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ART. 82 GDPR: STRICT LIABILITY OR LIABILITY BASED ON FAULT? *

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Abstract:

In its article 82 the GDPR expressly deals with damages for the infringement of the regulation. From the mere wording of the article it is not clear, whether the right to compensate is dependent on fault. Policy arguments suggest that the liability spelled out in the article 82 should be interpreted as strict. Strict liability although full and effective, in some instances may turn out to be excessive for the torfeasors and thus result in overdeternce. The aim of the article is both to verify the hypothesis of the liability at stake being strict and, in case of its affirmation, to propose to remedy some adverse effects.

Keywords: Data Protection Law, fault, strict kiability, multiple tortfeasors, recourse claim

Summary: 1. Preconditions to Liability provided in art. 82. – 2. The relevance of fault. – 3. Too burdensome liability of controlers? – 4. Towards fair allocation of risk. – 5. Concluding remarks.

1. Preconditions to Liability provided in art. 82

According to the article 82 of the General Data Protection Regulation (GDPR) 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. The compensatory liability spelled out in this provision of the GDPR may be viewed as an additional incentive for data controllers and processors to abide the rules on data

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processing. This compensatory scheme may thus operate alongside the public punishment with the aim to increase the effectiveness of the GDPR (or – in other words – to constitute the tool of its „private enforcement"). Looked at from this perspective the liability spelled out in the article 82 seems to be designed to play a preventive role. In fact, the preventive function (deterrence) of damages is familiar to European private law tradition [1]. What is however the main purpose of damages is compensation [2]. Therefore the liability at stake should in the first place grant any single data holder the compensation for losses incurred as a result of data breach. The preamble of the GDPR leaves no doubt that compensation constitutes a main aim of the liability at hand (see recital 146).

Whether the goal of compensation can be achieved under article 82 depends on the interpretation that will be employed in respect to the conditions to liability provided therein. When talking about preconditions to liability in damages traditionally three are pointed out, namely: a loss (be it monetary, non-monetary or both kinds of losses), an event defined in the piece of legislation imposing liability (the event that may trigger liability if it constitutes a cause of loss) and the causal link between this event and the items of loss incurred by the victim seeking compensation.

As far as the loss is concerned the GDPR provides a clear definition explaining that the term embraces two principle heads of losses, that is pecuniary and non-pecuniary losses. Although it is not expressly said in the GDPR it is quite clear that the first category composes both actual loss and lost future profits [3]. Some doubts may arise as to the scope of the term „non-monetary losses" used in the article 82. One may ask whether it only stands for pain and suffering or means loss of amenity as well. This doubt could well be avoided by the proper wording of the article at stake, especially that the EU legislation is aware of the potentiality of interpretative problems and can handle it successfully as shown in the article 2 of the CESL where "loss" is expressly defined as economic loss and non-economic loss in the form of pain and suffering, excluding other forms of non-economic loss such as impairment of the quality of life and loss of enjoyment. It seems however, that the problem is rather of minor importance and can easily be tackled by the future CJEU case law.

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[1] P.H. OSBORNE, *The Law of Torts* (Toronto 2011), 14; G.T. SCHWARTZ, *Reality in the Economic Analysis of Tort Law: Does Tort Law ReallyDeter?* (1994) 42 *UCLA Law Review*, 377, 425-427.

[2] C. VAN DAM, *European Tort Law* (Oxford 2013), 347; H. KOZIOL, *Comparative Conclusions in Helmut Koziol* (ed.) *Basic Questions of Tort Law from a Comparative Perspective* (Wien 2015), 746.

[3] See Opinion of A.G. CAPOTORTI in Case C-238/78, Ireks-Arkady GmbH v Council and Commission, ECR, 4.10.1979, 2955.

The same holds true for the way the GDRR handles causality. Despite the lack of any suggestion of how it should be ascertained when applying the article 82 it is quite obvious that it should be understood as based on the assumption commonly shared in European private law systems, that the liability arises only where the loss is sufficiently close (proximate cause) or adequate to the event[4].

