

# The right to compensation of a competitor for a violation of the GDPR

Tim F. Walree\* and Pieter T. J. Wolters\*\*

## Key Points

- Although the General Data Protection Regulation (GDPR) is primarily aimed at the protection of data subjects, competitors of the controller may also suffer damage due to an infringement.
- Article 82(1) of the GDPR stipulates that ‘any person’ shall have the right to receive compensation. It does not clarify whether a competitor can also invoke this right.
- At first sight, a right to compensation for competitors does not match the primary purpose of the GDPR.
- However, the GDPR also intends to advance the free movement of personal data, strengthen the protection of personal data, and harmonize data protection law. The right to compensation of competitors can make a meaningful contribution to these objectives.
- Furthermore, other provisions of European origin also allow enforcement by competitors.

## 1. Introduction

Article 82(1) of the General Data Protection Regulation (GDPR)<sup>1</sup> stipulates that ‘any person’ who suffers material or immaterial damage as a result of an infringement of the GDPR, shall have the right to receive compensation from the ‘controller’ or ‘processor’ for the damage

suffered.<sup>2</sup> However, the GDPR does not clarify who is covered by the term ‘any person’.

The Regulation is primarily aimed at the protection of the natural person whose personal data are being processed (the ‘data subject’).<sup>3</sup> However, the data subject is not the only ‘person’ who may encounter adverse consequences from a breach of the GDPR. Competitors of the controller may also suffer damage due to an infringement (Section 2).

The GDPR does not clarify whether a competitor can invoke the right to compensation. The prevailing opinion in the literature is that Article 82 GDPR does not protect competitors (Section 3.3.1). This opinion is based on the Regulation’s purpose. The GDPR is primarily aimed at the protection of fundamental rights and freedoms of natural persons. At first sight, a right to compensation for competitors does not match this purpose.

However, the protection of fundamental rights and freedoms of natural persons is not the only purpose of the GDPR. The Regulation also intends to advance the free movement of personal data, strengthen the protection of personal data, and harmonize data protection law. The right to compensation of competitors contributes to these objectives. Furthermore, other provisions of European origin also allow enforcement by competitors. Finally, in several German cases, competitors appealed to the GDPR in a claim on basis of the *Gesetz gegen den unlauteren Wettbewerb* (‘UWG’).

In this contribution, we answer the following question: ‘Can a competitor of a controller rely on the right to compensation of Article 82(1)? If so, under what conditions?’ Section 2 describes various examples in which a competitor suffers damage as a result of a breach of the GDPR. Subsequently, we analyse the text and

\*Radboud Business Law Institute, T.F. Walree, Montessorilaan 10, 6525 HR Nijmegen, The Netherlands. E-mail: t.walree@jur.ru.nl

\*\*Radboud Business Law Institute, P.T.J. Wolters, Montessorilaan 10, 6525 HR Nijmegen, The Netherlands. E-mail: p.wolters@jur.ru.nl

1 European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing

Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

2 About these concepts, see GDPR, art 4(7), (8). About the right to compensation, see also Brendan Van Alsenoy, ‘Liability under EU Data Protection Law. From Directive 95/46 to the General Data Protection Regulation’ (2016) 7 JIPITEC 271.

3 GDPR, art 4(1).

context of the GDPR and compare it to other provisions of European origin (Section 3) and the German UWG (Section 4). We finish with a conclusion (Section 5).

## 2. The damage of a competitor due to a violation of the GDPR

The GDPR is primarily aimed at the protection of data subjects (see also Section 3.3.1).

First and foremost, a violation by a controller leads to an infringement of the fundamental right to the protection of personal data of the data subject. However, competitors may also encounter adverse consequences.

In the next subsections, we will present a few examples of violations that cause such adverse consequences. They are chosen to illustrate various ways in which a competitor may suffer damage due to a violation of the GDPR by a controller. The various examples also share a common characteristic: the violation of the GDPR by the controller leads to a competitive advantage over its competitors. The violation can enable the controller to process additional personal data (Section 2.1), attract more customers (Section 2.2), or prevent customers from easily switching to a competitor (Section 2.3). The examples are not meant to be exhaustive. Any violation of the GDPR that gives a controller a competitive advantage over its competitors may lead to adverse consequences for the competitors and thus to a right to compensation (see also Section 4).

### 2.1 The unlawful processing of personal data

Personal data have economic value.<sup>4</sup> They provide insight in preferences and needs of (potential) customers.<sup>5</sup> Controllers use this information to develop or optimize their products and services.<sup>6</sup> Personal data are therefore indispensable to compete with other companies.<sup>7</sup> Access to personal data is also important for attracting

advertisers. Providers of digital services and products frequently do not require payment from their users.<sup>8</sup> Instead, their revenue model is based on displaying advertisements. Personal data are used to adjust the advertisements to the users' needs and preferences.<sup>9</sup> Access to more personal data enables a provider of digital services and products to better personalize the advertisements and increase its revenue.

A controller is only allowed to process personal data in accordance with the GDPR. In particular, a legal ground under Article 6(1) GDPR is required. A violation of this rule<sup>10</sup> can cause harm to a competitor. By collecting and using data without a legal ground, the controller has access to more personal data than a competitor who does adhere to the GDPR. It is therefore better able to personalize advertisements. This makes the controller more attractive to advertisers than its competitor. The competitor therefore misses out on revenue from advertisements.

### 2.2 The violation of a duty to provide information

A controller is obligated to process the personal data in a transparent manner.<sup>11</sup> It has a duty to inform the data subjects about the processing of their personal data. It must, for example, inform them about the purposes of the processing and about any (categories of) recipients of the personal data.<sup>12</sup> Furthermore, the controller may wish to use the 'freely given, specific, informed and unambiguous' consent of the data subject as a legal ground.<sup>13</sup> Both the information and the request for consent should use 'clear and plain language'.<sup>14</sup>

A violation of a duty to provide information could make it easier for a controller to attract new customers. The request for consent and adequate information about the processing may cause the data subject to think twice about the use of a

4 See eg European Parliament and Council Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1 ('Digital content and digital services Directive'), recital 24; Jacopo Ciani, 'A Competition-Law Oriented Look at the Application of Data Protection and IP Law to the Internet of Things: Towards a Wider "Holistic Approach"' in Mor Bakhom and others (eds), *Personal Data in Competition, Consumer Protection and Intellectual Property Law. Towards a Holistic Approach?* (Springer, Berlin 2018) 223–24; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (report for the European Commission, Publications Office of the European Union, Luxembourg 2019) 73.

