



British Institute of
International and
Comparative Law

Bringing claims for mass data-breaches

3 March 2020

Chairman

- Diana Wallis, University of Hull; formerly Vice-President, European Parliament

Speakers

- Kimela Shah, Oxera Consulting LLP
- Brian Johnston, Mason Hayes & Curran, Dublin
- Adam Rose, Mishcon de Reya LLP
- Neil Purslow, Therium Capital Management Limited



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Bringing claims for mass data-breaches: Quantum issues

Prepared for BIICL event

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March 2020

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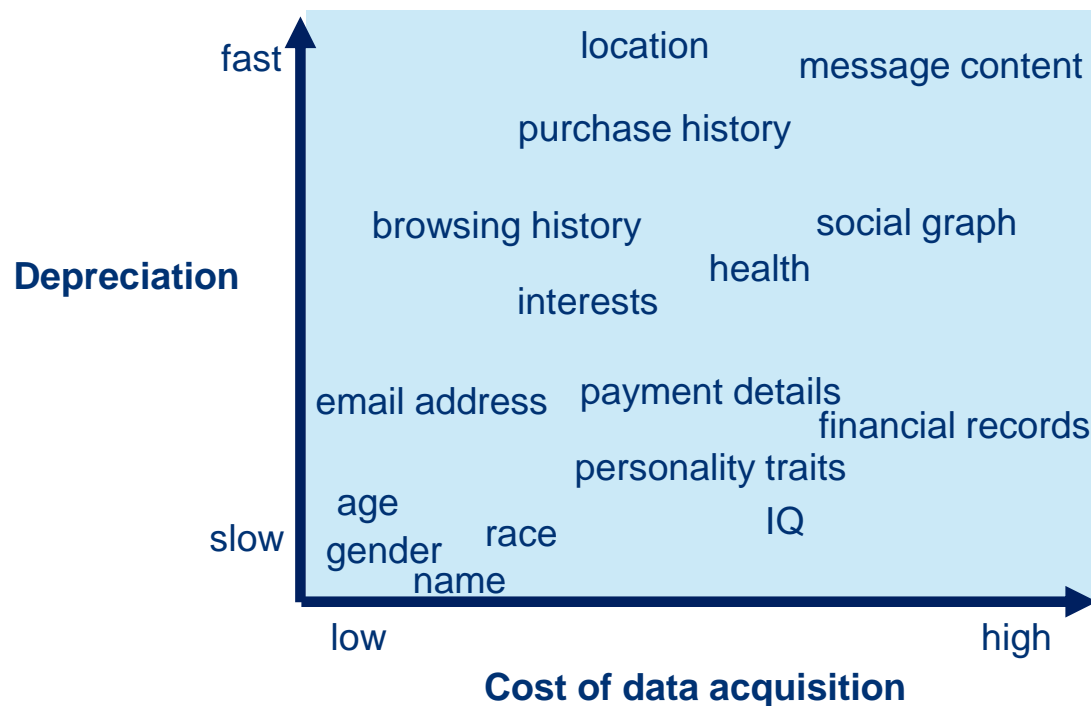
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Data as an asset

Data has different value to different users

UK Information Commissioner, Elizabeth Denham: *'Personal data has a real value so organisations have a legal duty to ensure its security, just like they would do with any other asset.'*

DG Comp, Head of Unit, Claes Bengtsson: *'In digital mergers we follow the money, and follow the data'*

