Bird & Bird

Privacy Unpacked – Episode 2

Podcast transcript – Demystifying the right to compensation in GDPR claims in the wake of the CJEU's landmark decision in UI v Österreichische Post AG

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Bryony Hurst:

Hi there and welcome to our second episode of Privacy Unpacked from Bird & Bird. I am Bryony Hurst and I'm a partner in Bird & Bird's International Privacy and Data Protection Practice specialising in Data Protection Litigation. I am joined today by Anna Morgan, Head of Privacy and Data Protection in our Irish Office, and Simon Assion, a partner in our German Privacy Team. In this episode, our team will be discussing the CJEU's landmark decision in the case of UI against Österreichische Post and for those like me whose German/Austrian is a bit questionable, we'll call it the Austrian Post Case. This was handed down on the 4th of May 2023. This case dealt for the first time with the question of whether every breach of the provision of GDPR leads to damages, and whether a certain threshold is required in order to be entitled to damages. Simon, could I ask you to start by giving us some background on the case and how it got to the CJEU?

Simon Assion:

Yeah, I'm happy to first comment on why it was so strongly anticipated at least in Germany, and because we have, I would say hundreds of cases pending before German courts that we are all looking to this one case for clarification, what is a damage under the GDPR, especially in the case of immoral immaterial damage, but first on how it actually happened because Austria in this case is very closely related to Germany, we read each other's papers, obviously speak each other's language, so I got some good insights into how it all played out in Austria.

So the origin of this case was that the Austrian Post the former incumbent of post services in Austria started selling address data for marketing purposes. They didn't want to leave it at that, so they started enriching that address data with additional data, and whilst they were at it they started enriching it with what they called political affinity data, they did that by matching addresses with prior election results, and in the one case that

then later went up to the European Court of Justice, this led to the result that the Claimant was attributed with the political affinity of the FPO, which is the right wing party in Austria, and then the Claimant was quite upset about that, took that case to court saying attribution of FPO affiliation with him infringed Article 9 GDPR so this is about sensitive data, political data, and lack of legal basis for that.

So whether the Austrian Post had a legal basis under Article 9 GDPR was actually not subject of the decision now handed down by the European Court of Justice. It was assumed that this already breached Article 9 GDPR, but now the Claimant didn't stop, the Claimant claimed damages, damage compensation, for misuse of his data. He said he felt upset, disturbed by the fact that he had been called a supporter of FPO, requested damages from the Austrian Post, and besides him it was at least 2,000 others in Austria who did that as well, but this guy, sort of fought through the landmark case for all the others.

Bryony Hurst:

Okay thank you, that's very interesting. So it sounds like it was a significant case even if it had stayed in Austria, but Anna could you tell me what specifically the CJEU was asked to decide upon?

Anna Morgan:

Yeah Bryony. So there were three questions which the Court of Justice of the EU was asked to consider in this case and they all hinged around the interpretation and the application of Article 82.1 of the GDPR which of course is the Article that establishes the right to compensation from a data controller for a data subject who has suffered either a material or non-material damage as a result of an infringement of the GDPR in relation to their own personal data. So, these questions that were referred by the Austrian Supreme Court to the Court of Justice, they were aimed at obtaining clarity no whether there should be certain conditions or minimum thresholds that should have to be met in order for a data subject claimant to be successful in making a claim for non-material damages under Article 82.

So maybe just taking each of the questions in turn, the first question which the Court of Justice dealt with was the question of whether it is simply enough to show that the GDPR has been infringed in order to be able to obtain compensation. Next then the Court of Justice considered whether it is permissible or not to apply national law rules about the threshold for non-material damage that has to be reached, so in other words, could there or should there be a certain level of seriousness of the damage that a data subject would have to meet to be able to obtain compensation, and then the third and final question the Court considered was whether national laws can determine the amount of damages payable under the right to compensation, so whether they were EU laws or essentially whether it was a matter for the national legal system.

