Liability for data breaches under Article 82 GDPR in Germany and Spain

Responsabilidad por brecha de datos en virtud del artículo 82 del RGPD en Alemania y España

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Resumen:
Este artículo analiza la interpretación actual de la responsabilidad civil en virtud del artículo 82 RGPD en relación con los daños morales en los casos de brechas de datos. Parte de la jurisprudencia del Tribunal de Justicia de la Unión Europea (TJUE) y examina la jurisprudencia reciente en Alemania y España. Se presta especial atención al concepto de "pérdida de control": mientras que el Tribunal Federal de Justicia alemán considera que la pérdida de control demostrada constituye en sí misma un daño moral, el artículo sostiene que una interpretación coherente del enfoque basado en el perjuicio del TJUE sigue exigiendo que el interesado demuestre efectos negativos reales adicionales (como el miedo o la ansiedad). A continuación, la autora examina cómo esta cuestión interactúa con la doctrina española sobre el daño moral y la jurisprudencia consolidada en materia de honor y privacidad. También explora las implicaciones de un concepto excesivamente amplio de daño moral para la economía de datos y el funcionamiento de los tribunales, especialmente en el contexto de las demandas masivas automatizadas. Por último, el artículo aboga por un modelo en el que el artículo 82 RGPD siga centrándose en la reparación compensatoria individual, mientras que la aplicación estructural contra las infracciones a gran escala sea llevada a cabo principalmente por las autoridades de control para evitar litigios estratégicos abusivos y excesivos.

Palabras clave:
Artículo 82 del RGPD; daño moral; pérdida de control; litigios por brecha de datos; acción privada.

Abstract:
This article analyzes the current interpretation of civil liability under Article 82 GDPR for non-material damages in data-breach cases. It starts from the case law of the Court of Justice of the European Union (CJEU) and examines recent jurisprudence in Germany and Spain. A central focus lies on the concept of "loss of control": while the German Federal Court of Justice treats proven loss of control as non-material damage per se, the article argues that a coherent reading of the CJEU's harm-based approach still requires the data subject to demonstrate additional actual negative effects (such as fear or anxiety). The author then examines how this question interacts with Spain's moral-damage doctrine and established case law on honor and privacy. It then explores the policy implications of an overly broad concept of non-material damage for the data economy and the functioning of the courts, particularly in the context of automated mass claims. Ultimately, the article advocates a model in which Article 82 GDPR remains focused on individual compensatory redress, while structural enforcement against large-scale infringements is primarily carried out by supervisory authorities to avoid abusive and excessive strategic litigation.

Keywords:
Article 82 GDPR; non-material damage; loss of control; data breach litigation; private enforcement.

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1. Introduction

Civil liability under Article 82 of the General Data Protection Regulation (GDPR) is a cornerstone of the private enforcement of European data protection law. According to Article 82(1) GDPR, any person who has suffered from material or non-material damage because of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered. The Court of Justice of the European Union ("CJEU") has named three conditions for the liability:[1] (1) an infringement of the GDPR, (2) actual material or non-material damage, and (3) a causal link between the infringement and the damage.

On non-material damages, the question of what the data subject must prove regarding the damage and its causation is the subject of an extensive legal debate. In a November 18, 2024, judgment, the German Federal Court of Justice (*Bundesgerichtshof*, "BGH") ruled on non-material damages in a case involving the collection of personal data from millions of Facebook users through a technical loophole ("scraping").[2] This landmark decision is controversial because it equates loss of control over the data with non-material damage. In short, the BGH ruled that the loss of control constitutes a damage per se. This approach has been criticized, but the BGH recently upheld its interpretation in its November 11, 2025, judgment on the Deezer data leak case.[3]

This article analyzes the liability framework for data breaches in Germany and Spain:

- The CJEU´s interpretation of liability under Article 82 GDPR.
- The November 2024 and 2025 decisions of the BGH.
- The position of the Spanish Supreme Court (*Tribunal Supremo*, "TS").
- Consequences for the enforcement of the GDPR and the digital economy.

2. The Milestones of the CJEU case law

Article 82 GDPR establishes a direct legal basis for claims under European Union law. It must be

[1] CJEU, Judgm. of 04.05.2023 - C-300/21, ECLI:EU:C:2023:370, para 32 and para 36.

[2] BGH, Judgm. of 18.11.2024 – VI ZR 10/24, ECLI:DE:BGH:2024:181124UVIZR10.24.0.

[3] BGH, Judgm. of 11.11.2025 – VI ZR 396/24, ECLI:DE:BGH:2025:111125UVIZR396.24.0.

interpreted autonomously and uniformly throughout the European Union.[4]

According to recital 146 of the GDPR, the concept of damage under Article 82 GDPR should be broadly interpreted, and data subjects should receive full and effective compensation for the damage they have suffered. Regarding the obligation to notify the supervisory authority of a personal data breach under Article 33(1) GDPR, Recital 85 states that a breach may *"result in physical, material or non-material damage to natural persons such as loss of control over their personal data or limitation of their rights, discrimination, identity theft or fraud, financial loss, unauthorised reversal of pseudonymisation, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage to the natural person concerned."*

Both recitals confirm that loss of control over personal data is directly connected to the legal concept of damage. However, the GDPR, does not clarify whether the mere loss of control *constitutes* a compensable damage on its own or if such a loss of control must *cause* additional negative consequences, such as fear, anxiety, or anger.

Since the GDPR does not establish civil procedure rules, enforcing claims in civil courts depends on the court systems and the civil procedure laws of the member states.[5] Since 2023, the CJEU has issued several decisions on preliminary questions, providing member state courts with a roadmap for handling cases involving non-material damages.

2.1. Foundations of liability: Österreichische Post

Recent case law began with the May 4, 2023, judgment in the case "Österreichische Post".[6] The Austrian postal service collected and processed data on the political party affiliation of the population using an algorithm based on social and demographic criteria. The data was sold to an organization that used it to send targeted advertisements. Offended by this, the plaintiff sued for damages due to adverse emotional effects, claiming a great upset, a loss of confidence and a feeling of exposure. The CJEU ruled in the plaintiff`s favor.

According to the CJEU, the infringement by itself does not constitute a damage, there must be a damage caused by the infringement.[7] The mere infringement does not necessarily lead to damage.[8] The concept of damage should be broadly interpreted, so non-material damage is not subject to a threshold of seriousness.[9] Courts in member states must rule on damages based on their domestic procedural law, considering the principles of equivalence and effectiveness.[10] This includes determining the amount of damages to which the data subject is entitled.[11] The amount of damages must provide a full and effective compensation to the data subject, without being punitive to the data controller/processor.[12]

2.2. Subsequent decisions of the CJEU

The CJEU has elaborated on these rules in several subsequent decisions: Gemeinde Ummendorf,[13] Natsionalna agentsia za prihodite,[14] Krankenversicherung Nordrhein,[15] MediaMarktSaturn,[16] Juris,[17]

[4] CJEU, Judgm. of 04.05.2023 - C-300/21, ECLI:EU:C:2023:370, para 29.

[5] CJEU, note 4, para 53, 54.

[6] CJEU, note 4.

[7] CJEU, Judgm. of 04.05.2023 - C-300/21, ECLI:EU:C:2023:370, para 33, 34, 42.

[8] CJEU, note 7, para 37.

[9] CJEU, note 7, para 51.

[10] CJEU, note 7, para 53.

[11] CJEU, note 7, para 54.

[12] CJEU, note 7, para 58.

[13] CJEU, Judgm. of 14.12.2023 - C-456/22, ECLI:EU:C:2023:988.

[14] CJEU, Judgm. of 14.12.2023 - C-340/21, ECLI:EU:C:2023:986.

[15] CJEU, Judgm. of 21.12.2023 - C-667/21, ECLI:EU:C:2023:1022.

[16] CJEU, Judgm. of 25.01.2024 - C-687/21, ECLI:EU:C:2024:72.

[17] CJEU, Judgm. of 11.04.2024 - C-741/21, ECLI:EU:C:2024:288.

Scalable Capital,[18] PS GbR,[19] Patērētāju tiesību aizsardzības centrs,[20] Agentsia po vpisvaniyata,[21] Quirin Privatbank,[22] Brillen Rottler.[23] The high volume of judgments in a short period of time reflects the significant uncertainty that courts in member states face when handling such cases. It is also an indicator that litigation with claims under Article 82(1) GDPR is rising.

