The interplay of data, consumer and Private International law rules in the area of collective access to justice in the European Union*

La interacción entre las normas de protección de datos, de defensa de las personas consumidoras y de Derecho internacional privado en el ámbito del acceso colectivo a la justicia en la Unión Europea

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Abstract: The objectives of this essay are to address the relationship between public and private enforcement of the rights contained in the General Data Protection Regulation (GDPR) in terms of data protection representative actions; to make a general overview of Directive 2020/1828 and to analyze to what extent a systematic interpretation of the various rules of different legal disciplines that may be involved in representative actions is possible and desirable. Furthermore, this paper addresses the question whether the introduction in the GDPR of new heads of international jurisdiction is appropriate and how these relate to the classical heads of jurisdiction of Regulation 1215/2012 that may be applicable in the area of representative actions.
Keywords: representative actions, data protection, consumers.

Resumen: Los objetivos de este trabajo son abordar la relación entre la aplicación pública y privada de los derechos contenidos en el Reglamento General de Protección de Datos (RGPD) en lo que respecta a las acciones de representación de protección de datos; realizar una aproximación a la Directiva 2020/1828 y analizar hasta qué punto es posible y deseable una interpretación sistemática de las distintas normas pertenecientes a diferentes disciplinas jurídicas que pueden potencialmente aplicarse en materia de acciones de representación. Además, se estudia si la introducción en el RGPD de nuevos foros de competencia judicial internacional es adecuada y cómo se relacionan éstos con los foros del Reglamento 1215/2012 que podrían ser aplicables en el ámbito de las acciones de representación.
Palabras clave: acciones de representación, protección de datos, consumidores.

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the same umbrella in the area of representative actions: a systematic interpretation? V. International jurisdiction in cross-border representative actions. 1. Representative actions and heads of jurisdiction in Regulation 1215/2012. 2. Representative actions and the new heads of jurisdiction in the GDPR. VI. Final remarks.

I. Introduction

1. Consumer and personal data protection are two relevant pillars of the regulatory framework of the European Union (henceforth "EU") institutions. In this context, one of the issues that has been discussed for many years is the possibility of introducing in the European Member States representative actions, a European version of American class actions[1]. The goal of the adoption of this tool is, on the one hand, to favor access to justice for citizens in scenarios of mass damages and, on the other hand, to deter future wrongdoings harmful to the citizenry by companies operating in the European Union[2].

2. The entry into force in May 2018 of the very well-known Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (henceforth "GDPR") should be highlighted at this point. The GDPR establishes two closely related mechanisms for the prosecution of offenses that violate the protection of personal data: one, focused on public enforcement through the imposition of fines on offenders, and the other, in the field of private enforcement which refers to the possibility of bringing individual or representative actions before the courts[3].

3. The latest legislative push for representative actions at the EU level is "Directive (EU) 2020/1828 of the Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers (henceforth "Directive 2020/1828" or the "Directive")[4]. It entered into force on 24 December 2020 and introduces, for the first time, representative actions for both injunctions and redress in all Member States of the European Union.

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[1] The institutions of the European Union have made an effort not to call this system "class action", as it is known in the United States, but "representative actions". The argument behind this position is that the American class action is dysfunctional in the sense that it does not always seek the protection of the members of the class but the financial benefit of the litigants, in the framework of a highly competitive and specialized legal industry. See C. Smithka, "From Budapest to Berlin: How implementing class action lawsuits in the European Union would increase competition and strenghten consumer confidence", *Wisconsin International Law Journal*, vol. 27, 2009, p. 178. See J. Spier, "Balancing Acts: How to Cope with Major Catastrophes, particularly the Financial Crisis", *Journal of European Tort Law*, vol. 4, 2013, p. 224. However, authors such as Cassone and Ramello do not see so many negative aspects in the procedural or judicial entrepreneurship carried out by lawyers, so frequent in the United States in the area of class actions: "therefore, even thought some commentators are uncomfortable with the idea of «selfish» individual intrests being used as an instrument for promoting collective welfare, class action has the potential to recreate, in the judicial domain, the same effects that individual interests and motivations, governed by the perfect competition paradigm, bring to the market". See A. Cassone and G.B. Ramello, "Private, club and public goods: the economic boundaries of class action litigation», in J.G. Backhaus, A. Cassone, and G.B. Ramello (eds.), *The Law and Economics of Class Actions in Europe. Lessons from America*, Cheltenham, Edward Elgar Publishing, 2012, p. 124. Regarding its denomination, the phenomenon of collective redress has been called by different names (e.g. collective redress, class action, collective action, representative action, multi-party action, group action, etc.), making its scientific study more difficult. See B. Hess, "Collective Redress and the Jurisdictional Model of the Brussels I Regulation", in A. Nuyts and N. Hatzimihail, *Cross-Border Class Actions. The European Way*, Munich, Sellier, 2014, p. 59. See M.J. Sande Mayo, *Las acciones colectivas en defensa de los consumidores*, Cizur Menor, Thomson Reuters Aranzadi, 2018, pp. 25 and 26.

[2] See R. Van den Bergh, and L. Visscher, "The preventive function of collective actions for damages in consumer law", *Erasmus Law Review*, vol. 2, 2008, pp. 22-23. See R. D. Blair and C. Durrance, "The Economics of Antitrust Class Actions", *The Oxford Handbook of International Antitrust Economics*, 2014, p. 203.

[3] The complementarity of public and private enforcement, which is now being promoted in the GRPD, has occurred and has been studied with greater intensity in the field of antitrust law. See P. Buccirossi and M Carpagnano, "It is Time for the European Union to Legislate in the Field of Collective Redress in Antitrust (and how)", *Journal of European Competition Law & Practice*, vol. 4, 2013, p. 15.

[4] Previously, Directive 93/13/EEC of the Council of 5 April 1993 on unfair terms in consumer contracts regulated in its article 7.2, for the first time, the need for Member States to incorporate injunctive representative actions in their domestic legislation. Also noteworthy is the publication of the 2013 Recommendation introducing a horizontal and non-sectoral approach to

4. Consumer law and Data Protection law, to which Antitrust law or even Procedural law should be added, are often analyzed in a differentiated manner in the scientific literature but are beginning to find a strong common analytical framework in the area of European representative actions[5].