Bryony Hurst:

Okay, thank you. So potentially very significant questions and I can see why everyone was holding their breath and waiting for this decision. What was their verdict in relation to the first question on causation?

Anna Morgan:

Yeah, so on that first question about whether or not it's sufficient to have simply a mere infringement to be able to obtain compensation successfully, the Court answered that in the negative, it said that mere infringement of the GDPR isn't enough, and in doing this it kind of passed through the language of Article 82 and it said that it's clear from that language that a data subject has to have suffered damage as a result of the infringement of the GDPR, and that there has to be a causal link between the infringement in question and then the damage that's being claimed.

So essentially it established a three-part test for real material damages, number 1, you show the infringement, number 2 you show you've suffered damage, and number 3 you show that there is a causal link between those two issues.

Bryony Hurst:

Great, thank you. Speaking from an English Law perspective so far so straight forward, that's what we have. What about question 2, what was the outcome there?

Anna Morgan:

Yeah, so on this question around the kind of level of seriousness, whether there needs to be a minimum threshold that you have to meet in order to obtain compensation. Again, the Court answered this in the negative and it pointed out that there isn't anything in the GDPR provisions that indicates there would be such a minimum threshold of damage, and in fact it went on and it said that having that kind of threshold would essentially undermine the GDPR, because there

could be fluctuations across national courts in regard to the threshold that they might each apply. In addition to that, the Court said that the meaning of damage and non-material damage has to have an autonomous and uniform definition according to EU law rather than any national laws that might for example create that type of minimum threshold, and here it also pointed to the fact that the EU legislator has traditionally favoured a broad concept of damage. So in summary, you can't have national laws which would require a minimum level of seriousness in order to be able to obtain non-material damages.

Bryony Hurst:

Alright, to an English litigator that is more of a surprising outcome. And how about question 3, how did that turn out?

Anna Morgan:

Yeah, so I think this is possibly the crunchiest piece of the whole judgment and it's certainly an aspect that there's been an awful lot of attention paid to, and I think one of the reasons for this is because it possibly raises more questions than it answers, so of course this is the question of how do you go about determining the amount of damages payable under this right to compensation, and whether it should be determined in accordance with national laws or otherwise. So on this point, the Court said that there is nothing in the GDPR defining the rules on assessment of damages, and so in the absence of those types of rules, it's really for national legal systems to prescribe the detailed rules around the criteria for determining how you work out how much compensation is payable.

Now, at the same time, the Court of Justice did emphasis that those issues should be subject to the EU principles of equivalence and effectiveness, so in other words you cannot have national rules that prescribe less favourable conditions for data subjects than would generally apply under EU law or make it excessively difficult or impossible in practice for a data subject to exercise that right to compensation under Article 82. And then in terms of effectiveness, the Court also included quite an interesting addendum which is that you don't have to have an element of punitive damages in order to comply with the requirement for full and effective compensation under the GDPR for damage suffered, so as long as the data subject is compensated in entirety for the damage that is sufficient.

Bryony Hurst:

Okay, yeah, I can see why this is interesting, it sounds like it's essentially pushed it back down to the national courts to determine as they see fit, and there's some interesting challenges there I reckon around equivalence and effectiveness, but perhaps we'll get onto that. Simon, could you give us some insights into how the decision has been received so far?

Simon Assion:

Yeah, so the decision is still quite young, it hasn't had any effect in actual case law so there's as far as I know no court decision directly referring to this Supreme Court of Justice ruling. What happened though is that quite a number of scholars and spectators and commentators read the decision and tried to you know, make sense of it, including myself and I think most of us including myself to some degree have failed to do that, especially if you are like myself handling cases before courts, that you know, that need answering. What about a person who claimed a Data Subject Access Request and Article 15 GDPR, what if the copy is wrong, what if it was delayed, what happens to a person whom had feelings of distress for a GDPR breach, what happens to a person who actually had fears you know, of their data being misused. What happens to persons affected by data leakages like for example, after some data breaches data is published on the dark net. Is that now a case that can be rewarded with damages or not.

