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EU DATA PROTECTION LIABILITY: THE EXEMPTION CLAUSE EX ART. 82 GDPR UNDER THE EUROPEAN COURT OF JUSTICE INTERPRETATION AND THE LIMITS OF HARMONISATION

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Abstract

This research examines the case-law of the Court of Justice of the European Union (CJEU) on the liability regime for unlawful data processing under the General Data Protection Regulation (GDPR). In particular, it focuses on the exemption clause provided for in art. 82(3) GDPR. Starting with judgment C-300/21, the CJEU has interpreted the terms and concepts contained in art. 82 GDPR as autonomous concepts of European Union law. This attempt at harmonisation is one of the few in the field of civil liability, which has traditionally been left to the competence of EU Member States. However, the GDPR does not provide all the elements necessary to establish the liability of data controllers. Building on this gap, this research explores the appropriate methodology to support the harmonisation process initiated by the GDPR, namely comparative law, and examines the doctrines of private law relevant to the attribution of civil liability in the realm of data protection.

Indice Contributo

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Keywords

Privacy liability – 82 GDPR – Tort Harmonisation – Tort Law – CJEU GDPR

1. Reasons and objectives of the research

This research originates from the uncertainty within legal scholarship regarding the nature of the exempting proof provided for by the art. 82(3) of the General Data Protection Regulation[1] (GDPR, or Regulation), and from the intention to contribute to clarifying this issue.

In this matter, the most important recent case law of the Court of Justice of the European Union (CJEU, or the Court) has, since its first 2023 decision[2], interpreted

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council 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 L 119/1.

[2] C-300/21, *UI* v. *Österreichische Post*, Judgment of the Court (Third Chamber) of 4 May 2023, EU:C:2023:370. Commented by F. Episcopo, *UI v. Österreichische Post – A first brick in the wall for a European interpretation of art. 82 GDPR*, in Journal of European Consumer and Market Law, 13(2)/2024; S. Li, *Compensation for non-material damage under Article 82 GDPR: a review of case C-300/21*,

several crucial aspects of art. 82 GDPR. Indeed, the CJEU's case-law constitutes the primary forum in which Union law is interpreted and applied, and, in this analysis, it provides a good opportunity to discuss the main doctrinal positions related to the exempting proof in the GDPR.

As will be shown, the CJEU has sought to ensure a harmonised interpretation of those GDPR provisions that do not expressly refer to the law of the Member States.

This paper, by commenting on such case-law, aims to offer suggestions for the interpretation of the exempting proof under art. 82(3) GDPR in a way that facilitates this process of harmonisation.

In particular, this research addresses the lack of consistency and coordination across the various judgments, particularly the reasoning the Court adopted to justify the choice of a fault-based liability system.

To offer a comprehensive overview, the study will reconstruct in advance the doctrinal discussion in which the CJEU's decisions have intervened.

After that, the main elements of art. 82 GDPR will be examined through a chronological analysis of the Court's decisions, complemented, where appropriate, by the opinions of the Advocates General[3].

The paper is structured as follows: paragraph 2 describes the methodology applied to conduct the research, justifying why the comparative method could be a useful tool

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in Maastricht Journal of European and Comparative Law, 30(3)/2023; M.J.S. Moròn, *Reflexiones en torno a la jurisprudencia del TJUE sobre la acción indemnizatoria del art. 82 RGPD (asuntos C-300/21; C-340/21; C-456/22; C-667/21; C-687/21; C-741/21)*, in Cuadernos de Derecho Transnacional, 16(2)/2024; M.C. Vergès, *El concepto autònomo de responsabilidad civil en el àmbito de la protecciòn de datos personales en la era digital: anàlisis del artìculo 82 del regolamento 2016/679*, in Revista de Derecho Comunitario Europeo, 79/2024; M. Federico, *"La tempesta perfetta": ultime dalla Corte di Lussemburgo su danno (non patrimoniale) da illecito trattamento dei dati personali e possibili risvolti in tema di tutela collettiva*, in Il foro italiano, 148(6)/2023.

[3] It must be advanced that the AG's opinions are not binding, meaning that their importance is measurable only in terms of persuasiveness; secondly, the answers provided therein are significantly limited by the referred questions. On the relationship between the opinions of the Advocate General and Court's decisions see D. Chalmers, G. Davies, G. Monti, *European Union Law*, Cambridge University Press, 2019, 162.

for harmonising liability in data protection; to this end, it will examine in more detail how the EU has approached private law harmonisation to date. Paragraph 3, on the other hand, will be divided into four smaller sections: section 3.1 describes the general context, taking into account the general doctrine of civil liability and its applications in the field of data protection; section 3.2 focuses on the breach of the GDPR, required as a necessary element for compensation; section 3.3 explores the causal link between the breach and the damage; finally, section 3.4 examines the various decisions of the CJEU on the subject. These decisions will be commented on individually using the methodology described in paragraph 2.

The final paragraph will summarise the research results, discussing both the CJEU case law and the feasibility of the proposal. The following judgments will be analysed in chronological order, in order to take into account the evolution of the Court's

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reasoning: C-340/21[4], C-667/21[5], C-687/21[6], C-741/21[7], joint cases C-182/22 and C-189/22[8], and C-200/23[9].

2. Method

This paragraph outlines the legal methodology adopted to offer suggestions for the interpretation of the exempting proof under art. 82(3) GDPR to facilitate the harmonisation process conducted by the Court. It explains why comparative law may represent an appropriate methodology and how it could contribute to this objective.

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[4] C-340/21, *VB* v. *Natsionalna agentsia za prihodite,* Judgment of the Court (Third Chamber) of 14 December 2023, EU:C:2023:986; commented by G.M. Riccio, *Danni non patrimoniali per violazione dei dati personali: verso un'alluvione giudiziaria? (Nota a Corte giust. 14 dicembre 2023, causa C-340/21)*, in Il foro italiano, 149(2)/2024; S. Nusselder, *Security measures in the GDPR & the NAP judgement (340/21)*, in Tilburg Institute for Law, Technology, and Society (TILT), 2024; F. Castagnari, *On the responsibility of the Financial Administration as "data controller" in the event of a data breach due to a "hacker attack" by third parties: critical and systematic profiles*, in Rivista telematica di diritto tributario, 2/2024.

[5] C-667/21, *ZQ v Medizinischer Dienst der Krankenversicherung Nordrhein, Körperschaft des öffentlichen Rechts,* Judgment of the Court (Third Chamber) of 21 December 2023, EU:C:2023:1022; commented by M. Buzzoni, *One, Two, Three… Fault? CJEU Rules on Civil Liability Requirements under the GDPR*, in Conflict of laws, 2024; M. Tzanou et al., *Overview 2023: Case Law of the CJEU and the ECtHR, Country Reports and Books of the Year*, in European data protection law review, 1/2024.

[6] C-687/21, *BL v MediaMarktSaturn Hagen-Iserlohn GmbH,* Judgment of the Court (Third Chamber) of 25 January 2024, EU:C:2024:72; commented by L. Tomasso, *Chronique droit de l'internet - Protection des données personnelles, dommage moral (CJUE, 3e ch., 25 janv. 2024, aff. C-687/21 et autres)*, in La Semaine juridique. Entreprise et affaires, 2024; F. Marchadier, *Précisions sur le régime européen de responsabilité pour traitement illicite de données à caractère personnel*, in RTDCiv. Revue trimestrielle de droit civil, 2024.

[7] C-741/21, *GP v juris GmbH*, Judgment of the Court (Third Chamber) of 11 April 2024, EU:C:2024:288; commented by C. Piltz, I. Kukin, *Schadenersatz bei Verstößen gegen die DSGVO*, in Daten und Sicherheit, 9/2024; P.A. de Miguel Asensio, *Determinación de la indemnización por daños derivados de infracciones del Reglamento General de Protección de Datos*, in La Ley Uniòn Europea, 125/2024.

[8] Joint cases C-182/22 and C-189/22, *JU and SO v Scalable Capital GmbH*, Judgment of the Court (Third Chamber) of 20 June 2024, EU:C:2024:531; commented by T. Petri, *Aus der Rechtsprechung zur DSGVO in den Jahren 2023 – 2024 (Teil 2)*, in Datenschutz und Datensicherheit - DuD, 49/2025; N. Jääskinen, *Robo de datos personales registrados en una aplicación de negociación con valores*, in La Ley Unión Europea, 129/2024.

[9] C-200/23, *Agentsia po vpisvaniyata v OL*, Judgment of the Court (Third Chamber) of 4 October 2024, EU:C:2024:827; commented by D.P.P. Dias, *Aplicabilidade do direito ao apagamento face à publicidade obrigatoria ds registos publicos das sociedades*, in Revista do servico de apoio jurìdico, 1(2)/2025; A. Lecourt, *Droit du numérique vs droit des sociétés: nouvelles précisions autour des données personnelles inscrites au registre du commerce et des sociétés*, in Revue trimestrielle de droit commercial et de droit économique, 2024.

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The European Legislature, through the GDPR, aimed to harmonise the data protection regulatory framework across EU Member States. Furthermore, with a single provision, namely art. 82 GDPR, it attempted to harmonise the entire liability regime for unlawful data processing. This harmonisation objective is unique for two reasons: (i) traditionally, the legal instrument used by EU institutions to harmonise civil law is the directive, as liability is generally left to the discretion of Member States[10]; (ii) the harmonisation of the liability regime is achieved through a single provision, whereas in other cases the liability framework has been defined through entire laws[11].

In addition to the fact that the European Commission has chosen to implement a regulation, which is directly binding and prevails over conflicting national rules, it should be noted that the CJEU has denied the possibility of interpreting the provisions of the GDPR on the basis of national legal traditions, as long as those rules do not explicitly refer to national legal frameworks.

Therefore, both the Regulation's instrument and the CJEU's interpretative approach led to the conclusion that the provisions of the GDPR can be interpreted solely based on the Regulation's text, to ensure harmonisation between Member States.

This harmonisation process, compared with previous civil-law harmonisation efforts, is remarkable for several reasons.

Firstly, according to the EU treaties, the Union institutions do not have the power to intervene in the field of civil law, which has traditionally been left to the Member States[12]. However, over time, they have acquired new powers through the adoption of directives aimed at harmonising those segments of tort law considered to cross

[10] For an overview of the EU directives addressing civil liability see M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, A. Marciano, G.B. Ramello (edited by), Springer, 2019, 1033-1034.

[11] See for example the new product liability directive (Directive EU 2024/2853).

[12] M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, cit., 1033.

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national borders and/or affect the development of the internal market[13]. This trend began in the 1970s with the Directive on civil liability insurance[14], and continued with several attempts to harmonise private law[15]. However, these initiatives have never interfered with the general architecture of substantive tort law; instead, they have only shaped particular civil torts[16]. Even today, the harmonisation of civil law is very limited and is primarily based on national law[17].

In this regard, it has been pointed out that the instruments most frequently used by the EU institutions for harmonisation purposes are directives, which, owing to their flexibility, have allowed Member States to apply their own legal categories, thereby intensifying differences rather than promoting uniformity[18]. As regards regulations, there are only a few examples, such as EU Regulation 864/2007 on the law applicable

[13] M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, cit., 1033. More in general, on the expansion of EU competences, see O. Scarcello, *Fundamental Rights and the Federal Equilibrium: Comparing the Doctrines of Incorporation in the USA and the EU*, in Maastricht Journal of European and Comparative Law, 6/2023,

[14] M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, cit., 1033.

[15] U. Magnus, *Tort law in general*, in *Elgar Encyclopedia of Comparative Law*, M. Smits, et al. (edited by), Edwards Elgar, 2023, 882-883; M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, cit., 1035.

[16] M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, cit., 1034.

[17] T.K. Graziano, *Comparative tort law*, Routledge, 2018, 46.

[18] M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, cit., 1035.

to non-contractual obligations[19]. Even in this case, however, deep uniformity has not been achieved due to disagreement over the meanings of important concepts[20].

