

# media LAWS

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*Sono stati sottoposti a referaggio anonimo a doppio cieco i saggi di Ginevra Cerrina Feroni, Giovanna Capilli, Martina Cazzaniga, Luca Di Majo, Marina Federico, Marco Ladu, Maria-Teresa Paracampo, Raffaele Torino, Enrico Toti, Andrea Vigorito. Su determinazione della Direzione, ai sensi dell'art. 15 del Regolamento, sono stati altresì sottoposti a referaggio anonimo i contributi di Pietro Dunn, Giulia Napoli, Lavinia Vizzoni, Nicolò Biligotti ed Elena Kaiser.*

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# European Collective Redress and Data Protection Challenges and Opportunities\*

Marina Federico

## Abstract

This paper analyses the potential of group actions as an instrument for data protection law enforcement in Europe. The first part investigates whether article 80 GDPR may provide a legal basis for aggregate litigation in data protection law. The second part of the essay explores the relationship between EU Directive 2020/1828 and the GDPR, and evaluates the potential of the new European representative action to enforce data protection rights and deter Big Tech's unfair practices. Lastly, this essay outlines a private enforcement framework to ensure data protection and consumer rights in Europe, one that is able to balance the freedom of data, market needs and the protection of individuals.

Il saggio intende indagare le potenzialità della tutela collettiva come strumento per garantire la protezione dei dati personali. La prima parte del lavoro è volta a verificare se l'art. 80 del Regolamento europeo per la protezione dei dati personali (GDPR), possa offrire una base giuridica per la tutela collettiva in questa materia. La seconda parte è invece dedicata al rapporto tra il GDPR e la nuova direttiva (UE) 1828/2020 sulle azioni rappresentative a tutela degli interessi dei consumatori, ed al possibile impiego della nuova azione rappresentativa europea per la protezione dei dati personali. L'obiettivo del contributo è quello di tratteggiare i caratteri essenziali di un sistema rimediale idoneo a garantire la *data privacy* degli individui, in grado di bilanciare la libera circolazione dei dati e le esigenze di tutela della persona.

## Summary

1. Introduction. - 2. Private enforcement and data protection: challenges. - 3. Article 80 GDPR: is there a legal basis for group actions in data protection law? - 4. The case of *Meta Platforms v. the German Federal Union of Consumer Organisations and Associations*. - 5. Collective actions: the European approach. - 6. *Group data protection*: a collective interest? - 7. Data protection and consumer law: an integrated enforcement system. - 8. Compensatory actions. - 9. Private enforcement and data protection: opportunities.

\* L'articolo è stato sottoposto, in conformità al regolamento della Rivista, a referaggio "a doppio cieco".

## Keywords

data protection - consumer law - group data protection - aggregate litigation - representative actions

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## 1. Introduction

In Informational Capitalism<sup>1</sup>, data is viewed as a commodity<sup>2</sup>. It circulates fast on the Internet, and is used to formulate accurate behavioural predictions, using techniques called “big data analytics”. More specifically, what is regarded as a valuable good is the information that public and private actors can derive from a huge amount of data<sup>3</sup>. These data, both personal and anonymous, is often referred to as “big data”. Big data is data of great volume, velocity and variety<sup>4</sup> from which useful conclusions can be inferred through data mining<sup>5</sup>.

In fact, the information that big data analytics can infer from data disseminated by Internet users is often employed for a range of commercial purposes. These include improving services and products, developing targeted advertisements, tailoring goods offered to meet the characteristics and needs of individual users<sup>6</sup>. Personal data pro-

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<sup>1</sup> Informational Capitalism refers to: «the alignment of capitalism as a mode of production with informationalism as a mode of development. [...] Capitalism is oriented toward profit-maximizing, that is, toward increasing the amount of surplus appropriated by capital on the basis of the private control over the means of production and circulation, while informationalism «is oriented toward accumulation of knowledge and towards higher levels of complexity in information processing». In a regime of informational capitalism, market actors use knowledge, culture, and networked information technologies as means of extracting and appropriating surplus value, including consumer surplus». J. Cohen, *Between Truth and Power. The Legal Constructions of Informational Capitalism*, Oxford, 2019, 5-6.

<sup>2</sup> H. Zech, *Data as a Tradeable Commodity – Implications for Contract Law*, 2017, in J. Drexl (ed.), *Proceedings of the 18th EIPIN Congress: The New Data Economy between Data Ownership, Privacy and Safeguarding Competition*, Edward Elgar Publishing, 1. As famously stated by the British mathematician Clive Humby, in 2006, data have been defined as «the new oil» of our age.

<sup>3</sup> D.L. Rubinfeld-M.S. Gal, *Access Barriers to Big Data*, in *Arizona Law Review*, 2, 2017, 341 ss. See also P.C. Zikopoulos-C. Eaton-G. Deroos-T. Deutsch-G. Lapis, *Understanding Big Data*, New York, 2012; K. Crawford-D. Boyd, *Critical Questions for Big Data. Provocations for a Cultural, Technological and Scholarly Phenomenon*, in *Information, Communication & Society*, 5, 2012, 662 ss.; F. X. Diebold, *A Personal Perspective on the Origin(s) and Development of “Big Data”: The Phenomenon, the Term, and the Discipline*, in *PIER Working Paper No. 13-003*, 1 ss.; V. Mayer-Schonberger-K. Cukier, *Big Data: A Revolution That Will Transform How We Live, Work and Think*, Boston, 2013; M. T. Maggiolino, *I big data e il diritto antitrust*, Napoli, 2018, 23-72.

<sup>4</sup> According to the Gartner Information Technology Dictionary, big data are: «high-volume, high-velocity and high-variety information assets that demand cost-effective, innovative forms of information processing for enhanced insight and decision making» (see D. Laney, *3D Data Management: Controlling Data Volume, Velocity and Variety*, Gartner Information Technology Dictionary, 2001). Another definition of big data as «large amounts of different types of data produced with high velocity from a high number of various types of sources» is given in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a thriving data-driven economy, COM/2014/0442 final.

<sup>5</sup> T. Zarsky, “Mine your own business!” *Making the case for the implications of the data mining of personal information in the forum of public opinion*, in *Yale Journal of Law and Technology*, 5, 2003, 6-7.

<sup>6</sup> V. Zeno-Zencovich, *Do “Data Markets” Exist?*, in *Rivista di diritto dei media*, 2, 2019, 22 ss.

cessing is a profitable activity which allows companies to develop and offer new services. This would explain why European lawmakers generally regard the flow and the sharing of users' data favorably, since this enables businesses to grow in a competitive market<sup>7</sup>. More generally, data are also necessary for Artificial Intelligence (hereinafter: AI) systems to perform their tasks<sup>8</sup>.

However, the collection of huge quantities of personal data leads to a high risk of mass violations of people's fundamental rights, namely self-determination, personal identity, non-discrimination and, *inter alia*, data protection. Examples of the latter include: accidental data breaches; large-scale processing of personal data, carried out without a proper legal basis; people not granted access to their personal data; automated decision-making processes resulting in discrimination against people and harming their self-determination, for example in some machine learning credit scoring algorithms.

