

Submission on the General Scheme of the Data Protection Bill 2017 to the Committee on Justice and Equality

by Dr Eoin O'Dell*

1. Introduction

In the European Union, the Charter of Fundamental Rights guarantees the right to respect for private life, in general, and to the protection of personal data, in particular.¹ The Court of Justice of the European Union has long stressed the importance of these rights;² the Charter has added impetus to their recognition and protection;³ and they are given detailed effect by the General Data Protection Regulation.⁴ Rights require remedies, and the GDPR provides a strong regime of regulation and sanctions. Public regulation and enforcement are undertaken by national data protection supervisory authorities, such as the Office of the Data Protection Commissioner. However, private enforcement is a significant part of the GDPR; hence, to give effect to the right to an effective judicial remedy in accordance with Article 47 of the Charter,⁵ data subjects can claim compensation from controllers or processors for damage suffered as a result of processing that infringes the GDPR. In particular, Article 82(1) GDPR provides:

* Fellow and Associate Professor of Law

¹ See Articles 7 and 8 of the Charter Fundamental Rights of the European Union [hereafter: CFR]. See also Article 16(1) of the Treaty on the Functioning of the European Union [hereafter: TFEU] (right to the protection of personal data).

² Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk* (ECLI:EU:C:2003:294; ECJ, 20 May 2003) [68], [73]-[75]; Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España* [2008] ECR I-271 (ECLI:EU:C:2008:54; ECJ, 29 January 2008) [63].

³ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* (EU:C:2010:662; CJEU, 9 November 2010) [47]; Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* (ECLI:EU:C:2014:238; CJEU, 8 April 2014) [29], [40]; Case C-131/12 *Google Spain SL and Google Inc v Agencia Española de Protección de Datos* (ECLI:EU:C:2014:317; CJEU, 13 May 2014) [69]; C-212/13 *Ryneš v v Úřad pro ochranu osobních údajů* (ECLI:EU:C:2014:2428; CJEU, 11 December 2014) [28]-[29]; Case C-230/14 *Weltimmo sro v Nemzeti Adatvédelmi és Információszabadság Hatóság* (ECLI:EU:C:2015:639; CJEU, 01 October 2015) [25], [30]; Case C-362/14 *Schrems v Data Protection Commissioner* (ECLI:EU:C:2015:650; CJEU, 6 October 2015) [37]-[40].

⁴ Regulation 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 [the General Data Protection Regulation; hereafter: GDPR]; it will apply from 25 May 2018 (see Article 99(2) GDPR).

⁵ See Case C-362/14 *Schrems v Data Protection Commissioner* (ECLI:EU:C:2015:650; CJEU, 6 October 2015) [95] (effective judicial remedy necessary to vindicate privacy and data protection rights); see also Article 19 of the Treaty on the European Union (Member States' duty to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law).

Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered. ...

As a consequence, compliance with the GDPR is ensured through a mutually reinforcing combination of public and private enforcement that blends public fines with private damages. In particular, claims for compensation pursuant to Article 82 GDPR strengthen the working of the Regulation, since they discourage practices, frequently covert, which are liable to infringe the rights of data subjects, thereby making a significant contribution to the protection of privacy and data protection rights in the European Union.⁶

Legislation is necessary to give further effect to the GDPR in Irish law, and this is provided for in the General Scheme of the Data Protection Bill 2017.⁷ Head 91 of the Scheme provides “a data protection action” to data subjects whose rights under the GDPR or its translating legislation are infringed.⁸

The Police and Criminal Justice Authorities Directive⁹ was adopted alongside the GDPR, and it also provides for both public and private enforcement, including a claim for compensation. Article 56 PCJAD provides:

Member States shall provide for any person who has suffered material or non-material damage as a result of an unlawful processing operation or of any act infringing national provisions adopted pursuant to this Directive to have the right to receive compensation for the damage suffered from the controller or any other authority competent under Member State law.

Head 58 of the Scheme provides a claim for compensation to any person whose rights under the Part of the Scheme transposing the PCJAD have been infringed.¹⁰

A claim for compensation in a Regulation is unusual but not unique as a matter of EU law.¹¹ On the other hand, a claim for compensation in a Directive, such as the PCJAD,

⁶ See, by analogy, the approach of the CJEU to the private enforcement of EU competition rules: Case C-557/12 *Kone AG v ÖBB-Infrastruktur AG* (ECLI:EU:C:2014:1317; CJEU, 5 June 2014) [23].

⁷ Hereafter: the Scheme.

