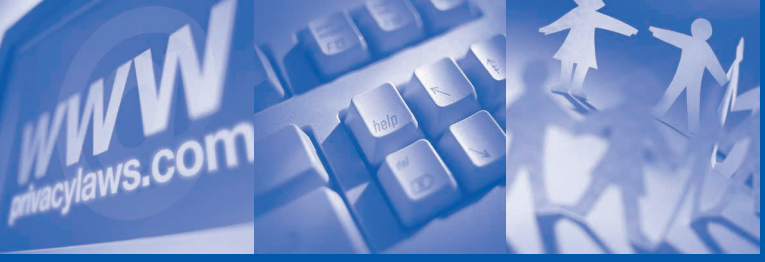


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# An update on compensation claims under the EU GDPR

CJEU Advocate General: No compensation for mere upset feelings. By **Lore Leitner**, **Arjun Dhar**, **Josephine Jay** and **Miles Lynn** of Goodwin.

The EU General Data Protection Regulation (GDPR), under Art. 82, provides the right for any person who has suffered material or non-material damage as a result of a GDPR infringement to receive compensation. However, what constitutes "non-material damage" and the associated level of damages to be awarded has long been a contentious topic in European jurisprudence.

*Continued on p.3*

# Latin America's EU linked Model Contractual Clauses for international data transfers

A session at the Global Privacy Assembly explained how Model Contract Clauses are creating business value in Latin America. **Stewart Dresner** reports from Istanbul.

Standard and Model Contractual Clauses, as a legal basis for transferring personal data between jurisdictions, create business value while protecting individual rights, and have advantages over consent (which can be withdrawn) and Binding Corporate Rules (usually

*Continued on p.5*



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# comment

## If you can take your eye off the ball, watch the app!

The World Cup in Qatar has attracted attention to many aspects other than football itself, one of them being lack of privacy. The tens of thousands of surveillance cameras using facial recognition technology prompted France's DPA, the CNIL, to advise football fans to use a burner mobile (an inexpensive prepaid anonymous phone) in order to safeguard their personal data. Germany's federal DPA has also issued a warning about Qatar's data collection via World Cup apps and advised visitors to not take their usual phone to Qatar due to excessive data collection via the app. Ironically, Qatar has had a data protection law in force since 2017, but is not on the list of jurisdictions regarded by the EU as "adequate".

The dilemmas posed by facial recognition technologies was one of the issues debated by the DPAs at their annual international conference in Turkey, where they adopted a resolution on this technology (p.21). Stewart Dresner and I attended the open days of the conference. Read an overview of the proceedings on p.17 and the latest news about Latin American Standard Contractual Clauses and other developments in the region on p.1.

Indonesia's data protection law in now in force – a major change in the world's fourth-most populous country (p.22). Bangladesh has prepared a Bill (p.26) and the EU has several Acts in the pipeline that will affect the data protection framework. The draft AI Act is making progress, and the Digital Services Act, EU's new online content regulation, has been in force since 16 November. Companies now have until 17 February 2024 to ensure compliance (p.27).

In the US, a debate has started about the Federal Trade Commission's rulemaking in the fields of consumer privacy and data security (p.8). The FTC's focus is very much on behavioural advertising. Some commentators are however questioning the FTC's authority to engage in privacy rulemaking, especially now as there are attempts in the US Congress to adopt a federal level privacy law.

Our Germany correspondents report on data transfers in the context of US-based subsidiaries, and the application of *Schrems II* (p.12). We also bring you an analysis of a recent Advocate General's Opinion from the Court of Justice of the European Union on compensation under the EU GDPR (p.1).

Laura Linkomies, Editor
PRIVACY LAWS & BUSINESS

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*EU GDPR... from p.1*

On 6 October 2022, Advocate-General Campos Sánchez-Bordona delivered his Opinion[1] on the issue of non-material damage in *UI v Österreichische Post AG* — a case referred[2] to the Court of Justice of the European Union (CJEU) by the Supreme Court of Austria. The Austrian court put forward three questions, which we paraphrase below:

1. To obtain compensation under Art. 82 GDPR, must the data subject suffer harm in addition to the GDPR infringement, or is the infringement intrinsically sufficient?
2. In assessing compensation, must the court consider requirements of EU law beyond the principles of effectiveness and equivalence?
3. Must a claim for compensation for "non-material damage" meet a *de minimis* threshold that requires more than mere upset feelings caused by the GDPR infringement?

## Background

The case was brought by a data subject, UI, against the Austrian postal service, Österreichische Post. In order to facilitate targeted election advertising, Österreichische Post collected information on the political preferences of the Austrian population. To do so, it ran an algorithm using the data (e.g., addresses and ages) to identify the likely political inclinations of various data subjects, including UI. UI was categorised to have a high affinity with the Freedom Party of Austria – a far right populist party.

