DANUBE • 16(3) • pp. 240–263
DOI: 10.2478/danb-2025-0012

sciendo Danube

The Court of Justice and Compensation for Non-Material Damage in Case of Infringement of the GDPR

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Abstract

Slowly but surely, the area regulated by European Union law has become accustomed to the protection of personal data materialized in the GDPR Regulation, which has already celebrated its seventh birthday this year. Although it can already be stated that the fundamental questions and mechanisms for the functioning of this in many ways revolutionary and massive legal regulation have now been resolved or set, there are still areas that are in many ways unclear and await interpretation. One such area was compensation for non-material damage in case of infringement of the Regulation, which, in connection with the protection of personal data, was only brought to light by the GDPR. It is this institute that is the subject of this article, which will present the historical development of the institute, its theoretical foundations and, in particular, the case law of the Court of Justice, which in recent years has begun to interpret this institute and thus give it a realistic and practical picture.

Keywords

Personal Data, GDPR, Compensation for Non-Material Damage, Court of Justice

I. Introduction

In recent decades, data has become one of the most valuable assets. Some authors even call it the currency of the future.[3] There is certainly no need to remind the strong resonance caused by the adoption of the GDPR. This year, the Regulation celebrates its seventh birthday, during which time it has become an integral part of everyday life in the European Union. Correspondingly, there are a large number of questions that have arisen over the years about its application and the answers to them, in particular by the Court of Justice, through the answers to preliminary questions submitted by the courts of the Member

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[3] Reiners, 2015, p. 51, 55; Martini, in: Paal/Pauly, 2017, rec. 45 – calling data the "commodity of the 21st century".

States.[4] Nevertheless, there are still areas that have remained unanswered until recently and which have raised many questions. One of these is compensation for non-material damage under Art. 82(1) of the Regulation.[5] It was not until 2021[6] that preliminary questions on this issue started to appear before the Court of Justice and the Court of Justice started to answer them in 2023.[7] This article is devoted to the issue of compensation for non-material damage in case of infringement of the GDPR and the case law developed by the Court of Justice on this issue.

Although the presentation and analysis of the adopted conclusions of the Court of Justice form the core of the paper, the paper is deliberately not only a gloss of the adopted case law of the Court of Justice, but also in its introductory part it is supplemented by an introduction to the previous (before the adoption of the GDPR) and current (contained in the GDPR) legislation, supplemented by a comparative comparison of the approach of the Member States to the award of compensation for non-material damage before its explicit enshrinement in the GDPR, as well as a reflection on the unclear interpretative possibilities of the discussed Art. 82 GDPR. Having set out the legislative framework in this way, it then proceeds to the aforementioned presentation and analysis of the first judgments of the Court of Justice relating to the issue of compensation for non-material damage in the event of a infringement of the GDPR – the emphasis being placed not only on the substantive conclusions of the answers to the individual preliminary questions, but also on the Court's reasoning for those conclusions. The paper concludes with an assessment of the Court's case law to date and raises further questions that the Court is likely to be called upon to answer in the coming years by the courts of the Member States.

II. Legal Regulation of Compensation for Non-Material Damage in the Processing of Personal Data

Directive 95/46/EC

Judical remedy was enshrined in par. 55 of the recital of the Directive. This recital of the Directive then found its normative reflection in Chapter III entitled "Judicial remedies, liability and sanctions", specifically in Art. 23, which read:

1. *Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.*
2. *The controller may be exempted from thr liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage.*

[4] For example, the search form of the CJEU database contains 226 proceedings under the heading "Data Protection" – see: https://curia.europa.eu/juris/recherche.jsf?language=eng.

[5] Moreover, the "waiting" for the Court's case law on this provision is compounded by the fact that the Court has not issued any preliminary ruling on the question of compensation for damage under Directive 95/46/EC – cf. Kuner et al., 2020, p. 1170.

[6] The first reference for a preliminary ruling before the Court of Justice was made by the Austrian Supreme Court in case Österreichische Post, C 300/21 – see below for details.

[7] The first judgment (in the Österreichische Post case) was delivered by the Court on 4 May 2023.

Two shortcomings in particular have been criticised of the compensation arrangements set out in the Directive. The first was that the Directive did not expressly provide for a right to compensation for non-material damage;[8] secondly, the Directive did not contain provisions governing the liability of processors.[9]
Although the Directive did not explicitly provide for a right to compensation for non-material damage, some Member States provided for such compensation in their civil or administrative proceedings (but most Member States only provided for compensation for material damage).[10] Even then, several respondents from different Member States testified that they had suffered psychological and social (i.e. non-material) damage rather than material damage in the event of an infringement of their personal data.[11] Some Member States also set out *a priori* in their legislation the amount of compensation that could be awarded to the persons concerned. More often, however, it was left to the courts of the Member States to decide on the specific amount of compensation in a given case. The amounts of compensation awarded varied considerably from one Member State to another. Austria, for example, set an upper limit for compensation for non-material damage of EUR 20 000. In contrast, for example, in Finland, the amounts of compensation ranged from EUR 300 to EUR 800, in Sweden from EUR 600 to EUR 1 200 and in Poland from EUR 1 200 to EUR 12 000.[12]

GDPR Regulation

European Union law naturally recognises the principle of *ubi ius, ibi remedium*.[13] This principle, which is generally implemented in particular by Art. 47(1) of the EU Charter of Fundamental Rights,[14] means that *"Since subjective rights arising from EU law must be effective, no right can exist without an adequate remedy"*.[15] This general principle is in the area of data protection currently enshrined in Art. 82 of the GDPR. The Regulation is a rather exceptional regulation in this respect at the level of European law, as it does not only provide for a general right to an effective judicial remedy,[16] but also for a specific right to obtain compensation for damage caused by an infringement of the Regulation.[17] Other examples of such arrangements include, for example, the claims for compensation

[8] In this regard, cf. Art. 23(1) of the Directive, quoted above, which spoke in general terms of "damage" without specifying in any way what kind of damage (whether only material or also non-material).
[9] Kuner et al., 2020, p. 1165.
[10] Access to data protection remedies in EU Member States, 2013, p. 21.
[11] Ibid, p 28.
[12] Ibid.
[13] Translated as: where there is law, there is protection.
[14] Art. 47(1): *Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article*.
From the case-law of the Court of Justice on this provision, cf. further e.g. C-362/14, ECLI:EU:C:2015:650, par. 95 and the other extensive case-law of the Court of Justice cited therein.
[15] C-413/15, Opinion of Advocate General Sharpston, ECLI:EU:C:2017:745, par. 32.
[16] Which is provided for in Art. 79 of the Regulation.
[17] Agree e.g. O'dell, 2007, p. 9.

for damage enshrined in various transport regulations.[18] Outside the field of transport, for example, Art. 94 of the Community Plant Variety Rights Regulation[19] can be cited. Moreover, as already mentioned above, liability for non-material damage was absent from Directive 95/46/EC. This institute was explicitly incorporated into the draft of GDPR Regulation by the European Parliament legislative resolution of 12 March 2014.[20]
The relevant provisions of Art. 82 of the Regulation[21] read:

82(1) Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

82(2) Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.

