



COLLECTIVE REDRESS IN THE GENERAL DATA PROTECTION REGULATION

AN OPPORTUNITY TO IMPROVE ACCESS TO JUSTICE IN THE EUROPEAN UNION?

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WORKING PAPER
7/2018

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Abstract: The General Data Protection Regulation (GDPR), coming into force in May 2018, represents a significant step in the consumer data protection field. One of the main innovations introduced by the GDPR is the Member States' possibility to implement collective redress mechanisms, provided by Article 80 of the GDPR. As it can be inferred by the Recitals concerning private enforcement, the aim of the GDPR is to enhance the effectiveness of judicial remedies in accordance with article 47 of the EU Charter of Fundamental Rights. The long-standing practice of the US, as well as the mechanisms already employed in the EU Member States, will be briefly presented in the first part of the work, in order to establish the meaning and the scope of application of collective redress. The second part of the paper is instead reserved to the analysis of the relevant dispositions in the GDPR, with particular reference to their drafting history and their implementation in national legislations. Finally, the conclusions with respect to the usefulness and the effectiveness of collective redress are presented after a brief analysis of the recent decision *Schrems v. Facebook*.

Keywords: Collective redress, GDPR, Article 80, *Schrems v. Facebook*, Access to justice.

Resumen: *El Reglamento General de Protección de Datos (GDPR), que entró en aplicación en mayo de 2018, representa un paso significativo en el campo de la protección de datos del consumidor. Una de las principales innovaciones introducidas por el GDPR es la posibilidad de los Estados miembros de implementar mecanismos de reparación colectiva, prevista en el artículo 80 del GDPR. Como puede inferirse de los considerandos relativos a la aplicación privada, el objetivo del GDPR es mejorar la eficacia de los recursos judiciales de conformidad con el artículo 47 de la Carta de los Derechos Fundamentales de la UE. La práctica extendida en los Estados Unidos, así como los mecanismos ya empleados en los Estados miembros de la UE, se presentarán brevemente en la primera parte del trabajo, a fin de establecer el significado y el alcance de la aplicación de la reparación colectiva. La segunda parte del documento está reservada al análisis de las disposiciones relevantes en el GDPR, con referencia particular a su historial de redacción y a su implementación en las legislaciones nacionales. Finalmente, las conclusiones con respecto a la utilidad y efectividad de la reparación colectiva se presentan luego de un breve análisis de la reciente decisión *Schrems v. Facebook*.*

Título: *Reparación colectiva en el Reglamento General de Protección de Datos (UE): ¿una oportunidad para mejorar el acceso a la justicia en la Unión Europea?*

Palabras clave: *Reparación colectiva, GDPR, Artículo 80, *Schrems v. Facebook*, Acceso a la justicia.*

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1. Collective Redress: meaning and scope of application

Collective redress¹ is an expression used in the European context with reference to a specific type of litigation also known in the United States of America as class action. It consists in a legal mechanism that allows a large number of people to take legal action against a single or few defendants, with the peculiarity that the individual plaintiffs are permitted to act as a group. This kind of proceeding clearly requires that the claims of the different class members share the same or similar set of facts and are directed to the same aim. Moreover, the need for the expedition and simplification of the procedure makes impossible for all the members to take active part to the proceeding in court. Therefore, it is necessary that only a representative plaintiff is an actual party of the legal proceeding, while the other class members are nevertheless bound by its outcome. The representation of other subjects is the peculiar characteristic of class actions, considered as a distinct phenomenon from group litigation, where the action is brought jointly by those who have suffered harm. These fundamental features are typical of collective redress worldwide, but there are many different manners to discipline the various aspect of the legal action, resulting in the multiplicity of national legislation models in this field².

Essentially, the various solutions derive from two fundamental prototypes³. Opt-out class actions provide a definition of class members interested in the outcome of a legal action, that are therefore part of the legal action in the lack of a positive opposition. On the contrary, opt-in class actions require possible members of the class to deliberately join the legal action. While the former is typical of the US system, the latter characterizes representative actions in those EU Member States that provide some sort of collective redress. There is an intense debate concerning which one is preferable.

¹ D. R. Hensler, N. M. Pace, B. Dombey-Moore, B. Giddens, J. Gross, and E. K. Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Santa Monica; 2000; B. Haar, *Regulation Through Litigation — Collective Redress in Need of a New Balance Between Individual Rights and Regulatory Objectives in Europe*, *Theoretical Inquiries in Law*, 19, 2018 pp. 203-233; for an economic analysis of class actions see: A. Cassone and G.B. Ramello, *The Simple Economics of Class Action: Private Provision of Club and Public Goods*, *European Journal of Law and Economics*, 2011 pp. 205–224;

² For a comparative analysis of collective redress mechanisms: D. R. Hensler, C. Hodges, I. Tzankova, *Class Actions In Context: How Culture, Economics and Politics Shape Collective Litigation*, Northampton, 2016; R. Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective*, Oxford, 2004 pp. 23 and ff. .

