbetsdomstolen) in its final judgment in December 2009. The chapter discusses this judgment and presents an alternative understanding of the EU law requirements concerning remedies for EU-unlawful collective actions.

In the final version a short comparative analysis of the sanctions in some Member States will be added.
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1 Introduction

In the *Laval* and *Viking* cases the European Court of Justice (ECJ) made it clear that collective actions taken by trade unions might, under certain circumstances, violate the freedom of services and the right of establishment under the Treaty (Articles 49 and 56 TFEU). These cases have, together with *Rüffert* and *Commission v Luxembourg*, given rise to an intense debate.

This article will not address under which circumstances a collective action might be ‘EU-unlawful’. Instead it will concentrate on which remedies are to be available if such an EU-unlawful collective action is initiated. This question is highly sensitive for industrial relations in many Member States. It is also of relevance to the debate on horizontal liability for breaches of EU law.

The issue of remedies for EU-unlawful collective actions has been at the fore in three high profile disputes, the *Viking* case, the *Balpa* dispute and the *Laval* case. The *Viking* case, which concerned a collective action in Finland, was settled outside court and the content of the settlement is not known. In the *Balpa* dispute in 2008 the threat of huge damage claims made the trade union withdraw its notice on a collective action. The question was, however, dealt with by the Swedish Labour Court in its final judgment in the *Laval* case.

I will in this article first give a short overview of the final *Laval* judgment and will then analyse which requirements EU law puts on national remedies for EU-unlawful collective actions.

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2 The Judgment of the Labour Court

The Swedish Labour Court (Arbetsdomstolen) gave its final judgment in the Laval dispute in December 2009.5

The facts of the Laval case are fairly well-known. Laval un Partneri Ltd was a Latvian company which posted workers from Latvia to work for construction companies in Sweden. Laval was subject to collective actions by Swedish trade unions. The aim of the collective actions was to force Laval to sign a collective agreement. Laval commenced proceedings before the Swedish Labour Court against the trade unions, seeking both a declaration that the collective actions were unlawful and an order that the actions should cease. Laval also claimed compensation for the damage suffered.

The Labour Court made a preliminary reference to the ECJ. The ECJ answered two questions. The first question was whether the collective actions were precluded by (now) Article 56 TFEU and the Posting of Workers Directive.6 The second question was whether a specific piece of Swedish legislation – the so called lex Britannia – was in breach of EU law. The shortest possible summary of the preliminary ruling is that the ECJ answered both questions with a “yes”. The collective actions were in conflict with Article 56 TFEU and the Posting of Workers Directive, and lex Britannia was in breach of Articles 56 and 57 TFEU.

Since the ECJ in its preliminary ruling had found that the collective actions were unlawful according to EU law, the only question the Swedish Labour Court had to take a stance on was whether the trade unions were obliged to pay damages to Laval due to the unlawful collective actions. Laval claimed damages for economic losses of around 150 000 Euro and punitive damages (that is damages for non-economic losses) of almost the same amount.

The reasoning of the Labour Court is very thorough and complex. The findings cover 28 pages in the court report. I will in the following summarise some of the main arguments.

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5 The Labour Court Judgement AD 2009 nr 89. An unofficial translation of the judgement is available on http://arbetsratt.juridicum.su.se/Filer/PDF/ErikSjoedin/AD%202009%20nr%2089%20Laval%20English.pdf

The Swedish Labour Court is the first and last instance in for many labour disputes, inter alia, disputes on collective actions. The Court has a tripartite composition. See further, Adlercreutz & Nyström, Labour law in Sweden, 150 ff.

The Labour Court observed that there are no national rules, either in statutes or in case law, which give Laval a right to damages for collective actions which violate the Treaty. Damage liability for the trade unions must therefore be solely based on EU law.

The Labour Court first recalls the case law of the ECJ concerning Member State liability for breaches of EU law. The principle of state liability was first applied in Francovich and has been developed in subsequent case law. According to this case law, a Member State may be liable for loss and damage caused to individuals as a result of breaches of European Union law. Individuals harmed have a right to damages when three conditions are met:

1. the rule of Community law breached is intended to confer rights upon individuals,
2. the breach is sufficiently serious, and
3. there is a direct causal link between the breach of Community law and the damage sustained by any individual.