82(3) A controller or processor shall be exempt from liability under paragraph 2 if it proves that it is not in any way responsible for the event giving rise to the damage.

82(6) Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under the law of the Member State referred to in Article 79(2).[22] [23]

The undeniable advantage of Art. 82 of the Regulation is that, unlike the legislation enshrined in the Directive, it provides for a direct right of action for compensation for damage (both material and non-material) caused by an infringement of the Regulation. This right is therefore directly and uniformly applicable in all Member States, which both creates greater legal certainty for the persons concerned and makes compensation easier to enforce.[24]
The claim is not limited to certain stages of data processing or certain processing activities.[25] Moreover, the concept of "infringement of the Regulation" should be interpreted broadly to include processing that infringes delegated and implementing acts adopted in accordance with the GDPR and Member State law specifying rules of the GDPR. Individuals should receive full and effective compensation for the damage they have suffered.[26]

[18] Art. 5(1)(c) of Regulation (EC) No 261/2004, Art. 13(1), 16(a) or 17(2) of Regulation (EC) No 1371/2007, Art. 19(5) of Regulation (EU) No 1177/2010 or Arts. 17 and 19(2) of Regulation (EU) No 181/2011.
[19] Regulation (EC) No 2100/94.
[20] European Parliament legislative resolution of 12 March 2014, P7_TA(2014)0212, 2017/C 378/55, OJ C 378, 9.11.2017, pp. 399–492 – cf. therein Art. 77 and its changes.
[21] To complete the picture, it should be noted that Directive (EU) 2016/680 and its Art. 56 and Regulation (EU) 2018/1725 in its Art. 65 also contain the same regulation.
[22] Art. 82(1), (2), (3) and (6) are cited in the text of the paper and are the key provisions for compensation of damages under the GDPR. Art. 82(4) and 82(5) are also relevant, but they deal with the joint and several liability of several controllers or processors (par. 4), as well as their mutual recourse (par. 5). For the purposes of this paper, these provisions do not need to be introduced further.
[23] From the recitals of the Regulation is particularly relevant par. 146.
[24] Cf. e.g. Kugler et al., 2018, p. 191, or Kuner et al., 2020, p. 1175, as well as Advocate General Bordona in his opinion in Österreichische Post case, par. 84.
[25] Laue et al., 2016, rec. 4.
[26] Recital 146 of the Regulation.

Furthermore, the concept of damage should be interpreted broadly in the light of the case law of the Court of Justice.[27]

Compensation for damage may be claimed by *"any person"* who has suffered damage. The right to compensation of damages applies in the first instance to the data subject, but the use of the term *"any person"* suggests that a person other than the data subject will also be able to claim compensation of damages under Art. 82 of the Regulation, provided the conditions are met. This conclusion is confirmed by the literature published so far, according to which special attention will have to be paid to the existence of a sufficient causal link between the damage caused to such person and the breach of the data protection right.[28] However, the use of the term *"any person"* in the context of the right to compensation under the GDPR cannot, of course, be interpreted in a way that legal persons are also entitled to compensation. The GDPR only applies to the protection of personal data of natural persons.[29] In the context of compensation for damage, this general premise is confirmed by recital 85 of the Regulation.

An important innovation brought about by the Regulation is the enshrinement of the processor's liability.[30] [31] The Directive only regulated the liability of the controller. Under Art. 82(2) of the GDPR, where a controller and a processor are involved in the processing of data, a graduated liability system applies, taking into account the different roles of the controller and the processor in the processing activities.[32] [33]

Finally, it should be added that the controller or processor may, pursuant to Art. 82(3) of the Regulation, exempt himself from liability for the damage caused. In order to do

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[27] Ibid.

In recital 85, the Regulation then distinguishes between physical, material and non-material harm and lists some examples of such harm, such as loss of control over personal data or restriction of rights, discrimination, identity theft or misuse, financial loss, unauthorised revocation of pseudonymisation, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage.

[28] Voigt, 2017, p. 206 as well as citing additional literature in footnote 34.

[29] Cf. for example the name of the regulation itself or the European Commission's reply: https://commission.europa.eu/law/law-topic/data-protection/reform/rules-business-and-organisations/application-regulation/do-data-protection-rules-apply-data-about-company_en.

[30] For example, in the Czech Republic, the processor's liability was already established during the existence of the Directive, before the GDPR Regulation was adopted, on the basis of § 8 of the Czech Act No. 101/2000 Coll., on the Protection of Personal Data, which provided that: *If the processor discovers that the controller is in breach of the obligations set out in this Act, it is obliged to notify the controller immediately and terminate the processing of personal data. If he or she fails to do so, he or she shall be jointly and severally liable with the data controller for the damage suffered by the data subject*.

[31] For an in-depth analysis of the position of the controller and processor in relation to compensation and the changes resulting from the transition from the Directive to the GDPR Regulation, see e.g. van Alsenoy, 2016.

[32] Becker, 2016, rec. 6.

[33] The controller is thus liable for unlawful processing and must therefore compensate for any damage resulting from such processing, regardless of whether or not the controller directly caused the damage. Its comprehensive liability arises from its determination of the purposes and means of processing, as well as from its power to instruct processors on how to carry out the processing. As the processor acts on behalf of the controller, its liability is limited to damage resulting from a breach of its own obligations under the GDPR or where it has acted outside or contrary to the controller's lawful instructions. The processor is therefore advantaged as it is only liable in limited cases.

so, they must prove that they are not in any way responsible for the event that led to the damage. Some authors pointed to the change in the wording of the provision compared to that contained in the Directive, from which they conclude that the standard of proof has been raised compared to that contained in the Directive.[34] This will probably make it more difficult for data controllers and processors to take advantage of the exemption, as even the smallest contribution to the event that led to the damage will lead to their liability.[35]

III. Compensation for Non-Material Damage in Case of Infringement of the GDPR and Court of Justice

C-300/21 – Österreichische Post

The dispute in the main proceedings

Österreichische Post AG (the Austrian national postal service provider) collected information on the political party preferences of the Austrian population. It then sold this data to various organisations so that they could carry out targeted advertising. The applicant brought an action before the Austrian courts seeking an order that Österreichische Post cease processing his personal data. The case subsequently came before the Austrian Supreme Court (*Oberster Gerichtshof*), which referred three questions for a preliminary ruling to the Court.