The GDPR provides a clear example of these tort law harmonisation objectives[21], characterised by its unusual regulatory form and the compression of the entire liability regime into a single provision. However, in this regard, legal scholars have noted a lack of essential elements in art. 82 GDPR, which, despite the promise of complete harmonisation, could lead to only partial harmonisation[22]. Indeed, several key concepts, such as the standard of conduct, the causal link, and events beyond control (e.g., force majeure), are not defined in the Regulation but are essential to give concrete form to the liability framework.

To this end, where and how should the missing and necessary information be obtained when it is not provided by the GDPR?

This paper will address this issue relying on the legal principles shared by most civil liability systems in EU Member States. The reason for this choice lies in the fact that both the objectives of the GDPR and the CJEU are to harmonise the data protection regulatory frameworks of Member States, so the missing elements should be sought with this harmonisation objective in mind, to make it as feasible as possible. Focusing exclusively on the most widely shared principles may facilitate the interpretation of

[19] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007,

Another example is the Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L 302, 17.11.2009.

[20] M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, cit., 1035.

[21] On the GDPR's purpose of civil liability harmonisation see E. Tosi, *Unlawful data processing prevention and strict liability regime under EU GDPR*, in Italian law journal, 7(2)/2021, 877; more in general, on the GDPR, see J.P. Albrecht, *How the GDPR will change the world*, in European data protection law review, 3/2016, 287.

[22] F. Episcopo, *UI v. Österreichische Post – A first brick in the wall for a European interpretation of art. 82 GDPR*, cit., 91; more in general, on the GDPR, see E. Mišćenić, A.L. Hoffman, *The role of opening clauses in harmonization of eu law: example of the EU's general data protection regulation (GDPR)*, in EU and comparative law issues and challenges series (ECLIC), 4/2020, 46.

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art. 82(3) of the GDPR and promote harmonisation among Member States, which are already familiar with these principles.

Conversely, grounding the interpretation in principles insufficiently shared across the Union risks producing the opposite outcome: the transplantation of legal institutions into legal systems unfamiliar with them may compel Member States to undertake significant structural adjustments[23].

Therefore, this paper will firstly outline how EU Member States traditionally addressed exemption clauses in tort law. The identification of the most shared principles will help in assessing whether the CJEU is interpreting art. 82(3) GDPR consistently with the tradition of the Member States, or, whether it is transplanting a so-called legal irritant[24], potentially compromising the effects of a uniform interpretation in all EU countries[25].

The task of identifying these principles will be pursued by referring to comparative legal doctrine, and, more specifically, to that aimed at determining the common principles of national tort law systems. In other words, the gaps in the GDPR will be filled by the legal findings obtained from research into the principles of EU tort law.

Since the 1980s, the EU institutions have initiated a (partial) process of Europeanisation of tort law, creating a new field of study characterised by the method of legal comparison, with varying nuances[26].

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[23] M. Siems, *Comparative law*, Cambridge University Press, 2018, 239.

[24] See G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, in Modern law reviews, 61/1998; E. Örücü, *Law as transposition*, in International & comparative law quarterly, 2008.

[25] «Lack of familiarity with the new rules and their underpinning rationales, as well as the possible path dependency on deep rooted local traditions, could lead to the defeat of any harmonization project» (references omitted), M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, cit., 1033.

[26] R. Zimmermann, *Comparative law and the Europeanization of private law*, in *The Oxford handbook of comparative law*, M. Reimann, R. Zimmermann (edited by), Oxford University Press, 2020, 541.

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Comparative law has emerged as an indispensable method in the work of European courts, which have been shown to rely on the national law of all Member States both to interpret EU law and to apply the European Convention on Human Rights[27].

As mentioned, this paper will comment on the case-law of the Court of Justice of the European Union on the exemption clause provided for in art. 82 GDPR, using comparative studies on European tort law as a reference.

This paper suggests that the Court should fill the gaps in the GDPR by drawing on comparative tort law and the results obtained over the years only when such principles are sufficiently shared among Member States.

A reliable *tertium comparationis* is provided by the Principles of European Tort Law on Liability (PETL)[28], the result of an intense period of comparative tort law studies[29]; another is the Draft Common Frame of Reference (DCFR)[30], which, although

[27] «The aims of improving national legislation or national case law scarcely exhaust, however, the pragmatic or utilitarian applications of comparative legal reasoning. A larger pragmatic objective is the regional or international harmonization of law, of great importance today within Europe but also in the worldwide process of development of international and transnational law», H.P. Glenn, *Aims of comparative law,* in *Elgar Encyclopedia of Comparative Law,* J.M. Smits, et al. (edited by), Edwards Elgar, 2023; see also M. Martìn-Casals, *The impact of the PETL on national legislation and case law – a* survey, in Journal of European tort law, 14(1)/2023.

On the courts' use of Principles of European Contract Law (PECL), see J.M. Smits, *Convergence of private law in Europe: towards a new ius commune?*, in *Comparative law. A handbook*, E. Örücü, D. Nelken (edited by), Oxford and Portland Oregon, 2007, 232; T.K. Graziano, *Comparative tort law*, cit., 66.

[28] European Group on Tort Law, *Principles of European Tort Law* (Text and Commentary), Springer, Vienna/New York, 2005.

[29] «The first and the greatest strength of the PETL thus lies in the fact that they provide, for the first time, a *tertium comparationis* and a *reference* for future discussions and deliberations on tort law in Europe and beyond in the same way that the contract law principles do…A second strength of the PETL is the method that was used to prepare them. The PETL were developed on the basis of a broad comparative study…Today, such a broad comparative view is essential for the success of any project on common principles of European law, for the outcome of the research to be acceptable, and for support to be found throughout Europe», T.K. Graziano, *Comparative tort law*, cit., 51.

[30] C. von Bar, E. Clive, H. Schulte-Nölke (edted by), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, 2009.

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referring more to accountability than liability, does not differ significantly from the PETL[31].

These impressive works are of great importance for this paper: the harmonisation pursued through an EU regulation and through the decisions of the CJEU represents a top-down method of harmonisation which, despite its undisputed advantages in terms of enforcing power, risks imposing legal rules that are foreign to the legal traditions of the Member States (legal irritants), potentially compromising the effects of a uniform interpretation in all EU countries[32].

In this context, legal scholars have emphasised that top-down harmonisation should be supported by bottom-up initiatives aimed at developing a common legal culture[33]. The PETL and the DCFR, which provide an overview of the most widely shared EU

[31] «In the early 2000s the EU itself began a more comprehensive attempt at harmonization, under the rather open and vague notion of the Common Frame of Reference (CFR). In preparation for this exercise, two further academic groups - the Study Group on a European Civil Code and the so-called Acquis Group - published a Draft Common Frame of Reference (DCFR) in 2009. The tort law solutions proposed in the PETL and the DCFR are rather similar. Differences concern minor points only. Yet, at present, the EU appears to be restricting its CFR harmonization initiative to contract law, perhaps even to sales contracts and related services contracts» (references omitted), U. Magnus, *Tort law in general*, in *Elgar Encyclopedia of Comparative Law*, cit., 882-883.

[32] «Lack of familiarity with the new rules and their underpinning rationales, as well as the possible path dependency on deep rooted local traditions, could lead to the defeat of any harmonization project» (references omitted), M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, cit., 1033.

[33] «"Knowledge-building" enterprises share the common view that top-down harmonization cannot be undertaken without the collateral support of bottom-up initiatives. Therefore, the real instrument and target for those who are seeking the establishment of a truly European tort law should be the development of a common legal culture, based on as much knowledge as possible of the legal experience of each European jurisdiction. Irrespective of the uses to which knowledge may be applied, which may or may not include the pursuit of legal harmonization, knowledge building is both the starting point and the final aim of two projects whose scope is broader than the ones we just examined, insofar as their focus goes beyond tort law only. These two projects are the Ius Commune Casebooks for the Common Law of Europe and the Common Core of European Private Law», M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, cit., 1038.

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principles on tort law, can be considered as such, as can other studies, justifying their presence in this paper[34].

3. Infringement and liability exemption

3.1 The context

Before the Court initiated its jurisprudential process, scholars had pointed out that art. 82 GDPR highlights the shortcomings in the coordination between European and national tort law[35].

Art. 82 GDPR is generally interpreted as recognising the right of data subjects to compensation without any recourse to national law[36]. However, despite this intention, the provision was formulated ambiguously, reflecting a middle ground between partial and complete harmonisation, leaving commentators with considerable doubts[37]. This ambiguity has amplified the CJEU's role, which has been called upon to identify and specify which national rules remain permitted and which should be considered pre-empted by the GDPR[38].

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[34] Despite this reliance, this research considers the issues related to the findings of comparative studies. To this connection, see U. Kischel, *Comparative law*, Oxford University Press, 2019, 88; M. Bussani, M. Infantino, *Harmonization of Tort law in Europe*, in *Encyclopedia of law and economics*, cit., 1038.

[35] J. Knetsch, *The Compensation of Non-Pecuniary Loss in GDPR Infringement Cases*, in Journal of European Tort Law, 13(2)/2022, 153; see also F. Episcopo, *The vicissitudes of life at the coalface: remedies and procedures for enforcing union law before national courts*, in *The evolution of EU law*, P. Craig (edited by), Oxford University Press, 2017.

[36] G. Zanfir-Fortuna, *Article 82. Right to compensation and liabilty*, in C. Kuner, L.A. Bygrave, C. Docksey, L. Drechsler, *The EU General Data Protection Regulation (GDPR): A Commentary,* 2020, 1163; S. Li, *Compensation for non-material damage under Article 82 GDPR: a review of case C-300/21,* cit., 336.; J. Knetsch, *The Compensation of Non-Pecuniary Loss in GDPR Infringement Cases*, cit., 137-138.

[37] F. Episcopo, *UI v. Österreichische Post – A first brick in the wall for a European interpretation of art. 82 GDPR*, cit., 91.

[38] P.A. de Miguel Asensio, *Determinación de la indemnización por daños derivados de infracciones del Reglamento General de Protección de Datos*, cit., 496.

To this end, in interpreting art. 82 GDPR in C-300/21, the Court ruled that the «terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard, inter alia, to the wording of the provision concerned and to its context»[39] (para 29)[40].

This line of interpretation has been followed in subsequent decisions, implying that the entire case-law of the CJEU on art. 82 GDPR represents an attempt to harmonise the data protection liability regime across all Member States, except for the quantification of compensation, which remains within the competence of national courts[41].

In C-300/21, the Court identified the conditions necessary for civil liability in data protection: (i) processing of personal data that infringes the provisions of the GDPR; (ii) damage suffered by the data subject; (iii) a causal link between the unlawful processing and the damage (para 32, 36).

This paper aims to shed light on the exemption clause provided for in art. 82(3) GDPR, and this objective requires analysing two of the three conditions necessary for liability: the infringement and the causal link. Both elements can be discussed

[39] «Un concepto propio o autónomo constituye un término común a todos los Estados miembros de la Unión Europea que se va formando a partir de las interpretaciones que realiza el Tribunal de Luxemburgo de conformidad con los Tratados a petición de los órganos jurisdiccionales nacionales», M.C. Vergès, *El concepto autònomo de responsabilidad civil en el àmbito de la protecciòn de datos personales en la era digital: anàlisis del artìculo 82 del regolamento 2016/679,* cit., 58; see also F. Gotzen, *Autonomous Concepts in the Case Law of the Court of Justice of the European Union on Copyright*, Revue Internationale du Droit d'Auteur, 262/2020; L. Mancano, *Judicial Harmonisation Through Autonomous Concepts of European Union Law. The Example of the European Arrest Warrant Framework Decision*, in European law review, 43/2018.

[40] The Court refers to judgments of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)*, C-439/19, EU:C:2021:504, paragraph 81; of 10 February 2022, *ShareWood Switzerland*, C-595/20, EU:C:2022:86, paragraph 21; of 15 April 2021, *The North of England P & I Association*, C-786/19, EU:C:2021:276, paragraph 48, and of 10 June 2021, *KRONE – Verlag*, C-65/20, EU:C:2021:471, paragraph 25).

[41] C-300/21, para 59.

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without a deep inquiry into the nature of the damage, which would not affect the notions of infringement and causation.

3.2 The GDPR infringement

What constitutes a violation can be inferred from recital 146 GDPR, according to which unlawful data processing is that which violates the Regulation, its delegated and implementing acts, and the laws of Member States specifying the rules of the GDPR.

