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# LIABILITY FOR THE UNAUTHORISED USE OF PERSONAL DATA IN SOCIAL NETWORKS: THE CASE FOR COLLECTIVE REDRESS \*

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## Abstract:

This paper analyses liability for the unauthorised use of personal data in social networks such as Facebook. In particular, it presents and shortly comments upon one initiative in Spain to obtain collective redress for damage caused as a result of the so-called Facebook-Cambridge Analytica scandal.

**Keyword:** Facebook, Cambridge Analytica, data protection, collective redress

**Summary:** 1. Introduction. – 2. Promethean fire. – 3. The case for collective redress. – 4. Spain is different. – 5. #MyDataIsMine. – 6. A matter of class. – 7. What is next. – 8. Conclusions.

## 1. Introduction

It is already a common thing to hear that the world's most valuable resource is no longer oil, but data. The amount of published information or data is growing so rapidly that it is often talked of as a 'data explosion'. The effects of this abundance are felt in many ways, and inevitably some conflicts arise.

Data value usually increases when data is big. Big data provides a plethora of new opportunities and makes things which were previously unthinkable, possible. For instance, big data makes it possible to profile a person starting from the scat-

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tered pieces of personal information which the same person has been leaving through the Internet. Personal profiling in its turn makes it possible to offer that person personalised offers of products or services, including medical treatments or the like. Knowing the potential addressee of advertising better proffers the obvious advantage that the person in question will be in a better position to receive information about commercial offers which may be to their interest.

However all this comes at a price, since personal profiling entails risks as well. Many Internet users have fallen for the idea that services like Facebook are ‘free’, when in fact they are not.

This paper explores one of the scenarios where personal profiling leads to harm caused to the individual whose information is used by another person. In particular, a violation of the rights to privacy and data protection may occur whenever someone gains access to another’s personal data without authorisation. This is essentially what happened in the so-called ‘Facebook-Cambridge Analytica scandal’, where it is said that a private company was able to create personal profiles of thousands, if not millions, of people around the world, without their consent, by means of the Facebook social network. Whenever these kind of scenarios take place, it may be asked whether or not there is the possibility of some kind of redress for the affected data subjects, and if so, which.

Thus this paper analyses liability for the unauthorised use of personal data on social networks. In particular, it presents and briefly comments upon one initiative in Spain to obtain collective redress for damage caused from the social network under discussion.

## 2. Promethean fire

As is well known, the Facebook–Cambridge Analytica scandal was a major controversy in 2018, where the latter company allegedly harvested the personal data of millions of people’s Facebook profiles without their authorisation to use it for political advertising. Cambridge Analytica, a company which had been created in 2013, managed to get access to a massive amount of personal data without the consent of the data subjects at issue. Although both companies involved basically denied any wrongdoing, it is alleged that around 50 million personal profiles were mined for data. The scandal attracted a great deal of public attention, in part because it was alleged that Donald Trumps’ election victory as well as the Brexit vote may have profited from such a data misuse.

Access to personal data seems to have been gained through the use of a mobile application (or ‘app’) called ‘thisisyourdigitallife’. The app was created by an academic called Aleksandr Kogan and his company Global Science

Research in 2004<sup>1</sup>. Users downloaded the app from the Internet and were paid to take a psychological test. However this company not only gathered personal data from the users themselves but also from their Facebook friends by means of the app in question<sup>2</sup>. Kogan then shared the data with Cambridge Analytica, which developed software to help influence choices in elections, according to a the company's mastermind-turned-whistle-blower<sup>3</sup> Christopher Wylie.