5. It is worth mentioning the recent case of *Meta Platforms Ireland Limited v. Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V* (henceforth, "*Meta Platforms Ireland Limited v. Brundesverband")*, in which the CJEU ruled that national legislation that grants legal standing to a consumer association to bring a representative action for injunctive relief in data protection matters, without requiring the identification of the data subjects affected by the data breach or that they have given a mandate to bring such an action, does not preclude Article 80.2 of the GDPR[6]. In this particular case, the CJEU gives a broad interpretation of the concept of public interest referred to in the aforementioned article 80.1 of the GDPR by understanding that consumer associations can be considered as entities seeking such interest in the exercise of a representative action looking for the injunction of a data mishandling which in turn affects consumers and which has an impact in terms of unfair competition[7]. Despite not applying Directive 2020/1828 to the specific case, as we shall see, the CJEU performs a systematic interpretation of the GDPR in the light of the recently mentioned Directive[8].

6. On the other hand, within the framework of the European integration process, Private International Law has been granted a privileged position with respect to other branches of law since the Member States, as expressed in article 81 of the Treaty on the Functioning of the European Union (TFEU), have transferred their legislative competence in this area to the institutions of the Union, generating a true Private International Law of the European Union[9].

7. Until now the problematic issues of representative actions and Private International Law had to be addressed with the Private International Law instruments available to us. For international jurisdictional aspects, we had to turn to Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012, known as the Brussels I recast (henceforth "Regulation 1215/2012") or, failing that, to the internal Private International law systems of each Member State. With the entry into force of the GDPR, new heads of jurisdiction were introduced for individual or representative actions in matters of personal data protection.

8. The objectives of this essay are, on the one hand, to analyze the relationship between public and private enforcement in the GDPR that give rise to data protection representative actions; make a

collective actions for injunctions in the European Union. See I. Benöhr, "Collective Redress in the Field of European Consumer Law", *Legal Issues of Economic Integration*, vol. 41, 2014, 256. However, some Member States do not have a representative action system as proposed by the European legislator, as was the case with Lithuania or Luxembourg. Other Member States have systems of representative actions but have significant substantive and procedural law problems, as is the case in Spain. See Commission and British Institute of International and Comparative Law report on the *State of Collective Redress in the EU in the context of the implementation of the Commission Recommendation* (JUST/2016/JCOO/FW/CIVI/0099), 2017.

[5] Antitrust representative actions have been a hot topic during recent years but it is beyond the scope of this essay. In this regard, see P. Buccirossi and M. Carpagnano, *op. cit.* p. 15.

[6] See CJEU 28 April 2022, *Meta Platforms Ireland Limited v. Brundesverband,* 319/20, ECLI:EU:C:2022:322, paras. 53, 55, 56 and 59.

[7] See CJEU 28 April 2022, *Meta Platforms Ireland Limited v. Brundesverband,* 319/20, ECLI:EU:C:2022:322, paras. 65 and 66. Advocate General J. Richard de la Tour stated in this case that "instances of the interaction between the law relating to the protection of personal data, consumer law and competition law are frequent and numerous, since the same conduct may be covered simultaneously by legal rules belonging to those different areas. Such actions contribute to making the protection of personal data more effective". See Opinion of the Advocate General J. Richard de la Tour, 2 December 2021, *Meta Platforms Ireland Limited v. Brundesverband*, C-319/20, ECLI:EU:C:2021:979, para 81.

[8] See CJEU 28 April 2022, *Meta Platforms Ireland Limited v. Brundesverband,* 319/20, ECLI:EU:C:2022:322, para. 81.

[9] See G. Christandl, "Multi-Unit States in European Union Private International Law", *Journal of Private International Law*, vol. 9, 2013, p. 227. See E. Rodríguez Pineau, "Article 81 [Judicial Cooperation in Civil Matters] (ex-Article 65 TEC)", in H.-J. Blanke and S. Mangiameli (eds.), *Treaty on the Functioning of the European Union – A Commentary*, 2021, p. 1550.

general overview of Directive 2020/1828 and, in this scenario, study whether Consumer and Personal Data Protection Law should be interpreted systematically in the area of European representative actions. Furthermore, we intend to address the question as to whether the introduction in the GDPR of new heads of jurisdiction is appropriate and desirable in the area of representative actions and how they relate to the classic heads of jurisdiction already contained in Regulation 1215/2012.

II. Closely related public and private personal data protection systems in the GDPR: the insertion of data protection representative actions

9. In addition to individual legal action, the GDPR recognizes the possibility of bringing representative actions for mishandlings of personal data[10]. The novelty now offered by this regulation is that to the mechanism of public enforcement for the protection of data rights of natural persons is added a mechanism of private enforcement of such rights. Henceforth, in addition to the possible fines that may be imposed by the competent data authority, persons harmed by data-related wrongdoing can have some control of the prosecution of such wrongdoing through the exercise of judicial actions[11].

10. The GDPR states that any company that detects a data security breach must formally notify any aggrieved individuals and the data authority (articles 33 and 34 GDPR)[12]. Without prejudice to the investigation and possible sanction implemented by the data authority, individuals who have detected a security breach in the processing of their data or a breach of the duties of the controller or processor of their personal data, may register the corresponding administrative complaint with the aforementioned authority (article 15.1f GDPR). The data controller must also inform the data subject about the possibility of lodging such a complaint (14.1e GDPR).

11. Prior to the entry into force of the GDPR, in many Member States, the supervisory authority initiated the corresponding sanctioning procedure without the individual who brought the data wrongdoing to its attention knowing more about the procedure in question and whether or not the controller or processor of the data had been finally sanctioned[13]. With the current regulation, the data authority must inform the individual who filed the complaint whether or not proceedings have been initiated against the responsible company and the outcome of such proceedings.

12. Individuals are granted the possibility of exercising control over their personal data, beyond the action that can be taken by the supervisory authority[14]. To exercise this control, among other instruments, the GDPR articulates a collective protection mechanism —i.e. representative actions—, in addition to the individual one, so that those harmed by a data protection offence can request the cessation of such conduct and also demand compensation for the damage caused.

13. In this regard, article 79.1 provides that without prejudice to any remedy of an administrative or extrajudicial nature, including recourse to the supervisory authority, every data subject shall have

[10] See L. Jančiūtė, "Data protection and the construction of collective redress in Europe: exploring challenges and opportunities", *International Data Privacy Law*, vol. 9, 2019, p. 14.