Questions referred for a preliminary ruling

(1) Does the award of compensation under Article 82 of [the GDPR] also require, in addition to infringement of provisions of the GDPR, that an applicant must have suffered harm, or is the infringement of provisions of the GDPR in itself sufficient for the award of compensation?

(2) Does the assessment of the compensation depend on further EU-law requirements in addition to the principles of effectiveness and equivalence?

(3) Is it compatible with EU law to take the view that the award of compensation for non-material damage presupposes the existence of a consequence [or effect] of the infringement of at least some weight that goes beyond the upset caused by that infringement?

Judgment of the Court

On the first question referred

The Court of Justice opted for the option that three conditions must be cumulatively fulfilled in order for the right to compensation to be granted: (a) infringement of the Regulation, (b) the occurrence of the damage, and (c) a causal link between the infringement of the Regulation and the occurrence of the damage.[36]

[34] Voigt, 2017, p. 208.
[35] Laue et al., 2016, rec. 9 or Frenzel, in: Paal/Pauly, 2017, rec. 15.
[36] Particularly par. 36.

As a preliminary point, the Court of Justice observes that the Regulation does not refer to the law of the Member States as regards the meaning and scope of the expressions *"material or non-material damage"* and *"compensation for the damage suffered"*. The Court therefore began by language interpretation of Art. 82(1) of the Regulation. In so doing, it held that it is clear from the wording of that provision that the existence of *"suffered"* damage is one of the conditions for the right to compensation provided for in that provision, as is the existence of an infringement of the regulation and a causal link between that damage and that infringement. Those three conditions must be satisfied cumulatively. The Court reached the same conclusion by applying a systematic interpretation of the Regulation, referring to the relationship between Art. 82(1) and (2) of the Regulation. In the Court's view, the second paragraph, which specifies the liability regime set out in principle in the first paragraph, takes over the three conditions necessary for a claim for compensation.[37] The Court has also based its interpretation on several recitals of the Regulation, namely par. 75, 85 and 146.

On the third question referred

The Court then proceeded to answer the third question, since the answer to that question was conditional on the answer to the second question.[38] Here, the Court came to a negative conclusion: according to the Court, Art. 82(1) of the Regulation precludes a national rule or practice which makes compensation for non-material damage subject to a certain degree of seriousness.[39] The Court was led to adopt this answer for three reasons.

Firstly, the Court pointed out that the Regulation does not define the concept of *"damage"*. The regulation does not mention any threshold of seriousness in any of its provisions. ***Secondly***, according to the Court, the context of the provision also indicates that the entitlement to compensation for damage is not conditional on the damage reaching a certain threshold of seriousness. Indeed, recital 146 of the GDPR states in its third sentence that *"the concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation"*. ***Thirdly***, the Court reffered to recital 10, which states that the provisions of the regulation aim to ensure a consistent and high level of protection of natural persons.[40]

On the second question referred

Finally, the Court also answered the second question referred for a preliminary ruling. The Court replied that, for the purposes of determining the amount of compensation for damage, the national courts must apply the national rules of each Member State concerning the scope

[37] Par. 32 to 36.
[38] Par. 43.
[39] Par. 51.
[40] In this sense see judgments of the Court of 16 July 2020, Facebook Ireland a Schrems, C-311/18, EU:C:2020:559, par. 101, and of 12 January 2023, Österreichische Post, C-154/21, EU:C:2023:3, par. 44 and the case law cited therein.

of financial compensation, provided that the principles of equivalence[41] and effectiveness[42] of EU law are complied with. The Court therefore does not require any other principle than those two.

C-340/21 – Nacionalna agencia za prichodite

The dispute in the main proceedings

Nacionalna agencia za prichodite is a Bulgarian state body whose tasks consist, inter alia, in the identification, seizure and recovery of public debts. In 2019, Bulgarian media revealed that a cyber-attack had resulted in unauthorised access to the Agency's information system and the publication of personal data contained therein on the internet. The cyber-attack affected more than six million individuals of Bulgarian or foreign nationality. Several hundred of them, including the applicant in the original proceedings, brought actions against the Agency for compensation for the non-material damage allegedly suffered as a result of the publication of their personal data. The Supreme Administrative Court (*Varchoven administrativen sad*) decided to refer the following preliminary questions.

Questions referred for a preliminary ruling

(1) Are Articles 24 and 32 of [the GDPR] to be interpreted as meaning that unauthorised disclosure of, or access to, personal data within the meaning of point 12 of Article 4 of [the GDPR] by persons who are not employees of the controller's administration and are not subject to its control is sufficient for the presumption that the technical and organisational measures implemented are not appropriate?

(2) If the first question is answered in the negative, what should be the subject matter and scope of the judicial review of legality in the examination as to whether the technical and organisational measures implemented by the controller are appropriate pursuant to Article 32 of [the GDPR]?

(3) If the first question is answered in the negative, is the principle of accountability under Article 5(2) and Article 24 of [the GDPR], read in conjunction with recital 74 thereof, to be interpreted as meaning that, in legal proceedings under Article 82(1) of [that regulation], the controller bears the burden of proving that the technical and organisational measures implemented are appropriate pursuant to Article 32 of that regulation?

Can the obtaining of an expert's report be regarded as a necessary and sufficient means of proof to establish whether the technical and organisational measures implemented by the controller were appropriate in a case such as the present one, where the unauthorised access to, and disclosure of, personal data are the result of a "hacking attack"?

[41] The first principle means that, in the absence of Union rules in a particular area, it is for the Member State's legal system, on the basis of the principle of procedural autonomy, to regulate the procedural conditions of legal proceedings designed to ensure the protection of the rights of individuals, provided, however, that those conditions are not less favourable in situations to which Union law applies than in similar situations governed by national law.

[42] The second principle means that procedural conditions of a Member State do not, in practice, prevent or make excessively difficult the exercise of rights conferred by EU law. To the both principles see the judgments of the Court of Justice of 13 December 2017, El Hassani, C 403/16, EU:C:2017:960, par. 26, and of 15 September 2022, Uniqa Versicherungen, C 18/21, EU:C:2022:682, par. 36.

(4) Is Article 82(3) of [the GDPR] to be interpreted as meaning that unauthorised disclosure of, or access to, personal data within the meaning of point 12 of Article 4 of [the GDPR] by means of, as in the present case, a "hacking attack" by persons who are not employees of the controller's administration and are not subject to its control constitutes an event for which the controller is not in any way responsible and which entitles it to exemption from liability?

(5) Is Article 82(1) and (2) of [the GDPR], read in conjunction with recitals 85 and 146 thereof, to be interpreted as meaning that, in a case such as the present one, involving a personal data breach consisting in unauthorised access to, and dissemination of, personal data by means of a "hacking attack", the worries, fears and anxieties suffered by the data subject with regard to a possible misuse of personal data in the future fall per se within the concept of non-material damage, which is to be interpreted broadly, and entitle him or her to compensation for damage where such misuse has not been established and/or the data subject has not suffered any further harm?