Before the CJEU's case-law on art. 82 GDPR, since the Regulation does not explicitly identify all possible unlawful processing, scholars wondered whether only some violations of the GDPR, or all of them, should be considered sufficient to establish a cause of action for compensation[42], refraining from the old issue of protected interests[43]. The view that art. 82 GDPR is a general rule of liability[44] that has gained widespread popularity and is followed by most national courts in the EU[45].

Moreover, although it was generally accepted that any obligation established by the GDPR, if breached, could give rise to a right to compensation, some authors noted

[42] «However, it is not without reason that the European Parliament insisted on the general term 'infringement'. Indeed, this term can also be interpreted in a way that any kind of infringement is sufficient to give a cause of action to the claimant. If so, this would also include violations of information rights laid out in arts 12–15 GDPR», J. Knetsch, *The Compensation of Non-Pecuniary Loss in GDPR Infringement Cases*, cit., 142.

[43] U. Magnus, *Tort law in general*, in *Elgar Encyclopedia of Comparative Law*, cit., 878-879; see also S.D. Lindenbergh, *Damages (in tort),* in *Elgar Encyclopedia of Comparative Law,* J.M. Smits, et al. (edited by), Edwards Elgar, 2023, 289; European Group on Tort Law, *Principles of European Tort Law* (Text and Commentary), cit., 24.

[44] M. Gambini, *Responsabilita e risarcimento nel trattamento dei dati personali*, in Cuffaro V., D'Orazio R., Ricciuto V. (edited by), *I dati personali nel diritto europeo*, 2019, 1033.

[45] For instance, on compensation for violation of art. 15 GDPR, see Higher Regional Court (Oberlandesgericht) of Vienna, 7 December 2020, ref 11 R 153/20f, 154/ 20b; Regional Labour Court (Landesarbeitsgericht) of Lower Saxony, 22 October 2021, ref 16 Sa 761/20; Labour Court (Arbeitsgericht) of Neumünster, 11 August 2020, ref 1 Ca 247 c/20.

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that, in order to determine whether a provision had been breached, the nature of the obligation in question had to be taken into account[46].

Such structure reflects a distinction traditionally recognised across European private law systems, which generally distinguish between two types of obligations: obligations to use reasonable care and skill (known as *Diensvertrag* in Germany, *obligation de moyens* in France, or *obbligazione di mezzi* in Italy)[47], linked to fault-based liability systems[48], and obligations to achieve a specific result (known as *Werkvertrag* in Germany, *obligation de résultat* in France, or *obbligazione di risultato* in Italy)[49], linked to liability systems not based on fault (hereinafter, we will refer to this approach as strict liability)[50].

[46] «To properly understand the liability exposure of controllers, it is necessary to first understand the nature of controller obligations», B. Van Alsenoy, *Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation*, in Journal of Intellectual Property, Information Technology and E-Commerce Law, 7(3)/2016, 273.

[47] M. Bussani, A.J. Sebok, M. Infantino, *Common law and civil law perspectives on tort law*, Oxford University press, 2019, 56; the same applies for contractual liability, see D. Alessi, *The distinction between Obligations de Résultat and Obligations de Moyens and the Enforceability of Promises*, in European review of private law, 13(5), 2005.

[48] M. Cappeletti, *Justifying strict liability: a comparative analysis in legal reasoning*, Oxford University press, 2022, 13; M. Bussani, A.J. Sebok, M. Infantino, *Common law and civil law perspectives on tort law*, cit., 43; F. Werro, E. Buyuksagis, *The bounds between negligence and strict liability*, in *Comparative Tort Law*, M. Bussani, A.J. Sebok (edited by), Edward Elgar, 2015, 203; U. Magnus, *Tort law in general*, in *Elgar Encyclopedia of Comparative Law*, cit., 880.

[49] M. Bussani, A.J. Sebok, M. Infantino, *Common law and civil law perspectives on tort law*, cit., 56; the same applies for contractual liability, see D. Alessi, *The distinction between Obligations de Résultat and Obligations de Moyens and the Enforceability of Promises*, cit.

[50] «Under a regime of strict liability, the underlying principle is that liability ought to result from the materialization of a specific risk, which is linked either to a thing or an activity under the defendant's control, irrespective of any actual lack of care on his part. A milder form of strict liability can be found where a lack of care on the defendant's part is presumed upon the materialization of a particular hazard and occurrence of certain injuries; as noted, if such a presumption is not subject to refutation, the liability is strict i). The determining factor for imposing such liability is usually that the injuries in question tend to occur even where due care is exercised, or that they can be avoided only at excessive cost (ii)» F. Werro, E. Buyuksagis, *The bounds between negligence and strict liability*, cit., 207; M. Cappeletti, *Justifying strict liability: a comparative analysis in legal reasoning*, cit, 14.

Obligations of means (or conduct) are framed as commitments to perform a specific task with due care and diligence, or to exert best effort[51]. They do not guarantee a particular result[52]. In the context of professional obligations, determining whether the task has been performed with due care depends on the specific type of obligation assumed and the circumstances of the case, namely, the standard of conduct[53]. To establish liability for a breach of an obligation of means, proof of fault is required[54].

Obligations of result, on the other hand, are characterised by a commitment to achieve a specific outcome and have traditionally been linked to a strict liability regime focused on whether or not the result is achieved[55]. However, even in these cases, a strict exempting proof is admitted[56].

In conclusion, an infringement cannot be established if the data controller or data processor provides valid exonerating evidence. Accordingly, obligations of means are not considered breached if the standard of conduct is met, regardless of whether damage has occurred[57]. Similarly, obligations of result must not be deemed breached

[51] B. Winiger, E. Karner, K. Oliphant (edited by), *Digest of European tort law, Volume 3: Essential cases on misconduct*, De Gruyter, 2018, 777.

[52] B. Winiger, E. Karner, K. Oliphant (edited by), *Digest of European tort law, Volume 3: Essential cases on misconduct*, cit., 28.

[53] European Group on Tort Law, *Principles of European Tort Law* (Text and Commentary), cit., 76; similarly, C. von Bar, E. Clive, H. Schulte-Nölke (edted by), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, cit., 3274.

[54] O. Morèteau, *Basic questions of tort law from a french perspective*, in *Basic questions of tort law from a comparative perspective*, H. Koziol (edited by), Jan Sramek Verlag, 2015, 34.

[55] «In some other legal systems, and especially in an international comparative context, the notion of force majeure is first and foremost dealt with in relation to duties to achieve a specific result», M. Schmidt-Kessel, K. Mayer, *Supervening events and force majeure*, in *Elgar Encyclopedia of Comparative Law*, M. Smits, et al. (edited by), Edwards Elgar, 2023, 840; O. Morèteau, *Basic questions of tort law from a french perspective*, cit., 34.

[56] European Group on Tort Law, *Principles of European Tort Law* (Text and Commentary), cit., 127; similarly, C. von Bar, E. Clive, H. Schulte-Nölke (edted by), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, cit., 3538.

[57] J. Gardner, *Torts and other wrongs*, Oxford university press, 2019, 216.

when the perpetrator of the unlawful act has demonstrated *force majeure* or exonerating conduct by the victim[58].

These distinctions are also relevant in the context of the GDPR.

In this regard, it has been emphasised that most of the obligations imposed on data controllers under the GDPR are formulated as obligations of means, for example, art. 17(2) GDPR, which requires data controllers to take 'reasonable steps' to inform other data controllers of the erasure request, was intended as such[59]. Conversely, the obligation under art. 35(1) GDPR, which requires processors to consult the supervisory authority in advance for high-risk data processing, could be classified as an obligation of result, as it leaves no room for a different outcome.

However, some obligations have hybrid characteristics. For example, the obligation to ensure processing in accordance with art. 32 GDPR has been considered both an obligation of means by some[60] and an obligation of result by others[61], with the consequence of different liability regimes.

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[58] European Group on Tort Law, *Principles of European Tort Law* (Text and Commentary), cit., 129 on *force majeure*, stating that «if a natural phenomenon causes the victim's loss which has to be considered part of the latter's sphere anyway (see Art, 3:106), to that extent liability cannot be established in the first place, so that no defence is needed on the keeper's side»; similarly, C. von Bar, E. Clive, H. Schulte-Nölke (edted by), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, cit., 3539-3540; M. Bussani, A.J. Sebok, M. Infantino, *Common law and civil law perspectives on tort law*, cit., 24-25.

[59] B. Van Alsenoy, *Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation*, cit. 282.

[60] «Under the GDPR, damages due to a breach of the security do not always lead to private law liability. Pursuant to Article 82(1), the data subjects are only entitled to receive compensation if there is an infringement. There is no violation if the security of the personal data was breached despite the implementation of appropriate measures», P.T.J. Wolters, *The security of personal data under the GDPR: a harmonized duty or a shared responsibility?*, in International Data privacy law, 7(3)/2017, 172; B. Van Alsenoy, *Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation*, cit.; L.A. Bygrave, *Security by design: aspirations and realities in a regulatory context*, in Oslo law review, 8(3)/2021.

[61] «For example, considering the way the GDPR defines 'pseudonymisation', it implies that pseudonymisation has not only to be technically implemented in data protection systems, but also to result in organisational measures, such as management of access rights for the personnel that has access to the key of the pseudonymised data», L. Jasmontaite, et al., *Data protection by design and by*

As explained, according to the traditional relationship between the legal nature of the obligation and the relevant liability regime, when a duty is considered an obligation of means, the data controller only has to demonstrate compliance with the required standard of conduct; this means that, for example, a data breach would not be sufficient in itself to establish the inadequacy of security measures under art. 32 GDPR. Conversely, if considered as an obligation of result, the loss of data resulting from a data breach should automatically trigger the controller's liability. In the latter case, however, the controller could still demonstrate that it is not in any way responsible for the event giving rise to the damage under art. 82(3) GDPR, for example, by demonstrating *force majeure* or significant conduct on the part of the data subject.

That said, it should be noted that, while this relationship is traditionally understood as described, some scholars have deviated from it in their interpretation of the provisions of the GDPR, for example, by associating obligations of means with strict liability[62], highlighting a lack of certainty as to how this relationship should be understood.

Although art. 82(3) GDPR certainly excludes forms of absolute liability[63], the legal nature of the data protection liability regime provided for in art. 82 GDPR was controversial even before the CJEU's case-law. Most scholars were inclined to interpret art. 82 GDPR as a strict liability regime[64]. In support of this interpretation,

default: framing guiding principles into legal obligations in the GDPR, in Data protection by design and by default, 2/2018, 7; F. Bilotta, *La responsabilita civilenel trattamento dei dati personali*, in *Circolazione e protezione dei dati personali, tra liberta e regole del mercato*, R. Panetta (edited by), 2019.

[62] Van Alsenoy links art. 32 GDPR, intended by him as an obligation of means, to a strict liability regime: B. Van Alsenoy, *Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation*, cit., 283.

[63] «"absolute liability" (where no or hardly any defences apply)», European Group on Tort Law, *Principles of European Tort Law* (Text and Commentary), cit., 102; M. Bussani, A.J. Sebok, M. Infantino, *Common law and civil law perspectives on tort law*, cit., 24.

[64] *Ex* multis, see R. Strugala, *Art. 82 GDPR: Strict Liability or Liability Based on Fault?*, in European Journal of Privacy Law & Technologies (EJPLT), 2020; G. Zanfir-Fortuna, *Article 82. Right to compensation and liability*, cit.; E. Tosi, *Responsabilità civile per illecito trattamento dei dati personali e danno non*

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it was noted that this liability regime could be considered a continuation of the one provided for in art. 23 of Directive 95/46/EC[65], which was interpreted as requiring proof of an external cause or event beyond control, such as *force majeure* or error on the part of the data subject[66]. Given their similar wording, art. 82 GDPR has been interpreted as requiring the same type of proof[67]. From this perspective, the mere absence of fault would not be sufficient to exempt from liability[68].

3.3 The causal link between infringement and damage

Moving on to the causal link, the Regulation does not even mention it. The Court of Justice of the European Union has inferred it through a literal interpretation of art.

patrimoniale, Giuffrè, 2019; S. Li, *Compensation for non-material damage under Article 82 GDPR: a review of case C-300/21*, 336.