[11] See M. Requejo Isidro, "Procedural Harmonization and Private Enforcement in the Area of Personal Data Protection", *Max Planck Institute Luxembourg for Procedural Law Research Paper (3),* 2019, p. 8.

[12] See. C. van Waesberge and S. De Smedt, "Cybersecurity and Data Breach Notification Obligations Under the Current Future and Legislative Framework", *European Data Protection Law Review*, no. 3, 2016, p. 396. See J. Chorpash, "Do You Accept These Cookies? How the General Data Protection Regulation Keeps Consumer Information Safe", *Northwestern Journal of International Law & Business*, vol. 40, no. 2, 2020, p. 234.

[13] This was the case in some Member States, such as Spain. See P. Dozapo Fraguío, "La protección de datos en el derecho europeo: principales aportaciones doctrinales y marco regulatorio vigente. (Novedades del Reglamento General de Protección de Datos)", *Revista Española de Derecho Europeo*, no. 68/2018, 2018, p. 145.

[14] See L. Lundstedt, "I*nternational Jurisdiction over Crossborder Private Enforcement Actions under GDPR", Stockholm Faculty of Law Research Paper Series,* no 57, 2018.

the right to effective judicial protection exercised before the courts if an unlawful act affecting his or her personal data has been committed. Next, article 80.1 GDPR provides that every data subject shall have the right to mandate a "not-for-profit body, organization or association" with objectives in the public interest, to exercise the right referred to in article 79[15].

14. By virtue of article 288 TFEU, Regulations - the GDPR is one of them - have direct applicability (they do not need a transposition instrument) and produce a direct effect (they can be invoked by European citizens as soon as they enter into force) in the Member States. Direct effect has two aspects: vertical, when a citizen can invoke the European rule against a State or public authority; and horizontal, when the European rule is invoked by a private individual against another private individual[16].

15. The direct effect may be partial, if only one of the two aforementioned aspects takes place, or complete, if both occur[17]. In *Van Gend and Loos v. Nederlandse Administratie der Belastingen*, the CJEU specified, with regard to EU primary law, that in order to have direct effect the rule must be unconditional, clear and precise[18]. In *Politi v Ministero delle finanze* the CJEU stated that Regulations have a complete direct effect[19].

16. The GDPR, in principle, should have direct applicability, so that a transposition of the regulation would not be necessary; and produce a full direct effect, so that citizens could invoke its provisions against the State and against other citizens. This valid theoretical approach, which is well established in European Union law, does not seem to be strictly applicable to personal data representative actions[20].

17. Regarding the direct applicability effect, it is crystal clear that article 80 GDPR is not sufficient to implement a real system of data protection representative actions in the Member States through the notion of direct applicability, but a regulatory development by the Member States is essential, a task that many national legislators have not carried out[21]. This problem is rooted in the fact that regulatory

[15] Regarding the entity that may have standing to sue, article 80.1 requires that it should be "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". As already noted in the introduction and will be addressed in more depth in section 4 of this essay, the CJEU gave a broad interpretation of the notion of "public interest" of the entity with standing. The CJEU determined that a national law granting standing to a consumer association for the exercise of representative actions in data protection matters should be interpreted as not precluding article 80 GDPR as long as the representative action was indeed intended to protect a right covered by the GDPR itself. See CJEU 28 April 2022, *Meta Platforms Ireland Limited v. Brundesverband,* 319/20, ECLI:EU:C:2022:322, paras. 65 and 66.

[16] See B. de Write, "Direct Effect, Supremacy, and the Nature of the Legal Order", in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 1999, p. 184.

[17] See R. Torino, "The Internal Market. Short history and basic concepts", in R. Torino (Ed.), *Introduction to European Union Internal Market Law*, 2017, p. 20.

[18] See CJEU 5 February 1963, *Algemene Transport— en Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 26/62, ECLI:EU:C:1963:1.

[19] As it is regulated in article 288 TFEU, now in force. See CJEU 14 December 1971, *Politi S.A.S., Robecco sul Naviglio v. Ministry for Finance of the Italian Republic,* 43/71, ECLI:EU:C:1971:122.

[20] In *Meta Platforms Ireland Limited v. Brundesverband* , the CJEU stated: "in that regard, it must be recalled that, according to the Court's settled case-law, pursuant to Article 288 TFEU and by virtue of the very nature of regulations and of their function in the system of sources of EU law, the provisions of those regulations generally have immediate effect in the national legal systems without it being necessary for the national authorities to adopt measures of application. Nonetheless, some of those provisions may necessitate, for their implementation, the adoption of measures of application by the Member States (judgment of 15 June 2021, *Facebook Ireland and Others*, C645/19, EU:C:2021:483, paragraph 110 and the case-law cited). That is the case, inter alia, of Article 80(2) of the GDPR, which leaves the Member States a discretion with regard to its implementation. Thus, in order for it to be possible to proceed with the representative action without a mandate provided for in that provision, Member States must make use of the option made available to them by that provision to provide in their national law for that mode of representation of data subjects". See CJEU 28 April 2022, *Meta Platforms Ireland Limited v. Brundesverband,* C-319/20, ECLI:EU:C:2022:322, paras. 58 y 59.

[21] Member States such as Spain, Belgium, France or Germany have not regulated data protection representative actions threby failing to comply with article 80 GDPR. Other Member States have implemented a regulation that differs from the provisions of article 80 GDPR. However, it does not seem that the European legislator wanted to give so much leeway to the

competence in procedural law has not been ceded to the institutions of the European Union but remains a competence of the national legislators[22].

18. Problems of direct applicability have their consequence on the vertical direct effect. It could be argued that in those Member States where there is no regulatory development of something as complex as representative actions, an entity with legal standing cannot invoke article 80 before a judicial authority when the judge does not have the appropriate national legal mechanisms to carry out a collective process and therefore is unable to enforce article 80 GDPR[23].

19. In spite of all these problems, it can be concluded that the mechanisms of *public and private enforcement* are parallel, but they feed and interact with each other. With the introduction of the obligation to inform the injured individual of the data protection offence on the part of the controller or processor responsible, any data offence becomes known, at least to the injured individuals who, in turn, may bring it to the attention of entities with legal standing, so that these entities may exercise the corresponding representative actions —where regulated—, without prejudice to any individual action which remains intact[24]. In this scenario, the instance hearing the representative action may request from the data authority the sanctioning file and all the documents contained therein. In this sense, the data wrongdoing could be accredited in the jurisdictional venue by what was resolved in the administrative venue.

