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Non-Material Damages Claims under the GDPR

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The webinar will begin at 4.00pm

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Today's Speaker



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Agenda

1. Introduction
2. GDPR Refresher
3. (Strict?) Liability
4. Damages: Material & Non-Material
5. Procedural Considerations
6. Representative Actions
7. Q&A



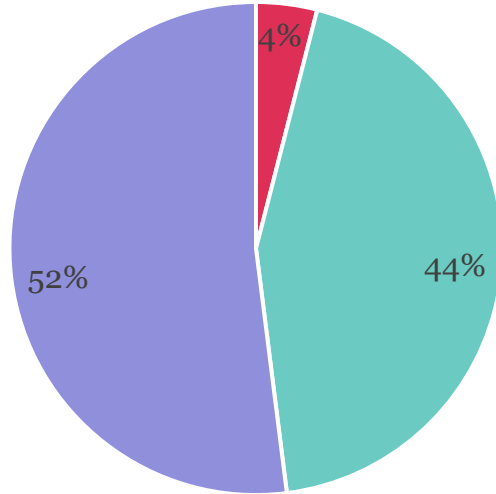
Introduction

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Introduction

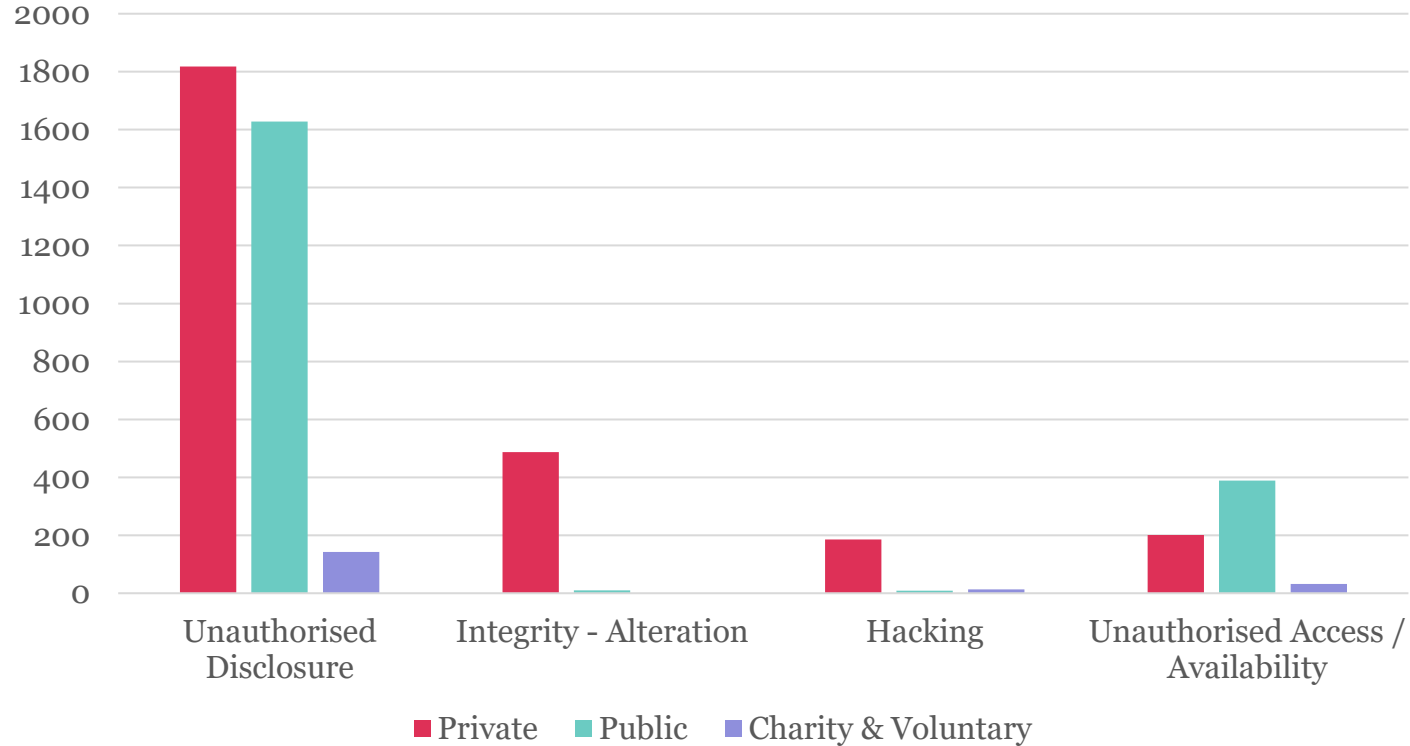
- Total personal data breach notifications received by the DPC in 2022 was 5,695.
- IBM, in its X-Force Threat Intelligence Index 2023 identified that organisations operating in the Manufacturing, Finance and Insurance, Professional, Business and Consumer Services, and Energy sectors combine to account for almost 70% of all reported cyberattacks in 2022.
- A Eurobarometer survey undertaken in November/December 2021 found that 28% of SME's operating across industries experienced at least one cybercrime event in 2021.
- Personal data breaches, either unintentional or nefarious, becoming more ubiquitous and costly.