On the first question referred

The Court of Justice first of all held that the reference in Art. 32(1) and (2) of the GDPR to a *"level of security appropriate to the risk"* and to an *"appropriate level of security"* indicates that the Regulation establishes a risk management regime and does not seek to eliminate (completely) the risks of personal data breaches.[43]
Thus, it follows from the wording of Art. 24 and 32 GDPR that these provisions only impose an obligation on the controller to put in place technical and organisational measures aimed at preventing, to the greatest extent possible, any breach of security of personal data. The appropriateness of such measures must be assessed specifically, and the courts must consider whether those measures have been put in place by the controller taking into account the individual criteria set out in those articles and the data protection needs of the processing in question, as well as the risks arising from that processing.[44] Therefore, Art. 24 and 32 GDPR cannot be interpreted as meaning that the unauthorised disclosure or communication of personal data by a third party is sufficient to conclude that the measures taken by the controller in question are not appropriate within the meaning of those provisions, without enabling the controller to prove otherwise.[45]

On the second question referred

On the second question referred the Court first reiterates that Art. 32 GDPR requires the controller and the processor, taking into account the assessment criteria set out in par. 1,[46] to implement appropriate technical and organisational measures to ensure a level of security

[43] Par. 29.
[44] Par. 30.
[45] Par. 31.
[46] Art. 32(1) Regulation: Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:
(a) the pseudonymisation and encryption of personal data;

appropriate to the risk. In addition, par. 2[47] of that Article contains an illustrative list of certain factors that are relevant when assessing the appropriate level of security in light of the risks of the processing in question. According to the Court, it follows from Art. 32(1) and (2) that the appropriateness of technical and organisational measures must be assessed in two stages. In the first stage, the risks of a personal data breach caused by the processing in question and their possible consequences for the rights and freedoms of natural persons must be identified. This assessment must be carried out in a specific manner, taking into account the degree of likelihood of the risks identified and their severity. In a second stage, it is necessary to verify whether the measures put in place by the controller are appropriate to those risks, taking into account the state of the art, the cost of implementation, as well as the nature, scope, context and purposes of the processing.[48]

The Court of Justice went on to say the national court must be able to review the comprehensive assessment carried out by the controller to ensure that the measures taken by the controller can ensure a sufficient level of security.[49] Such a review requires a specific analysis of the nature and content of the measures put in place by the controller, the manner in which those measures have been applied and their practical effects on the level of security that the controller was required to ensure, taking into account the risks of the processing.[50]

On the third question referred

The Court replied that it is clear from the wording of Art. 5(2), 24(1) and 32(1) of the GDPR that the burden of proving that personal data are processed in a manner which ensures their adequate security within the meaning of Art. 5(1)(f) and 32 of the Regulation rests with the controller concerned.[51]

On the second part of the third question reffered The Court of Justice stated quite simply, and not surprisingly, that the GDPR does not set out any rules on the admissibility and probative value of expert report to be applied by national courts,[52] an expert's report thus cannot constitute systematically necessary and sufficient evidence.[53]

(b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
(c) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;
(d) a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

[47] Art. 32(2) Regulation: In assessing the appropriate level of security account shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed.

[48] Par. 42.

[49] Par. 43.

[50] Par. 46.

[51] The Court refers here to its judgments of 4 May 2023, Bundesrepublik Deutschland (Electronic Inbox), C 60/22, EU:C:2023:373, par. 52 and 53, and of 4 July 2023, Meta Platforms and Others (General Conditions of Use of the Social Network), C 252/21, EU:C:C:2023:537, par. 95.

[52] Par. 60.

[53] Par. 64.

On the fourth question referred

According to the Court of Justice, it follows from the Art. 82(2), (3) and Recital 146 of the Regulation that the controller concerned must, in principle, compensate for the damage caused by the infringement of the Regulation in connection with that processing and, in addition, may be exempted from liability only if it proves that it is not in any way responsible for the event giving rise to the damage. Thus, as is clear from the explicit addition of the adverbial qualifier *"in no way"* during the legislative process, the circumstances in which a controller can claim exemption from liability must be strictly limited to circumstances where that controller is able to demonstrate that it cannot be held liable for the damage.
In the light of all the above considerations, the Court of Justice answered the fourth question referred for a preliminary ruling by stating that Art. 82(3) GDPR must be interpreted as meaning that the controller cannot be exempted from its obligation to compensate a person for damage caused to him on the basis of Art. 82(3) GDPR. 82(1) and (2) of that regulation solely on the ground that that damage was caused by the unauthorised disclosure or access to personal data by "third parties" within the meaning of Art. 4(10) of the regulation, where that controller must prove that it is not in any way responsible for the event giving rise to the damage.[54]

On the fifth question referred

Here, the Court emphasised that Art. 82(1) GDPR does not distinguish between cases where, as a result of a proven infringement of the provisions of the regulation, the "non-material damage" alleged by the data subject is linked to the misuse of his or her personal data by third parties which has already occurred at the date of the application for compensation or is linked to the fear of the data subject that such misuse may occur in the future.[55] Therefore, the wording of Art. 82(1) of the GDPR does not exclude that the notion of "non-material damage" referred to in that provision includes the situation where the data subject, in order to obtain compensation on the basis of that provision, argues his or her fear that his or her personal data will be misused by third parties in the future as a result of a breach of this Regulation that has occurred.[56]
However, it should be stressed that the subject affected by a breach of the GDPR that has had negative consequences for him or her is required to prove that those consequences constitute non-material damage within the meaning of Art. 82 of the Regulation.[57] In particular, where a data subject claiming compensation for damage on this basis argues that there is a fear that his personal data will be misused in the future as a result of such a breach, the national court must verify that this fear can be considered justified in the particular circumstances and in relation to the data subject.

[54] Par. 74.
[55] Par. 79.
[56] Par. 80.
[57] Here the Court referred to the Österreichische Post judgement, par. 50.

C-667/21 – Krankenversicherung Nordrhein

The dispute in the main proceedings

The Medizinischer Dienst der Krankenversicherung Nordrhein (hereinafter referred to as *"MDK Nordrhein"*), is a public body which, as a medical service, has the statutory task of assessing, by means of expert opinions, the incapacity for work of persons insured by statutory health insurance companies, including in the case of its own employees. Prior to his sick leave, the applicant was an employee of MDK Nordrhein. The applicant considered that MDK Nordrhein, as his employer, had illegally processed his medical data. *Bundesarbeitsgericht* (Federal Labour Court, Germany) decided to refer a number of preliminary questions to the Court of Justice. Given the focus of the article, relevant are the last two of the five preliminary questions reffered.

