

Data Privacy and Cybersecurity

Financial Risks Following a Data Privacy Violation – A Greater Risk Developing in the UK?

By: [Kelly Hagedorn](#) and [Matthew Worby](#)

The risk of regulatory action posed by a violation of data privacy legislation is now a well-publicised issue that companies face in the UK. This is in large part down to the apparent willingness of the Information Commissioner's Office (ICO) to impose large fines for such conduct. For example, the proposed £183.5 million fine announced against British Airways in 2019 following its data breach (the BA Breach).

Recent developments suggest that companies now need to consider an additional risk: the instigation of collective litigation against a company by individuals who have been affected by a data breach. Such collective litigation has the potential to be as – or possibly even more – expensive than a fine levied by the ICO.

An example of such litigation arises out of the April 2020 announcement by EasyJet, that it had suffered a data breach (the EasyJet Breach).

The EasyJet Breach is thought to have resulted in the accessing of:

- the names, email addresses and travel itineraries (but not passport information) of approximately nine million customers; and
- the credit card details of 2,208 customers.^[1]

A short time after EasyJet issued a press release about the EasyJet Breach, at least one law firm began seeking claimants for a collective action against the company (the Prospective EasyJet Claim).

A greater financial risk than an ICO fine?

The economic risk posed by collective litigation, if the action is successful, is clear. If a successful collective action is big enough, the damages may dwarf any fine imposed by the ICO to date.

The damages awarded to each affected individual following a successful claim in relation to a data breach are likely to be relatively small. There is no clear guidance within the UK's legislative framework governing data protection. Case law decided under the Data Protection Act 1998 (no longer in force) held that civil damages are intended to compensate the individual rather than being an additional punitive sanction.^[2] This is evident from the estimate given by the law firm seeking to establish the Prospective EasyJet Claim; up to £2,000 per claimant in damages.

Such an amount is unlikely to trouble most companies when taken on an individual basis. However, when a class of individuals make such a claim, the financial impact of the damages that may be awarded will increase significantly.

In the event that the sum of £2,000 damages is awarded to each potential claimant that the Prospective EasyJet Claim might encompass, the total cost of damages for EasyJet would be £18 billion.

When will we know if such an approach will be successful?

Whilst the potential damages figure might appear alarming, it is important to note that the success of collective litigation in the UK is, as yet, unclear. However, recent developments suggest that the UK courts might be moving incrementally towards a greater number of collective actions – particularly for data breaches.

Representative actions

On 11 March 2020, the UK's Supreme Court confirmed that it would hear an appeal by Google in respect to a representative action that the technology company is currently facing.^[3] Representative actions are perhaps the form of collective litigation in the UK that is most similar to the US class action system. Such an action is brought by one or more people representing a group with the “*same interest*” in a claim, on an opt-out basis.^[4]

Google is being sued by Richard Lloyd, the only named claimant, for Google's alleged tracking of iPhone users' behaviour without their consent between 2011 and 2012. Up to 4.4 million individuals may be represented by the action. Mr Lloyd is presently seeking £750 in individual damages.

One of the key questions that the Supreme Court will consider is to what extent such an action meets the “*same interest*” requirement needed for a representative action to succeed. The Court of Appeal held in October 2019 that the individuals within the class that Mr Lloyd seeks to represent meet this test, but it is possible that the Supreme Court will reverse that decision.

Group Litigation Orders (GLO)

GLOs are an opt-in form of collective litigation. They are used for claims which “*give rise to common or related issues of fact or law*”.^[5] On 4 October 2019, the High Court permitted British Airways customers to bring collective litigation against the company by way of a GLO in relation to the BA Breach.

It is too soon to tell if the claim against British Airways will be successful. The cut-off date to join the group is presently set at January 2021. It is only after this point that we will be able to start evaluating how viable a GLO might be for a collective civil action in respect to a data privacy violation.

Conclusion

In light of these recent developments, companies should factor the possibility of a subsequent collective civil claim in the UK into any risk-weighting decisions around the security of the data that they hold.

The potentially high cost of regulatory action following the violation of individuals' data privacy rights is already clear. Revising risk-based strategies in light of potential collective litigation will ensure that companies can make effective decisions and future-proof their approach to data privacy.

[1] [https://www.easyjet.com/en/infoalert#:~:text=We have informed our customers,Information Commissioner's Office \(ICO\).](https://www.easyjet.com/en/infoalert#:~:text=We have informed our customers,Information Commissioner's Office (ICO).)

[2] *Halliday v Creation Consumer Finance* [2013] EWCA Civ 333.

[3] Appeal granted in light of the judgment issued by the Court of Appeal, see *Lloyd v Google LLC* [2019] EWCA Civ 1599.

[4] England and Wales Civil Procedure Rule 19.6.

[5] England and Wales Civil Procedure Rule 19.10 and Practice Direction 19B.

Contact Us



Kelly Hagedorn

khagedorn@jenner.com | [Download V-Card](#)



Matthew Worby

mworby@jenner.com | [Download V-Card](#)

Meet Our Team

Practice Leaders

David Bitkower

Chair

dbitkower@jenner.com

[Download V-Card](#)

David P. Saunders

Co-chair

dsaunders@jenner.com

[Download V-Card](#)