DPC Breach Notifications 2022 - Breakdown



■ Voluntary & Charity - 246 ■ Public Sector - 2,568 ■ Private Sector - 3,014

Data Breach Notifications (By Category)



GDPR Refresher

2

GDPR Refresher

- **Personal Data** - any information that relates to an identified or identifiable living individual.
- **Data Subject** - an individual to whom personal data relates.
- **Data controller** - person or entity that decides the purposes and methods of processing data.
- **Data processor** – person or entity that processes personal data on behalf of controller.



GDPR Refresher (Cont'd)

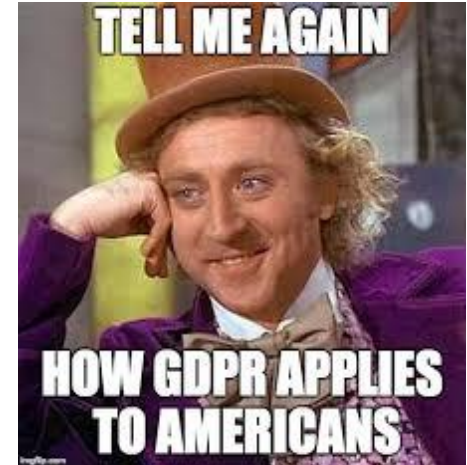
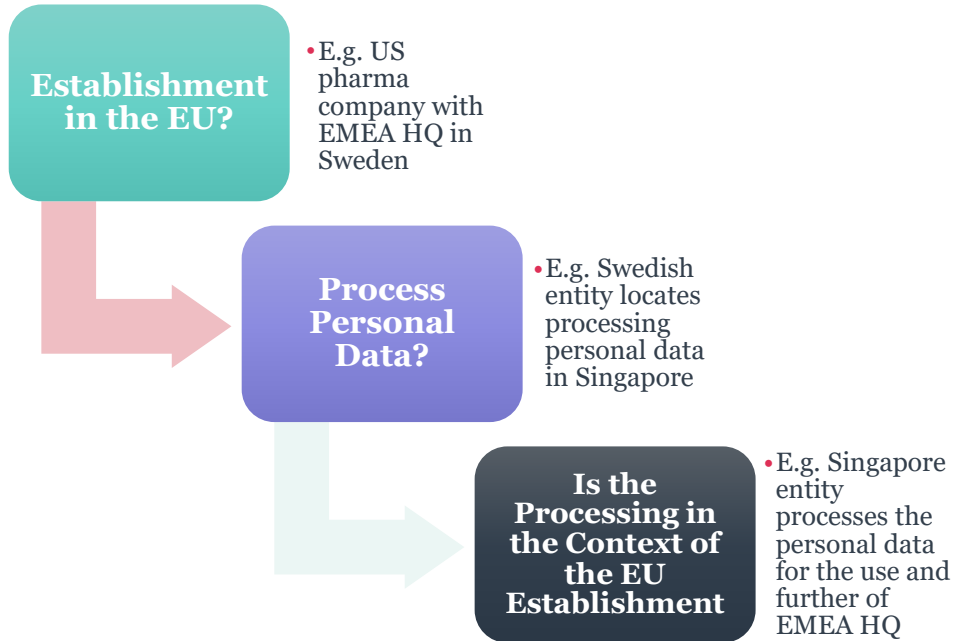
- **Personal Data Breach:**
 - Breach of security that leads to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data, transmitted, stored or otherwise processed.
 - Negatively impacts the confidentiality, integrity, or availability of personal data.
 - The data controller/processor is **unable to ensure compliance** with the obligations set out in the GDPR.