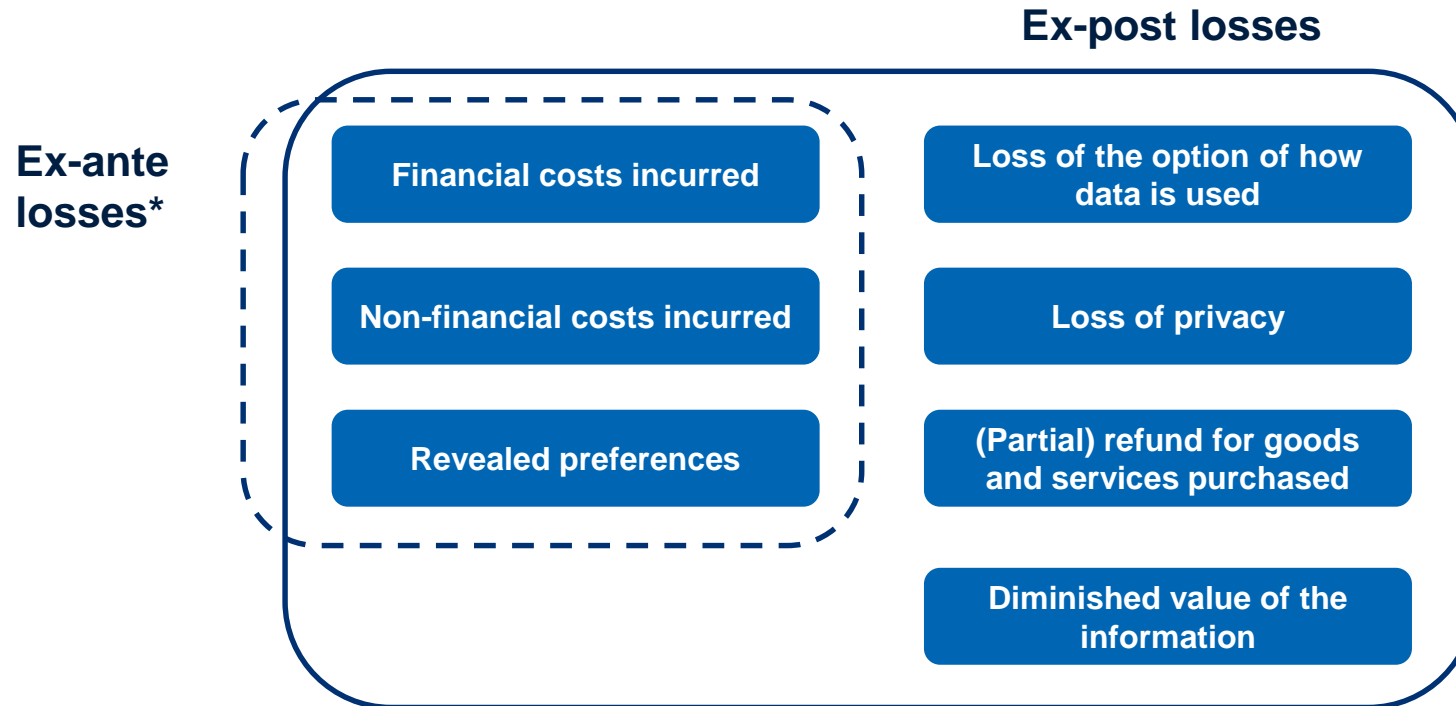


- Has the data been combined with other data?
- How is the data being used?
- Who is the data being used by?

Source of figure: Oxera (2018), 'Consumer data in online markets', prepared for Which?

Quantifying damages got mass claims (I)

Identifying types of losses



*Relevant discussion of ex-ante claims for future losses arising from data breaches can be drawn from cases in the US, e.g.:

- *John Smallman v. MGM Resorts International*, US District Court, District of Nevada
- *Marriott International Inc. Customer Data Security Breach Litigation*, MDL No. 2879

Quantifying damages for mass claims (II)

Toolkit



Quantifying ex-post damages:

- **Policy appraisal techniques**
 - Value of time, value of inconvenience are frequently used in policy appraisal
- **Consumer surveys**
 - Can estimate option value/opportunity cost to consumers using conjoint analysis
- **Market based techniques**
 - Market transactions in data—e.g. M&A, market capitalisation of firms such as facebook
- **Econometric analysis**
 - Event study or modelling of prices/other outcomes, hedonic regressions to estimate value
- **Cost based techniques**
 - e.g. Cost of providing simple security vs military grade security

Quantifying ex-ante damages:

- **Market based techniques**
 - e.g. dark web transaction values
- **Insurance benchmarks**
 - e.g. what does it cost to insure against such risks?
- **Risk simulation**
 - combine the techniques above for estimating the value of damages with the likelihood of damages occurring

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Complaints and compensation

Brian Johnston

Partner, Privacy & Data Security



What about complaints?

Available but effective remedy?

No barriers, cost implications or risk – **why not make one?**

Resulting in **huge volumes of complaints** – impacting on SAs

Significant procedural steps to resolving any complaint regarding cross-border processing

One-stop-shop to remain for now – but **procedural issues to be looked at**



Complaints as a litigation tool

Complaints are an effective litigation tool

SAs need to **get complaints resolved** – amicable resolution

A **tricky balance**: are you in a complaint resolution process or pre-litigation?