III. Consumer representative actions in Directive 2020/1828: a general overview

20. The entry into force of Directive 1828/2020 obliges Member States to introduce in their national laws a system of injunctions and compensation actions in defense of consumers only, which complies with the objectives set out in the Directive itself. Member States shall adopt and publish laws and regulations that will enable them to comply with such objectives by 15 December 2022 and these rules shall enter into force as of 15 June 2023[25].

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national legislator when regulating data protection representative actions. See A. Pato, "The Collective Private Enforcement of Data Protection Rights in the EU", *MPI-IAPL Summer School Working Paper*, 3rd ed, 2019, p. 20.

[22] When a topic with procedural significance is legislated in EU law, the rules that regulate it generally invoke precepts of (generally, substantive) law contained in the treaties. In the case of the GDPR, recital 1 refers to article 8.1 of the Charter of Fundamental Rights of the European Union (2012/C 326/02) and article 16.1 TFEU (both referring to the protection of personal data of EU citizens). See G. Wagner, "Harmonisation of Civil Procedure: Policy Perspectives", in X.E. Kramer and C.H. Van Rhee, (eds.), *Civil Litigation in a Globalising World*, The Hague, Springer, 2012, p. 107.

[23] See M. Brkan, "Data protection and European Private International Law", *Robert Shuman Centre for Advanced Studies Research Paper No. RSCAS 2015/40*, 2015, p. 10.

[24] In the Civil Law jurisdictions, a scrupulous respect for individual action has been ensured to the detriment therefore of a significant development of representative actions, on the understanding that individual action embodies the fundamental pillar of citizen access to justice. Taruffo argues that "the traditional perception is that only individuals are vested with a right of action for the protection of their own individual substantive rights. The typical plaintiff is an individual who files a claim concerning an allegedly violated single and specific right of his or her own and seeks an individual remedy against an individual defendant". See M. Taruffo, "Some remarks on group litigation in comparative perspective", *Duke Journal of Comparative & International Law*, vol. 11, nº 2, 2001, p. 415. In the same vein, see H.L. Buxbaum, "Public regulation and private enforcement in a global economy: strategies for managing conflict", *Collected Courses of The Hague Academy of International Law*, vol. 399, 2019, p. 362. This sometimes overly strict respect for the consumer's individual action persists in Directive 2020/1828, as can be seen from recital 48: "injunctive measures issued under this Directive should be without prejudice to individual actions for redress measures brought by consumers who have been harmed by the practice that is the subject of the injunctive measures".

[25] Some Member States could delay the transposition of the Directive as long as possible or not transpose it at all if they consider that their legislation already complies with the objectives set by Directive 2020/1828, given the leeway that this Directive gives to Member States. In this regard, recital 11 of Directive 2020/1828 states that "taking into account their legal traditions, it should leave it to the discretion of the Member States whether to design the procedural mechanism for representative actions required by this Directive as part of an existing or as part of a new procedural mechanism for collective injunctive measures or redress measures, or as a distinct procedural mechanism, provided that at least one national procedural mechanism for representative actions complies with this Directive".

21. Directive 2020/1828 grants legal standing to "qualified entities" which it defines as "any organization or public body representing consumers' interests which has been designated by a Member State as qualified to bring representative actions". Articles 4 and 5 regulate criteria of transparency and strong control of the activity of these entities which, in any case, must be non-profit and have as an essential objective the protection of consumers[26].

22. The representative actions referred to in the Directive only protect consumers, defined as "any natural person who is acting for purposes which are outside his own trade, business, craft or profession" (article 3.1). The problem with this subjective restriction is that it is sometimes complicated for the instance hearing the representative action to determine whether each of the affected individuals is a consumer or not, and this can complicate the exercise of some representative actions[27].

23. Directive 2020/1828 gives Member States the freedom to design an opt-in system, an opt-out system or a mixture of both[28]. For injunctive actions, article 8 provides that "in order for a qualified entity to seek an injunctive measure, individual consumers shall not be required to express their wish to be represented by that qualified entity" and, for redress actions, article 9 regulates that "Member States shall lay down rules on how and at which stage of a representative action for redress measures the individual consumers concerned by that representative action explicitly or tacitly express their wish within an appropriate time limit after that representative action has been brought, to be represented or not by the qualified entity in that representative action and to be bound or not by the outcome of the representative action".

24. However, article 9.3 provides that, for redress representative actions, where the injured parties are habitually resident in a Member State other than the one in which the representative action is to be brought, national legislators must provide for an opt-in system: "Member States shall ensure that individual consumers who are not habitually resident in the Member State of the court or administrative authority before which a representative action has been brought have to explicitly express their wish to be represented in that representative action in order for those consumers to be bound by the outcome of that representative action"[29]. Article 9.6 also regulates that "Member States shall ensure that a redress

[26] The European Union legislator has opted for public or private entities specifically dedicated to the protection of consumer rights to be the ones with legal standing, instead of a leading lawyer or a leading injured person being the one in charge of forming the class and bringing the representation action, as is the case in many Common Law jurisdictions. Member States will have to determine what type of organizations have standing. In Member States such as Spain, it is the consumer associations -private entities- that exercise practically all representative actions(in Spain, besides consumer associations, other entites such as the Public Prosecutor or *ad hoc* group of consumers.amont others, have legal standing). In other Member States, it is public entities that have legal standing. For example, in Finland, the public entity *Kuluttaja-asiamies* has standing and in Lithuania, the Consumer Rights Protection Center - CRPC. See P. Cortés, *The Law of Consumer Redress in an Envolving Digital Market. Upgrading from Alternative to Online Dispute Resolution*, Cambridge, Cambridge University Press, 2018, p. 31. It can be argued that the will of the European legislator in Directive 2020/1828 is to have a strong control of the standing to sue, which also serves as a filter to avoid misuse of the system. As indicated, the Directive opts for a legal standing concentrated in a closed list of entities, over which strict public control is foreseen. It thus excludes any manifestation of spontaneity and any room for action by individuals. See F. Gascón Inchausti, "¿Hacia un modelo europeo de tutela colectiva?", *Cuadernos de Derecho Transnacional*, vol. 12, nº 2, 2020, p. 1322.

