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INTERNATIONAL REPORT

PRIVACY LAWS & BUSINESS

DATA PROTECTION & PRIVACY INFORMATION WORLDWIDE

Non-material damages for data violations in Germany

Lea Stegemann of Noerr PartGmbH and **Jakob Horn** of Taylor Wessing LLP provide an overview of German case law on non-material damage claims.

The GDPR, with Article 82, explicitly introduced claims for non-material damages (“emotional damages”) for data protection violations. In Germany, there are already thousands of court proceedings in which individuals claim

non-material damages. Hence, data protection violations are increasingly being pursued not only by public but also by private enforcement, and claims for damages are becoming a

Continued on p.3

France: CNIL sanctions Orange with a hefty fine for ads appearing as emails

Zero-tolerance approach towards Orange’s direct marketing practices. By **Nana Botchorichvili** of IDEA Avocats, France.

On 14 November 2024, France’s Data Protection Authority (CNIL) issued a fine of €50 million against Orange, France’s leading telecommunications operator, for displaying advertising

messages in customer email inboxes without their prior consent¹.

Indeed, as part of its Internet, mobile and fixed phone services,

Continued on p.5

What’s right for children and their data?

11 March 2025, A&O Shearman, London – in-person and online

This **PL&B** conference will explore best practices when designing online services to engage with and protect children.

Speakers include: Lego, Google, BBC, k-ID, TikTok, VerifyMy, and 5 Rights

www.privacylaws.com/children2025

Issue 193

FEBRUARY 2025

COMMENT

2 - Change gathers pace in 2025

NEWS

8 - Mexico risks losing its DPA

12 - Appointment of EDPS is delayed

ANALYSIS

1 - Non-material damages in Germany

1 - France: CNIL sanctions Orange

20 - Malaysia, Singapore revise data laws

23 - Australia limits facial recognition

26 - Poland: Legitimate interests ruling

LEGISLATION

15 - Cambodia’s draft data privacy law

MANAGEMENT

10 - ePrivacy Directive in advertising

25 - Events Diary

NEWS IN BRIEF

7 - Meta fined €251 million in Ireland

7 - IAB submits views on consent or pay to the EDPB

9 - EDPB expects more detail in EU adequacy assessments

14 - South Korea passes AI law

14 - CJEU sets precedent with individual compensation in a data transfer case

14 - Italy’s Garante fines OpenAI €15m

19 - Gender identity is not necessary data to buy a transport ticket

22 - Ireland tops survey of GDPR fines

22 - OECD assesses risks and benefits of AI

25 - Australia: Meta settles \$AU50 million for Cambridge Analytica case

27 - EDPB calls for alignment between GDPR and other EU digital laws

27 - US trade organisations advocate federal privacy law

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INTERNATIONAL report

ISSUE NO 193

FEBRUARY 2025

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Published byPrivacy Laws & Business, 2nd Floor,
Monument House, 215 Marsh Road, Pinner,
Middlesex HA5 5NE, United Kingdom**Tel: +44 (0)20 8868 9200****Email: info@privacylaws.com****Website: www.privacylaws.com****Subscriptions:** The *Privacy Laws & Business* InternationalReport is produced six times a year and is available on an
annual subscription basis only. Subscription details are at the
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Design by ProCreative +44 (0)845 3003753

Printed by Rapidity Communications Ltd +44 (0)20 7689 8686

ISSN 2046-844X

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“comment”

Change gathers pace in 2025

The international privacy community has been surprised by news about a new Chinese open source AI large language model Deep Seek. According to the BBC, OpenAI says that Chinese and other companies are “constantly trying to distil the models of leading US AI companies”. From the Deep Seek user perspective, the question is about data security.

US President Donald Trump’s executive orders affect privacy in the US and elsewhere, for example terminating the membership of the Democratic members of the Privacy and Civil Liberties Oversight Board with immediate effect. At a conference in Brussels on Data Protection Day, 28 January, organised by the European Data Protection Supervisor, the Privacy Salon (CPDP) and the Council of Europe, Marina Kaljurand, 1st Vice-President of the European Parliament’s LIBE Committee, declared in the context of the GDPR and the Law Enforcement Directive, this decision is “not what we expect from an ally.” Irena Moozová, Deputy Director-General for Justice and Consumers at the European Commission added “the EU won’t be shy to use provisions we have available.”

