The autonomous concept of "damage" according to the GDPR and its unfortunate implications.

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Case C-300/21, *UI v Österreichische Post*, Judgment of the Court (Third Chamber) of 4 May 2023, ECLI:EU:C:2023:370

1. Introduction

In the Case C-300/21 (*Österreichische Post*),[1] the ECJ addressed the fundamental issue on whether the GDPR's right to compensation (Article 82 of the GDPR) applies to non-material damage regardless of how serious that damage is. Thus, when the Court ruled that the concept of "damage" in Article 82 of the GDPR *does not contain any threshold of seriousness*, experts saw this as a much-needed clarification, a win for privacy advocates, and a route to a wider usage of collective redress mechanisms.[2] Indeed, given the widespread occurrence of liminal non-material damage arising from breaches of the GDPR (such as your loss of time and annoyance caused when you interact with the many illegal cookie banners on websites), this decision appears to be vital for the protection of individuals from everyday online harms.

Yet contrary to what some may believe,[3] we argue that the *Österreichische Post* judgment did not fully answer the main question it was asked and, in effect, made it more (not less) complicated to seek compensation for liminal harms pursuant to Article 82 of the GDPR. This is because, as we argue below, the Court judgment is open to at least four different interpretations, all of which are capable, in effect, to reintroduce the *de minimis* threshold of seriousness which the Court arguably wanted to reject. Further, we argue that in view of the *Österreichische Post* judgment, the domestic application of Article 82 is liable to become inconsistent across Member States or extremely inefficient. These implications of the *Österreichische Post* judgment would run contrary to the requirement of consistent and homogenous application of the GDPR as envisaged by its Recital 10, and against the right to an effective judicial remedy envisaged by Article 79 of the GDPR.

2. Factual (and legal) background

The Austrian Postal Service (Österreichische Post) collected various social and demographic data of the Austrian population in order to statistically infer the degree of their affinity with national political parties. This information about peoples' inferred political affinity was

[1] Case C-300/21, *UI v Österreichische Post*, EU:C:2023:370.
[2] See, e.g., Helme, "Case Law, CJEU: Case C-300/21, Österreichische Post (Non-material damage resulting from unlawful processing of data", (2023) *Inforrm*, available at <https://perma.cc/B3YN-83QR>; Mikolasch, "Requirements for GDPR compensation after the ECJ decision in UI v Österreichische Post", (2023) *European Law Blog*, available at <https://perma.cc/E8LC-B4EL>.
[3] See, e.g., Li, "Compensation for non-material damage under Article 82 GDPR: A review of Case C-300/21", 30 Masst. J. Eur. & Comp. L., (2023), 335–45, at 343.

supposed to be used for targeted political adverts which would be sent by mail to these data subjects. This data processing was carried out without the data subjects' consent, which rendered the activity unlawful under the GDPR.

The applicant (UI) was inferred to have a high degree of affinity with a certain Austrian political party.[4] The applicant "felt offended by the fact that an affinity with the party in question had been attributed to him … [and the] fact that data relating to his supposed political opinions were retained within that company caused him great upset, a loss of confidence and a feeling of exposure. … [N]o harm other than those adverse emotional effects of a temporary nature has been established".[5] The applicant sought an injunction (which was granted by the Austrian judiciary) and compensation of EUR 1,000 for the non-material damage suffered (which was rejected by both the first and second instance Austrian courts).

The key legal provision underlying the *Österreichische Post* case was Article 82(1) of the GDPR which states that "[a]ny 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 applicant appealed to the Supreme Court of Austria (Oberste Gerichtshof) on the issue of compensation for the non-material damage. The Supreme Court thought the relationship between the domestic and EU law concerning the remedial liability under Article 82 of the GDPR unclear. In particular, the Supreme Court thought it unclear whether the concept of "damage" according to the GDPR "should be interpreted autonomously".[6] Further, the Supreme Court was uncertain whether the conditions for the implementation of remedial liability "should be defined in the light ... of the requirements of EU law",[7] as opposed to the requirements of national laws. According to Austrian legal requirements for the implementation of remedial liability, the applicant would be entitled to compensation only if the "damage" suffered reached some threshold of seriousness. This is known as the *de minimis non lex curat* principle.

