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PRIVACY LAWS & BUSINESS

DATA PROTECTION & PRIVACY INFORMATION WORLDWIDE

Norway takes active role on the European stage

Norway adopted a GDPR-compliant national data protection law sooner than several EU countries. Its DPA actively participates in the EU mainstream. **Stewart and Merrill Dresner** report from Oslo.

Bjørn Erik Thon, Data Protection Commissioner, and Jørgen Skorstad, Head of the Legal Department at the Datatilsynet (the DPA) explained that although the new Personal Data Act, number 38, was adopted on 15 June this year, its entry into force was

delayed until 20 July due to the need for coordination with its European Economic Area (EEA) partners, Iceland and Liechtenstein. The GDPR was formally adopted in the EEA by way of a Joint Committee Decision

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US CLOUD Act creates global data access framework

US law enforcement agencies can compel tech companies subject to US jurisdiction to disclose communications data stored overseas. By **Kurt Wimmer** and **Katharine Goodloe** of Covington & Burling LLP.

In March 2018, the United States enacted the Clarifying Lawful Overseas Use of Data (CLOUD) Act¹, a new statute creating a framework for government access to data held by technology

companies worldwide.

The CLOUD Act has two distinct parts. Part I of the Act expands the geographic reach of certain US warrants issued to technology

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Collective action under GDPR: A civil law perspective from Spain

Javier Fernández-Samaniego, Blas Piñar Guzmán and Manuela Rojas of Samaniego Law report from Madrid.

Since Spain's first Data Protection Law entered into force almost 25 years ago Spain has been, without exaggeration, the EU Member State with the most stringent system of data protection law enforcement in the EU. Its legal system provides for penalties for non-compliance of up to €600,000 and a strict Supervisory Authority (the *Agencia Española de Protección de Datos* – the “*Agencia*”) imposing an average total of €20 million in fines per year to private sector organisations.

In that context, one – particularly if coming from the US – could think that judicial remedies for breaches of Spanish DP Law and compensation for damages suffered as a result of unlawful processing operations¹ were also amounting to millions. But the reality is that claims for compensations in the civil courts were limited to a relatively small number of individual cases mainly based on unlawful inclusion in bad debtors data files/credit bureaus. For the time being, the maximum compensation awarded by Spanish Courts to an individual, due to immaterial damage suffered by unlawful processing, has been circa €10,000².

The influential Spanish consumers association OCU³ launched a campaign on 30 May this year (“My data is mine”⁴) together with its allied organizations from Portugal, Italy and Belgium (Euroconsumers), announcing a collective action against Facebook to seek compensation of €200 per user over the Cambridge Analytica affair. By 18 October, 33,486 people had joined this campaign.⁵ Such a campaign is fuelling the idea that the time of personal data class actions has arrived in Europe, but neither the GDPR nor the civil procedure rules of the EU Members States, nor the so-called New deal for European Consumers⁶ provides for a US-style class action in Europe for data protection wrongdoings.

DIVERGENCE ACROSS THE EU

The Charter of Fundamental Rights of

the EU (“Charter”) and most of the EU States’ constitutions clearly differentiate:

- the legal regime for the protection of personal data (Article 8 of the Charter) and,
- a high level of consumer protection (Article 38 of the Charter).

These areas have a different legal nature, regulatory framework, scope, remedies, liabilities, actions and judicial redress mechanisms. In this regard, several aspects must be highlighted:

1. Consumer organizations are not *per se* automatically allowed to represent data subjects for the purposes of Article 80 GDPR, which refers to the not-for-profit body, organization or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects’ rights and freedoms with regard to the protection of their personal data. That means that only what will be regarded as Privacy Not for Profit Organisations (NPOs) – which comply with requirements of Article 80 – have the right to represent data subjects for these purposes.
2. Article 80 of the GDPR provides Privacy NPOs with rights of action both with a mandate and without a mandate from data subjects. Having said that, it is important to highlight that the actions available to Privacy NPOs without a data subject’s mandate under Article 80.2 GDPR (such as the right to lodge complaints before supervisory authorities and to exercise the rights referred to in Articles 78 and 79 GDPR) do not include the right to receive compensation for damages suffered (Article 82 GDPR) which would always require a data subject’s mandate.
3. The actions provided by EU Member States to consumer organizations under EU Consumer Directives are not exactly the same as the

actions provided to Privacy NPOs by the GDPR. Article 80.1 GDPR refers to the procedural regulations of EU Member States in relation to the possibility of initiating a claim’s consolidation mechanism i.e. to collect mandates of data subjects prior to claiming for compensation on their behalf. So the key is in the national/Member State rules on mechanisms for collective claims.

COLLECTIVE ACTIONS IN SPAIN

Spain’s current Data Protection Bill does not refer to collective actions so the relevant regulation governing the collective claims’ mechanism is Spain’s Civil Procedure Law. The collective redress mechanisms provided in this law aims to protect consumers’ rights and interests and not the protection of data protection rights, which are two different areas of law, as stated above. However, it could be the case that some unlawful processing of personal data could also be deemed an infringement harming the collective interest of consumers. The discussion below refers to these cases.