³ *Ibid.*

Regardless of these practical issues, the main feature of collective redress is the scope this mechanism is meant to serve. Though the origins of class action are not clear⁴, in modern times collective redress can be considered as a tool to improve access to justice, employed by governments to respond to the concern regarding the effectiveness of the protection granted by the law. The cost of legal proceedings is one of the toughest obstacles that litigators, and particularly natural persons, have to face, even before having entered into court. In fact, if the claimant believes that whatever the outcome of the proceeding might be, it will not be enough to cover the expenses paid to reach that same outcome, litigation will not be pursued. This is particularly true with reference to smaller claims, which might be not worth the risk⁵. Moreover, the scarcity of resources of natural persons entails another considerable disadvantage. While individuals struggle to cover the cost of litigation, the same corporations that violated their rights are often in the condition to have recourse to the most competent and highly paid lawyers, with a subsequent disproportion in the proceedings⁶. However, when the means of each individual damaged by a single corporation are combined, even the smaller claimants can be assisted properly and have a chance to win in court.

Together with the enhancement of access to justice, class actions have also a remarkable deterrent effect⁷, that can be considered as a direct consequence of this same enhancement. The fact that more legal actions are taken in front of courts means that corporations are put in a position in which violating the law has a deeper impact on their economic choices. It may be better to positively adapt to governmental requirements than to pay compensation at the end of a lengthy proceeding.

This argument leads to a final benefit effect of collective redress, that consists in the mitigation of the overall expenses for legal proceedings⁸ since it makes more difficult to re-litigate the same issue.

Certainly, collective redress implies a few drawbacks that need to be taken into account and emerge clearly in the US litigation system.

⁴ On this regard see: S. T. Spence, Looking Back ... In a Collective Way, A short history of class action law, American Bar Association, 2002.

⁵ M. Cappelletti, Alternative Dispute Resolution Process within the Framework of the World-Wide Access-to-Justice Movement in Modern Law Review 56, no. 3, 1993, p. 284.

⁶ *Ibid.*

⁷ The deterrent effect was known and analysed already immediately after the establishment of class actions in the US, see: K. W. Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest in Journal of Legal Studies 4, no. 1, 1975 pp. 54 and ff. .

⁸ A. Cassone and G.B. Ramello, The Simple Economics of Class Action: Private Provision of Club and Public Goods, European Journal of Law and Economics, 2011 p. 211.

2. Collective redress in the US

As already mentioned US adopts an opt-out class action scheme in its national legislation⁹. Rule 23 of the Federal Rules of Civil Procedure is the model rule for all the class actions proceedings in the US. No matter the area in which a legal action has been brought, from civil rights to environmental claims, there is a set of rules that applies almost to every situation. For instance, the first letter of the provision disciplines the requisites of class actions:

- (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
 - (1) the class is so numerous that joinder of all members is impracticable;
 - (2) there are questions of law or fact common to the class;
 - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
 - (4) the representative parties will fairly and adequately protect the interests of the class.

On the basis of these requirements the Court has to certify the nature of class action in an early phase of the proceeding, defining its scope and giving notice to the class members in the most practicable way¹⁰. This notice has a fundamental value since it allows class members to opt out of the class, if they do not agree with its terms or if they prefer to act individually. The legal action is then conducted by a class counsel that must “fairly and adequately represent the interests of the class”¹¹.

The benefits of this procedure are clear, as it does not need a positive action of class members and can therefore constitute the tool for access to justice and deterrent purposes explained above. In this context, the role of the Court is particularly important since the judge has a certain control over the action in each step of the proceeding¹². However, opt-out class actions are deemed to bring several issues that risk to undermine the very core aims of collective redress.

The first and most important problem arising from opt-out representative actions is the incentive to overlitigation¹³. The lack of requirements concerning the positive participation of class members entails that it is possible to conduct rather massive

⁹ For a first introduction to collective redress in the US see: J. C. Alexander, *An Introduction to Class Action Procedure in the United States*, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, 2000 p. 1.

¹⁰ Including the use of newspapers, television, radio and Internet web sites.

¹¹ Rule 23 (g) (4) of the Federal Rules of Civil Procedure.

¹² See extensively on this point: E. Falla, *The role of the Court in Collective Redress Litigation* : Comparative Report, Bruxelles, 2014.

¹³ L. S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, Emory Law Journal, 2014 p. 413 and ff. .

cases, involving a great number of individuals, irrespective of the actual legal value of the suit. Moreover, the well-known issues arising from contingency fees provided in the US makes even more difficult to put limitations to unjustified claims, as well as third-party funding¹⁴. In the meantime, the mere fact that a class action has been filed, might have the consequence that corporations decide to settle because of the high risk at stake, the possible costs associated with the discovery and the bad advertising a cumulative action cause. In this context, the complexity of dismissal, even with regard to the weakest cases, makes the prospect of opt-out class actions even more desirable for plaintiffs 'class action law firm.

Another drawback strictly connected to this point concerns the conflict of interest¹⁵ caused by opt-out class action, but that must be considered even with reference to opt-in collective redress mechanisms. The role of class lawyers is amplified every time it is not possible for any individual to follow the legal action in its entirety and it is required in order to bring the class action to a positive outcome. In the meantime, the lawyers' interests are often not aligned with the ones of the class members, particularly in the US because of the contingency fees agreements. Class lawyers might be eager to accept settlement proposals even when they would not satisfy the requests of the class members, if the efforts needed to actually face the trial are not proportionate to the raise of their personal rewards.