It was thus important for the Austrian Supreme Court to seek clarity on whether the *de minimis* principle can be applied to compensation under Article 82 of the GDPR and whether the assessment of compensation, given that there are no specific rules in the GDPR that would govern such assessment, require something more than compliance with the principles of effectiveness and equivalence.

For the benefit of clarity, let us remind that the principles of effectiveness and equivalence are concisely set out in *Manfredi* C-295/04 at [71]: "in the absence of [specific EU] rules governing the matter, it is for the domestic legal system of each Member State … to prescribe the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU] law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by [EU] law (principle of effectiveness)".[8]

[4] Case C-300/21, *Österreichische Post*, para 12.
[5] Ibid., para 12.
[6] Ibid., para 16.
[7] Ibid., para 16.
[8] See also ibid., para 54 (in which the Court applied *Manfredi* by analogy).

The Supreme Court of Austria thus referred three questions for a preliminary ruling to the Court of Justice:[9]

(i) Does the award of compensation under Article 82 require the existence of some consequential harm or does the infringement of GDPR provisions in itself constitute compensable harm?
(ii) Does the assessment of the compensation depend on further EU-law requirements in addition to the principles of effectiveness and equivalence?
(iii) Is it compatible with EU law to take the view that the award of compensation for non-material damage presupposes a *de minimis* threshold (a certain degree of seriousness) below which no compensation will be granted?

3. Opinion of the Advocate General

In response to the first question, the A.G. Campos Sánchez-Bordona opined that EU law does not grant compensation for a mere infringement of the GDPR because (i) that would be inconsistent with the wording of Article 82(1) of the GDPR which requires the compensable damage to be "a result of [the] infringement", and due to the fact that (ii) such remedy would be punitive in nature which is inconsistent with the notion of compensation in the GDPR.[10] The A.G. also rejected the possibility that an infringement of the GDPR could give rise to "an *irrebuttable presumption* of damage",[11] including the presumption of loss of control over data caused by data processing without the data subject's consent.

As regards the second question, the A.G. thought the principles of equivalence and effectiveness of little importance in the present case,[12] because the GDPR already contains specific rules on both compensatory damages (Article 82) and possibly even non-compensatory nominal damages (Article 79),[13] and because Article 82 "applies in respect of all non-material damage occurring as a result of an infringement".[14] In the A.G.'s view, there was thus little (if any) room for the application of the two principles in respect of the financial remedy sought by the applicant.

On the third question, the A.G. held that the concept of non-material damage pursuant to Article 82(1) includes a threshold of seriousness, because of "the disproportion between its monetary value and the cost of bringing proceedings"[15] and because moral prejudice (*qua* compensable non-material damage) does not exist independently of the actual damage suffered.[16] In order to answer this question, the A.G. conceptually separated (i) the intensity of the harm suffered from (ii) the type of such harm, stating that the Austrian Supreme Court's question was only about the former.[17] This means that the threshold of seriousness would apply only to the intensity of the harm suffered. According to the A.G., it was then for the national courts to find this "fine line between mere upset (which is not eligible for

[9] Ibid., para 20.
[10] A.G. Opinion in Case C-300/21, *Österreichische Post*, EU:C:2022:756, paras 27–55.
[11] Ibid., para 56 (emphasis in original).
[12] Ibid., para 84.
[13] Ibid., paras 91 and 92.
[14] Ibid., para 84.
[15] Ibid., fn 84.
[16] Ibid., fn 79, referring to an IP law Case C-99/15, *Liffers*, EU:C:2016:173, para 17.
[17] A.G. Opinion in Case C-300/21, *Österreichische Post*, para 96.

compensation) and genuine non-material damage (which is eligible for compensation) … [taking into account] the perception prevailing in society at a given time",[18] as if the two were the same type of harm of a different intensity. In this regard, the A.G.'s opinion invited the Court to clarify some of these distinctions but, as we show below, the Court did not take up this opportunity.