According to Wylie, his job as a 'director in research' with Cambridge Analytica – where he served for one year and a half – consisted in designing psychological profiles to influence both the Brexit vote and the 2016 presidential election. The conservative strategist Steve Bannon –who later worked in President Trump's White House– was Wylie's boss<sup>4</sup>. Such influence was achieved by means of disinformation campaigns, which were microtargeted at people considered to be more prone to conspiratorial thinking, according to a book written by Wylie<sup>5</sup>. Following this account, 'Facebook's data was weaponised by the firm' and 'left millions of Americans vulnerable to the propaganda operations of hostile foreign states'<sup>6</sup>. From the whistle-blower's perspective, Cambridge Analytica was able to take a large amount of data and use it to design and deliver targeted content capable of moving public opinion on a large scale, and that was because Facebook's loosely supervised permissioning procedures made it surprisingly easy to do it<sup>7</sup>. In fact, it seems hard to imagine how such a data misuse would have been possible without a data set as large as the one managed by Facebook in the very first place. As one scholar has aptly put it, Facebook was at the time 'like the data set of the gods'<sup>8</sup>. Thus, Kogan

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<sup>1</sup> Kogan was a psychologist who had earned an appointment as a lecturer at Cambridge University in 2012. See J.C. WONG-P. LEWIS-H. DAVIES, *How academic at centre of Facebook scandal tried – and failed – to spin personal data into gold* (2018) *Guardian*, available at <https://www.theguardian.com/news/2018/apr/24/aleksandr-kogan-cambridge-analytica-facebook-data-business-ventures> (accessed 1 May 2020).

<sup>2</sup> See Channel 4 News, *Here's everything you need to know about the Cambridge Analytica scandal* (2018), available at <https://www.cnn.com/2018/03/21/facebook-cambridge-analytica-scandal-everything-you-need-to-know.html> (accessed 1 May 2020).

<sup>3</sup> As S. ZUBOFF, *The Age of Surveillance Capitalism* (London 2019), 278, calls him.

<sup>4</sup> See Forbes, *Christopher Wylie* (2020), available at <https://www.forbes.com/profile/christopher-wylie/#6b36729f7f47> (accessed 1 May 2020).

<sup>5</sup> See C. WYLIE, *Mindf\*ck. Inside Cambridge Analytica's Plot to Break the World* (London 2019), 5 ff. As Wylie explains, in the practice of microtargeting 'machine learning algorithms ingest large amounts of voter data to divide the electorate into narrow segments and predict which individual voters are the best targets to persuade or turn out in an election (*ibidem* 22).

<sup>6</sup> *Ibidem* 5 and 66.

<sup>7</sup> *Ibidem* 95.

<sup>8</sup> See S. LEVY, *Facebook. The Inside Story* (London 2020), 406. According to the same author, even if Facebook had always set its terms so that information could not be retained, transferred, or

acted as a sort of Prometheus by stealing the divine fire and making it possible for Cambridge Analytica to misuse it.

### 3. The case for collective redress

As seems obvious, in a case like the one described above the number of persons affected by the data misuse is very large. Not only was personal information gathered from the app's direct users, but also their Facebook friends. Data provided by themselves to Facebook was used to create psychological profiles with which to categorise them. Those who seemed more vulnerable to psychological manipulation were targeted by Cambridge Analytica so their vote could be changed if needed. In essence, it is not only the right to privacy that is at stake here – in those legal systems where such a right is protected – but also the right to data protection. Facebook failed to prevent the misappropriation of data from happening. Moreover, it failed to timely inform the affected users. What is worse, once it looked into the matter, it discovered hundreds of other developers who had violated its rules, and suspended 69,000 apps, including 10,000 which may have misused Facebook user data<sup>9</sup>. That in itself proves that Facebook could have done better in the past.

When considered in an isolated way, harm is very small indeed. Therefore, from an economic perspective each individual affected has little incentives to litigate. However, when considered from a collective or macro perspective, harm is considerable. Furthermore, the nature of harm sustained by the victims is homogenous. When these conditions concur, there are good reasons from a procedural economy perspective to put all the single claims together and let a single court decide them all as a whole. Such a collective claim also avoids the risk of the contradicting court decisions, which could be issued if each victim filed a separate claim on their own. If one bears all this in mind, it cannot come as a surprise that since the scandal there have been several collective claims running in parallel in different countries –as will be shown below.

### 4. Spain is different

In the case of Spain, there are two separate initiatives in connection with the scandal mentioned above which are worth mentioning.

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sold, it had done very little to enforce those rules, and it still had no way of actually knowing what happened to data after it left Facebook (*ibidem* 410).

<sup>9</sup> *Ibidem* 430.