The message from politicians and privacy advocates was loud and clear: the EU will retain and defend its privacy principles and values. The main EU-wide task is now to oversee the implementation of the EU Digital Services Package (p.27) of data related legislation and continue work on the GDPR to ensure more consistency in enforcement. Karolina Mojzesowicz of the EU Commission confirmed again that the GDPR will not be reopened – she stressed that “solutions are embedded in the GDPR itself” due to its flexibility. The regulation on procedural rules that is expected soon is an example of this type of adjustment.

While Mexico is abolishing its independent Data Protection Authority (p.8), privacy principles are becoming more firmly established elsewhere. Malaysia’s Personal Data Protection Act has been strengthened to significantly increase the powers of the regulator and strengthen individuals’ rights (p.20) and South Korea has adopted an AI law (p.14).

Laura Linkomies, Editor
PRIVACY LAWS & BUSINESS

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Germany... from p.1

growing risk for companies. There are already several hundred published judgments on non-material damage claims, forming a solid body of German case law.

To get a clearer picture, we have quantitatively analysed this German case law. Our study shows the extent to which German courts allow or reject claims and the factors on which these decisions depend. It can provide practitioners with an initial impression of the actual financial risk that damage claims may pose for companies following a data protection violation in Germany. Courts in other member states where there is not as much case law available might take guidance from German jurisprudence. At the same time, recent rulings from the European Court of Justice and the German Federal Court of Justice suggest that the case law presented here is likely to evolve further.

DRIVERS OF PRIVATE ENFORCEMENT IN GERMANY

Compared to other EU member states, Germany has a particularly high number of lawsuits in which plaintiffs seek non-material damages under Art. 82 GDPR. Normally, people in Germany often have a rational disinterest in pursuing rather small claims in court, as the financial risk is relatively high in these cases. In data protection cases, however, more people decide to take legal action because a number of plaintiff-oriented law firms offer financially attractive enforcement options. These firms specifically seek out claimants with legal expenses insurance, which covers litigation costs for insured claimants, allowing claimants to pursue their claims in court without financial risk. Alternatively, these firms work with litigation funders, who underwrite the risk of legal costs in exchange for a share of any successful claims.

Many of the plaintiff-focused firms were set up to pursue claims in the Volkswagen emissions case. These firms have now expanded into other fields, such as data protection cases. These law firms advertise their services aggressively with big promises and thus reach many people who might not have thought of enforcing their claims themselves.

Since the implementation of the EU Representative Actions Directive, qualified entities can also sue directly for damages on behalf of consumers. In December 2024, the first collective action for compensation in a data protection case was filed against Meta Platforms Ltd.¹

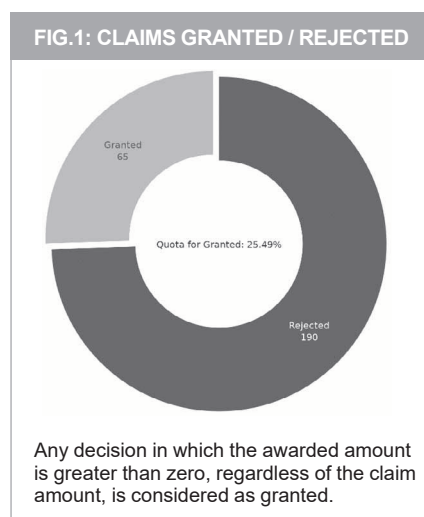
THE EXAMINED DECISIONS

In Germany, there are hundreds of published decisions on non-material damages following data protection violations. At the end of August 2023, we created a dataset with published decisions and analysed them using quantitative analyses. The oldest decision in the dataset dates from 7 November 2018,² the most recent from 15 August 2023.³ The decisions come from courts all over Germany.