GDPR REFRESHER (Cont'd)

- **Liability & Compensation:**
 - Chapter 8 of the GDPR.
 - Article 79 – the right to an effective judicial remedy.
 - Article 80 – representative actions.
 - Article 82 – right to compensation.
 - Section 117 of the Data Protection Act 2018.

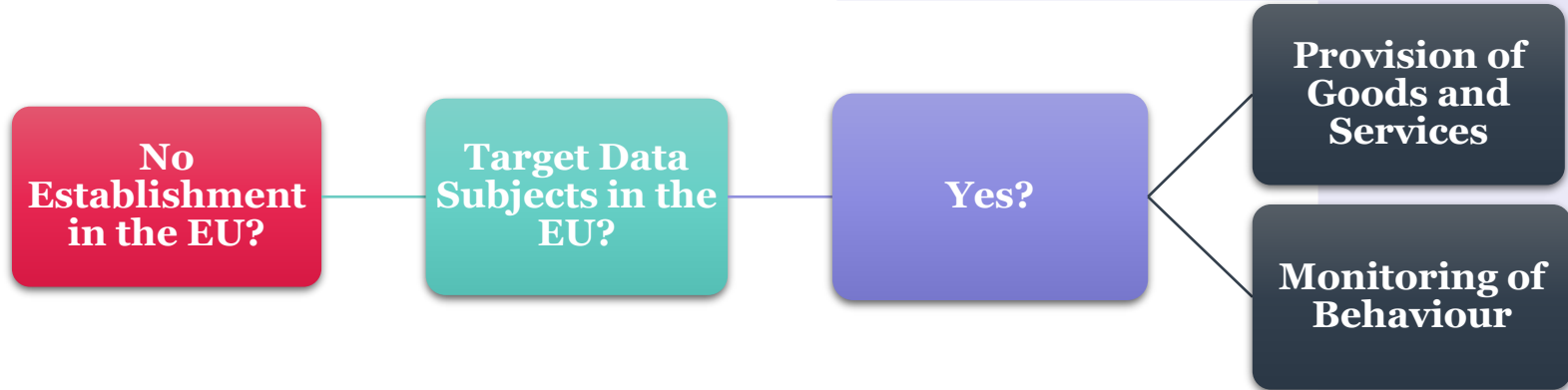
GDPR Refresher (Cont'd)

- **Territorial Application**



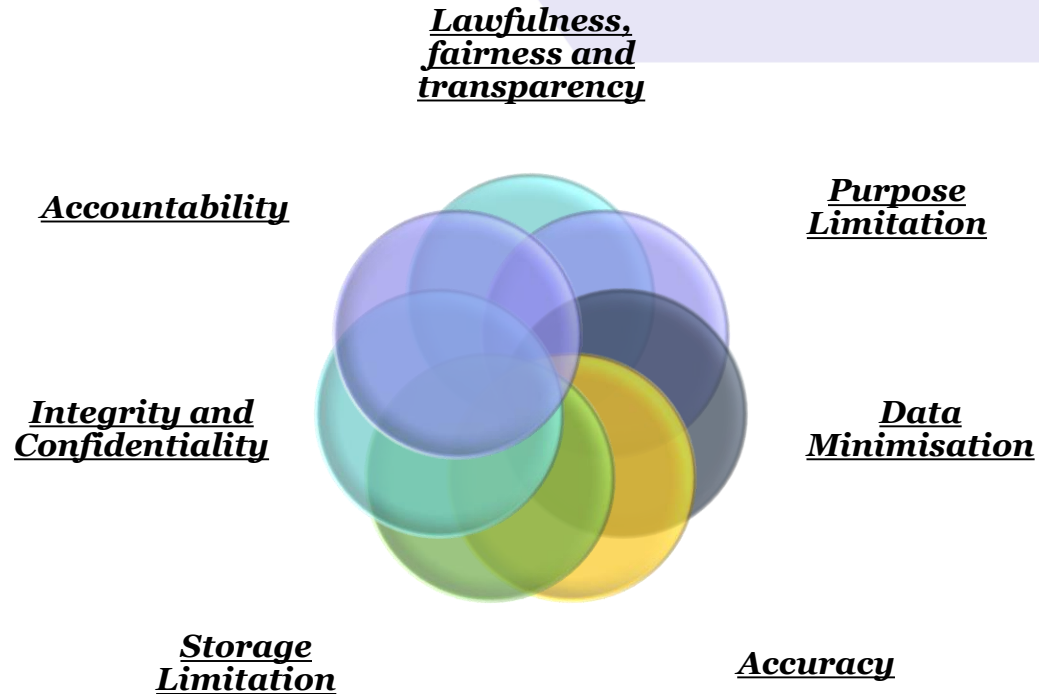
GDPR REFRESHER (Cont'd)

