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ORIGINAL SCIENTIFIC ARTICLE

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TOWARD A EUROPEAN TORT LAW OF DATA PROTECTION: THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND ITS IMPACT ON NATIONAL TORT LAWS

Abstract: *The paper examines the provisions governing non-material damage resulting from violations of the right to personal data protection under the General Data Protection Regulation (GDPR), as well as their interpretation in the case law of the Court of Justice of the European Union (CJEU). Particular attention is devoted to judgments in which the Court develops autonomous, yet insufficiently precise, legal concepts, thereby creating legal uncertainty and complicating the application of relevant provisions at the national level. Although the CJEU has entrusted national courts with the assessment of damages, the paper emphasizes that in practice it is impossible to fully separate the conditions for awarding damages from the process of determining the amount of compensation.*

Key words: GDPR, Tort Liability, Non-Material Damage, Court of Justice of the European Union.

1. Introduction

The intersection of EU digital regulations and national tort laws is complex and continuously evolving. As new regulations emerge and the Court of Justice of the European Union (CJEU) clarifies and interprets their provisions, national courts must navigate the tension between EU-wide standards and national legal traditions. The CJEU has recently decided several cases on the right to compensation based on the General Data Protection Regulation (GDPR), aiming to define the conditions for compensation of non-material (non-pecuniary) damage and ensure that tort claims related to data protection are handled consistently across the EU.

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This article examines the ways in which the EU's attempts to establish a comprehensive legal framework for regulating the digital frontier have tacitly displaced national tort laws[1] in favor of seemingly autonomous, yet vague and opaque rules, largely devoid of substance. This tendency causes legal uncertainty, complicating enforcement and potentially undermining fundamental principles of liability and redress for infringement of data protection rights when enforced on the national level.

Recently, the CJEU has decided several cases addressing intriguing and novel questions regarding the interpretation of various GDPR provisions such as: do any and all infringements of the GDPR give equal rise to compensation claims? Is infringement in itself enough for liability? To which extent should the level of fault and seriousness of the infringement be taken into account when setting the level of compensation and do damages in the area of data protection also have a punitive function? Under which circumstances can controllers claim that they are not responsible for an infringement, and which standard of care will their conduct be measured against? Underlying these many questions is a broader one: is a data protection claim one that is focused on causes of harm (i.e., objective conduct of the controller or processor leading up to damage) or is it one which focuses on the consequences that a data subject has suffered subjectively?

EU institutions have traditionally refrained from intervening in the overall structure of substantive tort law.[2] This is why the significant judicial activity in recent years raises the question of whether fundamental aspects of tort law are undergoing "backdoor harmonization"[3] and what the broader legal implications and systemic effects of this development may be. Such tendencies can have serious consequences and lead to what Koziol refers to as "double fragmentation of the law".[4] On one side, the CJEU judgments significantly impact national tort laws, introducing provisions that may be unfamiliar to their legal traditions. On the other hand, the EU directives and regulations lack a coherent foundation in tort law concepts, often resulting in inconsistencies among them.

The article starts by introducing the right to data protection and the concept of damages in Article 82 (1) of the GDPR. Although Article 82

1 In this article we use the term tort law. It is also common to use the terms delictual liability, non-contractual liability and extra-contractual liability in the same sense.

2 Bar, C. von, 1998, *The common European law of torts*, Vol. 2, Oxford, Oxford University Press, p. 408.

3 Marcos, F., Sanchez, A., 2008, Damages for breach of the EC antitrust rules: harmonizing tort law through the back door?, *InDret*, No. 1, p. 2.

4 Koziol, H., 2013, Harmonizing Tort Law in the European Union: Advantages and Difficulties, *ELTE Law Journal*, No. 1, p. 76, fn. 15.

(1) GDPR grants data subjects the right to both material and non-material damages, the emphasis will be on non-material damages, as this is the issue that has been in the focus of the CJEU case law. Despite the need to create autonomous tort law rules in the EU, in order to strengthen the European internal market, this is a challenging task, as few issues in tort law are assessed as differently across Europe as non-material damages,[5] making it difficult to reconcile the need for autonomous concepts with the preservation of national legal traditions.

Through the analysis of recent case law of the CJEU, we will focus on questions addressed by the Court in its recent judgments relating to Article 82 of the GDPR, issued in response to preliminary ruling requests from national courts. We will then discuss how the Court has interpreted and introduced autonomous concepts in data protection law, hence de facto harmonizing certain aspects of tort law traditionally regulated at the level of member states. Finally, we will look at how the CJEU case law on Article 82 GDPR challenges the national tort law rules of the member states.

2. Data Protection and the Right to Compensation

The right to the protection of personal data is a type of personality right. Personality rights are often referred to as "private human rights",[6] and cover different legal interests connected to the person, which are protected and enforced through means of private law.

Personal data protection is closely related to privacy, although privacy and data protection are commonly recognized as two separate rights.[7] While privacy is a broader notion that entails the right to hide parts of an individual's life from the view of the wider public,[8] data protection aims to ensure the fair processing (collection, use, storage) of personal data by both public and private actors.[9]

The legal basis for regulating data protection in the EU in contained in Article 16 of the Treaty on the Functioning of the European Union

5 Knetsch, J., 2022, The compensation of non-pecuniary loss in GDPR infringement cases, *JETL*, Vol. 13, No. 2, p. 135.

6 Brüggemeier, G. *et al.*, 2010, *Personality rights in European Tort Law*, Cambridge, Cambridge University Press, p. 6.

7 European Data Protection Supervisor, n.d., Data Protection, (https://edps.europa.eu/data-protection/data-protection_en, 28. 3. 2025).

8 Humble, K., 2020, Human rights, international law and the right to privacy, *Journal of Internet Law*, Vol. 23, No. 12.

9 European Data Protection Supervisor, n.d.

(TFEU), which requires that the EU lay down data protection rules for the processing of personal data. Based on this mandate, the EU has explicitly granted the right to data protection in the Charter of Fundamental Rights of the EU,[10] as well as in the General Data Protection Regulation (GDPR).[11] Regulations are a type of EU legislation that have direct effect in national laws without the need for their implementation in the national legal systems. The EU decision to replace the directive as the regulatory form with a regulation, reflects the need for a higher level of legal unification in this area of law.[12]

Article 79 (1) GDPR provides individuals with the right to an effective remedy when their rights under the Regulation have been violated. Additionally, the abovementioned Article 82 (1) of the GDPR grants data subjects the direct right to receive compensation for both material and non-material (non-pecuniary) damages resulting from infringements of its provisions.[13] While the provision might sound straightforward – after all, courts have dealt with issues of non-material damage for spread of personal information for more than two millennia – the CJEU has established that every aspect of a compensation claim, apart from the final calculation of damages, must be interpreted autonomously.[14]

The interpretation and correct application of Article 82 (1) by national courts, and its integration with domestic procedural and tort rules, with the aim of preventing obstacles derived from the legislative fragmentation, is crucial for ensuring the effective enforcement of data protection rights and equal protection of citizens throughout the EU.

10 Charter of Fundamental Rights of the European Union, 2012/C 326/02, 14 December 2007. Art. 8 states that: "Everyone has the right to protection of personal data concerning him or her."

11 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

12 Before the EU adopted the GDPR in 2016, data protection was governed by the Data Protection Directive (95/46/EC) from 1995.

13 Directive 95/46/EC also recognized the right to non-material damages, although this right was seldom exercised. See European Union Agency for Fundamental Rights (FRA), 2013, *Access to data protection remedies in the EU Member States*, Publications Office of the European Union, points 3 and 4. The Court had never offered a specific interpretation of the Directive's provision on non-material damages, so the previous legal practice does not offer any clarification. Opinion of Advocate General Campos Sánchez-Bordona, 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische Post AG*, point 2. Claims for compensation are usually provided for in directives rather than in regulations. Art. 82 (1) is unusual in that regard. See Knetsch, J., 2022, p. 138.

