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About personal data protection from a collective perspective

A proposito di protezione dei dati personali in prospettiva collettiva

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Abstract

The contribution moves from the observation that individual remedies alone are insufficient for the protection of personal data and examines the main collective protection instrument provided for in the field of data protection, article 80 of the GDPR, highlighting its strengths and weaknesses.

Il contributo muove dalla constatazione della insufficienza dei rimedi solo individuali per la protezione dei dati personali ed esamina il principale strumento di tutela collettiva previsto in materia di data protection, l'art. 80 GDPR, mettendone in evidenza luci e ombre.

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Summary: 1. The relationship between class actions and the right to privacy. – 2. The aggregate protection of personal data in EU General Data Protection Regulation 2016/679. – 3. The state of the art in Italy. – 4. The Facebook case.

1. The relationship between class actions and the right to privacy.

In today's digital society, the limitations of the individual dimension of interests harmed by mass offences are evident, as is the need for collective judicial protection tools that can overcome the obstacles to access to justice inherent in serial litigation.[1]

Multi-party litigation allows for the protection of multiple interests: the individual interests underlying the rights of the injured parties; the individual interest of the defendant in being able to predict and manage the costs associated with serial litigation; the general interest in the rational and efficient use of judicial resources and the consistency of trial outcomes; the general interests in the proper functioning of markets, the competitiveness of economic systems and the maintenance of democratic order.[2]

The decision to promote the adoption of aggregate protection instruments in order to achieve effective protection in cases of widespread interests is an approach already adopted by the European legislator; however, this policy choice clashes with what is still a fragmented intervention, the effects of which have a direct impact on the instruments available at national level.

This is clearly evident in the case of personal data protection, where, despite increasing instances of massive breaches of data protection rules, the possibility for data subjects to use forms of aggregate protection is only available in some Member States.

2. The aggregate protection of personal data in EU General Data Protection Regulation 2016/679.

Among the innovative contents of EU Regulation 2016/679 (GDPR) is the provision in Article 80, which recognises the possibility for data subjects to exercise their rights through a mandate to non-profit associations or organisations that can represent them both in administrative proceedings before the Data Protection Authority and in judicial proceedings before civil courts.

This provision is part of a broader debate on the issue of collective

[1] The complexity of remedial measures in the field of data protection is highlighted, for example, by G Comandè, under Article 15, in FD Busnelli and CM Bianca (eds), *Commentario al D.Lgs. 30 giugno 2003, n. 196 "Codice della privacy"* (Commentary on Legislative Decree No. 196 of 30 June 2003, "Privacy Code") (Cedam 2007) 364.

[2] M Federico, 'European Collective Redress and Data Protection Challenges and Opportunities' (2023) 1 MediaLaws, 86: "*group actions are not only a deterrent to businesses engaging in unlawful conducts; more importantly, they may grant individuals effective relief*".

protection in various legal areas at European level.[3]

Unfortunately, the approach adopted by the Regulation does not reduce this risk of fragmentation, as the legislator chose not to outline a European collective action, but rather to define a European right to collective action.[4]

The Regulation establishes that data subjects have the right to initiate collective actions, without defining this instrument, leaving it to Member States to decide on the characteristics and procedural rules to be applied.

In the absence of precise regulatory guidance in the current framework provided by the Regulation, Member States therefore have broad discretion.

There are two main options available to national legislators.

The first option is to extend the applicability of existing rules on collective actions to the field of personal data protection: this is the path taken by France, where consumer protection legislation has been extended to include personal data protection, with the possibility of using the *action de groupe* to bring an injunction without, however, being able to claim damages.[5]

Some useful elements can be found in the case law of the Court of Justice of the EU, and in particular in the Schrems II case (C-498/16), where the Court did not exclude the possibility for a data subject, as a consumer, to use the collective redress instruments available at national level in the case of class actions (where the class of data subjects have the common characteristic of being residents of the same Member State).[6]

The second option is to introduce new legislation setting out in detail the applicable procedure, standing to sue, the effects of decisions, coordination between individual and "aggregate" actions, and finally the coordination of actions before the supervisory authority and the courts.

From a procedural point of view, Article 80(1) of the GDPR provides that the data subject has the right to authorise a body, organisation or non-profit association, duly constituted under the law of a Member State and pursuing objectives of public interest, as well as being active in the field of protecting the rights and freedoms of data subjects, to lodge a complaint on their behalf.