A third considerable weakness highlighted by collective actions in the US is the results of the lack of decision making control for the class members¹⁶. Plaintiffs do not have a saying on how to conduct litigation or on when is preferable to settle. Therefore, the main aim of collective redress, i.e. the need of an effective remedy for small claims, can be jeopardized by the rules that discipline it in practice.

3. Collective redress in the EU

The situation in the European Union is completely different from the US¹⁷. On one hand, the lack of a common framework with regard to collective redress means that each State is free to introduce such procedures in its national legislation, and in the modalities it prefers. On the other hand, there is a general scepticism towards

¹⁴ Deborah Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 *George Washington Law Review*, 2011, pp. 306.

¹⁵ Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, *U. Chi. Legal F.*, 2003, 581.

¹⁶ J. C. Alexander, *An Introduction to Class Action Procedure in the United States*, Presented Conference: *Debates over Group Litigation in Comparative Perspective*, Geneva, 2000 pp. 16 and ff. .

¹⁷ Iris Benöhr, 'Collective Redress in the Field of European Consumer Law' (2014) 41 *Legal Issues of Economic Integration*, Issue 3, p. 243.

collective redress, in favour of public enforcement remedies, especially in the civil law countries.

However, the European institutions have proven over time their support for a progressive inclusion of collective redress mechanism in the Member States civil procedure legislation¹⁸. The legal background of this approach can be traced in Article 47 (1) of Charter of the Fundamental Rights of the European Union. In fact, this crucial provision clearly states the need to provide effective remedies for the violations of EU law¹⁹. Therefore, EU is constantly on the move to create an environment in which substantive rights can be practically actioned in courts.

A decisive step in the integration of collective redress in the EU system was achieved with the 2013 Recommendation on common principles for injunctive and compensatory collective redress mechanisms²⁰. This soft law instrument, though not binding on the Member States is a clear sign of the determination of the European Commission to endure its efforts in this field. In this respect, Recital 7 is particularly interesting since it depicts the areas in which the development of collective redress is most desirable:

Amongst those areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value, are consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection.

At the same time the EU has shown its concerns in relation to the above mentioned risks that come with class actions²¹. The abuse of litigation is particularly despised and

¹⁸ The Green Paper on Consumer Collective Redress (COM(2008) 794, 27.11.2008) was published on 27 November 2008, as a result of the growing discussion concerning consumer access to justice that have grown during the 2000s.

¹⁹ “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

²⁰ European Commission (2013) Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under Union Law, 2013/396/EU.

²¹ See Recital 15 of the 2013 Recommendation: “Collective redress mechanisms should preserve procedural safeguards and guarantees of parties to civil actions. In order to avoid the development of an abusive litigation culture in mass harm situations, the national collective redress mechanisms should contain the fundamental safeguards identified in this Recommendation. Elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule.”

needs to be counterbalanced by the traditional safeguards provided by the common European civil procedure rules. More specifically, it is believed that, in the absence of punitive damages and taken into account the principle of the “loser pays” applied in the EU Member States, the drawbacks of collective remedies found in the US system should not constitute the same menaces in Europe. There is also a negative approach with reference to opt-out class actions since they end up to sacrifice the individuals’ rights to decide to take part to litigation proceedings.

To outline the procedural rules of EU Member States with respect to collective redress goes beyond the scope of this work²². However, it must be noted that the European approach has had an overall positive impact, since several national legislations now provides for class action or similar mechanisms in the consumer field²³. In the meantime this evolution is surely not completed, given that in most cases collective action can be directed only to injunctive relief and it is not possible to claim compensation for the damages. This last point also applies to the Injunction Directive, which establishes the right for certain entities of a Member State to conduct actions directed to the termination of an infringement of consumer rights in another Member State²⁴. Although this legal procedure is not a proper representative action, since the relief is not sought on behalf of consumers, it is interesting to note that it constitutes a novelty in the EU framework, but it is still not aimed to the recovery of pecuniary and non-pecuniary damages.

4. GDPR innovations in the litigation field

The Regulation 2016/679 (hereinafter referred as the “General Data Protection Regulation” or “GDPR”) has been defined as “one of the most ambitious legal projects of the European Union in the last years”²⁵. The process of its discussion and approval lasted more than four years, with crucial variations and additions required by the European Parliament or resulting from the intense lobbying activity of corporations. Eventually, on 27 April 2016 the text was published on the Official Journal of the

²² In this respect see: and by C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe*, Oxford, 2008; D. Fairgrieve, G. Howells, *Collective Redress Procedures—European Debates*, *International and Comparative Law Quarterly*, 58(2), 2009, pp. 379-409.

²³ In this respect see: *State Of Collective Redress in the Eu in the Context of the Implementation of the Commission Recommendation Just/2016/Jcoo/Fw/Civi/0099b.*; Rodger, *Competition Law: Comparative Private Enforcement and Collective Redress Across the EU*, Alphen aan den Rijn, 2013 p. 163 and ff. .