We could call these the Brasserie du Pêcheur-conditions.

The Labour Court states that liability for damages on an EU law basis, in the case law of the EU Court, has been extended to horizontal relations, that is when a private party claims damages in accordance with EU law against another private party. The Labour Court refers to two cases dealing with competition law (Courage v. Crehan and Manfredi v. Lloyd) and one case concerning free movement of workers (Raccanelli). One prerequisite for such horizontal liability is that the piece of EU law that has been violated has horizontal direct effect (that the EU provisions create rights for individuals that the national courts have to protect in horizontal relationships). From this case law the Labour Court draws the conclusion that it may be

‘considered established that there is a general legal principle within EC law that damages are also to be able to be awarded between private parties upon a violation of a treaty provision that has horizontal

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direct effect. That this principle is not only applicable within the area of competition law but also ought to be applicable with respect to violations against other treaty provisions can be seen from the judgement in the case, Raccanelli.’

The Labour Court found that the trade unions in principle were liable to pay damages ‘assuming that the remaining criteria for such liability are fulfilled’. The Court then refers to the Brasserie du Pécheur-conditions, with one adjustment: the infringed EU law must have horizontal direct effect (it is not enough that it is ‘intended to confer rights on individuals’). When applying this formula to the case, the Labour Court found that article 56 TFEU had horizontal direct effect in relation to the trade unions. It was also, according to the Court, evident that there is such causality as is required. Further, the Court considered the breach of Article 56 TFEU sufficiently serious.

The Labour Court stressed that the Brasserie du Pécheur-conditions do not constitute an exhaustive regulation of damages. In the absence of any EU legislation it is in accordance with the rules of national law on liability that the Member States must make reparation for the consequences of the loss and damage caused. Therefore, the Labour Court applied the regulations concerning damages in the Co-Determination Act analogously. A trade union organising a collective action which is unlawful according to the Co-Determination Act is liable to pay reparation for both economic and punitive damages (allmänt skadeständ), the latter being a particular form of damages which may be payable in addition to compensation for the economic loss.

According to the Labour Court, it was evident that Laval had suffered economic losses as a consequence of the unlawful collective actions, but that Laval had not been able to prove that it had suffered economic harm to the amount claimed. The claim with respect to the economic damages was therefore denied. The Labour Court set the punitive damages that Laval were to receive from the trade unions to 550 000 SEK (about 55 000 Euro).

Three out of seven judges in the panel were of a dissenting opinion.
Is there a general principle of EU law on liability of individuals to pay damages for breach of EU law (analogous to the state liability principle)?

The stance taken by the Labour Court gives rise to the question of whether the ECJ has established a general principle of EU law concerning the liability of individuals to pay damages for breach of EU law (analogous to the state liability principle). As already mentioned, the Labour Court refers to three cases: Courage, Manfredi and Raccanelli.

Both Courage (from 2001) and Manfredi (from 2006) concerned breaches of EU competition law (now Article 101 TFEU). In Courage a pub tenant had concluded a standard form of agreement for lease of a pub, which contained a provision that he had to buy beer exclusively from the Courage brewery. The pub tenant argued, inter alia, that the beer tie in his contract was contrary to Article 101 TFEU and that he had suffered damages since the price he had to pay for the beer was substantially higher than the price Courage applied for independent pubs. In the Manfredi case, a consumer claimed damages from an insurance company for the increase in the cost of premiums paid by reason of an agreement between several insurance companies, which had been declared unlawful according to competition law.

In both cases the ECJ stated that the full effectiveness of Article 101 TFEU would be put at risk if it was not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (Courage p. 26 and Manfredi p. 60). Article 101 is thus interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm (Manfredi p. 63).

Could these cases be regarded as expressions of the general principle of horizontal liability as proclaimed by the Labour Court?

