EUROPEAN
Justice Forum

EJF ADVOACY WORK ON GENERAL DATA PROTECTION REGULATION

EXECUTIVE SUMMARY

The General Data Protection Regulation GDPR (or "Regulation")[1] is at last a finished product and will become law shortly. The text for publication in the Official Journal is agreed[2] and is attached. It will be adopted by the Council in the summer, and the Regulation will come into force later this year. As a Regulation, the legislation does not require Member State transposition and will apply directly.

EJF was active on a small part of this dossier; the part that introduced a class action right. In the early days we did debate whether we should get involved given (a) the impossibly wide scope of the intended legislation, and (b) the Commission's June 2013 Recommendation[3], which seemed to have settled the matter: it was horizontal in application and expressly anticipated[4] data protection infringements as within the areas which the Recommendation was intended to cover. So why have a standalone class action law? Should the Recommendation not have answered the problem?

The answer is no; we learnt in the course of this process that one part of the Commission does not or does not choose to, talk to the other, and one cannot take the Commission's legislative initiatives (e.g. a non-binding Recommendation, horizontal in effect, about class action mechanisms) as representing the result of a unified policy. They are not.

So, although data protection is far too broad a canvas for EJF to tackle in its entirety, we devoted considerable time to Chapter VIII of the Regulation, because it mandates a class action mechanism, was within our strategic focus and manageable. We also commented on the provisions in Chapter VIII dealing with administrative sanctions.

We started our serious engagement when the LIBE Committee of the Parliament responded to the Commission's proposed text in 2013. We made submissions on the LIBE amendments to Chapter VIII and related Articles. Before the trilogues started we made further submissions, this time on the Council text, in December 2014, and as the trilogues commenced, in the first quarter of 2015 we had a sequence of outreach meetings on it[5]. Towards the end Business Europe rowed in with a document which borrowed heavily on our messages.[6]

What has EJF got for its efforts? The short answer is a little, and that was worth fighting for, but not anywhere near as much as we would have liked. The longer answer is that politically Chapter VIII was never a big picture issue: it was the small tip of a very large iceberg. Tucked behind a mountain of much bigger issues, we knew that our messages would struggle for attention. This became particularly obvious as the trilogues moved to their conclusion against a deadline

[1] Consolidated text - http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_5419_2016_INIT&from=EN
[2] Adopted by the European Parliament on 14 April 2016
[3] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) - http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN
[4] Recital 7 of the Commission Recommendation of 11 June 2013 (2013/396/EU)
[5] A list of policy makers we met in 2015 is attached
[6] BUSINESSEUROPE input for trilogue discussions on the general data protection regulation, December 2015 - https://www.businesseurope.eu/sites/buseur/files/media/position_papers/internal_market/2015-12-10_final_input_general_data_protection_regulation.pdf

monopolized by the bigger issues leaving little air-time in the timetable for Chapter VIII. It was nonetheless essential that we were putting our messages across.

This note describes the points at issue in Chapter VIII, what we did to convey our messages, and the end result. What this note does not try to do is to argue some interesting legal points: whether a class action "right" really exists, is it a procedural or substantive law right, whether the attempt to mandate it infringes the subsidiarity principle, and the extent to which there is legally sustainable competence in the EU law process to mandate a class action procedure in the light of the Commission's 2013 Recommendation.

INTRODUCTION

The GPDR came onto EJF's radar in 2012, when after lengthy consultation, the Commission published its proposal for a Regulation amending Directive 95/46/EC[7]. The Commission's intention was to engineer a complete overhaul of EU law relating to the protection of personal data in the light of rapid technology advances, and the consequent massive increase of on-line data flows (data sharing and collecting), in the 10 years+ since the Directive. The Snowden leaks the following year only accelerated the political pressure for change to ensure effective EU-wide protection of data users' privacy.

The reason EJF became active in this legislation is because Members distrusted Chapter VIII, 'Remedies, Liabilities and Sanctions'. The rest of the huge apparatus of the Regulation (e.g. data profiling, one-stop shop, data transfers to third countries) we intentionally ignored; as a result the very small component we focused on was some way down the list of political priorities and we recognised this from the start. But we concluded that such an initiative coming so soon after the Recommendation, which really should have shut the debate down, we had to say something.

In Chapter VIII, the Commission introduced a series of private enforcement rights for infringements of EU data law which Member States must apply directly – if you like, the back-end of all that goes before. These rights include a right for data users to appoint a representative to a lodge a complaint with a supervisory authority and /or to pursue a claim for compensation against the data processor and controller. In short, a representative complaint, or as the case may be, action. That is not a particularly controversial concept in the abstract. The problem as we saw it, and it remains, is that here was a blatantly sector-specific attempt to legislate for class actions, which ignored the Commission's Recommendation of June 2013, which was horizontal and non-legislative; and without any reference to the Recommendations' hard- fought- for guidelines or safeguards. Accordingly our efforts were focused on deleting this specific provision, praying coherence with the Recommendation in aid, and amending some of the others in Chapter VIII.