4. Judgment of the Court

The Court answered the second and third question posed by the Austrian Supreme Court differently than the A.G. Interestingly, the Court's judgment largely avoided any engagement with the A.G.'s opinion and instead provided its own justified answers. For example, the Court did not discuss the ''presumption of damage'' or "nominal damages" in its ruling, because these issues were not evoked in the referral. The only engagement with the A.G.'s opinion concerned the requirement of "full and effective compensation" as set out in Recital 146 of the GDPR. Hence, the Court concurred with the A.G. that full and effective compensation means that the suffered damage must be "compensated in its entirety"[19] and does not entail punitive damages.[20]

4.1. The right to compensation cannot arise from a GDPR infringement alone.

In response to the first question, the Court clarified that the terms contained in Article 82 of the GDPR "must be regarded … as constituting autonomous concepts of EU law",[21] since the relevant GDPR provision makes no reference to the law of Member States.[22] This concerns the autonomous concepts of "material or non-material damage" and "compensation for the damage suffered".[23] Accordingly, these terms "must be interpreted in a *uniform manner in all of the Member States*".[24]

In this vein, and effectively in line with the A.G.'s opinion, the Court then ruled that a "mere infringement of the [GDPR] … is not sufficient to confer a right to compensation".[25] Instead, such right depends on three cumulative conditions: (i) a GDPR infringement, (ii) damage suffered by the data subject, and (iii) a causal link between that damage and the infringement.[26]

[18] Ibid., para 116.
[19] Case C-300/21, *Österreichische Post*, para 58.
[20] Ibid., para 58.
[21] Ibid., para 30.
[22] Ibid., paras 29 and 30. See also Recitals 75, 85 and 146 of the GDPR.
[23] Case C-300/21, *Österreichische Post*, para 30.
[24] Ibid., para 30 (emphasis added).
[25] Ibid., para 42.
[26] Ibid., paras 32–36.

4.2. The domestic rules on assessment of compensation must be applied in accordance with the EU law principles of equivalence and effectiveness.

On the second question, in contrast with the A.G., the Court ruled that since the GDPR does not contain any provision intended to define the rules on the assessment of damages, "national courts must apply the domestic rules of each Member State relating to the extent of financial compensation, provided that the principles of equivalence and effectiveness of EU law are complied with".[27] As per the principle of *equivalence*, those rules should be not less favourable than those governing similar domestic situations.[28] As per the principle of *effectiveness*, those rules should not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law.[29] In this regard, the Court left it to the Austrian Supreme Court to determine whether the domestic rules on assessment of damages "make it impossible in practice or excessively difficult to exercise the rights conferred by EU law".[30]

4.3. The autonomous concept of "damage" under Article 82 does not include any threshold of seriousness.

In relation to the third question, the Court ruled that Article 82(1) of the GDPR precludes a "national rule or practice"[31] to subject non-material damages to a threshold of seriousness. This was contrary to the A.G.'s opinion. The Court provided three main justifications for its answer. First, there is no threshold of seriousness because the wording of Article 82 does not refer to "any threshold of seriousness".[32] Second, the broad concept of "damage" in Recital 146 of the GDPR[33] would be countered if that concept were limited solely to damage of a certain degree of seriousness.[34] Third, the need for a threshold of seriousness would risk undermining the consistent and homogenous application of the GDPR rules required in Recital 10,[35] because "the graduation of such a threshold would be liable to fluctuate according to the assessment of the courts seised".[36]

5. Analysis / Comment

The significance of the Court's ruling about the absence of a threshold of seriousness is evident, especially in the light of recent EU legislation. For example, the Collective Redress Directive[37] will make it arguably easier to bring collective claims for non-material online harms

[27] Ibid., para 59.
[28] Ibid., paras 53–55.
[29] Ibid., paras 53, 54, and 56.
[30] Ibid., para 56.
[31] Ibid., para 51.
[32] Ibid., para 45.
[33] Ibid., paras 46 and 47.
[34] Ibid., para 46.
[35] Ibid., para 48.
[36] Ibid., para 49 (note that other linguistic versions of the judgment state "could", rather than "would be liable to").
[37] Directive (EU) 2020/1828, O.J. 2020, L 409/1.

as the *Österreichische Post* judgment opens the floodgates to collective claims even where the individual harm suffered would be liminal. Also, it can be expected that the proposed AI Liability Directive[38] will allow more claimants to seek GDPR-based compensation in cases of large-scale automated data processing. This is because the Directive would shift the burden of proof in cases of compensation claims for damage caused by AI systems, including in cases of GDPR-based claims. Accordingly, the Court's judgment is likely to increase the volume of compensation claims. This, in turn, may see the emergence of new compensation-as-a-service solutions from companies that would help data controllers or the victims of GDPR breaches to deal with such claims more effectively.