UI was offended by the party affinity attributed to him, claiming that it was insulting, shameful, and damaging to his reputation — although, notably, this information was not transferred to third parties. Further, he asserted that it caused him great upset and a loss of confidence, as well as a feeling of public exposure. For his discomfort, he claimed compensation of €1,000 in non-material damages. The case was dismissed in the lower courts in Austria; however, it was later appealed to the Austrian Supreme Court, which then referred three questions — to which we refer above and below — to the CJEU.

## The Opinion

**1. To obtain compensation under Art. 82 GDPR, must the data subject suffer harm in addition to the GDPR infringement, or is the infringement intrinsically sufficient?** The Advocate General differentiated between two approaches to compensation under Art. 82 GDPR: (i) where an infringement of the GDPR, regardless of the existence of harm, gives rise to a claim in damages; and (ii) where an infringement of the GDPR automatically produces harm that gives rise to a claim in damages. He considered this theoretical distinction important because in situation (ii) damage is a prerequisite for compensation. Regardless, in practice, the applicant need not prove damage in either case.

In the Advocate General's view, compensation regardless of the existence of harm or damage (i.e. approach (i)) conflicts with the words of Art. 82(1) GDPR, which gives a right to compensation to any person "who has suffered … damage as a result of an infringement" (emphasis in original). It was also his opinion that the approach conflicts with the primary aim of the civil liability established by the GDPR, which is to give the data subject "full and effective compensation for the damage suffered". Indeed, if there is no damage, any compensation would not serve the function of redress, it would simply exist to punish the controller.

The Advocate General analysed situation (ii) through literal, historical, contextual, and teleological lenses. He first noted that other EU legislation expressly provides for an automatic right to compensation, which is notably absent under the GDPR.

Further, in an attempt to better define what constitutes non-material damages under the GDPR, he dismissed arguments stating that mere loss of control over data necessarily constitutes non-material damage. On this point, he observed that it was not the GDPR's sole objective for data subjects to have absolute control over their personal data. Although this is one objective, it must be seen alongside other objectives of the GDPR, including the promotion of free movement of data in the single market. The aim of the GDPR, he stated, is to legitimise the processing of personal data under strict conditions, not to limit it systematically.

If no damage – or at least no material damage – is suffered by the data subject, then the damages cannot be regarded as compensatory and would more closely resemble punitive damages. The Attorney General noted that it is possible for Member States' legal systems to provide for the payment of punitive damages. Yet, after considering a literal interpretation of the GDPR, an interpretation in light of the history of the provision, a contextual interpretation, and a purposive interpretation, he concluded that the GDPR intends to compensate the injured party for the harm suffered, not punish the infringer.

In doing so, he made a number of useful observations. For example, he noted that although the duty on an infringing party to compensate operates as an incentive on that party to observe the rules, this is merely supplemental to public enforcement of the rules, which serves the punitive functions contemplated by the GDPR. He also noted that allowing for compensation without damage would encourage unjustified civil litigation and could thereby discourage data processing.

**2. In assessing compensation, must the court consider any requirements of EU law beyond the principles of effectiveness and equivalence?** The principle of effectiveness requires that Member States' courts ensure that national remedies and procedural rules do not render claims based on EU law impossible in practice or unreasonably difficult to enforce; and the principle of equivalence requires that the protection within a national legal system of EU-law-based rights must not be less favourable than in the case of individual rights based on national law.

The Advocate General explained that because the harmonised provisions of the GDPR apply directly, and because Art. 82 of the GDPR applies in respect of all non-material damage occurring as a result of an infringement, the principles of effectiveness and equivalence do not play an important role in the assessment of compensation.

The Advocate General made clear that compensation will depend, primarily, on the claim put forward by each applicant. He also reiterated that

punitive damages are not provided for by the GDPR's system of civil liability, but that other options have been adopted in CJEU and national European case law. For example, some national legal systems allow for symbolic payments, or payments intended to neutralise an unfairly obtained profit. Indeed, in terms of symbolic payments, the GDPR allows, under Art. 79, for Member States to offer such remedies to data subjects where there is no damage at all; and where there is damage, any difficulty in proving the damage must not result in nominal damages. Regarding neutralising a profit, the Advocate General expressed the view that this is not part of the law of damages and is not provided for by the GDPR. However, he also recognised that other areas of EU law do provide non-financial remedies to non-material damage, "such as recognition that the infringement occurred, thereby providing the applicant with a certain moral satisfaction".

**3. Must a claim for compensation for "non-material damage" meet a *de minimis* threshold that requires more than mere upset feelings caused by the GDPR infringement?** Perhaps most significantly, the Advocate General concluded that the GDPR does not support claims for compensation for mere upset feelings. He did so by separating cases into three categories: (i) those that result in material damage; (ii) those that result in non-material damage; and (iii) those that result in mere annoyance and upset.