The first is a complaint filed by a consumer association called FACUA-Consumers in Action<sup>10</sup> before the Spanish Agency on Data Protection (*Agencia Española de Protección de Datos* or AEPD for short)<sup>11</sup>. The AEPD is a public administration independent agency which is entrusted with the protection of personal data in Spain. In accordance with the administrative nature of the agency, it does not settle private law matters and does not thus award compensation to the victims, however it may fine the liable parties. This is in line with the general stance adopted by Spanish law, whereby public authorities may impose fines on the infringers but are generally not allowed to decide on damage compensation to private parties<sup>12</sup>. The latter can nevertheless file a claim before the court. The scope and functioning of the Agency is provided for by domestic legislation, namely the Organic Act on Personal Data Protection and the Safeguard of Digital Rights 2018<sup>13</sup>.

The second initiative, which will be elaborated on further in this paper, is the claim filed by a different consumer protection association, called Organización de Consumidores y Usuarios (OCU)<sup>14</sup>. It is a consumer organisation in the form of a private law association created in 1975 and thus created non for profit. It currently has about 300,000 members.

The OCU claim is more interesting than the one mentioned above for several reasons. To start with, the claim is filed against Facebook in connection with the scandal referred to before. According to the claimant association, the problem is not only the violation of data protection but also the business model adopted by the defendant company. The claim was filed in October 2018 before the Commercial Court No 5 of Madrid. In July 2019, the claim was allowed for further study by the court, thus it was not rejected on preliminary

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<sup>10</sup> FACUA stands for “Federación de Asociaciones de Consumidores y Usuarios de Andalucía”. Currently the association has extended its radius of operation beyond the region of Andalusia to which it was initially devoted and is one of the major consumer protection associations in the country. See the association’s website at [www.facua.org/english](http://www.facua.org/english) (accessed 1 May 2020).

<sup>11</sup> See the Agency’s website (available in Spanish only) at [www.aepd.es/es](http://www.aepd.es/es) (accessed 1 May 2020).

<sup>12</sup> See E.C. LOBATO, *La liquidación de daños entre particulares en el procedimiento administrativo* (2003) 2 (1) *InDret*, 2.

<sup>13</sup> *Ley Orgánica 3/2018*, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales (Official Gazette, *Boletín Oficial del Estado*, BOE, no 294, 6 December 2018). Available at [www.boe.es/eli/es/lo/2018/12/05/3](http://www.boe.es/eli/es/lo/2018/12/05/3) (accessed 1 May 2020). In legal scholarship generally see M. A. ARENAS RAMIRO – A. ORTEGA GIMÉNEZ (eds.), *Protección de datos. Comentarios a la Ley Orgánica de Protección de Datos y Garantía de Derechos Digitales* (en relación con el RGPD (Madrid 2019), with further references.

<sup>14</sup> Its webpage can be found at [www.ocu.org/](http://www.ocu.org/) (accessed 1 May 2020).



grounds<sup>15</sup>. The text of the claim itself has not been published<sup>16</sup>.

Pursuant to what the claimant has explained in press notes and the media, the claim is based on the lack of the users' consent to use their data for political profiling. Facebook users were not even informed about what the aim for using their data was. According to OCU, data can be the object of a property right, and thus it belongs to the user only. Therefore, each user alone is entitled to decide about data use. Leaving aside for now whether such a proprietary approach is statutorily correct or even theoretically sound, the claim further relies on the fundamental right to personal data (enshrined in the Spanish Constitution, art 18.4)<sup>17</sup>. According to OCU, this is an instance where it becomes necessary to protect an interest of a diffuse nature (*intereses colectivos difusos*)<sup>18</sup>.

The claimant requests several things from the court. First, a declaration that the standard terms on which data gathering from Facebook was made possible are illegal and therefore void. Second, cessation and abstention in the future, so further violations are prevented from occurring. And third, and perhaps most interestingly, OCU claims compensation for harm caused to each Spanish Facebook user. The compensation award requested is established at 'at least' 200 € per person. Bearing in mind that in Spain there were around 23 million users at the time when the events took place, that would entail one of the highest compensation sums ever to be awarded by a Spanish court, should the claim succeed<sup>19</sup>.