⁸ Head 91 is set out in Part 1 of the Appendix, below.

⁹ Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [The Police and Criminal Justice Authorities Directive; hereafter: PCJAD]; this will have to be implemented before 6 May 2018 (see Article 63(1) PCJAD).

¹⁰ Head 58 is set out in Part 1 of the Appendix, below.

is quite common as a matter of EU law.¹² In either case, the formulations of such claims are usually clear. However, the formulation in Article 82(1) GDPR. It does not say that a person whose rights have been infringed *has* the right to receive compensation. Instead, it provides, in a much more mealy-mouthed fashion, that a plaintiff *shall have* such a right. Whilst this is similar to Article 5(1)(c) of the Flight Cancellation Regulation, there is no further phrase like Article 7 of that Regulation, which provides additionally and unambiguously that “passengers *shall receive* compensation”. The mandate in Article 82(1) GDPR that plaintiffs “shall have” a claim seems to imply that there is something more to be done in national law before plaintiffs actually have the claim. Admittedly, this does not replicate any of the usual strictures in a Directive, found for example in Article 56 PCJAD, that Member States shall “provide” or “ensure” or “introduce” or “lay down” measures to achieve an outcome, such as a claim for compensation. But the formulation in Article 82(1) GDPR still seems to envisage some national law mechanism in ensuring that a plaintiff “shall” have a claim to compensation. It does not seem to be sufficiently clear, precise and unconditional to create a direct horizontal claim for compensation that can be relied upon in the Irish courts without an express provision giving effect to it in the Scheme.

On the other hand, the CJEU has provided expansive interpretations of claims for compensation pursuant to various other Regulations¹³ and Directives,¹⁴ A similarly expansive interpretations of the claim for compensation for damage in Article 82(1) GDPR is inevitable, not least because Recital 146 GDPR provides:

¹¹ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [hereafter: the Flight Cancellation Regulation]; Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights [hereafter: the Plant Variety Rights Regulation], given full effect by the European Communities (Protection of Plant Variety Rights) Regulations 2007 (SI No 273 of 2007).

¹² See, eg, Folkert Wilman *Private Enforcement of EU Law Before National Courts: The EU Legislative Framework* (Edward Elgar, Cheltenham, 2015). Directives provide claims for compensation for defective products, infringements of package holiday contracts, public procurement rules, intellectual property rights, competition law, trade secrets, and equality.

¹³ Case C-481/14 *Hansson v Jungpflanzen Grünwald GmbH* (ECLI:EU:C:2016:419; CJEU, 9 June 2016) [Plant Variety Rights Regulation]; Joined Cases C-402/07 and C-432/07 *Sturgeon v Condor Flugdienst GmbH and Böck v Air France SA* [2009] ECR-I 10932 (ECLI:EU:C:2009:716; CJEU, 9 November 2009) [Flight Compensation Regulation].

¹⁴ Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-04367 (ECLI:EU:C:1993:335; ECJ, 2 August 1993) (compensation must enable the loss and damage actually sustained to be made good in full); Case C-168/00 *Leitner v TUI Deutschland GmbH* [2002] ECR I-1631 (ECLI:EU:C:2002:163; ECJ, 12 March 2002) (claim for compensation includes non-material damage, such as distress); Case C-314/09 *Stadt Graz v Strabag AG* [2010] ECR I-8769 (ECLI:EU:C:2010:567; ECJ, 30 September 2010) (claim for compensation not conditional on fault)

... The concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation. ... Data subjects should receive full and effective compensation for the damage they have suffered. ...

However, such an expansive interpretation by the CJEU is inevitable *only if it is asked*; and, unless and until it is, there is the potential for great uncertainty. It would therefore be better to have this matter settled by legislation rather than leaving it to the vagaries of litigation to – and in – the CJEU. The clearest solution would be to provide expressly for a claim for compensation in the Scheme, just as an express claim to compensation is necessary to transpose Article 56 PCJAD.

Where such legislation is necessary, then a failure to enact it could leave the State open to a claim for damages from someone who suffered loss by reason of the State's failure to give full effect to Article 82(1) GDPR.¹⁵

For all of these reasons, therefore, the Scheme giving full effect to the GDPR and transposing the PCJAD into Irish law should expressly provide for the claims for compensation in Article 82(1) GDPR and Article 56 PCJAD. Heads 91 and 58 (respectively) of the Scheme address this issue, but they do not successfully provide for such claims for compensation.