Basically all of these questions are unanswered by this European Court of Justice ruling, we are sort of sent back to where we started, having said that, I think maybe the expectations in this one court ruling were a bit too high, because if you look at it in detail there's a number of additional cases pending before the European Court of Justice, and we will get additional decisions quite soon, the next one is actually coming up probably before this podcast is published, so I'm quite looking forward to the future decisions because this decision in my opinion did not really answer many questions.

Bryony Hurst:

Very interesting, it sounds like we'll need a lot of podcasts in the future to deal with those and hopefully provide a few more answers. If it's been pushed back down to national courts and we're left to speculate about what the impact might be in various countries, could you offer a few thoughts on how this might play out in Ireland?

Anna Morgan

Yeah, so Ireland has an interesting data litigation landscape currently because we've had incredibly few damages claims actually progressing to court since 2018, and anecdotally we're hearing that the vast majority of these are settled ahead of hearing, and generally for any significant sums in the kind of low thousands and I think the reason for that is because data controllers in these actions have been very reluctant to essentially be the first Irish test cases to what level of compensation should be awarded, particularly in non-material damages cases.

My sense is that this Court of Justice judgment isn't going to change those current trends significantly, I think on the one hand parts of it can be seen as favourable to plaintiffs insofar as it confirms that there is no de minimis level of damage for compensation in non-material damage cases, but then that you have to satisfy the three part test that I talked about could on the other hand be seen as favourable to controller defendants, so I think all in all you could come out and say those elements essentially neutralise each other.

I think it is worth pointing out that we do have quite an interesting case before our Circuit Court currently involving a claim arising out of a data breach which was experienced by a courier company, and the plaintiff in their case for damages has claimed non-material damage for interference with his peace and privacy and apprehension as to the use to which his data has been put, as well as loss of control and the inability to exercise his data subject rights. And the controller in that case successfully made an application for that litigation to be stayed in January of this year, and the stay in other words, the suspension of that case was made on the basis of not only this Austrian Post case because it was still remaining for determination before the Court of Justice at that time, but rather the suspension was made on the collective basis of both this and five other cases on Article 82 which are all pending for the Court of Justice, and in doing so the Irish Court pointed to the risk or irreconcilable judgments and it noted the EU jury of sincere cooperation which applied to it, so that stay that was granted means that the Irish Court presumably won't pick up that case again until all of those remaining five preliminary references have been determined by the Court of Justice, so I think that in itself will likely have something of a chilling effect on Irish litigation for non-material damages, given that the Court has recognised the range of issues that still have to be determined by the Court of Justice around Article 82.

Bryony Hurst:

Very interesting, and on the subject of irreconcilable judgments, obviously in the UK we're no longer bound by CJEU judgments but I as a UK privacy litigator have been watching this case with interest. It reminds me it certainly has echoes of quite a seminal decision that was handed down by the Supreme Court here in the case of Lloyd v Google in late 2021, I think there's probably two kind of main areas of overlap which are interesting now to draw comparisons between the position in the UK and in the EU, so in the Lloyd case the Supreme Court was asked to determine what sort of harm could be compensated under UK data protection law, in this case it wasn't GDPR, it was the pre-GDPR law a few years ago, and in this case, it held that that law did not permit damages for loss of control alone, so something less than even near upset but simply a kind of in principle loss that should be compensated, and it was also asked to determine whether or not there was a minimum threshold of seriousness, which might ring some bells with data protection damages claims, and the answer to that question was held to be yes, there is a minimum threshold and the Court provided a very strong indication that claims where the harm was merely trivial, so nothing but mere upset without more shouldn't be permitted basically to take up valuable court time and resources.