The previous is both noteworthy and astonishing. To start with, it may strike the reader that the compensation sum requested is of 'at least' 200 €<sup>20</sup>. This is in contrast with the general provisions of Spanish procedural law, according to

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<sup>15</sup> According to information provided by OCU, Admitida a trámite la demanda colectiva de OCU contra Facebook, 9 July 2019, available at <https://www.ocu.org/organizacion/prensa/notas-de-prensa/2019/admision-demanda-facebook>.

<sup>16</sup> A request from the author to obtain a copy was rejected by an OCU official on the basis of intellectual property protection.

<sup>17</sup> An official English translation by the Spanish Official Gazette can be found online under BOE, The Spanish Constitution, available at [www.boe.es/legislacion/documentos/Constitucion\\_INGLES.pdf](http://www.boe.es/legislacion/documentos/Constitucion_INGLES.pdf) (accessed 1 May 2020).

<sup>18</sup> See Radio Televisión Española, *La OCU demanda a Facebook por la cesión irregular de datos de sus usuarios españoles*, 11 October 2018, [www.rtve.es/noticias/20181011/ocu-demanda-facebook-cesion-irregular-datos-usuarios-espanoles/1817367.shtml](http://www.rtve.es/noticias/20181011/ocu-demanda-facebook-cesion-irregular-datos-usuarios-espanoles/1817367.shtml) (accessed 1 May 2020).

<sup>19</sup> The number of Facebook users in Spain has declined since then. According to data provided by Statista, Facebook has lost approx. 2 million users in this country in the last two years. See Statista, *Número de usuarios de Facebook en España de 2014 a 2019* (2020), available at <https://es.statista.com/estadisticas/518719/usuarios-de-facebook-en-espana/> (accessed 1 May 2020).

<sup>20</sup> See OCU, *OCU presenta una demanda colectiva contra Facebook por cesión irregular de datos*, 11 October 2018, available at [www.ocu.org/organizacion/prensa/notas-de-prensa/2018/demandafacebook111018](http://www.ocu.org/organizacion/prensa/notas-de-prensa/2018/demandafacebook111018) (accessed 1 May 2020).

which the object of the claim has to be ‘precise and clear’ (pursuant to art 399.1 of the Civil Procedure Act or *Ley de Enjuiciamiento Civil*, hereinafter LEC)<sup>21</sup>. From a practical perspective, it is worth mentioning that under Spanish law a court is prevented from awarding the claimant more than the latter has claimed (art 218.1 LEC).

Moreover, this is actually a very low amount, at least if one compares the same with the one asked for in similar claims filed in other countries. For instance, in the Austrian case *Max Schrems v Facebook* (pending before Austrian Supreme Court at the time of sending this paper to press), the compensation sum requested was 500 € per user<sup>22</sup>. And in a class action filed in the US the claim was 1,000 USD per user (totaling approx. € 5,200 million to the change)<sup>23</sup>.

## 5. #MyDataIsMine

As has been said, OCU filed its claim in October 11th, 2018 before a commercial court in Madrid. This is not an isolated case since there have been sister claims in other countries as well. The alleged purpose of the claim is ‘to compensate all users who could be the victims of data misuse’. According to Facebook, the number of victims of Cambridge Analytica in Spain is approx. 137,000<sup>24</sup>.

When OCU received notice of the case, it started a campaign in the media called ‘#MisDatosSonMios’<sup>25</sup> (#MyDataIsMine, in the English translation) and invited the affected parties to support the claim. OCU has not made clear what kind of support it was seeking, in particular whether it was merely begging for

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<sup>21</sup> See *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil* (BOE no 7, 8 January 2000), available at [www.boe.es/buscar/act.php?id=BOE-A-2000-323](http://www.boe.es/buscar/act.php?id=BOE-A-2000-323) (accessed 1 May 2020).

<sup>22</sup> Mr. Schrems filed further claims afterwards when the General Data Protection Regulation was passed. See D. SCALLY, *Max Schrems files first cases under GDPR against Facebook and Google* (2018) *The Irish Times*, available at <https://www.irishtimes.com/business/technology/max-schrems-files-first-cases-under-gdpr-against-facebook-and-google-1.3508177> (accessed 1 May 2020).