Article 79 GDPR provides for a right to an effective judicial remedy against a controller or processor; and Article 82 GDPR provides for a claim for compensation as part of that effective judicial remedy. Head 91 of the Scheme seems to be directed towards these Articles.¹⁶ Head 91(1) provides what it describes as “a data protection action” to data subjects whose rights under the GDPR or its translating legislation are infringed. Head 91(2) provides jurisdiction to the Circuit Court, concurrently with the High Court, to hear such actions. Head 91(3) provides:

In a data protection action under this Head, the Circuit Court shall, without prejudice to its powers to award compensation in respect of material or non-material damage, have the power to grant relief by means of injunction or declaratory orders.

And Head 91(4)(b) requires a plaintiff in a data protection action to specify, *inter alia*, “any material or non-material damage alleged to have been occasioned by the infringement”.

¹⁵ Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer v Germany* [1996] ECR I-4845 (ECLI:EU:C:1996:375; ECJ, 8 October 1996) (Germany's failure to transpose the original Package Holidays Directive gave rise to a claim for damages for holiday-makers who failed to get compensation and refunds for holidays where the organizers became insolvent).

¹⁶ Head 91 is set out in Part 1 of the Appendix, below.

The reference in Head 91(3) to the provision of other remedies “without prejudice to [the Circuit Court’s] ... powers to award compensation” assumes that the Court has such powers. And the reference in Head 91(4)(b) to “any material or non-material damage” further assumes that the powers to award compensation cover both material and non-material damage. However, Head 91 does not expressly afford a claim compensation for material or non-material damage; nor is it expressly afforded elsewhere in the Scheme. It may be that this Head is predicated on the assumption that Article 82(1) GDPR is directly horizontally effective and thereby provides those “powers to award compensation. However, for the various reasons set out above, it is not so clear that Article 82(1) GDPR is indeed directly horizontally effective. Whilst Head 91 provides a superstructure for an effective judicial remedy for infringement of the GDPR or of its translating legislation, and whilst it assumes a claim for compensation, it does not expressly provide one. Rather than hope that litigation to the CJEU establishes that Article 82(1) GDPR is directly horizontally effective and requires that it be interpreted expansively, the best solution would be for Head 91 of to contain an express provision giving full effect to Article 82(1) GDPR in Irish law.

The architecture of the PCJAD in this respect is very similar to the GDPR. Article 54 PCJAD provides for a right to an effective judicial remedy against a controller or processor; and Article 56 PCJAD provides for a claim for compensation as part of that effective judicial remedy. Head 58 of the Scheme seems to be directed towards these Articles.¹⁷ It provides that a person “who suffers material or non-material damage” by reason of an infringement of the Part of the Scheme transposing the PCJAD “shall have the right to receive compensation ...”. This is a clear claim for compensation, and it is unfortunate that a similarly clear clause was not provided in Head 91. However, Head 58 does not locate this claim for compensation in a superstructure for an effective judicial remedy for infringement of that Part of the Scheme, comparable with the superstructure provided in Head 91. It may be that Head 58 is predicated on the assumption that ordinary court procedures will fill that gap. Rather than hope that litigation will work this issue out, the best solution would be for the claim for compensation in Head 58 of the Scheme to be contained an express superstructure for an effective judicial remedy, much as is provided in Head 91.

Both Head 58 and Head 91 do half the necessary work, and each does a different half: whereas Head 58 contains an express claim for compensation but does not provide a superstructure for an effective remedy, Head 91 provides a superstructure for an effective remedy but does not contain an express claim for compensation. The

¹⁷ Head 58 is set out in Part 1 of the Appendix, below.

solution is simple; in Head 58, add a superstructure for an effective remedy along the lines of that already provided in Head 91; and, in Head 91, add an express claim for compensation, following the lead of Head 58. In this way, the issues of compensation and remedies for infringement of the GDPR and the PCJAD can be dealt with on a consistent basis in the Scheme.

In amending these Heads, three principles should be borne in mind. First, the claim for compensation should commence with as much of the language as possible of Article 82(1) GDPR and Article 56 PCJAD. In this context, a decision will have to be made as to whether the legislation should follow the lead of the Regulations and refer to “compensation” for their breach, or whether it should follow normal Irish practice and refer to “damages”. Given that “compensation” in EU terms can be taken to mean “damages” in Irish terms, translating or transposing legislation should refer to “damages” where the relevant Regulations or Directives refer to “compensation”. Nothing will be lost in translation or transposition, and accuracy of analysis at Irish law will be gained.