The interpretation of Courage and Manfredi has been subject to thorough debate in the literature. The common position seems to be that the Courage and Manfredi cases are not expressions of a gen-
eral principle of horizontal liability, analogous to the state liability principle. There are several reasons for this position.

First, it can be noted that the Brasserie du pêcheur or subsequent state liability case law are not mentioned at all in Courage. In the subsequent case, Manfredi, the Court does refer to Brasserie du pêcheur (paragraph 93 and 96). The reference, however, is not made when answering the question of whether Article 101 TFEU entitles a harmed individual to claim damages in horizontal relations. Rather, the reference to Brasserie du pêcheur is given when the Court addresses the specific question of whether Article 101 is to be interpreted as requiring national courts to award punitive damages and compensations for loss of profit (lucrum cessans), when such damages are available in national law (see more about the principle of equivalence below).

Second, it must be stressed that the Court, when explaining the conditions for awarding damages, neither refers to nor applies the Brasserie du pêcheur-conditions. The reasoning of the Court in Courage and Manfredi follows another line of reasoning, which I will return to below.

Third, the reasons put forward by the Court for establishing the doctrine on state liability differs from the ratio legis for horizontal liability in the event of a breach of Article 101 TFEU. The basis for state liability is, according to the Court, first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to cooperate imposed on Member States by (now) Article 4.3.11 Francovich is often explained as a reaction to lack of commitment by the Member State to honour at home what they have promised in Brussels.12 The argument is not valid in horizontal relations. Private parties, like trade unions, could not be under obligation to cooperate.13 In Courage and Manfredi the Court only stressed that the full effectiveness of Article 101 TFEU would be put at risk if it was not open to

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10 See, for instance, Dougan, National remedies before the Court of Justice: issues of harmonisation and differentiation 378, Nazzini in Barnard & Odudu, The outer limits of European union law 420 and Ward, Judicial review and the rights of private parties in EU law 249 ff. Advocate General van Gerven argued in his famous opinion in C-128/92 Banks [1994] ECR I-1209 that the Francovich doctrine should apply also in horizontal relationships.


12 See, for instance, Dougan in Craig & De Búrca, The Evolution of EU Law p. 414 ff.

13 Ward, Judicial review and the rights of private parties in EU law 252.
any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

In Racanelli the Court confirmed its earlier case law according to which (now) Article 45 TFEU could, under certain circumstances, apply in horizontal relations. The Court was also asked what the consequences in law are if there had been a violation of Article 49 TFEU. The Court’s answer contains, in my opinion, reference to the procedural autonomy of the Member States, limited by the principle of effective judicial protection, which I will return to below. However, the wording used by the Court is somewhat ambiguous. After declaring that the Member States are free to choose between different remedies (p. 50, cited below), the Court states that it is for the court of the Member State to assess ‘the nature of the compensation which he would be entitled to claim’ (p. 51, italics added).

15 The wording indicates that this sentence is to be read as ‘the Member State court shall decide both if damages are to be awarded and the more precise modalities’, rather than ‘damages must be available at national level, but the more precise modalities are to be decided by the Member State court.’ This interpretation is also consistent with the starting point of the Court, according to which the Member States are free to choose between the different remedies. Further, and perhaps most importantly, it seems most unlikely that the ECJ would finally decide such a controversial issue as horizontal liability for breaches of directly effective Treaty provisions in a judgment with only three judges and without an opinion from the Advocate General, and without giving any further reason for its decision.

16 It follows from the foregoing that the Labour Court’s arguments are far from convincing. As a court of last instance, the Labour Court is required to make a reference to the ECJ before giving a judgment which comprises interpretation of EU law. A national court may refrain from requesting a preliminary ruling if the point

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15 Danish: ’som han måtte være berettiget til’. French: ‘la nature de la réparation à laquelle il serait en droit de prétendre’. German: ‘welche Art von Wiedergutmachung er beanspruchen könnte’. The Swedish version, which is the one the Swedish Labour Court refer to, is instead using the indicative: ‘fastställa den ersättning som denne har rätt att kräva’, which would be translated to English as ‘the compensation which he is entitled to claim’.

