

31st Conference on Postal and Delivery Economics
Gdansk, 24-26 May 2023

**Non-material damages for GDPR
infringements after the Austria Post
judgment**

Alessandra Fratini

I. The facts and national proceedings

- AP's processing of political party affinities
- Applicant seeking injunction and compensation for upset and exposure suffered from wrongful affiliation
- 3 questions referred for preliminary ruling

II. The Judgment of the Court

- Q1: Mere infringement does not confer the right to compensation
- Q3: No *de minimis* threshold for damage to be compensated
- Q2: Amount of compensation to be determined by national rules and courts, subject to principles

} ≠ AG

IV. Implications for controllers


The facts and national proceedings

1. Processing by Post ÖSTERREICHISCHE POST AG

- AP collected information on political party affinities of Austrian population for defining, via algorithm using socio-demographic features, 'target group addresses' for election advertising
- Applicant learnt of his supposed affinity with FPÖ
- No consent, data not transferred to third parties

*Retention of
supposed affinity*

Great upset, a loss of confidence +
also a feeling of public exposure

- Action seeking injunction for AP to cease processing + 1.000€ as compensation for non-material damages
 - Courts (1st instance + appeal) granted injunction but rejected claim for compensation
 - Under AU law, mere feelings of discomfort not sufficient, damage claimed must reach a certain 'threshold of seriousness'
 - Applicant brought appeal before AU Supreme Court
-  3 questions referred to CJEU for preliminary ruling

The questions for preliminary ruling

1. Does Article 82 GDPR require that an applicant must have suffered harm **or is an infringement of GDPR 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 of the infringement of **at least some weight that goes beyond the upset** caused by that infringement?

The Judgment of the Court

C-300/21, UI v Österreichische Post AG

1. Not every infringement gives rise to a right to compensation

- No reference in Art. 82(1) GDPR to laws of MS
 - 'material or non-material damage' / 'compensation for the damage suffered' are autonomous EU law concepts
- ↳
 - to be interpreted having regard to wording and context



Wording	Context
Compensation subject to 3 cumul. conditions <ol style="list-style-type: none"> 1. Infringement of GDPR 2. Material/non-material damage resulting from that infringement 3. Causal link btw damage and infringement 	<ul style="list-style-type: none"> • Article 82(2): same 3 conditions • Rec. 75, 85, 146 confirm that • ≠ Art. 77-78 and 83-84, which are not conditional on existence of individual damage

3. No *de minimis* threshold

- AG: annoyance or upset ≠ non-material damages (every GDPR breach leading to some displeasure)
 - Fine line between mere upset (not eligible) and non-material damage (eligible): task for national courts
- Need for an autonomous and uniform interpretation of 'non-material damage' under Art. 82(1)

Wording	Context
No reference to any threshold of seriousness	<ul style="list-style-type: none"> • Rec. 146: 'concept of damage should be broadly interpreted (...) in a manner which fully reflects the objectives of this Reg.' • Objectives pursued by GDPR in terms of consistent and homogenous application

2. Assessment of compensation for national courts

- No rules in GDPR governing assessment of damages
It is for MS' legal system to prescribe detailed criteria on
 compensation payable, subject to principles of equivalence and effectiveness (≠ AG: 'not playing an important role')
- **Compensatory** function of right to compensation under Art. 82, intended to ensure 'full and effective compensation' for the damage suffered
 No need to require payment of **punitive** damages

Implications for controllers and processors

- Being the 1st judgment on compensation for non-material damages, likely impact on
 - National litigation (exp. where a *de minimis* threshold has been implemented, as in AU/DE)
 - Other preliminary references before the CJEU
- With no *de minimis*, even minor angst or upset resulting from a GDPR infringement might justify a request for compensation: a new era of emotional damages claims?
 - Costs a deterrent for individual actions
 - Collective actions in the event of infringements that affect a large number of data subjects, with Collective Redress Directive applying as of 25/06 next

- In principle, the judgment enhances data subjects' right to compensation → enforceability of GDPR
- In practice, long and windy road to mass litigation, as judgment provides no legal certainty (additional cases and judgments to substantiate criteria)
- From a controller's perspective, the judgment sets the stage for future compliance efforts
- In view of material impact of the judgment on their risk profile, it is reasonable to expect that controllers/processors take data protection more seriously and allocate to it means and resources accordingly

Thank you!

Alessandra Fratini
a.fratini@fratinivergano.eu
www.fratinivergano.eu