2. The relevance of fault

Much more problematic is the formulation of the third condition to liability being the event causing loss of the data holder. It is not clear from the wording of the provision whether the mere breach of rules concerning data processing constitutes an event giving rise to liability on its own. Possible interpretation involves additional requirements of intention or negligence being necessary to trigger liability. In other words, it is not certain if the liability is based on fault or is purely objective, which would entail that the liability may be established irrespectively of any kind of fault on the controller's or processor's side. Doubts are even more apparent if one takes into account the discrepancies in different language versions of the GDPR. The above-mentioned discrepancies concern the condition to escape liability described in the 3th paragraph of the article 82. Whereas the majority of the language versions use the formula, according to which the controller and processor may be exempt from liability if they prove that they are „not in any way responsible for the event giving rise to the damage", the Polish version dictates that the exemption comes into play where the controller or processor prove not to be at fault.

Doubts as to the principle of liability (that is doubts concerning fault being or not being precondition to it) have serious bearing on data holders chances to claim compensation successfully. A restrictive interpretation demanding fault would entail that in great number of cases they could not be awarded damages. The mere fact of breaching the GDPR rules will not trigger liability if the controller's negligence cannot be established, for instance where the controller is not capable of guilt (of being held liable based on fault) because of mental illness. The liability of controller would not arise either if the breach of the GDPR can be ascribed to the processor and there is no negligence (or other type of fault) on the side of a controller. Where the processor turns out to be insolvent and incapable of paying damages, the victims remain uncompensated.

In my view, to establish whether the liability for losses stemming from data

[4] See Case T-149/96, Coldiretti and 110 Farmers v Council and Commission, EU, 30.9.1998, 228.

breach is dependent on fault two main arguments should be taken into account. The first argument speaking in favor of no fault liability interpretation is anchored in the wording of the GDPR's predecessor – the Directive 95/46/WE [5], which has been replaced by the GDPR in 2018. The directive not only used the same formula enabling the exemption from liability where the controller proves "not to be responsible" for breach of rules on data processing that the GDPR repeats in the article 82. It also listed in the preamble (recital 55) an exemplary circumstances the occurrence of which makes it possible to escape liability. These circumstances are: force majeure (*vis maior*) and fault on the part of the data holder. Both exemplary circumstances cannot be viewed as exculpatory in the traditional sense of the word as they do not entail the lack of fault defined as intention or negligence. The recital 55 of the preamble of the Directive made it clear that the possibility of escaping liability is exceptional and limited to very narrow matrix of facts which is a characteristic feature of strict liability scheme. The latter should not be confused with absolute liability. In contrast to it, within the strict liability scheme the tortfeasor can be exempted from liability in the case of successful exoneration. Exoneration is different from exculpation in that the former is possible only where one of certain exhaustively listed exoneration circumstances occurs and the tortfesor successfully proves to be so whereas the latter takes place where there is no intention or negligence on tortfeasor's side. Thus the liability provided in the Directive was not based on fault but a strict liability [6]. No suggestion can be traced down in the GDPR that it was intended to change the approach taken in the Directive.

Also it is necessary to bear in mind the requirement that the compensation be full and effective which is expressed in the preamble (recital 146) of the GDPR. In my view the need to decline fault as a precondition to liability at hand is a consequence of this requirement. As a matter of fact there is a great number of judgments, where the CJEU (ECJ) suggests or even expressly states that fault as a precondition to liability in the form of monetary compensation constitutes a serious obstacle for the victims and thus undermines the requirement of the compensation being effective.

This is the case of judgments concerning compensation for loss suffered through a breach of the competition rules (issued before the directive 2014/104

[5] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[6] See M.A. BÜLLESBACH (eds.), *Concise European IT Law* (Praha 2010), 109; B. VAN ALSENOY, *Liability under EU Data Protection Law From Directive 95/46 to the General Data Protection Regulation* (2016) 7 *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 273.

EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union was in place). For instance in the "*Manfredi*" case [7] the Court of Justice stated that any individual can claim compensation for the harm suffered as a consequence of the breach of the competition rules and underlined that a causal nexus between an infringement of the competition rules and the harm thereby caused is sufficient to ground a claim in damages. This follows that in general no relevance should be given to whether the rules have been infringed intentionally or by negligence. In the course of preparatory work on the future directive the Commission later referred to this suggestion in the so called Green Paper and the so called White Paper. It was held that any fault requirements under national law would have to be limited for they hamper the effectiveness of compensation. The Commission saw no reasons to relieve infringers from liability on grounds of absence of fault other than in cases where the infringer made an excusable error (an error would be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition) [8]. Thus the Commission accepted that fault requirement would have to be limited to very exceptional situations.