[65] «Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered. The controller may be exempted from this liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage».

[66] B. Van Alsenoy, *Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation*, cit., 283; other scholars admitted the possibility to establish a fault-based liability system based on art. 23, see T. Kosmides, *The legal nature of the controller's civil liability according to art. 23 of Directive 95/46 EC (Data Protection Directive)*, in *Honorary Volume for Evi Laskari*, M. Bottis, A. Giannakoulopoulos (edited by), texts and articles from the 5th International Conference on Information Law (ICIL), 2012.

[67] «Interestingly, the GDPR does not contain a recital similar to recital (55) of Directive 95/46, which provides two examples of how a controller might prove that it is "not responsible for the event giving rise to the damage" (i.e., force majeure or error on the part of the data subject). Nevertheless, it is reasonable to assume that the words "not responsible for the event giving rise to the damage" should still be interpreted in the same way. As a result, the escape clause of article 82(3) still refers exclusively to "events beyond control", i.e. an abnormal occurrence which cannot be averted by any reasonable measures and which does not constitute the realisation of the risk for which the person is strictly liable. If anything, the addition of the words "in any way" (in comparison to article 23 [2] of Directive 95/46), suggests a desire to tighten the scope of the escape clause even further», B. Van Alsenoy, *Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation*, cit., 283.

[68] J. Knetsch, *The Compensation of Non-Pecuniary Loss in GDPR Infringement Cases*, cit., 142.

82 GDPR, which refers to «damage caused by processing which infringes this Regulation» (paragraph 2) and to «any damage caused by processing» (paragraph 3)[69].

This is not new: even national legislatures have not explicitly addressed its definition or its actual functioning[70], given the difficulties in defining a generally applicable criterion of causation test[71].

In the context of data protection, the literature is very limited. The few scholars who have addressed it have invoked general principles of causality without providing specific adaptations for data protection[72].

In analysing traditional causality theory, it should be emphasised that most EU Member States recognise the fundamental distinction between factual and legal (or policy-based) investigations of causality. However, despite this common ground, a comparison between Member States has highlighted the fragmentation of how these inquiries actually work[73]. Indeed, in some cases, national legal systems have used different tools and reasoning yet arrived at similar results; in other cases, even when

[69] C-300/21, para 32, 36, 37.

[70] M. Bussani, A.J. Sebok, M. Infantino, *Common law and civil law perspectives on tort law*, cit., 177-178.

[71] C. Van Dam, *European tort law*, Oxford University Press, 2013, 307.

[72] «La relación de causalidad implica que esa infracción del Reglamento de protección de datos es la *conditio sine qua non* de la causa del perjuicio a la víctima, ya que, si no se hubiese producido la misma, no hubiera habido daños. La infracción en el ámbito de la protección de datos personales ha de estar suficientemente demostrada a nivel objetivo, pero no podemos obviar que la relación causa-efecto acostumbra a ser de carácter subjetivo. Por tanto, es preciso aportar pruebas que la apoyen basadas en los medios permitidos en derecho. En algunos casos son relaciones difíciles de demostrar o justificar, debido a la subjetividad que implican, especialmente en el ámbito de la imagen personal» (references omitted), M.C. Vergès, *El concepto autònomo de responsabilidad civil en el àmbito de la protecciòn de datos personales en la era digital: anàlisis del artìculo 82 del regolamento 2016/679*, cit., 276; see also J. Knetsch, *The Compensation of Non-Pecuniary Loss in GDPR Infringement Cases*, cit., 145 ff.

[73] «Second, all European jurisdictions acknowledge a fundamental divide running through the causal inquiry, which can be broken down into different sub-species of investigation: one eminently factual, and the other quintessentially legal or policy-based.6 In many legal systems, the divide overlaps with that between issues of facts and issues of law, thus determining the reviewability of judgments», M. Infantino, E. Zervogianni, *Unravelling causation in European tort laws*, in Rabels zeitschrift fur auslandisches und internationals privatrecht, 83/2019, 649-650, 672.

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the same tool or rule was invoked, it was applied with different meanings or produced different results[74]. In this regard, it has been observed that once general theories are abandoned, practical cases demonstrate that they are applied differently[75].

These differences stem from the different theories applied at each stage. While factual causation is generally established on the basis of the but-for/*condicio sine qua non* test[76], the second stage of the investigation is governed by a wide range of tests rooted in different key concepts[77]. Indeed, on the one hand, the factual investigation requires little more than establishing that the damage would not have occurred in the absence of the unlawful activity; on the other hand, the more indirect and distant the link between the data processing activity and the damage, the more political reasoning is required to determine whether causality should be accepted or not[78].

As regards the factual examination, as mentioned above, the standard criterion is the but-for test, according to which, in the absence of the defendant's unlawful activity,

[74] «Still, the disagreement as to the outcome does not necessarily imply a different approach to causation as such, the disagreement being attributable to reasons other than causation. This confirms Sacco's well-known finding about the possible mismatch between declamatory statements, official rules and operational results, but it also corroborates the idea that it is hard to see clear lines of convergence in European legal systems' approaches to causation» (references omitted), M. Infantino, E. Zervogianni, *Unravelling causation in European tort laws*, cit., 672.

[75] C. Van Dam, *European tort law*, cit., 308.

[76] The PETL describe this test as «an activity or conduct…is a cause of the victim's damage if, in the absence of the activity, the damage would not have occurred», European Group on Tort Law, *Principles of European Tort Law* (Text and Commentary), cit., 43.

[77] «Third, it is often emphasized – especially in comparative tort law literature – that the space and the role reserved for causation analysis are not uniform across legal systems. On the basis of studies whose focus was largely on the triad of the "major" European jurisdictions (that is, England, France and Germany), it is often observed that jurisdictions whose main liability equation includes extensive analysis on whether the defendant breached a duty of care owed to the victim (England), or on whether the latter's injury is worthy of tort law protection (Germany), leave in principle less room for causation reasoning than jurisdictions based on a broad formula for negligence liability (France)» (references omitted), M. Infantino, E. Zervogianni, *Unravelling causation in European tort laws*, cit., 649-650; C. Van Dam, *European tort law*, cit., 310.

[78] «Among those considerations rank the foreseeability of the damage, the magnitude of the damage, the value of the violated right or interest and the protective purpose of the violated rule or duty», U. Magnus, *Tort law in general*, in *Elgar Encyclopedia of Comparative Law*, cit., 879.

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the claimant would not have suffered such damage[79]. The assessment of legal causality is carried out through various theories[80], such as that based on the predictability of the damage caused, which makes the defendant liable only for those damages whose occurrence was foreseeable; or based on the scope of application of the violated rule, according to which compensation is granted only for damages that can be considered within the scope of application of the rule violated by the wrongdoer; however, legal causality can also be determined on the basis of the so-called "proximity rule", which assesses the proximity between the activity in question and the resulting damage[81].

An important difference between Member States concerns the evidence required to establish/break the causal link. In some jurisdictions, indeed, the causal link is established if ascertained with certainty (*überwiegende Wahr-scheinlichkeit* in Germany), while in others a predominant probability (*più probabile che non* in Italy, or *degré suffisant de probabilité* in France) of the purported cause is deemed sufficient[82].

The fragmentation that characterises theories of causality in the EU makes it difficult to envisage harmonising this element. Given the GDPR's silence on this matter, the CJEU would be left to interpret the causality nexus without any explanation from the GDPR on how it should work and without a generally accepted theory among Member States. The risk of harmonisation would be to impose concepts and notions that could be in sharp contrast to the traditions of some Member States.

In light of the above, it appears to be a broad consensus on the general notion of infringement. In contrast, the practical functioning of the causal link remains highly

[79] I. Puppe, *The concept of causation in the law,* in *Critical essays on causation and responsibility*, B. Kahmen, M. Stepanians (edited by), De Gruyter, 2013, 69; M. Infantino, *Causation theories and causation rules*, in *Comparative tort law*, M. Bussani, A.J. Sebok (edited by), Edwards Elgar, 2015, 283-284; for the problems related to the *condicio sine qua non* test see C. Van Dam, *European tort law*, cit., 311.

[80] For an overview see cit. European Group on Tort Law, *Principles of European Tort Law* (Text and Commentary), cit., 61ff.

[81] M. Infantino, *Causation theories and causation rules*, cit., 283-284; C. Van Dam, *European tort law*, cit., 311.

[82] C. Van Dam, *European tort law*, cit., 324-326; M. Infantino, *Causation theories and causation rules*, cit., 295; T.K. Graziano, *Comparative tort law*, cit., 279.

fragmented across the Member States. Taking this into account, and considering additional elements, such as the absence in the GDPR of a clearly identified liability criterion (whether fault-based or not) and of the required exonerating evidence, as well as the harmonisation purpose of both the GDPR and the case law of the CJEU, it may be suggested that the Court interprets the notion of infringement under art. 82 GDPR in light of the legal traditions of the Member States. Given the broad consensus outlined above, such an approach could facilitate the Court's objective of promoting harmonisation.

Conversely, any attempt to harmonise the operation of the causal link may result in the transposition of legal irritants into national systems, where such concepts risk colliding with pre-existing doctrinal categories and procedural frameworks, thereby generating frictions rather than convergence.

However, as will be described, the CJEU did not delve into the concept of infringement, ultimately associating the criterion of fault with obligations of result (see C-741/21), thereby requiring Member States to adopt an interpretation of the law that, in most instances, runs counter to their established legal traditions.

Section 3.4 examines the trajectory of the CJEU's case law, highlighting the specific developments that led the Court to depart from the legal traditions most widely shared across the Member States, ultimately undermining the harmonisation purpose of the GDPR.

3.4 The CJEU path

The case-law of the Court of Justice of the European Union will be presented below in chronological order, including the opinions of the Advocates General where relevant to the analysis. Each decision will be accompanied by commentary and linked to others to reflect the Court's evolving interpretation.

As will be described, the Court set out its position in cases C-340/21 and C-667/21 and, albeit with nuances, adopted a fault-based liability regime, which it confirmed in subsequent decisions. In the analysis, it will be highlighted that the principles set out in cases C-340/21 and C-667/21, while appropriate with respect to obligations of conduct, do not provide a solid basis for harmonisation in relation to breaches of obligations of result, as was the case in C-741/21.

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The discussion will offer a different interpretation of the GDPR liability regime, connecting it to the general doctrine of EU tort law, the GDPR's harmonisation purpose, and the specific peculiarities of the case presented to the Court.

C-340/21.

The first judgment assessing the infringement as a necessary condition to establish liability is C-340/21, whose AG's opinion is particularly relevant.

The first preliminary question asked whether art. 24 and 32 GDPR should be interpreted as that unauthorised disclosure of personal data or unauthorised access by third parties are in themselves sufficient elements to hold that the technical and organisational measures implemented by the controller were not appropriate in the meaning of art. 24 and 32 GDPR.

The Advocate General's Opinion.

The Advocate General's opinion is based on two fundamental premises: i) the technical and organisational measures required by the principle of accountability[83] should be appropriate, in the sense that they should achieve a certain level of acceptability «both in technical terms (relevance of measures) and qualitative terms (effectiveness of protection)» (para 26); ii) the GDPR would be modelled on risk prevention and the accountability of the data controller, thus adopting a purposive approach aimed at achieving the best possible result in terms of effectiveness (para 27).

In answering the first question referred, the Advocate General first focused on the literal interpretation of art. 24 and 32 of the GDPR, emphasising the discretion of the data controller in determining the most appropriate measures, in light of the specific

[83] «The principle of accountability is established by Article 5(2) GDPR, affirming that 'the controller shall be responsible for, and be able to demonstrate compliance with paragraph 1 (accountability). By stating so, Article 5(2) establishes the autonomy of the principle of accountability in the data protection law eco-system, and at the same time the strict operational connection to other principles relating to the processing of personal data - such as the principle of lawfulness, of fairness and of transparency - and to the rules that substantiate these principles», G. Schneider, *Accountability*, in *Elgar encyclopedia of law and data science*, G. Comandè (edited by), Edward Elgar, 2022, 9.

assessment factors listed therein (paras 30, 31). In particular, the AG focused on two criteria: the state of the art and the costs of implementation.