Questions referred for a preliminary ruling

4) Is Article 82(1) GDPR of a special or generally preventive nature and should this be taken into account when determining the amount of non-material damage under Article 82(1) GDPR to be compensated by the controller or processor?

(5) Is the degree of fault of the controller or processor relevant for determining the amount of non-material damage to be compensated on the basis of Article 82(1) GDPR? In particular, may the absence or low degree of fault of the controller or processor be taken into account in favour of the controller or processor?

On the fourth question referred

In its answer, the Court of Justice distinguished Art. 82 of the Regulation from Art. 83 and 84. In that regard, it stated that Art. 82 GDPR does not have a punitive or deterrent but a compensatory function,[58] unlike Art. 83 and 84, which allow for administrative fines as well as other sanctions. The relationship between the rules set out in Art. 82 and those set out in Art. 83 and 84 shows that there is a difference between the two categories of provisions, but also complementarity in terms of incentives to comply with the GDPR.[59] As regards the second part of the preliminary question, the Court then answered that, since the right to compensation for damage provided for in Art. 82 GDPR does not have a deterrent or even punitive function, the seriousness of the infringement of the Regulation which caused the damage in question cannot affect the amount of compensation awarded under that provision, even if the damage is not material but non-material. It follows that the amount awarded may be set up to the maximum amount fully compensating the damage, but never higher, regardless of how serious the breach of the Regulation was.[60]

[58] Here we can point out the difference with, for example, Directive 2006/54 and its Art. 18, which establishes not only a compensatory but also a deterrent function of the compensation. However, the Court of Justice here as well places the emphasis on full compensation for the damage suffered, i.e. on the compensatory function; cf. judgment of the Court of Justice of 17 December 2015, C-407/14, ECLI:EU:C:2015:831.
[59] Par. 85.
[60] Par. 86.

On the fifth question referred

The Court began its response by noting that Art. 82(2) of the GDPR provides that a controller engaged in processing is liable for the harm caused by processing which infringes the Regulation. However, the wording of that provision in some of its language versions, in particular in the German version, which was the language of the case, does not make it possible to determine with certainty whether the infringement must be attributable to the controller in order for his liability to be established. The Court therefore proceeds to analyse the different language versions of the first sentence of Art. 82(2) GDPR.[61] From this, the Court found that the controller is presumed to have been involved in the processing which constitutes the infringement of the Regulation in question. The controller is exempted from liability under Art. 82(2) if he proves that he is not in any way responsible for the event giving rise to the damage. Art. 82 of the GDPR must therefore be interpreted as meaning that the liability of the controller is conditional on the existence of fault on the part of the controller,[62] which is presumed unless the controller proves that the fact which caused the damage is in no way attributable to the controller.

As regards the second part of the fifth question, which concerned the determination of the amount of compensation for damages under Art. 82 of the GDPR, the Court reiterated its answer to the previous preliminary question in this case that, in view of its compensatory function, Art. 82 of the GDPR does not require that the degree of seriousness of the infringement of that regulation allegedly committed by the controller be taken into account in determining the amount of compensation awarded for non-material damage under that provision, but requires that that amount be set so as to fully compensate for the damage specifically caused by the infringement of the Regulation.

C-687/21 – MediaMarktSaturn

The dispute in the main proceedings

Applicant purchased a home electrical appliance from company Saturn. For this purpose, an employee of that company drew up a contract of purchase and credit. On that occasion, he entered into Saturn's computer system a number of the plaintiff's personal data. Contract documents containing this personal data were printed and signed by both parties. The applicant then handed them over to Saturn employees at the point of sale. Another customer, who had overtaken the applicant while waiting for the goods to be dispensed, received both the appliance ordered by the applicant and the documents in question by mistake and took everything. Because the mistake was quickly discovered, the appliance and the contract documents were returned to the applicant within half an hour of their delivery to the other customer. The company offered to compensate the applicant for this oversight by delivering

[61] Art. 82(2), first sentence, of the Regulation: *Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation*.

[62] The Court has also expressed liability for fault in relation to an administrative fine imposed on a data controller by an administrative authority of a Member State pursuant to Art. 83 of the Regulation – cf. judgment of the Court of Justice of 5 December 2023, C 807/21, Deutsche Wohnen SE v. Staatsanwaltschaft Berlin, ECLI:EU:C:2023:950, in particular par. 75.

the appliance to his home free of charge, but the applicant felt that this compensation was insufficient. The applicant therefore brought an action before the Amtsgericht Hagen (District Court of Hagen, Germany).

Questions referred for a preliminary ruling

(1) As no automatic legal effects are specified, is the compensation rule enacted in Article 82 of the [GDPR] invalid in the case of non-material damage?[63]

(2) Is it necessary, for the purposes of the right to compensation, to establish the occurrence of non-material damage, to be demonstrated by the claimant, in addition to the unauthorised disclosure of the protected data to an unauthorised third party?

(3) Does the accidental disclosure of the personal data of the data subject (name, address, occupation, income, employer) to a third party in a paper document (printout), as the result of a mistake by employees of the [concerned] undertaking, suffice in order to establish infringement of the [GDPR]?

(4) Where the undertaking accidentally discloses, through its employees, data entered in an automated data processing system to an unauthorised third party in the form of a printout, does that accidental disclosure to a third party qualify as unlawful further processing (Article 2(1), Article 5(1)(f), Article 6(1) and Article 24 of the [GDPR])?

(5) Is non-material damage within the meaning of Article 82 of the [GDPR] incurred even where the third party who received the document containing the personal data did not read the data before returning the document containing the information, or does the discomfort of the person whose personal data were unlawfully disclosed suffice for the purpose of establishing non-material damage within the meaning of Article 82 of the [GDPR], given that every unauthorised disclosure of personal data entails the risk, which cannot be eliminated, that the data might nevertheless have been passed on to any number of people or even misused?

On the first question referred

This preliminary question was (unfortunately?) declared invalid by the Court of Justice for breach of Art. 94(c) of the Rules of Procedure, as the referring court did not state any specific fact which would enable the Court of Justice to examine the validity of Art. 82 GDPR.

On the third and fourth question referred

Next, the Court addressed the third and fourth preliminary questions. After an extensive recapitulation of the conclusions reached in the *Nacionalna agencia za prichodite case*,[64] the Court replied that these articles must be interpreted as meaning that, in the context of an action for damages, the fact that the controller's employees mistakenly transmitted

[63] Although the courts of the Member States normally refer questions referred for a preliminary ruling on the interpretation of EU acts, in this case the referring court even had doubts about the validity of Art. 82 of the Regulation – cf. Art. 267(b) TFEU, which allows the courts of the Member States to inquire into the validity of Union acts in addition to their interpretation.