2.2.1. Key holdings in the CJEU cases

A recurring theme in the questions sent to the CJEU is that an infringement may only have minor consequences for the data subject. However, the CJEU has denied a liability threshold in cases involving non-material damages.[24] Due to its compensatory, non-punitive nature, Article 82 of the GDPR does not require the degree of seriousness of the infringement to be taken into account when determining the amount of compensation for non-material damages.[25] When setting the amount of compensation for the non-material damage, it is not necessary that the severity of the infringement or the fault is to be taken into account.[26] The attitude and motivation of the controller cannot justify an award lower than the full compensation for the actual damage suffered.[27]

This generous acceptance of liability is balanced by a more restrictive approach with regard to the amount of compensation: The data subject must prove actual damages different from the infringement.[28] The fear experienced by a data subject with regard to a possible misuse of his personal data by a third party is capable, in itself, of constituting a non-material damage.[29] The national court must determine, if this fear is well-founded; a purely hypothetical risk of misuse is insufficient.[30] Even in minor cases, the courts must individually verify if the non-material damage is well founded.[31] While the loss of control over personal data for a short period may constitute non-material damage, mere allegations of fear without proven negative consequences cannot give rise to compensation.[32]

The mere loss of control over personal data is included in the concept of damages according to the GDPR.[33] The loss of control over personal data, even for a short period of time, may constitute non-material damage.[34]

The assessment of the damages is subject to the legal system of each member state, including the criteria for determining the extent of the compensation payable in a given case.[35] If the damage is not serious, the national court may award minimal compensation (a small amount of money).[36] Furthermore, in cases of non-material damage an apology from the controller/processor can constitute standalone or supplementary compensation, if the court ascertains that the data subject is

[18] CJEU, Judgm. of 20.06.2024 - C-182/22 and C-189/22, ECLI:EU:C:2024:531.

[19] CJEU, Judgm. of 20.06.2024 - C-590/22, ECLI:EU:C:2024:536.

[20] CJEU, Judgm. of 04.12.2024 - C-507/23, ECLI:EU:C:2024:854.

[21] CJEU, Judgm. of 04.10.2024 - C-200/23, ECLI:EU:C:2024:827.

[22] CJEU, Judgm. of 04.09.2025 - C-655/23, ECLI:EU:C:2025:655.

[23] CJEU, Judgm. of 19.03.2026 - C-526/24, ECLI:EU:C:2026:216.

[24] CJEU, Judgm. of 14.12.2023 - C-456/22, ECLI:EU:C:2023:988, para 18; CJEU, Judgm. of 20.06.2024 - C-590/22, ECLI:EU:C:2024:536, para 28.

[25] CJEU, Judgm. of 21.12.2023 - C-667/21, ECLI:EU:C:2023:1022, para 102; CJEU, Judgm. of 25.01.2024 - C-687/21, ECLI:EU:C:2024:72, para 52, 54; CJEU, Judgm. of 11.04.2024 - C-741/21, ECLI:EU:C:2024:288, para 39, 43; CJEU, Judgm. of 20.06.2024 - C-182/22 and C-189/22, ECLI:EU:C:2024:531, para 29.

[26] CJEU, Judgm. of 25.01.2024 - C-687/21, ECLI:EU:C:2024:72, para 52, 54.

[27] CJEU, Judgm. of 04.10.2024 - C-507/23, ECLI:EU:C:2024:854, para 44.

[28] CJEU, Judgm. of 14.12.2023 - C-456/22, ECLI:EU:C:2023:988, para 21.

[29] CJEU, Judgm. of 25.01.2024 - C-687/21, ECLI:EU:C:2024:72, para 65.

[30] CJEU, Judgm. of 14.12.2023 - C-340/21, ECLI:EU:C:2023:986, para 85; CJEU, Judgm. of 25.01.2024 - C-687/21, ECLI:EU:C:2024:72, para 67, 68.

[31] CJEU, Judgm. of 14.12.2023 - C-340/21, ECLI:EU:C:2023:986, para 85.

[32] CJEU, Judgm. of 20.06.2024 - C-590/22, ECLI:EU:C:2024:536, para 33, 34.

[33] CJEU, Judgm. of 14.12.2023 - C-340/21, ECLI:EU:C:2023:986, para 82; CJEU, Judgm. of 11.04.2024 - C-741/21, ECLI:EU:C:2024:288, para 42.

[34] CJEU, Judgment of 11.04.2024 - C-741/21, ECLI:EU:C:2024:288, para 42; CJEU, Judgm. of 20.06.2024 - C-590/22, ECLI:EU:C:2024:536, para 33.

[35] CJEU, Judgm. of 20.06.2024 - C-182/22 and C-189/22, ECLI:EU:C:2024:531, para 33.

[36] CJEU, Judgm. of 20.06.2024 - C-182/22 and C-189/22, ECLI:EU:C:2024:531, para 45; CJEU, Judgm. of 04.10.2024 - C-507/23, ECLI:EU:C:2024:854, para 35.

compensated in full under the circumstances of the individual case.[37]

This liability under Article 82(1) GDPR does not require the plaintiff to prove fault; however, Article 82(3) allows a data controller or processor to prove that it is not in any way responsible for the event that caused the damage. This system constitutes a fault-based liability in which the burden of proof rests not on the person who has suffered damage, but on the controller.[38]

2.2.2. Agentsia po vpisvaniyata

In its November 18, 2024, landmark decision, the BGH relied heavily on the CJEU's decision in the Agentsia po vpisvaniyata case.[39] In that decision, the CJEU summarized its case law thus far, stating that infringement must be distinguished from damage and that non-material damage must be proven by the data subject. Furthermore, the CJEU stated that fear of misuse of the data in the future must be well-founded in order to constitute non-material damage.[40] The CJEU reiterated that the mere loss of control is included in the concepts of damage even if there has not been an actual misuse of the personal data.[41]

The Bulgarian court had found non-material damages consisting in psychological and emotional suffering, namely fear and concern with regard to possible abuse of the data and the sense of powerlessness and disappointment.[42] Based on this finding, the CJEU concluded the following (emphasis added):[43] *"Article 82(1) of the GDPR must be interpreted as meaning that **a loss of control**, for a limited period, by the data subject over his or her personal data, on account of those data being made available online to the public, in the commercial register of a Member State, **may suffice to cause 'non-material damage'**, provided that that data subject demonstrates that he or she has actually suffered such damage, however minimal, without that concept of 'non-material damage' requiring that the existence of additional tangible adverse consequences be demonstrated."*

2.2.3. Quirin Privatbank

On September 4, 2025, the CJEU ruled on the Quirin Privatbank case.[44] As the first decision after the BGH's landmark case on November 15, 2024, interest was high in seeing if the CJEU would further clarify the concept of loss of control. The preliminary question again originated in a procedure before the BGH. A job applicant´s personal data was mistakenly sent by the prospective employer (a bank) to a third party who knew the applicant and asked if he was seeking employment. The applicant sued the bank, demanding (1) a prohibitory injunction to prevent any future unlawful processing and (2) 1,000 Euros in nonmaterial damages.

Regarding the claim of preventing future infringements, the CJEU ruled that the GDPR[45] does not provide a preventive remedy for enabling the data subject to obtain a prohibitory court injunction that the controller refrain from future unlawful processing.[46] However, it is compatible with the GDPR that the law of the member states provides for such a preventive remedy.[47] If such a preventive remedy is granted by the courts of the member states, it does not reduce the extent of the financial compensation for non-material damage payable under Article 82(1) GDPR.[48]

The BGH further raised the question of whether non-material damage under Article 82(1) GDPR "*encompasses negative feelings experienced by the data subject as a result of the unauthorised*

[37] CJEU, Judgm. of 04.10.2024 - C-507/23, ECLI:EU:C:2024:854, para 36.

[38] CJEU, Judgm. of 21.12.2023 - C-667/21, ECLI:EU:C:2023:1022, para 94; CJEU, Judgm. of 11.04.2024 - C-741/21, ECLI:EU:C:2024:288, para 46.

[39] CJEU, Judgm. of 04.10.2024 - C-200/23, ECLI:EU:C:2024:827.

[40] CJEU, note 39, para 140 to 144.

[41] CJEU, note 39, para 145.

[42] CJEU, note 39, para 155.

[43] CJEU, note 39, para 156.

[44] CJEU, Judgm. of 04.09.2025 - C-655/23, ECLI:EU:C:2025:655.

[45] The BGH asked specifically if such a remedy followed from Articles 17, 18, 79 GDPR.

[46] CJEU, Judgm. of 04.09.2025 - C-655/23, ECLI:EU:C:2025:655, para 52. For a detailed discussion in Spanish cf. Felipe Oyarzún Vargas. „Consideraciones acerca de las acciones de cesación y los daños morales por la pérdida de control de los datos personales. Comentario a la sentencia del TJUE de 4 de septiembre de 2025, asunto C-655/23 (Quirin Privatbank)", *Cuadernos de Derecho Transnacional (CDT)* 2026, 695, 702.

[47] CJEU, Judgm. of 04.09.2025 - C-655/23, ECLI:EU:C:2025:655, para 51.