In accordance with the EU Injunction Directive for the protection of consumers’ interests⁷ as implemented in Spain, Spanish Law provides (i) injunctive redress and (ii) compensatory redress in cases where a group/class of affected consumers launch a collective action for compensatory redress if it meets certain requirements.

1. Collective actions aiming to receive compensation (Compensatory collective redress): As stated above and as per Article 80.1 GDPR, Privacy NPOs are not entitled to start an action without the mandate of data subjects claiming compensation for damages suffered based on Article 82 GDPR. Having said that, in those infringements of GDPR which could also be deemed a consumers’ infringement subject to compensation, Spain’s Procedure Law provides the

possibility of a compensatory collective redress with the following aspects to be considered:

Entitlement to claim or standing to sue: If the group of consumers harmed is identified or easily identifiable – a classic example is a group victim of a food poisoning by a restaurant – standing to sue is in:

1. the group of harmed people to the extent the claim is sustained by the majority of the harmed group (Articles 6.1.7 and 11.2 Spain's Procedure Law);
2. consumers and users associations, and
3. legal entities incorporated for the protection of the harmed identifiable or easily identifiable group - for instance and in the example above, an association of consumers affected by the food poisoning which is incorporated *ad hoc* for that purposes.

If the group of consumers harmed is vague and difficult to identify, the standing to sue is exclusively based on the legally deemed representative consumers' and users' associations (Article 11.3 of Spain's Procedure Act).

Procedural mechanisms and publicity measures to allow opt-in: In order to allow the group of harmed people to gain standing to sue and be able to join together as the majority of the harmed consumers, Article 256.1.6 of Spain's Procedure Law sets out a preparatory measure aimed to identify the harmed consumers, which also allows a limited discovery against the future defendant, so it cooperates in the identification of specific harmed individuals.

Furthermore, Article 15 of Spain's Procedure Law requires that in cases of vague groups which are difficult to be identified, once the claim is submitted before the Courts, it must be advertised in the media. The proceedings are then suspended for two months so that any consumers who have suffered harm may opt-in to specify their individual harm. In case of identified or easily identifiable harmed consumers, there is a requirement for the claimant to demonstrate that it has called for or collected mandates from all harmed consumers who may opt-in.

Effects of the judgment and enforcement: Courts awarding compensatory damages must name individuals who have benefited from the Judgements or

the requirements and criteria to be met in order to benefit from the right to compensation granted for those who were not in the proceedings but who wish to benefit from enforcement (Article 221 and 519 Spain's Procedure Law).

Despite not granting an opt-out option for the collective redress group, Spain's Procedure allows people who have suffered harm, and who do not want to take part in the collective action, to bring individual actions.

2. Collective actions seeking an injunction (Injunctive collective redress): Spain's Procedure Law has implemented the EU Injunctions Directive and includes a collective injunctive redress mechanism. These injunctions include obtaining Judgements that may order the cessation or prohibition of any infringement (including the use of abusive terms and conditions). Therefore, actions for injunctions seeking the cessation of abusive Privacy Policies cannot be rejected by the court, for instance to the extent it could be deemed a consumer law infringement (Article 53 of the Consumers Statute) which could involve measures such as the publication of the decision (Article 221.2 Spain's Procedure Law).

The qualified entities to bring an action for an injunction are the ones set out above depending on whether the claimants seeking an injunction are identified or easily identifiable. Furthermore, those entitled to bring an action for the protection of so-called "diffused interests" are listed in the Official Gazette of the EU as complying with the European Injunctions Directive (Art. 6.1.8 of Spain's Procedure Law in relation to Article 54 of the Consumers Statute). Furthermore, the Public Prosecutors and the National Institute for the Protection of Consumers are entitled to bring an action for an injunction, although this is not common in practice.

THE WAY FORWARD

According to public sources and the news, the main campaign for collective action in which a consumer's organization is collecting mandates in Spain is the so-called "My data is mine" against Facebook brought by OCU. However, it is still early days to predict what the outcome will be as, due to the procedural landscape described, this action may be subject to a number of

procedural pitfalls and challenges.

Other consumer associations are focusing on lodging complaints before Spain's Data Protection Agency targeting alleged breaches of Data Protection regulations with social networks and their data breaches.

Both the EU Data Protection and Consumer Protection authorities have been very clear stating that the representative actions and collective redress in the EU extend to consumers' protection when they are online, and will be distinctly different from US-style class actions. In words of Věra Jourová, Commissioner for Justice, Consumers and Gender Equality: "Representative actions, in the European way, will bring more fairness to consumers, not more business for law firms". One thing is sure, a door has been opened by Article 80 GDPR and all the stakeholders must have eyes wide open to ensure that this right is used properly and not abused.

AUTHORS

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- 2 *Inter alia* Judgement of the Spanish Supreme Court Civil Chamber, of 26 April 2017, confirming a compensation of €7,000 for "moral damage", or Judgement of the Spanish Supreme Court, Social Chamber, of 3 May 2016, granting a compensation of €10,000 for somewhat similar circumstances.
- 3 www.ocu.org/especiales/misdatossonmios/
- 4 www.mydataismine.com
- 5 www.test-achats.be/actions-collectives/facebook
- 6 europa.eu/rapid/press-release_IP-18-3041_en.htm
- 7 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version).

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