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Max Schrems against Facebook
STJUE, as. C-498/16

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MAX SCHREMS AGAINST FACEBOOK STJUE, AS. C-498/16

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Abstract: The lawsuit filed by Max Schrems against Facebook Ireland Ltd. in 2014, under the section on consumer contracts of Regulation No. 44 / 2001, gave rise to a preliminary ruling before the CJEU with regard to the interpretation of Arts. 15 and 16 of the Regulation. The decision was delivered on January 2018: it is as expected and does not deserve much comment. On the contrary, it is worth analysing the setting of the dispute, in particular as regards the weaker party's resources as a claimant against one of the giants of social networks and online media. Equally interesting is the examination of the claim in light of the EU rules that (allegedly) would have applied to the merits, had the claim been filed after the date of application of Regulation n° 2016/679, on the protection of personal data.

Keywords: international jurisdiction, consumer, social media, data protection, collective redress.

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1. The Facts of the Case C- 498/16¹

Mr. Schrems is a user of the social network Facebook since 2008. Initially he used this network for exclusively private purposes. From 2010 he has kept an account for his private activities - the exchange of photos, chatting and posting. In 2011, he opened a Facebook page registered and established by him, in order to report to internet users on his legal proceedings against Facebook Ireland, his lectures, his participation in panel debates and his media appearances, as well as to call for the donation of funds and to advertise his books.

On July 31, 2014, Mr Schrems brought a complaint against Facebook Ireland Ltd before the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court of Vienna, Austria), arguing numerous infringements of the Austrian and Irish provisions on data protection- indirectly, of Directive 95/46/ EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and the free circulation of these data- had been committed by the defendant. Mr Schrems claimed to have *locus standi* on the basis of both his own rights and similar rights which seven other contractual partners, also consumers and residing in Austria, Germany and India, had assigned to him for the purposes of his action against Facebook Ireland.²

The parties to the dispute disagreed as to the international jurisdiction of the Austrian court, which according to Mr. Schrems would be based on Art. 16.1 Regulation n ° 44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters³. The Vienna Civil Regional Court dismissed the claim, considering that Max Schrems used Facebook for professional purposes, therefore did not qualify as a 'consumer' for the purposes of the Regulation. In addition, the court ruled that the jurisdiction *ratione personae* of the assignors of claims is not transferable to the assignee.

Mr Schrems brought an appeal before the Oberlandesgericht Wien (Regional Higher Court of Vienna, Austria), which amended the decision in part, upholding the claims related to the contract between Mr. Schrems and the defendant in the main proceedings. By contrast, it dismissed the appeal in regard to the assigned claims on the ground that the jurisdictional privilege accorded by Art. 16 regulation n° 44/2001 can only be invoked by a consumer for his own claims.

¹ Case C- 498/16, EU:C:2018:37.

² The lawsuit -English version-, can be found under http://www.europe-v-facebook.org/sk/sk_en.pdf.

³ OJ, 2001, L 12/1. It may be striking that the arguments on the merits, based on the violation of the fundamental right to the protection of personal data, are channeled through a procedural rule intended for consumer contracts. The truth is that there was no other possibility under Regulation n° 44/2001. The weakness of the instrument in this regard is evident as well in other areas where the parties to a dispute experiment a similar imbalance but the claimant cannot be classified as a consumer within the meaning of the Regulation: see case C-375/13, Kolassa, EU:C:2015:37, and C-366/13, Profit Investment SIM, EU:C:2016:282, and Matteo Gargantini's criticism of the CJEU for not distinguishing between retail investors (or consumers) and professionals, in 'Capital Markets and the Market for Judicial Decisions: In Search of Consistency', MPILux Working Paper 2016/1.

Both parties appealed against the decision before the Oberster Gerichtshof (Supreme Civil and Criminal Court, Austria).

2. The Question Referred for a Preliminary Ruling

2.1 *The Questions*

The Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is Article 15 of Regulation ... n° 44/2001 ... to be interpreted as meaning that a 'consumer' within the meaning of that provision loses that status if, after the comparatively long use of a private Facebook account, he publishes books in connection with the enforcement of his claims, on occasion also delivers lectures for remuneration, operates websites, collects donations for the enforcement of his claims and has assigned to him the claims of numerous consumers on the assurance that he will remit to them any proceeds awarded, after the deduction of legal costs?

(2) Is Article 16 of Regulation ... n° 44/2001 to be interpreted as meaning that a consumer in a Member State can also invoke at the same time as his own claims arising from a consumer supply at the claimant's place of jurisdiction the claims of others consumers on the same subject who are domiciled

- (a) in the same Member State,
- (b) in another Member State, or
- (c) in a non-member State,

if the claims assigned to him arise from consumer supplies involving the same defendant in the same legal context and if the assignment is not part of a professional or trade activity of the applicant, but rather serves to ensure the joint enforcement of claims?