The state-of-the-art factor was discussed in relation to the security measures prescribed by art. 32 GDPR. In the AG's opinion, this implies that appropriateness should be measured on the basis of what was technologically reasonably possible at the time of implementation (also taking into account the costs of implementation) (para 32). Such appropriateness was conceptualised as being maintained despite possible breaches, carried out using highly sophisticated tools capable of overcoming measures implemented in accordance with the state of the art (para 33).

Turning to implementation costs, the AG claimed that a balance is required between the interests of data subjects, who generally tend towards a higher level of protection, and the economic interests of data controllers, who sometimes favour a lower level of protection (para 36).

This literal interpretation was complemented by a teleological one[84], according to which it would be illogical to impose on data controllers the obligation to prevent any personal data breach regardless of the diligence required for the preparation of security measures; moreover, the AG continued, if it is true that the GDPR establishes a framework of accountability, then data controllers should always be able to demonstrate their compliance (para 35).

This opinion, expressed on the first referred question, should be linked to that expressed on the fourth referred question, which analyses the exempting proof contained in art. 82(3) GDPR.

It was asked whether the liability exemption clause provided for in art. 82(3) GDPR should be interpreted as excusing data controllers merely because the damage resulted from an unauthorised disclosure of, or access to, personal data realised by third parties.

The Advocate General's response began by recalling the philosophy underlying the Regulation, namely the rejection of automatisms (para 59). It follows a literal

[84] The Advocate does not explicitly differentiate between the different types of interpretation, however, how it will be shown, it could have been relevant.

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interpretation of art. 82(3) GDPR and recital 146 GDPR, both of which require to be «not in any way responsible for the event giving rise to the damage». From this wording, the AG deduced that the standard of proof required is quite high (para 60) and recalled, by analogy, the case law of the CJEU, according to which exceptions to a general rule must be interpreted restrictively (footnote 21)[85].

On this basis, the AG directly addressed the question of the nature of the liability regime. It argued that a coordinated reading of art. 82 GDPR and the obligations to implement and demonstrate the appropriateness of technical and organisational measures (defined as obligations of conduct) allow for the recognition of a form of liability aggravated by the presumption of fault (para 62). The AG based its position on the fact that data controllers can provide exonerating evidence, contrary to what is permitted in strict liability regimes (para 63). Furthermore, it added that the reversal of the burden of proof reflects the need to make compensation effective, as data subjects would encounter excessive difficulties in proving the fault of data controllers. Conversely, the data controller is in the best position to prove that she is not responsible for the event that caused the damage (para 63). Based on the above regarding the nature of the data controller's liability, the AG stated that data controllers can always prove that they are in no way liable for the event that caused the damage; however, the mere fact that the event was caused by a person outside their sphere of control cannot be considered sufficient evidence to exempt them from liability (para 65). Indeed, it continued, the event that caused the damage could be precisely the inadequacy of the measures applied, resulting from the data processors' fault (para 66). If such scenarios did not fall within the scope of art. 82 GDPR, data subjects would not be entitled to compensation and the protection objective pursued under art. 1(2), recitals 10, 11 and 13 GDPR could not be achieved (para 68).

For these reasons, the Advocate General concluded that, under art. 82(3) GDPR, which exempts the controller from liability on the sole ground that a third party has

[85] It cites the following decisions: 15 October 2020, *Association française des usagers de banques* (C-778/18, EU:C:2020:831, paragraph 53), and of 5 April 2022, *Commissioner of An Garda Síochána and Others* (C-140/20, EU:C:2022:258, paragraph 40).

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infringed the Regulation, would have an effect incompatible with the protection objective pursued by the GDPR (para 69).

Comment

In highlighting the critical aspects, the fundamental principles underlying the opinion on the first referred question require some clarification. First, the Advocate General emphasised that the entire regulation is guided by risk prevention and accountability of the data controller; subsequently, however, it concluded in favour of a fault-based liability regime. In this regard, it is worth noting that risk-based regulations and fault-based liability systems are not inherently at odds. However, Member States have traditionally linked risky activities, such as data processing, to strict liability regimes to narrow the scope for exemptions[86].

Subsequently, when the AG states that the GDPR requires only the *best possible* result in terms of the effectiveness of the measures, it provides its own interpretation based on the entire regulation, rather than on specific sentences (there are no sentences in the regulation that require only the *best* effectiveness or appropriateness of the measures, as understood by the AG)[87]. In this case, the AG considered art. 24 and 32 GDPR as obligations of means, defining them as obligations of conduct, which reflect a specific diligence and require only the exercise of best efforts. In this regard, concluding in favour of a fault-based liability regime is consistent with the legal traditions of the Member States, thus making harmonisation in this area feasible.

Moving on to the criterion of implementation costs, the AG's interpretation appears particularly problematic. The AG interprets this parameter as requiring only the

[86] G.C. Keating, *Reasonableness and risk: right and responsibility in the law of torts*, Oxford University press, 2022, 230; the PETL distinguished between dangerous and abnormally dangerous activities, both falling under the strict liability regime, European Group on Tort Law, *Principles of European Tort Law* (Text and Commentary), cit., 101; in this regard, it was stated that the references to risks enshrined in art. 24 and 32 GDPR should not be interpreted to investigate the nature of the liability regime, see B. Van Alsenoy, *Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation*, cit., 282.

[87] Such reading is in line with the idea, generally accepted, according to which risk-management frameworks are not intended to require the removal of every possible risk. In this sense see M. Macenaite, *The "riskification" of European data protection law through a two-fold shift*, in European journal of risk regulation, 2017.

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adoption of measures that entail reasonable costs. However, this interpretation appears in contrast to the European Data Protection Board's (EDPB) opinion on the principles of data protection by design and by default[88]. In that opinion, the EDPB stated that implementation costs should not be a reason not to implement data protection by design; indeed, the EDPB continues, the measures chosen must ensure compliance with the principles of the GDPR, regardless of the financial effort required[89]. In this regard, it was stated that, even taking into account implementation costs, the measures taken must at least ensure the effective protection of data subjects[90]. Although not directly applicable, the EDPB's opinions are of great importance for interpreting data protection rules. Therefore, if the AG's purpose were to suggest that the CJEU overrules the EDPB's statement, further justification would have been necessary. Instead, the AG opted for a succinct interpretation of *reasonable* costs, without adequate elaboration.

The CJEU's decision

Moving on to the Court's decision on the first question referred, it concerned the autonomous and uniform interpretation of art. 24 and 32 GDPR. It is worth recalling that the Court was asked whether art. 24 and 32 GDPR could be interpreted as meaning that the unauthorised disclosure of personal data or unauthorised access by third parties is sufficient to establish that the measures taken by data controllers were not appropriate.

The Court began by pointing out that art. 24 and 32 GDPR do not expressly refer to the law of the Member States for the purposes of determining their meaning and scope, so the terms contained therein must be interpreted autonomously and uniformly throughout the European Union, taking into account the wording of the provisions, their objectives and their context (para 23).

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[88] EDPB, Guidelines 4/2019 on Article 25, Data Protection by Design and by Default, version 2.0, adopted on 20 October 2020.

[89] EDPB, Guidelines 4/2019 on Article 25, Data Protection by Design and by Default, version 2.0, adopted on 20 October 2020, 9, para 25.

[90] A. Selzer, *The appropriateness of technical and organisational measures under article 32 GDPR*, in European Data Protection law review, 1/2021, 123; C. Quelle, *The 'risk revolution' in EU data protection law: we can't have our cake and eat it, too*, in Tilburg Law School Legal Studies Research Paper Series, 17/2017, 20.

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As a preliminary point, the Court held that art. 24 GDPR imposes a general obligation to implement appropriate technical and organisational measures to ensure that data processing activities are carried out in accordance with the GDPR and to demonstrate such compliance (para 24)91. In this regard, the Court stated that the principle of accountability laid down in art. 5(2) GDPR finds its operational expression in art. 24 GDPR (para 48)92.

The actual analysis began with literal and teleological interpretations of art. 32 GDPR, clarifying that it can be inferred from its wording that the Regulation establishes a risk-management system and that it in no way purports to eliminate all risks of personal data breaches: such risks must be managed and mitigated by appropriate measures, such as those referred to in art. 32 GDPR (para 29). In this regard, with respect to data breaches, the Court analysed the wording of art. 24 and 32 GDPR and stated that these provisions simply require data controllers (and data processors, if appointed) to take technical and organisational measures to prevent, as far as possible, data breaches (para 30)93.

The Court therefore concluded that art. 24 and 32 GDPR cannot be interpreted as meaning that the unauthorised disclosure of personal data or unauthorised access by third parties is sufficient to establish that the measures taken by the data controllers were not appropriate (para 31, 39)94. If this were the case, the Court of Justice of the European Union stated, the irrefutable presumption that would result would be contrary to art. 5, 24, 32 and recital 74 GDPR, according to which controllers can demonstrate that the measures implemented are effective and comply with the Regulation (para 32, 34, 35). Furthermore, art. 82(3) GDPR also allows data controllers to demonstrate that they are in no way responsible for the event that caused the damage.

Turning to the Court's decision on the fourth question referred, it completely ignored the issue of identifying the nature of the liability system. It simply pointed out that, under art. 82 GDPR, the evidence must be strictly limited to proving that the damage is not attributable to the controllers (para 70)95; in the event of data breaches, data controllers must demonstrate their compliance with the obligations laid down in art.

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91 Confirmed in C-687/21, para 36.

92 Confirmed in C-687/21, para 43.

93 Confirmed with different reasoning in C-687/21, para 39.

94 Confirmed in C-687/21, para 40.

95 Confirmed in C-200/23, para 164 and C-741/21, para 51.

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32 GDPR (para 71), understood as proof of the absence of a causal link between the damage and their conduct, which allegedly violated the GDPR (para 72)96.
The Court considered that this exemption from liability is consistent with the objective of the GDPR to ensure a high level of protection for data subjects, as set out in recitals 10 and 11 GDPR (para 73). In conclusion, the Court stated that even in cases where the damage results from the disclosure of data to unauthorised third parties, data controllers may be exempt from the obligation to pay compensation if they prove that they are in no way responsible for the event that gave rise to the damage in question (para 74).

Comment

In commenting on this judgment, it should first be noted that the CJEU issued its decision without addressing some of the arguments put forward by the AG97. Unfortunately, it is not possible to find arguments for or against many important positions taken by the AG, which would have been highly significant for a broader understanding of the issue.

Firstly, the Court interprets the meaning and scope of the provision in question as autonomous concepts to be interpreted uniformly across all Member States; to this end, it must read these provisions in light of their wording, objectives, and context. While the Advocate General is not referring to this specific method of interpretation, she reads these provisions in a similar way, providing a literal, systematic and teleological argument. For these reasons, the AG's arguments remain valid for an autonomous interpretation of the provisions in question.

The first preliminary question delves into the element of infringement, asking when art. 24 and 32 GDPR can be considered infringed; in its response, the AG clarified that these duties must be understood as obligations of means; therefore, the occurrence of damage is not sufficient to establish their infringement. The CJEU's response is largely in line with the AG's opinion; however, it omits significant details. Indeed, it did not repeat the key factors of the literal interpretation of art. 24 and 32

96 Confirmed in C-200/23, para 165.

97 M. Buzzoni, *One, Two, Three… Fault? CJEU Rules on Civil Liability Requirements under the GDPR*, cit., 3.

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GDPR, namely the analysis of the state of the art and the criteria relating to implementation costs. Regarding the interpretation of implementation costs, given the concerns expressed, it is welcome that the Court of Justice of the European Union did not repeat this argument, which can therefore no longer be taken into consideration.

Regarding the state of the state-of-the-art factor, however, clarifications would have been necessary.

The AG interprets the concept of appropriateness of the measure (also) in terms of effectiveness of protection, in the sense that the measures must meet a certain level of qualitative acceptability. This level should be achieved by meeting the standard set by current knowledge (ie state of the art), with the consequence that only such measures could be considered as appropriate (para 26). Along the same lines, the AG stated that the objective of protection under the GDPR is to ensure the «best possible result in terms of effectiveness» (para 27). However, the AG considered that the reference to the state of the art implies that the required technological level of the measures would be limited to what is reasonably possible at the time of implementation (para 32).