[27] Llamas Pombo, when referring to the Spanish civil procedure regulation, advocates for a flexible interpretation of such legal requirement. It is not possible to apply it otherwise, nor to attribute to the judge the obligation to investigate case by case the concurrence of the legal requirements in relation to subjects that sometimes by definition are indeterminate or difficult to determine, especially in cases of non-contractual liability. See E. Llamas Pombo, "Requisitos de la acción colectiva de Responsabilidad Civil", *Diario La Ley*, no 7141, 2009, p. 1.

[28] See Directive 2020/1828, recital 43.

[29] While Directive 2020/1828 requires injured individuals to expressly show their willingness to participate in the representative action when they are habitually resident in a State other than the one in which the action is to be brought, the Directive does not refer to how the consumers concerned should be notified in order to enable them to communicate this willingness. The legal instruments to which we must resort in terms of international notification are, at the level of EU law, Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (henceforth, "Regulation 1393/2007"). As of 1 July 2022, Regulation 1393/2007 will be replaced by the new Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Mem-

measure entitles consumers to benefit from the remedies provided by that redress measure without the need to bring a separate action"[30].

25. As indicated in the introduction of this paper, the European Union legislator avoids the American class action model in which it is a leading lawyer or leading injured party who brings the action and is in charge of forming a class of affected individuals. Directive 2020/1828 introduces a redress collective mechanism in all Member States but rejects punitive damages and even rejects the use of the American nomenclature, i.e. class action, referring at all times to "representative action"[31]. The expla-

ber States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) (henceforth, "Regulation 2020/1784"). At the treaty level, we highlight the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (henceforth, the "Hague Convention on the service of documents"), without prejudice to the existence of other bilateral instruments that may deal with international service. In the absence of application of the Regulation 1397/2007 or of the Hague Convention on the service of documents, we will have to resort to the national rule that may regulate this matter. Neither Regulation 1393/2007 nor Regulation 2020/1784 refer to notifications in representation actions, which is a missed opportunity as far as Regulation 2020/1784 is concerned. In fact, it could be argued that neither of the aforementioned Regulations could apply when the consumers who could potentially benefit from the representation action were undetermined (i.e. in many cases) since article 1.2 of both Regulations require that in order to be applicable it is necessary that the address of the notified person is known, something difficult to comply with when a representative action is exercised without identification of the injured parties under article 7 of Directive 2020/1828. The mentioned article 7 only requires for the exercise of the action that the qualified entity provides the court or administrative authority with sufficient information about the consumers concerned. Article 9.5 of Directive 2020/1828, in relation to redress actions, state that "where a redress measure does not specify individual consumers entitled to benefit from remedies provided by the redress measure, it shall at least describe the group of consumers entitled to benefit from those remedies". Thus, the Directive promotes a regulation of representative actions in which it is not necessary to identify a priori the consumers concerned, which may be incompatible with an opt-in system for consumers with habitual residence in other Member States to whom the notification of the representative action becomes complicated. In addition, the Hague Convention on the service of documents nor does regulates the notification in matters of representative actions, and its current text does not seem to be well suited to this phenomenon either.

[30] This last point poses a challenge, especially for the Civil Law jurisdictions: how to determine the amount of compensation at the outset when the consumers represented are not determined and how to avoid subsequent actions in which the amount is determined individually. Mascarell Navarro, when referring to the Spanish legal system, mentions the problem of the illiquidity of the representative action court judgment and argues that the court decisions must necessarily be liquid. This author explains that, otherwise, the representative action would lose much of its usefulness if judgments were allowed to be illiquid and the amount of compensation had to be settled in subsequent lawsuits. Mascarell Navarro further argues that for the judgment to be liquid, the plaintiff must state in the claim the amount claimed or clearly establish the basis for quantification by means of a simple arithmetic operation. If the quantum is not established in the collective protection judgment, and it is determined on a case by case basis, as individual enforcement actions are exercised, a situation of legal uncertainty could be generated for the defendant. The latter would not know *ab initio* what compensation they are facing, although in many cases they could make their own calculations if they have the information regarding the number of consumers with whom they subscribed a contract. See M.J. Mascarell Navarro, "Adhesión a la sentencia colectiva de condena de los consumidores y usuarios no determinados individualmente (la vía del art. 519 LEC)", *Justicia*, no 2, 2018, pp. 96-97. Gascón Inchausti argues that a total amount of compensation (aggregate sum) could be established in the representative action judgment, which is derived from the use of a mechanism or mathematical formula (aggregate proof of claim) that makes it possible to calculate the damage caused and, consequently, the total amount of compensation. This total amount is set out in the representative action judment. See F. Gascón Inchausti, "Acción colectiva de los usuarios frente a la entidad concesionaria de una autopista como consecuencia de las retenciones provocadas por una nevada (algunas consideraciones a la luz de la sentencia del Tribunal Supremo de 15 de julio de 2010)", *Revista Aranzadi Civil-Mercantil*, no 6, 2011, p. 72. Smith was in favor of this measure and stated that it should be included in the next directive regulating representative actions, something which in the end did not happen regarding Directive 2020/1828. This author indicated that ideally, the claim for damages should be available in the Member States on the basis that the court can issue a decision stating the total amount or aggregate amount to be compensated and that, subsequently, this amount should be distributed among each of the injured individuals. See V. Smith, "Towards a Coherent European Approach to Collective Redress: More Questions than Answers?", *Business Law Review*, august/september, 2011, p. 206. Aricle 9.6 of Directive 2020/1828 also states that "Member States may lay down rules on the destination of any outstanding redress funds that are not recovered within the established time limits".

[31] See footnote 1. Regarding punitive damages, in contrast to the approach taken in the United States, the common position of the EU institutions is to disallow or discourage them. Recital 10 of Directive 2020/1828 states: "to prevent the misuse of representative actions, the awarding of punitive damages should be avoided and rules on certain procedural aspects, such as the designation and funding of qualified entities, should be laid down". Another example of this is its express prohibition in the recent proposal on the modernization of the European Energy Charter, which expressly states that a new article on the assessment of damages should be included, stating the following: "monetary damages shall not be greater than the loss suffered by the Investor as a result of the breach of the provisions referred to in Part III, reduced by any prior damages or compensation already

nation behind this approach is to avoid the creation of a litigation industry that seeks more the financial benefit of the litigator than that of the consumer but, at the same time, EU legislator wants to introduce a representative action system that also seeks deterrence[32].