[48] CJEU, note 47, para 83.

transmission of his or her personal data to a third party, such as fear or annoyance, which are caused by a loss of control over those data, by a potential misuse of those data or by damage to the data subject's reputation."[49]

The CJEU affirmed that a data breach may constitute a non-material damage. In its reasoning, the CJEU repeated the above-cited passage from the Agentsia po vpisvaniyata case,[50] stating that loss of control may be sufficient to *cause* non-material damage, provided that the data subject demonstrates that he or she has actually suffered such damage.[51] Even if the feelings of fear or annoyance may also form part of the general risk inherent in everyday life, such negative feelings are capable of constituting a non-material damage if the data subject experiences these feelings, with their negative consequences, precisely because of the infringement.[52]

The wording of the final passage on that question seems to clearly distinguish between loss of control and actually suffered negative consequences (emphasis added):[53] "*Article 82(1) of the GDPR must be interpreted as meaning that* ***the concept of 'non-material damage'*** *contained in that provision* ***encompasses negative feelings*** *experienced by the data subject as a result of an unauthorised transmission of his or her personal data to a third party, such as fear or annoyance,* ***which are caused by a loss of control*** *over those data, by a potential misuse of those data or by harm to his or her reputation, provided that the data subject demonstrates that he or she is experiencing such feelings, with their negative consequences, on account of the infringement of that regulation.*"

This paragraph implies that loss of control can *cause* non-material damage under Art. 82(1) GDPR, but contrary to the BGH's opinion, it is not the damage itself.

2.2.4. Brillen Rottler

On March 19, 2026, the CJEU issued its most recent decision in the Brillen Rottler case.[54] A German local court raised the preliminary question in a case involving a person residing in Austria who registered for the newsletter of a family-run optician in Germany. Thirteen days after registering, the individual requested access to his data under Article 15(1) GDPR, but the optician denied the request, claiming it was abusive under Article 12(5) GDPR. The data subject claimed non-material damages of 1,000 Euros. Through a negative declaratory action, the optician requested that the court declare the claim unfounded. It turned out that this was not the first time the data subject had made such claims.

The CJEU ruled that a large number of data access requests, followed by compensation claims, sent to various data controllers may indicate abusive intention and may be considered excessive under Article 12(5) GDPR.[55]

The CJEU then held that liability under Article 82(1) GDPR is not limited to damages resulting from the processing of personal data.[56] Damages resulting from an infringement of the right of access provided for in Article 15(1) GDPR are also covered by Article 82(1) GDPR.[57]

Regarding the damages covered by Article 82(1) GDPR, the CJEU reiterated its previous statement from the case Agentsia po vpisvaniyata[58] that the mere loss of control is included in the concept of damage, even if there was no actual misuse of the data.[59]

The CJEU emphasized the necessity of a causal link between the infringement and the damage. This causal link may be broken by the conduct of the data subject, provided that that conduct

[49] CJEU, Judgm. of 04.09.2025 - C-655/23, ECLI:EU:C:2025:655, para 53.

[50] CJEU, Judgm. of 04.10.2024 - C-200/23, ECLI:EU:C:2024:827, para 156.

[51] CJEU, Judgm. of 04.09.2025 - C-655/23, ECLI:EU:C:2025:655, para 60.

[52] CJEU, note 51, para 62.

[53] CJEU, note 51, para 64.

[54] CJEU, Judgm. of 19.03.2026 - C-526/24, ECLI:EU:C:2026:216. Cf. Yannick Peisker and Johannes Tegel, "Rechtsmissbräuchliche Geltendmachung des datenschutzrechtlichen Auskunftsanspruchs", *Neue Juristische Wochenschrift* (NJW) 2026, 1709, 1712.

[55] CJEU, Judgm. of 19.03.2026 - C-526/24, ECLI:EU:C:2026:216, para 45.

[56] CJEU, note 55, para 48.

[57] CJEU, note 55, para 55.

[58] CJEU, Judgm. of 04.10.2024 - C-200/23, ECLI:EU:C:2024:827, para 145.

[59] CJEU, Judgm. of 19.03.2026 - C-526/24, ECLI:EU:C:2026:216, para 61.

proves to be the determining cause of the damage.[60] There is no claim under Article 82(1) GDPR if the damage was suffered as a result of the loss of control over personal data or as a result of uncertainty as to whether those data have been processed where the causal link is broken by the data subject's conduct, in so far as that loss of control or that uncertainty was caused by the data subject's decision to submit those data to the controller with the aim of artificially creating the conditions laid down for the application of that provision.[61]

The following conclusion was reached (emphasis added):[62] "*Article 82(1) of the GDPR must be interpreted as meaning that the* ***non-material damage*** *suffered by the data subject* ***encompasses the loss of control*** *over his or her personal data or his or her uncertainty as to whether his or her data have been processed,* ***provided*** *that it is demonstrated, in particular, that the data subject* ***actually suffered such damage and*** *that his or her* ***conduct was not the determining cause of that damage***."

This conclusion raises the question of whether the CJEU has affirmed the BGH's interpretation that the mere loss of control *constitutes* non-material damage itself. What the concept of non-material damage "encompasses", has evolved throughout the CJEU's decisions: Earlier decisions stated that the concept encompasses a situation in which the data subject experiences fear of misuse of the personal data.[63] According to Quirin Privatbank, the concept of non-material damage "encompasses negative feelings experienced by the data subject" (such as fear or annoyance) which are caused by a loss of control, by a potential misuse or by harm to the reputation.[64] In Brillen Rottler, however, the CJEU stated that the non-material damage suffered by the data subject "encompasses the loss of control over his or her personal data". The CJEU seems to directly link the concepts of non-material damage and loss of control. Fear or other negative feelings are not specifically mentioned.

Such a broad interpretation would not be fully consistent because the CJEU mentions "compensation for the damage allegedly suffered as a result of the loss of control over his or her personal data" in Brillen Rottler and only then states that "the non-material damage suffered by the data subject encompasses the loss of control over his or her personal data".[65] Considering that Brillen Rottler focused on the question of causality and whether the data subject's conduct caused the damage, it is doubtful that the CJEU intended to adopt the BGH's approach, or if the conclusion was merely a simplification of the CJEU's previous position. The CJEU should clarify this linguistic and logical imprecision.

2.2.5. Pending Cases

The Regional Court of Erfurt in Germany brought exactly this question of whether mere loss of control constitutes damage per se before the CJEU. In the Erser case, the court requested a preliminary ruling on a data scraping case against Meta regarding whether the mere loss of control constitutes non-material damage under Article 82(1) GDPR.[66] The Regional Court sought clarification on whether compensation could be awarded even if the data subject did not demonstrate concrete, individual material or non-material damage, such as well-founded fears of misuse or other psychological harm. Instead, the data subject merely claimed that his data were published online and that he therefore lost control over them. The outcome of this procedure would have clarified the BGH´s interpretation that the mere loss of control can be considered non-material damage. However, on February 4, 2026, the Regional Court of Erfurt withdrew its preliminary question, and on January 23, 2026, the CJEU closed the file.[67] The plaintiff had withdrawn the complaint.

In the context of Article 82(1) GDPR, more cases are pending before the CJEU. The Austrian case

[60] CJEU, note 59, para 65.

[61] CJEU, note 59, para 66.

[62] CJEU, note 59, para 67.

[63] CJEU, Judgm. of 14.12.2023 - C-340/21, ECLI:EU:C:2023:986, para 80; CJEU, Judgm. of 25.01.2024 - C-687/21, ECLI:EU:C:2024:72 para 67.

[64] CJEU, Judgm. of 04.09.2025 - C-655/23, ECLI:EU:C:2025:655, para 64.

[65] CJEU, Judgm. of 19.03.2026 - C-526/24, ECLI:EU:C:2026:216, para 66 versus para 67.

[66] CJEU, case C-273/25.

[67] https://infocuria.curia.europa.eu/tabs/document/C/2025/C-0273-25-00000000RP-01-P-01/ORD_NP/317014-DE-1-html

Waldfelber[68] and the German case Freie Hansestadt Hamburg[69] both raise the question, among others, of whether negative consequences for the data subject resulting from an infringement that solely involves the obligation to provide information under Article 15(1) GDPR constitute damage. In the Brillen Rottler decision, the CJEU basically affirmed this question and, at least in principle, extended the liability to the right of access.[70] Regarding damages, in the case Freie Hansestadt Hamburg, the BGH asked if the resulting hindrance of the capacity to verifying the lawfulness of the data processing and asserting any relevant rights constitutes non-material damage. According to the Brillen Rottler approach, it is expected that the CJEU will deem the uncertainty as to whether personal data has been processed sufficient.[71]

The important Undelam case before the CJEU, initiated by the BGH, seeks clarification on abusive claims.[72] The case stems from the use of Google Fonts on websites. Whenever an internet user opened a website with Google Fonts, the website automatically transmitted the visitor's IP address and other personal data to Google in the U.S. Given the CJEU's broad interpretation of liability under Article 82(1) GDPR, German courts have awarded 100 Euros in such cases.[73] This led to a wave of cases in which plaintiffs used bots to identify websites that loaded Google Fonts externally, sending mass letters demanding compensation ranging from 100 to 500 Euros. This type of automated prosecution raised questions about abusive litigation and GDPR trolling. Therefore, the BGH referred the issue of liability to the CJEU when the data subject knowingly caused the controller to violate the GDPR solely to assert a claim based on that violation. This raises the question of whether non-material damage can be affirmed if similar infringements are intentionally caused in large numbers by automated means. Even if the conditions of liability under Article 82(1) GDPR are formally met, the BGH wants to know if liability can be denied in cases of abusive conduct given the intention to gain an advantage from the GDPR by artificially creating the conditions for obtaining the advantage. If the CJEU follows its ruling in Brillen Rottler regarding causation by the data subject's own actions,[74] liability will likely be denied.