²⁴ Article 2 of the Directive 2009/22/EC.

²⁵ L. Feiler, N. Forgó and M. Weigl, *The EU General Data Protection Regulation (GDPR): A Commentary*, Woking, 2018.

European Union with a specific clause on the basis of which it shall be applied from 25 May 2018²⁶. Indeed, this revolutionary piece of legislation is an attempt of the European institutions to adapt legislation to the contemporary world and might result in the final recognition of the EU leadership in the field of data protection²⁷.

It is no mystery that communication technologies have been under a constant and rapid development in the last 20 years. Devices that are nowadays part of the everyday life were unimaginable when the Directive 95/46/EC (hereinafter “Data Protection Directive”) became enforceable and so were the possible violations of the fundamental rights of the user of those devices.

These observations were clearly taken into account by the European Union as Recital 7 explicitly affirms that the technological development and the subsequent globalisation “require a strong and more coherent data protection framework in the Union”²⁸. As a matter of fact, the aims of the Data Protection Directive have not changed over time²⁹, but since the context is not the same and new dangers and devices put the citizens’ rights in peril, a new approach was necessary.

In this respect the GDPR provides several innovations that will have a deep impact on data processing when this activity has a link with the European Union. This is not the proper place to conduct a comprehensive analysis of the reform conducted by this Regulation, but clearly every study on the privacy topic in the European Union and worldwide cannot ignore the fact that the GDPR implies new obligations for companies, new rights for individuals and judicial remedies of a much greater extent than before. Several Recitals explicitly mention the need to respect the principle of the effective judicial remedy³⁰. Injunctive together with compensatory relief are clearly considered in the light of the enforcement of the obligations provided. This is why the GDPR is particularly innovative in the litigation field, with particular reference to the extension of the situations in which a claim can be brought on the basis of a data protection breach.

²⁶ Article 99 of the General Data Protection Regulation

²⁷ See extensively: G. Greenleaf, *The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108*, in *International Data Privacy Law*, Vol. 2, Issue 2, 2012.

²⁸ Article 99 (1) of the GDPR.

²⁹ In this respect it might be observed that recitals of the Directive and of the Regulation have the same character and share aims and methods.

³⁰ See: Recital 4, Recital 11, Recital 98, Recital 108, Recital 114, Recital 129, Recital 141, Recital 142, Recital 143, Recital 146 and Recital 148.

With reference to this last point, crucial for this paper, it must be highlighted that Article 3(2)³¹ implies that corporations outside the European Union territory have to respect the same set of rules of those established in the European Union in every situation in which they handle data linked to an individual in the EU. Although most of the biggest internet corporations based in the US operate in Europe throughout subsidiaries, extraterritoriality means that even non-European small-sized businesses, that do not have subsidiaries in Europe, will have to fulfil data protection obligations when data processing is targeted to someone located in the EU. The increasing number of the subjects obliged to comply with the European legislation is an element that empirically implies an increase in violations committed and therefore in potential judicial actions initiated.

Another major extension of liability concerns the allocation of responsibility between controllers and data processors. Article 82 establishes a direct liability towards subjects whose right to privacy has been violated and specifically mentions both these categories. More specifically, paragraph 4 reads that:

“Where more than one controller or processor, or both a controller and a processor, are involved in the same processing and where they are, under paragraphs 2 and 3, responsible for any damage caused by processing, each controller or processor shall be held liable for the entire damage in order to ensure effective compensation of the data subject”

The result of this provision has been described as a “cumulative liability regime”³² which will consequently lead to situations in which the data subject has a choice to take legal action against the controller, the processor, or both³³, even in situations in which data has been processed by multiple subjects. This new regime should also be considered relevant for the scope of this article, since it deeply affects the strategies of litigation of data subjects across the European Union.

Among the other novelties provided, commentators have welcomed in a generally positive way the clarification concerning eligible damages. The extent of the right to compensation has been broadened, and it now explicitly includes non-material damages. This is an important step since in the vast majority of cases privacy violations give rise to non-pecuniary damages, while financial loss or material damages in general

³¹ “This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or

(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.”

³² B. Van Alsenoy, *Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation*, JIPITEC, Vol. 7, 2016 p.282

³³ Therefore, Paragraph 4 establishes a regime of joint liability, further disciplined by paragraph 5.

are significantly more difficult to proof. In the framework of the Data Protection Directive Member States held different position in this regard³⁴ that in some cases caused massive issues in the interpretation of the national legislation³⁵.

This last point is an express example of another feature of past legislation that needed a drastic change. In fact, one of the main limits of the Data Protection Directive had proven to be its nature, that requires Member States to dictate the means to achieve a particular result³⁶. This distinguishing characteristic of directives had a serious implication in the implementation of EU privacy dispositions. The whole system was affected by a deep fragmentation, because the level of protection and the enforcement of rights varied in the territory of the European Union, depending on the national acts that ensured their application. On the contrary, a regulation does not depend on national measures of implementation since, under Article 288 of the TFUE: "It shall be binding in its entirety and directly applicable in all Member States". The adoption of the GDPR is supposed to have a serious effect in the harmonization of the Member States legislation, as expressly stated in Recital 9³⁷.