2.2 *Ruling and Reasoning*

The CJEU answered to both questions following closely AG Bobeck's conclusions:⁴ Art. 15 of Regulation n° 44/2001 must be interpreted as meaning that a user of a private Facebook account does not lose the status of 'consumer' within the meaning of that provision when publishing books, delivering lectures, managing websites, fundraising or being assigned the claims of other consumers. Art. 16.1 does not apply to the proceedings brought by a consumer before the court of his domicile with the purpose to assert, not only its own rights, but also claims assigned by other consumers domiciled in the same Member State, in other Member States or in non-member countries.

Leaning on her previous case law, the Court reminds that the interpretation of grounds for jurisdiction like the ones on Section 4 of Chapter II of the Regulation, which are exceptions to the general rule of the domicile of the defendant, must be strict. The 'consumer' concept of the Regulation

⁴ ECLI:EU:C:2017:863.

is to be interpreted autonomously, but taking into account the definition in other EU provisions in order to ensure the consistency of EU law. For the purposes of Arts. 15 and 16 Regulation n° 44/2001 the 'consumer' notion must be strictly construed, looking at the position of the individual concerned in the particular contract and having regard to the nature and objective of that contract, and not to the subjective situation of the person concerned (his knowledge, specialization or information). As a consequence, the same person may qualify as a consumer in relation to certain transactions and as an economic operator in relation to others. The protection granted to the consumer is only justified if the contract has been concluded outside and independently of any activity or professional purpose. When the contract is mixed, the protection will continue to apply provided the link between such contract and the professional activity is marginal in the context of the operation considered as a whole. In case C-498/16 Max Schrems might have lost the status of consumer as a consequence of the use given to Facebook services over time; the CJEU, applying the criteria described, concluded that he had not.

In relation to the second question referred by the national court, the Court, backed again by previous jurisprudence, recalls that Art. 16 is meant to protect the consumer as an economically weaker and legally less experienced party only when acting personally as plaintiff or defendant. Predictability regarding the attribution of jurisdiction requires that the contract under exam be concluded between the consumer and the trader or professional affected by the claim.

2.3 Assessment. *The Actual Interest of the Schrems Case*

The CJEU does not deviate from her prior jurisprudence; her answer is orthodox; it has not taken anybody by surprise. One could therefore conclude that, *per se*, this is not an interesting decision. As matter of fact, the expectation raised by the preliminary reference in case C-498/16 and the reason why even the general public had its eyes on the CJEU lies elsewhere: firstly, in the identity of the parties to the claim. Max Schrems is an 'old acquaintance' thanks to case C-362/14,⁵ which ended with Decision 2000/520/EC⁶ being declared void by the Court. Facebook does not need any introduction. In addition, at first sight the controversy between the parties is an uneven one, a kind of contemporary 'David against Goliath'. But is it, really? In this context, we propose to examine both the legal definition of 'consumer' and some specific features of Max Schrems's claim (below, under 3).

The second reason why case C-498/16 deserves attention lies with the subject matter under discussion. The substantive argument of Max Schrems is based on the personal data protection rules in force at the time the claim was filed. However, from the procedural perspective, the lawsuit was filed in Austria based on section four of Chapter II of Regulation n° 44/2001, which addresses consumer contracts. In his reaction to the CJEU decision Max Schrems regretted that the reference for a preliminary ruling had not been made under Regulation n° 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

⁵ ECLI:EU:C:2015:650.

⁶ On the adequacy of the protection adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, OJ, 2000, L 215/7.

Protection Regulation):⁷ 'This would have been far more exciting if the GDPR were already in place,' 'Then they [Facebook] would face a potential group lawsuit with 50 million users'.⁸ The question is, to what extent is he right? (below, under 4).

3. A Contemporary 'David v. Goliath'

3.1 *Hypertrophy of the Legal Category of 'Consumer'*

In the popular imagination, a consumer is a particularly vulnerable individual: an uninformed, manipulable subject. The definition of 'consumer' for the purposes of the EU instruments, shared by the CJEU, is somewhat different: it focuses on the opposition between a natural person acting for purposes unrelated to his business or his profession, and an economic operator, within the framework of a specific contractual relationship; what the individual knows (or does not know), his economic situation, his qualifications ... are irrelevant.⁹ Building upon this idea, the CJEU has interpreted the concept of 'consumer' extensively and reached outcomes that may, at first sight, be disconcerting: a buyer qualifies as a 'consumer' in case C-99/96, where the parties entered into a written contract of sale of an Intership vessel, for a price of 250,000 DM (more than 127,000 euros) to be paid in five instalments.¹⁰ Recently, in case C-110/14, the CJEU has ruled that a practising lawyer who had entered into a loan agreement with a bank, without specifying the purposes of the credit, can be considered as a consumer according to Art. 2.b of Directive 93/13 / EEC, provided the contract is not linked to the lawyer's professional activity - and this even if the debt is secured by a mortgage taken out by that person in his capacity as representative of his law firm.¹¹

In view of the above, the characterization of Max Schrems as a consumer in spite of his studies in law and his evident mastery of the subject matter of the lawsuit is not unexpected. That his claim against Facebook had been financed since 2014 by the Cologne firm Roland ProzessFinanz, in a formula according to which the benefit of the latter would be 20% of the damages awarded, does not matter.