So that had an immediate effect on Mr Lloyd who had been attempting to bring his claim as a representative of a far larger class on an opt out basis, and as a result of the decision in that case, the class could not – it was held that he wasn't an adequate representative, they didn't all have the same interest in the class action can proceed, quite a few copycat claims that had been stayed pending that decision also fell away, but the decision also had wider repercussions that went beyond class actions, because it produced quite significant hurdles actually for individual claims as well in needing to demonstrate that there was in fact some sort of harm that had been suffered which was more than trivial.

But, don't get me wrong, we are still seeing a steady flow of threatened data privacy claims in the UK, I think a lot of Claimant law firms work on the basis that many businesses would still rather settle kind of low level claims than fight all the way publicly and incur the expense of this, but the decision definitely did lead to a decline on the number of cases both individual and collective that were filed in the UK courts, and where they were filed, the fight often now centres on demonstrating this seriousness in showing you can get over that threshold, so I had wondered if the same might happen in the EU if the CJEU had upheld the minimum threshold point, but now I

have my own suspicions about whether the reverse might actually occur, it feels to me that Claimants will be encouraged by the decision, and I would have thought litigation funders too, as class actions based on very minimal harm but with potentially big damages awards now seem viable on the basis of this, they're certainly not ruled out.

Simon Assion:

Yeah that also may be from the point of view of someone handling such a case that may be affected by this court decision in Germany, so interestingly now the Court decision can be cited by both parties, right, both the Claimant's and defendants can say that this court decision backs their argument. If you brought it down as you already said, we have three criteria that must be met, first a breach of GDPR, secondly a damage to the causality between GDPR breach and damage, and the damage then can be as minor as possible, it can be anything there is no minimum threshold, however the question remains what actually is a damage, you know, is a mere feeling of upset a damage, if I got a sweat on my brow you know, is that a damage, because I have a problem with someone having my data.

This question hasn't been answered. And then what is very interesting, so this leads to another argument which can be used specifically against collective actions or class actions, whatever you want to call them, because what the European Court of Justice clearly said is that the Claimants need to prove in each case separately that they had a damage, so each individual to some degree will be effected differently by a breach of the GDPR, for example, in the Austrian Post case, one person may feel very upset for being affiliated with a right wing party, the other person will just not care, or someone will be affiliated with the green party, now, is that a higher damage or a lower damage? It depends on where you live in Austria probably, and who you are.

So, for organisation who organise mass claims like there was in Austria right, I mentioned two other Claimants organised by an organisation called Cobin Claims that means that in theory they have to prove in each individual case how strongly and in which way each individual Claimants were affected, and that is very hard to organise if at all. So, it will be very interesting to see how sort of the Claimant industry will react to this ruling and certainly some good arguments I would say to fight off these kinds of mass claims. Having said that, the upcoming laws implementing the Representative Action Directive may have some effect on that.

Bryony Hurst:

That's very interesting Simon to think about new procedural mechanisms that might accompany this change in substantive data privacy law. Anna, would you be able to do a little bit of horizon scanning about where this decision leads next in terms of EU privacy litigation.

Anna Morgan:

Well, I think as we've all been discussing over the last kind of 15 minutes or so, this decision really doesn't provide the much needed clarity around data privacy damages that many of us were hoping it would, and it does really leave open the door I think for different member states to award damages for different types of harms, Simon's just taken us through lots of interesting examples of the type of variations that we might see materialising so you know, things like near upset versus genuine anxiety or depression or you know, emotional distress as a form of damage, and of course then those different types of harm could be awarded compensation at differing levels and at different values, so I think the judgment really does open up the possibility to potentially massive fragmentation across the EU in relation to the treatment and the valuation of Article 82 damages claims as a whole, and then I suppose pushing all of this back onto national courts is going to lead to you know, a really inconsistent playing field for data protection damages claims and Claimants across the EU, and of course we are aware of the more international network of Bird & Bird, how vastly different national courts can treat these claims already, and the Court of Justice now has essentially just permitted and invalidated the continuation of that type of pattern.