2.3. Policy Implications of the EU Case Law

At its core, the case law of the CJEU follows the traditional concepts of liability: infringement, causation, and compensation of damages.[75] Upon closer inspection, however, these principles lead to an extensive liability under Article 82(1) GDPR: Infringement includes processing and the right to access; damages include non-material damages; there is no de minimis threshold; and fear and other negative feelings constitute non-material damages. Loss of control can also cause or constitute a non-material damage.

Together, these principles create a strong incentive to file claims under Article 82(1) GDPR. Given the complex nature and interconnections between data systems in the platform economy, an infringement can often be found. One structural infringement or data leak can lead to a data breach affecting millions of people. Even if a small amount is awarded for each breach, the total amount can be enormous. Plaintiffs' lawyers will likely use automation to identify infringements and bundle as many claims as possible to streamline enforcement.

CJEU case law contains filters against frivolous claims. Non-material damage must be well-founded and proven by the data subject and cannot be hypothetical. There is no causation if the data subject´s conduct is the determining cause. The award of money is not punitive and, in minor infringements, can be minimal. However, the application of these filters relies heavily on the courts of the member states. The following example from Germany shows that courts react differently when deciding a few cases of GDPR liability or when facing a massive wave of litigation.

[68] CJEU, case C-185/25.

[69] CJEU, case C-416/25. BGH, Resolut. of 06.05.2025 – VI ZR 53/23, ECLI:DE:BGH:2025:060525BVIZR53.23.0.

[70] CJEU, Judgm. of 19.03.2026 - C-526/24, ECLI:EU:C:2026:216, para 55.

[71] CJEU, note 70, para 64.

[72] CJEU, case C-654/25. BGH, Resolut. of 28.08.2025 – VI ZR 258/24, ECLI:DE:BGH:2025:280825BVIZR258.24.0.

[73] Regional Court of Munich I, Judgm. of 20.01.2022 – 3 O 17493/20, ECLI:DE:LGMUEN1:2022:0120.3O17493.20.0A.

[74] CJEU, Judgm. of 19.03.2026 - C-526/24, ECLI:EU:C:2026:216, para 66.

[75] Jorge Izquierdo Fernández. "Litigación civil en materia de protección de datos. Daño inmaterial. Estado de la cuestión". *Foro de Actualidad Jurídica Uría Menéndez* (AJUM) 69 (12/2025), 209, 211.

3. Implementation of the liability in Germany

3.1. The BGH Approach on Loss of Control

The following section analyzes the BGH´s approach to interpreting non-material damages. According to the BGH, the mere loss of control can *constitute* non-material damage, eliminating the need for plaintiffs to prove negative consequences such as fear, anxiety, or anger.

3.1.1. The Facebook-Decision of the BGH of November 18, 2024

On November 18, 2024,[76] the BGH applied the CJEU´s rules to a scraping case concerning the liability of Meta/Facebook. Unknown third parties entered random digits to find users´ telephone numbers and accessed the data of 533 million users worldwide via the network's contact import function. The plaintiff´s personal data was published online. The Higher Regional Court dismissed the claim on appeal. The BGH reversed the decision of the Higher Regional Court and remanded the case.

The BGH decided on two key issues:

First, mere loss of control (*Kontrollverlust*) constitutes non-material damage. The BGH referenced the CJEU's Agentsia po vpisvaniyata decision, stating that the mere loss of control, even for a short time, can be considered non-material damage, even without proof of additional tangible negative consequences.[77] According to the BGH, the CJEU´s case law clearly encompasses the mere loss of control (*Kontrollverlust)* over one's own data as a result of an infringement of the GDPR as damage, even if there is no actual misuse of the data in question to the detriment of the subject.[78]

However, the data subject must prove both the loss of control and the damage itself. Once loss of control is established, it constitutes non-material damage, and additional fears or anxieties are not required. Such fears would only deepen or exacerbate the existing non-material damage.[79]

If a loss of control cannot be proven, a well-founded fear that personal data will be misused by third parties due to a data breach is sufficient to justify a claim for damages.[80] Mere assertion of fear, without proven negative consequences, as well as a purely hypothetical risk of misuse by an unauthorized third party, are insufficient.[81]

Second, the BGH remanded the case to the Higher Regional Court, instructing it to determine the amount of non-material damages according to the applicable national law and considering the principles of equivalence and effectiveness. If loss of control is the only damage, an amount in the single digits would be insufficient. The BGH indicates that it would not object to assessing compensation for loss of control in the amount of approximately 100 Euros.[82]

3.1.2. Subsequent Case Law

On January 28, 2025,[83] the BGH dismissed a claim for non-material damages in a case where a business sent a single unsolicited advertisement email to a former customer, who then sued for 500 Euros in damages. The BGH argued that the liability under Article 82(1) GDPR is purely compensatory and, that in this case, no loss of control occurred because the personal data was not made accessible to any third party.[84] The BGH upheld its previous doctrine that the harm to the data subject can consist solely of loss of control as such. If the loss of control is proven, it constitutes the non-material damage and specific fears or anxieties resulting from that loss of control are not necessary; such fears or anxieties would only deepen or exacerbate the already occurred

[76] BGH, Judgm. of 18.11.2024 – VI ZR 10/24, ECLI:DE:BGH:2024:181124UVIZR10.24.0.

[77] BGH, note 76, para. 30.

[78] BGH, note 76, para. 30.

[79] BGH, note 76 para. 31.

[80] BGH, note 76, para. 32.

[81] BGH, note 76, para. 32

[82] BGH, note 76, para. 100.

[83] BGH, Judgm. of 28.01.2025 – VI ZR 109/23, ECLI:DE:BGH:2025:280125UVIZR109.23.0.

[84] BGH, note 83, para 18.

non-material damage.[85]

In a public sector case, liability was confirmed on February 2, 2025. The case involved the unlawful handling of a federal employee´s personnel file by a German state agency. Liability was not excluded, even though the state employees were bound by confidentiality.[86]

On May 13, 2025, the BGH dismissed a case in which a city authority had sent acknowledgements of receipt of court documents via unencrypted fax to its lawyers.[87] The documents were related to an administrative court dispute with the plaintiff, who was an explosives dealer. The court left open if transmitting the documents by unencrypted fax infringed data protection law. Regarding the plaintiff's claim for 7,000 Euros in damages, the BGH ruled that the hypothetical risk of interception of an unencrypted fax does not, in itself, constitute a loss of control or compensable non-material damage under Article 82(1) GDPR.[88]

The German Federal Labor Court (*Bundesarbeitsgericht*, "BAG") agreed with the BGH that the mere loss of control may constitute non-material damage, if the data subject can prove it.[89] Liability was confirmed in a case involving the transfer employees´ personal data to Workday, a cloud-based human resources management software in the U.S. The plaintiff demanded 3,000 Euros in compensation, but the BAG only granted 200 Euros.[90]

3.1.3. The Deezer-Decision of the BGH of November 11, 2025

Approximately two months after the CJEU decision in Quirin Privatbank, on November 11, 2025, the BGH issued another significant ruling on Article 82(1) GDPR.[91] The plaintiff was a customer of Deezer, a French music streaming service. Until 2019, the defendant Deezer had an external controller in Israel carry out the relevant processing of customer data. In 2019, the external controller in Israel confirmed to the defendant that the customer data had been deleted ("*as our contract terminates today, we will be deleting your site and all the data on the site tomorrow*"), but the defendant did not verify this. In truth, the customer data was not deleted and was subsequently obtained by hackers, who offered it for sale on the darknet. The plaintiff sued for non-material damages of 3,000 Euros, claiming that he was worried about the whereabouts and potential misuse of his data, such as identity theft, phishing, unsolicited sales calls, and spam emails.

In this case, the BGH could have affirmed liability without discussing the concept of loss of control as damage per se. The plaintiff´s personal data had already been misused when it was offered for sale on the darknet. Furthermore, the Higher Regional Court determined that the plaintiff's fear of further misuse of his data was well-founded.[92] Since the loss of control manifested as abusive use of personal data, the question of liability in the absence of negative consequences was not decisive for the case, which the BGH acknowledges.[93]

The BGH clarified that, in cases of personal data publication on the darknet, emotional harm caused by the data misuse is not an additional element required.[94] The CJEU's conclusion that proven negative emotions, along with their negative consequences – which are caused by a loss of control, etc. – are encompassed by the concept of non-material damage does not imply that such negative emotions are an absolute prerequisite for establishing damage.[95]

Remarkably, a significant part of the decision explains why the concept of loss of control as non-material damage in itself is correct and compatible with the CJEU case law, even after Quirin Privatbank. The BGH reaffirms the concept of *Kontrollverlust,* or loss of control, as a damage in

[85] BGH, note 83, para 17.

[86] BGH, Judgm. of 11.02.2025 – VI ZR 365/22, ECLI:DE:BGH:2025:110225UVIZR365.22.0, para 16.