5 Inge Graef, 'Blurring Boundaries of Consumer Welfare. How to Create Synergies Between Competition, Consumer and Data Protection Law in Digital Markets' in Mor Bakhom and others (eds), *Personal Data in Competition, Consumer Protection and Intellectual Property Law. Towards a Holistic Approach?* (Springer, Berlin 2018) 139.

6 Barbara Van der Auwermeulen, 'How to Attribute the Right to Data Portability in Europe: A Comparative Analysis of Legislations' (2017) 33

Computer Law & Security Review 57, 58; Crémer, De Montjoye and Schweitzer (n 4) 73, 76.

7 Graef (n 5) 122.

8 See eg Digital content and digital services Directive, recital 24; OECD, *Online Advertising. Trends, Benefits and Risks for Consumers* (OECD digital economy papers No 272, OECD Publishing, Paris 2019) 15.

9 See also Frederik J Zuiderveen Borgesius, 'Singling Out People Without Knowing Their Names – Behavioural Targeting, Pseudonymous Data, and the New Data Protection Regulation' (2016) 32 Computer Law & Security Review 256.

10 For example, a controller could buy and use a dataset or collect personal data without the consent of the data subject or a legitimate interest. GDPR, art 6(1)(a), (f).

11 GDPR, art 5(1)(a).

12 GDPR, art 13(1)(c), (d), 14(1)(c).

13 GDPR, art 4(11), 6(1)(a).

14 GDPR, art 7(2), 12(1).

service.<sup>15</sup> This is especially true for privacy-aware customers. Dealing with personal data in a ‘privacy-friendly’ manner can be a ‘unique selling point’ for the controller. It could be a reason for (potential) customers to choose a particular service or product.<sup>16</sup> A failure to request consent or inadequate and incomplete information that falsely suggests a privacy-friendly business model can therefore benefit a controller to the detriment of a competitor with comparable processing activities who does properly inform its (potential) customers. They allow the controller to attract customers more easily.

### 2.3 Non-compliance with the right to data portability

Under certain conditions, a data subject has the right to data portability pursuant to Article 20 GDPR.<sup>17</sup> This right entitles the data subject to a copy of its personal data in a structured, common, and machine-readable form. This allows a data subject to transfer its personal data from the controller to a competitor.<sup>18</sup> If the controller does not respect this right, it is more difficult for the data subject to switch between providers for ‘data-driven services’.<sup>19</sup> A controller can thus prevent its customers from easily switching to a competitor.

## 3. The text and context of the GDPR

Section 2 demonstrates that a competitor may suffer damage because of an infringement of the GDPR. This raises the question whether a harmed competitor can rely on Article 82(1) GDPR. The Regulation does not provide an explicit answer to this question. In this section, we successively analyse the text of Article 82(1)

GDPR (Section 3.1), other provisions of the GDPR (Section 3.2) and its underlying objectives (Section 3.3).

### 3.1 The text of Article 82(1) GDPR

The text of Article 82(1) of the GDPR states that ‘any person’ who has suffered damage as a result of an infringement of the Regulation is entitled to compensation from the controller or processor. A competitor may suffer damage due to a violation by the controller (Section 2). A textual interpretation therefore leads to the conclusion that a competitor can also rely on Article 82(1). Moreover, the GDPR does not limit the concept of a ‘person’ to natural persons. Many other provisions specifically refer to either natural or legal persons.<sup>20</sup> In this light, the general ‘any person’ suggests that legal persons are not excluded from the protection of Article 82(1) GDPR. Although the article does not explicitly state that both a natural person and a legal person fall under the definition of ‘any person’,<sup>21</sup> this is no exception.<sup>22</sup>

### 3.2 Other provisions of the GDPR

Other provisions of the GDPR suggest that the competitor cannot rely on the right to compensation. The Regulation is primarily aimed at the protection of the data subject. For example, personal data must be processed lawfully, fairly, and in a transparent manner *in relation to the data subject* (Article 5(1)(a) GDPR). A controller can also process personal data for the purposes of its legitimate interests, except where such interests are overridden by the interests or fundamental rights and freedoms *of the data subject*.

The provisions on enforcement also provide an argument against a competitor’s right to compensation. The GDPR explicitly grants enforcement tools to data

15 Eg Kenneth Olmstead and Michelle Atkinson, *Apps Permissions in the Google Play Store* (Pew Research Center 2015) 5.

16 Demetrius Klitou, *Privacy-Invasive Technologies and Privacy by Design. Safeguarding Privacy, Liberty and Security in the 21<sup>st</sup> Century* (TMC Asser Press, The Hague 2014) 279–81. See also Ann Cavoukian, Scott Taylor and Martin E Abrams, ‘Privacy by Design: Essential for Organizational Accountability and Strong Business Practices’ (2010) 3 *Identity in the Information Society* 405; Gry Hasselbalch and Pernille Tranberg, *Data Ethics. The New Competitive Advantage* (Publishare, Copenhagen 2016). It is not clear to what extent data subjects are truly affected by non-compliance with the duty to provide information. Data subjects deal with a vast quantity of parties who process their data in various ways. Even if data subjects value a privacy-friendly use of their personal data, it is practically impossible for them to read and understand the information that is provided by the controller. Eg Bert-Jaap Koops, ‘The trouble with European data protection law’ (2014) 4 *IDPL* 250, 252; Christophe Lazaro and Daniel Le Métayer, ‘Control over Personal Data: True Remedy or Fairy Tale?’ (2015) 12 *SCRIP* 23, 10, 23–24; Jef Ausloos and Pierre Dewitte, ‘Shattering One-Way Mirrors – Data Subject Access Rights in Practice’ (2018) 8 *IDPL* 4, 21; P T J Wolters, ‘The Control by and Rights of the Data Subject Under the GDPR’ (2018) 22 *Journal of Internet Law* 1, 7. For empirical research on the reading of privacy statements by data subjects, see eg

European Commission, *Special Eurobarometer 487a, Report, The General Data Protection Regulation* (OECD Publishing, Paris 2019) 47–55.

17 About this right and its conditions, see eg GDPR, recital 68; art 29 Data Protection Working Party, *Guidelines on the right to data portability* (16/EN WP 242 rev.01, 2017); Paul De Hert and others, ‘The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services’ (2018) 34 *Computer Law & Security Review* 193; Wolters (n 16) 10–11.