- **Territorial Application**



GDPR REFRESHER (Cont'd)

- Principles of the GDPR



(Strict?) Liability

3

(Strict?) Liability

Article 82

- Where someone suffers damage as the result of an **infringement** of the GDPR, that individual has the right to compensation for the damage suffered.
- Controller / processor is liable for that damage unless can prove they are in **no way responsible**.
- To amount to a personal data breach (a form of infringement) there must be a **breach of security**.



(Strict?) Liability

Article 32 – Security of Processing

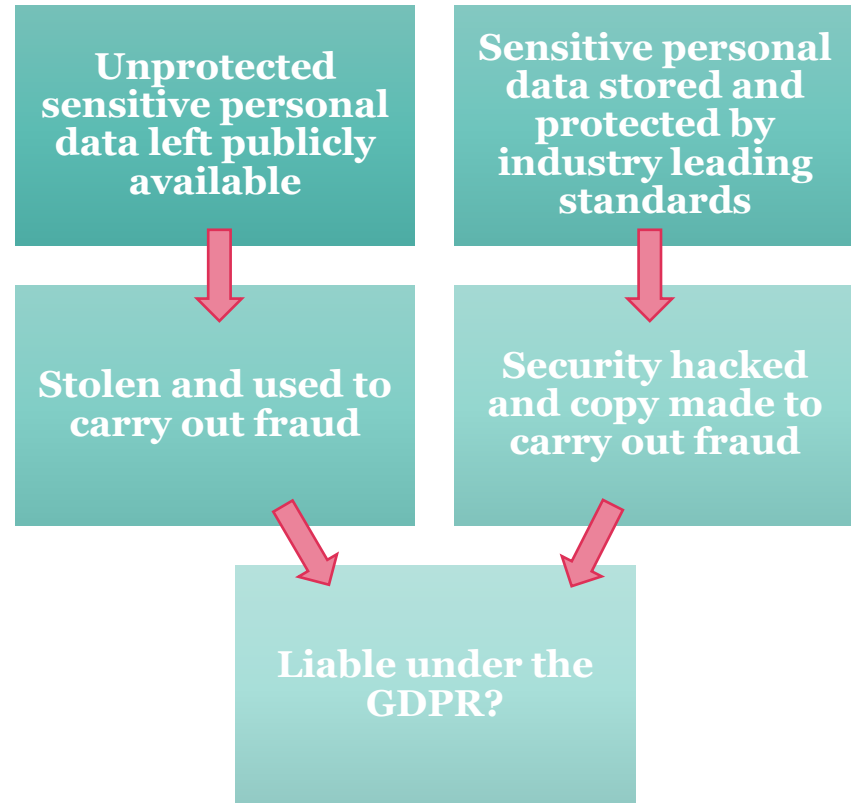
- Article 32 (1) - Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall ***implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk.***
- Art 32 (2) - In ***assessing the appropriate level of security account*** shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed.