When such conducts occur on the Internet, they often have a cross-border dimension, negatively impacting individuals who live in different parts of the world. In these cases, the injured parties can hardly gather to initiate legal proceedings against a data controller. Moreover, individuals alone often have neither the means nor the economic resources to pursue their rights in court; the power imbalance between traders and consumers is therefore particularly high<sup>9</sup>. Consequently, the effectiveness of the General Data Protection Regulation (hereinafter: GDPR)<sup>10</sup>, which is the cornerstone of European data protection law, ends up being compromised<sup>11</sup>.

Hence, there arises the need for an effective enforcement system of EU data protection law implemented by both public and private actors. Considering the disruptive impact of personal data processing on a vast number of subjects and its potential consequences, a possible approach could be to reassess the law of remedies on a collective basis. It would then be crucial to coordinate the remedial system with the protection offered by National Supervisory Authorities and the risk-based approach

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<sup>7</sup> V. Ricciuto., *Authorities and Private Companies in Regulating Software Technologies*, in *Privacy and Data Protection in Software Services*, Berlin, 2022, 16. The EU law approach is evident also in the new proposal for a Regulation of the European parliament and of the council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act, hereinafter: AIA) and amending certain EU legislative acts, COM/2021/206 final.

<sup>8</sup> V. Zeno-Zencovich, *Do "Data Markets?"*, cit., 30-31. AI systems are «systems that can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with» (art. 3, para. 1 («Definitions»), AIA) and they have an increasingly important role in our daily life. For one of the first definitions of AI, see R. Kurzweil, *What is Artificial Intelligence Anyway?*, in *American Scientist*, 3,1985, 258 ss.

<sup>9</sup> See M. Lippi-G. Contissa-A. Jablonowska-H.W. Micklitz-P. Palka- G. Sartor-P. Torroni, *The Force Awakens: Artificial Intelligence for Consumer Law*, in *JAIR (Journal of Artificial Intelligence Research)*, 67, 2020, 171; G. Colangelo-M. Maggolino, *From fragile to smart consumers: Shifting paradigm for the digital era*, in *Computer Law and Security Review*, 2, 2019, 174-176.

<sup>10</sup> Regulation (EU) 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 (General Data Protection Regulation).

<sup>11</sup> On the relationship between the digital economy based on big data and the GDPR, T. Zarsky, *Incompatible: The GDPR in the Age of Big Data*, in *Seton Hall Law Review*, 4, 2017, 995 ss.

adopted by the European Union in the law of new technologies<sup>12</sup>.

The GDPR places considerable emphasis on public enforcement, conferring significant powers on Data Protection Authorities<sup>13</sup>. However, a purely public enforcement model is inadequate. This is firstly because there is the risk that certain unfair conducts may not be addressed by public regulators. Secondly, the investigative powers of Supervisory Authorities may vary between Member States<sup>14</sup>. In order to enforce compliance with the GDPR, Supervisory Authorities are equipped with corrective powers and can impose administrative fines, depending on the nature of the infringement<sup>15</sup>. While these sanctions certainly do have a strong deterrent effect, they need to be accompanied by civil redress and judicial remedies.

Public enforcement needs to be complemented with remedies which will provide data subjects with fair compensation when their rights are infringed<sup>16</sup>. Moreover, in its defense, public enforcement requires huge public expenditure and time. Furthermore, regulation cannot be totally comprehensive, especially in this field as Information and Communication Technologies (ICTs) are changing at a faster and faster pace. Although EU law provisions attempt to be technologically neutral, the globalized and interconnected world constantly poses new challenges. Hence, an efficient private enforcement system should be designed to complement the public enforcement sphere in order to deal with mass violations of data protection rights. Given that data users are generally consumers of digital services, in developing the private enforcement system it may be helpful to consider the close ties between data protection and consumer law, as group litigation has already been used in the latter.

The paper therefore assesses whether and how collective litigation can be used in data protection law. The analysis focuses on art. 80 GDPR («Representation of data subjects») and the new European Directive 2020/1828 on representative actions for the collective interests of consumers. Its aim is to address the following questions: *i*) Is there a legal basis in the GDPR for private enforcement remedies such as group actions? *ii*) Can consumer law tools be used for collective actions in the field of data protection?

The paper is structured as follows: after this brief introduction, sections 2 and 3 investigate the features of art. 80 GDPR to ascertain whether art. 80 could constitute a legal basis for collective injunctive and compensatory measures. Section 4 reviews a re-

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<sup>12</sup> On the risk-based approach see R. Gellert., *The risk-based approach to data protection*, Oxford, 2020; A. Mantelero, *Responsabilità e rischio nel Regolamento UE 2016/679*, in *Le Nuove Leggi Civili Commentate*, 1, 2017, 144 ss.

<sup>13</sup> Chapter VI («Independent Supervisory Authorities»), Section 2 («Competence, Tasks and Powers») and especially art. 58 GDPR («Powers»).

<sup>14</sup> See P. Voigt-A. von dem Bussche, *The EU General Data Protection Regulation (GDPR). A practical guide*, Berlin, 2017, 202 ss.

<sup>15</sup> Ivi, 210 ss.

<sup>16</sup> For the different functions of public and private enforcement, even if with reference to antitrust law, see G. Muscolo, *Il nuovo assetto istituzionale del private antitrust enforcement*, in G. Benacchio-M. Carpagnano (a cura di), *Aspetti istituzionali e prospettive applicative del private antitrust enforcement nell'Unione Europea, Atti del VI Convegno Biennale Antitrust Facoltà di Giurisprudenza Trento, 6-8 aprile 2017*, Trento, 2018, 19-21. On private and public enforcement in the GDPR, see P. Voigt-A. von dem Bussche, *The EU*, cit., 201 ss. and P. Lambert, *Data Protection, Privacy Regulators and Supervisory Authorities*, London, 2020, 235 ss.

cent judgment of the European Court of Justice (hereinafter: CJEU), case C-319/20, *Meta Platforms Ireland Ltd. v. Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* (Federal Union of Consumer Organizations and Associations of Germany, hereinafter: the Federal Union) published on April 28, 2022<sup>17</sup>. In sections 5, 6 and 7, it turns to the collective dimension of data protection, looking at the relationship between data protection and consumer law, with special reference to Directive (EU) 2020/1828. In section 8, the paper addresses some concerns regarding compensatory actions. Finally, some future perspectives on the enforcement of EU data protection law are highlighted, and a conclusion drawn.