16 For another reading of the case, see Bernitz & Reich, Common Market Law Review 2011 p.612.
of law at issue is clear from the settled case-law of the Court or leaves no room for any reasonable doubt.\textsuperscript{17} From the above it follows that the issue of liability for individuals to pay damages for breach of EU law is manifestly unclear. Further, according to the so called CILFIT-criteria the national court must be convinced that the interpretation is equally obvious to the courts of the other Member States and to the ECJ.\textsuperscript{18} In this case, three out of seven judges did not agree with the interpretation made by the majority of the Court. When the interpretation is not obvious to all members of one and the same court, it can certainly not be obvious to the courts of all Member States.

The conclusion of the Swedish Labour Court, that it is established that there is a general principle of EU law on liability of individuals to pay damages for breach of EU law (analogous to the state liability principle), must have particularly low value as a precedent, taking into account the lack of support for the reasoning in the case law of the ECJ, the small majority dictating the judgment and the fact that no preliminary reference was made.

4 A method for determining when liability of individuals to pay damages for breach of EU law is required

If there is no such principle, as the Labour Court argues, what should apply instead? Even if one does not accept the Labour Court’s view, this does not imply that \textit{Courage} and \textit{Manfredi} lack relevance for the question of whether a trade union arranging an ‘EU-unlawful’ collective action is liable to pay damages according to EU law.

The main finding in \textit{Courage} and \textit{Manfredi} was that individuals are entitled to claim compensation for that harm caused them by an agreement or practice violating Article 101 TFEU. This finding – which is specific to Article 101 TFEU and the kinds of violations of Article 101 TFEU specific to those cases – could not in itself be applied analogously to other violations of other pieces of EU law. The judgments do however provide a method or programme for determining whether or not it should be possible for individuals to

\textsuperscript{17} See, for instance, C-99/00 \textit{Lyckeskog} [2002] ECR I-4839.

\textsuperscript{18} Case 283/81 \textit{CILFIT} [1982] ECR 3415.
claim compensation for a violation of EU law caused by another individual. In my opinion, this method is not limited to competition law, but might also be relevant to other EU provisions with horizontal direct effect, although the requirements for awarding damages must be qualified. The reasoning of the ECJ in *Courage* indicates an analysis in five steps.

First, the Court concludes that individuals may rely on breaches of Article 101 TFEU before national courts in horizontal relations (p. 24), consequently, it has direct horizontal effect.

It is a debated issue how the legal effects of a directly effective provision are best to be described and understood. I will not enter into that discussion. In short, a national court should apply a directly effective EU provision instead of a conflicting norm of national law or in the absence of transposition.

However, just by stating that a national court should directly apply, for instance Article 56 TFEU, does not answer the question of when liability of individuals to pay damages for breach of EU law is required. EU provisions often only give a norm concerning which behaviours are accepted or not (a rule of conduct or a substantive provision), but do not specify what should happen if these rules are violated. To give one example: Article 18 TFEU prescribes that any discrimination on grounds of nationality should be prohibited, but does not indicate how a breach of the prohibition shall be remedied. The EU provision is, in this sense, incomplete.

Due to this, a directly effective EU (substantive) provision will usually be complemented with national remedies. In, for instance, *Raccanelli* the Court explains this.

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19 Arnull, The European Union and its Court of Justice, p. 328, Biondi & Farley, The right to damages in European law, p. 75 and Dougan, National remedies before the Court of Justice : issues of harmonisation and differentiation379. See also C-253/00 Muñoz and Superior Fructícola [2002] ECR I-7289.

20 The following is inspired by a *responsum* given by Professor Torbjörn Andersson in the Laval-case (available in the file of the Labour Court).

