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The case of collective remedies in Data protection

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- Cambridge Analytica/Facebook

- a Facebook app was programmed to gather personal data from more than 87 million users' profiles without their consent shows how crucial data gathering is for online platforms.
- Data subjects were clearly not aware of the type and objectives of the processing, not having consented to a further use of the data gathered by the app.
- The social networking platform failed to perform the monitoring tasks allocated to the data processor in the case of a breach.
- From a legal perspective this was unlawful data processing which could be subject to judicial and administrative proceedings.
 - UK and Italian data protection and communication authorities started investigations resulting in fines imposed to the social network





Collective actions in data protection



- Data subjects is still weaker vis-à-vis that of data processors, particularly in the case of big online companies
- GDPR innovation:
 - Article 80
 - data subjects “shall have the right to mandate a not-for-profit body, organisation or association [...] to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law”.





Transnational collective actions



- Article 81
- Where a competent court of a Member State has information on proceedings, concerning the **same subject matter** as regards processing **by the same controller or processor**, that are pending **in a court in another Member State**, it shall contact that court in the other Member State to confirm the existence of such proceedings.
- 2. Where proceedings concerning the same subject matter as regards processing of the same controller or processor are pending in a court in another Member State, **any competent court other than the court first seized may suspend its proceedings.**
- 3. Where those proceedings are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, **decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.**





PIL and transnational collective actions (I)



- The current legal framework for PILs is still unsatisfactory
 - Brussels I Regulation and the Rome I and Rome II Regulations are all drafted taking as point of reference a conflict between an individual claimant and an individual defendant.
- Article 4 of the Brussels I Regulation provides the possibility of multiple claims being consolidated: choice of jurisdiction designates the **defendant's domicile**.
 - any collective action for violation of data protection would be obliged to sue the data controller at its headquarters in any EU member state, for instance Ireland in the case of Facebook





PIL and transnational collective actions (II)



- Article 7 (2) Brussels I Regulation provides that in the case of tort, delict or quasi-delict, the claimant may sue before the court of the place where the harmful event occurred.
- This allows cases of concurrent jurisdictions.
 - Only if the defendant proves that the harmful event occurred in the place where the decisions regarding the data processing were taken, i.e. at the headquarters of the data processor, will there be no difference in the application of the general rule provided by Article 4 Brussels I.
- In the case of **concurrent jurisdictions**, rules on *lis pendens* may apply
 - Art 81 GDPR provides for a *lex specialis vis-à-vis* Articles 29-34 Brussels I Regulation.





PIL and transnational collective actions (II)



- Which are the effects the decisions of the foreign court on the suspended proceedings?
- A decision in a collective claim is automatically recognised in the other member states according to Article 36 of the Brussels I Regulation without any specific procedure.
- The decision may be used in the suspended proceeding as a proof of the existence or non-existence of the violation, which can be evaluated by the judge.
- However, **no specific guideline is provided by the EU legislator as regards the role of the decision.**





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Conclusions



- Transnational collective claims in the data protection area cannot be exploited yet.
- Brussels I Regulation dedicated to jurisdiction and lis pendens are not apt to address multi-party conflicts.
- Further steps are needed from the European bodies, namely the effort to coordinate the specificities of GDPR enforcement system with amended private international law rules in order to provide an effective transnational collective action that can enhance the opportunities of data subjects to enforce their rights.



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