26. One of the relevant aspects that we must take into account and on which Directive 2020/1828 does not pronounce itself is how the relationship between a representative action and other subsequent individual actions that may be brought by affected consumers is regulated. Specifically, we refer to the institutions of lis pendens, related actions and the effect of res judicata, all of them elements that, at different procedural moments, seek the same objective: the avoidance of parallel proceedings that give rise to contradictory or irreconcilable court decisions[33].

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provided by the Contracting Party concerned. The tribunal shall not award punitive damages", https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf (latest consultation 30/05/2020). Díez Picazo y Ponce de León considers that punitive damages are alien to continental European systems and that there are powerful reasons for this. If one wants to punish and is authorized to punish, it does not seem fair or equitable to provide the person who suffered a damage with sums that are greater than this damage, because in such a case they are being enriched. The author adds that if it is considered fair to obtain from the perpetrator of a wrongful act, fines or the like, beyond the amount of the damage actually caused, it is only fair that these sums should go to the common people or, in other words, to the public treasury. See L. Díez Picazo y Ponce de León, *Derecho de Daños*, Madrid, Civitas, 1999, p. 46. García Rubio and Otero Crespo point out that "in terms of the compensatory scheme, like many other European jurisdictions, punitive damages are not available at the moment". See M.P. García Rubio and M. Otero Crespo, "Rebuilding the Pillars of Collective Litigation in the Light of the Commission Recommendation: The Spanish Approach to Collective Redress", in E. Lein, D. Fairgrieve, M. Otero Crespo, and V. Smith (eds.), *Collective redress in Europe: why and how,* London, British Institute of International and Comparative Law (BIICL), 2015, p. 142. However, we could say that punitive damages are not entirely alien to the legal systems of the Member States of the European Union, especially in the United Kingdom (a Member State until recently) and Ireland, which recognize the existence of this type of damages, although not as strongly as the American system does. Also in EU law, some damages that could be identified as punitive are timidly recognized with regard to consumer credit, anti-discrimination in the workplace and, particularly, with regard to discrimination between women and men. See H. Koziol, "Punitive Damages - A European Perspective", *Louisiana Law Review*, vol. 68, 2008, p. 749. Outside the European Union, in other jurisdictions such as Argentina, it seems that the legislator has opted to enhance the "punitive function" of civil liability instead of fostering the development of representative actions. It has been understood that the best way to deter companies from committing abuses in their relations with consumers and to encourage consumers to go to court to seek redress for their violated rights is, on the one hand, that the company that commits the abuse suffers a punishment, and, on the other hand, that the consumer appreciates that exercising his or her individual action is worthwhile insofar as he or she may receive an amount greater than the mere value of the damage caused. See M.N.G. Cossari, *Prevención y punición en la responsabilidad civil*, Buenos Aires, El Derecho, 2017, pp. 13 et seq. On punitive damages and private international law, see *in extenso* J. Carrascosa González, "Daños punitivos. Aspectos de Derecho internacional privado español y europeo, in M-J. Herrador Guardia (dir.): Derecho de daños, Cizur Menor, Thomson Reuters Aranzadi, 2013, pp. 383-462.

[32] Regarding the deterrence function of representative actions, see Directive 2020/1828, recitals 5 and 60.

Stadler argues that representative actions can function as a mechanism with a regulatory goal insofar as the mere existence of an effective instrument for the collective protection of injured consumers would encourage companies to change their marketing strategies and to comply strictly with consumer protection standards. See A. Stadler, "Group actions as a remedy to enforce consumer interests", in F. Cafaggi and H.W. Micklitz, *New frontiers of consumer protection. The interplay between private and public enforcement*, Oxford, Intersetia, 2009, p. 316. Civil law jurisdictions have traditionally characterized their civil liability systems as having a compensatory purpose, i.e. aimed at repairing the damage caused. To this effect, Pantaleón Prieto has stated that, in general in European law, civil liability has a purely compensatory function. It seeks only to compensate the injured party for the damage that the liable party has caused them and not to punish them for what they have done, nor to prevent them from continuing to do so. See F. Pantaleón, *La importación de "frigoríficos jurídicos"*, El País - Opinion, 1999, https://elpais.com/diario/1999/07/18/opinion/932248805_850215.html (latest consultation 07/06/2022). However, Díez Picazo y Ponce de León recognizes, that civil liability may have a preventive effect if we speak of prevention as a psychological impulse that may be experienced by the citizen who, recognizing the rule, tries to avoid the unfavorable consequences that would result from its application. See L. Díez-Picazo, *op. cit*., p. 46. Although it must be accepted that the civil liability systems of the Civil Law jurisdictions are of a purely compensatory nature, there is nothing to prevent us from considering that a good dispute resolution system, in this case a well-designed system of representative actions, could have, at least, a function of deterring the commission of unlawful acts against consumers.

[33] The relationship between representative actions and individual actions has always been complex and not well resolved by many of the domestic laws of the Member States. This complicated relationship is particularly apparent with regard to lis pendens and res judicata effect. In CJEU 14 April 2016, joint cases 381/14 and C-385/14, *Jorge Sales Sinués v. Caixabank SA and Youssouf Drame Ba Catalunya Caixa SA (Catalunya Banc SA)*, ECLI:EU:C:2016:252 the CJEU established that collective action and individual action have different purposes and nature (para. 36) and that this is not a harmonized issue at European level, so it is a matter to be regulated at national level (para. 32). It seems that this very sharp position contained in this decision of the CJEU is not the best approach since, in fact, in our view, representative actions and individual actions are related, and

27. Each Member State will have to address these aspects by adapting its domestic procedural law. However, Directive 2020/1828 states in article 15 that "Member States shall ensure that the final decision of a court or administrative authority of any Member State concerning the existence of an infringement harming collective interests of consumers can be used by all parties as evidence in the context of any other action before their national courts or administrative authorities to seek redress measures against the same trader for the same practice, in accordance with national law on evaluation of evidence". This is a novel issue as it obliges all Member States to recognize as evidence in subsequent proceedings judicial or administrative rulings decisions the existence of an infringement against consumer rights[34].

28. Another aspect introduced by Directive 2020/1828 that is not only new in the area of representative actions, but also an innovation at a general level in European Union law, is the regulation of "third-party funding" (TPF). TPF is a mechanism for financing by a third-party funder of the legal action. The third-party funder invests in the lawsuit and, if the funded party is successful, the funder will receive a portion of the compensation. If the funded party is unsuccessful, the third party funder will lose his or her investment[35].

