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## GDPR Violations in Germany: Civil Damages Actions on the Rise

***New trends in Germany reveal the urgent need for companies to develop effective defense strategies against damages claims raised in German civil courts.***

In recent months, German courts have been increasingly following a course similar to the US model of awarding damages in actions alleging data privacy violations. This development may have substantial financial and other consequences for companies involved in the digital economy, including the risk of mass data litigation.

This *Client Alert* provides an overview of recent case law on “immaterial damages” in Germany and corresponding risks. It also explores potential strategies that companies may rely on to defend against damages claims under the EU General Data Protection Regulation (GDPR).

### Background

Under Article 82 GDPR, data subjects may claim compensation for any material and/or immaterial damage suffered due to a data protection violation. Before the GDPR became binding in May 2018, data subjects could not readily obtain substantial immaterial damage under German data protection laws. Even after May 2018, German civil courts have initially been reluctant to grant significant compensation for immaterial damage under the GDPR. In particular, the courts have historically demanded proof of a specific and substantial immaterial damage before issuing an award.

### GDPR lawsuits as a strategic instrument in data protection?

Data protection violations may result in fines by the competent data protection authority. Under the GDPR, companies may face substantial fines of €20 million or up to 4% of the annual global turnover of the relevant group of the undertaking, whichever amount is higher.

But critically, data protection violations also give rise to potential damages claims. As data protection violations often affect a large number of data subjects, the financial risks may be considerable — particularly in the event of data breaches, such as ransomware or other cybersecurity incidents.

Experience has shown that respective mass claims for damages may have an even greater impact for companies than fines and other administrative proceedings. [Politico](#) puts it this way: “*Have a GDPR complaint? Skip the supervisory authority and take it to court.*” This idea captures the considerable risk

lurking in Article 82 GDPR: Data subjects can directly claim for damages if they believe that their data protection rights are violated.

In practice, data subjects who seek damages for immaterial damage under Article 82 GDPR often lodge a complaint with the competent data protection authority in parallel to their action against the company. On the basis of this complaint, the data subjects can then file a request for access to the respective case file in an attempt to strengthen their legal position in court.

## Business risk: Mass litigation in Germany

Data protection activists, plaintiffs' counsel, litigation financiers, and other relevant parties across the EU have already recognized the far-reaching opportunities that the new legal situation under the GDPR presents. For instance, the German consumer portal RightNow recently [announced](#) that it will release a new product specifically addressing claims due to data protection violations.

The risks for companies may multiply if a data protection violation affects both customers and business partners. In such circumstances, companies may face terminations of business contracts and/or claims for contractual compensation payments in addition to damages claims under Article 82 GDPR.

## Recent German case law: A new trend?

German courts are increasingly deviating from the restrictive approach they have traditionally taken in relation to immaterial damages for data protection violations.

The following chart summarizes recent German court rulings on immaterial damage under Article 82 GDPR. All decisions were issued by courts of first instance and could be set aside by the courts of appeal. Nonetheless, the decisions demonstrate the willingness of German civil and labor courts to grant plaintiffs immaterial damages to compensate GDPR violations.

Court	GDPR violation	Damages awarded to individual data subject	Relevant statements of the court
<b>Düsseldorf Labor Court</b> 5 March 2020, case no. 9 Ca 6557/18	Insufficient and delayed provision of information under Article 15 GDPR	€5,000	<ul style="list-style-type: none"> <li>The term "damage" within the meaning of Article 82 GDPR is to be interpreted widely.</li> <li>Data subjects may claim damages for immaterial damage caused by violations of the requirements for access requests (Article 15 GDPR).</li> </ul>
<b>Pforzheim Local Court</b> 25 March 2020, case no. 13 C 160/19	Unlawful disclosure of health data	€4,000	Damages claims must have a deterrent effect pursuant to Article 82 GDPR.

Court	GDPR violation	Damages awarded to individual data subject	Relevant statements of the court
<b>Darmstadt Regional Court</b> 26 May 2020, case no. 13 O 244/19	Unlawful disclosure of applicant data	€1,000	The loss of control over personal data may constitute immaterial damage within the meaning of Article 82 GDPR.
<b>Lübeck Labor Court</b> 20 June 2020, case no. 1 Ca 538/19	Unlawful publication of an employee photo	€1,000	Violations of the GDPR should be sanctioned effectively.
<b>Neumünster Labor Court</b> 11 August 2020, case no. 1 Ca 247 c/20	Delayed provision of information under Article 15 GDPR	€1,500 (€500 for each month of delay)	Recital 146 GDPR requires full and effective compensation by way of damages.
<b>Dresden Labor Court</b> 26 August 2020, case no. 13 Ca 1046/20	Unlawful disclosure of health data	€1,500	<ul style="list-style-type: none"> <li>The term “damage” must be interpreted in a way that fully complies with the objectives of the GDPR.</li> <li>According to Recital 146 GDPR, GDPR violations must be effectively compensated for.</li> </ul>
<b>Cologne Regional Labor Court</b> 14 September 2020, case no. 2 Sa 358/20  <b>First instance:</b> Cologne Labor Court, 12 March 2020, case no. 5 Ca 4806/19: € 300 immaterial damage granted	Continued publication of a PDF file of the plaintiff’s professional profile on the defendant’s website after the employment between the parties has terminated	€300  (First instance ruling confirmed)	<ul style="list-style-type: none"> <li>“Public” disclosure of personal data may result in immaterial damage within the meaning of Article 82 GDPR.</li> <li>The amount of damage to be awarded depends, among other things, on the degree of culpability, the potential and actual consequences of the violation and on whether the competent data protection authority has already reprimanded the violation.</li> </ul>