It has taken three and a half years for this piece of legislation to get onto the books. During the course of the legislative process a new Commission and a new Parliament have taken over the reins. The 'old' LIBE Committee submitted in 2013 more than 3000 amendments to the Commission's text. Those relating to Chapter VIII were unhelpful. The out-going Parliament voted to bind its successor to those amendments. Most of the time since has been taken by the 'new' Council reigning in some of the more extreme proposals from the 'old' LIBE, agreeing its own text and then engaging in numerous trilogues. It has been a highly politicized dossier.

[7] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data - http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML

There has been relatively little change from the Commission's Chapter VIII proposal to the final text. Certainly the finished product is not as good as we would like.

CHAPTER VIII ISSUES

Although there are stray provisions elsewhere in the Regulation which cross reference Chapter VIII, and EJF has made submissions on those, the real focus has been on Chapter VIII, and on very few Articles within that Chapter.

Our attention focused around Articles 73.2, 73.3, 76.1, 77, 79, (now, in the final text, contained within Articles 77 – 80, 82 and 83) and in particular around the inter-relationship between the various provisions in those Articles. Article 80 final text is the key, but first a brief summary of the other relevant provisions.[8]

Under Articles 77-79 data subjects are given a right to lodge a complaint with a supervisory authority (Article 77), every natural or legal person is given a right to an effective judicial remedy against a supervisory authority (Article 78) and data subjects are given a right to an effective judicial remedy against a data controller or processor as a result of processing which does not comply with the Regulation (Article 79). Let's call these the three rights.

There is a fourth right. Under Article 82.1 every person is given a right to compensation for material or "non-material" damage caused by an infringement[9].

There is nothing particularly controversial in the three rights or the fourth right, although we queried the expression "non-material damage". But in Article 80.1 data subjects are given the right to "mandate" an appropriately constituted representative to exercise each of the three rights, and to exercise the Article 82 right to receive compensation on behalf of the data subject "where provided for by Member State law". Recital 125 suggests this mandate is not confined to unitary actions. Indeed there is no point in a single claimant appointing a consumer association, say, to bring his or her unitary claim. It would lack all economic viability. In other words, though this is not spelt out, actions via representative parties must be available to pursue collective rights, by multiple data subjects (i.e. class actions). For the first time Member States are required by EU law to allow class actions.[10] It appears that by using "mandate", the legislation prescribes opt-in.

But there is nothing else; there is complete silence as to how such representative actions are to be conducted. There is a complete absence of any reference or guidance as to how such class actions are to be compatible with the guidelines and safeguards in the Recommendation. Indeed there is no reference to the Recommendation at all. The implication is that they will be conducted in accordance with the Recommendation, but we are left to guess. Perhaps it was considered inappropriate for a Regulation binding Member States directly, to require them to observe guidelines that are not binding.

In Article 80.2, Member States can, but do not have to, allow these representatives to pursue the three rights (but not the Article 82 right to compensation) without a mandate from anyone, what we call in the UK "a frolic of its own"; one might question what is representative about a process that might be better called "an unrepresentative action".

[8] From here on, references to Article numbers are to those in the final, agreed text.
[9] Quaere: if Article 79 gives a right to an effective judicial remedy, (which must include a right to compensation) what does Article 82.1 add – apart from the enigmatic idea that non-material damage (whatever that is) can be recovered?
[10] Albeit limited to breaches of data protection law

So the class action for data protection breaches is mandatory – MS must enable class actions for breaches of data protection law - but the unrepresentative "frolic of its own" action is discretionary, and where MS enact it, an unrepresentative claim cannot be for damages – made abundantly clear by Recital 142. In that limited but important respect we might detect an acknowledgment from the legislators of the curse of opt-out class actions – using opt-out damages actions to ramp up blackmail settlements. We submitted that it was against all legal principles (including its own Recommendation) for the EU to endorse unrepresentative actions, (an action without even a single identifiable party), a fortiori for damages claims, and to do so would just exacerbate the potential for abuse in class actions. We urged deletion of the representative action and of the unrepresentative action. Perhaps someone listened, we cannot know; but we can see the end result is a useful prohibition on opt-out damages actions. The Commission's text was not as clear on this point, and the LIBE Committee's amendment expressly permitted opt-out damages actions.

SAFEGUARDS

Our default position with the institutions was that if you insist on a standalone class action right you have to have safeguards for the way in which your representative actions are to be conducted, and for this purpose why not anchor your class action right to the numerous criteria set out in the Recommendation? This latter is, after all, a Commission instrument, arrived at after years of negotiation, about how Member States should introduce collective redress and with what safeguards.

The answer is that they chose not to do so.