29. In February 2021, the European Parliament published the Report entitled "Responsible private funding of litigation" which contains a series of recommendations for a possible future regulation of TPF in the European Union. In conjunction with the TPF Report of the European Parliament, the "Draft Report with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))" (henceforth, "Draft Report") was published, which includes, in its Annex a model proposal for a Directive on litigation funding for all types of claims or actions[36].

30. The regulation of the TPF on representative actions is understood as part of a generalized concern of the European legislator that this type of actions should not be frustrated by a lack of financial resources[37]. Thus, in addition to regulating the TPF, it is established that, without the Member States having to directly finance the exercise of representation actions, the national regulation should favor access to these resources by entities with legal standing. Thus, it regulates the limitation of court or administrative fees or access to legal aid. Qualified entities may be allowed to request a modest entry fee or similar charge to participate in the representation action (article 20)[38].

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representative actions may have an effect on both individual and other representative actions that are brought subsequently, so that a regime, although perhaps not of lis pendens stricto sensu, but of related actions should apply, both at national and international/European level. In the latter, art. 30 of Regulation 1215/2012 may apply. Directive 2020/1828 indirectly limits itself to leaving this task to the national legislator, as can be seen from recital 48: "Member States should lay down rules for the coordination of representative actions, individual actions brought by consumers and any other actions for the protection of the individual and collective interests of consumers as provided under Union and national law". On this issue, see extensively A. Nuyts, "The Consolidation of Collective Claims Under Brussels I», in A. Nuyts and N. Hatzimihail, *Cross-Border Class Actions. The European Way*, Munich, Sellier, 2014, pp. 69-83.

[34] This regulation confirms the existing relationship between representation actions and subsequent actions, particularly when they address the same trader for the same practice which requires a certain legal development that coordinates them. If a judgment resulting from a representative action is to be adduced as evidence in a second lawsuit, it makes sense for this second lawsuit to be suspended until the first lawsuit from which the judgment is to be derived is fully completed.

[35] See E. Fernández Masiá, "La financiación por terceros en el arbitraje internacional", *Cuadernos de Derecho Transnacional*, vol. 8, no 2, 2016, p. 204.

[36] The Draft Report, in our opinion, does not contain an adequate TPF regulation. If such regulation were finally enacted, it would be putting an end to the TPF market in the European Union to the benefit of other jurisdictions such as the United States. Thus, the Draft Report intends that the entire TPF agreement be disclosed in any case, applies to both ordinary jurisdiction and arbitration —potentially damaging the arbitration industry in the EU—, and proposes a regulation that is perhaps too strict and intrusive for litigation funders. In this regard, see my previous paper D. Agulló Agulló, "Los contratos de financiación de litigios por terceros (*third-party funding*) en España", *Revista de Derecho Civil*, vol. IX, núm. 1, pp. 183-231.

[37] García Rubio and Otero Crespo state that «funding and costs issues are closely related to effective access to justice, notably when cases concern consumer law issues, as the costs of civil litigation are usually high». See M.P. García Rubio and M. Otero Crespo, *op. cit.* p. 147.

[38] The national legislator will have to determine what type of financing it regulates for representative actions without being obliged to finance them with public money. See Directive 2020/1828, recital 70. A Member State may choose to establish a

31. Coming back to TPF, article 10.1 of Directive 2020/1828 establishes the general obligation of the Member States to introduce rules that adequately address conflicts of interest in such a way that the financing of a lawsuit by a funder who has a financial or strategic interest in the outcome of the action does not prevent the representative action from being brought for the protection of the interests of consumers, which is the purpose of this collective protection mechanism. In this regard, article 10.2 of Directive 2020/1828 refers to the fact that national regulation must ensure that the decisions of the qualified entity bringing the actions and obtaining the funding act in the interests of consumers and not in pursuit of any other objective. Article 10.2 also refers to the fact that the financing may not be offered by a competitor of the defendant or where the defendant is dependent on the funder.

32. In order for the plaintiff to comply with these requirements, article 10.3 provides that the claimant must disclose to the judge a financial overview of the sources of financing obtained. It is noteworthy that there is no requirement to disclose the financing arrangement in its entirety, as is required by the Draft Report (article 15.3). In the event that the judge identifies a lack of compliance with such requirements, they may require the plaintiff, in accordance with article 10.4 of the Directive, to refuse or modify the financing and may ultimately deny the legal standing of the qualified entity.

33. Directive 2020/1828 regulates the duty of disclosure from the protective approach of safeguarding the weaker party in the contractual relationship, in this case the consumer, so that the judge intervenes directly to ensure that the financing does not harm those protected by the representative action.

34. Directive 2020/1828 also provides for the possibility of terminating the representative action through a settlement agreement between the qualified entity and the defendant (article 11). The Directive provides that the parties may propose the settlement to the judge or that the judge may urge the parties to reach such a settlement. The settlement shall be subject to the scrutiny of the judge, who will be able to approve it or refuse it if it is considered contrary to national law or if it contains conditions that cannot be enforced, taking into account the interest of the parties and, particularly, the interests of the protected consumers. If the settlement is refused, the judge shall continue to hear the representative action[39].

35. Article 11.4 of Directive 2020/1828 states that "approved settlements shall be binding upon the qualified entity, the trader and the individual consumers concerned" but specifies that "Member States may lay down rules that give the individual consumers concerned by a representative action and by the subsequent settlement the possibility of accepting or refusing to be bound by settlements". Again, the individual action of the consumer is still protected in any case[40].

36. Directive 2020/1828 also refers to the need for adequate information on the representative actions being carried out in each Member State of the European Union. Therefore, some requirements are included for qualified entities regarding their duty to communicate and notify which representative actions they are going to exercise (art. 13). Directive 2020/1828 procures the establishment by the Euro-

system of loser pays principle but must ensure that the viability of the qualified entity is assured and that the exercise of an unsuccessful representative action does not frustrate its financial survival in the medium or long term. The problem of loser pays principle is when the representative actions are financed with public money, because if the action is unsuccessful, the costs of the process are being paid with public money without having compensated the consumers who were initially intended to be protected. The proposal regarding that each injured party should contribute a small amount to finance the representative action is interesting insofar as, in our opinion, it does not represent a major impediment to access to justice and makes it possible to finance its exercise without the need to resort to TPF or to use public money.