## Assessment of current case law in Germany

In the judges’ views in the aforementioned cases, any violation of GDPR requirements could, in principle, give rise to compensable immaterial damage. This even applies to violations of the extensive

transparency obligations under the GDPR. The Labor Courts Düsseldorf and Lübeck, for instance, held that the loss of control over personal data could constitute a compensable immaterial damage. According to this approach, no proven actual damage — such as reputational or financial damage — is required.

In contrast, other courts have held that under Article 82 GDPR only damages of some significance are to be compensated (e.g., Higher Regional Court Dresden, judgment of August 20, 2020; 4 U 1680/19; Regional Court Hamburg, judgment of September 4, 2020; 324 S 9/19). According to these higher courts' view, the plaintiffs need to prove that they have suffered an actual and concrete damage due to GDPR violation exceeding the materiality threshold.

The courts cited in this *Client Alert*, however, require a significantly lower threshold for successful damages claims. The judges take the view that Article 82 GDPR must have a deterrent effect. In this context, they refer to recital 146 GDPR to support this argument. The Labor Court Düsseldorf even went a step further arguing that the amount of the damage depends on, among other factors, the financial strength of the defendant.

Relying on the principle of effectiveness of EU laws as a justification for deterrent damages is very controversial. The GDPR provides for clear indications if a sanction should have a dissuasive effect. Article 83 (1) GDPR, for instance, expressly regulates that penalties should not only be proportionate and effective, but also have a dissuasive effect. Equivalent wording is missing in Article 82 GDPR.

Courts should also consider the economic consequences that could result from the concept of dissuasive or deterrent damages. Even minor infringement of data protection rules can affect a large number of data subjects — and thus lead to mass proceedings against companies. It is likely that plaintiffs, consumer lawyers, litigation financiers, and law firms may consider these judgments give rise to considerable opportunity to bring class actions for damages in the future in cases where they negligible harm.

## **Statements of data protection authorities indicate a low damage threshold**

Recent statements of some German data protection authorities also support the trend towards increasing damages claims. For instance, the Berlin Commissioner for Data Protection and Freedom of Information stated in a recent [press release](#) that civil damages claims based on GDPR violations concerning data transfers should be “deterrent.”

Indeed, plaintiffs often rely on statements of the joint board of the German data protection authorities (German Data Protection Conference – DSK) to substantiate their claims for damages. The DSK's short paper No. 18 on data protection risks, for instance, includes the following wording:

*“Unlawful processing activities or processing activities which do not comply with the principles of Art. 5 GDPR are in themselves impairments of the fundamental right to data protection and therefore already constitute a damage.”*

The German data protection authorities seems to take the view that any violation of data protection requirements could in principle constitute a compensable immaterial damage. However, one should take into account that the short paper No. 18 does not explicitly deal with damages claims under Article 82 GDPR, but with data breaches.

In practice, plaintiffs and their lawyers closely follow press releases and other publications issued by data protection authorities. For instance, if a data protection authority imposes a fine on a company or issues a formal warning, it is likely that consumer lawyers will take this decision as an opportunity to assert

damage claims on behalf of the company's customers. Experience also shows that courts are willing to adopt at least some of the findings in official statements by data protection authorities to justify their own judgments. For instance, the Labor Court Dresden followed this approach in its aforementioned decision on the unlawful disclosure of health data.

## Summary, defense strategies, and outlook

Companies should be aware that the recent court decisions cited above may constitute the beginning of a new trend in GDPR case law. However, it should also be noted that most of the relevant decisions are yet legally binding. The courts of appeal could still set aside these judgments. It likely will be several years before German courts adopt a uniform approach to the interpretation of Article 82 GDPR.

Defendants in respective proceedings should also be aware that there are arguments that have led other courts to dismiss actions for immaterial damages. For instance, it is often possible to challenge the arguments put forward by the plaintiffs to prove the existence of damage of some materiality. Rapid action to mitigate a potential plaintiffs' harm is often key to the success of such arguments. Experience shows that preparing defense strategies in advance or immediately after data subjects have raised claims according to Article 82 GDPR can minimize risks considerably.

German courts may refer relevant legal questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The CJEU has historically interpreted data protection rules very strictly in order to effectively protect data subjects' rights and freedoms. This approach is illustrated by the CJEU's decision on cross-border data transfers to the United States (judgment of July 16, 2020; C-311/18, *Schrems II*). The CJEU may well take a consumer-friendly approach with regard to damage claims. However, it would probably take several years until the CJEU renders a judgment on what level of damage should be compensated.

The decisions on GDPR damages claims presented in this *Client Alert* are a cause for concern but not panic. Nevertheless, companies are, however, well-advised to develop strategies to effectively defend against damages claims.

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