21 See, for instance, de Witte in Craig & De Búrca, The Evolution of EU Law 323-362, Craig & De Búrca, EU law : text, cases and materials, ibid.268 ff., Prechal in Barnard, The fundamentals of EU law revisited : assessing the impact of the constitutional debate 35 ff. and Edward in Prinssen & Schrauwen, Direct effect : rethinking a classic of EC legal doctrine

22 Rosas & Armatti, EU constitutional law : an introduction 64.

23 On the concepts of substantive rules and rules of conduct, see Malmberg et al, Effective enforcement of EC labour law 30ff.
‘… (EU law does not prescribe any specific measure) to be taken by the Member States […] in the event of a breach of the prohibition of discrimination, but leaves them free to choose between the different solutions suitable for achieving the objective of those respective provisions, depending on the different situations which may arise’ (p. 50).

This starting point is often described as a principle of national procedural autonomy.24 The fact that a directly effective (substantive) EU provision has to be complemented with national remedies does not give the Member States full procedural autonomy. The limitation in the procedural autonomy of the Member State is addressed in the following questions posed by the Court in Courage.

Second, after concluding that Article 101 TFEU has direct horizontal effect, the Court in Courage poses the question of whether the possibility of seeking compensation for loss is required to ensure the full effectiveness (effect utile) of the piece of EU law in question (p. 25). This question is answered with arguments closely connected to the enforcement of the particular piece of EU law at hand. The Court mentions that agreements or practices which are liable to restrict or distort competition are frequently covert. From that point of view, the possibility of actions for damages by parties of such an agreement before the national courts can make a significant contribution to the full effectiveness of Article 101 TFEU. The Court’s conclusion is that an absolute bar in national law against bringing damages claims for breaches of Article 101 is not compatible with EU law (p. 26-27). In Manfredi the Court went one step further and stated that any individual can claim compensation for that harm suffered by a breach of Article 101 (p. 63).

The Court then iterates that in the absence of EU rules governing the matter, remedies and sanctions for breach of horizontal directly effective EU law, are to be decided by the domestic legal system, subject to the principles of equivalence and effectiveness (p. 29).

The third question is thus if the claim put forward by the claimant may be awarded according to national law. If that is the case, the national court need not address the requirements of EU law.

24 Arnell, The European Union and its Court of Justice 268.
If, on the other hand, the question is answered in the negative, two more questions have to be asked. It follows from the case law of the ECJ that EU rules are not to be discriminated against by providing less favourable conditions for enforcement in comparison with domestic rules of a similar nature (the principles of equivalence) and that national rules may not render the exercise of (rights conferred by) Community law virtually impossible or excessively difficult (principles of effectiveness). This case law is now reflected in the Treaty of the European Union, where it is prescribed that Member States should provide remedies sufficient to ensure effective legal protection in the fields covered by Union law (Article 19 TEU).

The Fourth question is thus whether it is possible, according to national law, to award the damages in similar cases. If that is the case, the same possibility must apply with respect to claims based on Union law (the principles of equivalence). This was not an issue in Courage. In Manfredi, however, the Court made it clear that if, for instance, punitive damages may be awarded in similar actions according to national law, it must also be possible to award such damages pursuant to actions founded on the Union rules (p. 93).

The fifth question is whether national rule, which limits the possibility of claiming damages, renders the exercise of Union law excessively difficult (principle of effectiveness). The Court had already (in paragraph 26) determined that the full effectiveness of Article 101 TFEU would be put at risk if it was not open to any individual to claim damages for loss caused to him by a contract liable to restrict or distort competition. The arguments then focused on the effectiveness of EU law. The Court at this stage turns to national law and analysis of the exclusion or reduction of the right to damages following from national law might be justified. In Courage the ECJ gives a list of considerations which are acceptable for limiting the liability, such as preventing unjust enrichment and that a party should not profit from his own unlawful conduct. Further, it is possible to take into account the economic and legal context of the parties, the market position of the parties and the possibility of reducing loss.

It is obvious that the grounds for justification mentioned in Courage do not constitute an exhaustive list. It should also be noted that the justifications which the Court discusses in Courage relate to damages for violation of Article 101. Further, when discussing which restrictions of damages are justified, the Court takes into
account whether the restrictions are recognised in most of the legal systems of the Member States (Courage p. 29).