3.2 *Third-Party Funding*

The stance of the EU regarding litigation financing practices by third parties is, in principle, neutral. Their admissibility is not disputed, but they are not promoted either. It matters, though, that conditions are created to avoid that they lead to abuse, to prevent the conflict of interests with the financed party, or that they influence her litigation strategy. Third party funding is addressed in the Recommendation of June 11, 2013, on common principles for injunctive and compensatory collective redress

⁷ OJ, 2016, L 119/1.

⁸ Interview with M. Schrems, March 22, 2018, <https://www.bloomberg.com/news/articles/2018-03-22/max-schrems-took-on-facebook-in-europe-he-s-ready-to-do-it-again>.

⁹ Case C-498/16, para. 39.

¹⁰ Case C-99/96, *Mietz*, EU:C:1999:202.

¹¹ Case C-110/14, *Costea*, EU:C:2015:538.

mechanisms in the Member States concerning violations of rights granted under Union Law,¹² and referred to in the most recent - although, to the best of our knowledge, unsuccessful- initiative of the European Parliament to draw the attention of the Commission to the need for the harmonization of European standards for civil procedure in the EU.¹³ The Proposal for a Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, published in April 2018, Art. 7, obliges the MS to ensure that in cases where a representative action for redress is funded by a third party some practices of the third party are prohibited.¹⁴

Third party funding has provoked different reactions in the Member States. In Spain it remains unusual, although it does not seem to meet any problem at the legal level, and it has started to make its way in the framework of investment arbitration.¹⁵ In Austria there are no legal difficulties or cultural scruples in regard to third-party funding litigation; although it is a relatively new instrument lacking direct legal regulation, it is indisputably accepted since it was declared lawful by the Supreme Court in 2013, on the occasion of a lawsuit directly related to a class action (Austrian-style).¹⁶ The largest consumer associations in the country, VKI and the Arbeitskammer in Vienna, have relied on third party funding for years. Currently, the Austrian market is dominated by several local suppliers, together with the German Roland ProzessFinanz AG and Foris AG.

The future of the collaboration between Roland ProzessFinanz AG and Max Schrems has been jeopardized by the decision of the CJEU.¹⁷ Had it been favourable to Mr. Schrems's claims, the number of persons whose rights would be defended by Schrems as assignee would not have been seven, but much higher: through an *ad hoc* website, 25,000 Facebook users have transferred their claims to him, and 50,000 more are registered on a waiting list.¹⁸

3.3 Collective Redress

In November 2017, Max Schrems founded 'NOYB - European Center for Digital Rights'. NOYB (None of Your Business) is a non-profit organization established in accordance with Austrian law, aimed at ensuring that the fundamental right to data protection is duly respected. Its object is to financially

¹² OJ, 2013, L 201/60.

¹³ Of July 4, 2017, P8_TA(2017)0282.

¹⁴ COM(2018) 184 final, of April 11, 2018.

¹⁵ A. Wesolowski, 'Spain', in L. Perrin (ed.), *The Third Party Litigation Law Review*, 1st ed., London, 2017, pp. 135-144. According to the economic press, funds such as Therium Capital Management could also have an interest in collective lawsuits against banks, or by owners of service stations against oil companies for their pricing-setting strategies.

¹⁶ OGH, February 27, 2013, 6 Ob 224 / 12b. It is worth recalling that the *pactum de quota litis* is prohibited in Austria. Although this has not led to the rejection of financing by third parties, it transpires in drafting of the agreement, which can leave no room to doubts on that point. On the situation in Austria see M. Wegmüller, M. Gnägi, 'Austria', in L. Perrin (ed.), *The Third Party Litigation Law Review*, 1st ed., London, 2017, pp. 12-20.

¹⁷ Interview with Dr. Arndt Eversberg, January 28, 2018, at <https://www.juve.de/nachrichten/namenundnachrichten/2018/01/facebook-prozessfinanzierer-wir-kaempfen-weiter-fuer-die-sammelklage>: 'wir werden mit der von ihm gegründeten NGO zusammenarbeiten. Wir werden allerdings nicht wie bisher sämtliche Rechtsberaterkosten des Klagekomplexes übernehmen können'

¹⁸ See <https://www.fbclaim.com/ui/register>.

support civil lawsuits of general interest and strategic litigation against companies whose activities may put at a risk this fundamental right, raising the necessary funds to meet the costs of the proceedings.