Head 91 of the Scheme begins, but does not complete, the process of giving full effect to Article 82 GDPR in Irish law. In particular, while it provides a superstructure for an effective judicial remedy for infringement of the GDPR or of the Scheme it does not contain an express claim for compensation. It should therefore be amended to include a new subsection using as much of the language of Article 82(1) GDPR as possible, modified to refer to damages rather than compensation.¹⁸

Similarly, Head 58 of the Scheme begins, but does not complete, the process of transposing Article 56 PCJAD into Irish law. In particular, while it contains an express claim for compensation, it does not provide a superstructure for an effective judicial remedy for infringement of the Part of the Scheme transposing the PCJAD. The claim for compensation in Head 58 could be improved if it cleaved even more closely to the language of Article 56 PCJAD, modified to refer to damages rather than compensation. And that Head should be further amended to locate this claim for damages in the context of a superstructure for an effective judicial remedy, comparable with the superstructure provided in Head 91.¹⁹

The second principle to be borne in mind is that the nature of the damages claim at national law will have to be clarified. For example, in giving effect to Article 1 of the Products Liability Directive, section 2(1) of the Liability for Defective Products Act, 1991 characterised the claim as one for “damages in tort”. Again, the Sea Pollution

¹⁸ See the draft of Head 91(2) in Parts 2 and 3 of the Appendix, below.

¹⁹ See the draft of Head 58(1), (3)-(6) in Parts 2 and 3 of the Appendix, below.

(Hazardous Substances) (Compensation) Act 2005 gives effect to the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996. Section 16(1) of that Act provides:

An action for compensation under the Convention ... shall be deemed for the purposes of every enactment and rule of law to be an action founded on tort.²⁰

If a provision equivalent to section 16(1) were included in Heads 58 and 91 of the Scheme, then fundamental legal issues such as causation, remoteness, measures of damages (including disgorgement, and aggravated, and exemplary or punitive, damages), mitigation, limitation, contributory negligence, vicarious liability, defences, damages jurisdictions in the various courts, and so on, could be resolved by the application of settled principles of tort law. These claims would then be equivalent to, and thus not less favourable than, those relating to similar domestic claims; and they would be effective and thus not virtually impossible or excessively difficult to employ.

However, there is no provision equivalent to section 16(1) of the 2005 Act in Heads 58 or 91 of the Scheme; so it should be expressly provided that the claims in Heads 58 and 91 “shall be deemed for the purposes of every enactment and rule of law to be an action founded on tort”.²¹ Furthermore, such an express reference to tort would reinforce the proposal above that the translating and transposing legislation should refer to “damages” where Article 82(1) GDPR, and Article 56 PCJAD refer to “compensation”.

The second principle to be borne in mind is that Head 91 should be as comprehensive as possible in giving effect to Article 82 GDPR, and that Head 58 should be as comprehensive as possible in transposing Article 56 PCJAD. In particular, if a provision modelled on Article 82(1) GDPR is to be added to Head 91 of the Scheme, then other elements of Article 82 may also need be added. On the one hand, Article 82(4) and (5) GDPR provide for concurrent, and joint and several, liability. If a provision is added to Head 91 providing that the data protection claim in that Head is an action founded on tort, then the provisions of Part III of the Civil Liability Act, 1961 will deal with issues of concurrent, and joint and several, liability; and it will not be necessary to give further effect to 82(4) and (5) GDPR. On the other

²⁰ Section 28 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1996 is to similar effect. See also section 32(6) of the Competition Act 2002 and section 32(7) of the Consumer Protection Act 2007, unaccountably not re-enacted in section 25 of the Competition and Consumer Protection Act 2014.

²¹ See the drafts of Heads 58(7) and 91(7) in Parts 2 and 3 of the Appendix, below.

hand, Article 82(2) and (3) provide for some defences to the claim for compensation in Article 82(1), and if the claim in Article 82(1) is added to Head 91, then the defences to the claim will have to be added to Head 91 as well.²²

Claims for compensation are an important part of the enforcement architecture of the GDPR, of its associated PCJAD, and of the Scheme. Given that some of the choices in the Scheme have the effect of limiting public enforcement,²³ private enforcement mechanisms become crucial. They will help to discourage infringements of the rights of data subjects; they will make a significant contribution to the protection of privacy and data protection rights in the European Union; and they will help to ensure that the great promise of the GDPR is fully realised.

²² See the draft of Head 91(8) in Parts 2 and 3 of the Appendix, below; and see the impact on the draft of Head 58(8) in Parts 2 and 3 of the Appendix, below.

