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Update on data protection claims - Austrian Post Case

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This article, relating to Irish law, was written by the team in our Dublin office for Browne Jacobson Ireland LLP

The CJEU has handed down its decision in the much-awaited Austrian Post Case. This case sets out important principles of EU data protection law surrounding the interpretation of Article 82 of the GDPR, most notably, that there is no sufficiency of damage requirement under that Article. The Austrian Post Case is being monitored heavily from an Irish (and broader EU) perspective.

A relevant Irish case, *Cunniam v Parcel Connect Limited trading as Fastway Couriers Ireland and Others* [2023] IECC 1 ("Fastway Couriers Case") has been stayed pending the result of the Austrian Post Case. This article looks firstly at the Irish backdrop of the Fastway Couriers Case which is informed by the later discussion on the Austrian Post Case.

The Irish background: the Fastway Couriers Case

The Fastway Couriers Case relates to a data breach in which the personal data of a significant number of Irish data subjects were compromised. A claim for damages arising from that data breach was made by the plaintiff under Article 82 of the GDPR. Any claim under Article 82(1), may be a claim for material, or non-material damage, with an accompanying right to compensation for the damage suffered.

The Fastway Couriers Case was a claim for non-material damage, and the plaintiff claimed relief for interference with his peace, privacy and apprehension about the use of his data together with the associated loss of his ability to effectively exercise his GDPR rights in respect of that data.

Against the backdrop of several ongoing referrals to the CJEU (one of which being the Austrian Post Case) on similar areas of law, Judge O'Connor stayed the Fastway Couriers Case pending the outcomes of the referrals to the CJEU. The stay was in large part arising out of the importance of the CJEU decision in the Austrian Post Case which would give greater guidance on the proper interpretation of Article 82 GDPR, and in particular, compensation for non-material damage.

The present decision: the Austrian Post Case

The Austrian Post Case arose out of a claim seeking compensation for non-material damage suffered as a result of non-consensual processing of personal data. This processing related to the claimant's political affiliation.

The three main questions for the CJEU in the Austrian Post Case were as follows:

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

Q 1 – What is necessary to sustain a claim for damages under Article 82?

The Court clarified that there is no reference in Article 82, or the recitals, to member state law regarding the concepts of "*material or non-material damage*". These concepts must then be EU concepts, which must be interpreted on a harmonised basis. The Court then provided the necessary cumulative test for how material or non-material damage should be interpreted to ensure consistency and harmonisation:

1. Damage must have been suffered, and
2. An infringement of the GDPR, and
3. A causal link between the damage and the breach of the GDPR (i.e., a causal link between (a) and (b) above).

The Court clarified that an infringement of the GDPR on its own is not sufficient to ground a claim; there must be associated causal damage linked to that infringement.

Q 2 – Is the Court mandating any particular requirements on member state courts in calculating damages?

The Court took a relaxed view and noted that there is nothing in the GDPR to require prescriptive court rules on compensation. National courts must now apply the domestic rules of each member state relating to financial compensation. In doing this, they must have regard to the familiar principles of equivalence and effectiveness of EU law which are broad EU guidelines which apply to assessment of damages in a general sense. The Court noted that there is no express reference in the GDPR requiring any particular adherence to these principles.

Q 3 – Is there a de minimis threshold of harm necessary to sustain a claim under Article 82?

The Court's decision is clear that there should be no member state rules which would have the effect of setting a de minimis threshold of damage before a claim under Article 82 can be made. As noted above, the Court views "*damage*" and "*non-material damage*" as EU law concepts in the absence of a reference to member state law being used to interpret these concepts.

The Court recites Recital 146 of the GDPR which provides 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*". The Court makes clear that having a de minimis threshold would lead to fluctuations in the assessment of member state courts and therefore making compensation subject to a de minimis threshold would risk undermining the coherence of the rules established by the GDPR.

Commentary

There is a general sentiment at EU Commission level that the GDPR's effectiveness is constrained by the ability of appeal to the courts of member states. Recent EU legislation such as the Digital Markets Act has been drafted to restrict fines from being as amenable to court challenges by giving regulators a more central role in the enforcement and appeal of fines. The CJEU has taken a broad interpretation of "damage" under the GDPR, which is not subject to *de minimis* thresholds. This open interpretation ties in with the EU Commission sentiment which is seeking more effective enforcement of EU regulations. The CJEU has subtly noted that while they cannot prescribe the method of implementing a fine for breach of Article 82, they may insist on the fine being "effective and equivalent" which means that the fine must not be arbitrarily low, having regard to national laws which would prejudice the effectiveness of the GDPR. We do not expect this to materially affect member states' power to decide on quantum of damages.

Conclusion

The court in the Fastway Couriers Case must now take instruction from the Austrian Post Case. The new test and associated guidelines in the Austrian Post Case have direct applicability and will inevitably inform the decision of court judgments in Ireland to ensure a harmonised and consistent approach to Article 82 claims. The decision is significant, and it will be interesting to see how the Irish courts apply this new case.

Key contacts

Raymond Sherry

Associate

raymond.sherry@brownejacobson.com

+35315743916

Jeanne Kelly

Partner

jeanne.kelly@brownejacobson.com

+353 (85) 846 3955

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