Does the existence of an NGO make a difference, in comparison to the individual-action approach followed by Max Schrems in 2014? Beyond the old adage ‘in union, strength’, what must be assessed is whether a claim by an organization entails any legal advantage in comparison to a claim filed by an individual.¹⁹ The preliminary ruling of the CJEU addressed the international jurisdiction under Regulation n° 44/2001. From this point of view, the fact that a claim is lodged by an organization representing the affiliated consumers, or the general interest, is immaterial: the case law of the CJEU in relation to the consumer section of the Regulation (and the same applies to its successor, Regulation no. 1215/2012, Brussels Ia, applicable as of January 10, 2015)²⁰ leaves out of its scope any claimant other than the consumer who is a party to the contract from which the dispute arises. The question is whether it remains so under Regulation 2016/679 on the protection of personal data. On his web page <http://europe-v-facebook.org/>, Max Schrems argues that had the controversy arisen after May 25, 2018, the lawsuit would have been filed by NOYB under the protection of Art. 80 of the data protection Regulation, and that this option would have allowed choosing the most advantageous national jurisdiction.²¹ We will analyse this opinion in what follows.

4 Under The Umbrella of Data Protection Rules

4.1 *Before and After Regulation n° 2016/679*

Regulation no. 2016/679 was adopted on April 27, 2016; it will be applicable as of May 25, 2018. Under the previous regime - Directive 96/45 / EC and the transposing national measures-, private enforcement was a very limited possibility. Attempts were made to channel it through rules addressing consumer protection: privacy policies in contracts were subjected to the scrutiny applied to abusive contract terms; the rules on unfair commercial practices served shielding individuals from profiling practices, used to illegally influence their decisions as consumers.²² However, the assimilation of data protection and consumer protection did not persuade everyone.²³ It was argued that privacy policy clauses in web pages are mere information and

¹⁹ According to Spanish law claims brought by an entity enjoy a specific procedural regime to some extent: they are allocated to the commercial courts; caution is not requested when precautionary measures are applied for.

²⁰ OJ 2012, L 351/1.

²¹ See footnote 8, and below under 4.3. It is worth mentioning that four complaints over ‘forced consent’ against Google, Instagram, WhatsApp and Facebook were filed with Data Protection Authorities (therefore seeking for administrative relief) by noyb.eu immediately after the date of full application of the GDPR.

²² N. Helberger, F. Zuiderveen Borgesius, A. Reyna, ‘The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law’, CMLR, 2017 (5), pp. 1427-1466, pp. 1449-1456, with examples of German case law, to which the one indicated below, footnote 24, can be added as well. MR Llácer Matacás, La autorización al tratamiento de información personal en la contratación de bienes y servicios, Dykinson, 2012, pp. 157-161 offers examples from the French case law.

²³ Max Planck Institute Luxembourg, An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law, Strand 2, Publications Office of the European Union, 2017, for. 123, with reference to the opinion of the Bureau Européen des Unions de Consommateurs (BEUC), ‘Key Consumer Demands for the Trilogue on the General

cannot be characterized as contractual clauses.²⁴ Furthermore, consumer law does not always help in the face of a violation of the right to data protection: the data subject may not act as a consumer - all individuals are entitled to the right to data protection, regardless of their role as an economic operator in the market.²⁵ Collective remedies in case of a violation of the right to information self-determination encountered conceptual difficulties: the associative formula was considered inadequate for carrying out the balancing of interests - those of the individual affected, and those of the company who, allegedly, has committed the infringement- which is typical whenever opposed fundamental rights are at stake.²⁶

It is against this backdrop that Regulation (EU) 2016/679, the GDPR, was enacted, after a long process of negotiations.²⁷

The Regulation sets up a system for the defense of personal data which combines administrative and extrajudicial remedies with civil judicial claims (see Art. 79.1).²⁸ The protection is granted to the 'data subject', a category encompassing only natural persons (Art. 1). This does not mean, however, that the data subject must be the one filing the lawsuit in case of infringement: *locus standing* is broader (see Art. 80). Civil remedies are undoubtedly available in case of infringement of the rights provided for by Arts. 12 to 23; there is no agreement regarding other rights outside Chapter III GDPR.²⁹ The violation must be a consequence of the processing: no other condition is required under the Spanish version of the Regulation, whereas a treatment must qualify as 'contrary to the Regulation' according to other versions.³⁰ Art. 79.1 provides for two types

Data Protection Regulation', 2015: 'The protection afforded to data subjects acting as consumers is very uncertain. Fundamentally, it is very difficult for consumers to avoid entering into contracts - eg when using social media or buying goods online - which have a significant impact on their privacy and the protection of their data; yet, the application of data protection, privacy and consumer protection rules for these situations is unclear, creating a regime which does not offer satisfactory protection to data subjects'.