(Strict?) Liability

Recital 83 of the GDPR – Security of Processing

- *Evaluate the risks* inherent in the processing and implement measures to mitigate those risks, such as encryption.
- Those measures should ensure an ***appropriate level of security***, including confidentiality
- ***Consideration should be given to the risks that are presented by personal data processing***, such as accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed which may in particular lead to physical, material or non-material damage.

(Strict?) Liability



(Strict?) Liability

Strict Liability?

- Do the actions of the data controller need to be considered here at all?
- Reading of Article 82, in particular paragraphs (2) and (3), suggests strict liability.
 - (2) - Any controller involved in processing **shall be liable for the damage caused by processing** which infringes this Regulation
 - (3) - A controller or processor shall be **exempt from liability** under paragraph 2 if it proves that it is **not in any way responsible** for the event giving rise to the damage
- Compare again other provisions which suggest elements of proportionality – e.g., Article 32, Recital 84 and Recital 4.

(Strict?) Liability

CJEU Position

- C-300/21- *UI v Osterreichische Post AG* (the ‘Austrian Post Case’)
- *Mere infringement of the GDPR is not sufficient* to establish a right to compensation under Article 82.
- Three cumulative conditions must be satisfied to confer a right to compensation on a data subject:
 - ✓ An infringement of the GDPR.
 - ✓ Damage must have resulted from that infringement; and,
 - ✓ There must be a causal link between the infringement and the damage suffered.



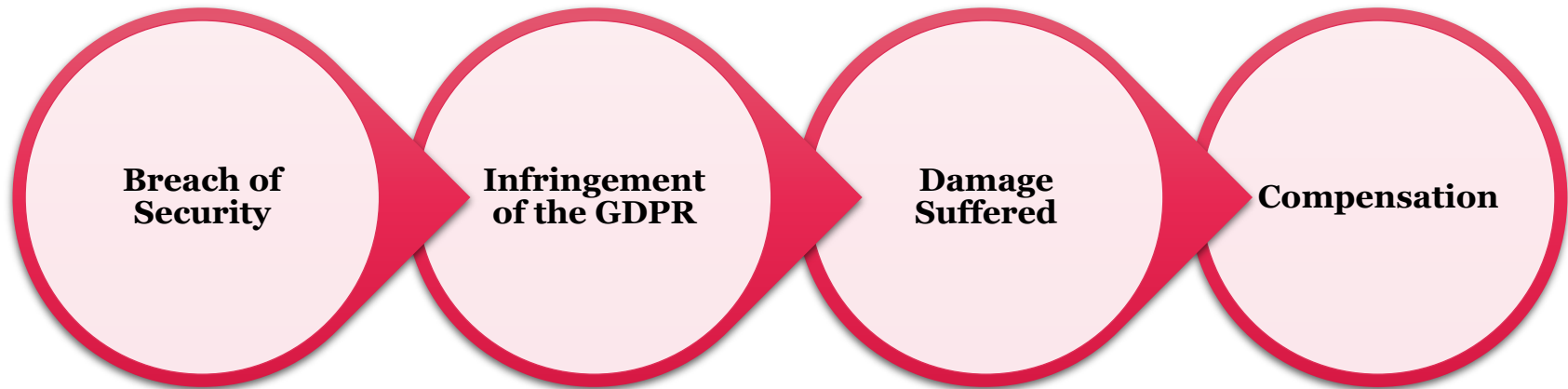
(Strict?) Liability

Irish Position

- Section 117 of the Data Protection Act 2018.
- Claims founded on Tort law – a civil wrong.
- *Shawl Property Investments Ltd v A. & B.*, Court of Appeal said (obiter) the right to compensation is not an absolute right and that a principle of proportionality needs to be considered when evaluating liability.
- “Nothing stated in s. 117 or indeed the Act itself suggests that a data protection action is a tort of strict liability.” [2021] IECA 53 at para. 114
- This and Austrian Post Case endorsed in *Kaminski v Ballymaguire Foods* [2023] IECC 5.