The dataset comprises of 255 published⁴ decisions, collected on the basis of the Noerr Damages Tracker⁵, which is co-managed by author Stegemann. The majority of these cases concern damages claims under Art. 82 GDPR, but some also concern related claims.⁶

Of the 255 decisions, most are judgments and some are orders, such as procedural or legal aid orders. The majority of decisions are first instance decisions of district courts (178 judgments) and appeal decisions of higher regional courts (73 judgments). Some decisions were also handed down by local courts and labour courts. In 34 cases there are several decisions on the same case from different types of court.

The courts have published more judgments every year. While courts only published two judgments in 2018, there were already 86 in 2023.



It is important to note that only manually researched and published decisions could be included in the dataset. It is therefore possible that not all decisions published by the end of the collection period were found. In addition, the number of unpublished judgments is likely to be high, as in Germany only about 1% of first instance judgments are published.⁷

Therefore, the results presented here cannot claim to be absolute; they must be seen in light of the problem that the authors are unable to resolve: Germany's restricted publication practice limits the accuracy of quantitative analyses.

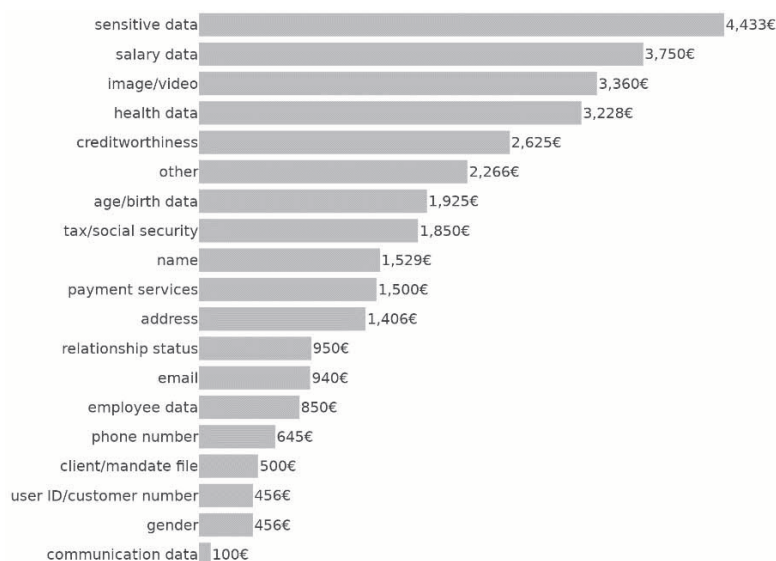
Nevertheless, the analysis is of value to practitioners. It provides an overview of damages awarded, as far as possible within the available data, and offers a broader perspective than the common practical approach of examining isolated decisions found more or less by chance.

PROPORTION OF CLAIMS DISMISSED AND CLAIMS GRANTED

To help practitioners assess the risk posed by non-material damage claims to a company, it is important to understand how often courts grant such claims at all. In nearly three-quarters of the cases analysed, courts fully dismissed the claim, setting the awarded damages at zero. In other words, a 'high-level' overview of published case law suggests that the likelihood of a defendant actually being liable for damages when a claim is filed is approximately 25%.

A deeper understanding of the high dismissal rate emerges from the reasons given for rejecting claims. Two main observations can be noted here: The vast majority of claims are dismissed because either no damage or no violation of the GDPR could be proven (approximately 95 cases each; in some cases both the lack of a violation of the GDPR and the lack of damage were cited). Other reasons for dismissal, such as the inapplicability of the GDPR or not passing the threshold of seriousness⁸ add up to 32 cases. Thus, it appears that it is difficult for the affected individuals to meet the burden of proof for both the violation of the GDPR and the damage. The case law of the CJEU is likely to make this even more challenging, as it explicitly states

FIG.2: MEAN DAMAGES AWARDED BY CATEGORY



Cases can be part of multiple bars if several data categories are affected by a single violation.

that a violation of the GDPR alone is not considered damage; damage must be proven separately.