[64] Cf. par. 36 to 43.

a document containing personal data to an unauthorised third party is not sufficient in itself to conclude that the technical and organisational measures put in place by the controller in question were not "appropriate".[65] The Court of Justice repeated that court of a member state must also take into account all the evidence which the controller has adduced to demonstrate the appropriateness of the technical and organisational measures which it has taken to comply with the obligations under the Regulation.[66]

On the second question referred

The Court of Justice has answered this preliminary question in the affirmative that Art. 82 GDPR must be interpreted as meaning that a person seeking compensation under that provision must prove not only that there has been a breach of the provisions of that regulation, but also that that breach has caused him material or non-material damage. In this respect, the Court of Justice has drawn on its previous decisions in which it has concluded that, in order to be entitled to compensation, three conditions must be cumulatively satisfied.[67] Furthermore, the Court recalls that Art. 82 GDPR precludes a national rule or practice which makes compensation for non-material damage within the meaning of that provision conditional on the fact that such damage suffered by a data subject, as defined in Article 4(1) of that regulation, has reached a certain level of gravity.[68] Finally, the Court reiterates that the subject affected by a breach of the GDPR which has had negative consequences for him is nevertheless required to prove that those consequences constitute non-material damage within the meaning of Art. 82 of the Regulation, since a mere breach of the provisions of the Regulation is not sufficient to confer a right to compensation.[69]

On the fifth question referred

The Court of Jusitce referred in particular to the *Nacionalna agencia za prichodite case*[70] and stated that it was not only the wording of Art. 82(1) of the GDPR, read in conjunction with recitals 85 and 146 of the Regulation, which call for a broad definition of the concept of "non-material damage" within the meaning of the first provision, but also from the objective of ensuring a high level of protection for natural persons with regard to the processing of personal data pursued by that regulation, it follows that the fear of possible misuse of personal data by third parties experienced by the data subject as a result of a breach of that regulation may in itself constitute "non-material damage" within the meaning of Art. 82(1).

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[65] Par. 45.

[66] Par. 44.

[67] a) existence of the damage suffered, b) existence of a breach of the GDPR, c) causal link between them – see the Österreichische Post case, par. 32 and 42; National Agency for Prichodite case, par. 77; Gemeinde Ummendorf case, par. 14; Krankenversicherung Nordrhein case, par. 82.

[68] See, to that effect, the Österreichische Post case, par. 51; National Agency for Prichodite case, par. 78; Gemeinde Ummendorf case, par. 16.

[69] See, to that effect, judgements Österreichische Post, par. 42, National Agency for Prichodite, par. 84; Gemeinde Ummendorf, par. 21 and 23.

[70] Par. 79 to 86.

On the other hand, however, the Court also recalled that the person bringing an action for damages under Art. 82 of the GDPR must prove the existence of such damage. In particular, a purely hypothetical risk of abuse by an unauthorised third party cannot give rise to compensation for damage. So it is also in the case of where no third party has accessed the personal data in question.[71]

C-456/22 – Gemeinde Ummendorf

The dispute in the main proceedings

Ummendorf is a municipality located in Southern Germany. The municipality published on the internet, without the applicants' consent, the agenda of a meeting of the municipal council, in which the names of the applicants were mentioned several times, as well as a judgment which also included the applicants' names and addresses of residence. Those documents were accessible on the homepage of the municipality's website for three days. *The Landgericht Ravensburg* (Regional Court of Ravensburg, Germany) held that the publication of the applicants' personal data on the internet by the municipality of Ummendorf infringed Art. 5(1)(a) of the GDPR. However, that court asked whether that publication caused the applicants non-material damage within the meaning of Art. 82 of the Regulation.

Question referred for a preliminary ruling

> Is the concept of non-material damage in Article 82(1) of [the GDPR] to be interpreted as meaning that the assumption of non-material damage requires a noticeable disadvantage and an objectively comprehensible impairment of personal interests, or is the mere short-term loss of the data subject's unfettered control over his or her data due to the publication of personal data on the internet for a period of a few days, which did not have any noticeable or adverse consequences for the data subject, sufficient for that purpose?

Answer of the Court

The Court again drew on previous case law when it stated that Art. 82(1) GDPR must be interpreted as precluding a national rule or practice which makes compensation for "non-material damage" within the meaning of that provision conditional on the damage suffered by the data subject having reached a certain level of seriousness.[72] Therefore, it cannot be considered that the additional conditions for liability set out in Art. 82(1) GDPR, such as the demonstration of serious damage or objectively understandable interference with personal interests, can be added to the three conditions[73] to be met. It follows that Art. 82(1) of the GDPR does not require that the "non-material damage" alleged by the data subject must reach a certain "de minimis threshold" in order to be compensable, should a breach of the provisions of the Regulation be proven.

[71] The Court has already reached a conclusion along these lines in Gemeinde Ummendorf case, par. 18 to 23.
[72] Cf. e.g. Österreichische Post, par. 51, Nacionalna agencia za prichodite, par. 78.
[73] (A) the existence of the damage suffered, (B) the infringement of the Regulation, (C) the causal link between them.

C-741/21 – juris GmbH

The dispute in the main proceedings

The applicant is an independent legal practitioner. He was a customer of juris GmbH, a company operating a legal database. After learning that his personal data was also used by juris GmbH for direct marketing purposes, the applicant withdrew all his consents to receive information from the company and objected to any processing of his data, except for the sending of newsletters, which he still wished to receive. Despite this, the applicant received a total of three promotional leaflets sent to his work address. Each of the leaflets in question contained a "personal trial code" which, on the website of the company juris, allowed access to an order form for that company's products which contained personal data relating to the applicant. Thus the applicant brought an action before the *Landgericht Saarbrücken* (Saarbrücken Regional Court, Germany), seeking compensation under Art. 82(1) of the GDPR.

Questions referred for a preliminary ruling

(2) Is liability for compensation under Article 82(3) of the GDPR excluded by the fact that the infringement is attributed to human error in the individual case on the part of a person acting under the authority of the processor or controller within the meaning of Article 29 of the GDPR?

(3) Is it permissible or necessary [to base] the assessment of compensation for non-material damage [on the] criteria for determining fines set out in Article 83 of the GDPR, in particular in Article 83(2) and 83(5) of the GDPR?

(4) Must the compensation be determined for each individual infringement, or are several infringements – or at least several infringements of the same nature – penalised by means of an overall amount of compensation, which is not determined by adding up individual amounts but is based on an evaluative overall assessment?