<sup>23</sup> See O. BOWCOTT - A. HERN, *Facebook and Cambridge Analytica face class action lawsuit* (2018) *The Guardian*, available at <https://www.theguardian.com/news/2018/apr/10/cambridge-analytica-and-facebook-face-class-action-lawsuit> (accessed 1 May 2020).

<sup>24</sup> To be more precise, exactly 136,985 Facebook users downloaded the app. See L.J. SÁNCHEZ, *Un año después de Cambridge Analytica, los expertos creen que un escándalo similar podría ser posible en nuestro país* (2019) *Confilegal*, available at <https://confilegal.com/20190320-un-ano-despues-de-cambridge-analytica-los-expertos-creen-que-un-escandalo-similar-podria-ser-posible-en-nuestro-pais/> (accessed 1 May 2020).

<sup>25</sup> See the webpage by OCU, *Mis datos son míos, Mr. Facebook*, available at <https://www.ocu.org/especiales/misdatossonmios/> (accessed 1 May 2020).

funds to continue the claim, merely moral support, or legally joining other claimants to the civil procedure. According to the press, OCU is going to ‘represent all Facebook users in Spain’. However, the form used in the OCU website asks the supporter to indicate whether she is a Facebook user or not. This suggests that a non-user can thus ‘support’ the campaign but not necessarily join the court proceedings or even count as a victim. At the time of sending this paper to the editor, 47,328 persons have joined the campaign. This is a notably small amount, if one takes the total number of Facebook users in Spain into consideration, as referred to above. Nonetheless, it seems a huge amount even for collective claims under Spanish law.

The OCU claim must be read against the background of a ‘My Data is Mine Declaration’, i.e. some sort of manifesto signed by OCU itself together with several foreign consumer organisations, namely Altroconsumo, Deco-Proteste, Proteste and Test-Aankoop/Test-Achats<sup>26</sup>. The declaration starts from the basis that the new data economy is a game-changer, it stresses the emergence of ‘predictive profiling’ and the Internet of Things (IoT) and that users should be recognised as data ‘owners’. According to the same, ‘[w]e cannot relinquish our autonomy and freedom in exchange for our comfort’. Moreover, the signatory parties state that complying with legislation is not enough. As their text goes, ‘[a]lmost fully account’ for added value should be provided to the user (benefits should be shared on a fair basis between data controllers and data subjects). Moreover, it continues, ‘[c]onsumers are crucial catalysts of a more sustainable and responsible digital value chain to make the data economy flourish’.

## 6. A matter of class

Although it is obviously too early to make any prognostic judgement about the prospective future (or lack of it) of the claim, it may be interesting to consider for a while the basis on which it is grounded, on which logically most of its strengths or weaknesses depend. The claim starts from the fact that there has been a data leak, since data which was controlled by Facebook ended up in the hands of another company without the users consenting or even knowing. Moreover, OCU stresses that Facebook has failed to provide a satisfactory explanation. In fact, there is no evidence that Facebook has adopted any steps to prevent something similar from happening again<sup>27</sup>. Pursuant to the claim, Face-

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<sup>26</sup> Available at <https://www.mydataismine.com/manifest> (accessed 1 May 2020).

<sup>27</sup> See J.C. WONG, *The Cambridge Analytica scandal changed the world – but it didn’t change Facebook* (2019) *The Guardian*, available at <https://www.theguardian.com/technology/2019/mar/17/the-cambridge-analytica-scandal-changed-the-world-but-it-didnt-change-facebook> (accessed 1 May 2020).

book behaviour compromised several legally protected interests, namely privacy, data protection, users autonomy (#NoSomosMarionetas [We are not puppets]), and data ownership (#MisDatosSonMios).

In its turn, Facebook has replied that there is actually no proof of data sharing and that data obtained was from people who downloaded the app, meaning there was no violation whatsoever<sup>28</sup>.