Similar conclusions are to be drawn from the case law regarding private procurement law. For example in the judgments C-275/03 [9] and T-33/09 [10] the ECJ found the national law to be incompatible with the EU law (namely Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, currently replaced by 2014/24/EU on public procurement and repealing Directive 2004/18/EC) as it makes the tenderer's right to damages for breach of the private procurement procedure conditional on the prove of fault on the side of the contracting authority. Moreover, in the judgment C-314/09 when answering the Austrian's supreme Court preliminary ruling question the CJEU held that restricting access to compensation by the requirement that the contracting authority be at fault would be contrary to the wording, context and objective of the Directive even if the fault is presumed [11]. It was underlined that the Directive (Article 1(1), Article 2(1), (5) and

[7] Case C-295/04, Manfredi v Lloyd Adriatico Assicurazioni S.p.A., ECR, 13.7.2006, I-6619.

[8] G. CUMMING-M. FREUDENTHAL, *Civil Procedure in EU Competition Cases Before the English and Dutch Courts* (Praha 2010), 123; White Paper on Damages actions for breach of the EC antitrust rules 6.

[9] Case C- 275/03, Commission v Portugal, ECR, 2004, I-00000.

[10] Case T-127, Commission v Portugal, ECJ, 29.3.2011.

[11] Case C-314/09, Stadt Graz v Strabag AG, ECR, 30.9.2010, I-8769.

(6), and the sixth recital in the preamble) establishes the right to damages but makes no mention that the infringement of the public procurement legislation to give rise to a right to damages should have specific features, such as being connected to fault – proved or presumed [12].

3. Too burdensome liability of controlers?

The above-mentioned case law strongly supports the conclusion that no fault requirement should be added in the course of interpretation to the text that does not express such a requirement. This is true even if fault were presumed for it would still leave room for potential exculpation by the defendant which in turn undermines the effectiveness of compensation. Since the requirement of compensation being full and effective stands for the GDPR (recital 146 of the Preamble), the line of reasoning employed by the CJEU (ECJ) in the above-described judgement is to be shared in the course of interpretation of the article 82 of the GDPR. Thus the proper way of reading article 82 of the GDPR seems to be the interpretation according to which the liability is triggered by the mere breach of rules regarding data processing. In case of processors the breach may concern only these rules that are specifically directed to processors or may take the form of acting outside or contrary to lawful instructions of the controller. As far as the controllers are concerned the liability may be triggered by the breach committed by the controllers themselves or by processors acting on their behalf even if the controller did not commit any breach [13]. Consequently the possibility of the controller or processor being exempted from liability if they prove that they are not in any way responsible for the event giving rise to the damage should be limited to exceptional cases other than a simple lack of fault (that is exoneration reasons similar to these listed in the Directive 95/46). As such the liability at hand can be seen as strict liability [14]. This is especially true for the liability of controllers may be held liable even where they did not commit any wrongful, illegal act (any data breach).

Article 82 of the GDPR definitely provides for a high level of incentive to

[12] See also B. WINIGER-E. KARNER-K. OLIPHANT (eds.), *Essential Cases on Misconduct* (Berlin 2018), 188.

[13] See article 82(2) according to which any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.

[14] B. VAN ALSENOY (fn 6) 283.

comply with data processing standards. While interpreted as not dependent on fault it also effectively grants compensation to any data holder who suffers loss as a result of a breach of these standards. However, a question may arise at this point whether the liability spelled out in the article 82 of the GDPR is not too excessive.

The question seems especially justified in respect to the liability of controllers for losses directly caused by the processors acting on their behalf as it appears to be far more burdensome than the traditional vicarious liability scheme. In contrast to vicarious liability (as known in the majority of legal systems), under article 82 of the GDPR the controller cannot escape liability by proving that the processor while processing data on their behalf acted outside their control and consent. This may result in judgments analogous to *Morissons data leak* case issued in the UK before the GDPR was in place (and thus decided on Data Protection Act 1998, DPA). The *Morrisons* supermarket chain has been found (both by High Court and Court of Appeal) liable for a personal data breach carried out by an employee, a senior internal auditor at the supermarket's, who deliberately leaked the details of staff members (information about staff salaries, bank details and national insurance numbers) to take revenge on the employer for disciplinary punishment. The High Court dismissed the primary claims as *Morrisons* had not authorized misuse of information and had appropriate measures in place that were intended to prevent misuse of personal data by *Morrisons* employees. In spite of this *Morrisons* was held vicariously liable – thus the liability was purely objective (strict) and the claim against *Morrisons* was based simply on the fact that the information entrusted to the defended were misused by their employee.