[87] BGH, Judgm. of 13.05.2025 – VI ZR 186/22, ECLI:DE:BGH:2025:130525UVIZR186.22.0.

[88] BGH, note 87, para 30.

[89] BAG, Judgm. of 08.05.2025 – 8 AZR 209/21, ECLI:DE:BAG:2025:080525.U.8AZR209.21.0, para 24.

[90] BAG, note 89, para 29.

[91] BGH, Judgm. of 11.11.2025 – VI ZR 396/24, ECLI:DE:BGH:2025:111125UVIZR396.24.0; Simon Assion, "Die Entwicklung des Datenschutzrechts", *Neue Juristische Wochenschrift* (NJW) 2026, 645, 647.

[92] BGH, Judgm. of 11.11.2025 – VI ZR 396/24, ECLI:DE:BGH:2025:111125UVIZR396.24.0, para 24.

[93] BGH, note 92, para 31, 32.

[94] BGH, note 92, para 33.

[95] BGH, note 92, para 33.

itself.[96] Then, the BGH discusses the critical commentary on its November 18, 2024, decision and concludes that the CJEU case law aligns with the BGH's approach.[97] Through a detailed textual analysis of the different linguistic versions of the CJEU's most recent cases, the BGH reaffirms the result that the mere loss of control may constitute (*begründen*), rather than merely causing (*verursachen*) a separate non-material damage.[98] According to the BGH, in addition to a proven loss of control, there is no requirement for additional tangible adverse consequences.[99]

3.2. Consequences of the BGH's Approach

3.2.1. Reception in Literature

The reception of the BGH decisions in German legal literature has been mixed. Some view the BGH´s interpretation as a concise concretization of European case law, offering a more positive review.[100] The November 11, 2025, decision was welcomed by some as a clear analysis of the CJEU case law that refuted unfounded criticism.[101] However, the BGH's assertion that the CJEU had already ruled that "loss of control equals non-material damage" is widely considered inaccurate because the CJEU requires the data subject to *demonstrate that he has actually suffered* a non-material damage.[102]

Furthermore, critics of the BGH approach point out the lack of a clear distinction between damage and the circumstances that caused it.[103] However, they also acknowledge that generic claims do not justify damages.[104] Regarding alleged fears, the BGH is considered too naive, given the daily risks of using the internet.[105] Other critics emphasize the risk that loss of control is increasingly being used to compensate for structural deficits in GDPR enforcement and that the BGH's approach entails unpredictable risks for dataintensive business models given the sheer number of potentially affected users.[106] If the mere loss of control were sufficient, Article 82(1) GDPR would effectively serve a punitive function, which, according to the case law of the CJEU, is precisely not its intended purpose.[107]

There are few Spanish articles discussing the German concepts of Article 82(1) GDPR liability. In his commentary to Quirin Privatbank, Oyarzún Vargas cites that the mere loss of control can constitute a non-material damage.[108] He then discusses the negative feelings of fear, anxiety, and anger derived from the loss of control.[109] This reflects the ambiguity of the CJEU's position.

[96] BGH, note 92, para 27.

[97] BGH, note 92, para 29.

[98] BGH, note 92, para 29

[99] BGH, note 92, para 29

[100] Oliver Zöll and Ruben Soeder. „Immaterielle Schadensersatzansprüche nach Art. 82 Abs. 1 DSGVO gegen Facebook im Scraping-Komplex", *Juris-Praxisreport Compliance* (jurisPR-Compl)1/2025 Anm. 4.

[101] Christian Däuble, „Haftung und Pflichten im Life Cycle der Auftragsverarbeitung", Recht Digital (RDi)2026, 152, 154; Christian Michael Schmidt, "Gefühlsschäden im Datenschutzrecht", *Neue Juristische Wochenschrift* (NJW)2026, 487, 488.

[102] Reto Mantz, „Schadensersatz für Datenlecks", *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR)2024, 1878, 1879; Boris P. Paal, „Immaterieller Schadensersatz beim Kontrollverlust über personenbezogene Daten", Neue Juristische Wochenschrift (NJW)2025, 261, 264; Jannik Heine, "Maßstäbe für immateriellen Schadensersatz nach Art. 82 DS-GVO", *Recht Digital* (RDi) 2025, 161, 163; Henrik Hanßen, „DSGVO-Schadensersatz: Aktuelle Rechtsprechung und Entwicklungen in der Praxis -Trends und Fallgruppen in der Rechtsprechung des EuGH, BGH, BAG und der Instanzgerichte", *Der Betrieb* (DB) 2025, 1531, 1532; Schürgers/Hirschberger, "Immaterieller Schadensersatz nach Art. 82 DS-GVO – Fokus auf die Darlegungs- und Beweislast", *Neue Zeitschrift für Arbeitsrecht* (NJW) 2025, 216, 221; Simon Diethelm Meyer, „Schadensersatz in Scraping-Fällen – Bemerkungen zur Facebook-Entscheidung des BGH", *Recht und Schaden* (r+s) 2025, 193, 197; Boole, Maria. "Kontrollverlust als Schaden – Nachweis- und Bemessungsmaßstäbe einer neuen Schadensart", *Zeitschrift für Datenschutz* (ZD) 2026, 17, 22.

[103] Paal, NJW 2025, 261, 263; Maximilian Wellmann, "Kontrollverlust nur bei Datenweitergabe an Dritte", *Zeitschrift für Datenschutz* (ZD) 2025, 331, 334; Peisker/Tegel, NJW 2026, 1709, 1712.

[104] Heine, RDi 2025, 161, 163.

[105] Jakob Horn, "Schadensersatz für Daten-Scraping auf Facebook", *Zeitschrift für Datenschutz* (ZD) 2025, 162, 165.

[106] Thomas Hoeren, "Immaterieller Schaden wegen Datenleck bei Musikstreamingdienstanbieter", *Zeitschrift für Datenschutz (ZD)* 2026, 218, 222.

[107] Meyer, r+s 2025, 193, 198.

[108] Oyarzún Vargas, CDT 2026, 695, 708.

[109] Oyarzún Vargas, note 108, 695, 714 („daños morales puros derivados de la pérdida de control de los datos personales").

Izquierdo Fernández criticizes the German approach to loss of control.[110] In his view, CJEU case law only supports the idea that loss of control is a factual circumstance or catalyst that cause non-material damage. However, the mere loss of control itself cannot be considered damage.[111] He argues that the passages from CJEU decisions that the BGH cites are merely transitional phrases that lead to the *ratio decidendi* in each case.[112] He sees the risk of the BGH approach promoting generic claims of loss of control, thus blurring the lines between infringement and damage and leading to a punitive function, which is contrary to the CJEU's position.[113] He points out, that the BGH´s interpretation must be understood in the context of the German legal tradition, in which monetary compensation for violations of privacy includes an element of prevention or deterrence of future infringements.[114]

3.2.2. What is Loss of Control?

The BGH did not provide a definition of loss of control in its decisions.[115] Without a clear definition established by case law, critics see the concept of loss of control as unclear and open to interpretation.[116] It is especially uncertain whether the mere possibility of third-party access to data constitutes a loss of control or if such access must be proven.[117] As Boole points out, the loss of control over one's data is characterized by unauthorized parties gaining de facto control over it, and the data subject being unable to determine its location, use, or the purpose of further processing.[118] To prevent abusive litigation, it is proposed that the trial court should question each plaintiff in person to substantiate their claims.[119] Subsequent BGH decisions have emphasized that plaintiffs must prove loss of control.[120] Furthermore, the theoretical possibilities and purely hypothetical risks do not constitute a loss of control.[121] However, non-material damage exists where loss of control has resulted in the misuse of the data on the darknet.[122]

3.2.3. Mere Loss of Control leads to Punitive Damages

The difficulty in defining loss of control demonstrates the misguided nature of the BGH's approach. Even if CJEU decisions are not linguistically consistent, loss of control should not be automatically considered non-material damage. The concept of loss of control originates in Recital 85 GDPR. In the recital, loss of control is listed alongside more prominent examples of damages, such as identity theft or fraud. However, based on its mention as part of a list, it is not apparent that loss of control should be the defining factor for the non-material damage under Article 82(1) GDPR.

If loss of control alone suffices, then further negative consequences, such as fear, anxiety or anger, are unnecessary. The plaintiff would only need to prove loss of control, not that he or she actually suffered additional negative consequences. In cases of large data breaches, loss of control can be inferred from the circumstances. In such situations, the BGH's approach would result in liability for structural GDPR infringements. This would provide plaintiffs with an easy method of claiming compensation. Thus, the concept mere loss of control would lead to punitive results and contravene the clear objective of CJEU case law which is that liability only serves to compensate for actual harm suffered by data subjects.

[110] Izquierdo Fernández, AJUM 69 (12/2025), 209, 215.

[111] Izquierdo Fernández, note 110, 209, 216.

[112] Izquierdo Fernández, note 110, 209, 218.

[113] Izquierdo Fernández, note 110, 209, 220.

[114] Izquierdo Fernández, note 110, 209, 221.