These specifications were particularly relevant. Indeed, as explained above, the obligation to implement and demonstrate the appropriateness (and effectiveness within the meaning of recital 74 GDPR) of the measures has been interpreted by scholars as both an obligation of means and an obligation of result.

In this regard, if interpreted strictly, the concept of effectiveness is inextricably linked to that of result[98], with the consequence that the only appropriate measure would be one that actually prevented the breach. The only effective measure, indeed, is one that succeeded *ex post* in avoiding the damage.

However, the AG provided acceptable arguments for considering these duties as obligations of means. On the contrary, the Court did not elaborate on the criteria of

[98] «*Producing a result that is wanted: having an intended effect»,* "effective", in The Britannica dictionary. https://www.britannica.com/dictionary/effective <<last accessed: 22/07/2025>>; «*successful or achieving the results that you want»,* voce "effective", in Cambridge dictionary. https://dictionary.cambridge.org/dictionary/english/effective <<last accessed: 22/07/2025>>.

state of the art and implementation costs[99]. It simply stated that, pursuant to recital 74 GDPR, data controllers are required to implement appropriate and effective measures and that such effectiveness must be demonstrated in accordance with the criteria set out in art. 24 and 32 GDPR[100]. The problem with this statement is that it is inconsistent with the other argument that the GDPR does not require the measure to be perfectly abstract, but only its concrete appropriateness to mitigate, as far as possible, the risks arising from the processing (C-340/21, para 30).

Despite this misalignment, the Court was sufficiently clear in stating that measures could be considered appropriate even if breached, so the unjustified reference to effectiveness does not compromise the decision's meaning[101].

Furthermore, to reconcile the concept of effectiveness with this judgment and the entire Regulation, it can be understood as an attribute of the measure to be assessed *ex ante* only, when the measure is applied or updated. Judges and authorities should not assess it from an *ex post* perspective, since, if it were breached, it would be self-evident that it was not effective[102].

Moving on to the answer to the fourth referred question, the CJEU's response provides important arguments. Indeed, it clarified that the violation of the measure cannot be attributed to the data controller if the latter proves that it has fulfilled the obligations laid down in art. 32 GDPR (para 71); immediately afterwards, the Court stated that data controllers can also escape liability by demonstrating the absence[103]

[99] S. Nusselder, *Security measures in the GDPR & the NAP judgement (340/21)*, cit., 5.

[100] P.G. Chiara, *The internet of things and EU law,* Springer, 2024, 170.

[101] Its importance is however not neglectable. Indeed, while recital 74 GDPR is not binding, this CJEU's decision that reads it in conjunction with articles 24 and 32 GDPR is directly enforceable within the Member States. On the effects of a CJEU preliminary ruling see C. Barnard, S. Peers (edited by), *European Union Law*, Oxford University Press, 2014, 291.

[102] Such interpretation is in line with the Italian one on dangerous activities under art. 2050 c.c., requiring to adopt all the adequate measures to prevent the damage, C.M Bianca, *La responsabilità*, Giuffrè Francis Lefebvre, 2021, 677.

[103] It was disputed whether the exempting proof shows the absence of the causal link, or, whether it breaks it. To this regard see J. Gardner, *Torts and other wrongs*, cit., 216.

of a causal link between their conduct and the damage (para 72). Reading these two paragraphs together, it can be inferred that the Court essentially interpreted art. 32 GDPR as an obligation of means. The picture that emerges is as follows: art. 32 GDPR establishes obligations of means, thus requiring only the best efforts[104]. In the event of damage, the data controller may be exempt from liability by demonstrating that: i) it is in no way responsible for the event that caused the damage, by proving compliance with the standard set by art. 32 GDPR, *i.e.,* the appropriateness of the security measures in light of the criteria listed therein; ii) an external cause caused the damage. In this way, the data controller demonstrates the absence/elision of the causal link.

This framework is reminiscent of a fault-based liability framework, in which each case is assessed individually, taking into account the criteria described in art. 32 GDPR[105].

This interpretation is entirely consistent with the principles of civil law generally accepted among EU Member States; therefore, this decision is well-suited to the harmonisation objective pursued by the European legislature through the GDPR and by the CJEU in this decision.

C-667/21

The issue of the nature of the liability regime was directly addressed in C-667/21 (fifth referred question), where it was asked whether the existence and/or proof of a fault or intent are necessary conditions to establish the data controller's liability under art. 82 GDPR.

The Advocate General's opinion

Particularly relevant to the analysis is the AG's opinion, according to which the civil liability regime established by the GDPR is not subject to the existence or proof of intent or fault, resulting in a strict liability regime. The AG put forward several

[104] S. Nusselder, *Security measures in the GDPR & the NAP judgement (340/21)*, cit., 4.

[105] F. Castagnari, *On the responsibility of the Financial Administration as "data controller" in the event of a data breach due to a "hacker attack" by third parties: critical and systematic profiles*, cit., 5-6.

arguments: one literal, another based on the preparatory work for the GDPR, one teleological, and one systematic.

Starting with the literal argument, it obviously focused on art. 82(1) GDPR, which, the AG observes, links compensation only to the damage suffered by data subjects as a result of a breach of the Regulation, regardless of other elements such as fault (para 74).

It is also noted that where the legislature wanted to require an assessment of fault, it did so readily; for example, the AG remarked that art. 83 GDPR explicitly mentions fault as an element to be assessed when estimating administrative fines (para 77). For these reasons, the AG concluded that a literal interpretation tends to exclude fault from the conditions for establishing compensation under art. 82 GDPR. Despite this statement, the AG noted that the lack of consistency in the Regulation's wording renders literal interpretations less persuasive (para 78).

The AG's argument, based on the preparatory work for the GDPR, highlighted only two specific passages: first, an amendment tabled in the Parliament's Committee on Civil Liberties, Justice and Home Affairs, which sought to link liability to intent or negligence, but was not adopted (para 83). Secondly, a choice between two options, agreed by the Council, for the criterion for attributing liability in data processing activities involving several persons. The first option provided for a model similar (but certainly not equal) to the principle of liability follows fault (para 84). The second option, instead, would have imposed on art. 82 GDPR, the inevitable obligation to compensate the data subject for the full amount of the damage, in the form of absolute liability, as no exemption was provided for (para 84). The first option was followed by the Council, which used it as the basis for the compromise text presented and implemented it by making the exemption rule more stringent: «... if ... it proves that it is not *in any way* responsible ...». This wording was subsequently approved (para 85). For these reasons, the AG concluded that even from an analysis of the preparatory work for the GDPR, it cannot be inferred that the liability regime provided for in art. 82 GDPR involves the element of fault (para 86).

Turning to the teleological argument, the AG observed that, according to recital 10 GDPR, the Regulation aims to ensure a high level of protection for natural persons while removing obstacles to the flow of personal data; in this context, art. 82 GDPR

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primarily pursues a compensatory function (para 87). From this, the AG deduced that ensuring full and effective compensation is an objective in itself and a right of the injured data subject (para 88). The right to compensation, the Court added, is linked to the objective of strengthening citizens' trust in the digital environment, which is expressly recognised in the GDPR (recital 7). To that end, ensuring that data subjects do not have to suffer the consequences of damage resulting from the unlawful processing of their data promotes such trust: «their assets are protected and, procedurally, their claims are more straightforward» (para 89). The fact that art. 82 GDPR does not require a breach of a duty of care, is consistent with this, and, according to the AG, it is consistent with the aforementioned objective of the Regulation (para 90).

Subsequently, the AG emphasised that what really matters for the purposes of compensation is the situation of the victim: it is irrelevant to the latter whether the wrongdoer acted intentionally or in fault; as long as the victim has suffered damage causally linked to the breach of the GDPR, they are entitled to claim compensation under art. 82 GDPR (para 91, 92).

The final argument analysed the entire GDPR scheme. In this case, the AG argued that a fault-based civil liability model promotes diligence and, therefore, protection against risks, while the alternative model, which does not take into account the behaviour of the parties, would discourage them from taking action (because, in the event of damage, they would still have to compensate for it) (para 99). The AG considered this result acceptable on the basis that art. 82 GDPR is part of a complex regulatory framework comprising public and private legal instruments for the protection of personal data. Within that regulatory framework, fault and intent are relevant only for determining administrative penalties; it is not necessary to make them relevant to civil liability. Indeed, the resulting fault-based liability would not be consistent with the objectives pursued by art. 82 GDPR (para 100).

To conclude, it is significant that the AG added that the actions of the data subjects may, depending on the circumstances, break the causal link between the infringement and the damage (para 110).

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The CJEU's decision

Moving on to the CJEU ruling, it started by recalling the three conditions required to establish compensation under art. 82 GDPR: infringement, causal link and damage.

It then compared the wording of the Regulation's different versions (German, French, Finnish, Spanish, Estonian, Greek, Italian, and Romanian), seeking to establish whether, under art. 82(2) GDPR, any data controller involved in processing activities should be held liable for damage caused by other participants in that processing (para 91). According to the results of this comparison, the first sentence of art. 82(2) GDPR would presuppose that the controllers have participated in the unlawful processing (para 92)[106]. This was particularly evident in the Spanish[107], Estonian[108], Greek[109], Italian[110] and Romanian[111] language versions, where the provision refers to his/her processing, rather than to a general processing activity (para 92)[112].

Based on this assumption, the CJEU stated that art. 82 GDPR provides a fault-based liability regime, which allows the possibility of always proving that the controllers are not responsible for the damage, even if they are presumed to have participated in the unlawful processing (para 93, 94).

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[106] Confirmed in C-741/21, para 46.

[107] «Cualquier responsable que participe en la operación de tratamiento responderá de los daños y perjuicios causados en caso de que dicha operación no cumpla lo dispuesto por el presente Reglamento».

[108] «Kõnealuse töötlemisega seotud vastutav töötleja vastutab kahju eest, mis on tekkinud sellise töötlemise tulemusel, millega rikutakse käesolevat määrust».

[109] « Κάθε υπεύθυνος επεξεργασίας που συμμετέχει στην επεξεργασία είναι υπεύθυνος για τη ζημία που προκάλεσε η εκ μέρους του επεξεργασία που παραβαίνει τον παρόντα κανονισμό».

[110] «Un titolare del trattamento coinvolto nel trattamento risponde per il danno cagionato dal suo trattamento che violi il presente regolamento».

[111] «Orice operator implicat în operaţiunile de prelucrare este răspunzător pentru prejudiciul cauzat de operaţiunile sale de prelucrare care încalcă prezentul regulament».

[112] On the contrary, other versions of the GDPR, in particular the German, French and Finnish ones, are worded in a more open manner, not allowing for a proper answer to the question (para 92).

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The Court continued with a contextual reading of art. 82(3) GDPR. It combined art. 82(3) GDPR with art. 24 and 32 GDPR, as interpreted by the Court itself in C-340/21, thus simply requiring the data controller to take technical and organisational measures to prevent, as far as possible, any personal data breaches (para 96). From this interpretation, the CJEU derived that art. 82 GDPR provides for fault-based liability in which the burden of proof lies with the data controllers (para 94).

From the teleological interpretation that reads art. 82 GDPR in conjunction with recitals 4 to 8 GDPR, the Court assessed the balance between the interests of data controllers and the rights of data subjects enshrined in the Regulation (para 98) and, as the AG, considered that this compromise was established to promote the development of the digital economy while ensuring the protection of the rights of data subjects. Along the same lines, it argued that a fault-based liability system, accompanied by a reversal of the burden of proof as provided for in art. 82 GDPR would be the most appropriate legal instrument to implement that balance (para 98).

The Court then recalled the AG's observation that it would not be consistent with the objective of the GDPR to ensure a high level of protection of personal data to require data subjects to prove, in addition to the breach and the damage suffered, the existence of fault on the part of the controller (para 99). Indeed, the Court emphasised that art. 82 GDPR does not provide for such a requirement, thus limiting the burden of proof on data subjects to the three necessary conditions (breach, damage and causal link).