14 CJEU, case C-300/21, *UI v. Österreichische Post*, ECLI:EU:C:2023:317, paras. 29–30.

3. Unification of Tort Law in the EU

Presently, a unified European tort law does not exist, despite multiple initiatives aimed at defining core European tort principles.[15] The EU lacks the general and comprehensive authority to regulate tort law,[16] except when the member states or the EU itself breach their obligations under the treaties.[17] This is why, instead of a systematic approach, the EU has opted for a gradual and sectoral alignment of tort rules in certain fields of law, such as product liability[18] and competition law.[19] In this way, the EU tort law has slowly but surely increased in volume, albeit remaining fragmented.

Existing national tort regimes vary significantly due to differences in legal traditions. These variations impact key aspects of tort law, including fault requirements, the scope of liability, available remedies, and the role of judicial discretion. For example, in some states, such as Germany, Austria and Netherlands, damages for non-material harm are not common, and courts are reluctant to award compensation to data subjects for non-material damages, since due to their nature such claims are often difficult to verify and also bear significant potential for misuse.[20] On the other hand, in France, Scandinavia and Italy, these damages are more readily granted.[21]

In several recent GDPR cases on non-material compensation claims, the CJEU clarified that the concept of non-material damages must be interpreted autonomously for the purposes of the GDPR.[22] The development of autonomous concepts in the case law of the CJEU challenges the diversity of national tort regimes by introducing uniform legal interpretations

15 Examples are the Principles of European Tort Law (PETL) dealing with substantive tort law, and Draft Common Frame of Reference (DCFR) which examines European tort law in a very broad, essentially normative sense. See Giliker, P., What do we mean by EU tort law, in: Giliker, P., (ed.), 2017, *Research Handbook on EU Tort Law*, Cheltenham, Edward Elgar, p. 5.

16 "There is thus no general EU competence to regulate private law in its entirety, but a number of specific competences addressing selected aspects." Mańko, R., 2015, EU competence in private law – The Treaty framework for a European private law and challenges for coherence, *European Parliamentary Research Service*, p. 1.

17 See Art. 260 as well as Art. 340 (2) TFEU.

18 Howells, G., Is European Product Liability Harmonised?, in: Koziol, H., Schulze, R., (eds.), 2008, *Tort and Insurance Law*, *Vol. 23*: *Tort Law of the European Community*, Vienna–New York, Springer.

19 Dunne, N., 2016, Antitrust and the Making of European Tort Law, *Oxford Journal of Legal Studies*, Vol. 36, No. 2.

20 Khalil, S., 2023, EU: CJEU Lowers Threshold for GDPR Damages, (https://www.schoenherr.eu/content/eu-cjeu-lowers-threshold-for-gdpr-damages/, 8. 5. 2023).

21 Giliker, P., 2017, p. 14.

22 CJEU, case C-300/21, *UI v. Österreichische Post*, ECLI:EU:C:2023:317, para. 2.

that may not align with established domestic legal traditions, making it difficult for national courts to apply these rules directly.

4. Criteria for Compensation Claims under the GDPR

The CJEU has outlined three primary criteria for a successful compensation claim: 1) infringement of the GDPR by the controller or a processor ("infringement"), 2) existence of material or non-material damage suffered by the data subject ("damage"), and finally 3) a link between the infringement committed and harm suffered, establishing that the latter occurred as a result of the former ("causal link").[23] This approach taken by the Court is rather universal and sound in terms of its structure – although it must be noted that, much as with national judgements following this pattern of tort liability elements, the CJEU leaves blurry certain lines between the individual elements.[24]

4.1. DOES INFRINGEMENT PER SE CONSTITUTE DAMAGE?

An infringement occurs when an entity fails to comply with one or more obligations under the GDPR. Infringement of a provision of the GDPR is clearly a *conditio sine qua non* for the establishment of successful compensation claims: if the GDPR has not been breached, there can be no grounds for liability under Article 82. We will not go further into the specific actions or omissions that constitute infringement but will focus on the elements of damage (harm) and causal link, as interpreted by the CJEU.

One of the questions the Court had to answer was whether the infringement of the provisions of the GDPR automatically produces harm that gives rise to the right to compensation. The CJEU has spoken seemingly clearly on the topic. First, in the *Österreichische Post* case, where the Austrian postal service collected and processed data on the political opinions of Austrian citizens without their explicit consent, the Court held that "the mere infringement of the provisions of that regulation is not sufficient to confer a right to compensation,"[25] justifying its stance by applying literal interpretation to the text of Article 82. The Court held it apparent that separate references to the terms "infringement" and "damage" clearly indicate

23 CJEU, case C-300/21, *UI v. Österreichische Post*, EU:C:2023:370, para. 1; CJEU, case C-687/21, *MediaMarktSaturn*, EU:C: 2024:72, para. 4.

24 CJEU, case C-741/21, *GP v. juris GmbH*, EU:C:2024:288, para. 1; CJEU, case C-590/22, *AT*, EU:C:2024:536, para. 3.

25 CJEU, case C-300/21, *UI v. Österreichische Post*, EU:C:2023:370, para. 42.

the legislative intention of the two elements being cumulative. Elaborating, the CJEU held that "it follows, first, that the occurrence of damage in the context of such processing is only potential; second, that an infringement of the GDPR does not necessarily result in damage, and, third, that there must be a causal link between the infringement in question and the damage suffered by the data subject in order to establish a right to compensation."[26] In other words, the Court effectively rejected the claims that any infringement of the GDPR suffices to give rise to a compensation claim solely by the virtue of being an infringement of a fundamental right. The Court re-affirmed this stance in multiple cases down the line – holding, in *VX*, that "the data subject is required to show that the consequences of the infringement which he or she claims to have suffered constitute damage which differs from the mere infringement of the provisions of that regulation,"[27] reiterating in *MediaMarktSaturn* that "the person seeking compensation by way of that provision is required to establish not only the infringement of provisions of that regulation, but also that that infringement caused him or her material or non-material damage."[28]

In *Österreichische Post*,[29] the Advocate General highlighted that, in absence of damage, the compensation no longer would have performed the function of redressing the adverse consequences caused by the breach, but rather another function closer to punishment.[30] He further made a point that in the event of a breach that does not create harm, the data subject is still afforded the right to make a complaint to a supervisory authority under Article 77 (1) GDPR, and that the different mechanisms in GDPR coexist and complement each other.[31]

4.2. CRITERIA FOR DAMAGES

4.2.1. What constitutes non-material damage in GDPR?

Establishing the existence of damage (harm) is a necessary requirement for obtaining compensation. Article 82 of the GDPR does not identify the specific nature, nor the form of non-material damage, nor does

26 CJEU, case C-300/21, *UI v. Österreichische Post*, EU:C:2023:370, para. 37.

27 CJEU, case C-456/22, *VX*, ECLI:EU:C: 2023:999, para. 18.

28 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C: 2024:72, para. 61.

29 The legal position of an Advocate General's opinions in the CJEU is that it they are not binding on the Court but serve as an independent and reasoned legal analysis to assist the judges in reaching their decision.

30 Opinion of Advocate General, Campos Sánchez-Bordona, 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische Post AG*, point 30.

31 *Ibid.*, point 54.

it refer to the laws of the member states to define the meaning and scope of the term "non-material damage".[32] The national courts have therefore in several cases called upon the CJEU to clarify and define the concept of damages in the context of data protection violations. By addressing this issue, the Court established and determined under what conditions individuals can seek redress for the consequences of data protection infringements.