[115] Henner Schläfke and Lea Stegemann, „Private Enforcement of the GDPR in Germany. How Individuals, Associations and Competitors Can Challenge Companies in Cases of Data Protection Violation", *Transatlantic Law Journal* 2025, 156, 157; Ulrich Kulke, „Der Ersatz des immateriellen Schadens aufgrund eines DSGVO-Verstoßes", *Monatsschrift für Deutsches Recht* (MDR) 2026, 74, 79.

[116] Boole, ZD 2026, 17, 18.

[117] Horn, ZD 2025, 162, 165.

[118] Boole, ZD 2026, 17, 18.

[119] Kulke, MDR 2026, 74, 79.

[120] BGH, Judgm. of 28.01.2025 – VI ZR 109/23, ECLI:DE:BGH:2025:280125UVIZR109.23.0, para. 18 (unwanted email).

[121] BGH, Judgm. of 13.05.2025 – VI ZR 186/22, ECLI:DE:BGH:2025:130525UVIZR186.22.0, para. 33, 34 (unencrypted fax).

[122] BGH, Judgm. of 11.11.2025 – VI ZR 396/24, ECLI:DE:BGH:2025:111125UVIZR396.24.0, para 32.

3.3. Policy Implications of the German Case Law

3.3.1. Incentive for Mass Litigation

Taken together, these BGH decisions greatly simplify the process of enforcing claims in mass data breach proceedings. The CJEU had already dismissed the requirements of a de minimis threshold or economic loss. When loss of control is not contingent on additional negative consequences in an individual case, there is a strong incentive to consolidate data subjects´ claims using automated litigation tools, resulting in standardized mass litigation.

This trend is evident in the numerous proceedings concerning Meta Business Tools. Meta tracked the browsing behavior of millions of users across platforms and apps to present them with targeted advertisements on Instagram. This tracking relied on data collected from third-party websites or apps that users have visited, even if they are not logged in to Facebook or Instagram. Based on the BGH's concept of loss of control, consumer-oriented law firms have announced the possibility of filing claims against Meta and have initiated several thousand lawsuits in Germany.[123] The plaintiffs in these cases typically file combined pleadings, declaring the tracking and processing as unlawful, prohibiting this practice in the future, and demanding the deletion of tracking data from third-party websites and payment of damages). German Higher Regional Courts (*Oberlandesgerichte*, "OLG") have affirmed claims of liability for non-material damages and have often granted higher amounts than in the scraping cases because Meta's tracking of users was more intrusive to privacy.[124] It is expected that the BGH will decide on these cases within the next year.

3.3.2. Procedural Simplification

In the context of German civil procedure, loss of control as damage per se simplifies case handling for courts because they don't have to examine negative consequences in each case, which ultimately depend on the plaintiff´s state of mind. Confronted with massive litigation, this could lead to the court system becoming blocked. Additionally, the broad interpretation of loss of control significantly reduces the awards that non-material plaintiffs can expect. From this perspective, the BGH strikes a balance between procedural simplification and the effective enforcement of the GDPR.

Remarkably, the BGH approach simultaneously creates a strong incentive for bundling claims in mass actions and provides courts with a simplified tool for handling such cases. However, the result of this combination may not be what the BGH intended: As seen in the request for a preliminary ruling in the Undelam case, there is a risk of an emerging GDPR litigation industry. Not without reason, the BGH is skeptical of the use of automation in litigation practice.

4. Application in Spain

In Spain, the application of the liability under Article 82 of the GDPR is more heavily reliant on national law than in Germany.

4.1. Foundations of liability in Spanish civil law

Article 18.1 of the Spanish Constitution guarantees the right to honor, to personal and family privacy, and to the own image. Furthermore, Article 18.4 states that the law shall limit the use of data processing in order to guarantee the honor and personal and family privacy of citizens and the full exercise of their rights.

Since 1982, Organic Law 1/1982[125] ("LOPDH") has specified constitutional rights in Article 9(3)(2). This article contains a specific rule stating that civil compensation for violations of the right to honor shall extend to moral (i.e., non-material) damage. This claim is connected to the procedural rule

[123] https://www.sueddeutsche.de/wirtschaft/meta-klagen-datensammlung-deutschland-schadenersatz-li.3334105

[124] OLG München, Judgm. of 18.12.2025 –14 U 1068/25, ECLI:DE:OLGMUEN:2025:1218.14U1068.25E.0A (750 Euros); OLG Dresden, Judgm, of 03.02.2026 –4 U 193/25, ECLI:DE:OLGDRES:2026:0203.4U193.25.0A (1,500 Euros); OLG Naumburg, Judgm. of 05.02.2026 – 9 U 44/25, ECLI:DE:OLGNAUM:2026:0205.9U44.25.00 (1,250 Euros); OLG Jena, Judgm. of 02.03.2026 – 3 U 31/25, ECLI:DE:OLGTH:2026:0302.3U31.25.0A (3,000 Euros); OLG Stuttgart, Judgmnts. of 29.04.2026 – 4 U 353/24, ECLI:DE:OLGSTUT:2026:0429.4U353.24.00 and 372/24, ECLI:DE:OLGSTUT:2026:0429.4U372.24.00 (500 Euros); Assion, NJW 2026, 645, 647.

[125] Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen, BOE núm. 115, de 14/05/1982.

in Article 9(3)(1) LOPDH, which states that damage is presumed when unlawful intrusion is proven.[126] Additionally, a data breach may give rise to a claim under general extracontractual liability according to Article 1902 of the Spanish Civil Code.[127]

4.2. Spanish cases on non-material damages for data infractions

There is no reliable body of jurisprudence in Spain regarding data breaches. Given the CJEU´s broad interpretation of Article 82 of the GDPR, it is reasonable to expect an increase in data breach-related litigation in Spain.[128]

Non-material damages for data infractions have primarily been discussed in cases where an individual was wrongfully listed as unreliable in a solvency registry (*ficheros de morosidad*).[129] Article 9 of the LOPDH has been the main basis for such claims, because an entry like this clearly affects one's honor negatively.[130] Recently, the TS upheld a conviction under the right to honor, awarding 1,500 Euros for moral damages , which is presumed "iuris et de iure" once the unlawful interference is established.[131] In such cases, Spanish courts increasingly refer to CJEU case law.[132] Some have suggested applying Spanish case law on measuring moral damages to cases involving the loss of control over personal data.[133]

Spain´s domestic regulation of civil liability regarding rights to privacy and honor is considered a "satellite" to the European cause of action.[134] For this reason, it may be wise for the plaintiffs to primarily use traditional domestic claims, as courts are more familiar with them.[135]

Accordingly, on March 19, 2024, the TS decided that, despite their interconnection, the rights to honor, privacy, and protection of personal data are autonomous.[136] However, this does not mean that the damage caused to each right can be differentiated when determining compensation. Citing the CJEU´s interpretation of Article 82 of the GDPR, the TS ruled that not every breach of the provisions entitles the data subject to compensation. A breach of data protection regulations, which may result in an administrative penalty, differs from obtaining compensation, which cannot be automatic. There can be no linear equivalence between a breach and compensation. Therefore, no non-material damages were granted in a case where a bank employee unlawfully inquired about her relatives in a solvency database: The TS found no evidence that the defendant's access of the plaintiff's personal data had external significance, was known to third parties, or caused the plaintiffs any harm.

The number of cases involving liability due to data breaches that do not result from incorrect entries in the solvency register is limited. On March 13, 2025, the TS ruled that the privacy rights of an employee of a law firm were infringed upon when scanned documents containing personal information about a labor dispute between the employee and the law firm were made accessible to all employees on the law firm's server.[137] Overruling the lower courts, the TS granted non-material damages of 3,000 Euros based on Article 9(3) LOPDH. Regarding the employer´s duties, the TS

[126] For more details cf. Anja Trebes, *Gewerblicher Rechtsschutz und Urheberrecht* (GRUR) Int 2003, 519, 524.

[127] Roger Sales Jiménez, „Protección de datos personales y el derecho al honor en sistemas de información crediticia", *La Ley,* no. 10407, Sección Tribuna, 15.12.2023; Javier Álvarez Hernando, „Infracciones del RGPD y su impacto en la responsabilidad civil", *La Ley*, no. 10655, Sección Tribuna, 30.01.2025.

[128] Álvarez Hernando, *La Ley*, no. 10655, Sección Tribuna, 30.01.2025.

[129] E.g., TS, Judgm. of 12.12.2025 – ROJ STS 5827/2025, ECLI:ES:TS:2025:5827; TS, Judgm. of 19.03.2024 – ROJ STS 1495/2024, ECLI:ES:TS:2024:1495, TS, Judgm. of 06.05.2024 – ROJ STS 2173/2024, ECLI:ES:TS:2024:2173, TS, Judgm. of 19.11.2024 – ROJ STS 5884/2024, ECLI:ES:TS:2024:5884, TS, Judgm. of 02.12.2024 – ROJ STS 5990/2024, ECLI:ES:TS:2024:5990, TS, Judgm. of 13.01.2025 – ROJ STS 109/2025, ECLI:ES:TS:2025:109, Audiencia Provincial of Santander, Judgm. of 21.05.2025 – ROJ SAP S 1026/2025, ECLI:ES:APS:2025:1026.