18 Art 29 Data Protection Working Party (n 17) 4–5; Van der Auwermeulen (n 6) 58; De Hert and others (n 17) 195, 198, 201; Wolters (n 16) 10–11; Crémer, De Montjoye and Schweitzer (n 4) 81.

19 Cf Helmut Köhler, ‘UWG § 3a’ in Helmut Köhler and others, *Gesetz gegen den unlauteren Wettbewerb* (Beck, Munich 2020), no 1.74b.

20 GDPR, arts 2(2)(c), 4(1), (4), (5), (13), (14), (15), 6(1)(d), 9(1), (2)(c), 12(6), 32(4), 35(3)(a), recitals 14, 18, 24, 26, 34, 35, 46, 51, 57, 71, 85, 86, 94, 148, 162.

21 Cf GDPR, arts 4(7), (8), (9), (10), (17), (18), 18(2), 49(1)(c), (78), recitals 45, 143, in which the GDPR explicitly mentions ‘natural and legal’ persons.

22 GDPR, arts 9(3), 29, 34(3)(a), 47(2)(h), (j), 49(1)(g), 62(5), recitals 26, 97, 129, 150.

subjects and supervisory authorities. The duties and position of supervisory authorities are extensively regulated in Articles 51–76 GDPR. They are also able to impose fines for non-compliance pursuant to Article 83. Furthermore, Chapter 3 creates various rights that data subjects can exercise against the controller. Chapter 8 also creates other tools for enforcement. The GDPR explicitly attributes these rights and enforcement tools to the data subject. For example, Articles 77(1) and 79(1) GDPR stipulate that a data subject has the right to file a complaint with a supervisory authority and to an effective judicial remedy. Other parties only play a facilitating role.<sup>23</sup>

There are even indications within Article 82 GDPR that competitors are not entitled to invoke the right to compensation. Article 82(4) stipulates that ‘involved’ controllers and processors and shall be held liable for the entire damage ‘in order to ensure effective compensation of the data subject’.

Article 82(1) GDPR clearly deviates from other provisions of the Regulation. The reason for this deviation is not clarified in the GDPR or its preparatory works. However, the deviation is consistent. Recital 146 also stipulates that the controller and processor should compensate any damage which *a person* may suffer and should be held liable for the entire damage so that the *data subject* receives full and effective compensation.

In the preparatory works of the Data Protection Directive,<sup>24</sup> the legislator’s intention was more clear. Article 23 of that Directive, the precursor of Article 82 GDPR, stated that ‘any person who has suffered damage as a result of an unlawful processing operation’ was entitled to compensation. In contrast, the proposal of the European Commission limited the right to compensation to ‘any individual whose personal data has been stored in a file’, in other words the data subject.<sup>25</sup> The subsequent extension to ‘any person’ suggests that the European legislator did not want to limit the right to compensation to data subjects. Since the GDPR also states that ‘any person’ can have a right to

compensation, it is reasonable to assume that the intention of the European legislator has not changed.<sup>26</sup>

### 3.3 The purposes of the GDPR and their influence on the right to compensation

Whether a data subject can derive rights from a provision of Union law depends, among other things, on the purpose of the provision.<sup>27</sup> The GDPR protects fundamental rights and freedoms of natural persons (Section 3.3.1) and advances the free movement of personal data. It pursues these aims by strengthening the protection of personal data (Section 3.3.2) and harmonizing data protection law (Section 3.3.3).<sup>28</sup>

To assess the influence of these purposes, we also draw on the rules and arguments developed for claims by competitors based on infringements of other European Union rules. Currently, not much is known about the potential role of competitors for the enforcement of the GDPR. In contrast, the role of competitors for the enforcement of other European rules has been elaborated upon. This includes the Directive on the assessment of the effects of certain public and private projects on the environment (Section 3.3.1), the quality standards with regard to fruit and vegetables (Section 3.3.2), and the Unfair Commercial Practices Directive (Section 3.3.3). Several considerations lead to the conclusion that similar arguments to those developed for other European rules also play a role in the context of Article 82(1) GDPR.

Most importantly, the purposes and objectives of the various European rules play a consistent role. For all of the discussed provisions, the purposes and objectives are considered to analyse whether a competitor or other injured party can act against an infringement. It is therefore likely that the purposes of the GDPR play a role in the context of Article 82(1) GDPR.

Furthermore, the positions of the parties that are harmed by a violation of the other European rules are comparable to the position of the competitor of a controller. In the discussed examples, the injured party is

23 For example, see GDPR, art 19 (the controller shall communicate any rectification, erasure or restriction carried out *at the request of the data subject*), 80 (the right to representation of *data subjects*).

24 European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

25 Commission, ‘Communication on the Protection of Individuals in Relation to the Processing of Personal Data in the Community and Information Security’ COM (90) 314 final, 40 (explanation that the data subject can claim damages), 64 (text of the proposed art 21, art 23 in the adopted Directive).

26 Cf Van Alsenoy (n 2) 283 (in the context of GDPR, art 82(3)).

27 See eg Case C-253/00 *Muñoz* [2002] ECLI:EU:C:2002:497, paras 29–30; Case C-445/06, *Danske Slagterier* [2009] ECLI:EU:C:2009:178, para 23; Case C-420/11 *Jutta Leth* [2013] ECLI:EU:C:2013:166, paras 27–28, 41.

28 See eg GDPR, recitals 9, 10, 11, 13, 170; Viviane Reding, ‘The European Data Protection Framework for the Twenty-First Century’ (2012) 2 IDPL 119, 121; Bart van der Sloot, ‘Do Data Protection Rules Protect the Individual and Should They? An Assessment of the Proposed General Data Protection Regulation’ (2014) 4 IDPL 307, 317; Jan Philipp Albrecht, ‘How the GDPR Will Change the World’ (2016) 2 EDPL 287, 288; Simon Davies, ‘The Data Protection Regulation: A Triumph of Pragmatism over Principle?’ (2016) 2 EDPL 2016, 290, 293–94; Paul de Hert and Vagelis Papakonstantinou, ‘The New General Data Protection Regulation: Still a Sound System for the Protection of Individuals?’ (2016) 32 Computer Law & Security Review 179, 182; PTJ Wolters, ‘The Security of Personal Data Under the GDPR: a Harmonized Duty or a Shared Responsibility?’ (2017) 7 IDPL 165, 165; n 29, 37, 60.

harmful by the violation of a rule that primarily regulates a relationship to which it is not a party. The European provisions regulate the relationship between a developer and a Member State (*Jutta Leth*, Section 3.3.1), a seller and a buyer (*Muñoz*, Section 3.3.2), or a business and a consumer (Unfair Commercial Practices Directive, Section 3.3.3). In the context of Article 82(1) GDPR, the competitor is harmed by a violation of a rule that primarily concerns the relationship between a controller and the data subject (see also Sections 2 and 3.3.3). Because of these similarities, it is reasonable to assume that comparable considerations will also be important for the question whether a competitor can rely on the right to compensation of Article 82(1) GDPR.