The claim's basis is similar to the one of other claims in foreign countries. The Cambridge Analytica scandal has given rise to more than thirty class actions internationally, and according to an opinion this could be just the tip of the iceberg<sup>29</sup>. A UK organisation called Fair Vote<sup>30</sup> has prepared a claim along the lines of the one filed by OCU in Spain. Facebook has actually been brought to court not only because of the Cambridge Analytica app but because of other third-party apps as well. Among others, it has been sued in the in the US District Court Northern District of California because of a data hacking which affected 50 million users (e.g. *Carla Echavarria and Derrick Walker v Facebook, Inc.*)<sup>31</sup>. Another claim – coincidentally, filed before the very same court as the previous one – was based on misconduct on Facebook's part because of users' location tracking when location had been deactivated (*Brett Heeger v Facebook*)<sup>32</sup>. In a different case, the claimant complained of Facebook logging of text messages and phone calls through its smartphone app (*John Condelles III v Facebook*)<sup>33</sup>; the claimant seeks at least USD 5 million and to turn the suit into

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<sup>28</sup> See S. SALINAS, *Zuckerberg on Cambridge Analytica: "We have a responsibility to protect your data, and if we can't then we don't deserve to serve you"* (2018) *CNBC*, available at <https://www.cnn.com/2018/03/21/zuckerberg-statement-on-cambridge-analytica.html> (accessed 1 May 2020).

<sup>29</sup> See J.J. ROBERTS, *Facebook Has Been Hit by Dozens of Data Lawsuits. And This Could Be Just the Beginning* (2018) *Fortune*, available at <https://fortune.com/2018/04/30/facebook-data-lawsuits/> (accessed 1 May 2020).

<sup>30</sup> See the campaign webpage under <https://fairvote.uk/home/facebook-claim/> (accessed 1 May 2020).

<sup>31</sup> *Carla Echavarria and Derrick Walker v Facebook, Inc.*, no. 5:18-cv-05982 (N.D. Cal. Sept. 28, 2018). On which see E. MELAMPY-A. LIU, *Echavarria v Facebook: Class Action Complaint Seeks Damages for the Massive Facebook Data Breach* (2018) *JOLT Digest*, available at <https://jolt.law.harvard.edu/digest/echavarria-v-facebook-class-action-complaint-seeks-damages-for-the-massive-facebook-data-breach> (accessed 1 May 2020).

<sup>32</sup> C-3:18-cv-06399, *Heeger v Facebook*, California Northern Court, 11.10.2018. The complaint can be found at <https://www.classaction.org/media/heeger-v-facebook-inc.pdf> (accessed 1 May 2020). On which see M.C. KELLY - J. FISHMAN, *Class Action Suits Challenge Facebook, Google Over Location Tracking* (2018), *JOLT Digest* available at <https://jolt.law.harvard.edu/digest/class-action-suits-challenge-facebook-google-over-location-tracking> (accessed 1 May 2020).

<sup>33</sup> C- 3:18-cv-02727, *Condelles III v Facebook*, District Court, N.D. California, 9.5.2018. See the

a class action across the US<sup>34</sup>. Just to provide another example, Facebook was also sued because of incidents of scanning of private messages without consent (*Campbell v Facebook*)<sup>35</sup>. In a settlement agreement, Facebook agreed to cessation of scanning, among other practices<sup>36</sup>.

## 7. What is next

The OCU claim, commented upon earlier, is extremely interesting for several reasons. To understand these, it is important to provide some context on the general framework under Spanish law. Spanish law does not have a ‘class action’ strictly speaking, and therefore the case under comment is no true class action. Accordingly, a single individual cannot file a class action under Spanish civil procedural law. Rather, legal scholarship describes the existing collective claim, which can indeed be filed, as a sort of ‘collective compensatory action’ which is not entirely equivalent to the US class action<sup>37</sup>. At any rate, in this paper the traditional terminology of ‘class action’ will be used for the sake of clarity and brevity.

Spanish legal scholars generally agree that the statutory framework on the Spanish class actions is confusing. As a civil law jurisdiction, substantive rules are provided in a Civil Code (*Código Civil*)<sup>38</sup>, which dates from 1889 but has been amended many times. Consumer law has grown outside the Code in several separate statutes, the principal one being a consolidated Consumer Protection

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case file at [https://www.pacermonitor.com/public/case/24465744/Condelles\\_III\\_v\\_Facebook\\_Inc](https://www.pacermonitor.com/public/case/24465744/Condelles_III_v_Facebook_Inc) (accessed 1 May 2020).