However, discretion is not completely excluded even in the current framework³⁸. Starting from the term "General" in the GDPR that suggests at once its difference, this regulation slightly differs from other regulations. More specifically, there are several opening clauses enabling an implementation to be carried out by Member States. First of all significant space was left to Member States in relation to Sector Specific Data Protection Law³⁹ while it was also guaranteed the possibility to include further

³⁴ For instance, non-material damages were provided in Italy and Spain, while the German legislation did not enshrine the possibility to claim for non-financial losses.

³⁵ The landmark case in the United Kingdom was *Google v Vidal-Hall* [2015] EWCA Civ 311, in which the Court of Appeal recognized for the first time the possibility to claim non-pecuniary damages.

³⁶ J. Wagner, A. Benecke, National Legislation within the Framework of the GDPR, *European Data Protection Law Review*, 2016.

³⁷ "The objectives and principles of Directive 95/46/EC remain sound, but it has not prevented fragmentation in the implementation of data protection across the Union, legal uncertainty or a widespread public perception that there are significant risks to the protection of natural persons, in particular with regard to online activity. Differences in the level of protection of the rights and freedoms of natural persons, in particular the right to the protection of personal data, with regard to the processing of personal data in the Member States may prevent the free flow of personal data throughout the Union. Those differences may therefore constitute an obstacle to the pursuit of economic activities at the level of the Union, distort competition and impede authorities in the discharge of their responsibilities under Union law. Such a difference in levels of protection is due to the existence of differences in the implementation and application of Directive 95/46/EC."

³⁸ J. Wagner, A. Benecke, National Legislation within the Framework of the GDPR, *European Data Protection Law Review*, 2016 p. 353 and ff. .

³⁹ Article (2) of the GDPR.

Restrictions⁴⁰ to data protection rights, provided that some strict conditions are met. Other deviations are possible such as the one related to the age of consent⁴¹ or to the duty to appoint a Data Protection Officer⁴².

In relation to the issue of collective redress, as disciplined by Article 80 of the GDPR, the role of States becomes essential, since the Regulation leaves to the decision of the Member States the possibility of not-for profit body, organisation or association to be mandated by data subjects in the exercise of their rights in court. In this context, if Member States will decide to remain idle, their legislative choice would mean the impossibility for collective redress to operate in practice.

5. Collective redress in the framework of the GDPR

The text of article 80 reads that:

1. The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.
2. Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing.

This provision is clearly a potential ground-breaker in the context of data protection litigation, as it introduces collective redress mechanisms for the first time in the data protection environment. It is true that even the Data Protection Directive provided for the possibility of Non-Governmental Organizations (hereinafter "NGOs") to represent data subject in front of supervisory authorities⁴³. However, Article 80 brings two substantial innovations: (i) the possibility for NGOs to claim compensation on behalf of data subjects, and (ii) the possibility for NGOs to lodge complaints and exercise rights independently of data subjects' mandate.

⁴⁰ Article 23 of the GDPR.

⁴¹ Article 8 (1) (2) of the GDPR.

⁴² Article 37 (4) of the GDPR.

⁴³ Article 28 of the Data Protection Directive.

For what concerns the first issue, EU choice emerges from the reference to Article 82, already recalled as it is the most significant disposition in relation to the right to compensation and liability. In practice, this disposition equals to an opt-in class action as previously described. In fact, the same right to receive compensation for damages held by a certain person can be transferred to NGOs that will then have the possibility to introduce legal actions against controllers and data processors. The only condition specifically required is that the NGO is “active in the field of the protection of data subjects’ rights and freedoms with regard to the protection of their personal data”. This provision is clearly directed to avoid the rise of professional class action litigators, interested in their personal profit in the legal action more than to the redress sought by the members of the class.

For what concerns the second issue instead, the key words are “independently of a data subject’s mandate”, implying a different kind of legal procedure, more similar to opt-out class actions described previously in this article. As a matter of fact, this disposition does not refer to any kind of transfer of data subjects’ rights. The mere fact that a violation of the obligations prescribed by the GDPR has occurred, sets off the legitimacy of NGOs to conduct legal actions in order to (i) lodge a complaint in front of supervisory authority, (ii) exercise right to an effective judicial remedy against a supervisory authority, (iii) exercise the right to an effective judicial remedy against a controller or processor. The analogy with opt-out class actions stops here, since Article 80 does not provide for a right of data subjects to withdraw from the legal action initiated by an NGO, nor it would make any sense, as claiming compensation is outside the scope of the second paragraph.

The significant impact that this disposition could have involved has been deeply reduced by the fact that the decision to introduce these two different collective redress mechanisms is left to the Member States. Therefore, their concrete applicability depends on national legislation that will have to implement GDPR. This considerable flow in the final text of Article 80 is the result of the negotiations occurred during the four years of debate that led to its approval, but at the same time these discussions made possible to go beyond certain rooted approaches of the EU system, saving the most innovative part of this provision.

