Op-Ed

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Introduction

Out of the 99 Articles of the General Data Protection Regulation (GDPR), the application of Article 82 GDPR has attracted much comment. It grants any person who has suffered material or non-material injury as a result of a GDPR infringement the right to claim compensation from the controller or processor. Legal commentators have paid particular attention to the issue of non-material harm. This is no surprise. Whereas compensation for material damage can be computed according to objective standards, compensation for non-pecuniary damage must regularly be based on subjective criteria. Consequently, one faces the difficult questions of determining just what adverse emotional impact constitutes compensable damage and just how much compensation needs to be awarded to remedy the harm caused. Additionally, in some jurisdictions the compensation for non-pecuniary loss is restricted in tort and even contract law, for example in Germany and Austria. Given that national courts tend to apply new European rules through the lens of traditional national legal standards, it was only a matter of time before EU countries sent Luxembourg referrals on the reach of Article 82 GDPR. The Austrian Post case, or more precisely *UI v Österreichische Post* (C-300/21) – as another preliminary ruling also concerned this defendant (C-154/21, *RW v Österreichische Post*) – gave the Court of Justice the opportunity to clarify important questions on the application of Article 82 GDPR. The resulting judgment has been criticised as 'rather disappointing' as 'it is likely that the judges in the EU Member States are not smarter than before' (in the words of J. Knetsch, here). I agree that the judges could have provided much more clarity on the important question of 'what is a non-material damage', but from a systematic point of view the Court of Justice has done much more right than wrong.

The Österreichische Post case

Österreichische Post AG is an address broker incorporated under Austrian law. In the case at issue, it had processed data through the use an algorithm defining target groups for advertising based on various social and demographic criteria. With regard to the personal data of the plaintiff,

the defendant had, by way of statistical extrapolation, derived that the plaintiff had a high affinity for a certain Austrian (right wing) political party. This information was, however, not shared with any third party. After having learned about the supposed affiliation with this political party, the plaintiff felt offended and exposed. The plaintiff sued the address broker for an injunction to cease processing his or her personal data and also claimed damages in the amount of 1,000 €. Austrian courts granted the injunction but rejected the claim for damages as the harm caused by the breach of data protection law did not pass a certain *de minimis* threshold. When the case came before the Austrian Supreme Court, it stayed the proceeding and asked the Court of Justice to interpret Article 82 GDPR.

Infringement of the GDPR and damage needs to be distinguished

The first important message of *Österreichische Post* is that a mere infringement of the data protection rules does not necessarily amount to damage that has to be compensated.

From the perspective of private law, this finding is obvious. Tort law generally requires an unlawful infringement of the law (or the unlawful breach of a protected right), but compensation is due only if this infringement causes an injury. The infringement and the concept of damage must therefore be distinguished as preconditions for liability. The same holds true as regards the non-contractual liability of the EU. A claim for damages against the EU for infringements perpetrated by its institutions or officials requires a 'sufficiently flagrant violation of a superior rule of law for the protection of the individual' (Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v Council*) that caused quantifiable damage (Case 145/83, *Adams v Commission*).

Despite this established structure of non-contractual liability, it was argued that every breach of the GDPR must result in the awarding of compensation as such an interpretation would ensure an effective enforcement of European rights. The Court of Justice rightly rejected this interpretation. Already the wording of Article 82 indicates that there are three distinct requirements (infringement, damage, causation), and therefore one cannot argue that an infringement necessarily entails compensable injury.

A European right to damages

The second important finding of the Court is that liability for damages for infringements of the GDPR is governed to a large extent by European law. In other areas of European tort law, the question arises which conditions for liability are entirely governed by EU law and which can be interpreted according to national standards (within the boundaries of the principles of effectiveness and equivalence). Out of the three cumulative conditions set forth by Article 82 GDPR, the infringement is obviously governed by European law. The Court of Justice also held that the concept of damage 'must be given an autonomous and uniform definition specific to EU law' (C-300/21, para 44).

Whether causation is a European or domestic concept was not specified by the Court, but given that it was mentioned in the list of conditions enshrined in Article 82 GDPR, it has at least a strong European connotation.

Domestic law, however, governs the assessment of the damages to which a harmed person may be entitled under Article 82 GDPR (C-300/21, para 53) as far as these rules correspond to the principles of equivalence and effectiveness. The same holds true for the rules of evidence applied by domestic courts in damages cases.

