



Collective Redress Directive—implications for data protection law

21/07/2020

Information Law analysis: Daniel Cooper, partner at Covington & Burling focusing on information technology regulatory issues, particularly data protection, e-commerce and data security matters, and Louise Freeman, partner at Covington & Burling and co-chair of the firm's Commercial Litigation and European Dispute Resolution Practice Groups consider the implications of the Collective Redress Directive (CR Directive) for organisations handling personal data. They expect that the European Parliament and Council will formally endorse the text of the draft Directive and put it to a final vote by the end of 2020.

What are the implications of the forthcoming CR Directive for organisations handling personal data that are subject to laws implementing that Directive?

The precise implications for organisations will not be entirely made clear until Member States transpose the Directive in the coming years, but they are potentially quite significant.

To explain, in late June 2020, the European Parliament and Council of the European Union agreed the terms of a 'Directive on representative actions for the protection of the collective interests of consumers' (COD/2018/0089 (the CR Directive), ending the lengthy process that began when the Commission first proposed legislation in order to strengthen consumer rights in the European Union through more effective and uniform collective redress mechanisms in 2018. At that time and still today, EU Member State approaches remain inconsistent, with only a few countries making such collective redress mechanisms generally available to consumers apart from in certain targeted fields.

One exception is the data protection field. Article 80 of the EU's [Regulation \(EU\) 2016/679](#), General Data Protection Regulation (GDPR), already requires Member States to provide the means for collective redress specifically in relation to claims arising under the GDPR. Under [Article 80\(1\)](#) of Regulation (EU) 2016/679, Member States must ensure that their respective legal regimes allow 'data subjects' to empower non-profit bodies, organisations and associations meeting limited criteria, to lodge data privacy complaints with supervisory authorities and seek judicial remedies, and can choose to allow for collective compensatory redress claims, for GDPR breaches against 'controllers' and 'processors' for 'material or immaterial' damage caused to data subjects. While [Article 80\(1\)](#) of Regulation (EU) 2016/679 envisions opt-in representative actions, an approach Member States largely have adopted, [Article 80\(2\)](#) of Regulation (EU) 2016/679 permits Member States to offer collective redress on an opt-out basis (although the latter does not include any explicit reference to compensatory redress).

Under the CR Directive, consumer rights organisations and public authorities, so-called 'qualified entities' will be able to pursue injunctive relief and other forms of collective redress against 'traders' for compensation, repair, replacement, price reductions, contract termination, and reimbursement for violations of a wide array of consumer rights identified in EU legislation, including the GDPR, listed in Annex I to the Directive. The Directive allows Member States to choose between an opt-in and opt-out regime, although consumers must always opt-in where they reside outside of the Member State where a representative action is brought by a qualified entity. The draft Directive and the GDPR thus form two broadly complementary, and intersecting,

pieces of EU legislation, aiming to strengthen consumer protection by providing for collective redress mechanisms. These are in addition to any domestic regimes that may separately exist and apply to collective redress for data protection claims.

Because they overlap as they do, Member States will need to work through some problems. Although the Directive is expressed to be 'without prejudice' to the GDPR and other laws listed in its Annex I, aligning its requirements with [Article 80](#) of Regulation (EU) 2016/679 could prove challenging. Member States may be tempted to create a uniform approach to collective redress that encompasses both, but there are subtle and not-so-subtle differences between [Article 80](#) of Regulation (EU) 2016/679 and the Directive, not least of which is the different standards for qualifying as a third party competent to launch representative actions under [Article 80](#) of Regulation (EU) 2016/679 and cross-border claims under the Directive. The Directive also provides much more prescriptive procedural rules to be satisfied in relation to such actions, as compared with the GDPR, which leaves it largely open to Member States to decide.

Alternatively, Member States may be tempted to maintain two parallel collective redress schemes, reflecting the varying features of [Article 80](#) of Regulation (EU) 2016/679 and the Directive. However, this too would pose challenges and could give rise to a complex, and potentially inefficient, Member State legal system for resolving consumer grievances.