In *Scalable Capital* the Court explicitly equalized damage caused by data breach with physical injury.[33] By making this comparison, it acknowledged the significant impact that data breach has on data subjects, at the same time recognizing that its psychological and financial consequences can be as serious as a physical injury. With this it confirmed that personal data deserves legal protection akin to physical injury.

According to Recital 146 of the GDPR,[34] 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." We will further analyze each of the three elements used to define the concept of damages.

The Court has in the recent case law specified the requirement of broad interpretation of the concept of damage, finding that the loss of control over personal data may already be sufficient to substantiate non-material damages.[35] It has also found, contrary to the opinion of the Advocate General,[36] that Article 82 (1) covers the fear of the potential misuse or

32 Opinion of Advocate General Collins, 26 October 2023, CJEU, joined cases C-182/22 and C-189/22, *Scalable Capital*, point 23.

33 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C: 2024:1123, para. 39.

34 Recitals as such do not have legislative force. The CJEU has consistently affirmed that recitals cannot directly create rights and duties, but they nevertheless play an important role in the EU legal order. The primary function of recitals is interpretative – they are used for explaining the essential objective pursued by the legislative act. See Heijer, M. den *et al.*, 2019, On the Use and Misuse of Recitals in European Union Law, *Amsterdam Law School Research Paper*, No. 2019-31, p. 3.

35 CJEU, case C-200/23, *Agentsia po vpisvaniyata v. OL*, ECLI:EU:C:2024:827, para. 157, "loss of control, for a limited period, by the data subject over his or her personal data, on account of those data being made available online to the public, in the commercial register of a Member State, may suffice to cause 'non-material damage'".

36 Opinion of Advocate General Pitruzzella in: *VB v. Natsionalna agentsia za prihodite* (C-340/21, EU:C:2023:353, points 81–83). See also Opinion of Advocate General Collins, 26 October 2023, on CJEU, joined cases C-182/22 and C-189/22 *Scalable Capital*, fn. 13, where he states: "I agree with Advocate General Pitruzzella that upset or displeasure at the fact that one's data has been 'hacked' does not suffice. To succeed in such a claim the data subject must demonstrate that the fear of misuse of his or her data caused him or her 'emotional damage'." Advocate General Campos Sánchez states in his Opinion of 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische*

personal data that the data subject experiences as a result of the breach.[37] The Court has also recognized psychological and emotional suffering as constituting non-material damage. In *Agentsia po vpisvaniyata*, the Court acknowledged "psychological and emotional suffering [...] namely fear of, and concern over, possible abuse, as well as the sense of powerlessness and disappointment that her personal data could not be protected" as constituting non-material damage.[38]

A very recent judgement by the General Court of the CJEU from January 2025[39] found that data subject had suffered non-material damage in that they were put in a position of uncertainty. This expansive approach implies that psychological distress and anxiety is sufficient to establish non-material damage.

As for the requirement that the concept of damage should be interpreted in light of the case law of the CJEU, the intention of this recital was most likely to refer to judgments on civil liability governed by other directives, since the Court had yet to rule on the concept of damage when the GDPR was adopted. As this interpretation is not clear from the wording of Recital 146 GDPR, a reference to analogy would have provided greater clarity.[40]

The third interpretation requirement is that the GDPR must be understood in a manner that fully reflects its objectives. The GDPR essentially has two objectives: to protect the inherent rights of individuals regarding their personal data, and to support a free, integrated digital market in the EU.[41] By interpreting non-material damages broadly, the GDPR sets high requirements and expectations to data controllers and processors, and ensures that they are incentivized to respect data protection norms. Respecting the objectives of the GDPR means the damages should avoid creating

Post AG, (point 105): "I do not believe, however, that it is possible to infer from this a rule pursuant to which *all* non-material damage, regardless of how serious it is, is eligible for compensation." Further, in point 109 he notes: "In support of my position, I note that the GDPR does not have as its sole aim the safeguarding of the fundamental right to the protection of personal data and that the system of guarantees laid down therein includes mechanisms of different types."

37 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, ECLI:EU:C:2023:908, para. 6.

38 CJEU, case C-200/23, para. 155

39 CJEU, case T– 354/22, para. 197.

40 Opinion of Advocate General Campos Sánchez-Bordona, 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische Post AG*, point 103.

41 Unlike Directive 95/46/EC, which prioritized the free movement of personal data, the GDPR places greater emphasis on the protection of personal data. Nonetheless, Article 1 of the GDPR clearly states that its objective is to reconcile the right to personal data protection with the free movement of such data.

a disincentive for data processing activities that are vital for the free movement of data, while at the same time compensating the victims in full. The challenge is to find a balance and compensate for harm without imposing overly burdensome liabilities that could stifle innovation and cross-border data flows. The balancing itself, however, is reserved for the national courts within their margin of appreciation.

4.2.2. Threshold for non-material damages

Article 82 (1) GDPR does not set a specific threshold for damages. It only states that "any person who has suffered material or non-material damage" has the right to compensation.

In an attempt to ensure that its rulings are not misinterpreted in a way that would let controllers and processors pick and choose which provisions they wish to adhere to and which would be too costly to breach, the Court took several steps. First, it established that any damage, no matter how minimal, can be compensated – subject to rather minimal exceptions.[42]

Secondly, it held that the degree of seriousness of the infringement or the level of fault, or even its intentional nature, are not to be taken into account when determining whether compensation should be awarded.[43] Thirdly, it firmly placed the burden of proof of non-infringement on data controllers, even when third parties were involved, despite the fact that, had it not been for their involvement, there would not have been any damage.[44] In other words, the Court refined its claim that the "mere infringement" is insufficient for damages claim[45] by adjusting the threshold of the other elements of a claim, i.e., the one of fault, burden of proof, causal link, and "damage". In doing so, it established, in essence, a binary system – either there was an infringement which led to no consequence at all, in which case a claim cannot be enforced, or there was an infringement, regardless of how accidental or minor, which has led to damage, no matter how serious or trivial, in which case compensation should be awarded.

Although some EU states, such as Austria,[46] require damages to reach certain threshold of seriousness, the CJEU is clear that no wrongful violation of data protection rights should go uncompensated, however small

42 CJEU, case C-182/22, *Scalable Capital*, EU:C: 2024:531, para. 46.

43 CJEU, case C-182/22, *Scalable Capital*, EU:C: 2024:531, paras. 28–30.

44 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, EU:C: 2023:986, para. 72.

45 CJEU, case C-300/21, *UI v. Österreichische Post*, EU:C: 2023:370, para. 42.

46 § 1328a, *Allgemeines bürgerliches Gesetzbuch* (ABGB).

the damage. This means that national legislation cannot prescribe a de minimis threshold for compensation claims.[47] This is because, according to the interpretation of the Court, limiting damages under Article 82 of the GDPR to a certain degree of seriousness would be contrary to the broad interpretation of this term.[48]

The approach taken by the Court is contrary to the solutions in Principles of European Tort Law (PETL), a common core of European tort law, which allow the judges to disregard trivial damage, regardless of whether another remedy is available to the victim.[49]

In substance, several effects of the CJEU clarifications are notable. The Court has lowered the threshold for recovering damages, holding that any harm, no matter how minimal, must be compensated – but that it must be specifically proven.[50] The fact that there can be no bar against cases where damages are minimal opens the door to a flood of litigation. On the other hand, the fact that such harm and the causal link must be specifically proven by the data subject, and awarded compensation calculated solely on the basis of that harm – with no regard to the gravity of the breach, its repeated or intentional nature – deprives the court the possibility to take the broader context into account, enforce public policy, and prevent future infringements.[51] This leads to an unfortunate situation where data subjects who have suffered serious harm, but who may struggle to prove a specific link – as is often in privacy cases – will be denied compensation, while those who can prove even minimal harm, mere annoyance, and suffering due to the most minutiae of breaches, will be able to bring lawsuits most legal systems would typically classify as pure nuisance.[52]

Proponents of the subjective concept of non-material damages consider this solution favorable to objective theory, which requires granting monetary compensation without the need to prove that the victim has suffered damages.[53] By granting compensation for the mere infringement of

47 CJEU, case C-456/22, *VX*, ECLI:EU:C: 2023:999, para. 1.

48 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, ECLI:EU:C: 2023:908, para. 81.