I think then when you look to the horizon and the fact that we have the Representative Action Directive which is coming down the line and is going to be implemented across Europe by the end of June, it will be fastening to see how that interacts with the results of this Court of Justice decision, and I think in particular whether the range of still pending preliminary references in this area which we've mentioned earlier would possibly at least temporarily stay the collective actions under the directive, and that directive of course allows specifically for collective actions in the area of data protection. And then I think finally, probably worth mentioning as well, although it's a bit more of a fringe issue at this point at least is that Article 81 of the GDPR allows for suspension of legal proceedings in one member state where the subject matter of that case is already before another member state court and that latter case came first in time, so

who knows, maybe we'll see that mechanism being used in compensation cases, in particular where there's a cross border element to the GDPR infringements which have kind of prompted the litigation and you have plaintiffs across multiple member states who are all taking very similar actions, it may be that we see that Article 81 mechanism being invoked into the future.

Bryony Hurst:

That's super interesting what you say actually about the Representative Action Directive and how it might interact with this decision and the others to come, I mean comparing again with the UK, it appears that damages certainly for distress, anxiety, and potentially even upset are recoverable here, we also have a very active litigation funding market and that has definitely significantly contributed to the boom in class actions in the data privacy field in the last few years here, it strikes me that this decision alone has the potential to lead to almost kind of class action hot spots across Europe.

The Representative Action Directive allows either opt-in or opt-out class action mechanisms to be put in place, you get a country that's put in place an opt-out class action mechanism, they also have a fairly permissive regime when it comes to data privacy damages, so they award damages for, you know, mere upset and they award fairly high awards for that kind of upset, it strikes me that the smart Claimant lawyers and funders will seek out those member states and have a bit of a field day focussing on building class actions to get damages for mass harm. That certainly has driven the UK data privacy litigation space which continue actually despite the Lloyd decision I mentioned earlier, so I would have thought that there will be potential for that in the EU going forwards. Simon, you mentioned earlier a whole raft of other CJEU decisions that are still pending that might have an impact on this space, what are those cases that we should be keeping an eye on?

Simon Assion:

There are plenty of, but I'll keep it to just three, I think the three most important ones, so the first one, this is a case coming from Germany, it's called ZQ v Medizinischer Dienst der Krankenversicherung Nordrhein, a case relating to a health insurance provider here in Germany, and in this case the Court will answer the question whether a lack of culpability/negligence is to be taken into account when calculating damages by that, the German Court wants to know whether this health insurance provider is liable for a breach of the GDPR which was not caused by their negligence, respectively not caused by their culpability.

Second one, very interesting case is a case coming from Bulgaria so I can't speak Bulgarian but the case number is C-340/21, and this case is on the question whether "worries, fears and anxieties suffered by the data subject are a damage in the meaning of Article 82 GDPR". So basically, this Bulgarian Court has the same question as the Austrian one, but more specific. This Court is asking what types of negative feelings does one actually have to have in order to be awarded with damages under the GDPR. So in this case we already have an opinion of the Advocate General, but the European Court of Justice has not yet announced when it will publish the final verdict.

The third case which I also find very interesting is incoming from Germany, it's case number C-741/21, and it concerns the question whether in cases of multiple GDPR infringements and where there is multiple potential damages inflicted on the data subject, whether that should lead to an overall compensation or to a compensation in each individual case. This case is against a legal services provider in Germany called US Gambia.

Bryony Hurst:

So it sounds like there's a lot more for us to unpack in future podcasts. I hope you found this episode of Privacy Unpacked useful, for further information you can check out the privacy litigation page on our Two Birds website. We also recently ran a global webinar covering recent developments in both regulatory enforcement challenges and also GDPR related civil damages claims, and the recording of that event is available on our website as well. If you have any questions for any of us, or suggestions for a future episode, please do get in touch, and if not, we look forward to your joining us next time. Thank you.

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