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

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

1. Introduction

Article 82(1) of the General Data Protection Regulation (GDPR) 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. 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.

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.

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) 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. It does not clarify whether a competitor can also invoke this right. 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’). 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

© The Author(s) 2020. Published by Oxford University Press. This is an Open Access article distributed under the terms of the Creative Commons Attribution License (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted reuse, distribution, and reproduction in any medium, provided the original work is properly cited.
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. They provide insight in preferences and needs of (potential) customers. Controllers use this information to develop or optimize their products and services. Personal data are therefore indispensable to compete with other companies. Access to personal data is also important for attracting advertisers. Providers of digital services and products frequently do not require payment from their users. Instead, their revenue model is based on displaying advertisements. Personal data are used to adjust the advertisements to the users’ needs and preferences.

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 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. 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. Furthermore, the controller may wish to use the ‘freely given, specific, informed and unambiguous’ consent of the data subject as a legal ground. Both the information and the request for consent should use ‘clear and plain language’.

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

---


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.


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. 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. 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. 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. If the controller does not respect this right, it is more difficult for the data subject to switch between providers for ‘data-driven services’. 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. 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’, this is no exception.

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 protection law enforcement authorities.
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.23

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,24 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.25 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.26

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.27 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).28

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).


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)).


harmed 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.

3.3.3 The fundamental rights and freedoms of natural persons

The Regulation primarily focuses on the protection of the fundamental rights and freedoms of natural persons. 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, but that legal persons (such as a competitor) cannot.

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. ‘Certain competitive disadvantages’ are, according to the Court, not a direct consequence. 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. However, the strict approach of Peter Paul is an exception.

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.

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

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.

In Muñoz, the plaintiff had requested an injunction. 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. The right to compensation 'discourages' violations of competition law and can make a significant contribution to the maintenance of effective competition in the Community. It is therefore an 'integral part of the system for enforcement'. 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. 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'. Effective rights and remedies are important for this protection. A possible claim for damages by a competitor strengthens the protection in various ways. First, it discourages unlawful processing by the controller. 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.
47 Also see Ch Sieburgh, 'EU Law and Non-Contractual Liability of the Union, Member States and Individuals in AS Harkamp and others (eds), The Influence of EU Law on National Private Law (Kluwer, Deventer 2014) 477–496, 496.
49 Eg GDPR, art 77(1), 79(1), recital 11, 104, 108; Case C-507/17 Google v CNIL [2019] ECCLI:EU:C:2019:772, para 70. In the context of the right to compensation, see GDPR, art 82(4), recital 146.
users and personal data. 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. It enables a competitor to secure a ‘level playing field’. The GDPR provides the same rules throughout the Union. However, a level playing field cannot exist as long as national supervisory authorities and data subjects interpret and enforce the GDPR divergently. 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.

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. 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.

Finally, the role of competitors in the enforcement of European law is also reflected in the ‘Unfair Commercial Practices Directive’. This Directive has clear similarities with the GDPR. It protects consumers against unfair commercial practices. 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. 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...
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.61 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.62 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.63 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’64 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.65

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.66 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

---

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:2018:0807.112085.18.00; Landgericht Wiesbaden 5 November 2018, ECLI:DE:LGWIESB:2018:1105.S0214.18.00; Landgericht Magdeburg 18 January 2019, ECLI:DE:LGMADE:2019:0118.36048.18.00; Landgericht Stuttgart 20 May 2019, 35 O 68/18 KBL. 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.67

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.68 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.69

The German ‘differentiated approach’ offers a midway 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.70

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).71 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 of violations of the GDPR that do not affect him.72 Purely hypothetical or very indirect 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,
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.


Advance Access Publication 17 December 2020