### 3.3.1 The fundamental rights and freedoms of natural persons

The Regulation primarily focuses on the protection of the fundamental rights and freedoms of natural persons.<sup>29</sup> It is not aimed at the protection of financial interests of legal persons. This ‘objective of protection’ seems to argue against a right to compensation of a competitor. Various authors therefore argue that the right to compensation is not limited to the data subject and that other natural persons also can rely on it,<sup>30</sup> but that legal persons (such as a competitor) cannot.<sup>31</sup>

*Jutta Leth* supports this interpretation. The Court of Justice ruled that the objective of protection of the breached rule also covers the prevention of economic damage that is a ‘direct economic consequence’ of the environmental effects referred to in the Directive on the assessment of the effects of certain public and private projects on the environment.<sup>32</sup> ‘Certain competitive disadvantages’ are, according to the Court, not a direct consequence.<sup>33</sup>

A similar reasoning in the context of the GDPR can lead to the conclusion that a competitor cannot invoke Article 82(1). Assuming that the objective of protection of the GDPR is limited to the fundamental rights and freedoms of the data subject, a competitive disadvantage is not a ‘direct economic consequence’. Although the disadvantage is caused by a violation of the Regulation, it is not a consequence of the infringement on the fundamental rights and freedoms of the data subject and therefore not eligible for compensation under Article 82(1) GDPR.

Moreover, even the conclusion that the financial interests of competitors are covered by the objective of protection of the GDPR would not automatically lead to the conclusion that they can invoke Article 82(1). In *Peter Paul*, the Court of Justice ruled that the various Directives on the supervision of credit institutions intend, among other things, to protect depositors. However, this objective of protection does not necessarily entail that depositors must be able to hold the supervisory authorities liable for defective supervision.<sup>34</sup> However, the strict approach of *Peter Paul* is an exception.<sup>35</sup> The harmonization envisaged by the Directives on the supervision of credit institutions is limited to what is essential, necessary, and sufficient to achieve their objectives. As long as depositors can assert a claim against the deposit-guarantee scheme, the coordination of the national rules on the liability of supervisory authorities is not necessary to secure these objectives.<sup>36</sup>

### 3.3.2 Strengthening the protection of personal data

The purpose of the GDPR is broader than the protection of individual data subjects. It also encompasses the more abstract goal of strengthening the protection of personal data. More specifically, it intends to strengthen

29 See GDPR, the title (‘the protection of natural persons’), art 1(2), recitals 1, 2, 3, 14.

30 See eg Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer, Berlin 2017) 216; Roman Dickmann, ‘Nach dem Datenabfluss: Schadenersatz nach art 82 der Datenschutz-Grundverordnung und die Rechte des Betroffenen an seinen personenbezogenen Daten’ [2018] *Recht und Schaden* 345; Heledd Lloyd-Jones and Peter Carey, ‘The Rights of Individuals’ in Peter Carey (ed), *Data Protection. A Practical Guide to UK and EU Law* (Oxford University Press, Oxford 2018) 152; Philip Laue and Sacha Kremer, *Das neue Datenschutzrecht in der betrieblichen Praxis* (Nomos, Baden-Baden 2019) 370–71. Cf Andreas Neun and Katharina Lubitzsch, ‘Die neue EU-Datenschutz-Grundverordnung – Rechtsschutz und Schadenersatz’ [2017] *Betriebs-Berater* 2563, 2568.

31 See eg Neun and Lubitzsch (n 30) 2568; Dickmann (n 30) 346; Antoni Rubí Puig, ‘Daños por infracciones del derecho a la protección de datos personales. El remedio indemnizatorio del artículo 82 RGPD’ (2018) 5 *Revista de Derecho Civil* 53, 59–61; Köhler (n 19) no 1.40e, 1.74b; Laue and Kremer (n 30) 370–71; Sabine Quaas, ‘DS-GVO Art. 82’ in Stefan Brink and Heinrich A. Wolff, *Beck’scher Online-Kommentar Datenschutzrecht* (Beck, Munich 2019), no 37. Various authors state that legal persons can have a right to compensation. Rosemary Jay, *Guide to*

*the General Data Protection Regulation. A Companion to Data Protection Law and Practice* (Thomson Reuters, London 2017) 294; Emmanuela Truli, ‘The General Data Protection Regulation and Civil Liability’ in Mor Bakhom and others (eds), *Personal Data in Competition, Consumer Protection and Intellectual Property Law. Towards a Holistic Approach?* (Springer, Berlin 2018) 309–10.

32 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40.

33 Case C-420/11 *Jutta Leth* [2013] ECLI:EU:C:2013:166, paras 36, 44, 48 (in the context of liability of a Member State).

34 Case C-222/02 *Peter Paul* [2004] ECLI:EU:C:2004:606.

35 Andrea Biondi and Martin Farley, ‘Damages in EU Law’ in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law. Volume I: The European Union Legal Order* (Oxford University Press, Oxford 2018) 1050. See also (n 47).