²⁴ P. Rott, 'Data protection law as consumer law - How consumer organizations can contribute to the enforcement of data protection law', (2017) 6 Journal of European Consumer and Market Law, Issue 3, pp. 113-119, p. 115. The opposite view can be identified in the German case law from 2013: LG Berlin, April 30, 2013, NJW, 2013, 2605-2606; LG Frankfurt, June 10, 2016, Beck Rechtsprechung, 10907. See as well the recent judgment of the Landsgericht Berlin of 16 January 2018, in Bundesverbands der Verbraucherzentralen und Verbraucherverbände against Facebook.

²⁵ J. Dönch, 'Verbandsklagen bei Verstößen gegen das Datenschutzrecht - neue Herausforderungen für Datenschutz-Compliance', *Betriebs-Berater*, 2016, pp. 962-967, p. 962; A. Halfmeier, 'Die neue Datenschutzverbandsklage', *NJW*, 2016, pp. 1126-1129, about the UKlaG, with references to jurisprudence; P. Rott, p. 116.

²⁶ J. Dönch, quoting the report of the Deutsche Gesellschaft für Recht und Informatik, dated August 15, 2014, to the Ministry of Justice and Consumer Protection.

²⁷ The Regulation resorts expressly to consumer regulations, in particular to Directive 93/13 / EEC, only in Recital 42. See however the recent Commission proposal on representative actions, COM (2018) 184 final, of April 11, 2018, coupling again the protection of data subjects and consumers.

²⁸ Advocating in favor of an autonomous interpretation of 'judicial' see EM. M. Martini, 'Art. 79', in BP Paal, DA Pauly (eds.), *Datenschutz-Grundverordnung*, CH Beck, 2 ed., 2018, para. 13-15.

²⁹ In favor M. Martini, 'Art. 79', para. 22; against B. Kresse, 'Art. 79', in Sydow (ed.), *Europäische Datenschutzgrundverordnung, Nomos, Manz, Dike*, 2017, para. 7; L. Feiler, N. Forgó, 'Art. 79', *EU-DSGVO*, Verlag Österreich, 2017, para. 1.

³⁰ The French: 'effectué en violation du présent règlement'; the English: 'in non-compliance with this Regulation'; the German: 'einer nicht im Einklang mit dieser Verordnung stehenden Verarbeitung'.

of remedy against a violation: injunctive relief, probably also with preventive character, and declaratory relief.³¹ The right to compensation is established in Art. 82.

At first glance,³² the claims brought to court by Max Schrems in 2014 would fit in the Regulation: there is no doubt about it regarding the first one, whereby he asked for a declaration of the status of Facebook as a service provider and its duty to comply with instructions, and its status as a controller insofar as the data processing is carried out for its own purposes. Max Schrems requested as well the declaration of nullity of certain clauses of the agreement with Facebook relating to the conditions of use in terms of security of treatment, an aspect currently contemplated in Art. 32 Regulation. Injunctive relief - related to the lack of consent of the data subject in relation as to the use of personal data - would be covered in the Regulation by Arts. 6 ff. Disclosure with respect to the data processed, the purpose of the treatment and, as far as possible, the recipient of the data, would fall under the scope of Art. 12 ff. Finally, his claim for damages (concerning alteration of contractual terms, compensation, and unjustified enrichment), would be based on the right to compensation for infringements according to Art. 82 Regulation. Only the costs and expenses of the proceedings would be decided according to the procedural law of the forum.

4.2 Representative Actions

Prior to Art. 80 Regulation 2016/679, in the heterogeneous European panorama of collective redress only few Member States offered such a remedy for data protection infringements. In Belgium the Law of March 28, 2014, *Loi portant insertion d'un titre 2 'De l'action en réparation collective' au livre XVII « Procédures juridictionnelles particulières » du Code de droit économique, et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique*, art. 3, provided for remedies in case of infringement of the Law of December 8, 1992 on the protection of privacy in relation to the processing of personal data.³³ In Germany, a specific provision was enacted in 2016: the new wording of art. 2 II 1 Nr. 11 UKlaG modifies the previous situation regarding the *Verbandsklage* by expressly including the rules on data protection to the notion of 'Verbraucherschutzgesetz'. Whether the amendment, prior to the adoption of the final draft of Art. 80.2 of the Regulation, is compatible with it, is not undisputed.³⁴

Art. 80 GDPR introduces a new scenario, whereby not-for-profit body, organization or association properly constituted in accordance with the law of a Member State, with statutory objectives which are in the public interest, and active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data, are entitled to lodge

³¹ M. Martini, 'Art. 79', para. 17.

³² It is to be expected that the Regulation gives rise to numerous referrals to the CJEU for a preliminary ruling. In fact, it has happened even before the date of full applicability of the text: see case C-673/17, on the notion of 'valid consent' in the context of art. 6.1.a of the Regulation, of November 30, 2017.

³³ An amendment of Belgium law to ensure compliance with the current Regulation has been adopted by the Conseil de Ministres in March 2018.

