

Policy brief

European Civil Society Workshop on the Compensation of Data Protection Harms Paris, April 25th, 2018

Contact information: julien.rossi@utc.fr
lucien.castex@isoc.fr

Background information

The European Civil Society Workshop on the Compensation of Data Protection Harms took place in Paris, on April 25th, 2018 [1]. It was made possible thanks to the support of Internet Society France. Participants were academics, lawyers and NGO members from France, Belgium, the Netherlands, Poland and the United Kingdom. The aim was to share experiences useful for the implementation of article 80 GDPR, and discuss the new possibilities it offers to enforce data protection rights of individuals in Europe, and the challenges faced, taking into account the challenge posed by the evaluation of harm caused by infringements to data protection law.

This document presents a short summary of findings, discusses challenges, and formulates recommendations.

Introduction and summary

The General Data Protection Regulation (GDPR) was adopted in 2016 and will be fully applicable on May 25th, 2018. While most definitions and principles remain unchanged compared to those of Directive 95/46/EC, it introduces some novelties that are directly applicable in Member States. For example, whereas Directive 95/46/EC provided that individuals could claim compensation for harms caused by infringement on their data protection rights, the GDPR now clearly states that this must include non-material damage [2]. Another novelty that is relevant to the compensation of harms to the protection of personal data is the possibility offered by article 80 for Non-Governmental Organisations (NGO's) recognised in national law to represent data subjects in front of civil courts and data protection authorities (DPAs).

Article 80 GDPR is divided into two parts. Article 80 (1) allows data subjects to mandate not-for-profit organisations to lodge a complaint on his or her behalf. Member states may decide if they also allow NGOs mandated by data subjects to sue unlawful data controllers for compensation of harms, based on art. 82 GDPR.

Article 80 (2) gives Member States an option to allow NGOs to introduce a request at a DPA or to go to court against an unlawful data controller even without having been mandated by data subjects.

Some countries already had national legislation allowing NGO's to represent data subjects in front of national courts. This has been for instance the case in France, under art. 43ter of the Data Protection Act (loi Informatique et Libertés), since the end of 2016.

But if and when asking for the financial compensation of immaterial harms caused by unlawful data processing is desirable, what constitutes such harm? And how much compensation should be asked?

Although the *Morrison* case in the United Kingdom is the first successful case of collective action against a data controller that we are aware of [3], there are some examples in the case law of national courts and of the European court of human rights (ECtHR) that we drew on during the workshop [4].

Finally, there are open questions regarding the cross-border aspects of the use of art. 80 GDPR to represent the interests of data subjects, raised among other by a recent decision by the European Union's Court of Justice (ECJ) [5], and by the combination of art. 80 GDPR with the one-stop-shop and consistency mechanisms where NGOs choose to bring cases to DPAs instead of national courts.

State of implementation of art. 80 GDPR

Article 80 (1) is directly applicable. But there may be procedural obstacles in some member states. For example, in Poland, NGOs cannot represent data subjects in front of civil courts. Also, while NGOs can by default use art. 80 (1) GDPR to bring cases to the DPA's attention, and ask for injunctions in civil courts, they will not be able to sue for the compensation of harms in all member states, creating an uneven

playing field for data subjects and unequal protection rights for citizens.

Art. 80 (2) is unevenly implemented across the EU. In France, some NGOs can already start collective action in the name of data subjects without having mandated them. The revised Data Protection Act

grants them the right to sue for damages' compensation in civil courts. In the United Kingdom, however, if the currently discussed Bill is adopted as is, it will be up to the government to introduce art. 80 (2) GDPR in British law by Regulation.

Initiatives and projects by NGO's across Europe

Before the workshop, we launched a survey to try and map out as many initiatives by NGOs in Europe as possible. During the survey and the discussion, it was pointed out that there may be different strategies based on political preferences, and possibilities offered by national legislation. Here are a few examples:

- La Quadrature du Net (France) is collecting mandates to file a complaint against Google, Amazon, Facebook, Apple and Microsoft, using art. 80 (1) GDPR, at the French DPA. This complaint is expected to be redirected by the French DPA to the relevant national DPAs under the consistency mechanism.
- E-Bastille (ISOC France) is planning to use existing national legislation implementing art. 80 (2) GDPR to bring unlawful data
- Panoptikon Foundation (Poland) is planning to initiate proceedings against data brokers, using an employee as a data subject, and *amicus curiae* procedures to support her.
- NOYB.eu (Austria) is planning to use art. 80 (1) GDPR to represent 25 000 data subjects against Facebook in an Austrian civil court, asking for € 500 compensation per data subject.

Varying levels of compensation of non-material harm across Europe

Our work has pointed out that compensation for non-material harm of data subjects was very uneven depending on national case law. The main difficulty is to get the infringement on data protection rights to be recognised as immaterial damage *per se*. This may be helped by the existence of the notion of "immaterial damage caused by unlawful data processing" envisioned in the GDPR, which is directly applicable. It could thus become an autonomous notion of EU law and be treated as such by national courts, even those that do not usually compensate immaterial damage, like in the Netherlands, or experience difficulties in the financial compensation of immaterial harms even when they are recognised, like in France.