However, upon closer inspection, the judgment is not so favourable to the victims of GDPR infringements as it may seem. We submit that there are at least four very different interpretations of the judgment. This alone would make it difficult for legal professionals to act upon this judgment, especially in the absence of further clarity in two subsequent ECJ decisions concerning a similar matter.[39] We argue that all of these interpretations could effectively reintroduce the threshold of seriousness that the Court rejected. As will soon be clear, these varying interpretations emerge from the Court's silence on how we should understand (i) the relationship between the seriousness of the breach, type of damage, intensity of damage, or quantum of compensation sought, (ii) the relationship between the harm actually suffered and the harm which amounts to compensable damage, and (iii) from which particular types of harm is Article 82 intended to protect the victims of GDPR infringements, i.e., how we should understand the protective purpose of Article 82 of the GDPR.

5.1. The concept of "damage": Only one plausible interpretation of the judgment?

In view of the Court's judgment, there are now at least two interpretations of the concept of "damage" under Article 82 of the GDPR.

The first plausible interpretation is extremely broad. Under this interpretation, the concept of "damage" would include any harm to the claimant's interests. Accordingly, national courts would be liable to compensate for interferences with the claimant's interests, even if such interests are not protected by the Union or domestic laws. Such interpretation would collapse the distinction between *actual harm* (an interference with the claimant's actual interest, regardless of whether that interest is legally protected) and *compensable harm* (an interference with the claimant's legally protected interest). As such, the judgment would go against a distinction that is well-established across European tort law systems where the label "damage" refers to compensable harm only.[40] Of course, given the proclaimed autonomy of the concept of "damage" in the GDPR (as explained in Section 4.1), this should not be seen as a problem per se.

[38] COM(2022)496 final, Arts. 3 and 4.
[39] C-456/22, *Gemeinde Ummendorf*, EU:C:2023:988, paras 12–23 and C-340/21, *Natsionalna agentsia za prihodite*, EU:C:2023:986, paras 75–86.
[40] Cf., Art. 2:101 of the Principles of European Tort Law: "Recoverable Damage: Damage requires material or immaterial harm to a legally protected interest."

However, we believe that this broad interpretation of the notion of "damage" would hardly lead to the required "consistent and homogeneous"[41] application of the GDPR because national courts would be often unconstrained in their decisions as to what amounts to compensable damage under Article 82 of the GDPR. They would be free to determine which interests should be protected by Article 82 and which should not and such uncontrolled (and in this sense arbitrary) decision-making is contrary to the nature of judicial power. Contrary to the gist of the Court's decision, this interpretation could effectively reintroduce the *de minimis* threshold by letting the national courts to decide which interests are serious enough to be protected and which are not. In fact, this interpretation could see domestic courts engage in judicial law-making—which is not their permissible function in most Member States—because they would sometimes be the first to decide that something is legally protected and this decision would create a legitimate expectation in other potential claimants that other courts will follow suit. We thus submit that the first interpretation outlined in this section needs to be rejected.

According to the second (and in our view preferable) interpretation, the conceptual separation of actual "harm" from compensable "damage" is maintained. Under this interpretation, Article 82 would only provide the right to compensation for harms that amount to *violations of the claimant's rights and legally protected interests*. The autonomous nature of the concept of "damage" in Article 82 then requires that the protection of such interests be identified in the EU rather than domestic law.