³⁴ P. Schantz, 'Die Datenschutz-Grundverordnung - Beginn einer neuen Zeitrechnung im Datenschutzrecht', *NJW*, 2016, pp. 1841-1847, p. 1847, for an affirmative answer. P. Rott, p. 116, or G. Spindler, 'Verbandsklagen und Datenschutz - das neue Verbandsklagerecht Neuregelungen und Probleme' (2016) 3 *Zeitschrift für Datenschutz* 116, for a different opinion.

complaints on behalf of the data subjects. The provision is twofold: paragraph one, relating to any claim including that of compensation (provided that the exercise by an entity of the right to receive compensation of behalf of the data subject is foreseen under the law of the Member State), requires the mandate of the data subject. Paragraph two refers to claims other than compensation; entities meeting the above-mentioned conditions can lodge a complaint without a mandate, when there are reasons to believe that the rights of a data subject have been violated as a result of the processing of personal data, as long as this is provided for by the legislation of the Member State where the complaint is filed. The requirements imposed on the association, organizations or entities aim to avoid the 'development of a commercial claims culture in the field of data protection'.³⁵

It is up to the Member States to complement the provision of the Regulation in a set of aspects: either because they are not regulated (i), or because an express *renvoi* is made to the rules of the Member States (ii). It is therefore to be expected that different solutions will be in force within the EU.

i) Outstanding examples of the absence of direct regulation in the Regulation, or gaps, are found in Art. 80.1. No indication is given as to how the representation should be, or how it should be granted. The same applies to the *locus standing* before the courts of a MS of entities, organizations or associations constituted in other MS.

According to some authors, for the sake of certainty representation should be granted in written form.³⁶ In Spain, where legally constituted associations of consumers are entitled to defend in court the rights and interests of their members (Art. 11.1 *Ley Enjuiciamiento Civil*), the consent of an associate regarding the exercise of his/her rights by the association must be reflected in some way; some scholars are of the opinion that tacit empowerment meets the requirement, and that it can be simply inferred from the legal constitution of the association combined with the membership of the partner under consideration.³⁷

Regarding the *locus standing* issue, a provision such as the one in Art. 4 of Directive 2009/22/EC, is lacking in the GDPR. Indeed, entities meeting the conditions of Art. 80 of the Regulation and listed according to the above-mentioned Art. 4 will benefit from such inclusion, which is the automatic proof of their legal capacity. Any other foreign entity will have to comply with the legislation of the Member State where the claim is to be filed.

ii) An express referral to the provisions of the MS can be found in Art. 80.1 regarding the very entitlement of entities, organizations or associations to claim compensation on behalf of the data subjects. The second paragraph of the provision depends completely on MS decisions. In this context,

³⁵ Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council 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). Draft - Statement of the Council's reasons, 8.4.2016, 5419/1/16 Rev. 1 Add. 1 p. 31.

³⁶ EM Frenzel, 'Art. 80', in P. Paal, DA Pauly (eds.), *Datenschutz-Grundverordnung*, CH Beck, 2 ed., 2018 para. 9.

³⁷ MI González Cano, *La tutela colectiva de consumidores y usuarios en el proceso civil*, Tirant lo Blanch, Valencia, 2002, pp. 147-148. J. Montero Aroca, *De la legitimación en el proceso civil*, Bosch, 2007, p. 424, more nuanced, only advocates against the need of a power of attorney.

some MS are preparing rules *ad hoc*:³⁸ this is the case of France, through the *Projet de loi relatif à la protection des données personnelles*, approved on March 21, 2018 in the Senate, modifying the *Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés*, by adding two provisions to it. This will complete the legal text, which, revised in 2016 to add Art. 43 ter, only provided for injunctive relief.³⁹

An amendment of the Spanish LEC provisions on collective redress in order to expressly include data protection is not foreseen. To what extent the current regime is already adapted to the GDPR is debatable. From the perspective of the substantive legitimation (as opposed to the procedural legitimation, or *locus standing*), the mere existence of the Regulation is sufficient to extend it beyond the 'consumer' to the 'data subject'. However, for the currently existing associations to represent the latter category they would have to expand their statutory activities so as to comprise data protection as well. Some in-force procedural options of the LEC regarding collective redress may not fit with the Regulation: for example, according to Art. 11.2 LEC groups composed of the individuals affected by the infringement have standing, just like legally constituted entities. Indeed, for the purposes of Art. 80 this kind of group could be assimilated to an 'organization', in a broad understanding of the latter term. However, they will lack 'statutory objectives'; as for the 'public interest' requirement, they will only group together on the occasion of an infringement, whereas the wording of the Regulation rather evokes continuity in the activity.

A further example of the reasonable doubts on the (non) adjustment of the Spanish collective redress regime to the GDPR: the extraordinary legitimation conferred by Arts. 11.2 and 11.3 of the LEC includes compensatory claims; this is hardly compatible with the mandate requirement established in the Regulation.