On the second question referred

The Court held that Art. 32(4) of the GDPR, which concerns the security of the processing of personal data, provides that the controller shall take measures to ensure that any natural person acting on his behalf and having access to personal data processes those personal data only on his instructions, unless the processing is already required by Union or Member State law. An employee of the controller is a natural person acting on the controller's behalf. It is therefore for that controller to ensure that its instructions are correctly applied by its employees. Therefore, the controller cannot exempt himself from liability under Art. 82(3) GDPR merely by claiming negligence or failure to fulfil an obligation on the part of the person acting on his behalf.

Therefore, in order to be exempted from liability under Art. 82(3) GDPR, it cannot be sufficient for the controller to prove that it has given instructions to persons acting under its authority and that one of those persons has failed to comply with its obligation to follow those instructions, so that it has contributed to the damage in question. In fact, if

it were possible for the controller to exonerate itself from liability merely by alleging the misconduct of a person acting on its behalf, that would undermine the useful effect of the right to compensation for damage enshrined in Art. 82(1) GDPR, as the referring court has essentially held, and would not be consistent with the objective of that regulation, which is to ensure a high level of protection for natural persons with regard to the processing of their personal data.

On the third and fourth question referred

In its answer to the first part of the combined question referred the Court pointed out that Art. 82 and 83 pursue different objectives. While Art. 82 regulates compensation for damage, Art. 83 regulates the imposition of administrative fines. This is also linked to the fact that Art. 82 of the Regulation has a compensatory function, whereas Art. 83 of the Regulation has a punitive function. There is a difference between these two categories of provisions, but also a complementarity in terms of incentives to comply with the GDPR.[74] Therefore, in view of the differences in wording and purposes between Art. 82 and Art. 83 of that Regulation, it cannot be considered that the criteria of determination set out specifically in that Art. 83 are applicable *mutatis mutandis* in the context of that Art. 82.
As regards the second part of this combined question, the Court stated that, secondly, as regards the manner in which national courts must assess the amount of financial compensation under Art. 82 of the GDPR in cases of multiple infringements of that regulation concerning the same data subject, it must first be pointed out, that it is for each Member State to establish the criteria which enable the amount of that compensation to be determined, provided that the principles of equivalence and effectiveness of EU law are respected. Furthermore, in view of the compensatory rather than punitive function of Art. 82 of the GDPR, the fact that a controller has committed several infringements against the same data subject cannot constitute a relevant criterion for the purposes of determining the compensation to be awarded to that data subject on the basis of that Art. 82. Indeed, only the harm actually suffered by the data subject should be taken into account for the purpose of determining the amount of monetary compensation.

IV. Answers of the Court of Justice – Summary

C-300/21 – Österreichische Post

- a mere infringement of a provision of the GDPR is not sufficient to confer a right to compensation;
- Member States' law or practice may not make compensation for non-material damage conditional on the achievement of a certain level of seriousness of the damage suffered by the data subject;
- when determining the amount of compensation for damages, national courts must apply the national rules of each Member State on the scope of monetary compensation, provided that the principles of equivalence and effectiveness of EU law are respected;

[74] Krankenversicherung Nordrhein, par. 85.

C-340/21 – Nacionalna agencia za prichodite

- the mere fact that there has been an unauthorised disclosure or access to personal data by "third parties" within the meaning of Art. 4(10) of the Regulation is not sufficient to consider that the technical and organisational measures put in place by the controller concerned were not "appropriate";
- the appropriateness of the technical and organisational measures put in place by the controller must be assessed by the national courts specifically taking into account the risks associated with the processing in question, assessing whether the nature, content and implementation of those measures are proportionate to those risks;
- the controller concerned bears the burden of proof as to the appropriateness of the measures it has implemented;
- an expert report cannot constitute systematically necessary and sufficient evidence in assessing the appropriateness of the security measures taken by the administrator;
- the controller cannot be exempted from its obligation to compensate for damage merely on the basis that that damage was caused by the unauthorised disclosure or access to personal data by "third parties" within the meaning of Art. 4(10) of the Regulation. The controller must prove that it is not in any way responsible for the event giving rise to the damage;
- the data subject's fear of possible misuse of personal data by third parties as a result of a breach of the Regulation may in itself constitute non-material damage;

C-667/21 – Krankenversicherung Nordrhein

- the right to compensation has a compensatory function, in the sense that monetary compensation must allow full compensation for the harm specifically caused by the breach of the Regulation, and not a deterrent or punitive function;
- the liability of the controller is subject to the existence of fault on his part, which is presumed unless the controller proves that the fact which caused the damage is not attributable to him;
- the Regulation does not require the degree of fault to be taken into account in determining the amount of compensation for damage;

C-687/21 – MediaMarktSaturn

- in an action for damages, the fact that the controller's employees accidentally transmitted a document containing personal data to an unauthorised third party is not sufficient in itself to conclude that the technical and organisational measures put in place by the controller in question were not appropriate;
- the right to compensation for damage has, in particular in the case of non-material damage, a compensatory function, in the sense that monetary compensation under that provision must allow full compensation for the damage which has specifically resulted from the infringement of the regulation, and not a punitive function;
- the compensation for damage does not require that the degree of seriousness of the infringement by the controller be taken into account;

- the person claiming compensation must prove not only that the provisions of the Regulation have been infringed but also that the infringement has caused him material or non-material damage;
- where a document containing personal data has been communicated to an unauthorised third party who has not been shown to be aware of the data, the mere fact that the data subject fears that his data may be disseminated or even misused in the future as a result of that communication, which enabled a copy of the document to be made before its return, does not constitute "non-material damage" within the meaning of this provision;

C-456/22 – Gemeinde Ummendorf

- the Regulation precludes national legislation or national practice which establishes a *"de minimis threshold"* to constitute non-material damage caused by an infringement of the Regulation. The burden is on the person concerned to demonstrate that the consequences of the infringement allegedly suffered constitute an injury which is different from a mere breach of the provisions of that Regulation;

C-741/21 – juris GmbH

- an infringement of the provisions of the Regulation conferring rights on the data subject is not in itself sufficient to constitute non-material damage, regardless of the degree of seriousness of the damage suffered by the data subject;
- the fact that the damage was caused by the misconduct of a person acting under his authority within the meaning of Art. 29 of the Regulation cannot be sufficient to exempt the controller from liability under Art. 82(3) of the Regulation;
- in order to determine the amount to be paid by way of compensation for damage, it is not appropriate, first, to apply *mutatis mutandis* the criteria for determining the amount of administrative fines laid down in Art. 83 of the Regulation and, second, to take into account the fact that the person claiming compensation is affected by several infringements of that Regulation in relation to the same processing of personal data.
- Although this conclusion was not directly stated by the Court of Justice in response to one of the preliminary questions referred, it is still necessary to state the Court's basic premise (which, moreover, has been reiterated by the Court in all its judgments), namely that, in order to claim compensation for damage, the three conditions of (a) the occurrence of the damage, (b) the infringement of the Regulation, and (c) the causal link between them must be fulfilled simultaneously.[75]

[75] Cf. Österreichische Post, par. 36, Natsionalna agentsia za prihodite, par. 77, Gemeinde Ummendorf, par. 14, Krankenversicherung Nordrhein, par. 82 a MediaMarktSaturn, par. 58.