(Strict?) Liability

Chain of Causation – Personal Data Breach



(Strict?) Liability

A Note of Caution – Recent Advocate General’s Opinion

- *C-667/21 - ZQ v Medizinischer Dienst der Krankenversicherung Nordrhein.*
- Considered the degree of fault on the controller for the purpose of considering damages for an infringement.
- The degree of fault on the part of the controller or processor does not have a bearing on establishing the liability of either of them or quantifying the amount of non-material damage to be compensated on the basis of Article 82 of GDPR.
- What matters is the situation of the victim who suffers the damage resulting from the infringement, in the absence of a rule requiring the victim to bear the consequences of that damage.

(Strict?) Liability

A Note of Caution (Cont'd)

- Particular attention to Article 82(3) - exemption is possible if ‘a controller ... proves that it is not in any way responsible for the event giving rise to the damage’.
- The words ‘not in any way’ stand out in that provision and suggest that the model is not one based on fault (or even very minor fault) with reversal of the burden of proof.
- No mention of intention or fault in the Article 82 compared to Article 83 which provides that administrative fines issued by Supervisory Authorities can consider negligence.
- It would diminish the practical attractiveness of the remedy for damages.
- **Austrian Post Case is the current guiding case – no strict liability.**
- Aligns with Irish law – Court of Appeal in the *Shawl* decision and more recently in the Circuit Court *Kaminski* judgment.

Damages Under Art. 82 of the GDPR

4

Damages

Material and non-material damage

- Article 82 – right compensation for material and non-material damage.
- Material damage = economic loss. Relatively straightforward to assess.
- Non-material damage is new introduction by the GDPR.
- Not defined under the GDPR but understood to cover upset, inconvenience, stress, anxiety. Difficult to assess.
- Recital 85 – non-exhaustive list of harms that an infringement may cause.
- Important decisions delivered by the CJEU in the Austrian Post Case and in Ireland with the *Kaminski v Ballymaguire Foods Limited* [2023] IECC 5 judgment.



Damages

De Minimis Rule

- Applies to the tort of infringement of statutory rights.
- Minimal technical breach does not give rise to a cause of action.
- In Ireland, unreported judgment, seven trade union members had their actions for breaching their data protection rights dismissed on the basis that “*more than minimal loss*” must be proved.
- UK – *Lloyd v Google LLC* [2021] UKSC 50 – damages not available for loss of control and requires a threshold of seriousness.
- UK – *Rolfe v Veale Wasbrough Vizards LLP* [2021] EWHC 2809 (QB) - “*claimants could not have suffered damage or distress above a de minimis level*”.

Damages

De Minimis Rule (cont'd)

- Mainland Europe – a growing trend toward applying the *De Minimis* rule for claims for non-material damage.
- Advocate General's Opinion in the Austrian Post Case:
 - ✓ Endorsed the De Minimis rule.
 - ✓ Mere infringement of provisions of the GDPR, without accompanying damage (material or non-material), is not sufficient for the purposes of awarding compensation.
 - ✓ Upset not recoverable.

Damages

No Minimal Treshold

- Austrian Post Case – the CJEU did not follow the Advocate General’s opinion.
- Wording of the GDPR does not provide for a limit to claims for non-material damages.
- To include a limit would be contrary to the concept of damage which is to be interpreted broadly.
- Recital 146 of the GDPR provides that the right to compensation requires that data subjects to receive “full and effective compensation for the damage they have suffered”.
- Damage must be casually linked to the alleged data breach.
- However, the CJEU acknowledged that the likelihood of national courts awarding compensation would vary depending on the seriousness of the damage.

Damages

Irish Position pre-Kaminski

- Regime prior to the GDPR to not allow for non-material damage claims.
- Right to compensation under Article 82 of the GDPR set out in Section 117(4)(b) of the Data Protection Act 2018:
 - *“The court hearing a data protection action shall have the power to grant to the plaintiff one or more than one of the following reliefs...*
 - ***(b) compensation for damage suffered by the plaintiff as a result of the infringement of a relevant enactment”***.