4.3 *International Jurisdiction*

As said, in the opinion of Max Schrems 'Article 80 of the upcoming GDPR grants users the right to mandate NGOs to represent them before a data protection authority or in court in individual cases. Article 80 can be used to form 'group actions' or 'collective complaints', if a large number of users are represented by NOYB ('mass mandate'). *This option also allows to choose favorable jurisdictions*':⁴⁰ Whether this statement is right may be disputed.

In accordance with Art. 79.2, proceedings based on the right to an effective judicial remedy (Art. 79.1) or claims for compensation (Art. 82) against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment; alternatively, before the courts of the Member State where the data subject has his or her habitual residence.⁴¹ Two fora are thus offered to the claimant, to be identified in the light of the Regulation

³⁸ Art. 80 addresses only standing; it does not affect any other relevant element of a collective remedy model, such as *res judicata*.

³⁹ <https://www.senat.fr/petite-loi-ameli/2017-2018/351.html>.

⁴⁰ <https://noyb.eu/concept>. Italics added.

⁴¹ Unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers. Art. 79.2 addresses only international jurisdiction; it does not fix the venue.

itself insofar as possible (therefore, for the notion of ‘establishment’ reference should be made to recital 22.)⁴² The grounds of jurisdiction are not subject to any additional link to the territory of a MS; the only supplementary conditions to be met are those required for the application of the Regulation itself according to Art. 3.⁴³

The interpretation of Art. 79.2 raises a number of questions, all relevant in the context of Max Schrems’s claim - some of them, independently of whether he intends to file the complaint personally or through NOYB. The relationship between the GDPR provision and the jurisdictional grounds provided for by Regulation n° 1215/2012, where art. 67 recognizes the primacy of the provisions contained in other EU instruments, is unclear. The wording of Art. 79 ‘proceedings... *shall* be brought’ suggests that it sets especial grounds for jurisdiction to the exclusion of any other. In support of this view it can be added that the establishment of the defendant - one of the jurisdictional criteria - overlaps largely with the criterion of the defendant’s domicile, which is the general ground for jurisdiction under the Brussels Ia Regulation: if they were to coexist, it would have very little added value.

Scholars are nevertheless split on this issue: according to recital 147 GDPR, where specific rules on jurisdiction are contained in the Regulation general rules of jurisdiction such as those set out in Regulation n° 1215/2012 ‘should not prejudice the application of such specific rules’; the wording allows to understand that the application of the latter rules may be restricted, instead of necessarily excluded from the outset. This, together with the general aim of the Regulation of granting a broad protection to the data subject (a ‘consistent and high level of protection’ of natural persons, see recital 10), would support the opinion favouring the juxtaposition of all the jurisdictional grounds.⁴⁴ However, in our view the argument may be rebutted: the GDPR is undoubtedly inspired by the above-mentioned principle, but at the same time it is therein acknowledged that ‘The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality’ (see recital 4). In addition, the right to an effective judicial protection, understood as the right of the data subject to be granted access to the courts, is not unlimited. It is therefore not absolutely unreasonable to argue that Art. 79.2 takes precedence over (and displaces) any other regime on international jurisdiction.⁴⁵ It is worth noticing that which view prevails is not without consequences; in particular, it will be decisive

⁴² To be interpreted in turn according to the case law on Directive 95/46/EC. For ‘establishment’ see case C- 230/14, *Weltimmo*, and P. de Miguel Asensio, ‘Aspectos internacionales de la protección de datos: las sentencias Shrems y Weltimmo del Tribunal de Justicia’, *La Ley Unión Europea*, núm. 31- Noviembre 2015; *id.*, ‘Competencia y Derecho aplicable en el Reglamento General sobre Protección de Datos de la Unión Europea’, *REDI*, vol. 69 (1), pp. 75-108, para. 12.

⁴³ Should the controller or processor not be established in the Union, Art. 3.2 requires that the processing activities relate to 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 to the monitoring of the data subject behaviour as far as it takes place within the Union. In addition, data subjects whose personal data are processed must be in the Union.

⁴⁴ P. de Miguel Asensio, in *REDI*, 35ff; C. Kohler, ‘Conflict of law issues in the 2016 data protection regulation of the European Union’, *Rivista di Diritto Internazionale Privato e Processuale*, 2016, vol. 3, pp. 653-675, under V, pp. 668-670, 672-673.