<sup>34</sup> See S. GIBBS, *Facebook hit with class action lawsuit over collection of texts and call logs* (2018) *The Guardian*, available at <https://www.theguardian.com/technology/2018/may/11/facebook-class-action-lawsuit-collection-texts-call-logs> (accessed 1 May 2020).

<sup>35</sup> C-13-5996 (WL 3581179), *Campbell v Facebook*, District Court, N.D. California, 18.8.2017, appeal docketed C-17-16873, 9.9.2015. The complaint is available at <https://digitalcommons.law.scu.edu/historical/603/> (accessed 1 May 2020).

<sup>36</sup> See A. BHARATKUMAR-L. REMBAR, *Campbell v Facebook: California District Judge Approves Final Class Action Settlement Over Facebook’s Use of URL Data* (2018) *JOLT Digest*, available at <https://jolt.law.harvard.edu/digest/campbell-v-facebook-california-district-judge-approves-final-class-action-settlement-over-facebooks-use-of-url-data> (accessed 1 May 2020).

<sup>37</sup> See J.J. MARÍN LÓPEZ, *Las acciones de clase en el derecho español* (2001) 1 (3) *Indret*, 3, available at [https://indret.com/wp-content/themes/indret/pdf/057\\_es.pdf](https://indret.com/wp-content/themes/indret/pdf/057_es.pdf) (accessed 1 May 2020).

<sup>38</sup> *Real Decreto* de 24 de julio de 1889 por el que se publica el Código Civil (Madrid Gazette, *Gaceta de Madrid*, 206, 25 July 1889). An official translation into English has been published by the Spanish Ministry of Justice (Ministerio de Justicia), *Spanish Civil Code*, Madrid, BOE, 2013. It can be found under <http://derechocivil-ugr.es/attachments/article/45/spanish-civil-code.pdf> (accessed 1 May 2020).

Act from 2007<sup>39</sup>. Private procedure is basically provided for in the Civil Procedure Act (LEC), mentioned above.

The procedural rules on class actions are indeed far from being clear because of deficient legal drafting. The LEC, mentioned above, provides the general rule on the standing of consumer associations to sue. Pursuant to art 11.3, *When those harmed by a harmful act are an indeterminate or difficult to determine plurality of consumers or users, the standing to sue in defense of these diffuse interests will correspond exclusively to the consumer and user associations that, according to the law, are representative*<sup>40</sup>. However, it is doubtful whether in the case at stake it is correct to talk of ‘diffuse interests’ (*intereses difusos*). As has been seen above, the interests harmed by Facebook in the context of the Cambridge Analytica scandal seem to be not of a truly diffuse nature, but in fact they are rather individual and homogeneous interests, namely, those of many consumers which can be very easy to determine. The relevant question is merely whether they were Facebook users when the facts occurred.

The previous comments lead to the conclusion that neither OCU, nor any other consumer protection association, has an exclusive standing to sue in this case. Rather, since those harmed are ‘perfectly determined’ or ‘easily determinable’, as the LEC provides (in art 11.2), those associations do indeed have standing to sue, but so do the groups of affected persons.

It remains to be seen whether the claim will be allowed or not. At any rate, the judge will call any interested parties to the court (pursuant to art 15 LEC). Thereby, any individual consumer who may have been harmed by the data misuse may have the opportunity to take part in the proceedings (art 15.1 para 1 LEC). The complaint will be eventually published by the court secretary. The Public Prosecutor, who has a more active role in private law cases under Spanish law than under other jurisdictions, may also be a party in the proceedings whenever it is considered that the social interest of the case so requires (art 15.1 para 2 LEC). Since, as has been noted, in this case the potential victims are easily identifiable, OCU may be deemed to have already complied with the statutory requirement (pursuant to art 15.2 LEC) that it notify all the interested parties about the intention to file a claim – given that it already campaigned as de-

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<sup>39</sup> *Real Decreto Legislativo 1/2007*, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (BOE 287, 30 November 2007), available at <https://www.boe.es/buscar/act.php?id=BOE-A-2007-20555> (accessed 1 May 2020).

