

Personal data: damages actions between GDPR and private antitrust enforcement

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CJEU, 4 July 2023, case C-252/21, *Meta*

“the compliance or non-compliance ... with the provisions of the GDPR may, depending on the circumstances, be a vital clue among the relevant circumstances of the case in order to establish whether that conduct entails resorting to methods governing normal competition and to assess the consequences of a certain practice in the market or for consumers”. [CJEU, 4 July 2023, *Meta*, case C-252/21, par. 47]

“access to personal data and the fact that it is possible to process such data have become a significant parameter of competition between undertakings in the digital economy. Therefore, excluding the rules on the protection of personal data from the legal framework to be taken into consideration by the competition authorities when examining an abuse of a dominant position would disregard the reality of this economic development and would be liable to undermine the effectiveness of competition law within the European Union”.[*ivi*, par. 51]

AGCM v. Google LLC

(Case A552 – Ostacoli alla Portabilità dei dati)

Weople: innovative application acting as an intermediary between the data subject and business using big data, with a view to exploit monetary value of personal data

Failure of Google to grant portability rights under art 20 GDPR to users prevents Weople to access the market of big data aggregators, amounting to exclusionary behaviour in breach of art 102 TFEU.

Commitment decision in July 2023.

GDPR, art. 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.[...]

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.

4. Where more than one controller or processor, or both a controller and a processor, are involved in the same processing and where they are, under paragraphs 2 and 3, responsible for any damage caused by processing, each controller or processor shall be held liable for the entire damage in order to ensure effective compensation of the data subject.”

Elements of the action for damages under GDPR

- **Eligibility:** probably only data subjects. Without prejudice of competitors to lodge a claim under national unfair competition practices law, see Directive 2005/29/EC , art 11.
- **Nature of liability:** seems strict liability regime. Exemption if controller proves that it is «*not in nay way responsible*».
- **Nature of damage:** pecuniary and non-pecuniary. Is a gravity treshold compatible with art. 82 GDPR? Several national cases provides for such a treshold.

[see UK Supreme Court, *Lloyds v. Google* [2021], Corte di Cassazione, n.16402, *G.F. c. Inps* [2021]; Corte di Cassazione, n.11020, *S.R. c. M.G.* [2021]; Corte di Cassazione, n.17383, *A.L. c. BNL* [2020]

CJEU, 4° May 2023, case C-300/21, *Osterreichische Post AG*

Par. 49 “Making compensation for non-material damage subject to a certain threshold of seriousness 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.

Is LOSS OF CONTROL over personal data a damage *per se*?

GDPR, recital 85

“A personal data breach may, if not addressed in an appropriate and timely manner, result in physical, material or non-material damage to natural persons such as loss of control over their personal data or limitation of their rights, discrimination, identity theft or fraud, financial loss, unauthorised reversal of pseudonymisation, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage to the natural person concerned.”

Pending cases before CJEU

Case C-340/21

Case C-741/21

*Inter alia: Is anxiety sufficient
damage? Controller's liability in
case of hacker attack?*

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