36 Case C-222/02 *Peter Paul* [2004] ECLI:EU:C:2004:606, paras 37, 42, 43; European Parliament and Council Directive 94/19/EC of the of 30 May 1994 on deposit-guarantee schemes [1994] OJ L135/5, art 7(6), the second last recital.

enforcement of data protection law.<sup>37</sup> A broad interpretation of ‘any person’ can contribute to a more effective enforcement. After all, data protection law has a certain ‘enforcement deficit’.<sup>38</sup> Data subjects do not have the financial resources, organization, and (technical) expertise that are necessary to exercise their rights effectively.<sup>39</sup> National supervisory authorities also lack the capacity to ensure effective enforcement.<sup>40</sup> In this light, complementary enforcement by competitors contributes to the full effect of the GDPR.<sup>41</sup>

The objective of ensuring full effect also plays a role in the enforcement of other provisions of Union law. Because of this objective, the Court of Justice concluded in *Muñoz* that a trader ‘must be capable of enforcement by means of civil proceedings’ against a competitor on the basis of a violation of quality standards with regard to fruit and vegetables.<sup>42</sup>

In *Muñoz*, the plaintiff had requested an injunction.<sup>43</sup> However, the Court of Justice has emphasized in various judgments that the right to compensation also plays an important role in ensuring the full effect of Union law. It demands that ‘any individual’ can claim compensation for a violation of competition law.<sup>44</sup> The

right to compensation ‘discourages’ violations of competition law and ‘can make a significant contribution to the maintenance of effective competition in the Community.’<sup>45</sup> It is therefore an ‘integral part of the system for enforcement’.<sup>46</sup> These judgments show that the objective of ensuring full effect and the principle of effectiveness play an important role in the development of a right to compensation for a violation of Union law. They suggest that the potential actors that can enforce Union law should not be limited too strictly.<sup>47</sup> Enforcement, including through a claim for damages by a competitor, always discourages violations and thereby contributes to the full effect of Union law.

The principle of effectiveness also plays an important role in data protection law. More specifically, the Court of Justice emphasizes the importance of ‘effective and complete protection’.<sup>48</sup> Effective rights and remedies are important for this protection.<sup>49</sup> A possible claim for damages by a competitor strengthens the protection in various ways. First, it discourages unlawful processing by the controller.<sup>50</sup> Secondly, it also encourages the competitor to adhere to the GDPR. Providers of digital services and products are fighting a fierce battle for

37 GDPR, recitals 7, 148.

38 See eg Nicholas Vinocur, ‘“We have a huge problem”: European regulator despairs over lack of enforcement’ (*Politico*, 27 December 2019) <<https://www.politico.eu/article/we-have-a-huge-problem-european-regulator-despairs-over-lack-of-enforcement/>> accessed 21 February 2020.

39 N 16; FRA, *Access to Data Protection Remedies in EU Member States* (Publications Office of the European Union, Luxembourg 2013) 29–30, 37–40, 50; Van der Sloot (n 28) 323; PTJ Wolters, ‘The Enforcement by the Data Subject under the GDPR’ (2019) 22 *Journal of Internet Law* 1, 29.

40 FRA, *Data Protection in the European Union: the role of National Data Protection Authorities* (Publications Office of the European Union, Luxembourg 2010) 7–8, 20; Christopher Kuner, *Transborder Data Flows and Data Privacy Law* (Oxford University Press, Oxford 2013) 143–44; Van der Sloot (n 28) 321; Hielke Hijmans, ‘The DPAs and their Cooperation: How Far are we in Making Enforcement of Data Protection Law More European?’ (2016) 2 *EDPL* 362, 366; Dan Svantesson, ‘Enforcing Privacy Across Different Jurisdictions’ in David Wright and Paul De Hert (eds), *Enforcing Privacy. Regulatory, Legal and Technological Approaches* (Springer, Berlin 2016) 201; Lydia Lundstedt, *International Jurisdiction Over Cross-border Private Enforcement Actions under the GDPR* (Stockholm Faculty of Law Research Paper Series No 57, 2018) 4; Michael Veale, Reuben Binns and Jef Ausloos, ‘When Data Protection by Design and Data Subject Rights Clash’ (2018) 8 *IDPL* 105, 105; Wolters (n 39) 23.

41 Christian Solmecke, ‘Kann die DSGVO über das UWG abgemahnt werden? Neue Gerichtsentscheidungen’ (*WBS-law.de* 7 July 2019) <<https://www.wbs-law.de/wettbewerbsrecht/kann-die-dsgvo-ueber-das-uwg-abgemahnt-werden-ig-wuerzburg-trifft-erste-entscheidung-23849/>> accessed 21 February 2020.

42 Case C-253/00 *Muñoz* [2002] ECLI:EU:C:2002:497, paras 30–32, concerning Council Regulation (EEC) No 1035/72 of 18 May 1972 on the common organization of the market in fruit and vegetables [1972] OJ L118/1 and Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organization of the market in fruit and vegetables [1996] OJ L297/1.

43 On the question whether this judgement also creates a right to compensation for competitors, see Walter van Gerven, ‘Crehan and the Way

Ahead’ (2006) 17 *European Business Law Review* 269, 271; Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 545–47.

44 Case C-453/99 *Courage v Crehan* [2001] ECLI:EU:C:2001:465, paras 25–26; Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECLI:EU:C:2006:461, paras 89–90; Case C-557/12 *Kone and Others* [2014] ECLI:EU:C:2014:1317, paras 21, 32–33; Case C-724/17 *Skanska* [2019] ECLI:EU:C:2019:204, para 43. Also see European Parliament and Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 (‘Damages for infringements of competition law Directive’), recital 3.

45 Case C-453/99 *Courage v Crehan* [2001] ECLI:EU:C:2001:465, para 27; Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECLI:EU:C:2006:461, para 91; Case C-360/09 *Pfleiderer* [2011] ECLI:EU:C:2011:389, para 29; Case C-199/11 *Otis and others* [2012] ECLI:EU:C:2012:684, para 42; Case C-536/11 *Donau Chemie and others* [2013] ECLI:EU:C:2013:366, para 23; Case C-557/12 *Kone and others* [2014] ECLI:EU:C:2014:1317, para 23; Case C-724/17 *Skanska* [2019] ECLI:EU:C:2019:204, paras 44–45.

46 Case C-724/17 *Skanska* [2019] ECLI:EU:C:2019:204, para 45.

47 Also see CH Sieburgh, ‘EU Law and Non-Contractual Liability of the Union, Member States and Individuals’ in AS Hartkamp and others (eds), *The Influence of EU Law on National Private Law* (Kluwer, Deventer 2014) 477–80, 496.

48 Eg Case C-132/12, *Google Spain*, [2014] ECLI:EU:C:2014:317, para 34; Case C-230/14 *Weltimmo* [2015] ECLI:EU:C:2015:639, paras 25, 30; Case C-210/16 *Wirtschaftsakademie* [2018] ECLI:EU:C:2018:388, para 28; Case C-40/17 *Fashion ID* [2019] ECLI:EU:C:2019:629, para 66.