49 European Group on Tort Law, 2005, *Principles of European Tort Law: Text and Commentary*, Vienna, Springer, Art. 6:102 PETL.

50 CJEU, case C-456/22, *VX*, EU:C:2024:999, para. 1; CJEU, case C-182/22, *Scalable Capital*, EU:C: 2024:531, para. 4.

51 CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, para. 4; CJEU, case C-741/21, *GP v. juris*, GmbH EU:C:2024:288, para. 3.

52 CJEU, case C-182/22, *Scalable Capital*, EU:C:2024:531, para. 4; CJEU, case C-300/21, *UI v. Österreichische Post*, EU:C:2023:370, para. 2.

53 Počuča, M., 2008, *Naknada nematerijalne štete zbog pretrpljenog straha*, Novi Sad, Privredna akademija, p. 133; Aleksandra Maganić emphasizes that objective con-

data protection rights without the need to prove harm, it would appear that personal data has an objectified value, and that monetary compensation represents the remuneration for misuse of this right, which is, of course, not the case. At the same time, there is a contrary argument to be made: that a violation of a fundamental right is, and must be, sufficient grounds to convey compensation, as the interests which they inherently protect, such as autonomy and dignity, must be considered protectable per se.[54]

The evidentiary rules in cases of GDPR infringement are left to the discretion of the national courts. There is, however, a requirement that the damage is concrete, i.e., the claimant must additionally demonstrate that the infringement has caused negative consequences (actual damage).[55] According to the CJEU, it is not enough that the risk of infringement is merely hypothetical[56] or that the victim claims they experienced fear, as the fear has to be well-founded.[57]

This raises the crucial question of how actual damage should be proven. The Regulation does not contain any provision aimed at determining the admissible methods of proof and the probative value.[58] The evidentiary rules in case of GDPR infringement are left to the discretion of the national courts. Different evidentiary issues can, however, cause challenges, such as what type of evidence is required to establish the existence of non-material damages. Should the pain and suffering due to infringement be established by testimony of an expert witness or by personal testimony? Is the special-sensitivity rule, also known as the eggshell-skull

ception of non-material damages could lead to an increase in the number of cases in which the victims would require non-material damages. See Maganić, A., Zaštita prava osobnosti, in: Vukadinović, D. V., (ed.), 2009, *Zbornik radova – Trideset godina zakona o obligacionim odnosima – de lege lata i de lege ferenda*, Belgrade, GTZ, p. 426.

54 See, for example, Radolović, A., 2006, Pravo osobnosti u novom Zakonu o obveznim odnosima, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 27, No. 1; Baretić, M., 2006, Pojam i funkcije neimovinske štete prema novom Zakonu o obveznim odnosima, *Zbornik Pravnog fakulteta u Zagrebu*, special issue, No. 56. In Swiss law, any infringement of a personality right is wrongful in the absence of a ground of justification. However, where personality rights have been recognized as autonomous, either by the courts or by the legislature, a presumption of fault and damage arises. The mere infringement of such a right is therefore sufficient to establish liability, without the need to prove fault or actual damage. See Neethling, J., 2005, Personality rights: a comparative overview, *Comparative and International Law Journal of Southern Africa*, Vol. 38, No. 2, pp. 219–220.

55 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 58.

56 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 68.

57 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, ECLI: EU:C:2023:986, para. 85. See also CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 67.

58 Opinion of Advocate General Pitruzzella in: *VB v. Natsionalna agentsia za prihodite*, CJEU, case C-340/21, EU:C:2023:353, point 56.

rule,[59] applicable in these cases? The Court does not provide answers to any of these questions.

4.2.3. Function of the damages

Damages in tort law can serve several functions: compensation, satisfaction, deterrence, or punishment. Compensation aims to restore the injured party to the position they would have been in had the harm not occurred (*restitutio in integrum*). In other words, compensation is intended to restore the balance of the legal situation that has been negatively affected (damaged) by infringement of the right. It is assessed objectively, unlike satisfaction, which acknowledges and vindicates the claimant's rights, providing a sense of justice or redress. Deterrence, or prevention, discourages wrongful conduct, while punishment penalizes the defendant for wrongdoing in order to deter similar misconduct.

In regard to GDPR violations, the Court has explicitly determined that Article 82 (1) of the GDPR must be interpreted as meaning that the right to compensation laid down in that provision fulfils an exclusively compensatory function.[60] However, it has also stated that the right of any person to seek compensation for damage reinforces the operational nature of the protection rules laid down by that regulation and is likely to discourage the reoccurrence of unlawful conduct.[61]

The Court's reasoning appears somewhat contradictory. On the one hand, it asserts that Article 82 (1) GDPR serves an "exclusively compensatory function", implying that the provision is solely intended to compensate individuals for actual harm suffered. On the other hand, it recognizes the deterrent effect of compensation, which suggests that the provision also serves a preventive purpose by discouraging future violations – a function that goes beyond mere compensation but is meant to serve broader societal interests.

Compensation remains a primary – though not an exclusive – function of tort law in most European legal system.[62] The preventive function, traditionally linked to criminal law, is widely acknowledged across Euro-

59 Kohutis, E., McCall, S., 2020, The Eggshell and Crumbling Skull Plaintiff: Psychological and Legal Considerations for Assessment, *Psychological Injury and Law*, Vol. 13, No. 4.

60 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C: 2024:1123, para. 24.

61 See, *inter alia*, CJEU, case C-300/21, *Österreichische Post*, EU:C:2023:370, paras. 38 and 40; and CJEU, case C-741/21, *juris*, EU:C:2024:288, para. 59.

62 Vizner, B., 1978, *Komentar Zakona o obveznim odnosima*, Knjiga druga, Zagreb, p. 913; Boom, W. van, 2010, Comparative notes on injunction and wrongful risk-taking, *Maastricht Journal of European and Comparative Law*, Vol. 17, No. 1, p. 15.

pean jurisdictions,[63] as well as in the PETL,[64] as a secondary aim of the damages awarded for infringements of personality rights. The Advocate General also believes that the action under Article 82 (1) was designed and laid down to support the typical functions of civil liability, damages for the injured party, and, on a secondary basis, damage for future harm.[65] The duty to compensate encourages greater caution in the future by promoting compliance with the rules and avoiding harm. He also stated that it cannot be ruled out that the reparation sought for non-material damage may include other than merely financial components, such as recognition that the infringement occurred, thereby providing the applicant with a certain moral satisfaction.[66]

Recital 146 of the GDPR states: "Data subjects should receive full and effective compensation for the damage they have suffered."

In its practice, the CJEU has further established guidelines for the national legal systems when determining the level of compensation, by requiring that they be "full and effective".[67] Full compensation means the victim should be placed in the same state as if the damage had not occurred, and there is no capping or limitation of damages. But what can be considered effective compensation? The effectiveness of a remedy is demonstrated by its ability to prevent the alleged violation of the law or its continuation, or by offering appropriate redress for any violation that has already taken place.[68] It could also be interpreted as to mean that compensation must be a timely, adequate, and efficient redress for individuals whose rights under the GDPR have been violated.