No punitive damages

The third important message is that national courts need not award punitive damages to comply with the principle of effectiveness (C-300/21, para 58). This finding is in line with the case law in other areas of European tort law. The Court of Justice has, for example, established a similar principle in *Manfredi* for the private enforcement of Articles 101, 102 TFEU (joined cases C-295/04 to C-298/04, paras 92 ff); and this rule is today codified in Article 3(3) Directive 2014/104/EU.

The blind spot: what is compensable non-material harm?

The weak component of the judgment concerns the important questions regarding the concept of damage and its assessment. In the main proceeding, the plaintiff claimed to have been offended and upset and to have felt exposed by the fact that the defendant had affiliated him or her with a certain political party. As the information was not shared with a third party, the Austrian courts argued that the grief suffered was not particularly severe and therefore did not exceed the necessary degree of 'seriousness', a precondition under Austrian and German law for an award of monetary compensation. This assessment was shared by AG *Campos Sánchez-Bordona*, who argued that there is no principle of European law according to which 'all non-material damage, regardless of how serious it is, is eligible for compensation' (Opinion, C-300/21, para 105). The mere state of being upset does not require a compensation.

The Court of Justice did not follow the reasoning of the AG. 'Making compensation for non-material damage subject to a certain threshold of seriousness', argued the Court, 'would risk undermining the coherence of the rules established by the GDPR, since the graduation of such a threshold, on which the possibility or otherwise of obtaining that compensation would depend, would be liable to fluctuate according to the assessment of the courts seised' (C-300/21, para 49).

Such a 'threshold of seriousness' could indeed be applied inconsistently across Europe. Unfortunately, the Court did not provide any guidance to domestic courts on how they should proceed instead, a shortcoming which also undermines the coherence of Article 82 GDPR. The European justices merely pointed out that the plaintiff is not 'relieved of the need to demonstrate that [negative consequences caused by the infringement] constitute non-material damage within the meaning of Article 82 [GDPR]' (C-300/21, para 50). Under which conditions grief, exposure, inconvenience and so on *does* amount to compensable non-material damage was not answered. The Court noted that the plaintiff must plead and prove specific facts that demonstrate that he or she has suffered a negative consequence from the infringement. It is, however, left to substantive law to define the dividing line between real damage and mere

inconvenience – unless every inconvenience pleaded also constitutes compensable injury.

Given that infringement and damage are two distinct conditions, not every infringement can, in my point of view, lead to compensable damage. Otherwise it would be meaningless to require a separate damage requirement. Thus, not all adverse feelings suffered as a result of the infringement call for compensation. If the discarded 'seriousness' test is not an option for distinguishing simple inconvenience from genuine damage, another distinction is necessary. I think this dividing line must be drawn with a view to the data involved and the (objective) consequences for the person concerned, who has to demonstrate a real and certain emotional harm.

Conclusion and outlook

Rome was not built in a day and also the European right of compensation for GDPR infringements will not be configured through a few judgments. *Österreichische Post* has shaped the basics of the European right for damages but has left open the decisive question of how to define non-material harm, an omission that needs to be corrected.

The European Court of Justice may soon get a chance to do so. In a preliminary reference concerning the publication of certain tax and social security data following a 'hacking attack' on a Bulgarian financial agency, the involved plaintiff seeks damages for the worries and fears of a future misuse of the hacked personal data (C-340/21, *VB v Natsionalna agentsia za prihodite*). AG *Pitruzzella* has argued that mere inconvenience resulting from an infringement of the law cannot constitute an injury (Opinion, C-340/21, para 79) as more is required to demonstrate real and certain damage. To assess whether there is such an injury, national courts should look at the facts of each individual case. Non-material damage requires a genuine impairment – however minor, but nevertheless demonstrable – of a person's physical or psychological sphere and depends also on the nature of the personal data involved and the importance it has in the data subject's life (Opinion, C-340/21, para 83).

This approach does not rely on the 'seriousness' threshold (as also minor impairments may be covered), yet it nonetheless provides a general definition on which national courts can rely. It also allows domestic courts to reject a claim for damages in cases in which no particular harm was caused to a plaintiff.

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