<sup>40</sup> Translation by the author. The original Spanish text reads as follows: *Cuando los perjudicados por un hecho dañoso sean una pluralidad de consumidores o usuarios indeterminada o de difícil determinación, la legitimación para demandar en juicio la defensa de estos intereses difusos corresponderá exclusivamente a las asociaciones de consumidores y usuarios que, conforme a la Ley, sean representativas.*

scribed above. If the court considers instead that it is too difficult for the claimant association to determine who the interested parties are, the proceedings will be suspended for a time period not exceeding two months, after which it will carry on with the consumers who have come to the court (pursuant to art 15.3 LEC). Any other consumers will not be allowed to join the case. However, should the claim prevail, they court may individually determine which consumers may benefit from the compensation award (art 221.1 and 519 LEC).

One of the more controversial issues in the case may be that of damage sustained by the parties. It does not seem entirely clear how the 200 € amount was established. OCU states that this should be compensating non-pecuniary loss (*daño moral*) sustained by the victims. However, damage assessment in the case of this kind of damage is obviously not as clear-cut as in the case of patrimonial damage (*daño patrimonial*, as it is called in Spanish). Spanish courts tend to be quite generous with regard to non-pecuniary loss compensation, although the criteria on which the precise award is based are not always apparent<sup>41</sup>.

At any rate, the present case may pave the way for other claims in the future, or not, depending on the outcome. The case may be a success anyway (in terms of publicity for the claimant organisation), which seems to have won some additional notoriety because of the claim.

## 8. Conclusions

The Facebook-Cambridge Analytica scandal is an excellent example of the risks posed by big data. Although it has attracted a lot of attention it does not seem to be an isolated case, but merely a symptom of the way in which capitalism operates in the digital realm<sup>42</sup>. In this particular case, personal data of millions of Facebook users was misused for political advertising without the data subjects' consent or even their being aware of it. It seems clear that Facebook negligently failed to adopt the steps required to prevent such a data misappropriation from taking place. Thus this is a clear case for a compensation claim based on the failure to secure the data and avoid such leaks. Even when Facebook requested that Cambridge Analytica and Wylie erase the data, Facebook never followed the request up and performed no due diligence<sup>43</sup>. It is no sur-

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<sup>41</sup> A scholarly opinion even complained that the Spanish courts munificence to that regard was in itself a scandal. See L.M. DIEZ-PICAZO, *El escándalo del daño moral* (Madrid 2008).

<sup>42</sup> According to S. ZUBOFF (fn 3) 280, Cambridge Analytica 'merely reoriented the surveillance capitalist machinery from commercial markets in behavioral futures toward guaranteed outcomes in the political sphere'.

<sup>43</sup> As explained by another whistle-blower, see B. KAISER, *Targeted. My Inside Story of*

prise, then, that several class action suits have been filed in different countries.

In Spain, the class action filed by the OCU, a major consumer protection association, has taken the lead and has attracted a great deal of public attention. However the huge number of potential victims, the lack of clarity as to how the damages are assessed, and a deficient statutory framework cast some doubts as to the outcome of the case now before the courts. In the meantime, it seems that Facebook is making use of every resource it can avail itself of to delay the court proceedings – including challenging the jurisdiction of the Spanish courts or requesting every document to be translated<sup>44</sup>. Whereas it is unclear whether Facebook has changed enough as to avoid anything similar from happening again, it could be said that the OCU has already won the case, at least in terms of notoriety. At any rate, it remains now for the Spanish court to show if – and how much – privacy and data protection matter under Spanish law.

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*Cambridge Analytica and How Trump, Brexit and Facebook Broke Democracy* (New York 2019), 317.

<sup>44</sup> Pursuant to a press note by OCU, *Caso Facebook: un nuevo paso hacia la compensación para todos los afectados* (2020), available at <https://www.ocu.org/organizacion/prensa/notas-de-prensa/2020/facebookresolucionitaliana130120> (accessed 1 May 2020).