Besides stating that damages have a compensatory function, the Court further explicitly established that no punitive damages can be claimed under the GDPR.[69] Punitive damages are not mentioned in the GDPR, nor does the regulation require the amount to be calculated to punish the data controller. Unlike compensatory damages, punitive damages are not equal to the damages suffered, but are higher, and focus on the tortfeasor, their level of fault as well as their economic situation. Although punitive

63 An exception is this regard are Italy, Netherlands and Greece. See Abramović, A., 2004, Odgovornost za štetu nastalu objavom informacije, *Hrvatska pravna revija*, Vol. 4, No. 6, p. 43.

64 See European Group on Tort Law, 2005, Art. 2:104.

65 Opinion of Advocate General Campos Sánchez-Bordona, 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische Post AG*, point 44.

66 *Ibid.*, point 89.

67 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C:2024:1123, para. 35.

68 Piątek, W., 2019, The right to an effective remedy in European law: significance, content and interaction, *China–EU Law J*, Vol. 6, No. 3–4, p. 163.

69 CJEU, case C-667/21, *Krankenversicherung Nordrhein*, ECLI:EU:C:2023:910, para. 4.

damages are not common in Europe, there are authors advocating their introduction into European legal systems.[70] Besides, we can identify certain punitive elements in European tort law systems, so this function is not completely unfamiliar.[71]

When determining the level of monetary compensation, only damages actually suffered by a person must be taken into consideration.[72] Along the same lines, in *Krankenversicherung Nordrhein*, the Court emphasized that the degree of seriousness of the controller's fault does not influence the amount of compensation for non-material damages, reinforcing the compensatory – not punitive – nature of Article 82.[73] Further, in view of compensatory rather than punitive function, the fact that several infringements have been committed by controller to the same data subject is not a relevant criterion for assessing the compensation.[74] Keeping with this line of thought, we can conclude that other circumstances, such as type of personal data concerned, tortfeasors wealth, or profits made from the infringement, would not impact the level of compensation. This is in line with the Court's argumentation against punitive damages whose purpose is to punish the tortfeasor.

In our view, the broader functions of tort law are inherently linked to the assessment of damages. The purpose of tort law – whether it is aimed primarily at compensation, deterrence, or punishment – directly influences how damages are quantified and awarded. A purely compensatory approach focuses on restoring the victim to their pre-injury state, whereas a deterrent or punitive function may justify higher damages to prevent future misconduct. Therefore, any discussion on the appropriate level of damages must take into account the underlying objectives that tort law seeks to achieve.

70 Müller, P., 2000, *Punitive damages and deutsches schadensrsatrecht*, Berlin, De Gruyter; Mrvić-Petrović, N., 1991, Naknada štete kao alternativna krivična sankcija, *Jugoslovenska revija za kriminologiju i krivično pravo*, Vol. 29, No. 3, pp. 85–86.

71 For Estonia see Lahe, J., 2011, Punitive Damages in Estonian Tort Law?, *Journal of European Tort Law*, Vol. 2, No. 3, p. 286; for Finland see Winiger, B. *et al.*, (eds.), 2011, *Essential Cases on Damage*, Berlin, Walter de Gryter, p. 46; for Italy see Art. 2059 of Civil Code. Article 18 (2) of Commission Regulation (EC) No. 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14 (3) of Council Regulation (EC) No. 2100/94 on Community plant variety rights (OJ 1995 L 173, p. 14) is usually cited as an example of punitive elements in EU: "the liability to compensate the holder for any further damage [...] shall cover at least a lump sum calculated on the basis of the quadruple average amount charged".

72 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 66 and the case law cited.

73 CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, para. 86.

74 CJEU, case C-741/21, *GP v. juris GmbH*, EU:C:2024:288, para. 64.

4.2.4. Assessment of damages

The GDPR does not contain provisions on the assessment of damages. The rules for deciding the level of compensation itself remain therefore within the scope of the national law of the member states. It is hence up to the legal system in each member state to prescribe the rules for determining the compensation level. This margin of appreciation will allow the states to adapt the level of damages to their standard of living. Unlike personal injury claims, which are typically assessed using predefined tables for pain and suffering in most member states,[75] determining personality rights infringements is more complex and varies significantly. This divergence increases the risk of forum shopping in cases of digital rights violations.

The Court has explicitly ruled that the criteria for determining administrative fines should not be considered when assessing damages for compensation.[76] This is because administrative fines are punitive in nature, and as such pursue different objectives then damages. A large part of the CJEU's reasoning builds upon what it sees as a fundamentally different nature of the right to an effective judicial remedy and the right to lodge a complaint with the data protection authority. As it argued in *MediaMarkt-Saturn*, Article 82, unlike Articles 83 and 84 of GDPR fulfils a compensatory function, in that financial compensation based on that provision must allow the damage actually suffered as a result of the infringement to be compensated in full. In that regard, damages and administrative fines are different, but complementary.[77]

In *GP v. juris GmbH*, the Court reaffirmed that when setting the level of compensation, "it is not necessary, first, to apply *mutatis mutandis* the criteria for setting the amount of administrative fines laid down in Article 83 of that regulation,"[78] and, with nearly identical wording in *AT*[79] and *Scalable Capital*,[80] respectively, that it is not necessary "first, to apply *mutatis mutandis* the criteria for setting the amount of administrative fines laid down in Article 83 of that regulation and, second, to confer on that right to compensation a dissuasive function" and that "the right

75 For example, in Italy: Tabella Unica Nazionale, Presidential Decree No. 12/2025; and in Spain: Baremo tables (Ley 35/2015, de 22 de septiembre, de reforma del sistema para la valoración de los daños y perjuicios causados a las personas en accidentes de circulación).

76 CJEU, case C-741/21, *GP v. juris GmbH*, EU:C: 2024:288, para. 57.

77 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, paras. 47–48.

78 CJEU, case C-741/21, *GP v. juris GmbH*, EU:C:2024:288, para. 57.

79 CJEU, case C-590/22, *AT*, EU:C:2024:536, para. 44.

80 CJEU, case C-182/22, *Scalable Capital*, EU:C:2024:531, para. 43.

to compensation laid down in that provision fulfils an exclusively compensatory function, in that financial compensation based on that provision must allow the damage suffered to be compensated in full." While the CJEU seemed to acknowledge that the prospect of compensation claims could dissuade controllers and processors from infringing the GDPR in a somewhat indirectly, it made it clear that this right is not meant to serve a public, dissuasive and punitive action, and thus took a leap to conclude that the nature of the infringement is a factor without relevance.

Such a leap, however, strikes as somewhat misguided. In cases involving public spreading of private information, the dissuasiveness of remedies plays a significant role not only for the society at large, but also for the one suffering the infringement. In other words, just because certain factors are mentioned as being relevant for setting the level of administrative fines, why does that make them automatically irrelevant for setting the level of compensation, even if we accept that the two rights serve uniquely distinct functions? If one is not to distinguish between a serious, repeated and intentional infringement and an accidental, isolated and minor one – is it too far-fetched to claim that the party committing the former must, at least in general, face measures to dissuade it from future infringements? Or, conversely – if no such dissuasiveness is present, does that not mean that instead of preventing the causes of harm (intentional infringements), one is in effect purely mechanically awarding compensation without regard to any past, present or future context, giving the tortfeasor an opportunity to merely keep infringing the right to data protection as long as they carefully budget for it? How effective are judicial remedies in such cases, in their true substance?

4.2.5. Types of compensation

Article 82 (1) is not limited in scope to material loss, but includes all forms of harm, thereby ensuring that any infringement of data protection rights, whether tangible or intangible, is recognized and remedied. There is nothing in the provision that can be understood as preventing the victim from simultaneously claiming both material and non-material damages, and the level of non-material damages is not dependent on the material damages.