From reading paragraph 1, it is clear that organisations and associations play an active role in promoting the protection, and possibly even compensation, of data subjects, provided that they meet two requirements: (i) they are established under the law of a Member State; (ii) they are active in the field of protecting the rights and freedoms of data subjects, pursuing these objectives in their statutes.

The first is a purely formal requirement.

The second requirement, on the other hand, presupposes an investigation to be carried out with regard to the actual activity, both through scrutiny of the entity's statutes and through effective verification of activities in the field of

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[3] M Federico, *Protezione dei dati personali e tutela collettiva. Itinerari di comparazione tra Europa e Stati Uniti* (Giappichelli 2024), 193 ff.

[4] F Casarosa, 'La tutela aggregata dei dati personali nel Regolamento UE 2016/679: una base per l'introduzione di rimedi collettivi?', in A Mantelero and D Poletti (eds), *Regolare la tecnologia: il Reg. UE 2016/679 e la protezione dei dati personali. Un dialogo tra Italia e Spagna* (Pisa University Press 2018), 237.

[5] M Federico, *Protezione dei dati personali e tutela collettiva. Itinerari di comparazione tra Europa e Stati Uniti* (n 2), 214.

[6] G Finocchiaro, 'La giurisprudenza della Corte di Giustizia in materia di dati personali da Google Spain a Schrems' (2015) Dir. Inf. e Inform., 779 ff.

protecting the rights and freedoms of data subjects.

Article 80(2) of the GDPR, on the other hand, provides that a body, organisation or association with the same characteristics as those described in paragraph 1 may act, regardless of the mandate conferred by the data subject, both before the supervisory authority and before the ordinary national courts, if it is considered that the rights of a data subject have been infringed as a result of the processing.

With regard to this provision, prevailing doctrine has held that in order to be granted an institutional mandate ex lege, not only statutory but also substantive checks must be successfully completed with regard to the characteristics referred to in Article 80(1).

Finally, Article 84 provides that Member States shall lay down rules on other penalties for infringements of Chapter VIII of the Regulation, in particular with regard to infringements that are not subject to the administrative penalties referred to in Article 83 of the Regulation.[7]

3. The state of the art in Italy.

The Italian legislator has not specifically addressed the issues listed above, effectively leaving their interpretation to legal doctrine and case law: this is no easy task.[8]

Article 80 of Regulation 2016/679 identifies non-profit associations and organisations as legitimate representatives acting on behalf of personal data controllers.

In order to ensure that the representative acts in the interests of the protected group and not for personal purposes, European legislation has imposed minimum reputational criteria: the association or organisation must be non-profit-making; it must be duly established in accordance with applicable national rules; it must be active in the field of protecting the rights and freedoms of data subjects with regard to the protection of personal data.

The Italian legislator has followed the same definition, recognising active legal standing, according to the amended Article 142 of the Privacy Code and Article 10 of Legislative Decree 150/2011, to third sector entities established pursuant to Legislative Decree 117/2017.[9]

Specifically, the Italian legislator has also included the requirement that such entities be active in the field of personal data protection.

Although similar to other rules relating to the representation of collective interests, the third requirement included in Article 80 can be interpreted restrictively, since in practice it requires the non-profit association or organisation not only to have the protection of personal data as an objective in

[7] F Casarosa, 'Azioni collettive fra tutela dei dati personali e tutela del consumatore: nuovi strumenti alla prova dei fatti', in P Iamiceli (ed), *Effettività delle tutele e diritto europeo. Un percorso di ricerca* (Editoriale Scientifica 2020), 439 ff.

[8] F Casarosa, *La tutela aggregata dei dati personali nel Regolamento UE 2016/679: una base per l'introduzione di rimedi collettivi?* (n 3), 239.

[9] F Valerini, 'Le novità processuali in materia di privacy dopo il Reg. 679/2016 (GDPR) e il D.Lgs. 101/2018' (2018) Judicium.

its statutes, but also to have already carried out activities relating to that objective.

On the one hand, the European legislator's choice moves towards greater guarantees of competence and reliability of the entities entitled to act; on the other hand, this limitation may be problematic where the organisation has been set up to protect the interests of other categories of entities, such as consumers or workers.

In such cases, the protection of consumers' or workers' personal data may not be explicitly defined in the statutory objectives, nor may it have been the subject of previous activities.