49 Eg GDPR, art 77(1), 79(1), recital 11, 104, 108; Case C-507/17 *Google v CNIL* [2019] ECLI:EU:C:2019:772, para 70. In the context of the right to compensation, see GDPR, art 82(4), recital 146.

50 Trulli (n 31) 310. Cf Case C-253/00 *Muñoz* [2002] ECLI:EU:C:2002:497, para 31.

users and personal data.<sup>51</sup> The competitor who misses out on users and advertising revenue as a result of violations by the controller (Section 2) has, somewhat overdrawn, two options. If it continues to adhere to the GDPR, it will lose the battle. As a result, the competitor is forced to also violate data protection law. The right to compensation offers an alternative. Instead of descending to the level of the controller, the competitor can also choose to force the controller to adhere to the GDPR.

Reality is more complex. Compliance with the GDPR is just one of the factors that contribute to a business' success. Moreover, enforcement only offers a fully fledged alternative if it actually removes the controller's gains. A competitor does not benefit much from compensation if the violation allowed the controller to acquire a firm hold on the market. The competitor's right to compensation can reduce the enforcement deficit but does not fully resolve it.

### 3.3.3 The harmonization of data protection law

The right to compensation also contributes to the free movement of personal data and the harmonization of data protection law and its enforcement.<sup>52</sup> It enables a competitor to secure a 'level playing field'. The GDPR provides the same rules throughout the Union.<sup>53</sup> However, a level playing field cannot exist as long as national supervisory authorities and data subjects interpret and enforce the GDPR divergently.<sup>54</sup> Complementary enforcement by competitors may reduce these differences. It may cause controllers to comply with the GDPR in countries or situations where the enforcement by supervisory authorities is less strict. Furthermore, it could contribute to the elimination of differences in the interpretation of the GDPR by provoking an autonomous interpretation by the Court of Justice.<sup>55</sup>

In the absence of a right to compensation for competitors pursuant to Article 82(1) GDPR, national

provisions might also lead to differences in the enforcement of data protection law. Even if Article 82(1) GDPR did not grant a right to compensation to competitors, a breach of data protection law could still give rise to such a right on a different legal basis. For example, the breach might result in a claim based on unfair commercial practices.<sup>56</sup> Unlike Article 82(1) of the GDPR, such a right to compensation does not arise directly from the law of the European Union. Its existence and conditions will therefore differ from one Member State to another. This would lead to differences in the enforcement of data protection law.<sup>57</sup>

Finally, the role of competitors in the enforcement of European law is also reflected in the 'Unfair Commercial Practices Directive'.<sup>58</sup> This Directive has clear similarities with the GDPR. It protects consumers against unfair commercial practices.<sup>59</sup> Like the GDPR (Section 3.3.1), it is not directly aimed at the protection of competitors. However, both the Directive and the Regulation also aim to strengthen the internal market by means of harmonization.<sup>60</sup> The Directive acknowledges that 'legitimate competitors' may be harmed by unfair commercial practices aimed at consumers. Recitals 6 and 8 therefore explicitly state that the Directive also indirectly protects competitors. The GDPR lacks a specific reference to competitors. However, recital 9 does explicitly list obstacles to the pursuit of economic activities and a distortion of competition as adverse effects of a lack of harmonization. This suggests that, unlike *Jutta Leth* (Section 3.3.1), the financial disadvantage of a competitor does fall within the objective of protection of the GDPR.

The Unfair Commercial Practices Directive explicitly states that competitors can play a role in enforcement. Article 11(1) requires Member States to ensure 'adequate and effective means to combat unfair commercial practices'. These means should enable enforcement of

51 Crémer, De Montjoye and Schweitzer (n 4) 32–33.

52 In this respect, the GDPR is different from *Peter Paul* (Section 3.3.1). The GDPR harmonises enforcement through the right to compensation.

53 The GDPR does allow national law to fill in certain gaps or deviate from specific rules. See eg GDPR, art 6(2), 8(1), 9(4). See also Peter Blume, 'Will it be a better world? The proposed EU Data Protection Regulation' (2012) 2 IDPL 130, 132–33; Simon Davies, 'The Data Protection Regulation: A Triumph of Pragmatism over Principle?' (2016) 2 EDPL 290, 294–96.

54 See also Section 3.3.2; n 40.

55 See also Wolters (n 39) 27–29.

56 GDPR, recital 146. See also Section 4; n 66.

57 The right to compensation for a violation of competition law (Section 3.3.2) is directly created by Union law. Only the procedural rules are national. See eg Case C-453/99 *Courage v Crehan* [2001] ECLI:EU:C:2001:465, para 29; Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECLI:EU:C:2006:461, para 62; Case C-724/17 *Skanska* [2019] ECLI:EU:C:2019:204, paras 24, 27. About the influence of these

rules on harmonisation, see Damages for infringements of competition law Directive, recital 8.

58 European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L149/22.

59 Unfair Commercial Practices Directive, art 1. The relationship between a data subject and a controller can be compared with the relationship between a consumer and a business. See also Dan Svantesson, 'Enter the Quagmire – the Complicated Relationship Between Data Protection Law and Consumer Protection Law' (2018) 34 Computer Law & Security Review 25, 28; Wolters (n 16) 7.

60 Unfair Commercial Practices Directive, art 1, 4, recitals 2, 3, 5, 12, 13 (free movement of goods and services and freedom of establishment); GDPR, art 1(1), (3), recitals 2, 3, 5, 6, 12, 53, 123, 166 (free movement of personal data).

the Directive ‘in the interest of consumers’. However, the Article also stipulates that parties who have a legitimate interest in combating unfair commercial practices, ‘including competitors’, should be able to take legal action. However, these remedies are not compulsory and can be different in each Member State.<sup>61</sup> Pursuant to Article 11(1)(b), enforcement by competitors could also take the form of a complaint before a competent administrative authority.

The Unfair Commercial Practices Directive demonstrates that competitors can also play a role in enforcing Union law that is primarily aimed at the protection of other parties.<sup>62</sup> The parallels between this Directive and the GDPR suggest that competitors can also play a role in the enforcement of the GDPR.