Neither the GDPR nor the Court explicitly limit remedies solely to monetary compensation. The determination of the form and amount of compensation is left to the national courts, which must apply domestic rules while adhering to the principles of equivalence and effectiveness.[81]

81 CJEU, case C-300/21, *UI v. Österreichische Post*, ECLI:EU:C:2023:317, para. 59.

This means that the GDPR does not preclude the possibility of other forms of redress, depending on national laws. Non-material remedies, such as apology or declaration of infringement, can also be relevant as types of non-material remedies in terms of the GDPR. The Regulation contains rights that are in some legal systems considered types of non-monetary remedies, such as rectification[82] and erasure.[83] These measures are particularly relevant in cases where financial compensation alone is insufficient to fully redress the injury.

Some EU member states also recognize symbolic damages, which can create incompatibilities with the Court's interpretation of remedies in the GDPR. French courts often award *franc symbolic* of 1 € at their discretion, even though the plaintiff may seek higher compensation in their claim. Also, in Swiss law, symbolic compensations are awarded in cases of personal violations that have not caused significant consequences.[84]

This question was brought to the CJEU by the German national court in the *Scalable Capital* case.[85] Specifically, the national court asked if minimal compensation, which might be seen as merely symbolic by the injured party or others, is permissible when the damage is of a non-serious nature but still sustained. The Court insists on a substantive remedy corresponding to the actual harm sustained.[86] However, the GDPR does not preclude member states which recognize symbolic damages from offering it to those who are affected by the infringement of a provision, within the remedies provided for in Article 79 of the GDPR, where there is no damage at all.[87]

This was explicitly confirmed in *A v. Patērētāju tiesību aizsardzības centrs*,[88] where the Court provided further nuance, holding that under certain conditions an apology may constitute sufficient compensation for non-material damage, but has emphasized that this form of redress must fully compensate the harm suffered, and cannot be merely symbolic or substitute for financial compensation where the damage remains unaddressed. National courts retain discretion to determine whether an apology achieves full reparation, based on the specific circumstances of each case, thereby respecting the principles of equivalence and effectiveness. In

82 Art. 16 GDPR.

83 Art. 17 GDPR.

84 Article 49 (2) of the Swiss Code of Obligations.

85 CJEU, case C-182/22, *Scalable Capital*, EU:C:2024:531, para. 12.

86 CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, para. 59.

87 Opinion of Advocate General Campos Sánchez-Bordona, 6 October 2022, CJEU, case C-300/21, *UI v. Österreichische Post AG*, points 91–92.

88 CJEU, case C-507/23, *A v. Patērētāju tiesību aizsardzības centrs*, ECLI:EU:C:2024:854, paras. 30–37.

particular, the Court highlighted that an apology might be appropriate in cases where non-material harm, such as distress, loss of trust, or reputational anxiety, can be meaningfully remedied by a formal acknowledgment and expression of regret. Nonetheless, where harm persists or where the apology does not adequately neutralize the adverse effects suffered by the data subject, this would be insufficient. The ruling thus reinforces that while GDPR remedies are not limited to monetary compensation, any alternative forms must genuinely restore the infringed rights to the greatest extent possible, rather than serving as mere formalities.

4.3. CAUSALITY

4.3.1. Proof of damage

A general principle of tort liability throughout all European legal systems is that there cannot be liability for torts without causality. There are, however, significant differences in the ways that they understand and establish causation.[89] Causation is a flexible concept and allows the member states to exhibit significant margin of appreciation and adapt the GDPR provisions to their own regulations.

The GDPR states that the controller or processor can be exempt from liability only when they "prove that it is not in any way responsible for the event giving rise to the damage".[90] The phrase indicates that EU lawmakers intended to set a very high standard for when a controller can escape liability.

In *Natsionalna agentsia za prihodite*, the CJEU addressed a situation involving a cyberattack on the Bulgarian National Revenue Agency that resulted in the unauthorized disclosure of personal data. The Court addressed the conditions under which controller could avoid liability under Article 82 (3). The CJEU clarified that the mere fact that damage resulted from unauthorized actions by a third party does not automatically exempt the controller from liability. In this case, the proof that the controller was not in any way responsible for the event that caused the damage involved proving that appropriate technical and organizational measures were in place to prevent such breaches, as required by Articles 24 and 32 of the GDPR.[91]

89 Infantino, M., Zervogianni, E., 2019, Unravelling Causation in European Tort Laws, Three Commonplaces through the Lens of Comparative Law, *RabelsZ*, Vol. 83, p. 647.

90 GDPR Art. 82 (3).

91 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, ECLI:EU:C:2023:908, para. 71.

This means that the controller's or processor's responsibility is presupposed unless they prove they were not in any way responsible. This presumption is rebuttable, and it is possible for them to prove otherwise. This reversal of burden of proof protects data subjects as the weaker party, because organizations processing personal data have far greater resources, technical expertise, and access to relevant information compared to the data subject. Any other rule would compromise the effectiveness of the protection.[92]

But does this refer to proof of lack of negligence or lack of causation? The phrase "not in any way responsible" can be interpreted in two ways. A literal interpretation of that provision appears to envisage that any (contributory) negligence or lapse on the part of the controller or processor suffices to exclude the application of the exemption.[93] If responsibility is understood in terms of fault-based liability, proving that they exercised due diligence and adhered to legal obligations (e.g., implementing appropriate security measures) could suffice. This would mean that if they were not negligent, they are hence not responsible. This approach may be more in line with the general tort principles in European legal systems, requiring at least some degree of fault or negligence.

If responsibility is understood more broadly, the controller or processor must demonstrate that their actions (or omissions) were not a cause of the damage. This would mean that, even if there was some failure on the part of the controller of processor, this was not a contributing factor to the harm suffered. The burden of proof is high, requiring clear evidence that they had absolutely no involvement in causing the damage.

In *Krankenversicherung Nordrhein*, the CJEU clarified that establishing liability under Article 82 GDPR requires the existence of fault on the part of the controller. However, this fault is presumed unless the controller can prove that it is not responsible for the event giving rise to the damage. It therefore follows that this article provides for fault-based liability in which the burden of proof rests not on the person who has suffered damage, but on the controller.[94] This interpretation underscores the compensatory nature of Article 82 GDPR and emphasizes that controllers must actively demonstrate their lack of responsibility to avoid liability.

92 Opinion of Advocate General Pitruzzella in: *Natsionalna agentsia za prihodite*, (C-340/21, EU:C:2023:353, point 63).

93 Opinion of Advocate General Collins, 26 October 2023, CJEU, joined cases C-182/22 and C-189/22, point 25.

94 CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, paras. 94 and 103.

5. National Tort Rules and Tensions with CJEU Case Law

National tort law frameworks exhibit significant tensions with the presented CJEU case law on the GDPR, highlighting challenges in application and enforcement of EU rules at the national level.

France's Civil Code, in Articles 1240 and 1241, includes the broad concept of *dommage moral* and allows courts to compensate mental or emotional distress,[95] yet French law continues to impose the requirement that such harm be certain, direct, and tightly connected to the defendant's wrongdoing.[96] In practice, courts often rely on standardized point systems, a method that can undermine the demand for individualized compensation outlined by the CJEU in *Scalable Capital*.[97] Although French law accepts non-material harm in principle, reconciling it with recent judgments, such as *VB v. Natsionalna agentsia za prihodite* and *AT*, which forbid *de minimis* thresholds,[98] remains challenging. If the damages are not large enough to deter the infringement of personal data, this opens possibilities for *fautes lucratives*[99] – low compensation amounts that would incentivize tortfeasors to take risks, i.e., not take the necessary level precaution, as they rely on the fact that the damage they will pay will potentially be lower than the cost of due diligence.

