

## Liability for infringements of the GDPR

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The liability regime under Article 82 General Data Protection Regulation (GDPR) has emerged as a cornerstone of the European framework for personal data protection. It grants any individual who has suffered material or non-material damage as a result of an infringement the right to compensation from the controller or processor. The Regulation thus proposes a common civil liability in this area, replacing the fragmented system that existed under the 1995 Directive.

The CJEU has clarified that liability requires four cumulative elements: an infringement of the GDPR, a damage, a causal link, and fault on the part of the controller or processor (CJEU, *ZQ v. Medizinischer Dienst*, 21 December 2023; *GP v. juris*, 11 April 2024). Damages may include moral harm, based on the broad interpretation of non-material damages in accordance with Recital 146 GDPR. Thus, even if the misuse of data has not materialized, the controller or the processor may be liable for that, provided that the damage exists (*Österreichische Post AG*, 4 May 2023).

However, recent case law of the Court of Justice reveals some unresolved tensions at the heart of this regime: while the GDPR proclaims a principle of accountability, whereby controllers must not only comply with but also demonstrate compliance with the rules (Article 5(2) GDPR), the burden of proving the infringement continues to rest on the data subject, leaving them with the procedural burden of establishing the facts that the principle of accountability was meant to document. In practice, accountability is shifted back from controllers to individuals, thereby undermining the regulatory rationale of ex ante responsibility. Also, although Article 82 GDPR does not expressly require the fault on the part of wrongdoers to consider them liable, recent CJEU case law requires this element. The fault, however, is presumed.

There are also other remaining unresolved questions related to the recognition of contributory negligence as a ground for exemption from liability, and a potential inconsistency may be identified between the transposition of Directive 2020/1828 on representative actions, and Article 80(2) GDPR, which provides for representative actions exclusively on an opt-in basis with regard to compensatory claims. The consequence is a liability system that promises more than it delivers, and that still requires interpretation. This presentation seeks to critically examine these tensions through an analysis of the CJEU's case law and the normative inconsistencies that persist.