## 2. Private enforcement and data protection: challenges

The public enforcement model has always been predominant in Europe, at least up to now. This might be due to the fact that the EU lacks procedural law competencies, apart from measures to develop judicial cooperation in civil and commercial law matters (as provided for in art. 81 of the Treaty on the Functioning of the European Union, hereinafter: TFEU). Consequently, civil procedure remedies still fall within national procedural laws. However, there is a growing trend in favour of private enforcement in consumer law matters, particularly to expand the role of the judiciary<sup>18</sup>; for instance, group litigation has recently been re-evaluated<sup>19</sup>. Directive (EU) 2020/1828<sup>20</sup> (part of the «New deal for Consumers» package<sup>21</sup>) encourages representative actions for the protection of the collective interests of consumers. Meanwhile, on a national level many European States have adopted new pieces of legislation regarding group actions, not only in consumer law<sup>22</sup>. For example, the Italian legislator enacted a new law on class actions in 2019 (arts. 840-*bis* ss. of the Italian Civil Procedure Code)<sup>23</sup>. However, some civil law jurisdictions are still quite skeptical about the application of

<sup>17</sup> CJEU, C-319/20, *Meta Platforms Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV.* (2022).

<sup>18</sup> H.W. Micklitz-F. Cafaggi, *Administrative and Judicial Enforcement in Consumer Protection: The Way Forward*, in *EUI Working Papers, Law*, 2008, 3-4.

<sup>19</sup> A. Biard, *Collective redress in the EU: a rainbow behind the clouds?*, in *ERA Forum*, 2018, 189 ss. See also H.W. Micklitz-F. Cafaggi, *Administrative and Judicial Enforcement*, cit., 2.

<sup>20</sup> Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ 2020 L. 409/1.

<sup>21</sup> Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers, COM(2018)183 final. On the New Deal for Consumers and its implications for consumer law, M. Grochowski, *European Consumer Law After The New Deal: A Tryplich*, in *Yearbook of European Law*, 1, 2020, 387 ss.

<sup>22</sup> C. I. Nagy, *Collective Actions in Europe: A Comparative, Economic and Transsystemic Analysis*, Berlin, 2019, 71 ss.

<sup>23</sup> On the new Italian law on class action, U. Ruffolo (ed.), *Class action ed azione collettiva inibitoria. Commento sistematico alla legge 12 aprile 2019, n. 31*, Milano, 2021; C. Consolo, *L'azione di classe, trifasica, infine inserita nel c.p.c.*, in *Rivista di diritto processuale*, 2, 2020, 714 ss.; B. Sassani (ed.), *Class action. Commento sistematico alla legge 12 aprile 2019, n. 31*, Pisa, 2019; A. Giussani, *La riforma dell'azione di classe*, in *Rivista di diritto processuale*, 6, 2019, 1572 ss.

collective actions, since these are almost inconceivable in legal systems where court rulings in prior adjudications are binding only on parties to the cases involved<sup>24</sup>. Ostensibly, group actions would seem to be at odds with some of the fundamental rules and principles of civil procedure, such as the private right of action and the principle of party disposition, and the so-called “subjective limits” of *res judicata*<sup>25</sup>.

Procedural law instruments are drawn up mainly on an individual basis. European Constitutions state that everyone should be allowed to bring their rights to courts through a judicial complaint.<sup>26</sup> This right is traditionally referred to as the right of action. Judicial authorities are obliged to pronounce their verdicts only on the basis of what parties have alleged and proved, in accordance with the dispositive principle<sup>27</sup>. The possibility of another (natural or legal) person enforcing someone else’s rights is regarded as exceptional, and would therefore need to be covered by legal provisions<sup>28</sup>. Moreover, according to the rules on the subjective limits of *res judicata*, individuals who were not litigants in a certain proceeding cannot be bound by its outcome. Otherwise, the interests of non-parties who did not have the opportunity to be heard would be impaired, and their right of defense would be violated<sup>29</sup>.

By contrast, in group actions, one subject (a legal entity or a natural person, the so-called “class representative”) acts as plaintiff on behalf of a plurality of individuals to uphold their rights; and absent class members are also bound by the final judgment<sup>30</sup>.

<sup>24</sup> C.I. Nagy, *Collective actions*, cit., 24 ss.

<sup>25</sup> The term “subjective limits of *res judicata*” refers to who is bound by the effects of a judgment.

<sup>26</sup> C.I. Nagy, *ivi*. See, for instance, art. 24 of the Italian Constitution: «Everyone can start a legal claim to protect their rights and legitimate interests» (*Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi* [...]) and art. 24 of the Spanish Constitution «Everyone has the right to obtain effective judicial protection of their rights and legitimate interests, and the right to defense in all the circumstances» (*Todas las personas tienen derecho a obtener la tutela efectiva de los jueces y tribunales en el ejercicio de sus derechos e intereses legítimos, sin que, en ningún caso, pueda producirse indefensión* [...]).

<sup>27</sup> In Italian law, the dispositive principle is laid down in art. 2907, para. 1, Italian Civil Code («Jurisdictional protection is provided by the judiciary, at the request of the interested party [...]); art. 99, Italian Civil Procedure Code («Who wants to assert a right in court must bring a claim before the competent judge»); art. 115, para. 1, Italian Civil Procedure Code («Courts must base their decisions on the basis of the evidence offered by parties or by the public prosecutor, or on the facts which were not specifically contested by the parties during the proceeding, except for the specific cases laid down by law»).

<sup>28</sup> Again, for example, in the Italian legal system, this is provided for in art. 81, Italian Civil Procedure Code («No one can assert someone else’s rights in court, except for the specific cases laid down by law»); in the French legal system by art. 31, French Civil Procedure Code («Everyone who has a legitimate interest in the success or rejection of a cause of action can start an action in court [...]). For a general perspective on the principle of party presentation in civil law countries’ proceedings, see O.G. Chase-H. Hershkoff-L. J. Silberman-J. Sorabji-R. Stürner-Y. Taniguchi-V. Varano, *Civil Litigation in Comparative Context*, in *NYU School of Law. Public Law & Legal Theory Research Paper Series WP no. 17-37 - Law & Economics Research Paper Series WP no. 17-35*, 2017, 9.

<sup>29</sup> N. Trocker, voce *Giudicato (diritto comparato e straniero)*, in *Enc. Giur. Treccani*, Roma, 1989, 3 ss. In Italian law, this principle is enshrined in art. 2909 of the Italian Civil Code. On the Italian rule of *res judicata*, see the landmark work of F. P. Luiso, *Principio del contraddittorio ed efficacia della sentenza verso i terzi*, Milano, 1981. On the rules of *res judicata* and their relationship with aggregate litigation, see also M. Cappelletti-B. Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, in *Articles by Maurer Faculty*, 1978, 210 ss.; M. Taruffo, “*Collateral estoppel*” e *giudicato sulle questioni*, II, in *Rivista di diritto processuale*, 2, 1972, 272 ss.

<sup>30</sup> R. Money-Kyrle - C. Hodges, *European Collective Action: Towards Coherence*, in *Maastricht Journal of*

This is particularly evident in opt-out collective redress, but it is also true for opt-in proceedings<sup>31</sup>. In fact, even when group members are required to opt into the litigation, namely to express their will to be included in the proceeding, their judicial rights are limited to a certain extent. Opt-in and opt-out procedures are justified by the benefits that collective litigation may bring in terms of access to justice and procedural economy. Nonetheless, in light of all the foregoing, group actions always need a correct and clear legal basis. Statutes should safeguard the right to due process, striking a balance between judicial efficiency, the right to a fair trial and legal coherence.