Article 80 gives some limited safeguard in the form of qualification criteria for standing to bring proceedings: the representative must be a not-for-profit body, organisation or association, it must be properly constituted according to the law of a Member State, it must have statutory objectives which are in the public interest and it must be active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data. This bears similarity to Article 4 (a) and (b) of the Recommendation, and is at least an acknowledgement that there should be some qualification criteria for standing to bring a representative action which on the face of it would exclude third party funders and law firms but does not exclude the possibility of such representatives being funded by third party funders and law firms. Why not go the whole distance and expressly state that the representative must comply with the entirety of the Article 4 criteria, which very clearly and comprehensively circumscribe the type of representative to be allowed standing, including the requirement that the entity should have sufficient capacity in terms of financial resources, human resources and legal expertise to represent multiple claimants acting in their best interest?

Apart from defining the standing criteria for the representative party the Regulation says nothing about the representative action procedure, so leaving it to Member States to design their own mechanisms, presumably with the guidelines in the Commission's recommendation in mind. It's just very unsatisfactory

OUTREACH

This consisted of written submissions (attached), and meetings with a raft of responsible individuals. A list of those we saw in early 2015, when the dossier was in front of the Council, and Luxembourg had the Presidency, is attached.

Our written submissions were consistent with all our well-known messages on class actions. The general gravamen was that the Recommendation had covered the issue of class actions comprehensively and it was incoherent for the Commission to be legislating for class actions. What was the evidence of need?

The simple answer to this was the Commission's view of its sacred duty, as Treaty guardian, of fundamental rights of citizens. The fundamental rights in question being the rights of personal privacy and protection of personal data.

It is difficult to judge the tangible effect of written submissions, and therefore the return on the effort made, but they always give us visibility and a useful platform for stakeholder meetings. As to the latter we thought we made some headway particularly with the individuals at the Luxembourg Perm rep, and absolutely nil progress with the individuals at the unit responsible for the dossier at the Commission.

What has emerged in the final text is much the same as the Commission proposed but, as might be expected, modified slightly. The central concept of having a representative action for data protection infringements has not changed, so we are left with a class action mechanism for data protection. Modifications relevant to EJF members, in the sense that they answer our calls for safeguards, but in very limited fashion, go to the criteria of standing of the representative party. And the fact that such a party cannot bring actions for damages if not mandated to do so; suggesting only an opt-in class action.

CONCLUSIONS

A number of broader and narrower points for reflection arise:

1. This was a classic case of how legislative initiatives for class actions can get buried inside something bigger and if you don't review the bigger picture – and understand the context - you miss the problem. The class action genie keeps popping up in discrete policy areas, such as, here, data protection.

2. The Commission will continue to initiate class action legislation on a sector by sector basis, without any regard to the Recommendation. The experience of our outreach on the Regulation makes this abundantly clear. The Regulation is now a precedent for the principle that any sector can justify its stand-alone class action mechanism (here the justification was the pre-eminence of protecting a Treaty right).

3. This conclusion reinforces the view that the Recommendation itself is part of a continuing policy campaign by some parts of the Commission to grapple with and legislate for EU-wide class actions systems. A cynical view might see it is a device – a stalling device – which is part of a bigger device. If DG JUST, who sponsored the Regulation, and also the Recommendation, can ignore the Recommendation completely, as they did, they are unlikely to treat its "hands-off" approach seriously if they have policy reasons to do so; either when considering the suitability of other sectors for class actions or when the Commission comes to review the impact of the Recommendation in 2017. And we know that DG COMP will be returning to the point in 2020 if not before when it comes to review the Competition Damages Directive and the results of its consultation on enforcement authorities.

4. The Recommendation in hindsight may be an even more significant policy result for us than I for one realised. We know that it reflects an institutional consensus for containing the abuses recognised to exist with US-style class actions by means of a range of safeguards, and this is crucial to our efforts. But it looks like being the reference data point for when EU-wide class actions come to be debated in earnest again next year. We should hold firmly on to the ground secured in the form of the safeguards, and keep banging away about their importance, so as not to let this advantage disappear in what we know will be a new wave of calls for class actions.

5. The Regulation actually says very little about class actions. May be we should be thankful, and maybe we should not be suspicious, instead recognising the possibility that the Commission, the Parliament and the Council did not want to get bogged down in the detail of civil procedure. But did they see they were letting the genie out of the bottle and through the door?

6. The Regulation gives a right to data users to nominate a properly constituted representative to bring a damages claim but says nothing about the mechanics of bringing that claim. It does not even say what "mandate" actually involves. It could mean opt-in (probably) or it could mean opt-out (unlikely). The act of mandating suggests a conscious authorisation by an identifiable data user instructing a third party to act on his behalf.

7. Collective redress continues to be floated by politicians as one of the panaceas for improving the single market. The mantra is that by reducing barriers to trade across borders through unifying enforcement of EU law infringements, you will make cross border trade predictable, profitable and more attractive to consumers throughout the EU. The Junker Commission has pledged its priority to be the promotion of competitiveness, the growth of the single market and innovation. That can go in a number of different directions. That is our battleground.

8. Over time we must monitor the emergence of representative actions based on Article 80 in key member states.