But even this second interpretation is not without its difficulties. The Court did not indicate whether the concept of "damage" must be interpreted in view of the protective purpose of all (or only some of the) norms of EU law, or all (or only some of the) norms of the GDPR. This leaves national courts without any practicable guidance as to what types of material and non-material damage are compensable under of Article 82. To be clear, a doctrine of protective purpose comes here from tort (delict) law where it limits the scope of compensable damage to types of harm against which the legislator intended to protect the claimant. The wording of recital 146[42] also indicates that the GDPR's right to compensation is limited by some kind of protective purpose, but it is unclear how that limitation should be interpreted.

Thus, we submit that the Court should have at least clarified whether the harm alleged amounts to "damage" (i) whenever it violates interests and rights protected by EU law at large, (ii) whenever it violates interests and rights protected by liability-establishing EU law norms, or (iii) whether it amounts to "damage" only if it violates interests and rights protected by the liability-establishing GDPR norms. This clarification would significantly narrow the scope of uncertainty for national courts and, simultaneously, give the Austrian Supreme Court a direct answer to the third question. That is because, as the A.G. has already pointed out, the threshold of seriousness may in principle concern the intensity of damage as well as the type of damage. And since the protective purpose concerns the type of damage, it remains unclear from the *Österreichische Post* judgment whether some types of protected interest are insignificant (and, in this sense, below the threshold of seriousness) for compensation. Without knowing which types of protected interest fall under the concept of "damage" in the GDPR, national courts may therefore inadvertently reintroduce the threshold of seriousness by the back door.

[41] Case C-300/21, *Österreichische Post*, para 48. See also ibid., para 30 and Case C-456/22, *Gemeinde Ummendorf*, para 15.
[42] Recital 146 of the GDPR: "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."

Besides, if the range of legally protected interests is to be defined by the EU law, it is difficult to imagine that national courts would, in practice, decide which specific types of interest are so protected other than by frequently seeking further clarification from the Court. Such clarifications will be needed especially given the requirement for a uniform interpretation of "damage" under Article 82. This makes the application of Article 82 of the GDPR extremely inefficient and impracticable, but unnecessarily so. What would have been most helpful in this regard is if the Court provided a full list (or at least a taxonomy) of harms that amount to compensable damage under EU law.[43] That, of course, is not the Court's task when answering specific questions that are necessary to enable the referring court to give judgment on the case at hand.[44] This task may thus be better suited for the Commission which is expected to come up with legislative proposal to "ensure uniform and consistent protection of natural persons with regard to [data] processing".[45] In summary, the Court could have provided at least elementary indication as to the norms which define the types of protected interests under Article 82 of the GDPR.

5.2. The threshold of seriousness: Three interpretations of the judgment.

Provided that our second interpretation of the concept of "damage" stands, there are still at least three interpretations of the Court's judgment and each of those could effectively reintroduce the same "threshold of seriousness" that the Court wanted to reject. The first interpretation would reintroduce the threshold by looking at the seriousness of the infringement. The second interpretation would do so by either (i) looking at the seriousness of the type (as opposed to the intensity) of the damage suffered, or (ii) confusing the seriousness of the intensity with the level of intensity needed for the "damage" to be objectively perceptible, as will be explained below. And the third interpretation would reintroduce the threshold by looking at how large (and in this sense serious) the quantum of compensation sought is. Let us consider each interpretation in turn.

First, while the Court stated that the threshold of seriousness does not apply to "damage", it did not clarify whether such "damage" would be compensable regardless of the infringement's seriousness. If correct, this interpretation would mean that national courts could refuse to award compensation for any "damage" if the infringement itself is not sufficiently serious. This is all the more important because the GDPR governs the conditions for the establishment of liability and because the GDPR rules supersede the rules in force in individual Member States, as observed by the Court.[46] And while the text of the GDPR does not expressly require seriousness of the infringement for the purposes of establishing the wrongdoer's compensatory liability (as opposed to their liability to pay administrative fines),[47] the Court's judgment makes it possible to introduce this requirement into Article 82 of the GDPR.

[43] Cf., Havu, "Damages Liability for Non-material Harm in EU Case Law", 44 Eur. L. Rev., (2019), 492–514.
[44] Art. 267 TFEU.
[45] Art. 98 of the GDPR.
[46] See Recital 146 of the GDPR and Case C-300/21, *Österreichische Post*, para 16.
[47] See Art. 83(2) of the GDPR and Case C-683/21, *Nacionalinis visuomenės sveikatos centras*, EU:C:2023:949, paras 60–86.