V. Conclusion

The Court of Justice, through the judgments discussed here, has first of all presented the general starting points for the assessment of compensation for (non-material) damage in the event of an infirngement of the Regulation and has laid down the general foundations on which the decision of the courts of the Member States is to be based when assessing individual cases.[76] In the author's opinion, these decisions did not bring any great surprises, the Court of Justice was guided primarily by a linguistic and teleological interpretation of the regulation and the set of decisions adopted can be assessed as reasonable and successful, offering a balance between the protection of the persons concerned but, on the other hand, not unduly burdening controllers and processors, which could result in an exodus of these entities from the European Union and more difficult control of the handling of personal data.[77] [78] In the logic of the matter and in view of the entirely new explicit enshrinement of compensation for non-material damage in the Regulation, the Court of Justice could not use historical interpretation and therefore, in certain conclusions, help itself with other principles of European Union law – in particular the principles of effectiveness and equivalence,[79] which leave some room for the Member States to regulate the issue themselves. The authors also agree with these conclusions.

Probably the most interesting questions before the Court so far have been (a) the question of the *"de minimis threshold"* for a right to damages, and (b) whether mere fear of possible future misuse of personal data gives rise to a right to damages under the regulation.

The Court of Justice has expressed its views on the *"de minimis threshold"* in its answer to the second preliminary question in *Österreichische Post*, where it concluded that the law or practice of the Member States may not make compensation for non-material damage conditional on the achievement of a certain degree of seriousness of the damage suffered by the data subject, and thus, on the face of it, disagreed with the Advocate General's view, who replied in his opinion that *"the compensation for non-material damage provided for in the regulation does not cover mere upset which the person concerned may feel as a result of the infringement of GDPR provisions. It is for the national courts to determine when, owing to its characteristics, a subjective feeling of displeasure may be deemed, in each case, to be non-material damage"*.[80] Although at first sight it might appear that the Court of Justice has reached a different conclusion from that suggested by Advocate General Bordona in his opinion, in the author's view that is not the case. In its judgment, the Court avoided considering the difference between non-pecuniary damage and mere indignation,

[76] Of course, depending on the preliminary questions raised, it also reached more specific questions – cf. e.g. the second part of the third preliminary question in Nacionalna agencija za prichodite case concerning the need to use expert report on the appropriateness of the security measures taken by a controller.

[77] Cf. von Danwitz, 2024, p. 11 or Hassel, 2024, Blogpost 18/2024.

[78] An apt example of the balance struck by the Court of Justice between the protection of personal data but, on the other hand, not excessive requirements for controllers or processors can be found in the conclusions reached in the answer to the second question referred for a preliminary ruling in the juris GmbH case and, on the other hand, to the first question referred for a preliminary ruling in the MediaMarktSaturn case.

[79] Cf. Österreichische Post, second question referred for a preliminary ruling or juris GmbH, third and fourth questions referred for a preliminary ruling.

[80] Opinion of Advocate General Bordona, Österreichische Post, ECLI:EU:C:2022:756, par. 117.

as suggested by the Advocate General in his opinion, and this question has thus far remained unanswered by the Court. For the time being, therefore, it is clear that the courts of the Member States cannot make compensation for non-material damage conditional on the achievement of a certain degree of seriousness of damage,[81] but it is not clear whether they can also find "lesser" consequences of non-compliance with the regulation which, because they are of minor importance, would not necessarily give rise to a right to compensation. In the author's view, this should be possible; indeed, the Advocate General himself drew attention in his opinion to such practice in several Member States and in the Court of Justice itself in other areas of legal regulation.[82] [83] Unfortunately, however, the Court of Justice has not provided such an answer.

On the question of whether mere fear of possible future misuse of personal data gives rise to a claim for compensation for damage under the Regulation, the Court of Justice first addressed the question in its judgment *Nacionalna agencia za prichodite*, where it held that the fear of possible misuse of personal data by third parties, which the data subject has as a result of a breach of the Regulation, may in itself constitute non-material damage. However, this conclusion was then clarified by the Court in *MediaMarktSaturn*, in which the Court upheld the above conclusion, but also recalled that a person bringing an action for damages under the GDPR must prove the existence of such actual harm suffered – even though such harm may be minimal.[84] In particular, a purely hypothetical risk of abuse by an unauthorised third party cannot give rise to compensation.[85]

In summary, it can therefore be concluded that the basic requirement for assessing compensation for damage is full compensation for the damage actually suffered. This requirement is mainly apparent from the recitals of the Regulation – in particular its par. 146, according to which the controller or processor should compensate all damage caused by the breach of the Regulation and data subjects[86] should receive full and effective compensation for the damage suffered. This conclusion is widely repeated in the case law adopted by the Court of Justice.[87] However, as the Court of Justice has rightly pointed out, full compensation for the harm actually caused does not act "only" in one direction in favour of the injured parties, but at the same time in the "other" direction as well, since it also represents the

[81] This conclusion was repeated by the Court in its Gemeinde Ummendorf judgment.

[82] On the practice of the Member States, cf. par. 111 of the opinion and footnote 83 of the opinion, where the Advocate General drew attention to this practice in Italy, Germany and Austria.

[83] On the case-law of the Court of Justice in other areas of regulation, cf. par. 111 of the Opinion and footnote 84, where the Advocate General drew attention to such an approach of the Court of Justice in the field of air and water transport.

[84] Gemeinde Ummendorf, par 22.

[85] MediaMarktSaturn, par. 67 and 68 and Natsionalna agentsia za prihodite, par. 85.

[86] Here it is necessary to point out a minor inconsistency in the text of the Regulation. While recital 146 of the Regulation states that only "data subjects" should receive compensation, Art. 82(1) of the Regulation states that "any person" should receive compensation.

[87] Österreichische Post, par. 57, Krenkenversicherung Nordrhein, par. 87, MediaMarktSaturn, par. 50, juris GmbH, par. 61.

maximum limit which the injured party can claim[88] and at the same time requires those persons to prove that they have actually suffered such damage, however minimal.[89]

Acknowledgements

This paper was written within the framework of the grant competition project at the Faculty of Law of Palacký University (IGA) – Compensation for Non-Material Damage in Case of Infringement of the GDPR, Project no. IGA_PF_2023_015.

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[88] Krankenversicherung Nordrhein, par. 86 and juris GmbH, par. 60.

[89] Gemeinde Ummendorf, par. 22.

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