An important difference with the Directive is that the GDPR does not contain any reference to enforcement by competitors.<sup>63</sup> Apart from the aforementioned recital 9, it does not even allude to their position at all. Although this could indicate a conscious decision to exclude competitors from the enforcement of the GDPR, a teleological interpretation leads to the conclusion that competitors can play a role. The competitor’s right to compensation can, after all, contribute to the objectives of the GDPR (see also Section 3.3.2).

#### 4. A differentiated approach?

Article 82(1) GDPR does not create a right to compensation by itself. The violation of another provision of the GDPR is a prerequisite. So far, we have not made a distinction between the various rules of the GDPR. In this ‘all-or-nothing’ approach, any violation could lead to a right to compensation. Alternatively, a

‘differentiated approach’ is possible. In this approach, the right to compensation depends on the characteristics of the infringed provision.

This approach can be found in the German *Gesetz gegen den unlauteren Wettbewerb* (‘UWG’). Pursuant to Section 3a of the UWG, a competitor can take legal action against a violation of a rule that is intended to regulate market behaviour (‘Marktverhalten’). A rule has a ‘marktverhaltensregelnden Charakter’ if it is at least partly intended to regulate market behaviour in the interest of ‘Marktteilnehmers’<sup>64</sup> such as consumers and competitors. Market behaviour includes all activities that are used to promote the sale of goods or services. For example, it includes advertisements and the conclusion of a contract.<sup>65</sup>

In several German cases, a competitor demands that a controller ceases a certain violation of the GDPR. However, several courts reject this claim because, according to them, Articles 77 to 84 of the GDPR exhaustively regulate enforcement.<sup>66</sup> The Oberlandesgericht Hamburg dismisses this interpretation of the GDPR. Although not every obligation of the GDPR can be enforced by a competitor, it is possible for provisions that also intend to regulate market behaviour and thus have a *marktverhaltensregelnden Charakter*.

In the case before the Oberlandesgericht Hamburg, a competitor demanded an injunction against the controller (a pharmaceutical company) for processing health data without consent. However, the controller only used those sensitive data for healthcare purposes. The court ruled that the provisions regarding the use of health data for these purposes are aimed at the protection of the health and privacy of patients. They do not intend to regulate market behaviour. Therefore, the

61 For example, competitors can claim damages or start other civil proceedings in the Netherlands. DWF Verkade, *Oneerlijke handelspraktijken jegens consumenten* (Wolters Kluwer 2016) no 8, 74; MSA Faraj and L B A Tigelaar, ‘Naar een hanteerbare vordering voor een concurrent tegen een ondernemer die zich schuldig maakt aan oneerlijke handelspraktijken’ (2018) *TvC* 284. Competitors can also take legal actions under the ‘UWG’ in Germany. Section 4. In contrast, competitors have no right to redress under English law. Susan Singleton, ‘The Consumer Protection from Unfair Trading Regulation’ (2009) 15 *Computer and Telecommunications Law Review* 77; Hugh Collins, ‘Harmonisation by Example: European Laws against Unfair Commercial Practices’ (2010) 73 *Modern Law Review* 89.

62 In this respect, the Directive is different from competition law as discussed in Section 3.3.2. Competition law is primarily aimed at the protection of ‘the market’, but also at the protection of competitors. Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECLI:EU:C:2009:343, para 38; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline and Others v Commission and Others* [2009] ECLI:EU:C:2009:610, para 63. Cf Richard Whish and David Bailey, *Competition Law* (Oxford University Press 2018) 21–22. For an example of a claim for compensation in a conflict between competitors, see Case C-302/13 *flyLAL v Starptauistikā* [2014] ECLI:EU:C:2014:2319.

63 Apart from the mention recital 9, the GDPR does not discuss the position of competitors at all.

64 UWG, s 2(1)(2);

65 Köhler (n 19) no 1.61–1.66.

66 Landgericht Bochum 7 August 2018, ECLI:DE:LGBO:2018:0807.I12O85.18.00; Landgericht Wiesbaden 5 November 2018, ECLI:DE:LGWIESB:2018:1105.5O214.18.00; Landgericht Magdeburg 18 January 2019, ECLI:DE:LGMAGDE:2019:0118.36O48.18.00; Landgericht Stuttgart 20 mei 2019, 35 O 68/18 KfH. See also Köhler (n 19) no 1.40e, 1.74b. For this reason, the enforcement by non-data subjects would be limited to the options discussed in GDPR, art 80. This is incorrect. First, see GDPR, recital 146; Section 3.3.3. Next, art 80 only provides rules about the enforcement of the rights of the data subject by a third party. It does not provide any rules about rights of non-data subjects. See also Jan Henrich, ‘German Unfair Competition Law and the GDPR - Courts Are Indecisive about Parallel Remedies’ (2018) 4 *EDPL* 515, 518; n 41. Finally, the rights of arts 77, 78 and 79 GDPR are ‘without prejudice’ to other administrative or (non-)judicial remedy. The Landgericht Magdeburg states that this only means that the provisions are without prejudice to the other rights of data subjects. This discussion does not affect the answer to our research question. This article is not concerned with remedies that are not contained in the GDPR, but with the question whether competitors can also benefit from art 82(1).

competitor cannot act against a violation of these rules. The possibility that the competitor has missed out on customers due to this violation does not lead to a different conclusion. According to the court, this would be different if the unlawfully processed personal data were used for advertising purposes. This constitutes a violation of German data protection law. This rule does intend to regulate market behaviour.<sup>67</sup>

German judges have allowed competitors to enforce other provisions of the GDPR. For example, the Oberlandesgericht München has ruled that a competitor can take action against a violation of the ban on telephone sales without prior permission.<sup>68</sup> Furthermore, the Landgericht Würzburg declared that a competitor can demand an injunction against a controller that uses a website to collect personal data without using encryption or providing adequate information.<sup>69</sup>

The German 'differentiated approach' offers a mid-way solution. Additional enforcement by competitors contributes to the achievement of the objectives of the GDPR (Sections 3.3.2 and 3.3.3). At the same time, the differentiated approach ensures that competitors cannot act against violations that do not concern them or only concern them indirectly. As a result, companies are unable to 'abuse' the GDPR to disrupt their competitors' business.<sup>70</sup>

The differentiated approach requires a distinction between provisions that regulate market behaviour and those that do not. This distinction cannot be justified under the GDPR. After all, all obligations of the controller are primarily aimed at the protection of fundamental rights and freedoms of natural persons (Section 3.3.1). At the same time, the GDPR 'as a whole' advances the free movement of personal data and the harmonization and strengthening of data protection law and its enforcement (Sections 3.3.2 and 3.3.3). It does not contain provisions that are *solely* intended to protect the fundamental rights of a data subject. More generally, most rules in the GDPR can apply to both market and non-

market behaviour. This is illustrated by the examples about the various requirements to obtain consent in both the German cases discussed in this section and the examples of Sections 2.1 and 2.2. The German cases show that this requirement does not always have a *marktverhaltensregelnden Charakter*. Similarly, an omission to obtain consent can affect both the conclusion of a contract (Section 2.2) and the development of the product (Section 2.1).<sup>71</sup> A clear distinction between provisions with and without the intention to regulate market behaviour can therefore not be made. For this reason, the German differentiated approach is not to be preferred.