[130] TS, Judgm. of 18.02.2015 – ROJ STS 557/2015, ECLI:ES:TS:2015:557. Sales Jiménez, *La Ley,* no. 10407, Sección Tribuna, 15.12.2023; Oyarzún Vargas, CDT 2026, 695, 712.

[131] TS, Judgm. of 12.12.2025 – ROJ STS 5827/2025, ECLI:ES:TS:2025:5827.

[132] TS, Judgm. of 05.03.2026 – ROJ STS 996/2026, ECLI:ES:TS:2026:996; Audiencia Provincial of Madrid, Judgm. of 28.06.2024 – ROJ SAP M 9841/2024, ECLI:ES:APM:2024:9841.

[133] Oyarzún Vargas, CDT 2026, 695, 713.

[134] Jorge Cabet. "Responsabilidad por daños en el artículo 82 del Reglamento General de Protección de Datos", *Legal Today*, 11.08.2023.

[135] Cabet, *Legal Today*, 11.08.2023.

[136] TS, Judgm. of 19.03.2024 – ROJ STS 1495/2024, ECLI:ES:TS:2024:1495.

[137] TS, Judgm. of 13.03.2025 – ROJ STS 1054/2025, ECLI:ES:TS:2025:1054.

relied on those under the GDPR. The right to intimacy (*derecho a la intimidad*) and the right to the protection of personal data (*derecho a la protección de datos personales*) were considered distinct yet related categories. The concept of "privacy" is broader than that of "private life" and even more so than that of "intimacy".

The Regional Court of Girona ruled that a bank was not liable under the GDPR or Spanish law in a case where a bank (defendant) sent personal data to an attorney´s (plaintiff) professional email address (info@...) , including his personal email and home address.[138] The court saw no violation because the wrongful communication was sent only to the data subject, not to a third party. The Court based its reasoning on the concept of loss of control: The fundamental right to data protection aims to ensure that individuals have control over their personal data, how it is used, and where it is sent, to prevent its unlawful circulation, which harms the dignity and rights of the data subject. In this case, however, the data subject never lost control because he was the recipient of the email.

On March 5, 2026, the TS last ruled on the relationship between Article 82(1) GDPR and Article 9(3) LOPDH.[139] In this judgment which concerned another solvency register case, the question arose as to whether the presumption of moral damages is compatible with Article 82(1) GDPR, given that the CJEU requires proof of actual non-material damage. The TS clearly distinguishes between an infringement of the GDPR and a violation of the right to honor. According to the TS, when the effects of a violation of personal data protection regulations extend beyond a mere formal breach of established principles and/or requirements, affecting the right to honor, it constitutes a violation of a fundamental right. This violation is much more serious and not governed by the GDPR, but rather by Article 9 LOPDH.[140] The TS concluded that a distinction must be made between two levels: the mere violation of the GDPR applicable to data processing and the violation of the right to honor. In the former case, damage or harm must be proven, in the latter, it is presumed by express legal provision. This provision cannot be understood as repealed by the GDPR, as it refers to a different matter.

The TS´s approach favors the plaintiff when there is an infringement of the GDPR and an illegitimate intrusion into the right to honor, personal and family privacy, and one's own image: In this case, the plaintiff can base the claim on Article 9(3) LOPDH and does not need to prove actual damage because it is legally presumed. However, if there is no violation of the right to honor, as is often the case with data leaks or security breaches, the claim should be raised under Article 82 GDPR.[141]

4.3. Loss of control as a non-material damage

The question of whether loss of control alone constitutes non-material damage is rarely discussed in Spanish legal literature. Some have commented that the loss of control alone is insufficient for non-material damage.[142] The follow-up question is which negative consequences must be proven to constitute non-material damage.[143] Even in cases of unlawful data disclosure, non-material damage cannot be presumed because doing so would create economic and financial problems for organizations and have a harmful effect on the economy in general, given the current risk of cyberattacks.[144] The CJEU´s jurisprudence regarding non-material damages, especially the idea that fear of abuse might suffice, has been compared to Pandora´s box.[145] If proving non-material damage poses a challenge to applying Article 82 GDPR,[146] this implies that merely losing control is insuffi-

[138] Audiencia Provincial of Girona, Judgm. of 05.11.2025 - ROJ SAP GI 2605/2025, ECLI:ES:APGI:2025:2605.

[139] TS, Judgm. of 05.03.2026 – ROJ STS 996/2026, ECLI:ES:TS:2026:996.

[140] TS, note 139.

[141] Cabet, *Legal Today*, 11.08.2023.

[142] Jose María Martin Faba, „El robo de datos personales, por sí mismo, no da lugar a indemnización", *La Ley Unión Europea*, no. 129, Octubre 2024, comentario 7; María José Santos Morón, "Reflections on the jurisprudence of the CJUE regarding the action for damages under Art. 82 RGPD (cases C-300/21; C-340/21; C-456/22; C-667/21; C-687/21; C-741/21)", *Cuadernos Derecho Transnacional* (CDT) 2024, 1405 para. 28; Pedro de Miguel Asensio, „Right to compensation for damage caused by data processing: international issues", *Cuadernos de derecho Transnacional (*CDT) 2024, 487 para. 14; Misericordia Cavaller Vergés, „El concepto autónomo de responsabilidad civil en el ámbito de la protección de datos personales en la era digital: análisis del artículo 82 del Reglamento 2016/679", *Revista de Derecho Comunitario Europeo* (RDCE) 2024, 251, 275.

[143] Santos Morón, CDT 2024, 1405 para. 29.

[144] Cavaller Vergés RDCE 2024, 251, 276.

[145] Javier Plaza Penadés,. „La responsabilidad civil del artículo 82 RGPD en brechas seguridad", *Revista Aranzadi de Derecho y Nuevas Tecnologías* 64, 2024.

[146] Álvarez Hernando, *La Ley*, no. 10655, Sección Tribuna, 30.01.2025.

cient to fulfill the burden of proof.

Another challenge is quantifying non-material damages. In cases of wrongful entry into a solvency register, courts have awarded damages ranging from 1,800 to 12,000 Euros. The TS has ruled that damages in cases involving a violation of the right to honor cannot be merely symbolic. When measuring damages, the effect on internal dignity and external perception by third parties must be considered.[147] Thus, the amount of compensation for non-material damages in data breaches depends on the number of potential third parties who could misuse the data, how long the data has been accessible to third parties, and the type of personal data involved.[148] Providing more precise clarification on the quantification of non-material damages in data breaches would lead to greater legal certainty.[149]

4.2. Policy Implications of the Spanish Case Law

The focus on the case law in Spain seems to be disconnected from the European landscape. Spanish courts have primarily relied on claim of violations of the right to honor, personal and family privacy, and one's own image, especially in the cases regarding the debtors registry. This will probably change in the future because the number of infringements regarding internet platforms is significantly higher. The question then becomes how Spanish courts will react when the right to honor has not been violated but the infringement occurs in the processing and access of personal data. The issues of non-material damages, loss of control, and the amount of compensation will become more urgent than they are now in Spain. It is a positive development that the TS is increasingly incorporating CJEU case law on GDPR liability in its decisions, even when the outcome does not depend on a GDPR cause of action. These references prepare the Spanish legal landscape for cases focused on Article 82(1) GDPR.

5. Consequences and legal policy

What are the consequences of this jurisprudence for the digital economy? More specifically, is the BGH's broad approach to non-material damages reasonable and balanced, considering the position of users (data subjects), the data economy, and the court system? Discussing these consequences can help determine if case law effectively increases data protection or if it gives data subjects (and their lawyers) undeserved advantages while hindering the development of beneficial uses of data for the data economy.

5.1. Private enforcement against Big Data

As demonstrated above for the CJEU case law and even more for the BGH approach, the judicial interpretation of Article 82 GDPR grants data subjects a strong legal position. The liability mechanism may serve as an incentive in two ways.

First, data companies will seek to exonerate themselves under Article 82(3) GDPR by preventing data breaches and misuse of personal information. They can implement technical and organizational measures.[150] Documenting data protection compliance is essential.[151] Once a breach becomes public, the data subject will receive fair compensation without the data company being punished. Prevention and compensation are two forms of liability that lead to stronger data protection measures.

However, broad liability could lead to outcomes that contradict its purpose. Data companies may try to keep data breaches secret to avoid excessive liability. Additionally, the total compensation awarded to a very large number of data subjects in various member states could be disproportionate. Taken altogether, the damages could be prohibitive for data companies. For example. if every user in the scraping case before the BGH could sue in Germany, the total compensation would be 100 Euros multiplied by 533 million. This example shows that, even if the CJEU´s legal arguments seem plausible, they could lead to inconsistent results in a broader context of the digital economy.

[147] TS, Judgm. of 18.02.2015 – ROJ STS 557/2015, ECLI:ES:TS:2015:557.

[148] Martin Faba, *La Ley Unión Europea*, no. 129, Octubre 2024, comentario 11.