In his view, although EU law does recognise the principle of compensation for non-material damage, this does not apply to all non-material damage regardless of seriousness. In analysing the court's case law, he pointed out the relevance of the distinction between (ii) non-material damage (for which compensation may be awarded), and (iii) other inconveniences arising from the abuse of the law, which do not necessarily create a right to compensation. The latter, he describes, is an inevitable corollary of life in society.

In justifying his position, he also points out the following:

1. That it is not the sole aim of the GDPR to safeguard the fundamental right to the protection of personal data, nor to limit systematically the processing of personal data, but rather to legitimise it under strict conditions;
2. That any breach of a provision governing data protection leads to some negative reaction on the part of the data subject, and compensation for this negative feeling is different from the category of cases in which the court has awarded compensation without damage; and
3. That the system established by the GDPR puts in place various other remedies.

The Attorney General concludes by acknowledging the subtlety of the distinction between mere upset and genuine non-material damage, but makes clear that differentiating between the two falls to the courts of the Member States. He also acknowledges that this will likely be subject to public perceptions in those individual Member States about the permissible degree of tolerance regarding instances where the subjective effects of the infringement of a provision do not exceed a *de minimis* level.

## Consequences of the Opinion

The Opinion provides welcome clarity on an issue that different Member States – and even different courts within individual Member States – have approached inconsistently. As discussed below, the English High Court ruled in 2021 that a *de minimis* threshold applies to data breach claims under the GDPR. The German Federal Constitutional Court, on the other hand, ruled in the same year that a low-value case concerning the unlawful sending of an advertising email should not have been dismissed by a lower court for its failure to exceed a materiality threshold – although it also held that the CJEU needed to clarify whether the GDPR provides for a materiality threshold for damage claims.

This Opinion is beneficial to businesses, and particularly businesses contending with opportunistic low-value data breach claims. It helps that the Opinion recognises the effect of granting compensation on encouraging opportunistic litigation, and the overall dampening effect it would have on the willingness of private industry to engage in data processing.

It also adds clarity on calculating the quantum of damages expected in data breach claims. For example, it makes clear that the GDPR does not recognise a private right to punitive damages, and therefore damages for cases with no damage or non-material damage should be calculated specifically in light of the harm suffered, with compensatory principles in mind.

The Opinion is delivered with a few caveats. First, although the CJEU's judgment is likely to follow the Opinion, this is not a certainty; and it remains to be seen which aspects of the Opinion the court will incorporate into its judgment. Second, the Opinion expressly leaves drawing the line between non-material damage (which is eligible for compensation) and mere annoyance and upset (which is not eligible for compensation) to the courts of Member States. In doing so, the Attorney General acknowledges that the courts of Member States "will probably be unable to avoid in their rulings the perception prevailing in society at a given time". In other words, what constitutes *de minimis* will depend on the country in question and general societal perceptions. As a result, one will need to keep an eye on rulings of Member States' courts to gain insight on where that *de minimis* threshold is established.

## English law

Case law of the CJEU made on or after 31 December 2020 is not binding on the UK courts. The UK courts therefore have the option to align their position with the EU position or take their own path.

The notion that the right to compensation under the GDPR is compensatory rather than punitive accords with the English approach. In *Halliday v Creation Consumer Finance Limited* [2013] EWCA Civ 333[3], Arden LJ stated that "it is not the function of the civil court, unless specifically provided for, to impose sanctions", and that this function is better served by other parts of the judicial system, through administrative remedies or criminal penalties, for example.

However, there is still some level of ambiguity in English law. In *Johnson v Eastlight Community Homes Ltd* [2021] EWHC 3069 (QB)[4], the High Court ruled that a *de minimis* threshold

 

applies to data breach claims under the GDPR. Yet, in *SMO v TikTok* [2022] EWHC 489 (QB)[5], the court considered that there was at least an arguable case that compensation under the GDPR is available as of right.

## Pending cases

This Opinion – and more importantly the CJEU's judgment – will also have implications for other cases in which similar references have been made to the CJEU. A non-exhaustive list is included below:

- *BL v Saturn Electro* (Case C-687/21)[6]: This reference from a German court asks whether it is necessary for the right to compensation to establish non-material damage in addition to a mere infringement.
- *GP v Juris GmbH* (Case C-741/21)[7]: This reference from a German court concerns an individual who received direct marketing without providing his consent and following several opt-out requests. Despite the individual suffering no financial loss or distress, the CJEU is asked whether a mere infringement can support a claim for damages, and whether there is a *de minimis* threshold that must be reached.
- *VB v Natsionalna agentsia za prihodite* (Case C-340-21)[8]: This reference by a Bulgarian court asks whether a data subject who has been a victim in a personal data breach can claim for their "worries, fears and anxieties" even where misuse of the personal data has not been established and the data subject has not suffered any further harm.

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