To what extent is the CR Directive likely to strengthen data protection enforcement in practice (and how does it supplement or overlap with Article 80 of the GDPR)?

The impact that the CR Directive will have on the enforcement of data protection rights is difficult to predict, given the complications noted above and the need for each Member State to transpose the Directive in its own manner. The Directive muddies the waters in terms of how collective redress will work in relation to data protection claims, which could pose its own set of issues. That said, the Directive can be expected, on the whole, to increase the exposure that organisations have today to collective action claims grounded in EU data protection laws.

For instance, the Directive's drafters plainly sought to ensure that representative actions involving EU consumer rights, including data protection rights, can be launched on a cross-border basis by qualifying consumer rights groups and public authorities. Article 4, in fact, provides that Member States must ensure that where an alleged infringement affects consumers residing in different Member States, a representative action may potentially be brought before the courts of that Member State by qualified entities from several different Member States. By contrast, the GDPR, and Article 80 in particular, do not address cross-border claims at all.

In addition, the Directive will empower qualified entities to launch representative action claims not merely in relation to alleged breaches of the GDPR, the EU's foundational data privacy statute, but also in relation to breaches of the e-Privacy Directive. In other words, the e-Privacy regime's contentious provisions relating to the use of cookies and similar technologies, and those regulating e-marketing will provide plenty of fodder for future representative action claims.

Finally, the Directive, unlike the GDPR, expressly requires Member States to allow qualified entities to launch representative actions for compensatory redress, whether on an opt-in or opt-out basis, providing a stronger legal backing for such actions than under Article 80, which vests discretion to Member States as to whether they wish to allow for such compensatory redress actions. Under Article 80, representative bodies can only seek such compensation 'where provided for by Member State law'.

Accordingly, notwithstanding the confused relationship between the CR Directive and the GDPR and potential issues with transposing the former, organisations processing personal data are likely to become exposed to a broader array of collective actions spanning a larger number of issues and jurisdictions.

What are the likely implications of the CR Directive for UK data subjects and UK organisations (eg given Brexit)?

The UK should not be required to implement the CR Directive, as it is not expected to form part of EU law that directly applies in the UK when the 11-month 'implementation' period concludes on 31 December 2020,

pursuant to the EU-UK Withdrawal Agreement. This is likely to be the case, even if the implementation period is extended by one or two years by mutual agreement, although indications are that that is unlikely.

This means that UK data subjects are unlikely to benefit from the collective redress rights set forth in the Directive, and would need to rely on existing mechanisms under English law for seeking collective redress for data protection claims. Under English Civil Procedure Rules, there are effectively two forms of collective action, group litigation orders and representative actions, which have their own unique qualities, including differing standards for joining claimants together into a common action. Whether some post-Brexit political agreement between the UK and EU enables a UK data subject to join in a representative action in an EU Member State, or results in a UK organisation defending itself in a cross-border action brought by a qualified entity established in an EU Member State, only time will tell.

What are the next steps and likely timelines?

Expectations are that the European Parliament and Council will formally endorse the text of the draft Directive and put it to a final vote by the end of 2020, following which the Directive will be published in the Official Journal of the European Union and enter into force 20 days later. Following that, the Directive provides for a 24-month implementation period, and grants Member States a further extension of six months to apply it. According to most estimates, the Directive's effects will not be fully felt until 2023.

Interviewed by Gloria Palazzi

XXXXXXX ([add link to MTE](#)) is a XXXXX at XXXXXXX, and a member of LexisPSL's Q&A Expert Panel. Suitable candidates are welcome to apply to become members of the panel. Please contact lexisask@lexisnexis.co.uk.

FREE TRIAL

The Future of Law. Since 1818.

RELX (UK) Limited, trading as LexisNexis®. Registered office 1-3 Strand London WC2N 5JR. Registered in England number 2746621. VAT Registered No. GB 730 8595 20. LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. © 2018 LexisNexis SA-SA-0918-035. The information in this document is current as of October 2018 and is subject to change without notice.