As mentioned above, it is well known that collective redress mechanisms<sup>32</sup> can help consumers to share their judicial costs and burdens when pursuing their case in court. As in certain claims the individual loss suffered by the consumer may be too small compared to the cost of litigation<sup>33</sup>, collective redress can ensure effective access to justice to individuals, reduce the cost of litigation and achieve judicial economy. Collective litigation can also ensure clarity and consistency between decisions regarding similar matters, perform a regulatory function and deter unfair practices of the “Tech giants”.

This is particularly true for compensatory actions in data protection law. The losses suffered by the data subjects are often non-pecuniary<sup>34</sup>. This non-monetary damage arising from a violation of data protection law may vary in nature. For example, users might suffer distress and anxiety after an accidental data breach, or discomfort regarding possible identity theft, or their self-determination may be violated, for instance when purchasing services under the undue influence of targeted advertising. This type of harm may be too small if considered individually and this situation is likely to discourage data subjects seeking redress, given the considerable cost of litigation. The GDPR clearly states that every data subject shall receive effective judicial protection, in compliance with art. 47 of the Charter of Fundamental Rights of the European Union (CFR). Despite this, access to justice risks being impaired if individuals

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*European and Comparative Law*, 4, 2012, 496.

<sup>31</sup> Opt-in systems require individuals to take a positive action to be included in an aggregate proceeding; on the contrary, in opt-out systems individuals who do not want to be bound by the outcome of a judgment should take a positive action to be excluded by the proceeding. On the advantages and disadvantages of opt-in and opt-out models, see R. Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective*, Oxford, 2004, 37 ss.

<sup>32</sup> Please note that in this paper the term “collective redress” is used broadly, in the sense of: «a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices» (Commission Staff Working Document, Public Consultation: Towards a Coherent Approach to Collective Redress, SEC(2011)173 final, cited in N. E. Hatzimihail, *Collective Redress and Global Governance (Concluding Remarks)*, in A. Nuyts - N. E. Hatzimihail (eds.), *Cross-Border Class Actions, The European Way*, Munich, 2014, 315).

<sup>33</sup> C. I. Nagy, *Collective Actions*, cit., 9 ss.

<sup>34</sup> Compensation and liability in European data protection are mainly covered by art. 82 GDPR («Right to compensation and liability») and recital 75 GDPR. On the variety of material and non-material damages as considered in the GDPR, see C. Camardi, *Liability and Accountability in the ‘Digital’ Relationship*, in R. Senigaglia-C. Irti-A. Bernes (eds.), *Privacy and Data Protection in Software Services*, Berlin, 2022, 26.



do not know how to or do not have the means to assert their rights<sup>35</sup>. Furthermore, the right to data protection is regarded as a fundamental right in the EU legal order, according to art. 8 CFR<sup>36</sup>, and fundamental rights violations shall always be compensated<sup>37</sup>.

Collective redress might therefore be an appropriate way to compensate large numbers of individuals whose privacy rights have been affected. Furthermore, as far as non-pecuniary damages are concerned, national courts have maintained that personal rights violated by the same unlawful conduct and sharing certain characteristics can be compensated collectively<sup>38</sup>. In such cases, judges generally calculate a lump sum which the defendant shall pay, and then award each class member a percentage of the total. Although damages are awarded in an approximate manner via this method, it is also true that without collective redress the injured parties would not be compensated at all.

Bearing in mind all the potential advantages of aggregate litigation, it is necessary to ascertain if it has a legal basis under the GDPR. As far as EU data protection law is concerned, resorting to group actions is a controversial matter, given that the GDPR is built around the model of individual consent as the main legal basis for personal data processing. Similarly, the remedial system laid down in Chapter VIII GDPR («Remedies, liability and penalties») would seem essentially individualistic<sup>39</sup>.

Nevertheless, a legal basis for collective redress might be found in art. 80 GDPR<sup>40</sup>. This allows Member States' laws to permit «bodies, organizations and associations» to lodge a complaint with a Supervisory Authority, or to ask for a judicial remedy, with or without a data subject's mandate, when the rights of the data subjects have been infringed. Even though recital 142 seems to allow an organisation to act on behalf of a multitude of data subjects, art. 80 does not state this explicitly. Recently, this has been addressed by the CJEU in the *Meta Platforms* case, which will be examined further in the next sections.

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<sup>35</sup> See the enlightening study of M. Cappelletti-B.Garth, *Access*, cit., 181 ss.

<sup>36</sup> The European Charter of Human Rights (ECHR) also mentions in art. 8 the right to private life. Though not explicitly mentioning the right to data protection, the Convention has been used to protect the right to data privacy. On data privacy and its protection in the EU legal order, see FRA (European Union Agency for Fundamental Rights), *Handbook on European data protection law*, 2018.

<sup>37</sup> Affirmed by the Italian Supreme Court in the landmark cases Cass. civ., sez. III, 31 maggio 2003, n. 8827 and 8828, in *Il foro italiano*, 2003, 2273 ss., as well as Cass. civ., sez. un., 11 novembre 2008, n. 26972, in *Il repertorio del foro italiano*, 2008.

<sup>38</sup> For instance, see the judgment of the Italian Supreme Court, Cass. civ., sez. III, 31 maggio 2019, n. 14886, in *Il repertorio del foro italiano*, 2019, *Danni in materia civile*, n. 195. In civil law countries, however, this is still regarded as something exceptional. See L. Mullenix, *Lessons from Abroad: Complexity and Convergence*, in *Villanova Law Review*, 1, 2001, 7 ss.

<sup>39</sup> F. Piraino, *Il Regolamento generale sulla protezione dei dati personali e i diritti dell'interessato*, in *Le Nuove Leggi Civili Commentate*, 2, 2017, 377 ss.; A. Mantelero, *Responsabilità*, cit., 144 ss.

<sup>40</sup> A. Biard, *Collective redress*, cit., 202.

### 3. Article 80 GDPR: is there a legal basis for group actions in data protection law?

In Europe, the topic of collective actions in data protection law has not been researched in depth, for several reasons.

First of all, in the immediate aftermath of the GDPR implementation, the disruptive scope of personal data processing had yet to be seen. Nor was it possible to foresee the enormous success of the Regulation, which is now considered a virtuous model worldwide (the «Brussels effect»<sup>41</sup>). Moreover, legal scholars have tended to focus on the main innovations introduced by the GDPR as compared to the previous piece of legislation (Directive 95/46/EC<sup>42</sup>), for example regarding the «rights of the data subject» (Chapter III, Arts. 15 ss. GDPR). Lastly, the enforcement of data protection law has been carried out almost exclusively by Supervisory Authorities so far, therefore outside the scope of private enforcement<sup>43</sup>.

Such an emphasis on public enforcement applies to almost all European countries. EU legislation has mainly intervened in substantive law, leaving its private enforcement to Member States<sup>44</sup>. Hence, private enforcement in the EU has been conceived as «a fantastic beast»<sup>45</sup>. The procedural autonomy principle, devised by the CJEU, precludes the EU from intervening in procedural law matters. Indeed, civil procedure is a branch of law closely tied to national legal traditions, and where legal certainty is pivotal<sup>46</sup>.