AMOUNT OF DAMAGES AWARDED

For companies wanting to conduct a risk assessment, it is also relevant to consider the average amount of damages that courts award when they rule in favor of the plaintiff. On average (mean⁹), approximately €3,300 was awarded, while the median¹⁰ amount was €1,500. The highest amount awarded was €30,000, the lowest amount €25. It must be noted, though, that the higher amounts were usually not awarded for an ordinary data protection violation, but rather for cases where e.g. pictures of celebrities were published in media outlets or where an employer hired private investigators.

However, when we contrast the amounts awarded to the sums claimed,

it becomes clear that plaintiffs are often only partially successful. In particular, plaintiffs often claimed much higher sums than were awarded. In about 60% of cases (38 out of 65 cases where the claim was not fully rejected) the courts awarded 40% or less of the sum original claimed by the plaintiffs. In fewer than 10% of cases (six out of 65 cases, including two cases in which more than claimed was granted) the courts granted the claim almost the full amount or completely, namely between 80% and more of the sum.

A possible explanation for unrealistic claims may be that plaintiff's law firms' fees depend on the amount in dispute and that many times these fees are either covered by the defendant (if plaintiff is successful) or by the plaintiff's legal expense insurance. Therefore, law firms have an incentive to claim high amounts.

DAMAGES FOR VARIOUS TYPES OF PERSONAL DATA

The risk of a company being held liable for damages may, among other factors, depend on the sensitivity of the affected personal data.

To illustrate this, Figure 2 shows the respective awarded damages in relation to the affected data categories.

The trend shows that less sensitive, commonly shared data, which are frequently the subject of data protection violations, tend to correlate with judgments where lower amounts of damages are awarded. In contrast, when more sensitive data is affected, the damages awarded increase to the median, €1,500.

THE OUTLOOK

The current case law in Germany is expected to continue evolving. In addition to ten judgments from the European Court of Justice, the German Federal Court of Justice (BGH) has recently provided German courts with a new standard for evaluating claims. As described above, many courts have previously dismissed claims on the grounds that plaintiffs did not demonstrate damage which should be compensated. The BGH has now ruled that the mere loss of control over data can itself constitute damage. This concept was previously debated and often rejected by lower courts.

Loss of control as a form of damage provides a relatively straightforward basis for affected individuals to claim compensation for data protection violations, so an increase in successful claims is likely. However, the BGH also determined that a compensation amount of €100 is

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- 2 Labour Court Diez, judgment of 7 November 2018 – 8 C 130/18.
- 3 Higher Regional Court Hamm, judgment of 15 August 2023 – 7 U 19/23.
- 4 Sources primarily include openjur.de/ as well as the databases of Beck-Online and Juris. Occasionally, other databases are also used, especially the public judicial databases of the German federal states.
- 5 [/www.noerr.com/de/themen/gdpr-damages-tracker](http://www.noerr.com/de/themen/gdpr-damages-tracker)
- 6 In particular claims for violations of personal rights in the context of suspicion-based reporting under Sec. 823 German Civil Code in conjunction with Art. 1(1) and (2) of the German Constitution.
- 7 *Hamann*, JZ 2021, 656 (658).
- 8 Please note that this is not a valid argument anymore as the ECJ has ruled that there is no threshold of seriousness for claims under Art. 82 GDPR.
- 9 For the mean, the sum of all data points is divided by the number of data points. The mean is sensitive to individual outliers, as these can disproportionately affect the result.
- 10 The median represents the exact middle value of all data points, meaning that exactly half of the values lie below it and half above it. The median is somewhat more robust against outliers than the mean, as individual extremely high or low values only slightly impact the median.

appropriate for the loss of control in this specific case. This may establish a low benchmark, which could lead German courts to increasingly approve claims in this area but with lower average compensation amounts. Accordingly, the average sums of money awarded may decrease in the future.

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INFORMATION

The authors will give a presentation on this subject at *PL&B's* 38th International Conference, 7-9 July at St. John's College, Cambridge (p.25).
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