Secondary or ricochet harm, where plaintiffs claim compensation for psychological injuries tied to another person's damage, raises similar questions, since the GDPR does not explicitly address indirect damage. By contrast, France's *la perte d'une chance* approach can more readily accommodate fear or anxiety resulting from personal data misuse, aligning with *AT*, which treats even the possibility of data misuse as actionable.[100] However, ensuring that the strict liability for controllers, set forth by the GDPR and acknowledged in *VB v. Natsionalna agentsia za prihodite*,[101]

95 Civil Code of the French, Arts. 1240–1241 (formerly Arts. 1382–1383).

96 See Cour de cassation, 2e civ., 28 May 1954, D. 1954.649 (requiring that harm be certain and direct).

97 CJEU, case C-182/22, *Scalable Capital*, EU:C:2024:531, paras. 31–37.

98 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, EU:C:2023:986, para. 71; CJEU, case C-590/22, *AT*, EU:C:2024:536, para. 45.

99 See, e.g., Fasquelle, D., Mesa, R., 2005, Les fautes lucratives et les assurances de dommages, *Revue générale du droit des assurances*, No. 2.

100 On *la perte d'une chance*, see Cour de cassation, 1re civ., 21 November 2006, No. 05-15.690, Bull. civ. I, No. 507.

101 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, EU:C:2023:986, point 5 of the operational part of the judgement.

does not conflict with domestic fault requirements remains an ongoing point of contention.[102]

Germany's legal framework presents arguably deeper tensions with the CJEU case law. Section 253 BGB restricts non-material damages to cases expressly authorized by statute,[103] creating a statutory hurdle that does not neatly align with the GDPR's broad mandate under Article 82. German courts' use of *Schmerzensgeldtabellen* seeks to produce consistent awards yet may impede the CJEU's insistence on individualized reparation, most recently confirmed in *Scalable Capital*.[104] In addition, the quasi-punitive "satisfaction function," present in certain *Schmerzensgeld* rulings, conflicts with the Regulation's exclusively compensatory ethos, as explained in *MediaMarktSaturn* and *Krankenversicherung Nordrhein*.[105] Courts must also contend with the *Adäquanztheorie*, which limits liability to reasonably foreseeable consequences.[106] This narrower view of causation can exclude the types of fear or anxiety-based claims upheld by *VB v. Natsionalna agentsia za prihodite* and confirmed in *VX*. Procedural rules further complicate matters: §254 BGB imposes contributory negligence principles, and claimants often bear a heavy burden of proof. While in cases like *AT* the CJEU has clearly stated that no threshold of seriousness should bar compensation,[107] Germany's deep-rooted approach does not readily accommodate intangible harm that does not manifest in a traceable way.

Italian law appears more closely aligned with the GDPR's stance on non-material damage, but still presents its own challenges. Under Article 2059 of the Civil Code, informed by constitutional interpretation, Italian courts can compensate for a wide range of non-pecuniary harms arising from the infringement of fundamental rights.[108] This position coincides with the CJEU's logic in *VB v. Natsionalna agentsia za prihodite*, where the

102 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, EU:C:2023:986, para. 68, emphasizing strict liability for controllers under Art. 82 GDPR.

103 Bürgerliches Gesetzbuch (BGB) § 253 (restricting recovery for immaterial damage).

104 CJEU, case C-182/22, *Scalable Capital*, EU:C:2024:531, paras. 29–30 (individualized compensation principle).

105 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 43; CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, para. 56.

106 Bundesgerichtshof (BGH), 23 January 1951, *GSZ* 1/50, BGHZ 2, 263 (defining *Adäquanztheorie*).

107 CJEU, case C-590/22, *AT*, EU:C:2024:536, para. 49 (rejecting threshold for emotional/psychic harm).

108 Italian Civil Code, Art. 2059 (compensation of non-pecuniary damage), read in conjunction with Constitution of Italy, Arts. 2, 3, 32, etc.

controllers' strict liability was articulated, and in *Krankenversicherung Nordrhein*, which stressed that both material and non-material harm must be fully redressed. Italy's predisposition rule, under which defendants are liable even if unaware of the victim's special vulnerability,[109] echoes the near-absolute nature of responsibility in personal data breaches upheld by the Court. The *Barème* system employed by some Italian courts can still pose hurdles if it becomes too rigid. Yet, as long as it remains flexible enough to reflect the particular harm suffered – meeting the requirement in *Scalable Capital* for an individualized approach[110] – Italy largely avoids the pitfalls that Germany and France face with more standardized schemes.[111]

England's law on non-material damage illustrates even further discrepancies.[112] The requirement of "awareness", drawn from cases such as *H West & Son Ltd v. Shephard*,[113] has long shaped awards for pain and suffering, indicating a reluctance to recognize purely anxiety-based or intangible claims. This stands is in stark contrast to judgments such as *VB v. Natsionalna agentsia za prihodite*,[114] which upheld the compensability of "fear experienced by a data subject with regard to possible misuse", and *AT*, which eliminated de minimis barriers in assessing GDPR-related harm. Aggravated damages in English law traditionally factor in the defendant's conduct, reflecting a partially punitive element at odds with the Regulation's exclusively compensatory approach in *MediaMarktSaturn* and *Krankenversicherung Nordrhein*.[115] Meanwhile, the English courts also display reluctance to award damages for psychological distress unless the harm reaches a recognized severity, a stance that diverges from the CJEU's more permissive view of intangible harms. Judicial guidelines, such as the Guidelines for the Assessment of General Damages in Personal Injury Cases,[116] can provide ranges for awards, but *Scalable Capital* suggests that uniform caps or formulaic tables conflict

109 Cass. civ., Sez. III, 31 May 2003, No. 8827, Giur. It. 2003, 2205 (predisposition principle).

110 Trib. di Milano, 8 July 2003, in: *Nuova giurisprudenza civile commentata*, 2004, I, 260 (example of *tabelle di Milano* and personalization).

111 CJEU, case C-456/22, *VX*, EU:C:2024:999, para. 41.

112 The GDPR is retained UK's domestic law as the UK GDPR. However, the CJEU no longer has general jurisdiction over the UK in relation to any acts that have taken place on or after 1 January 2021.

113 *H West & Son Ltd v. Shephard* [1964] AC 326 (HL), pp. 347–349.

114 CJEU, case C-340/21, *VB v. Natsionalna agentsia za prihodite*, EU:C:2023:986, para. 71.

115 CJEU, case C-687/21, *MediaMarktSaturn*, EU:C:2024:72, para. 43; CJEU, case C-667/21, *Krankenversicherung Nordrhein*, EU:C:2023:1022, para. 56.

116 See Judicial College, 2022, Guidelines for the Assessment of General Damages in Personal Injury Cases, 16th ed., Oxford, Oxford University Press.

with the principle of fully restoring each individual to the position they would otherwise have occupied.[117]

It seems obvious that the digital frontier calls for a great level of harmonization, and that ensuring predictability, safety and trust in the digital environment must be seen as a priority. The problem, however, is not in the harmonization itself – rather, it is in the way such harmonization, half-coherent as it appears, pays no heed to the differences in national laws, and inserts autonomous terms into systems without drawing any clear lines.[118]

6. Challenges of Fragmented Harmonization of Tort Rules in Data Protection Law

The CJEU's deliberations in the area of non-material damages for infringement have created confusion about where precisely the "GDPR tort law" begins and where it ends.[119]

Although the Court has made it clear that national tort rules determine the level of compensation, they are, by their very nature, inextricably linked with other tort law rules.[120] In other words, one decouples the notion of harm and causality from national law, yet asks for calculation of damages to take place according to such laws. By accepting this approach, a hybrid entity of data protection and tort law is inserted into the legal systems of the European member states.[121]

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117 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C:2024:1123, para. 34.