⁴⁵ M. Requejo Isidro, ‘La aplicación privada del derecho para la protección de las personas físicas en materia de tratamiento de datos personales en el Reglamento (UE) 2016/679’, *La Ley-Mercantil*, N° 42, Sección Empresa y empresario / Doctrina, Diciembre 2017; B. Kresse, ‘Art. 79’, para. 33.

for the interpretation and application of the provision: should Art. 79.2 be understood as an exception to the general rule - the domicile of the defendant according to Art. 4 of the Brussels Ia Regulation-, it would be strictly interpreted, and restrictively applied.⁴⁶

A second relevant question in relation to Art. 79.2 -in particular to the jurisdictional ground based on the residence of the claimant, a clear *forum actoris*- is whether it is meant only for the benefit of the data subject whose rights have been infringed, or whether it profits as well the associations, entities or organizations alluded to in Art. 80. Relying on the wording of the latter provision, and in light of the unlimited referral it makes to Art. 79, some scholars advocate in favour of the second option.⁴⁷ On the other hand, should the rationale of the CJEU case law on consumer contracts under the Brussels Ia Regulation be projected to this point, the answer would be the opposite. In other words: entities, associations and organizations in the sense of Art. 80 could not rely on the jurisdictional grounds in Art. 79, because the rationale underpinning the privilege (the structural weakness of the individual at stake) do not exist. In addition, the entity would not have been a party to the contract with the data processing controller.⁴⁸ Indeed, these reasoning can be applied in the field of data protection only to some extent (section 4, Chapter II Brussels I regulation refers to *contracts*, whereas the violation of the right to personal data protection may happen outside any contractual relationship between the data subject and the controller, or the processor). At any rate, whether it does or not is still an open question, connected as well with the issue of the coexistence of Art. 79 GDPR and Regulation 1215/2012 we referred alluded to above: an interpretation excluding entities, associations and organizations from the benefit of Art. 79.2 is easier to defend if their access to a court in cross-border cases is ensured by the Brussels Ia Regulation.

Assuming entities are allowed to file a lawsuit before the courts of the habitual residence, the question immediately arises as to what 'habitual residence' is meant in this context: the one of the represented data subject (Art. 80.1)⁴⁹, or rather the entity's habitual residence? In the latter case, it would be necessary to decide whether a single concept prevails - like in the Rome I Regulation,⁵⁰ where it is endorsed to ensure certainty: see recital 39-, or whether a plurality of criteria is admitted - as in art. 63 Brussels Ia, for the 'domicile' of legal persons. Indeed, the reasoning in terms of predictability under the Rome I Regulation, which is a regulation on the applicable law, may not be directly transferable to a different domain, namely that of international jurisdiction. However, the fact that, within the framework of the GDPR, the habitual residence at stake would be that of the entity, thus of a claimant with whom the defendant has not had any previous relation, underpins the more restrictive interpretation.

⁴⁶ See above, under 2.2., the CJEU in case C- 498/16.

⁴⁷ L. Feiler, N. Forgó, 'Art. 79', para. 6.

⁴⁸ Above, under 2.2, the CJEU's reasoning regarding this issue.

⁴⁹ A subsequent question would be, which is the habitual residence of an association, entity or organization representing data subjects who have themselves habitual residence in different MS? It is worth noting, however, that in the mind of the EU lawmaker representative entities only act on behalf of individuals residing or domiciled on the same territory: see Art. 16 of the Proposal on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (above, footnote 14).

⁵⁰ Regulation n° 593/2008, on the law applicable to contractual obligations, OJ, L 177/6.

5 Conclusions

The CJEU decision in Case C-498/16, rendered on January 25, 2018, will not be remembered for what it says. The case itself will, as an outstanding example of strategic litigation of structurally weak parties *vis-à-vis* dominant economic players; and also, because it denounces existing hindrances to the collective redress of consumers and comparable categories of claimants, and the need for a legislative intervention in the area.⁵¹ Moreover, it has stimulated the academic reflection on how a claim similar to the one giving rise to the preliminary reference would be handled under the GDPR, in force as of May 25 of this year.

The European Commission has just published a Proposal on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC.⁵² Should it be enacted without any amendment (an unlikely possibility, to be sure) it would impact on the solutions of the GDPR for with cross-border infringements. The Directive intends to cover data protection - see Recital 6-; the GDPR is listed in Annex I.⁵³ Recital 41 and Art. 16 address the mutual recognition of the legal standing of qualified entities designated in advance in one MS, ensuring they are allowed to seek representative action in another MS. Moreover, according to the Proposal MS shall ensure that where the infringement affects or is likely to affect consumers from different MS, the representative action may be brought to the competent court of a Member State by several qualified entities from different MS, either acting jointly or represented by a single qualified entity.

Conversely, the existing rules regarding international jurisdiction and applicable law would remain unchanged, according to recital 9 and Art. 2.3 of the Proposal.

⁵¹ As stated both by the AG and the CJEU in case C- 498/16.

⁵² Above, footnote 14.

⁵³ According to Recital 6, the Directive 'should cover infringements of provisions of Union law which protect the interests of consumers, regardless of whether they are referred to as consumers or as travellers, users, customers, retail investors, retail clients or other in the relevant Union law'. The 'consumer' category becomes an omni-comprehensive, umbrella notion. It remains to be seen whether the protection granted fits well to the sub-categories (such as that of data subject; see above, under 4.1, on the suitability of applying consumer protection rules to the infringements in the field of personal data protection.)



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