Nevertheless, resorting to the principle of effectiveness (laid down in art. 47 CFR and in art. 19 (1) TEU) and the principle of *effet utile*, the EU has been intervening more and more in procedural matters<sup>47</sup>. In fact, the CFR affords a high degree of protection to consumers, providing them with adequate remedies and access to justice. Unsurprisingly then, some legal scholars have talked of a «procedural consumer law» in the making<sup>48</sup>. Indeed, the above-mentioned Directive (EU) 2020/1828 on consumer collective interests promotes the harmonization of consumer group actions in the Member States.

<sup>41</sup> A. Bradford, *The Brussels Effect*, in *Northwestern University Law Review*, 1, 2015, 22 ss.

<sup>42</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 2016 L 119/1.

<sup>43</sup> M. Requejo Isidro, *Procedural Harmonisation and Private Enforcement in the GDPR*, in F. Gascón Inchausti-B. Hess (eds.), *The Future of the European Law of Civil Procedure. Coordination or Harmonisation?*, Cambridge, 2020, 194.

<sup>44</sup> H. W. Micklitz-F. Cafaggi, *Administrative and Judicial Enforcement*, cit., 3 ss.

<sup>45</sup> R. Pardolesi, *Il private enforcement del diritto antitrust: un animale fantastico, e dove trovarlo*, in G. A. Benacchio-M. Carpagano (eds.), *Aspetti istituzionali*, cit., 49.

<sup>46</sup> S. Law-J.T. Nowak *Procedural Harmonisation by the European Court of Justice*, in F. Gascón Inchausti-B. Hess, *The future*, cit., 19 ss., 31 ss.

<sup>47</sup> F. Cafaggi-P. Iamiceli, *The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions*, in *European Review of Private Law*, 3, 2017, 575 ss.

<sup>48</sup> V. Zeno-Zencovich - M. C. Paglietti., *Diritto processuale dei consumatori*, Napoli, 2009.

With specific reference to the protection of personal data, the GDPR contains some provisions relating to judicial remedies (art. 78 ss. GDPR). Firstly, it states that data subjects must have appropriate procedural tools to enforce their rights but does not explicitly mention group actions. However, a wider interpretation of art. 80 GDPR would provide a legal basis for group actions promoting the interests of the data subjects. This was the conclusion reached some years ago by the CJEU, in case C-40/17, *Fashion ID v. Verbraucherzentrale NRW eV*<sup>49</sup>, and endorsed more recently in case C-319/20, *Meta Platforms Ireland Ltd. v. the German Federal Union of Consumer Organisations and Associations*.

Art. 80 GDPR allows a data subject to be represented in administrative and judicial proceedings «by a not-for-profit body, organisation or association which has been properly constituted under 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». The GDPR probably limits the type of entities entitled to act as representatives in order to prevent the courts from being flooded with unwarranted claims. Consumers might otherwise become party to unmeritorious procedural initiatives, and risk no longer being able to assert their rights in court<sup>50</sup>.

As regards judicial proceedings, art. 80 (1) provides that the data subject can mandate eligible legal entities to appeal against measures undertaken by a Supervisory Authority, or to contest the actions of a data controller. The legal entity should also be able to exercise the right to receive compensation on behalf of the data subject, in accordance with art. 82 («Right to compensation and liability»), where provided for by Member States. In contrast, paragraph 2 of the same article states that it is up to Member States whether they allow entities to start a proceeding independently of a mandate when they consider the rights of the data subjects to have been infringed. In this case, the possibility of seeking damages is not expressly mentioned.

To sum up, in the first scenario, set out in art. 80 (1), the data subject gives a mandate to an entity to procedurally represent her or him; in the second, based on art. 80 (2), an entity asks for an effective judicial remedy for the data subject without her or his mandate, if allowed by the Member States.

Art. 80 does not specify whether the entity can represent more than one data subject. However, the possibility was envisaged while drafting the legislation<sup>51</sup> and emerges in recital 142, which states that an entity can bring judicial proceedings «on behalf of the data subjects».

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<sup>49</sup> CJEU, C-40/17, *Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV*. (2019).

<sup>50</sup> H. W. Micklitz-F. Cafaggi, *Administrative and Judicial Enforcement*, cit., 17.

<sup>51</sup> S. Thobani, *Art. 80 GDPR – Rappresentanza degli interessati*, in V. Barba-S. Pagliantini (eds.), *Commentario del Codice Civile*, diretto da E. Gabrielli, *Delle Persone, Leggi collegate*, vol. II, Milano, 2019, 1210.

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#### **4. The case of *Meta Platforms v. the German Federal Union of Consumer Organisations and Associations***

In cases *Fashion ID v. Verbraucherzentrale NRW eV* and *Meta Platforms*, the CJEU affirmed that art. 80 GDPR allows representative actions for the interests of a plurality of data subjects. The judgment *Meta Platforms* is of great importance, since the CJEU granted consumer organizations the right to lodge a complaint to enforce data protection law provisions on a collective basis, in accordance with art. 80.

The facts of the case concerned personal data processing conducted by Meta. Specifically, when Facebook users accessed free games on the platform, they accepted that the game providers received certain data and gave them permission to publish content on their behalf. This was deemed in violation of the requirements of consent of the data subjects (see art. 6-7 GDPR) and to the prohibition of unfair commercial practices (Directive 2005/29/EC<sup>52</sup>, amended by Directive (EU) 2019/2161<sup>53</sup>).

In this case, the Federal Court of Justice of Germany (*Bundesgerichtshof*) asked the CJEU for a preliminary ruling on the compatibility with art. 80 (2) GDPR of a national provision granting consumer associations legal status to request an injunction against conducts infringing the right to data protection. Indeed, the German provision recognized that legal entities could uphold the rights conferred on individuals through consumer law provisions, without requiring a mandate or proof of consumers having suffered actual harm<sup>54</sup>.

The Court first clarified that there is no need for a specific national law implementing art. 80 (2) when Member States laws already have legal provisions granting direct standing of legal entities in representative actions<sup>55</sup>. Accordingly, consumer associations may act without a mandate to enforce the GDPR, requesting a collective injunction.

The Court also stated that represented groups of individuals do not need to identify all their component members. Indeed, the GDPR itself defines the data subject as anyone who is «identified or identifiable». Thus, it is possible to start an injunctive action simply by designating a group of people affected by unlawful data processing<sup>56</sup> (e.g. consumers who have used a certain cloud computing service, or have subscribed to a social media platform).

The Court further stressed that an association or legal entity can bring a represent-

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<sup>52</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') OJ 2005, L. 149/22.

<sup>53</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ 2019, L. 328/7.

<sup>54</sup> CJEU, C-319/20, *Meta Platforms*, cit., §§ 27-36.

<sup>55</sup> CJEU, C-319/20, *Meta Platforms*, cit., §§ 60-66.