Therefore, the right to take legal action may be limited to entities that can guarantee both competence and the purpose of protecting the rights and freedoms of the data subjects.

The Regulation is silent on the procedural rules to be applied in the case of collective actions, leaving full discretion to national legislators.[10]

With regard to the applicable jurisdiction, an explicit indication is provided in Article 79 of the Regulation, which expressly states that individual appeals before the courts must be brought in the Member State where the controller or processor has an establishment.

Alternatively, such actions may be brought before the courts of the Member State in which the data subject is habitually resident.

The Italian legislator has reproduced the provision of the Regulation relating to individual actions, applying it to the rules on territorial jurisdiction, defining in the amended Article 10 of Legislative Decree 150/2011 that "the court of the place where the data controller resides or is established or the court of the place of residence of the data subject shall have jurisdiction, alternatively".

However, in the rest of the provision, the legislator failed to specify whether and how it should be adapted to collective actions.

In fact, in the case of multiple representatives of the third sector entity, it could be difficult to apply the alternative between the jurisdiction of the court of the place of residence or establishment of the data controller and that of the court of the place of residence of the data subject, since, for example, persons residing in different places could participate in the action.[11]

Therefore, unless the association is given free choice regarding the court of residence of one or more of the representatives, it may be reasonable to interpret the rule by identifying the jurisdiction in the court of the place of residence or establishment of the data controller.

The collective action may lead to a decision confirming a breach of personal data regulations, allowing for the imposition of an administrative fine or compensation for damages to the individuals concerned.

The question arises as to what effect such a declaration may have on persons who did not participate in the action, where the conduct of the data controller is found to be prejudicial to the rights of the representatives involved in the collective action.

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[10] P Mazza, 'Profili processuali del diritto alla protezione dei dati personali nel regime del Reg. UE 2016/679 (GDPR) e del riformato d.lgs. n. 196/2003' (2021) Corr. Giur., 959 ff.

[11] M Federico, *Protezione dei dati personali e tutela collettiva. Itinerari di comparazione tra Europa e Stati Uniti* (n 2), 201 ff.

In light of the wording of Article 80 of the Regulation, it is clear that the European legislator has recognised the possibility for Member States to adopt rules allowing the representation of interests independently of any form of mandate.

This would therefore allow non-profit associations and organisations to bring actions to ascertain violations of personal data protection rules, which could be followed by follow-on actions by individual consumers in order to obtain compensation for damages suffered as a result of the violation.[12]

Unfortunately, the Italian legislator has ruled out this possibility, allowing only collective actions based on the opt-in system. In such cases, the decision of the Data Protection Authority, as well as that of the court, will have legal effect only on the parties involved in the action.

It is interesting to note that, in the context of European measures relating to collective actions, a much more effective approach has been adopted in the Directive on representative actions for the protection of the collective interests of consumers.

In this case, Article 10 of the Directive states that, in the event of a final decision by a judicial or administrative body declaring, in a collective action, that a trader has infringed consumer protection rules, that decision shall constitute 'irrefutable evidence in actions for damages (within the same Member State) or a relative presumption of infringement (for cases brought in another Member State)'.

It is clear that in this case, the legislator took into account the critical issues that emerged following cases of infringement in Member States, first and foremost the Dieselgate case, where the collective protection of users clashed with the difficulty of recognising the effects of the decisions of the competition authorities of individual states with regard to collective actions relating to the same infringements.

However, this different approach is not without consequences in practical application, as there may well be cases where there is an overlap between the status of consumer and that of data subject, as clearly demonstrated by the Schrems II case (C-498/16) before the EU Court of Justice.

For example, a collective action focused on the unfairness of contractual clauses, such as the so-called privacy policy attached as contractual content in numerous terms of service for information society services, could guarantee both the participants in the action recognition of the harmful conduct of the commercial operator (and in this case the data controller) and consequently compensation for the damage caused by that conduct, but also allow consumers who find themselves in the same contractual conditions to use the decision as irrefutable evidence to bring equivalent actions for compensation for the damage suffered.

The same could not happen, however, in the case of collective actions against the same commercial operator where a breach of personal data protection rules is alleged.

Therefore, a situation of unequal judicial protection could arise that is not justified by significant substantive differences.