Indeed, the initial draft of the European Commission was released on 25 January 2012⁴⁴. The proposal built on the already existing provision of the Data Protection Directive and with Article 73 provided for a right of NGOs to lodge a complaint on

⁴⁴ Proposal for a Regulation Of The European Parliament And Of The Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) /* COM/2012/011 final - 2012/0011 (COD) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0011&from=EN>

behalf of a data subject whose rights have been infringed. At the same time, paragraph 3 of the same disposition established for the first time a right to lodge a complaint independently, whenever a data breach has occurred. Therefore, this first draft of the GDPR did not require the intervention of Member States to implement collective redress mechanisms in national legislation. However, the combined provisions of Articles 73, 76 and 79 did not entail the option for NGOs to claim compensation on behalf of data subject, a feature that is crucial in order to obtain the most by collective actions.

On 12 March 2014 the European Parliament approved its own version of the regulation⁴⁵. This draft of the GDPR, while still not requiring a phase of implementation conducted by national legislators, introduced two important novelties. In fact, the text of Article 77 included a first reference to non-pecuniary damages, and Article 76, with regard to NGOs, contained a reference to Article 77 and therefore to the right to claim compensation.

Finally, the so-called General Approach was approved and released by the Council of the European Union on 15 June 2015⁴⁶. This version of the GDPR came with a decisive regress in relation to the representation of data subjects. On one hand, Article 76 did not recall the right to claim compensation for NGOs. On the other hand, this text contains the first reference to Member States, thus enabling them to specify if and how collective redress should be provided in national acts implementing the GDPR.

It was the final stage of the legislation process, known as the Trilogue, that has brought the GDPR to the definitive text that was analysed before. The final content of Article 80 is therefore the result of a thorough negotiation between the different European institutions and can be considered as a compromise between the more liberal approach of the Commissions and the Parliament and the restrictive one of the Council, that represents the executive governments of EU Member States. Essentially, it was decided that the Regulation should not impose class action in the data protection litigation field, having considered the difference between the legal system

⁴⁵ European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)) available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%20TA%20P7-TA-2014-0212%200%20DOC%20XML%20V0//EN#BKMD-5>

⁴⁶ Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) - Preparation of a general approach N. 9565/15 available at: <http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf>

of the Member States and the absence of a common framework in the European Union.

In conclusion, GDPR has adopted a compromise solution that potentially could mean the overcome of the past legacy of the EU with reference to collective redress mechanism, but necessarily depends on the intervention of Member States for its actual success. At this point, it is clearly fundamental to analyse national acts implementing the GDPR in order to understand the outcome of this strategy.

6. National legislation implementing Article 80 of the GDPR

At the moment in which this article is being written, only one month before the definitive enforceability of the GDPR, 5 of the 28 Member States (less than 1 out of five) have enacted the national legislations necessary to coordinate and implement the European dispositions. First of all, this paragraph will scrutinize the approach in relation to collective redress of these “zealous” States, then it will deal with the most relevant drafts of others.

Germany was the first country to adopt a national act of implementation of the GDPR, on 30 June 2017⁴⁷. The dispositions on compensation and remedy against violation of privacy rights are silent for what concerns rights of NGOs, so Article 80 seems to not have received the necessary enactment to put it into practice.

On 31 July 2017 it was the time for Austria to comply with its duty to enact national legislation⁴⁸. The Federal Act on the Protection of Individuals with regard to the Processing of Personal Information sets off an article specifically reserved to the representation of data subjects. In particular, the Austrian law replicates what Article 80 (1) provided for⁴⁹, thus enabling NGOs to claim compensation on behalf of data subjects. On the contrary, no such rule exists as the one figured out by paragraph 2 of Article 80 of the GDPR. It is important to note that Austria is not new to class action litigation in the data protection field, as it will be seen later in this paper with reference to the Schrems case.

⁴⁷available at:
https://www.bmi.bund.de/SharedDocs/downloads/EN/gesetztestexte/datenschutzanpassungsumsetzungsgesetz.html;jsessionid=5905793DB80EC5AA9CC794B2D8EF0AF6.1_cid364d

⁴⁸available at:
https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2017_I_120/BGBLA_2017_I_120.pdf

⁴⁹ Article 28 of Federal Act on the Protection of Individuals with regard to the Processing of Personal Information.

Belgium did not introduce particular specifications in its implementing legislation, mainly directed to the creation of the Data Protection Authority⁵⁰. The act, dated 3 December 2017, does not intervene on the collective redress field.

The Data Protection Bill⁵¹ was enacted by Ireland on 30 January 2018 to give further effects to the Regulation 1016/679. Section 115 establishes the rules in relation to the representation of data subjects, providing the possibility of NGOs to lodge complaints and exercise their rights on their behalf. However, for what concerns compensation Section 123 reads that:

The court hearing a data protection action that has been brought, in accordance with section 115, on behalf of a data subject by a body, organisation or association to which subsection (2) of that section applies, shall not award compensation for material or non-material damage suffered.