5 Concluding remarks

What would then be the answer if the method just mentioned were to be applied regarding claims for damages on trade unions for arranging ‘EU-unlawful’ collective actions? I will not try to give a full answer to that question, but rather limit myself to some short remarks.

(1) In Laval, the ECJ explained that (now) Article 56 TFEU confers on individuals rights which the national courts must protect. Further, the Court held that the Article applies also to obstacles created by private organisations exercising their legal autonomy in order to collectively regulate the provision of services.25 In Viking, the ECJ stated that (now) Article 49 TFEU may be relied on by a private undertaking against a trade union or an association of trade unions.26 The Court, thus, has clarified that Articles 49 and 56 TFEU have direct horizontal effect when a trade union exercises their legal autonomy in order to collectively regulate the provision of services.

(2) When it comes to the question of whether the interest of the full effectiveness of EU law requires damages as a remedy, it is possible to point to several differences between the situations in Courage and Manfredi, on the one hand, and the kind of ‘EU-unlawful’ collective actions discussed here, on the other.

It could be mentioned that the Union has exclusive competence as regards the establishment of the competition rules for the functioning of the internal market (Article 3 TFEU). In such areas, the Member States may only adopt legally-binding acts, if so empowered by the Union or for the implementation of Union acts (Article 2 TFEU). Thus, it is natural that the EU provides full regulation of the area, including both what behaviours are acceptable or not on the market, and the sanctions available in case of breach of EU law. In the areas of internal market and social policy, on the other hand, the competence is shared between the Union and the Member

States. In areas of shared competence the Union may – according to the principle of subsidiarity – act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States (Article 5 TEU). Arguably, intrusions in the procedural autonomy of the Member State require stronger justifications in areas of shared competence than in areas of exclusive competence.

Further, collective actions are excluded from the competence of the EU to adopt directives according to its competence in social policy (Article 152.5 TFEU). Even if this provision does not exclude collective action from the domain of the economic freedoms, it calls for providing the Member State with a margin of appreciation in regulating remedies for unlawful collective actions.

While the practices in Courage and Manfredi had an illegal aim, an EU-unlawful collective action will typically have the aim of protecting the workers, which is regarded as a public interest objective, but goes beyond what is necessary to achieve this aim. Due account has also to be taken of the fact that the right to strike is regarded as a fundamental right and that the threat of severe damages might risk creating a situation where the right to strike cannot be exercised.

One of the main arguments in Courage was that the practices in such a case are covert and difficult to detect. A right to damage would give each of the parties an incentive to reveal the practices which distort competition and thus strengthens the practical working of competition law. Collective actions, on the contrary, are almost without exception made public. Further, there are in the Member State often mechanisms for preventing unlawful collective actions ex ante, for example different forms of mediation or interim decisions by Courts, which serve as an alternative to damages claims ex post.

Taking this into account, it is far from obvious that the ECJ would consider that, for instance, Article 56 TFEU must be interpreted as meaning that an individual must be able to claim compensation for the harm suffered from an EU-unlawful collective action if the Member State provides other effective methods of preventing such collective actions.

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28 See for instance Article 28 of the Charter of fundamental rights of the EU.
However, this issue will often not be decisive, since damages will be awarded in similar cases according to national law in many Member States. The remedies for ‘EU-unlawful’ collective actions must not be less favourable in comparison with domestic remedies for collective actions unlawful according to national law (*the principles of equivalence*).

A crucial question is whether national rules which limit the possibility of claiming damages render the exercise of Union law excessively difficult (*principle of effectiveness*). In the Member States it is not unusual for there to be rules limiting the trade unions’ liability. The question is then if the exclusion or reduction of damages in national law might be justified. This analysis should take into account the nature of the violation of the EU law, the reason for the restrictions, as well the extent to which such restrictions are recognised in most of the legal systems of the Member States.

This analysis would benefit from comparative analyses of the law of remedies for unlawful collective actions in the Member State.

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