In the UK, there is a lot of case law indicating that courts award £1 for the breach of data protection law,

and then evaluate varying amounts of financial compensation for the subsequent harm suffered as a consequence, like £20,000 under a negligence claim as the data had fallen into the hands of terrorists [6]. In Austria, the Supreme Court awarded 750 € for a wrong entry in a credit rating database, which harmed the reputation of the data subject [7].

In countries where immaterial damage is not easily compensated, or where NGOs are not given the possibility to sue for damages, a possibility to create a financial incentive for data controllers to comply with data protection law despite this is to demand injunctions ordering the companies to cease the processing, or change their practices, under a financial penalty (*astreinte*) for not complying under a given delay.

Cross-border aspects

There is a wide range of questions related to cross-border situations. These situations are particularly relevant in light of the Digital Single Market. In this context, an individual accessing from a Member State an online service established in another Member State might face more challenges in exercising their data protection rights than in a purely intra-Member State situation – access to group litigation would thus become even more important, but can in practice be

rendered difficult by the fragmentation formally allowed by art. 80.

Can a data subject located in member state A mandate an NGO in member state B to sue a data controller whose main establishment is in member state C? This is still an open issue. In a recent decision, the ECJ said that this was not allowed under the Rome I Regulation. However, the Rome I Regulation relates to consumer protection, whereas data protection deals with fundamental rights. Does

the GDPR, and art. 80, create a possibility for NGOs to accept mandates from data subjects in other member states?

If such mandates are not admitted in national courts, would that constitute a forbidden discrimination based on nationality under EU primary law?

A solution would be to bring the complaint to the national DPA instead of bringing it to a national court. This would trigger the consistency mechanism and involve the DPA responsible for supervising the data controller in country C, and circumvent the Rome Regulation. But this would not allow data subjects to be compensated.

This is a problem because some countries do not have NGOs specialised in digital rights that are able to represent data subjects under art. 80 GDPR. It creates fragmentation of the level of data protection in Europe despite the objective of the GDPR being increased harmonisation and a levelled playing field for data controllers across the Union.

Faced with uncertainty regarding this matter, La Quadrature du Net does not accept mandates for people not residing in France for its current class action project against Google, Facebook, Amazon, Apple and Microsoft [8].

Policy recommendations

1. Although art. 80 allows for Member States to adopt different national approaches, this possibility shall be read in line with the objectives of the Regulation. Situations of great disparity of access to group litigation would be in contradiction with such objectives. In any case, information about the availability of group litigation mechanisms and prospects of compensation shall be as clear and widely available as possible. A similar reasoning can be applied to art. 82. National laws should be reviewed to ensure that art. 80 will be applied equally in all Member States.

2. There are also questions regarding the combination of art. 80 (1) GDPR with the Rome and

Brussels Regulation. Guidance from the European Commission and the Article 29 Working Party would be useful to ensure that data subjects in member state A can indeed mandate an NGO in member state B to represent their interests. Otherwise, this will significantly hurt the level-playing field for data controllers, the effectiveness of access to data protection rights protected under art. 7 and 8 of the Charter of fundamental rights, and fragment the digital single market. Access to group-litigation should also be supported in cross-border situations. Existing national laws should be reviewed to propose an effective collective redress mechanism in the area of data protection rights.

Key references for further information

Cited references	Other references
<p>[1] Summary of the Workshop in French</p> <p>[2] Article 82 (1) GDPR</p> <p>[3] English High Court, Various Claimants v Wm Morrisons Supermarket Plc [2017] EWHC3133 (QB)</p> <p>[4] ECtHR 14 Feb. 2012, req. 7094/06, Romet vs. the Netherlands</p> <p>[5] ECJ 25 January 2018 Schrems vs. Facebook, case C-498/16</p> <p>[6] : CR19 v. Chief Constable of the Police Service of Northern Ireland [2014]</p> <p>[7] : Austrian Supreme Court (OGH 6 Ob 247/08d)</p> <p>[8] : https://gafam.laquadrature.net/</p>	<p>ALLNUTT H., WEBSTER R., 2017, <i>Personal Data: the new oil and its toxic legacy under the General Data Protection Regulation</i>, London, DACbeachcroft.</p> <p>ISIDRO M.R., 2017, « 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 », <i>La Ley mercantil</i>, 42, p. 1.</p> <p>WALREE T.F., 2017, « De vergoedbare schade bij de onrechtmatige verwerking van persoonsgegevens », <i>Weekblad voor Privaatrecht, Notariaat en Registratie</i>, vol. 148, iss. 7172, p. 921</p> <p>WIEWIÓROWSKI W., 2018, Civil society organisations as natural allies of the data protection authorities, 15 May, Brussels, European Data Protection Supervisor</p>

Lucien Castex, ISOC France, Université Sorbonne Nouvelle
 Gloria González Fuster, Vrije Universiteit Brussel
 Karolina Iwańska, Panoptykon Foundation
 Francesca Musiani, CNRS
 Julien Rossi, Université de technologie de Compiègne

The Workshop was supported and funded by Internet Society France



Internet Society
 France Chapter

About Internet Society France

ISOC France is the French chapter of the Internet Society. The Internet Society was founded in 1992 to promote the development of the Internet as a global technical infrastructure, a resource to enrich people's lives, and a force for good in society. Its work aligns with its goals for the Internet to be open, globally-connected, secure, and trustworthy. In 2018, ISOC France launched the E-Bastille initiative to help citizens gain control back over their personal data.

www.isoc.fr
www.ebastille.org