<sup>56</sup> CJEU, C-319/20, *Meta Platforms*, cit., §§ 68-69.

ative action, asking for injunctive relief, regardless of the infringement of specific rights of the data subjects. The Court affirmed that: «it is sufficient to claim that the data processing concerned is liable to affect the rights which identified or identifiable natural persons derive from that regulation, without it being necessary to prove actual harm suffered by the data subject, in a given situation, by the infringement of his or her rights»<sup>57</sup>. Accordingly, the mere risk of harm is enough for collective injunctions. The Court also advocated further integration between data protection and consumer law. «In the modern economy, marked by the boom in the digital economy, personal data processing is liable to affect individuals not only in their capacity as natural persons enjoying the rights conferred by Regulation (EU) 2016/679, but also in their capacity as consumers»<sup>58</sup>. These are the opening words of the opinion of Advocate General Jean Richard de la Tour. The CJEU indicated that a legal entity can simultaneously claim an infringement of data protection law and a breach of the prohibition of unfair commercial practices, the prohibition of the use of invalid general terms and conditions, and consumer law provisions in general<sup>59</sup>. Moreover, the CJEU cited Directive (EU) 2020/1828, on the representative actions for the protection of the collective interests of consumers. In fact, the Court noted that interpreting art. 80 GDPR as allowing group actions would be in line with the provisions of the Directive. The latter is another legal instrument for collectively enforcing consumer rights, including the protection of their data<sup>60</sup>. The CJEU would therefore seem to have armed consumers with a strong shield for defending their privacy rights.

## **5. Collective actions: the European approach**

On various occasions, the European Union has expressed concern that group actions could lead to an opportunistic use of trials and become a source of easy profits for part of the legal industry. Another worry it highlighted was that group actions would jeopardise the right of defense and due process and cause excessive standardization of adjudication<sup>61</sup>. Some of these fears have now been addressed by Directive (EU) 2020/1828 on representative actions for the collective interests of consumers. This was adopted in December 2020 and must be implemented in national laws by December 2022, and it was mentioned by the CJEU in the *Meta Platforms* case.

Safeguarding consumer collective interests is a topic that has long been discussed in the EU, being covered in a Green Paper in the early 90s already. At that time, the European Commission gave preference to injunctive measures<sup>62</sup>. This led to the adop-

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<sup>57</sup> CJEU, C-319/20, *Meta Platforms*, cit., § 72.

<sup>58</sup> Opinion of Advocate General Richard de la Tour, CJEU, C-319/20, *Meta Platforms*, cit., § 1.

<sup>59</sup> CJEU, C-319/20, *Meta Platforms*, cit., §§ 78-79.

<sup>60</sup> CJEU, C-319/20, *Meta Platforms*, cit., §§ 80-82.

<sup>61</sup> C. I. Nagy, *Collective Actions*, cit., 23 ss.

<sup>62</sup> Green Paper, Access of Consumers to Justice And The Settlement of Consumer Disputes in The Single Market, 16 November 1993, COM(93)576 Final.

tion of Directive 1998/27/EC<sup>63</sup>, amended and replaced by Directive 2009/22/EC<sup>64</sup>, now repealed by Directive (EU) 2020/1828.

Under this new Directive, the EU also acknowledged the need to compensate damages arising from mass injuries together with the necessity to harmonize collective redress measures, since many EU Member States had already endorsed these in their national procedural law<sup>65</sup>. Thus, the Directive provides for both injunctive and compensatory measures (termed collective redress, i.e. «compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid»<sup>66</sup>).

The EU also devised common rules of harmonization on collective actions in this Directive. The European approach is sectorial, meaning that representative actions (art. 3, para. 1, n. 5, Directive (EU) 1828/2020) are established solely for consumer interests. However, States are free to enable other group actions in different areas of law<sup>67</sup>. This is the case in Italy, where the law on class actions extends to every branch of law<sup>68</sup>. The EU Directive confers standing on qualified entities for starting a representative action (art. 3, para. 1, n. 4; art. 4 Directive (EU) 1828/2020), but States are again free to allow natural persons to act as class representatives when starting group actions according to their national laws.

The Directive applies only to representative actions for enforcing the «collective interests of consumers» (art. 2, Directive (EU) 1828/2020) thereby showing its intention to create a close interrelation between public and private enforcement. Traditionally, public enforcement is aimed at avoiding social harm and defending collective interests, while private enforcement is employed for seeking individual redress. By its reference to collective interests, it is evident that the boundaries dividing public and private enforcement have become increasingly blurred and the two areas are increasingly more intertwined. The explicit reference to the collective interests of consumers can be explained by the need to justify collective actions in European legal systems<sup>69</sup>. Annex I of the Directive lists the GDPR among the legal acts that can be enforced

<sup>63</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L 166.

<sup>64</sup> Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ 2009 L 110/30.

<sup>65</sup> Study requested by the European Parliament's JURI Committee, commissioned by Policy Department for Citizens' Rights and Constitutional Affairs, *Collective redress in the Member States of the European Union*, 2018, 17 ss. The implications and shortcomings of the fragmentation of collective redress systems were demonstrated in the Dieselgate case (B. Gsell, *The New European Directive on Representative Actions for the Protection of the Collective Interests of Consumers – A Huge, But Blurry Step Forward*, in *Common Market Law Review*, 5, 2021).

<sup>66</sup> Art. 3, n. 10), Directive (EU) 2020/1828.

<sup>67</sup> Art. 2, para. 2, Directive (EU) 2020/1828.

<sup>68</sup> Art. 840-*bis* ss., Italian Civil Procedure Code.

<sup>69</sup> The expression «collective interests of consumers» was previously used in art. 1, Directive 2009/22/EC on injunctions for the protection of consumers' interests, now repealed by Directive (EU) 2020/1828. However, the former stated that «collective interests means interests which do not include the cumulation of interests of individuals who have been harmed by an infringement» (recital 3, Directive 2009/22/CE). In contrast, the notion of collective interests employed by Directive (EU) 2020/1828 is broader: «the general interest of consumers and, in particular for the purposes of redress measures, the interests of a group of consumers» (art. 3, «Definitions», Directive (EU) 2020/1828).

through representative actions<sup>70</sup>. Indeed, violating the GDPR may harm the collective interests of consumers, such as having adequate information and commercial practices performed in good faith, fairness and loyalty, as well as transparency in contractual relations<sup>71</sup>. An example of harm is the case *Meta Platforms v. The Federal Union* where personal data were processed on the basis of uninformed and invalid consent and the data controller also committed a deceptive practice by not complying with all the informatory duties prescribed by consumer law.

However, the scope of the Directive could also extend further. If group data protection was deemed a collective interest of consumers, then it could be directly enforced through a representative action. This would mean that if the right to data protection of a group of users was violated, a qualified entity could start a representative action under the Directive, without having to prove a contextual violation of other consumer law provisions.

The following section will thus explore the concept of “group data protection” as a collective interest of consumers. Then, the links between art. 80 GDPR and the Directive on representative actions will be analyzed.