This is all the more true if "damage" under Article 82 is, in line with the *Österreichische Post* judgment, "broadly interpreted in the light of the [Court's] case-law"[48] which already contains the requirement of seriousness of the breach of EU law.[49] Therefore, although the Court did not make any relevant observations on the seriousness of the liability-establishing infringement, we believe it would be wrong for national courts to reintroduce the threshold of seriousness by applying it to the infringement because that would go against the gist of the *Österreichische Post* judgment.

Second, the Court remained silent on the distinctions made by the A.G. between (i) the intensity and (ii) the type of the damage suffered. This leaves open the interpretation according to which Article 82 would cover any *type* of "damage", but only if the *intensity* of that "damage" reaches a threshold of seriousness. We believe that, from a practical perspective, national courts cannot avoid making this assessment themselves. Indeed, in order to distinguish vexatious and frivolous claims from legitimate ones, national courts must always assess whether the intensity is sufficiently serious so as to make the infringement "real" and damage suffered *objectively perceptible*.[50] This conclusion is one of logic: a court can never make an award of compensation unless it is able to accept that the damage exists, and the *smaller* the damage, the *less likely* it is that it can be objectively perceived.

The key challenge for national courts will be not to let this assessment of intensity go against the gist of the Court's judgment. This could happen if, for example, a national court would collapse the conceptual separation between the intensity and the type of damage. Such a mistake can be found in the A.G.'s opinion on the third question. The A.G. collapsed the distinction between the intensity and type of harm when asserting that actual "damage" should be distinguished from "a mere feeling of displeasure due to another person's failure to comply with the law"[51] because emotions or feelings are not being "regarded as [a compensable type of] *damage*".[52] In doing so, the A.G. rejected emotions or feelings as a compensable type of damage on the basis that the existence of this type of damage may not be objectively perceptible below a certain threshold of intensity.

To help national courts manage this risk of collapsing the intensity with the type of damage, we suggest an alternative conceptualization. We recommend that the damage suffered is thought of as *normative loss* (or rights-violation, if you will) rather than actual loss, despite the two characterizations being two sides of the same coin.[53] Firstly, such alternative is better aligned with the GDPR's own protection of data subject rights. Secondly, if one characterizes the damage suffered in terms of normative loss, it makes more difficult to understand the damage suffered as something scalable. The more natural way of thinking about normative loss (*qua* interference with rights) would be to say that the rights either are interfered with or not. In effect, such rights-based thinking could therefore make it easier for the national courts to assess the intensity of the damage without reintroducing the threshold of seriousness. This

[48] Recital 146 of the GDPR and Case C-300/21, *Österreichische Post*, para 46.
[49] See, especially, Case C-571/16, *Kantarev v Balgarska Narodna Banka*, EU:C:2018:807, paras [92]–[95].
[50] This was confirmed by the District Court of Deggendorf, for example (see LG Deggendorf – 33 O 461/22, 20 Jun. 2023). See also Case C-340/21, *Natsionalna agentsia za prihodite*, para 85 and Case C-456/22, *Gemeinde Ummendorf*, para 17.
[51] A.G. Opinion in Case C-300/21, *Österreichische Post*, para 113.
[52] Ibid., fn 69 (emphasis in original). See also ibid., para 97 and fn 70.
[53] See Descheemaeker, "Unravelling Harms in Tort Law", 132 Law Quarterly Review, (2016) 595–617, at 600.

is because the only question of intensity the courts would be thinking about is whether the infringement exists or not, i.e., whether it is objectively perceptible. By contrast, they would be unlikely to contemplate whether the type of the rights infringed is objectively perceptible because this question would naturally not arise.