In conclusion, the Court stated that the determination of the controller's liability is subject to the existence of fault, which is presumed to exist unless the controller proves that she is in no way responsible (para 103)[113].

Comment

In commenting on this judgment, it should be noted that, once again, the CJEU issued its decision without any reference to the AG's opinion. In this case, however, the

[113] Confirmed in C-687/21, para 52; joint cases C-182/22 and 189/22, para 28; C-200/23, para 154.

contrasting conclusions in the opinion and the decision highlight the need for coordination between them.

Both the opinion and the judgment can be considered incomplete, and the fact that they reached different conclusions is not surprising; despite this divergence, however, they are still reconcilable.

The AG's interpretation, which considered a strict liability regime, is perfectly in line with its reasoning, which focused entirely on art. 82 GDPR; on the other hand, the CJEU interpreted art. 82 GDPR in conjunction with the provisions establishing evidentiary duties, mainly art. 24 and 32 GDPR[114], arguing for fault-based liability. Both decisions are acceptable when read individually. What is missing in this case is an assessment of the entire liability regime provided for in the Regulation.

Focusing on the CJEU's decision, it firstly declared the fault-based liability regime based on the combination of paragraphs 2 and 3 of art. 82 GDPR, resulting in a presumption of fault on the part of data controllers.

Against this latter argument, the mere possibility of proving one's non-liability does not necessarily imply fault-based liability. Indeed, in general, even strict liability regimes provide a way out, albeit more limited than that available in fault-based systems[115]. Therefore, the exemption clause provided for in art. 82(3) GDPR should only be interpreted as a reason to exclude an absolute liability regime[116].

The main problem is that the entire GDPR liability system cannot be understood on the basis of art. 82 GDPR alone, and this was the mistake made by the AG, who did not take into account the rest of the regulation.

The liability regime should derive from a combination of art. 82 GDPR, intended as the general rule of liability in the GDPR, and the specific obligation deemed to have been breached, as is the case in most European private law systems. Indeed, in the absence of a clear statement by the European legislature, the entire apparatus should

[114] It should be highlighted that the referred question was related only to art. 82 GDPR.

[115] European Group on Tort Law, *Principles of European Tort Law* (Text and Commentary), cit., 102.

[116] R. Strugala, *Art. 82 GDPR: Strict Liability or Liability Based on Fault?*, cit., 74.

be taken into consideration. In this regard, the classic distinction between obligations of means and obligations of result, along with the related liability regimes, could be very useful for identifying the specific scheme in question.

Nevertheless, the Court's ruling remains acceptable, as it adopted a fault-based liability system linking art. 82 GDPR to art. 24 and 32 GDPR, which, as discussed above, could be interpreted as obligations of means.

However, neither the AG nor the Court analysed the different consequences for liability[117]. The Court's decision interpreted art. 82 GDPR only in conjunction with those provisions that are considered to impose obligations of means, for which fault-based liability is considered acceptable[118]. Conversely, it did not discuss whether the liability regime remains the same for obligations of result[119], such as the obligation to follow data controllers' instructions under art. 29 GDPR, or the obligation to notify the Data Protection Authority under art. 35(1) GDPR, where there is no standard of conduct to be observed.

Furthermore, causation was barely addressed, leaving it as an empty concept within the GDPR.

Due to these omissions, the Court's decision appears incomplete rather than incorrect. It should be clarified, however, that even if the Court could have completed its reasoning by referring to the obligations of result or causation, it was not asked to do so. Indeed, the Court was asked only about the role of fault, while nothing was questioned about the obligations of result or strict liability regimes. In conclusion, the

[117] M.J.S. Moròn, *Reflexiones en torno a la jurisprudencia del TJUE sobre la acción indemnizatoria del art. 82 RGPD (asuntos C-300/21; C-340/21; C-456/22; C-667/21; C-687/21; C-741/21)*, cit., 1420.

[118] M.C. Vergès, *El concepto autònomo de responsabilidad civil en el àmbito de la protecciòn de datos personales en la era digital: anàlisis del artìculo 82 del regolamento 2016/679*, cit., 266; M.J.S. Moròn, *Reflexiones en torno a la jurisprudencia del TJUE sobre la acción indemnizatoria del art. 82 RGPD (asuntos C-300/21; C-340/21; C-456/22; C-667/21; C-687/21; C-741/21)*, cit., 1418.

[119] J. Eckhardt, M. Hansen, *Die Datenschutzrechtliche Verkehrssicherungspflicht*, in DuD, Datenschutz und Datensicherheit, 9/2024, 563.

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Court's decision is correct but still insufficient to account for the entire liability system.

C-687/21

The decisions issued in C-340/21 and C-667/21 were confirmed in C-687/21 (third, fourth and sixth referred questions), where the Court was asked, in essence, whether art. 5, 24, 32 and 82 GDPR (read together) must be interpreted as meaning that the disclosure of a printed document containing personal data to an unauthorised third party, realised by a company (data controller) through its employees, signifies that the technical and organisational measures required by art. 24 and 32 GDPR were not 'appropriate'.

The Court addressed this issue by explicitly confirming the fault-based liability system described in C-667/21 (para 52)[120]. The CJEU recognised that the disclosure of data may indicate that the technical and organisational measures implemented were not appropriate within the meaning of art. 24 and 32 GDPR, for example, due to fault or a shortcoming in the organisation of the data controller (para 41). It continued by remembering that data controllers are only required to prevent data breaches as far as possible (para 30) and, from a combined reading of art. 5, 24, 32 and recital 74 GDPR, it stated that data controllers can always demonstrate that personal data have been processed in a manner that ensures appropriate security within the meaning of art. 5 and 32 GDPR (para 42).

For these reasons, confirming what has already been established in previous judgments, the CJEU answered to the referred questions by establishing that, pursuant to art. 5, 24, 32, 83 and recitals 74 and 76 GDPR, the fact that the controller's employees mistakenly provided a document containing personal data to an unauthorised third party is not sufficient, in itself, to consider the technical and organisational measures implemented by the controller as non-appropriate within the meaning of art. 24 and 32 GDPR (para 39, 45).

[120] S. Nusselder, *Security measures in the GDPR & the NAP judgement (340/21)*, cit., 6.

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For this paper, this decision simply confirmed previous judgments, reading art. 82 GDPR in conjunction with the provisions imposing evidentiary obligations, which the Court implicitly treated as obligations of means. Furthermore, also in this case, the causal link was only mentioned.

Overall, this decision did not develop into the issue analysed by the previous rulings, but it is nevertheless helpful in highlighting the consolidation process of the Court's case-law on this matter.

C-741/21

Moving on to C-741/21 (second preliminary question), the Court of Justice of the European Union was asked whether, in order to be exempt from liability under art. 82(3) GDPR, it is sufficient for data controllers to demonstrate that the damage was caused by someone else acting under their authority within the meaning of art. 29 GDPR.

This judgment is beneficial for the current analysis because, as will be shown, it provides an opportunity to demonstrate what exercise the court should have carried out to interpret the liability exemption clause provided for in art. 82(3) GDPR.

In support of its answer, the Court confirmed the statements made in C-667/21, namely that art. 82 GDPR provides for a fault-based liability regime, under which data controllers are presumed to have participated in the unlawful processing activity with fault, with the burden of proof resting on them (para 46).

Reading art. 29 and 32(4) GDPR together, the Court emphasised that data controllers must take specific measures to ensure that authorised persons acting under their authority access and process personal data only in accordance with their instructions (para 47 and 48). The Court concluded that it is for data controllers to ensure that their instructions are correctly followed and applied, so that they cannot simply exonerate themselves from liability by invoking the fault of someone else acting under their authority (para 49). Indeed, the Court emphasised that controllers could only be exonerated if they proved that those acting under their authority had not followed the instructions given and that they (the controllers) had fulfilled their obligations. As

explained by the Court, if they violated the GDPR, in particular art. 24, 25 and 32 GDPR, causing the violation committed by those acting under their authority, they will be liable and will have to compensate for the damage (para 50). The Court reiterated that data controllers cannot escape liability merely by demonstrating that they have issued instructions to those acting under their authority, as required by art. 29 GDPR (para 51 and 52)[121]. They must, indeed, demonstrate that there is no causal link between the breach of their obligations under art. 5, 24 and 32 GDPR and the damage suffered by the data subjects (para 51).

If this were not the case, the Court noted, and controllers were exempt from liability simply by demonstrating that the damage was caused by someone else under their authority, the right to compensation would be significantly and negatively affected, and would not be consistent with the objective of the Regulation to ensure a high level of protection for data subjects (para 53)[122].

In conclusion, the CJEU ruled that art. 82 GDPR must be interpreted as meaning that it is not sufficient for data controllers to demonstrate that the damage was caused by those acting under their authority within the meaning of art. 29 GDPR (para 54).

Comment

The decision confirmed that art. 82 GDPR provides for a fault-based liability regime, as stated in C-667/21, without elaborating on it; however, while in C-667/21 the Court of Justice of the European Union was specifically asked to rule only on the role of fault, in C-741/21 it had greater freedom to address the entire issue of the nature of the liability regime.

The Court adopted fault as the sole criterion for liability, linking it only to art. 82 GDPR, whereas in previous decisions, art. 82 GDPR was understood as a fault-based liability system partly because it was read in conjunction with art. 24 and 32 GDPR.

This combination of provisions is of utmost importance. Indeed, it is in these provisions (art. 24 and 32 GDPR) that a reference to the standard of conduct can be

[121] Confirmed in C-200/23, para 165, 166.

[122] Confirmed in C-200/23, para 175.

found, and not in art. 82 GDPR considered alone (as stated also in C-667/21, para 90).

The fact that in C-667/21 the Court gave priority to the element of fault is due to its combined reading of art. 82 and 32 GDPR. In C-741/21, on the other hand, art. 82 GDPR was interpreted as establishing a fault-based system in its own (in para 46, the Court considered only the combination of paragraphs 1 and 2, referring to C-667/21).

Moving on to the motivations, the Court responded to the question referred by stating that data controllers must demonstrate the absence of a causal link between the damage and the breach of art. 32 GDPR (para 51, referring to C-340/21), and that it is not sufficient to demonstrate that instructions have been given[123]. However, in this case, the obligation in question is not that provided for in article 32(1) GDPR (*i.e.* to implement appropriate security measures in light of specific criteria), but that laid down in article 32(4) GDPR, according to which controllers must take steps to ensure that any natural person acting under their authority processes data only in accordance with their instructions. The Court referred to the decision in C-340/21, omitting to mention that the latter concerned the obligation to implement appropriate measures under art. 32(1) GDPR, whereas the case in question concerns art. 32(4) GDPR. While, in C-340/21, the Court implicitly interpreted the obligation to implement appropriate security measures as an obligation of means, in C-741/21 no reference is made to the nature of the obligations under art. 32(4) GDPR.

However, the aim of identifying the correct exonerating evidence can be pursued only by determining the nature of that obligation. This interpretative effort should be conducted in accordance with the case law of the Court of Justice of the European Union, which holds that terms contained in provisions that do not refer to the law of Member States must be interpreted autonomously and uniformly, based

on their wording, context, and objectives. Since art. 32 GDPR never delegates the interpretation of the concepts contained in the provision to Member States, its terms must be interpreted as autonomous concepts.

[123] M.C. Gamito, H.-W. Micklitz, *EU consumer law in 2023*, in Annuaire de droit de l'Union Européenne, 2023, 13.

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With regard to the wording, art. 32(4) GDPR requires controllers to «take steps to ensure…». This terminology resembles a strict order; in other provisions, the EU legislator has made it clear that only reasonable steps/efforts are required, for example, in art. 17(2) GDPR[124]. From this difference in wording, it could be inferred that the provision is intentionally designed to impose a strict command rather than to require best efforts. This reading tends to interpret art. 32(4) GDPR as an obligation of result, to be linked to a regime of strict liability according to the most agreed principles of tort law across the EU.