[149] Álvarez Hernando, *La Ley*, no. 10655, Sección Tribuna, 30.01.2025.

[150] Horn, ZD 2025, 162, 167.

[151] Hanßen, DB 2025, 1531, 1535; Plaza Penadés, Revista Aranzadi de Derecho y Nuevas Tecnologías 64, 2024.

5.2. Empowerment of the data subject vs. capricious claims

Similar inconsistencies exist regarding the empowerment of data subjects in the context of big data. For example, a data subject can claim fair compensation for non-material damages. This is an example of the empowerment of the individual.

However, do plaintiffs always truly care about data breaches and their consequences with respect to data security? One could speculate that some plaintiffs just want to seize the opportunity to make a quick buck. Considering the personal and intimate data that users often share on social media platforms, this question cannot be ignored. Some have therefore criticized the BGH´s approach as naive.[152]

Even if the CJEU demands that the courts verify the allegations, it is rarely possible due to limited resources. If the plaintiff explains his or her fears, it is usually impossible for the defendant to disprove it because fear is an internal state of mind. Furthermore, hearing each plaintiff at trial would be an ineffective use of the judicial system resources, especially if the payment were only 100 Euros.

The strain on judicial resources increases when data subjects are represented by specialized law firms that try to bring as many similar civil actions as possible to court for streamlined processing. The use of automation in GDPR litigation is an issue in the Undelam case. Comparisons have already been drawn between the data leak litigation industry and diesel litigation in Germany.[153] The new procedure for precedents and representative actions are instruments of German civil procedure law that aim to facilitate the enforcement of collective claims.[154] However, the success of these instruments is doubtful given the high degree of legal insurance in Germany because individual plaintiffs have easy access to the courts.[155]

5.3. Non-material compensation as more balanced approach

At face value, the compensation system set up by the CJEU takes the goals of data protection into account. However, examples show that the straightforward monetization of non-material damages could create incentives that would harm the data industry in the long run. How can the current liability system evolve to mitigate these negative incentives?

The CJEU relies heavily on the courts of the member states to review cases regarding the well-founded basis of fears or the calculation of damages, for example. Given the significant number of data breaches and the limited amount of individual compensation, it is unreasonable to expect the court system to address these issues in every single case, including minor data law infractions, at the expense of more substantial cases that require individual judicial review.

The crux of the issue is that awarding monetary compensation for non-material damages in every case could yield the wrong outcome. The CJEU could have taken a different approach: One solution would be to limit non-material damages to serious cases by establishing a seriousness threshold. Since it is not expected that the CJEU will change its position, the seriousness threshold could be applied to the form of compensation only. Only non-material damages surpassing a certain seriousness threshold should be eligible for monetary compensation. Other forms of compensation should be available for minor cases.

Recently, the CJEU expressed support for this approach in the Patērētāju tiesību aizsardzības centrs case. In cases of non-material damage, an apology from the controller/processor can serve as either standalone or supplementary compensation if the court determines that the data subject has been adequately compensated given the circumstances of the case.[156] This approach aligns non-material damages with non-material compensation.

Although there is no minimum threshold for damages, compensation may be divided based on the severity of the infraction and its impact on the individual. In cases below the seriousness threshold, compensation may be granted, especially in the form of an apology. Hybrid forms of compensation could also be considered; such as vouchers for premium social media platform services or fee waivers. Since monetary compensation is always available for serious cases, these new forms of

[152] Horn, ZD 2025, 162, 165.

[153] Mantz, GRUR 2024, 1878, 1880.

[154] For details cf. Schläfke/Stegemann, TLJ 2025, 156, 158.

[155] Heine, RDi 2025, 161, 163, 164.

[156] CJEU, Judgm. of 04.10.2024 - C-507/23, ECLI:EU:C:2024:854, para 36.

compensation would create a fairer liability system.

In the past, compensation in Spain has sometimes been merely symbolic.[157] For example, in a 2000 case, one peseta in symbolic compensation was ordered on the condition that publication of the judgment would suffice to repair the damage.[158] However, the TS subsequently overturned lower-court rulings that had held publication of a court judgment sufficient.[159] These decisions demonstrate the flexibility of Spanish law with respect to compensation for non-material damages.

5.4. Loss of Control and Strategic Litigation

The CJEU's decision in Brillen Rottler and the pending Undelam case may lead to a paradigm shift in Article 82 GDPR liability. While CJEU case law has emphasized the data subject's right to fair compensation, litigation practice (particularly in Germany) has demonstrated the limitations of an overly generous approach to compensating non-material damages. It is encouraging that the CJEU denied causation in Brillen Rottler because the GDPR infringement was provoked by the data subject's own conduct. This filter helps to prevent so-called "GDPR-hopping".[160] It is fair to say that the CJEU takes a strong position against abusive and excessive claims.[161] Although the CJEU has broadened the scope of liability to include infringements of the right of access to data under Article 15(1) GDPR, its strict enforcement of the prohibition of abusive practices provides an important counterbalance.

The CJEU has not yet taken an explicit position on the loss of control as damage per se. Given the risk of blurring the line between infringement and damage, as well as the growing litigation industry, the CJEU should insist on additional requirements. In contrast, the BGH's approach to loss of control favors the plaintiffs' position one-sidedly. If loss of control is the only consequence that has to be proven, the claim for damages is removed from the data subject-oriented approach of Article 82 GDPR. Law firms and legal tech companies will try to bundle as many cases as possible in order to create economies of scale. They will employ automation based on AI models to identify liability cases and process claims. As has been demonstrated by mass litigation in Germany, court filings can be automated. This development can be seen as an improvement to GDPR private enforcement. However, the liability mechanism of Article 82 GDPR should only be used if there is an actual need to compensate individuals for non-material damages. Creating liability claims by provoking data breaches or exacerbating them by collecting claims that individuals would never have brought on their own may lead to a weakening of the individual protection in the long run, because economic gains, not the protection of rights, determine liability.

The CJEU should focus on private enforcement of Article 82 GDPR on individuals. The CJEU should not recognize loss of control as non-material damage per se, and it should implement strict controls on abusive and automated claims. Regarding court procedures, the CJEU should limit mass litigation by requiring substantiation and verification of each individual claim by the courts. Article 82 GDPR should not be used to discipline the data industry or induce large payouts through strategic mass litigation.

If overarching public interests are involved, it should primarily be the role of democratically legitimized data protection agencies to enforce the GDPR. Effective administrative control by the supervisory authorities in Germany[162] and Spain[163] under Article 83 GDPR ensures that non-monetary compensation under Article 82 GDPR does not let the data companies off the hook too easily. According to Article 83(2)(2) GDPR, the administrative sanction must consider the number of data subjects affected and the level of damage suffered by them (litera a). It must also consider any action taken by the controller or processor to mitigate the damage suffered by data subjects (litera c). One mitigating circumstance can be if, in case of an infringement, the controller or processor

[157] Manuel Sánchez de Diego Fernández de la Riva and María Isabel Serrano Maíllo, „Analysis: Financial compensation for violations oft he right to honour in Spain",*International Press Institute* 2017, 4.

[158] Audiencia Provincial of Barcelona, Judgm. of 12.12.2000, confirmed by the TS, Judgm. of 18.02.2005 – ROJ STS 991/2005, ECLI:ES:TS:2005:991.

[159] TS, Judgm. of 25.09.2008 - 872/2008. TS, Judgm. of 18.02.2015 – ROJ STS 557/2015, ECLI:ES:TS:2015:557.

[160] Peisker/Tegel, NJW 2026, 1709, 1712.

[161] Sebastian Dienst and Korbinian Deutinger, "Datenschutzrecht: Datenschutzrechtlicher Auskunftsanspruch und Rechtsmissbrauch", *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW) 2026, 410, 416.

[162] In Germany, private entities are overseen by the Landesbeauftragte für den Datenschutz (LfDI), or State Data Protection Officers, in each of the 16 federal states.

[163] In Spain, the Spanish Data Protection Agency (Agencia Española de Protección de Datos, AEPD) is responsible for this supervision.

has done "whatever they can do in order to reduce the consequences of the breach for the individual(s) concerned."[164] This mechanism encourages the timely offering of compensation, whether monetary or otherwise.

5.5. Outlook

Since the CJEU's decision in the Österreichische Post case approximately three years ago, the number of data-liability cases in Germany has exponentially increased. Spain has seen slower development. This seems surprising, given Spain's long-standing recognition of access to moral damages. One possible reason is that the Spanish court system takes longer to resolve civil cases than the German system does.[165] As more GDPR liability cases arise, it remains to be seen whether the Spanish courts will adopt the BGH's extensive approach. The German decision on loss of control is also expected to lead to clarifications by the CJEU sooner or later. Even if the CJEU were to take a more cautious approach and require consequences beyond loss of control, the German discussion has clarified the goals and incentives of data protection liability.

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[164] European Data Protection Board, Guidelines 04/2022 on the calculation of administrative fines under the GDPR, 24.05.2023, para. 74.

[165] EU Justice Scoreboard 2024, Figure 5 to Figure 8.

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