Moreover, this distinction is not necessary to prevent competitors from abusing Article 82(1) GDPR. The right to compensation can only be invoked if damage occurred. A competitor has no right to damages for violations of the GDPR that do not affect him.<sup>72</sup> Purely hypothetical<sup>73</sup> or very indirect<sup>74</sup> damage is not eligible for compensation in Union law. The assessment of whether damage is 'actual and certain' or 'direct' also leads to a certain differentiation. However, this differentiation does not depend on an unconvincing distinction between the various provisions of the GDPR, but on the circumstances and actual losses in the specific case.

## 5. Conclusion

Non-compliance with the GDPR can harm a competitor in various ways (Section 2). However, the GDPR is primarily aimed at the protection of fundamental rights and freedoms of natural persons. At first sight, financial interests of competitors do not fall under the objective of protection. The prevailing opinion in the literature is therefore that competitors cannot rely on Article 82(1) GDPR (Section 3.3.1).

However, the purposes of the GDPR are broader than the protection of individual data subjects. It also intends to advance the free movement of personal data,

67 Oberlandesgericht Hamburg 25 October 2018, 3 U 66/17. See also Section 2.1.

68 Oberlandesgericht München 7 February 2019, 37 O 6840/17.

69 Landgericht Würzburg 13 September 2018, 11 O 1741/18 UWG. See also Section 2.2.

70 Cf Henrich (n 66) 515.

71 Cf Köhler (n 19) no 162 (stating that the development of a product is not market behaviour in the meaning of UWG, s 3a).

72 Cf Oberlandesgericht Dresden 11 June 2019, 4 U 760/19, para 3b. According to the Oberlandesgericht, the obligation to provide 'full and effective compensation' does not create a right to damages for minor violations without serious consequences. See also Damages for infringements of competition law Directive, art 3(3), 12(2), recital 13. According to this Directive, damages should not lead to overcompensation.

73 Damage must be actual and certain. See eg Case C-348/06 P *Commission v. Girardot* [2008] ECLI:EU:C:2008:107, para 54; Case C-337/15 P

*European Ombudsman v Claire Staelen* [2017] ECLI:EU:C:2017:256, para 91. Losses that are hypothetical, indeterminate or imprecise are not compensated. See eg Case 147/83 *Münchener Import v. Commission* [1985] ECLI:EU:C:1985:26, para 20; Case T-267/94 *Oleifici Italiani Spa v Commission* [1997] ECLI:EU:T:1997:113, para 73; Case T-13/96 *TEAM v. Commission* [1998] ECLI:EU:T:1998:254, para 76. See also extensively about 'damage' Antoni Vaquer, 'Damage', in Helmut Koziol and Reiner Schulze (eds), *Tort Law of the European Community* (Springer 2008) 27–28; Cees van Dam, *European Tort Law* (Oxford University Press 2013) 359–60. See also above, the discussion of Oberlandesgericht Hamburg 25 October 2018, 3 U 66/17.

74 See eg Case T-168/94 *Blackspur* [1995] ECLI:EU:T:170, para. 52; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur & Factortame* [1996] ECLI:EU:C:1996:79, para 51; Isabelle C. Durant, 'Causation', in Helmut Koziol and Reiner Schulze (eds), *Tort Law of the European Community* (Springer, Berlin 2008) 63–71; Van Dam (n 73) 311.

strengthen the protection of personal data, and harmonize data protection law. These overarching objectives benefit from additional enforcement by competitors (Sections 3.3.2 and 3.3.3). The right to compensation therefore contributes to the full effect of the GDPR.

Moreover, enforcement by competitors is congruent with Union law. The objective of ensuring the full effect of Union law entails that anyone can claim compensation for a violation of competition law (Section 3.3.2). Furthermore, the Unfair Commercial Practices Directive demonstrates that competitors can also play a role in the enforcement of Union law that is primarily aimed at the protection of other parties (Section 3.3.3). Moreover, additional enforcement by competitors is particularly important for data protection law because of the ‘enforcement deficit’ (Section 3.3.2).

Other arguments weigh against the right to compensation of competitors. Although Article 82(1) GDPR grants the right to compensation to ‘any person’ (Section 3.1), the provision is placed between the enforcement rights of data subjects. This could lead to the conclusion that Article 82(1) can also only be invoked by data subjects. However, the intention of the European legislator is not entirely clear. After all, the Data Protection Directive also granted the right to compensation to ‘any person’ (Section 3.2).

Enforcement by a competitor could lead to the ‘abuse’ of data protection law (Section 4). A competitor could sue the controller for minor violations of the GDPR that have no noticeable consequences for both

the data subject and the competitor. Such enforcement only disrupts business operations of the controller and does not lead to any significant strengthening of the protection of personal data.

The German UWG stipulates that a competitor can only act against violations of rules that are intended to regulate market behaviour. However, this differentiated approach requires a distinction that cannot be justified by the GDPR. Moreover, it is not necessary in the context of Article 82(1). The right to compensation arises only if the competitor has suffered damage (Section 4). A competitor therefore can only invoke Article 82(1) in situations where it is actually harmed by the violation. Although it will not always be easy to prove this, there are certainly situations in which such damage may occur (Section 2).

If the right to compensation remains limited to situations in which the competitor suffers damage, it can make a meaningful contribution to the objectives of the GDPR. Strong arguments support the interpretation that a competitor can rely on Article 82(1) GDPR. However, the lack of an explicit provision and the, at first glance, conflicting objectives continue to cause uncertainty. For this reason, a clear interpretation by the European Data Protection Board or the Court of Justice is desirable.

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