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[12] M Federico, *Protezione dei dati personali e tutela collettiva. Itinerari di comparazione tra Europa e Stati Uniti* (n 2), 109.

There is no doubt that Regulation (EU) 2016/679 has had the merit of innovating the field of judicial protection relating to the protection of personal data with a new tool that offers data subjects the possibility of coordinating their claims to obtain greater and better access to justice through a unified procedure for the resolution of uniform disputes between them.

However, the intervention raises problems from several points of view.

Firstly, the approach adopted does not deviate from the legislative and jurisprudential trend that characterises recent interventions by the European legislator, which, while affirming the need for effective protection of European rights, recognises a hierarchy between individual and collective actions, giving clear primacy to the former over the latter.

Furthermore, the complete delegation of powers by the European legislator to the Member States risks undermining the harmonisation objectives sought by the reform, precisely through the legislative choice of a regulation, since there are numerous procedural aspects that can lead to substantial differences in protection between countries.

Finally, as previously highlighted, the absence of guidance on standing, territorial jurisdiction and, above all, the effects of decisions could lead to unequal treatment between protected collective interests where there is an overlap between entities that qualify as personal data controllers and consumers.

The Italian legislator, partly due to the limited time available to define the instrument for implementing the European Regulation, has made a minimal addition, allowing collective action to protect personal data subjects to enter our legal system, without, however, providing detailed rules that could make it clearer to the interpreter (and in this specific case to the judge) which procedural rules may be applicable.

It is therefore likely that in the near future there will be numerous preliminary rulings by Italian judges seeking to make the rules on collective actions in this area clearer and more consistent with uniform criteria at European level.

4. The Facebook case.

Judgment C-319/20 delivered by the EU Court of Justice on 28 April 2022 marks a fundamental step in the process of adapting civil procedural law to the digital transformation of contemporary economic and social systems.

In fact, this ruling represents an important step in the protection of privacy and personal data in Europe, marking a further strengthening of European data protection regulations, particularly with regard to the specific issue of collective protection of consumers' personal data online.[13]

The ruling also provides a privileged vantage point from which to observe the difficult and ever-changing relationship between individuals and the market in the “information society”, whose energy source now seems to lie in

[13] MG Smiroldo, ‘Sulla legittimazione ad agire per la tutela dei dati personali: nuove <<affinità elettive>> tra persona e mercato?’ (2023) Riv. Trim. dir. Proc. civ., 993 ff.

the enormous amounts of data that each of us contributes to disseminating, more or less consciously, when surfing the internet.

In ruling on the exact interpretation of Article 80(2) of the GDPR, the Court significantly extended the right of the national association for the protection of individuals' data to take legal action.

More specifically, the possibility has been confirmed for individual Member States to adopt internal rules allowing consumer associations to bring collective actions for this purpose, even if only injunctive, regardless of the mandate of the individual and the actual violation of his or her rights, particularly in the context of other rules designed to protect consumers and competition.

The ruling, which is already significant in itself as it stems from a European preliminary ruling procedure, is even more important because it draws the interpreter's attention to a consolidated case law approach that anticipates the spirit of EU Directive No. 1828/2020 on representative actions for the protection of the collective interests of consumers. The latter is often referred to in the text of the ruling and in the conclusions of the Advocate General, which the panel of judges fully endorsed.

What emerges from a systematic analysis is an ideal continuity of intent, destined to grow stronger over time, characterised by a "promotional" concept of access to justice, particularly civil justice, where in future it will be possible to bring actions that are not exclusively prohibitive, as in the case in question, but also compensatory actions, in the ongoing plan to establish new and powerful links between the protection of personal data, on the one hand, and consumer and market protection, on the other.[14]

The case takes its name from a complaint filed by an Austrian citizen, Max Schrems, a well-known privacy activist, against Facebook Ireland.

The German Consumer Protection Union identified a potential violation of the GDPR and consumer protection legislation, particularly unfair commercial practices, when Meta made third-party video games available to users.

In these cases, users were warned that using the application allowed the supplier companies to obtain their personal data, authorising them to publish some of it.

All this was done with the implicit acceptance of the general terms and conditions of use of the application and the processing of data in the relevant privacy policy, simply by clicking on a button labelled "Play", which does not appear to be a valid means of contractual acceptance and free consent to the use of personal data.

For this reason, the German Union has denounced the violation of 'personal data protection, which also constitutes unfair commercial practice, a violation of consumer protection rules and a violation of the prohibition on applying invalid general terms and conditions'.