Damages

Irish Position pre Kaminski (cont'd)

- *Collins v FBD Insurance PLC* [2013] IEHC 137 & *Murphy v Callinan* [2018] IESC 59 - require a breach of duty and for the claimant to show damage to ground a claim for compensation – no longer the case.
- Under Tort law, a claim for non-material damage would be a claim for emotional distress or injury suffered.
- Damages could only be awarded for a recognised/diagnosed psychological injury (*Kelly v Hennessy* [1995] IESC 8).
- In Ireland - *Cunniam v Parcel Connect Limited trading as Fastway Couriers Ireland and Others* [2023] IECC 1, had intimated adopting or favouring the De Minimis rule. However, this was before the CJEU's decision in the Austrian Post Case.

Damages

Kaminski v Ballymaguire Foods Limited

- Plaintiff sought a claim for non-material damages under s.117 of the Data Protection Act 2018
- Plaintiff was identifiable in CCTV footage used to demonstrate poor food safety practices.
- Plaintiff became aware from other employees and was allegedly mocked and humiliated.
- Complaint related to the further processing of the CCTV footage for training and that the Plaintiff was identifiable.
- Suffered distress, anxiety, embarrassment and lack of sleep for a short period.

Damages

Kaminski v Ballymaguire Foods Limited (Cont'd)

- Defendant denied any breach under the GDPR or the 2018 Act.
- Defendant had appropriate data protection policies in place.
- No damage had been identified by the Plaintiff or in the alternative it is limited to a claim for non-material damages
- Defendant had a legitimate interest and therefore a lawful basis under Article 6 of the GDPR to process the CCTV footage for training.

Damages

Kaminski v Ballymaguire Foods Limited (Cont'd)

- Court observed:
 - Austrian Post decision gave sufficient platform to take a consistent approach to data breach claims for non-material loss.
 - Noted that there is no *de minimis* standard of loss.
 - Damage must be interpreted broadly.
 - Privacy is a human right and personal information is a key aspect.
 - Processing of personal data is only lawful where there is a demonstratable legal basis – Article 6 of the GDPR.
 - In the case of Legitimate Interest, it requires an assessment against individual's rights and freedoms.

Damages

Kaminski v Ballymaguire Foods Limited (Cont'd)

- A mere violation does not warrant an award of compensation a
- no minimum threshold to claim for non-material damages.
- Compensation does not cover “mere upset”.
- There must be a link between the infringement and the damage.
- Damage must be proved with supporting evidence where possible.
- Data policies should be clear and transparent and accessible by all parties affected
- An apology and delay are to be considered when assessing damage.
- Claim for legal costs can be affected the above.
- Award for most non-material damages claims will be modest.

Damages

Kaminski v Ballymaguire Foods Limited (Cont'd)

- Court held:
 - Plaintiff was identifiable.
 - Lack of clarity in the defendant's data protection policies at the time and the lawfulness of processing the footage for training purposes.
 - Poor security – CCTV footage stored on communal PC with no password protection.
 - Injury went beyond mere upset – “*emotional experience and negative emotions of insecurity which did affect him*”.
 - No medical report but was a truthful witness - awarded €2,000 to the Plaintiff.
 - Judgment doesn't refer to costs...

Damages

What Next?

- There will be further developments at an Irish level and from the EU.
- Courts and Civil Law (Miscellaneous Provisions) Act 2023, which amends the 2018 Act, giving the District Court jurisdiction to hear and determine data protection actions (yet to be commenced)
- Five more preliminary references to be decided on by the CJEU.
- From a data controller's perspective – demonstratable compliance with data protection obligations is still key – lawful basis, transparency, purpose limitation, security etc.
- Review your policies, have a response plan, do you need a RoPA (Article 30 of the GDPR)
- CCTV footage – particular focus – carry out DPIAs.