Therefore, Ireland deliberately chose to improve collective redress only as a mean of relief exercised in order to obtain the cessation of a data breach, with the explicit exception of the possibility to mandate an NGO the right to claim compensation for the damages suffered. It is important to note that most of the major internet corporations have their headquarters in Ireland, therefore its legislation is particularly relevant in this field.

Finally, the Slovakian New Personal Data Protection Act of 30 January 2018⁵² does not set off a discipline in relation to the representation of data subjects.

As already mentioned, only the previously considered States have already enacted an implementing legislation of the GDPR. Clearly, several other States have published in the past months draft bills or proposals with reference to the data protection regulation. In the present article, however, only the most relevant draft legislation in relation to collective redress will be analysed, particularly for matters concerning the internal discussions that it caused.

The United Kingdom drafting of the Data Protection Bill is surely of particular interest in this respect. Although the upcoming ending of the Brexit negotiations⁵³, UK has already decided to implement data protection obligations. In the last draft made publicly available on 23 March 2018 Section 180 and Section 181 regulate the representation of data subjects and outline the possibility of NGOs to conduct legal actions and claim compensation on behalf of persons whose rights have been

⁵⁰ available at: http://www.ejustice.just.fgov.be/mopdf/2018/01/10_1.pdf

⁵¹ available at: <http://www.oireachtas.ie/documents/bills28/bills/2018/1018/b1018s.pdf>

⁵² available at: <http://www.epi.sk/zz/2018-18>

⁵³ C. Kuner, D. J. B. Svantesson, F. H. Cate***, O. Lynskey, C. Millard, The global data protection implications of 'Brexit', in *International Data Privacy Law*, Vol. 6, No. 3, 2016 pp. 167.

infringed. However, the lack of a disposition providing for an independent right of NGOs to lodge a complaint provoked a strong reaction in the public opinion⁵⁴.

The exam of the *Projet De Loi relatif à la protection des données personnelles* is currently being carried out by the Senate in France⁵⁵. In the beginning the draft law, presented on 13 December 2017, did not provide for the possibility of NGOs to claim compensation on behalf of data subjects, allowing them only to lodge complaints and exercise other rights. Instead, the final text⁵⁶ emerging from the discussions in the commissions contains a reference to article 82 of the GDPR, thus apparently enabling NGO to take action also with reference to damages suffered by data subjects.

To sum up, at the present time Article 80 seems not to have reached its potential. Only Austria has considered collective compensation in its legislation concerning data protection, but this country already knew collective redress mechanisms independently from the GDPR. The draft text of two major players such as France and the United Kingdom show that other States could act differently in comparison with those that have already implemented GDPR in their legislation. However, it is dangerous to draw conclusions, given the fact that the vast majority of Member States has still not implemented the Regulation in their legislation.

7. The Schrems case

Some of the most significant decisions in the field of data protection have been rendered in proceedings brought by an Austrian activist: Mr. Maximilian Schrems. Although the outcome of his campaign against Safe Harbor⁵⁷ was decisive as it caused the revision of the agreements between the EU and the US⁵⁸, this article focuses on a

⁵⁴ <https://www.theguardian.com/commentisfree/2018/jan/09/hacked-off-data-protection-bill-fail-victims-consumers>

⁵⁵ available at: <http://www.assemblee-nationale.fr/15/ta/tap0110.pdf>

⁵⁶ "Toute personne peut mandater une association ou une organisation mentionnée au IV de l'article 43 *ter* aux fins d'exercer en son nom les droits prévus aux articles 77 à 79 et 82 du règlement (UE) 2016/679 du Parlement européen et du Conseil du 27 avril 2016 précité. Elle peut également les mandater pour agir devant la Commission nationale de l'informatique et des libertés, contre celle-ci devant un juge ou contre le responsable de traitement ou son sous-traitant devant une juridiction lorsqu'est en cause un traitement relevant du chapitre XIII de la présente loi."

⁵⁷ Maximilian Schrems v. Data Protection Commissioner, Judgment of 6 October 2015, C-362/14, C:2015:650.

⁵⁸ T. Ojanen, Making the essence of fundamental rights real: The court of justice of the european union clarifies the structure of fundamental rights under the charter. *European Constitutional Law Review*, 12(2), 2016, pp. 318-329; Varotto, S., The Schrems decision, the EU-US privacy shield and the necessity to rethink how to approach cross border personal data transfers at global level. *Communications Law*, 21(3), 2016 pp. 78-87.

second and more recent case, that may have a serious impact in the collective redress debate.

Although the Austrian legislator has not explicitly disciplined the field of collective redress, the Austrian Supreme Court has specifically recognized the possibility to mandate claims to other subjects⁵⁹, therefore upholding what the authors have defined as the Austrian model of the class action⁶⁰. Since Austria provides for a sort of collective redress mechanism, Mr. Schrems was able to start a proceeding against Facebook Ireland Limited together with other 25.000 participants, coming from Austria, but also from other States of the European Union and globally. On the basis of the legal action, Mr. Schrems claimed that several violation of privacy obligations have been occurred on the famous social network, starting from issues relating to the consent to unlawful transmission and processing of data. Each participant to the class action claimed only 500 Euro, but considered together the compensation sought amounted totally to more than 12 million Euros.