4. Towards fair allocation of risk

The burden of liability of controllers reflected in the *Morrisons* case results in a potential risk that should be of comparable concern to employers as the public punishments provided in the GDPR. The same is true for damages under article 82 of the GDPR if the no fault interpretation is accepted. Whether such a burden is just rises a serious question. It is true that the GDPR should work both as preventive and compensative tool. At the same time too high level of risk of liability may result in overdeterrence leading to the lowering of activity which puts entrepreneurs (data controllers) at risk of liability. There are at least two potential options to avoid this scenario in cases similar to *Morissons*.

On one hand it seems reasonable to read article 82 paragraph 4 and 5 [15] so that where a controller (or processor) who was not at fault has paid full compensation for the damage suffered, that controller (or processor) shall be entitled to claim back from other controllers or processors involved in the same processing who were at fault (especially where they committed breach intentionally or by gross negligence) the whole of the compensation paid so far. This interpretation would not hinder the compensative effect of liability as the compensation has already been paid (the compensation would remain full and effective). At the same time it would grant fair allocation of liability. It is controversial, however, if this interpretation can be accepted in the light of the wording of article 82. Although the article 82 is commonly said to be inspired by the Principles of European Tort Law (PETL), its wording differs significantly from the rules of solidary and several liability contained in the Principles. The latter rules expressly provide that a person subject to solidary liability (joint and several liability) may recover a contribution from any other person liable to the victim and that the amount of the contribution shall be what is considered just in the light of their respective degrees of fault (see article 9:102 of PETL). Whereas the GDPR mentions the possibility of claiming back the part of the compensation corresponding to their part of responsibility for the damage, in accordance with the conditions set out in paragraph 2. As said above, these conditions render the liability strict.

The alternative solution is to render it possible for the controllers in cases like *Morissons* to escape liability *vis-a-vis* the data holder. At the first glance it seems not to be excluded as the intention or gross negligence of the processor may appear to be exceptional event constituting the proof of the controller who is not at fault of him being „not in any way responsible for the event giving rise to the damage" in the meaning of article 82. This interpretation rises significant doubts though. First of all, it seems to seriously undermine the main purpose of the liability at stake as it may jeopardize compensation in cases where the processor happens to be insolvent. Moreover if the EU legislator had the intention of freeing controllers from liability in such circumstances they would have expressly deal with it in the article 28 of the GDPR. Its current wording speaks

[15] Article 82 (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. Article 82 (5): Where a controller or processor has, in accordance with paragraph 4, paid full compensation for the damage suffered, that controller or processor shall be entitled to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage, in accordance with the conditions set out in paragraph 2.

against this interpretation. The article states that if a processor infringes the GDPR by determining the purposes and means of processing, the processor shall be considered to be a controller in respect of that processing. The article underlines however that this is „without prejudice to articles 82" which follows that the processor becomes co-controller alongside the main controller who still remains liable under the article 82.

5. Concluding remarks

The wording of the GDPR rules on civil liability is vague and leaves room for manifold interpretation. As shown above the risks that this shortcoming of the GDPR may bring about is as serious as the risks bound to the public punishments provided in the Regulation. This should enhance academics to focus not only on public enforcement questions but to give more attention to private enforcement tools of the GDPR. By doing so this paper aimed at establishing whether the liability provided in the article 82 of the GDPR is based on fault or can be viewed as strict. The conclusion that the liability at hand is strict calls for an interpretation of the article 82 that would render the liability of controllers less burdensome in these situations where the damage of data holder was directly caused intentionally or negligently by a processor acting on behalf of the controller who was not at fault. In my view the interpretation should be accepted, according to which article 82 paragraph 4 and 5 enables the controller who was not at fault and has compensated the victim (a data holder who suffered damage) to claim back from the processor at fault (especially where they committed breach intentionally or by gross negligence) the whole of the compensation paid so far. Despite the fact that the wording of the provisions at hand leaves doubts as to whether this interpretation is legitimate, their *ratio legis* seems to speak in favor of this interpretation.