118 See also Angelopoulos, C., 2012, *The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States*, *International Review of Intellectual Property and Competition Law*, Vol. 43, No. 5.

119 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C:2024:1123. para. 5.

120 Laws of contracts and torts in Serbia, Croatia and Bosnia and Herzegovina explicitly state that the purpose of non-material damages is one of the criteria that is taken into consideration when assessing damages. See Art. 200 (2) of Law of Contracts and Torts of Federation of Bosnia and Herzegovina, (Zakon o obligacionim odnosima, *Official Gazette of the SFRY*, Nos. 29/78, 39/85, 45/89, and *Official Gazette of the Federation of BiH*, Nos. 2/92,13/93,13/94; *Official Gazette of Republika Srpska*, Nos. 17/93, 3/96, 39/03, 74/04); Art. 1100 (2) Obligations Act of Croatia (Zakon o obveznim odnosima, *Official Gazette*, Nos. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022, 156/2022, 155/2023); Art. 200 (2) of Law of Contracts and Torts of Serbia (*Official Gazette of the SFRY*, Nos. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia 57/89, *Official Gazette of the FRY*, No. 31/93, *Official Gazette of SCG*, No. 1/2003 – Constitutional Charter and *Official Gazette of the Republic of Serbia*, No. 18/2020).

121 CJEU, case C-182/22, *Scalable Capital*, ECLI:EU:C:2024:1123, para. 4.

In theory, creating a harmonized systemized EU tort law is a laudable effort; anything less, would lead to a patchwork of national laws that is neither consistent nor coherent. Yet, in practice, the Court has created an incoherent framework of its own: the lack of clarity which has left the national courts struggling more than before. Familiar with their national laws, disharmonized as they might happen to be, the courts are attempting to interpret the autonomous system – currently only outlined in broad contours – and to fit its elements in together with other – often hardly reconcilable – principles of their national tort law. The CJEU has attempted to mitigate the issue with a blizzard of cases – with nine rulings in the span of a year and a half – to little success. In the end, the extent of the uncertainty is so great that the Court was asked to invalidate GDPR Article 83 on the grounds of ambiguity.[122] It has refused to do so on the grounds that the referring court did not submit the documentation on the lack of the provision's specificity, declining to rule on the issue.

Instead of a compensation claim being a combined function of the objective assessment of the infringement causing the damage, the subjective consequences are the primary consideration, and given the allocation of burden of proof, under which the controller would have to prove that there was not the slightest breach on their side – establishing infringement becomes a pure formality devoid of context.

The tension is not only present in abstract; it creates serious fault lines across all the elements of a claim, which vary, both to degree and extent, by jurisdiction. For example, it is not immediately apparent how a court that, according to the core principles of its national tort law, awards no compensation for fear of minimal future harm is now to calculate damages under the GDPR?

Beyond country-specific concerns, preexisting rules on procedural and evidentiary thresholds compound the difficulty of incorporating the CJEU judgments. France's requirement of "direct and immediate consequences", Germany's adoption of the *Adäquanztheorie*, and England's demand for tangible proof of harm all contrast with the expansive reach of the GDPR, which the Court has described as capturing various fears, anxieties, and intangible harms even when direct material injury is absent. These diverse national doctrines help explain why certain courts remain cautious about opening the floodgates to a proliferation of claims, which is an underlying worry in Germany, with its strict statutory authorization requirements, and in England, where aggravated damages risk ballooning if courts relax the threshold for psychological injury. At the same time,

122 C-687/21, *MediaMarktSaturn*, paras. 31–34.

Italy and France, though more open to recognizing non-material harm, may over-rely on standardized or symbolic remedies.

In each of these jurisdictions, the CJEU's overarching insistence that no de minimis or seriousness threshold be imposed (*AT*, *VX*) and that controllers face nearly-strict liability for data breaches (*VB v. Natsionalna agentsia za prihodite*) strains against ingrained legislative and procedural traditions. National courts struggle to reconcile their established methods with the Court's emphasis on strictly compensatory personalized redress. Consequently, while the GDPR seeks harmonized outcomes, its broad vision often collides with the particularities of these diverse legal cultures, leading to divergent applications and, at times, friction with judgments, such as *Scalable Capital*, *Krankenversicherung Nordrhein*, *MediaMarktSaturn*, and *UI v. Österreichische Post*.[123]

Until the member states adjust or clarify their tort and procedural rules to better accommodate GDPR liability, the promise of uniformly high standards for data subjects' rights will remain a lofty goal without an anchor. Ultimately, the courts are left with the challenge of seemingly reconcealing the irreconcilable.

7. Conclusion

What on its surface seems to be a well-intentioned drive towards harmonization and uniformity in EU digital law has, in practice, undercut the established structures of law across different member states, without providing a coherent replacement. A framework that was supposed to build clarity has instead generated an "autonomous" layer of rules, creating hybrid legal constructs – a parallel "GDPR tort law", if you will – that national courts will need to reconcile and integrate into their traditional legal systems. The inescapable result is a proliferation of contradictory interpretations, where neither the text of national laws nor the original goals of the European legislation are duly served, and where national laws, or any comparisons between them, lose relevance in favor of ill-conceived and half-baked rules.

123 According to Václav Janeček and Cristiana Teixeira Santos, in *UI v. Österreichische Post* the Court made it even more complicated to seek compensation for liminal harms pursuant to Art. 82 GDPR. This due to the fact that the judgement is open for at least four different interpretations that are capable of reintroducing de minimis threshold of seriousness, which the court wanted to reject. See Janeček, V., Teixeira Santos, C., 2024, The autonomous concept of 'damage' according to the GDPR and its unfortunate implications: Österreichische Post, *Common Market Law Review*, Vol. 61, No. 2, p. 531.

It bears repeating: this article does not advocate for a wholesale rejection of autonomous concepts, nor does it question their utility, nor does it advocate that one should resort to leaving legislative gaps to be filled at the member state level. However, the current approach to regulating the digital realm fails to strike an appropriate balance between complementarity and displacement.

Whether any real benefit emerges from this patchwork remains debatable, especially when the stated pursued objective is to promote clarity and trust in the digital sphere. The unfortunate paradox thus is that in the pursuit of uniformity, European "digital" law has strayed from the very principles of clarity, foreseeability, and integration it once aspired to uphold.

Decades ago, the European Court of Human rights held that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[124] Can we still say that EU digital law is law.

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KA EVROPSKOM PRAVU O ZAŠTITI PODATAKA: SUDSKA PRAKSA SUDA PRAVDE EU I NJEN UTICAJ NA NACIONALNE ODŠTETNE ZAKONE

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APSTRAKT

U ovom radu se analiziraju odredbe o nematerijalnoj šteti zbog povrede prava na zaštitu ličnih podataka prema Opštoj uredbi o zaštiti podataka (GDPR) i njihovo tumačenje u praksi Suda pravde EU. Poseban fokus je na presudama u kojima Sud stvara autonomne, ali nedovoljno precizne pravne pojmove, što dovodi do pravne nesigurnosti i komplikacija u primeni propisa na nacionalnom nivou. Iako je Sud pravde EU procenu iznosa odštete prepustio nacionalnim sudovima, u radu se ističe da je u praksi nemoguće odvojiti uslove naknade štete od postupka određivanja visine odštete.

Ključne reči: GDPR, deliktna odgovornost, nematerijalna šteta, Sud pravde EU.

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