Damages

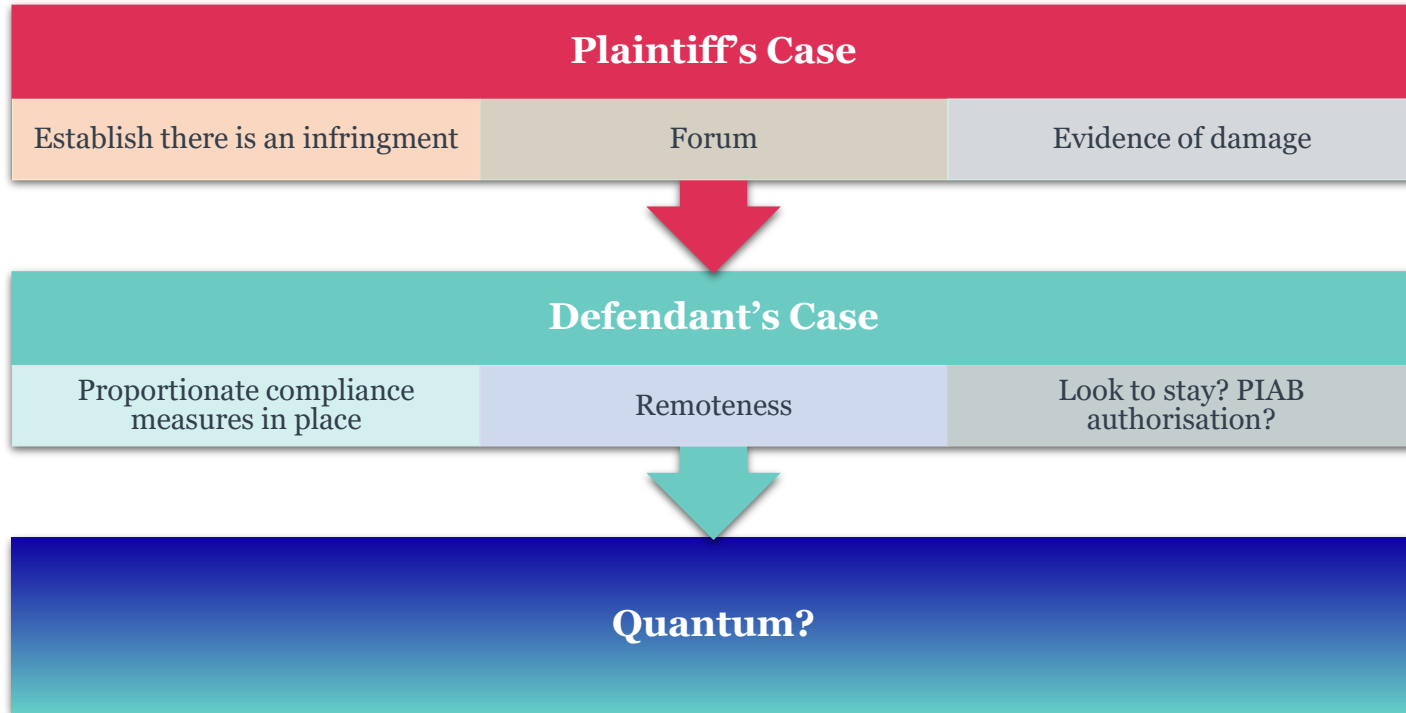
Recap

- Non-material damages still divisive.
- CJEU has held that the wording of the GDPR does not provide for a limit to claims for non-material damages.
- However, the CJEU acknowledged that the likelihood of national courts awarding compensation would vary depending on the seriousness of the damage.
- In Ireland – current jurisprudence now reflects Austrian Post decision – absence of real guidance on quantum.
- Divergence with the UK – continues with the De Minimis principle.
- More to follow from the CJEU.

Procedural Considerations in Ireland

5

Procedural Consideration in Ireland



Representative Actions

7

Representative Actions

Representative Actions

Allows for NGOs to bring actions on behalf of group of data subjects.

Circuit Court Rules in place.

Test Case

More common in Ireland.

Allows for small number of claims to be heard while others stay pending.

EU RAD Directive

Minimum standards for consumers to seek collective redress.

June 2023

Concluding Remarks

7

Concluding Remarks

Data breach actions featuring in wide range of civil disputes – e.g. employment and financial services.

Liability – at a crossroads – strict or not?

Non-material damages – no minimum threshold but claimant must prove damage.

Five preliminary references still before the CJEU relating to Article 82.

Irish Courts showing their capability to handle these types of claims.

Question of when, and not if, for data protection class actions being heard in Ireland

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**Thank you for your time.
Any questions?**

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