²³ For example, Head 23 of the Scheme envisages that administrative fines may be imposed on public authorities and bodies for breaches of the GDPR and its translating legislation arising in the course of the provision of goods or services for gain but not in the course of the provision of their public functions.

Appendix

1. Heads 58 and 91 of the General Scheme of the Data Protection Bill 2017

Head 58 – Right to compensation

A person who suffers material or non-material damage by reason of an infringement of this Part shall have the right to receive compensation from the competent authority or processor for damage or distress suffered.

Head 91 – Judicial remedy

- (1) Where a data subject considers that his or her rights under the Regulation or this Act have been infringed as a result of processing of his or her personal data, such infringement shall be actionable at the suit of the data subject (“data protection action”).
- (2) The Circuit Court shall, concurrently with the High Court, have jurisdiction to hear and determine proceedings under this Head.
- (3) In a data protection action under this Head, the Circuit Court shall, without prejudice to its powers to award compensation in respect of material or non-material damage, have the power to grant relief by means of injunction or declaratory orders.
- (4) For the purpose of commencing a data protection action, the data subject shall, in particular, specify—
 - (a) particulars of the acts of the controller or processor constituting the alleged infringement, and
 - (b) any material or non-material damage alleged to have been occasioned by the infringement.
- (5) The jurisdiction conferred on the Circuit Court by this Head may be exercised by the judge of the circuit in which—
 - (a) the controller or processor has an establishment, or
 - (b) the data subject has his or her habitual residence except where the alleged controller or processor is a public authority of the State acting in the exercise of its public powers.

2. Suggested amendments to Heads 58 and 91

Suggested additions **appear thus**; suggested deletions ~~appear thus~~

Head 58 – ~~Right to compensation~~ **Judicial remedy and damages**

- (1) **Where a person considers that his or her rights have been infringed as a result of an unlawful processing operation or other act infringing this Part, then such unlawful processing or other infringement shall be actionable at the suit of the person concerned (“infringement action”).**
- (2) **In an infringement action under this Head, a A person who has suffered ~~suffers~~ material or non-material damage as a result of ~~by reason of~~ an infringement of this Part shall have the right to receive ~~compensation~~ **damages** from the competent authority or processor for ~~the damage or distress~~ **damages** suffered.**

- (3) The Circuit Court shall, concurrently with the High Court, have jurisdiction to hear and determine proceedings in infringement actions under this Head.
- (4) In an infringement action under this Head, the Circuit Court shall, without prejudice to its powers to award damages pursuant to sub-Head (2), also have the power to grant relief by means of injunction or declaratory orders.
- (5) For the purpose of commencing an infringement action, the plaintiff shall, in particular, specify—
 - (a) particulars of the acts of the competent authority or processor constituting the alleged unlawful processing or other infringement, and
 - (b) any material or non-material damage alleged to have been occasioned by the alleged unlawful processing or other infringement.
- (6) The jurisdiction conferred on the Circuit Court by this Head may be exercised by the judge of the circuit in which—
 - (a) the competent authority or processor has an establishment, or
 - (b) the data subject has his or her habitual residence except where the competent authority or processor is a public authority of the State acting in the exercise of its public powers.
- (7) An infringement action under this Head shall be deemed for the purposes of every enactment and rule of law to be an action founded on tort.
- (8) In an infringement action under this Head, it shall be a defence for a competent authority or processor to show that it is not in any way responsible for the event giving rise to the alleged damage.

Head 91 – Judicial remedy and damages

- (1) Where a data subject considers that his or her rights under the Regulation or this Act have been infringed as a result of processing of his or her personal data, such infringement shall be actionable at the suit of the data subject (“data protection action”).
- (2) In a data protection action under this Head, a data subject who has suffered material or non-material damage as a result of an infringement of the Regulation or this Act shall have the right to receive damages from the controller or processor for the damage suffered.
- ~~(3)~~(2) The Circuit Court shall, concurrently with the High Court, have jurisdiction to hear and determine proceedings in data protection actions under this Head.
- ~~(4)~~(3) In a data protection action under this Head, the Circuit Court shall, without prejudice to its powers to award damages pursuant to sub-Head (2), also ~~compensation in respect of material or non-material damage~~, have the power to grant relief by means of injunction or declaratory orders.
- ~~(5)~~(4) For the purpose of commencing a data protection action, the data subject shall, in particular, specify—
 - (a) particulars of the acts of the controller or processor constituting the alleged infringement, and