## **6. Group data protection: a collective interest?**

One may wonder whether data protection can be regarded as a «collective interest of consumers», based on the Directive. The answer to this question is crucial in assessing the possibilities of group actions in this area. It is well known that while in common law «there is no right without a remedy» in civil law jurisdictions (the majority within the EU) «the right is said to precede the remedy»<sup>72</sup>. Since aggregate litigation derogates from certain characteristics of civil law jurisdictions<sup>73</sup>, group actions are available only for protecting certain kinds of interests (for example, «individual homogenous rights» in the Italian legal system). Hence, it is vital to ascertain whether data protection might be regarded a collective interest, to establish whether the newly adopted Directive (EU) 2020/1828 could be employed for this purpose.

In data protection law, the use of collective remedies seems to be mandated by actual facts. Not only was this affirmed in the judgment *Meta Platforms*, concerning this matter, but it was also considered in several soft law documents enacted by the Euro-

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<sup>70</sup> Annex I, n. 56), Dir (EU) 2020/1828.

<sup>71</sup> N. Helberger-F. Zuiderveen Borgesius-A. Reyna, *The perfect match? A closer look at the relationship between EU consumer law and data protection law*, in *Common Market Law Review*, 5, 2017, 1427 ss.

<sup>72</sup> See G. I. Seidman, *Comparative Civil Procedure*, in C. B. Picker-G. I. Seidman (eds.), *The Dynamism of Civil Procedure - Global Trends and Development*, Berlin, 2016, 8 and H. Dedek, *From Norms to Facts: The Realization of Rights in Common and Civil Private Law*, in *McGill Law Journal*, 1, 2010, 79-80.

<sup>73</sup> See Section 2.

pean Union<sup>74</sup>, and in the new Directive (EU) 2020/1828 on representative actions<sup>75</sup>. As noted earlier, digital techniques of mass profiling can lead to discriminatory outcomes, and the collection of (often sensitive) data can, in the event of data breaches, result in the dissemination, theft and destruction of these data. In other words, entire groups of individuals increasingly find themselves deprived of control over their information. These people are harmed by the same unlawful conduct, but are often unaware that they are not alone. In such cases, digital practices can generate not only individual injury, but also real social harm<sup>76</sup>.

Moreover, unlawful commercial practices appear to be at odds with the interest in a data-driven economy, where market needs must be balanced and reconciled with individual rights and freedoms. Directive (EU) 2020/1828 explicitly mentions the GDPR as one of the regulatory acts whose violation may have an impact on the collective interests of consumers<sup>77</sup>.

The above upholds the existence of a general interest in fair personal data processing, which preserves the fundamental rights and freedoms of groups of individuals subjected to the same digital techniques. This interest goes hand in hand with the individual right to personal data protection, namely the right to control one's personal information and the term "group data protection" encompasses this notion<sup>78</sup>.

The dual nature of group data protection, an individual right and a supra-individual interest, is similar to that witnessed in other sectors, for example the right to fair

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<sup>74</sup> Communication from the Commission to the European Parliament and the Council, Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation, COM/2020/264 final, part. 2; Commission Recommendation of 11 June 2013 on common principles on injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013/396/EU, recital 6. See also European Parliament's JURI Committee, *Collective redress*, cit., 262.

<sup>75</sup> Directive (EU) 2020/1828, recital 1 ss. On Directive (EU) 2020/1828, D. Fairgrieve-R. Salim, *Collective Redress in Europe: Moving Forward or Treading Water?*, in *International and Comparative Law Quarterly*, 2, 2022, 465 ss.; B. Gsell, *The New European Directive*, cit., 1365 ss.; L. Hornkohl, *Up and Downsides of the New EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers – Comments on Key Aspects*, in *Journal of European Consumer and Market Law*, 5, 2021, 189 ss.

<sup>76</sup> C. Camardi, *Note critiche in tema di danno da illecito trattamento dei dati personali*, in *Jus Civile*, 3, 2020, 810. As pointed out in recital 75 GDPR: «The risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from personal data processing which could lead to physical, material or non-material damage, in particular: where the processing may give rise to discrimination, identity theft or fraud, financial loss, damage to the reputation, loss of confidentiality of personal data protected by professional secrecy, unauthorised reversal of pseudonymisation, or any other significant economic or social disadvantage».

<sup>77</sup> See again Annex I, n. 56), Directive (EU) 2020/1828.

<sup>78</sup> The notion of "group data protection" stems from the concept of "collective data protection", elaborated by Alessandro Mantelero, and inspired by the notion of "group privacy". However, Mantelero focuses mainly on groups created by profiling techniques. Moreover, the Author does not seem to trust private enforcement tools, such as group actions, relying almost exclusively on the role of Supervisory Authorities. He also concludes emphasizing the collective dimension of data protection, as an aggregative interest. See A. Mantelero, *Personal data for decisional purposes in the age of analytics: from an individual to a collective dimension of data protection*, in *Computer Law & Security Review*, 2, 2016, 1 ss., 13; A. Mantelero, *From group privacy to collective privacy: towards a new dimension of privacy and data protection in the big data era*, in L. Floridi-L. Taylor-B. Van der Sloot (eds.), *Group privacy. New challenges of data technologies*, Berlin, 2017, 179 ss. On group privacy, see E. J. Bloustein, *Group Privacy: The Right to Huddle*, in *Rutgers-Camden Law Journal*, 8, 1977, 219 ss.



competition, the proper functioning of the market, fair business practices and correct information<sup>79</sup>.

Group data protection would therefore fall under the definition of collective interest provided in the Directive (art. 3, Directive (EU) 2020/1828), and this would consequently allow the European representative action to be used in this sector<sup>80</sup>. Given that an interest as group data protection exists, the focus will now shift to the relationship between Directive (EU) 2020/1828 and art. 80 GDPR.

## **7. Data protection and consumer law: an integrated enforcement system**

Given that users are frequently both consumers and data subjects, Directive (EU) 2020/1828 and art. 80 GDPR may overlap and interfere with each other in the future. When interpreting art. 80 GDPR in the case *Meta Platforms*, the CJEU affirmed that the Directive on representative actions «contains several elements which confirm that art. 80 of the GDPR does not preclude the bringing of additional representative actions in the field of consumer protection»<sup>81</sup>. In fact, recital 11 of the Directive states that representative actions do not replace existing legal provisions on group actions.

At first glance, the provisions of the Directive appear compatible with art. 80 GDPR. As stated above, the GDPR empowers certain legal entities to bring representative actions and claim both injunctive and redress remedies. The CJEU underlined that these entities include consumer associations<sup>82</sup>. For its part, the Directive grants standing to qualified entities that States «designate for that purpose» (art. 4, Directive (EU) 2020/1828). The requirements that qualified entities must meet are set out in art. 4 and are essentially aligned with those of art. 80 GDPR<sup>83</sup>.

Overall, representative actions are in line with the GDPR, even considering group data protection as a collective interest. Collective interests such as transparency and fairness in contractual relations fit perfectly with the data privacy of users<sup>84</sup>. For example, collective redress measures could play a role in cases of unfair commercial clauses in terms of services, or unfair business practices, when providers fail to comply with informative duties and violate the GDPR at the same time, thereby harming consumers. Under this scenario, consumers would have two possible options: namely, to act via EU

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<sup>79</sup> P. Helm, *Group Privacy in Times of Big Data. A Literature Review*, in *Digital Culture and Society*, 2, 2016, 144.