Third, the Court did not clarify whether compensation pursuant to Article 82 of the GDPR should be awarded regardless of the amount of compensation sought (which can also be viewed as a seriousness threshold). The only thing that the Court made clear regarding the assessment of compensation (i.e., the quantum of damages) was that it is now up to the national courts to carry out such assessment and to do so in line with the principles of equivalence and effectiveness. Yet given the Court's silence on the *de minimis* threshold in relation to the quantum of damage, there is no guarantee that claims for small compensation will be successful under Article 82. It is therefore imaginable that national courts would refuse to compensate the claimant if the remedy sought were very small, typically because of the disproportionate cost of the proceedings to the size of the claim.[54] Of course, national courts would be required to justify why they believe that the refusal to grant compensation complies with the principles of equivalence and effectiveness, but that would not automatically prevent them from reintroducing the threshold of seriousness. It would have been helpful if the Court clarified whether such small claims are within the purview of compensation under Article 82 of the GDPR. In the meantime, it is perhaps safer to seek substantive quantum of damage even if the non-material damage suffered may be small[55] or to pursue compensation as part of collective claims because in such cases the *de minimis* threshold is unlikely to apply.

6. Conclusion

It is difficult consistently and uniformly to apply EU law across Member States, but as long as this task is in the hands of supervisory authorities (as it is in the case of most of the GDPR provisions) the consistency and uniformity are more or less achievable.[56] The right to compensation for damage resulting from the infringement of the GDPR (Article 82) is, by contrast, a different story altogether. Compensation under Article 82 is sought by private individuals, not public authorities. What is more, Article 82 of the GDPR relies on generic legal concepts such as "damage" and the right to "compensation" which have long-established and often quite varied meanings and implications in the Member States' individual jurisdictions. Clarity on the correct interpretation of Article 82 of the GDPR is thus essential to achieving more settlements and consistent application of the law in civil disputes.

The *Österreichische Post* judgment was supposed to bring the desired clarity to Article 82 of the GDPR and thereby to make the outcomes of compensation claims for liminal "damage" under the GDPR more easily predictable. However, as we showed, the judgment is open to at least four different interpretations, some of which would make it extremely difficult to seek

[54] A similar argument was made by the A.G. in his opinion (see the A.G. Opinion in Case C-300/21, *Österreichische Post*, fn 84).
[55] Cf., e.g., the decision by the Regional Labour Court of Baden-Württemberg (LAG Baden-Württemberg - 9 Sa 73/21, 28 Jul. 2023) where the court granted €2,500 in compensation for non-material damage suffered by an employee as a result of the employer's refusal to comply with an access request. As the court noted, the fact that the data subject did not know what kind of information the employer processed about them was particularly concerning in the context of the employment relationship.
[56] See, e.g., the established consistency control mechanism (<https://perma.cc/2ADN-N6EB>) and the European Data Protection Board's Rules of Procedure, Title I, Art. 2 (<https://perma.cc/8RJJ-HKRV>).

compensation pursuant to Article 82 of the GDPR. Moreover, despite the Court's stated rejection of the threshold of seriousness in the definition of "damage" under Article 82, we showed how all of these interpretations could reintroduce the same threshold.

As a result, we submit that the Court did not fully answer the third question it was asked and there are some important loose threads that the Court will need to clarify going forward. Several pending cases[57] present a good opportunity to pick up at least some of them. First, the Court should have determined, at least in generic terms, what the protective purpose of compensation under Article 82 of the GDPR is and whether it is constrained by the protective purpose of the specific liability-establishing norms in the GDPR. Second, it would have been helpful if the Court provided at least an indicative list of legally protected interests that fall under the concept of "damage" in Article 82, because otherwise national courts will keep asking the Court for clarifications or will apply the GDPR inconsistently and without uniformity. And finally, third, the Court should have clarified whether the threshold of seriousness applies to the infringement, type of damage and/or quantum of compensation, because so far we only know that it does not apply to the intensity of the damage (and even that has its application problems if one does not characterise the "damage" as normative loss, as we have shown).

[57] At the time of writing, these are C-667/21, *Krankenversicherung Nordrhein*; C-687/21, *Saturn Electro*; C-741/21, *juris*; C-182/22 and C-189/22, *Scalable Capital I and II*; C-590/22, *PS*; C-200/23, *Agentsia po vpisvaniyata*; C-507/23, *Patērētāju tiesību aizsardzības centrs*; and theoretically also C-65/23, *K GmbH*.