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[14] S Pagliantini, 'GDPR e consumerizzazione dei dati personali. L'interferenza ascosa tra GDPR e diritto dei consumatori: appunti per una tassonomia' (2023) Giur. It., 2212 ff.; C Angiolini, 'Trattamento dei dati personali e rapporto di consumo: dalla Dir. 93/13 alla Dir. 2020/1828', in G Salvi (ed), *Il diritto contrattuale dei consumi ed i suoi attuali confini* (ESI 2021), 35 ff.; C Angiolini, 'Una riflessione critica sulla complementarità fra norme sulla protezione dei dati personali e diritto dei consumatori nella disciplina dei profili patrimoniali del rapporto fra interessato e titolare del trattamento', in C Angiolini and D Santarpia (eds), *La fattispecie "liquida": quattro casi sintomatici* (ESI 2023), 13 ff.

The Union took action in the German courts, filing a lawsuit and several injunctions against Meta, as the platform where these applications and related conduct were made available, in order to have the aforementioned illegalities recognised and to order Meta to cease them.

After two levels of judgment, it was the federal judge hearing the case who asked whether, 'following the entry into force of Regulation 2016/679, is a consumer protection association, such as the Federal Union, still entitled to take action, under previous consumer protection legislation, by bringing an action before the civil courts against infringements of that regulation, regardless of the specific infringement of the rights of the persons concerned and in the absence of a mandate from the latter'.

Hence the referral to the Court of Justice to resolve the interpretative doubt.

The doubt arose from an overlap between German legislation legitimising bodies such as the German Union, which predated the GDPR, and the entry into force of the GDPR. In fact, as noted in the previous pages, data protection legislation introduced specific rules on the subject that must be coordinated with consumer legislation, in Germany as in any country with a similar stratification.

The Court's ruling focuses on Article 80 of the GDPR.

Article 80 of the GDPR provides for two possibilities: a “closed” one, which allows data subjects to delegate representation to a third party, usually linked to the “third sector”, and an “open” one, which leaves it to Member States to allow organisations to act without a mandate for compensation for damages resulting from violations of the GDPR.

The second paragraph, which was examined by the Court, concerns the possibility for an organisation to act even without a specific mandate from a data subject, provided that the rights of data subjects under the GDPR have been infringed.

In this case, the organisation, such as a consumer protection association, may take action to protect collective rights, such as in the case of a breach of personal data protection rules linked to unfair commercial practices or other consumer protection violations.

In the case examined by the Court, the German Union acted without a mandate from the data subjects/consumers, arguing that the general interest in the protection of personal data justified its legitimacy.

The German court had initially interpreted Article 80(2) of the GDPR restrictively, considering that a specific interest had to have been infringed before the association could take action. According to this logic, it would have been up to the supervisory authorities to protect the general interest.

The Court of Justice, however, adopted a broad interpretation of Article 80(2) of the GDPR, ruling that a third sector organisation may act to protect the rights of data subjects, even without a specific individual infringement, insofar as this would provide an additional opportunity to monitor the application of the law in order to ensure the highest possible level of personal data protection.

The Court emphasised that an association for the protection of consumer interests, such as the German Federal Union, falls within the category of “body

entitled to act" because it pursues a public interest, in this case the protection of consumer rights, which may be related to the protection of personal data.

This interpretation broadens the scope of action for organisations, which can take action without identifying specific individual damage, but simply on the basis of a violation of the rights provided for by the GDPR. This means that the organisation can take action before the supervisory authorities or in court, even without identifying a single person harmed by the unlawful processing.

Finally, the Court ruled that the provisions of the GDPR do not preclude the introduction of national representative actions, such as class actions, for violations related to the protection of personal data, supporting the idea that they can also be used in the consumer sphere, in combination with privacy legislation.

The Court of Justice's ruling in the case concerning Article 80 of the GDPR marks an important step in protecting the rights of data subjects and expanding the scope for action by third sector organisations.

The Court reiterated the importance of ensuring a high level of personal data protection by expanding access to legal remedies for the public sector and consumer organisations, which can now intervene to defend users' rights, even without the direct involvement of the data subjects.

This approach promotes greater collective protection, allowing associations to defend general interests related to privacy without the need to identify an individual who has been harmed or a specific violation.