

# Breaches, remedies, liability and sanctions



## “Then spare the rod and spoil the child.”

Samuel Butler, Poet and Satirist

Article 75 of the General Data Protection Regulation states that:

**“Every natural person shall have the right to a judicial remedy if they consider that their rights under this Regulation have been infringed as a result of the processing of their personal data in non-compliance with this Regulation”.**

Article 77 goes on to state that:

**“Any person who has suffered damage as a result of an unlawful processing operation or of an action incompatible with this Regulation shall have the right to receive compensation from the controller or the processor for the damage suffered”.**

Article 79 gives the power to the relevant Data Protection Authority to impose sanctions which:

**“shall in each individual case be effective, proportionate and dissuasive”.**

### **Unlimited liability**

The enforcement regime introduced by the GDPR is tougher and the litigation risk is much more pronounced. Whereas under the current regime there are significant restrictions on liability, the GDPR exposes entities to a virtually unlimited financial liability. This “tightening up” means a bigger stick for the regulator, more rights for the individual as well as rights for pressure groups.

### **Breach reporting**

Data breaches are to be dealt with much more severely, which is reflected in the onerous obligations under Articles 31 and 32 of the GDPR whereby a controller should inform the Data Protection Authority (“DPA”) of a data breach without undue delay and, when feasible, within 72 hours after becoming aware of it. A data controller should document personal data breaches, including information about what happened, how it happened, the effect of the breach and any remedial action taken. The data subjects should be informed of the breach without undue delay, if it is deemed that they are likely to be adversely affected by it.

### **Litigation and fines**

Perhaps more significantly, the GDPR allows data subjects the right to bring court proceedings under Article 76 if their rights have been unduly infringed and opens the door to class action by pressure groups on the basis that compensatory claims are deemed appropriate in respect of particularly damaging breaches. Not only does a business have to be wary of such claims, but the DPAs are also themselves

equipped with the ability to impose hefty penalties for a breach, in the sum of €20 million or 4% of annual worldwide turnover (whichever is higher), provided for under Article 79. The harsh regulatory and litigation risks will be very real for many entities and, in particular, to those that process sensitive personal data.

Furthermore, it appears inevitable that litigation for data breaches will follow the example set in the United States, which frequently sees claims being commenced before the courts for compensation after privacy and security breaches. The GDPR allows data subjects the ability to bring court proceedings if their rights have been unduly infringed and it opens the door to individual compensation claims for mere distress and class actions, including by pressure groups.

### **Enforcement**

While the attention of business might end up focussing too much on the financial penalties, it is also important to note that Article 53 of the GDPR provides DPAs with the power to order a data controller to:

- impose a temporary or indefinite ban on processing;
- suspend data flows to a recipient in a third party.
- comply with the data subject’s requests;
- provide any information;
- ensure compliance with prior authorisations and prior consultations;
- warn or admonish; and/or,
- order rectification, erasure or destructions.

# PwC's global privacy practice



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