Information provided as part of complaint process/amicable resolution **can be used by the complainant (and the SA)**

SAs are utilising **mutual assistance tools** under GDPR to assist data subjects in their Member States

Compensation

Remains unclear

Concept of 'immaterial' damage **remains unclear** – as does a consistent approach to quantum

Lack of clarity and consistency across the EU: Germany, Austria and the Netherlands

Claims on the rise – especially 'test cases'

Settlements are resolving many of these claims

Differing approaches to 'immaterial'

Germany	Austria	Netherlands
Social media account suspended for three days	Processing of political data by Austrian postal service	Disclosure of information about long-term illness to new employer
Requires 'detrimental effects'	Loss of control was sufficient	Risks did not materialise
Exception where large scale and resulting from deliberate acts for commercial gain	Case involved special category data	Case involved special category data





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Opt-out class actions: Lloyd v Google

- 2011/2012: Google collected private browser generated information (BGI) from iPhone users, without their knowledge, when they were using the Apple Safari browser, via the DoubleClick Ad cookie.
- See the Court of Appeal judgment at [11]
- Google aggregated that data, and sold it to advertisers
- Richard Lloyd issued a claim form alleging breach of statutory duty under section 4(4) DPA98 and damages on behalf of the represented class under section 13 DPA98 [Note: would have been the same under GDPR – Art 82(1) ‘material or non-material damage’]

IN THE HIGH COURT

[2018] EWHC 2599 (QB)...

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- Warby J dismissed the claim:
 - None of the claimants had suffered ‘damage’
 - The class didn’t have the ‘same interest’ within CPR Part 19.6(1) required for a representative action
 - The judge exercised his discretion under CPR Part 19.6(2) against allowing the claim to proceed
- “The main beneficiaries of any award at the end of this litigation would be the funders and the lawyers, by a considerable margin.” [102]

And if that wasn’t bad enough:

- “It would not be unfair to describe this as officious litigation, embarked upon on behalf of individuals who have not authorised it, and have shown no interest in seeking any remedy for, or even complaining about, the alleged breaches.” [103]

WHAT DOES CPR PART 19.6 SAY?

- (1) Where more than one person has the same interest in a claim
 - (a) the claim may be begun; or
 - (b) the court may order that the claim be continued,
by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

- (2) The court may direct that a person may not act as a representative.

- (3) Any party may apply to the court for an order under paragraph (2).

AND REALLY IMPORTANTLY...

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- (4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule
 - (a) is binding on all persons represented in the claim; but
 - (b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.

“... all individuals who:

- (a) at any date between 9 August 2011 and 15 February 2012 whilst they were present in England and Wales:
 - (i) had an “Apple ID”;
 - (ii) owned or were in lawful possession of an iPhone 3G or subsequent model running iOS version 4.2.1 or later;
 - (iii) used the Apple Safari internet browser version 5.0 or later on that iPhone to access a website that was participating in Google’s DoubleClick advertising service;
 - (iv) did not change the default security settings in the Apple Safari internet browser and did not opt-out of tracking and collation via the Defendant’s “Ads Preference Manager”; and
 - (v) did not obtain a DoubleClick Ad cookie via a “first party” request made by their Safari browser of DoubleClick’s server;
- (b) are resident in England and Wales at the date of issue or such other domicile date as the Court may order; and
- (c) are not a Judge of the Supreme Court, a Judge of the High Court or a Master of the Queen’s Bench Division, who held office on or after 31 May 2017.” [19]

1. Was the judge right “to hold that a claimant cannot recover uniform per capita damages for infringement of their data protection rights under s13DPA98, without proving pecuniary loss or distress”?
2. Was the judge right “to hold that the members of the class did not have the same interest under CPR Part 19.6(1) and were not identifiable”?
3. Can “the judge’s exercise of discretion be vitiated”?

- Damages are ‘in principle’ capable of being awarded for ‘loss of control of data’ under
 - Directive 95/46 Art 23 [“MSs shall provide that any person who has suffered damage as a result of an unlawful processing operation ... is entitled to compensation from the controller for the damage suffered”] and
 - DPA98 Section 13 [“individual who suffers damage by reason of [a breach] is entitled to compensation”] (even where there is no pecuniary loss and no distress) [70]
- “The judge ought to have held that the members of the represented class had the same interest under CPR Part 19.6(1) and that they were identifiable.” [81]
- “I have concluded that this is a claim which, as a matter of discretion, should be allowed to proceed.”[87]

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BRINGING CLAIMS FOR MASS DATA-BREACHES: PRACTICAL CONSIDERATIONS

- Opt-in mechanisms are sub-optimal and a collective redress mechanism is needed in mass data-breach cases.
- Comparisons between CPR 19.6 and CAT Collective Proceedings Orders, Australian class action regime under Part IVA of the *Federal Court of Australia Act 1976* and provision for representative actions under the *European Directive on Representative Actions for the Protection of the Collective Interests of Consumers (2018/0089)*
- Limits of the representative action procedure:
 - Lack of guidance!
 - Same claim requirement: forces lowest common denominator approach to damages.
 - Representative required personally to have a claim.
 - High cost and adverse costs risk – restricting access to justice
- Policy questions:
 - Representative actions and limitation?
 - Should contingency fees be permitted?
 - Could funding cost be permitted from undistributed damages?
 - How will the Court deal with competing representative actions?