The case poses serious issues in relation to admissibility, with particular reference to jurisdiction. More specifically, Facebook challenges the consumer status claimed by Mr. Schrems, as he has used the social network to advertise its activities as a lawyer and therefore for professional purposes. Moreover, according to Facebook, Mr. Schrems should not be able to take legal action in Austria, as provided by Article 16 (1) of the Brussels Regulation⁶¹, but has to proceed in Ireland, where Facebook has its headquarter. At the same time, it is doubtful if a consumer might take legal action in his country of domicile, even on behalf of other consumers that have mandated him to claim compensation in a certain legal proceeding. Eventually these matters were brought in front of the Austrian Supreme Court. In turn, the Supreme Court decided to refer a preliminary ruling to the European Court of Justice concerning two questions. Essentially, the issues concerned the fact that Mr. Schrems, as far as he qualified as a consumer under EU law, could file his claims in front of Austrian courts, even on behalf of the other claimants, coming from other EU and non-EU States.

The decision of the Court⁶² came with a compromise result, having regard to the expectations of the parties. In the light of its reasoning, Mr. Schrems qualified as a

⁵⁹ Oberster Gerichtshof, 12 July 2005, 4 Ob 116/05w.

⁶⁰ G. E. Kodek, *Collective Redress in Austria*, *The Annals of the American Academy of Political and Social Science*, 2009 p. 87.

⁶¹ See the text of Article 16 (1) of Regulation 44/2001, applicable to the dispute of Mr. Schrems: A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

⁶² Maximilian Schrems v. Facebook Ireland Limited, Judgment of 25 January 2018, C-498/16, EU:C:2018:37.

consumer, notwithstanding the fact that he had used Facebook to advertise its activities against the Californian Corporation, precisely because those activities were necessary in order to guarantee his safeguard as well as the safeguard of other consumers⁶³. On the other hand, he was not given the possibility to bring the assigned claims in front of Austrian Courts, regardless of the provenience of the individual that mandated him⁶⁴. More specifically the Court in paragraph 45 points out that:

The rules on jurisdiction laid down, as regards consumer contracts, in Article 16(1) of the regulation apply, in accordance with the wording of that provision, only to an action brought by a consumer against the other party to the contract, which necessarily implies that a contract has been concluded by the consumer with the trader or professional concerned.

The extent of this strict interpretation, which is consistent with the previous case law of the ECJ⁶⁵, may undermine the future of collective redress mechanism in the European Union, in the absence of a special jurisdiction provision. Indeed, the obligation upon representative subjects to take legal action in the country in which the defending corporation has its registered office could mean a consistent increase in legal expenses. At the same time, it seems difficult to overcome the literal interpretation maintained by the ECJ, that requires the existence of a contract between the party who claims jurisdiction under Article 16 (1) and the defendant.

8. Conclusions

In modern times collective redress has proven to be an ambivalent instrument in the hands of national legislators. The improvement of access to justice as well as the deterrent effect are the undeniable benefits that arise from its establishment, particularly in the areas in which an effective remedy for the infringements of large corporations is difficult. However, it has been seen that the outcomes pursued in theory were not always achieved in practice, due to the well-known issues of overlitigation and conflict of interests.

The European Union, notwithstanding these drawbacks and maybe considering them typical of other legal orders, has progressively increased its involvement in the reform of national procedural legislations with the aim of including in them collective redress. At the beginning, this involvement took the form of mere discussions, then of non-binding recommendations. Finally, at the very moment these conclusions are written,

⁶³ Paragraph 39 and ff. .

⁶⁴ Paragraph 42 and ff.

⁶⁵ ÖFAB, Östergötlands Fastigheter AB v Frank Koot, Evergreen Investments BV, Judgment of 18 July 2013, C-147/12, EU:C:2013:490 para. 35.

the European Commission released a Proposal for a Directive On Representative Actions For The Protection Of The Collective Interests Of Consumers⁶⁶.

In this context, Article 80 of the GDPR could have represented an important step towards the creation of a European common framework in the field of collective actions. In fact, the application of these mechanisms in a specific field such as the one of data protection might have shown the problems and their possible solutions, so that the European legislator would have considered them in other areas of consumer law. However, the choice of leaving to States the final decision concerning the introduction of collective redress meant that this provision will be considered in the same way as a recommendation by States and the analysis of their implementing legislation at this stage confirms this impression. At the same time, in those Member States in which collective redress is already a reality, issues of jurisdiction risk to put at jeopardy the little that has been achieved in the European context.

In conclusion, the European Union has come to a fork in the road: either it continues to merely suggest collective redress as a possible mechanism to improve access to justice, and Member States will probably continue not to listen as in the past, or it will directly take a stand on this matter and start to create a common framework for collective redress in the EU. Although the recent proposal for a directive seems to be headed to this second direction, it needs to be more carefully analysed, having particular regard to the adjustments that both the Parliament and the Council will require.



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at:

https://ec.europa.eu/info/sites/info/files/proposal_for_a_directive_on_representative_actions_for_the_protection_of_the_collective_interests_of_consumers_0.pdf