<sup>80</sup> On the nature of the “collective interests” recalled by Directive (EU) 2020/1828, see E. Camilleri, *La dir. 1828/2020/UE sulle azioni rappresentative e il “sistema delle prove”. La promozione dell’interesse pubblico attraverso la tutela degli interessi collettivi dei consumatori: verso quale modello di enforcement?*, in *Nuove Leggi Civili Commentate*, 4, 2022, 1086 ss.

<sup>81</sup> CJEU, C-319/20, *Meta Platforms*, cit., § 81.

<sup>82</sup> CJEU, C-319/20, *Meta Platforms*, cit., § 65.

<sup>83</sup> Art. 80, para. 1, GDPR.

<sup>84</sup> See P. Rott, *Data protection law as consumer law. How consumer organisations can contribute to the enforcement of data protection law*, in *Journal of European Consumer & Market Law*, 3, 2017, 115 ss.

representative actions or via national class actions, in accordance with art. 80 GDPR<sup>85</sup>.

### 8. Compensatory actions

While the Directive explicitly allows for injunctive and compensatory actions, art. 80 GDPR seems to make a distinction between them. The GDPR allows a qualified entity to ask for compensatory measures if it obtains a mandate from the data subject (art. 80 (1) and art. 82 GDPR). However, when entities exercise data subjects' rights without a mandate (art. 80 (2)) the possibility of claiming damages is debatable<sup>86</sup>. Indeed, art. 80 (2) does not explicitly refer to art. 82. Nor does the recent judgment *Meta Platforms* cover compensatory claims, since the CJEU's ruling covered only injunctive measures. Nevertheless, the wording of art. 80 (2) does not exclude compensatory actions, and the case *Meta Platforms* may also be a point in favor of allowing an entity to ask for redress even without a mandate.

Although art. 80 (2) GDPR does not mention collective compensatory measures, the latter may fall under the broad notion of «effective judicial remedy»<sup>87</sup>. The GDPR is a Regulation, thus providing scope for full harmonization among Member States. However, in *Meta Platforms* the CJEU qualified art. 80 (2) as an «open clause»<sup>88</sup>. It has therefore left room for national laws to implement art. 80 (2) in a manner that best guarantees the rights laid down in the Regulation.

The CJEU referred to effective protection, the need to secure proper redress, and consumers' access to justice. These goals may be achieved more promptly by strengthening collective redress measures<sup>89</sup>. This could be pursued by, for example, expanding the number of eligible entities that can sue a data controller<sup>90</sup>, including those who do not have a mandate. Collective redress can, in fact, aggregate small claims, satisfy individual rights and deter companies from engaging in unfair practices. Were a legal system to legitimize collective redress even when the data subjects have not conferred a mandate on the representative entity, the system would be likely to defend the effectiveness and

<sup>85</sup> F. Gascon Inchausti, *A new European way to collective redress? Representative actions under Directive 2020/1828 of 25 November*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 2, 2021, 66. Cfr. G. De Cristofaro, *Azioni "rappresentative" e tutela degli interessi collettivi dei consumatori. La "lunga marcia" che ha condotto all'approvazione della dir. 2020/1828/UE e i profili problematici del suo recepimento nel diritto italiano*, in *Nuove Leggi Civili Commentate*, 4, 2022, 1022.

<sup>86</sup> See F. Casarosa, *Azioni collettive fra tutela dei dati personali e tutela dei consumatori: nuovi strumenti alla prova dei fatti*, in P. Iamiceli (ed.), *Effettività delle tutele e diritto europeo. Un percorso di ricerca per e con la formazione giudiziaria*, Open Access – Università degli Studi Trento, 2020, 439; F. Casarosa, *Transnational collective actions for cross-border data protection violations*, in *Internet Policy Review*, 9, 2020, 5 ss.; A. Pato, *The collective private enforcement of data protection rights in the EU*, in *MPI-LAPL Summer School 3rd ed, Forthcoming*, 2019, 2 ss.; A. Pato, *The National Adaptation of Article 80 GDPR, Towards the Effective Private Enforcement of Collective Data Protection Rights*, in K. McCullagh-O. Tambou-S. Bourton (eds.), *National Adaptations of the GDPR*, Series Open Access Book, in *Blogdroiteuropéen*, 2018, 99.

<sup>87</sup> Art. 79 GDPR, mentioned in art. 80, para. 2, GDPR.

<sup>88</sup> CJEU, C-319/20, *Meta Platforms*, cit., § 57.

<sup>89</sup> CJEU, C-319/20, *Meta Platforms*, cit., §§ 73-75.

<sup>90</sup> V. Zeno Zencovich - M. C. Paglietti, *Diritto processuale*, cit., 51.

supremacy of EU law.

Furthermore, if Member States already allow collective compensatory mechanisms under their laws, these mechanisms could potentially be used by a legal entity having direct standing to undertake a collective action, in line with art. 80 (2) GDPR<sup>91</sup>. Although the CJEU referred only to injunctive claims in its ruling, there is no reason to maintain that the judgment does not also apply to redress measures in this respect. Ultimately, in representative actions, the Directive allows a legitimate entity to seek redress with or without a mandate from consumers, leaving States free to choose opt-in or opt-out mechanisms (art. 8 (3), Directive (EU) 2020/1828).

## **9. Private enforcement and data protection: opportunities**

In conclusion, group actions are not only a deterrent to businesses engaging in unlawful conducts; more importantly, they may grant individuals effective relief<sup>92</sup>. This is true especially for data protection law. When the right to data privacy is violated on a large scale, collective redress provides a useful procedural tool. The legal basis for this can be found in art. 80 GDPR. This is not the only route. Collective actions may be started, when data subjects are also consumers, through national laws implementing Directive (EU) 2020/1828. Thus, the Directive is taking steps in the right direction to protect consumer rights.

While collective redress poses big challenges, it could certainly be an important tool for the enforcement of digital rights in the era of ICTs. Under the “multi-level” legal order, we need to (re)think our traditional dogmas and categories, such as the right of action, standing and liability. Moreover, the enforcement of these rights should be pursued globally and uniformly, since their dimension is global itself.

Our globalized and digital world also requires heightened awareness of how procedural and substantive law interconnect. Further harmonization and convergence of procedural law rules are essential to achieve a common ground for handling cross-border disputes. Additionally, Member States and EU institutions, including the judiciary, ought to continue to cooperate closely in ensuring a direct and indirect enforcement system that is both multilayered and effective. In such a system, consumer law and data protection law should increasingly interact with each other. Developing group actions can be pivotal in this regard, ensuring the effectiveness of people’s fundamental rights, especially their right to data privacy.

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<sup>91</sup> See again CJEU, C-319/20, *Meta Platforms*, cit., §§ 60-66.

<sup>92</sup> C. Hodges, *Collective Redress: The Need for New Technologies*, in *Journal of Consumer Policy*, 2019, 60-61.