- (b) any material or non-material damage alleged to have been occasioned by the **alleged** infringement.
- (6)(5)** The jurisdiction conferred on the Circuit Court by this Head may be exercised by the judge of the circuit in which—
 - (a) the controller or processor has an establishment, or
 - (b) the data subject has his or her habitual residence except where the controller or processor is a public authority of the State acting in the exercise of its public powers.
- (7) A data protection action under this Head shall be deemed for the purposes of every enactment and rule of law to be an action founded on tort.**
- (8) (a) Without prejudice to its liability as a controller, any controller involved in processing shall also be liable in a data protection action under this Head for the damage caused by processing which infringes the Regulation or this Act.**
 - (b) A processor shall be liable in a data protection action under this Head for the damage caused by processing only where it has not complied with obligations of the Regulation or this Act specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.**
 - (c) In a data protection action under this Head, it shall be a defence for a controller or processor to show that it is not in any way responsible for the event giving rise to the alleged damage.**

3. Heads 58 and 91 after suggested amendment

Head 58 – Judicial remedy and damages

- (1) Where a person considers that his or her rights have been infringed as a result of an unlawful processing operation or other act infringing this Part, then such unlawful processing or other infringement shall be actionable at the suit of the person concerned (“infringement action”).
- (2) In an infringement action under this Head, a person who has suffered material or non-material damage as a result of an infringement of this Part shall have the right to receive damages from the competent authority or processor for the damage suffered.
- (3) The Circuit Court shall, concurrently with the High Court, have jurisdiction to hear and determine proceedings in infringement actions under this Head.
- (4) In an infringement action under this Head, the Circuit Court shall, without prejudice to its powers to award damages pursuant to sub-Head (2), also have the power to grant relief by means of injunction or declaratory orders.
- (5) For the purpose of commencing an infringement action, the plaintiff shall, in particular, specify—
 - (a) particulars of the acts of the competent authority or processor constituting the alleged unlawful processing or other infringement, and
 - (b) any material or non-material damage alleged to have been occasioned by the alleged unlawful processing or other infringement.

- (6) The jurisdiction conferred on the Circuit Court by this Head may be exercised by the judge of the circuit in which—
 - (a) the competent authority or processor has an establishment, or
 - (b) the data subject has his or her habitual residence except where the competent authority or processor is a public authority of the State acting in the exercise of its public powers.
- (7) An infringement action under this Head shall be deemed for the purposes of every enactment and rule of law to be an action founded on tort.
- (8) In an infringement action under this Head, it shall be a defence for a competent authority or processor to show that it is not in any way responsible for the event giving rise to the alleged damage.

Head 91 – Judicial remedy and damages

- (1) Where a data subject considers that his or her rights under the Regulation or this Act have been infringed as a result of processing of his or her personal data, such infringement shall be actionable at the suit of the data subject (“data protection action”).
- (2) In a data protection action under this Head, a data subject who has suffered material or non-material damage as a result of an infringement of the Regulation or this Act shall have the right to receive damages from the controller or processor for the damage suffered.
- (3) The Circuit Court shall, concurrently with the High Court, have jurisdiction to hear and determine proceedings in data protection actions under this Head.
- (4) In a data protection action under this Head, the Circuit Court shall, without prejudice to its powers to award damages pursuant to sub-Head (2), also have the power to grant relief by means of injunction or declaratory orders.
- (5) For the purpose of commencing a data protection action, the data subject shall, in particular, specify—
 - (a) particulars of the acts of the controller or processor constituting the alleged infringement, and
 - (b) any material or non-material damage alleged to have been occasioned by the alleged infringement.
- (6) The jurisdiction conferred on the Circuit Court by this Head may be exercised by the judge of the circuit in which—
 - (a) the controller or processor has an establishment, or
 - (b) the data subject has his or her habitual residence except where the controller or processor is a public authority of the State acting in the exercise of its public powers.
- (7) A data protection action under this Head shall be deemed for the purposes of every enactment and rule of law to be an action founded on tort.
- (8) (a) Without prejudice to its liability as a controller, any controller involved in processing shall also be liable in a data protection action under this Head for the damage caused by processing which infringes the Regulation or this Act.

- (b) A processor shall be liable in a data protection action under this Head for the damage caused by processing only where it has not complied with obligations of the Regulation or this Act specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller.
- (c) In a data protection action under this Head, it shall be a defence for a controller or processor to show that it is not in any way responsible for the event giving rise to the alleged damage.