Moving to the context, it should be noted that data controllers are presumed to be responsible for unlawful processing under art. 82(2) GDPR, while data processors are only held liable in specific situations indicated in the Regulation (art. 28 GDPR). Conversely, persons acting under the authority of data controllers are not subject to a particular regime of liability under the GDPR. The fact that controllers are presumed to be liable by default, while other actors are liable only in certain situations, suggests that the objective of the provision is to place the burden of breaches outside these exceptional scenarios on the controller, as they are the fulcrum of liability for unlawful processing activities.

These three arguments point to a strict liability regime, as the content of the obligation appears to require a specific result. This result is also supported by the doctrine that data controllers are liable for breaches committed by their employees/auxiliaries[125].

Finally, another element supporting a strict liability regime lies in the most widely accepted interpretation of auxiliaries' liability in the private law systems of Member

[124] See also art. 5(1)(d), art. 8(2) GDPR, art. 14(5)(b).

[125] B. Van Alsenoy, *Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation*, cit., 282; C. Millard, D. Kamarinou, *Article 29. Processing under the authority of the controller or processor*, in Kuner C., Bygrave L. A., Docksey C., Drechsler L., *The EU General Data Protection Regulation (GDPR): A Commentary,*2020, 614.

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States[126]. This doctrine, supported by the PETL and the DCFR, understood this as a strict liability regime in both tort and contractual contexts[127].

It is worth noting that, historically, Germany has been an important exception, basing employee liability on fault[128].

Based on this interpretation of the content of art. 32(4) GDPR, and linking it to art. 82(3) GDPR, it should be concluded that exonerating evidence cannot be the absence of fault understood as the adoption of specific diligence, as implied by the CJEU decision. Rather, the exonerating evidence should be an event beyond the data controller's control that breaks the link between the damage and the activity enacted by the auxiliaries.

Furthermore, art. 32(4) GDPR and the related art. 28(3)(b) GDPR do not describe any form of conduct to be complied with, contrary to art. 32(1) GDPR, which lists specific parameters to guide the conduct of data controllers.

For these reasons, this decision does not appear to be sound. It does not adequately explain the nature of the liability regime and, at the same time, does not investigate the alleged obligation that has been

breached. In light of the above arguments, the exonerating evidence should have been only *force majeure*, the event caused by the data subject or the liability of the data processor (if appointed).

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[126] P. Giliker, *Vicarious liability in tort*, Cambridge university press, 2010; more recently, P. Giliker, *Comparative law and legal culture: placing vicarious liability in comparative perspective*, in Chinese journal of comparative law, 6(2)/2018; U. Magnus, *Tort law in general*, in *Elgar Encyclopedia of Comparative Law*, cit., 881.

[127] The liability of auxiliaries in the context of contracts is relevant because of the contractual relationship between controllers, processors and authorised individuals, as prescribed by art. 28(3)(b) GDPR.

See C. von Bar, E. Clive, H. Schulte-Nölke (edted by), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, cit., 3323; European Group on Tort Law, *Principles of European Tort Law* (Text and Commentary), cit., 116.

[128] See P. Giliker, *Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective*, in Journal of European tort law, 2(1)/2011.

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Furthermore, unfortunately, it did not delve into the investigation of causality (both factual and legal), so there would still be no indication of how to determine whether a given event could break the causal link.

To conclude, the interpretation that reads art. 82 (paragraphs 2 and 3) GDPR as presuming the fault of data controllers, without an inquiry over the nature of the duty breached, was subsequently confirmed without further developments in joined cases C-182/22 and C-189/22[129], and in C-200/23[130], highlighting the consolidation of this case-law.

4. Conclusions

This paper seeks to show that, if analysed independently, the CJEU's decisions might appear correct, whereas viewed from a broader perspective they are far from undisputable. The CJEU, however, was never asked to consider the GDPR's entire liability regime. The questions referred constrained the Court's decisions to narrow inquiries, preventing proper, complete analyses.

In the introduction to this paper, it was suggested that a useful compass for guiding the harmonisation of data protection liability, particularly concerning the liability exemption clause, could be found in the principles of tort law most widely accepted among the Member States. The Court should have compared the structure of the Regulation to the traditions commonly embraced by the Member States, and, in case of compatibility between the two, it should have interpreted those GDPR provisions in light of such traditions, at least for what concerns the elements not addressed in the GDPR, such as the nature of the liability regime and the consequent exonerating evidence.

This paper argues that, in light of the harmonisation purpose of the GDPR and the CJEU, the GDPR should be interpreted as entangling two different liability regimes: a fault-based one for the obligations of means, mainly art. 24 and 32(1) GDPR, and a

[129] Para 28.

[130] Para 154, 161, 162, 163.

strict liability regime for the obligations of results, such as art. 32(4) GDPR. Concerning the respective exonerating evidence, while for the former even the respect of the standard of conduct described in the provision proves the absence of the infringement, the latter requires proving the elision of the causal link because of an event beyond control, such as *force majeure* or error on the part of the data subject. In other cases, instead, the link is missing in the first place, for instance, when the data processor's liability under art. 82(2) GDPR is triggered.

This interpretation of art. 82 GDPR is suggested because it reflects the most widely accepted tort law principles across the EU. Consequently, it can facilitate the harmonisation of the EU legal systems.

The Court, instead, proceeded differently, ignoring the legal scholarship that highlighted the importance of identifying the obligations' nature for the purpose of determining the nature of the exempting proof[131].

In C-340/21, indeed, the Court, consistent with its typically concise style of reasoning[132], did not engage in conceptual distinctions, such as that between obligations of conduct and obligations of result. However, it reasoned accordingly, holding that art. 24 and 32 GDPR merely require controllers to take only the measures that can, as far as possible, prevent data breaches (para. 30). Moreover, the Court clarified that compliance with the evidentiary duties enshrined in those provisions is sufficient to demonstrate the absence of liability under art. 82 GDPR (paras. 71–72). This reasoning was

subsequently confirmed in later judgments, which expressly invoked the notion of fault. This framework, in which obligations describing a standard of conduct require only what is reasonably possible, in combination with a liability regime grounded in fault, reflects the traditional doctrines common to most Member States, thereby

[131] B. Van Alsenoy, *Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation*, cit., 273.

[132] «A specific example where a form of 'hybridisation" that can be observed are the judgments of the Court of Justice of the EU (CJEU). Its concise style of reasoning is akin to French courts, but it also uses a common-law style of relying on precedents and, in substance, has made use of some German concepts, such as the principle of proportionality», M. Siems, *Comparative law*, cit., 287.

facilitating the harmonisation objective pursued by both the GDPR and the CJEU. However, although the Court reaffirmed in subsequent decisions that liability is fault-based, it did not always reiterate the reasoning advanced in C-340/21 and C-667/21.

Since the decision in C-667/21, indeed, the Court has adopted the fault criterion, also on the basis of the presumption read into art. 82(3) GDPR, according to which data controllers can always prove they are not responsible for causing the damage, even if they are presumed to have participated in the unlawful processing (para 93, 94).

As explained, this argument is questionable; indeed, the fact that from the interpretation of art. 82 GDPR data controllers can always prove to be not liable, even if they are presumed to have participated in the processing, does not mean that the Regulation provides for a liability system based on fault. The exempting clause provided for by art. 82(3) GDPR merely precludes an absolute liability system, which is insufficient to determine whether the system is based on fault[133].

This argument was applied in C-741/21 (para 46), where the Court did not consider the nature of the obligation at issue (responsibility over auxiliaries), concluding for a fault-based liability system for a duty interpreted by most of the EU Member States as imposing an obligation of result, linked to a strict liability regime[134].

The analysis of C-741/21 remarked that for these kinds of obligations it would be impossible to find a standard of conduct on which to assess the presence/absence of fault, and, provided that most of EU legal systems historically linked obligations of result with strict liability rules, the decision issued in C-741/21 risks transplanting an unfamiliar rule into them.

Therefore, it is suggested that the CJEU observes and applies the most widely accepted tort law principles across the Member States, thereby evaluating the nature of the obligation at issue so as to identify the exempting proof required.

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[133] U. Magnus, *Tort law in general*, in *Elgar Encyclopedia of Comparative Law*, cit., 881.

[134] P. Giliker, *Vicarious liability in tort*, cit.; more recently, P. Giliker, *Comparative law and legal culture: placing vicarious liability in comparative perspective*, cit.; U. Magnus, *Tort law in general*, in *Elgar Encyclopedia of Comparative Law*, cit., 881.

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The decision in C-741/21 is in marked contrast to the intent to interpret the terms of art. 82 GDPR, and its exempting proof (derived from the combination of different provisions not referring to the law of Member States), as autonomous concepts in a uniform way across the Member States. Indeed, it moves away from the common traditions of EU tort law, which combine liability based on fault with obligations of means, and strict liability with obligations of result[135]. In conclusion, this interpretation of art. 82 GDPR could undermine the Court's harmonisation process.

The final picture outlined by the CJEU reflects a double divergence: i) between the traditional scholarship focused on the GDPR, prone to read art. 82 GDPR as imposing a strict liability regime[136], and the CJEU jurisprudence, establishing a fault-based liability system; and ii) between such case-law and the Member States' private law traditions, linking liability based on fault with obligations of means, and strict liability with obligations of result.

Furthermore, the CJEU has not yet taken a position on the causal link, most likely because Member States' theories of causation still differ significantly (at least for the legal/policy inquiry)[137].

Therefore, national courts will still apply their own causation mechanisms to determine whether the proof demonstrates the absence of causation.

To conclude, in the attempt to contribute, this work suggests interpreting the missing elements of the liability exemption established by art. 82(3) GDPR through the lens of the most widely accepted tort law principles among the Member States, in particular in relation to the burden of proof. This would favour a similar interpretation

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[135] F. Werro, E. Buyuksagis, *The bounds between negligence and strict liability*, cit., 207; M. Cappeletti, *Justifying strict liability: a comparative analysis in legal reasoning*, cit., 14; M. Bussani, A.J. Sebok, M. Infantino, *Common law and civil law perspectives on tort law*, cit., 43; U. Magnus, *Tort law in general*, in *Elgar Encyclopedia of Comparative Law*, cit., 880.

[136] *Ex* multis, see R. Strugala, *Art. 82 GDPR: Strict Liability or Liability Based on Fault?*, cit.; G. Zanfir-Fortuna, *Article 82. Right to compensation and liability*, cit.; E. Tosi, *Responsabilità civile per illecito trattamento dei dati personali e danno non patrimoniale*, cit., 2019; S. Li, *Compensation for non-material damage under Article 82 GDPR: a review of case C-300/21*, cit., 336.

[137] M. Infantino, E. Zervogianni, *Unravelling causation in European tort laws*, cit., 649-650, 672.

of the relevant terms and concepts across the Member States. In doing so, the CJEU could enhance the level of harmonisation, given the familiarity of the Member States with these principles. Conversely, it would be difficult to imagine how Member States could approach foreign concepts, such as the fault's assessment for obligations of result.

Finally, it should be noted that, although this work has referred to common principles in the EU regarding strict and fault-based liability systems, these concepts, despite the common terminology, are indeed not always equally interpreted across the Member States[138]. For instance, the legal inquiry into fault in Germany is highly particular within the EU framework[139]; furthermore, the distinction between obligations of means and of results is more articulated in France than in other countries, such as Italy[140].

Therefore, this work recognises that understanding these notions will, in any case, depend in part on national factors[141]; thus, their harmonisation is only partially possible, given their inherent national dimension[142]. Nevertheless, when the CJEU rules, its judgments harmonise, and, under certain conditions (a legal tradition sufficiently shared across the Member States), comparative law can provide a reliable means of guiding this process, thereby avoiding the transplanting of legal irritants, as described in this article.

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[138] M. Siems, *Comparative law*, cit., 5.

[139] European Centre of Tort and Insurance Law, *Unification of Tort Law: Fault*, Kluwer Law International, The Hague, 2005, 103 ff.

[140] The French legal scholarship distinguishes between *obligations de moyens renforcées* and *obligations de résultat atténuées*, see M. Fabre-Magnan, *Droit des obligations. 1. Contract et engagement unilateral*, PUF, Thémis droit, 7° edition, 2024, 632.

[141] M. Siems, *Comparative law*, cit., 121.

[142] H.-W. Micklitz, *The full harmonization dream*, in Journal of European consumer and market law, 4(11)/2022.

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