[39] In the area of settlement agreements, the Dutch system may be of interest (*Wet afwikkeling massaschade in collectieve actie* of 27 June 2005*)*. This is a very particular instrument. As Kramer warns, we are dealing with an "settlement without action", that is, no collective action but directly an attempt at collective agreement. X.E. Kramer, «Securities Collective Action and Private International Law Issues in Dutch WCAM», *Global Business & Development Law Journal*, vol. 27, 2014, p. 239. Regarding settlement agreements in the Netherlands, see T. Arons and W.H. van Boom, "Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from The Netherlands", *European Business Law Review,* 2010, pp. 857-883.

[40] See footnote 24.

pean Commission of a database that collects relevant information regarding different aspects mentioned in article 14 of the Directive[41].

IV. Data protection and Consumer law under the same umbrella in the area of representative actions: a systematic interpretation?

37. President Kennedy, in his "Special Message to the Congress on Protecting the Consumer Interest" began by stating that "consumers, by definition, include us all"[42]; and he was right in this statement: all of us, or most of us, are consumers when we go to the supermarket to do our weekly shopping. We are consumers when we buy a drink on a sunny Sunday or when we purchase a technological product for our personal use through, for example, an online shopping platform. All citizens, in short, are consumers in their daily lives on many occasions.

38. From a European perspective, the idea of protecting the consumer is based on the fact that the consumer is a weaker party in the contractual relationship. In general, consumers cannot negotiate the terms of the contract, but merely adhere to it: their only choice, in the best of cases, is limited to deciding whether or not to enter into the contract[43]. In this scenario of contractual inequality, abuses can occur on the part of the companies, and EU law has set itself the objective, for several decades now, of providing the consumer with the means to make this contractual relationship less and less unequal. It is in this scenario that Directive 2020/1828 has been enacted[44].

39. The notion of consumer is changing and somewhat fluctuating in the field of European private law, in both substantive and procedural international law. Directive 2020/1828 defines a consumer as "any natural person who acts for purposes which are outside that person's trade, business, craft or profession" (article 3.1). Regarding Private International Law, in *Gruber*, the CJEU stated that "a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of

[41] In addition, it is necessary for Member States to introduce rules that address the proper functioning and transparency of qualified entities. Art. 5 of Directive 2020/1828 deals with the information and supervision of qualified entities. This article establishes, in its point 1, that each Member State must communicate to the Commission the qualified entities that it designates for the exercise of cross-border representative actions. In turn, the Commission must make public a list of all the designated entities. Point 2 regulates that Member States must ensure that information on qualified entities for the exercise of representative actions is available to the public and point 3 states that they must, at least every 5 years, review that the qualified entities comply with all the requirements and that, if they do not do so, they will lose their status as qualified entities. Point 4 establishes that if either the Member State or the Commission has any indication or concern about the lack of compliance with the requirements of a qualified entity, the Member State that designated it must investigate. The defendant may also note that, in its opinion, the qualified entity does not comply with such requirements.

[42] See President J.F. Kennedy, *Special Message to the Congress on Protecting the Consumer Interest* (15 March 1962), https://www.presidency.ucsb.edu/documents/special-message-the-congress-protecting-the-consumer-interest (latest consultation 16 May 2022).

[43] See S. De Vries, "Consumer protection and the EU Single Market rules – The search for the «paradigm consumer», *Journal of European Consumer and Market Law*, 2012, p. 242. Kuipers explains that "the Comission considers that consumer welfare is at the heart of well-functioning markets. The final objective is to protect consumers effectively from serious risks and threats". See J.J. Kuipers, *EU and Private International Law. The Interrelationship in Contractual Obligations*, Martinus Nijhoff Publishers, 2012, p. 192. The European Union's interest in developing consumer protection rules has been described by Dalhuisen as probably excessive. However, the fact remains that the Union's institutions are merely reaffirming their commitment to the development of legislative packages aimed at increasingly protecting the weaker party in the contractual relationship. See J. Dalhuisen, *Dalhuisen on International Commercial, Financial and Trade Law*, Portland, Hart Publishing, 2004, p. 269.

[44] Cappelletti underlined the three areas from which the phenomenon of representative actions has been analyzed (economic, social and legal): "some writers have discussed the "economic justification[s] of the class action; others have demonstrated the vital importance of «public interest law», and especially the class action, as a tool to equalize the parties in litigation; still others have analyzed the legal significance of developments in the area of public interest representation in one or another particular country, especially the United States where such developments have been most advanced and meaningful". See M. Cappelletti, "Vindicating the public interest through the courts: a comparativist´s contribution", *Buffalo Law Review*, vol. 25, no 3, 1976, p. 644.

the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect"[45].

40. However, in *Schrems*, the CJEU seems to change its jurisprudence. The particularity of social networks is that the profiles created on them can be used personally or professionally and that a profile on a social network can be used interchangeably or evolve from one use to another. Specifically, in the case of Facebook, several types of profiles can be created. For example, a "Facebook profile" or a "Facebook page", among others, can be generated. Maximilian Schems had both a profile and a page on Facebook. On the one hand, from 2008 to 2011 the "profile" was used solely on a personal basis. From 2011 onwards the same profile was used interchangeably as a personal profile and as a portal to advertise Maximilian Schrems' professional activities. On the other hand, Maximilian Schrems' "page" was always used for professional purposes[46].

41. In *Schrems*, the CJEU stated that "indeed, an interpretation of the notion of 'consumer' which excluded such activities would have the effect of preventing an effective defence of the rights that consumers enjoy in relation to their contractual partners who are traders or professionals, including those rights which relate to the protection of their personal data. Such an interpretation would disregard the objective set out in Article 169(1) TFEU of promoting the right of consumers to organise themselves in order to safeguard their interests"[47].

42. Directive 2020/1828 adopts a consumerist position by establishing a system of collective protection only for consumers. This Directive regulates a system of minimums, so some Member States could regulate a representative action mechanism offering protection that extends to non-consumers. This consumerist position of Directive 2020/1828 contrasts with the non-consumerist position of the GDPR, which protects any natural person, consumer or not, when there has been improper processing of their personal data by a third party. Thus, a professional natural person acting within their business activity will be protected by the provisions of the GDPR.

43. On the one hand, in a Member State that regulates representative actions that only protect consumers, non-consumers will not be able to benefit from such a tool in the sense that they cannot be represented by a qualified entity or participate in the representative action process. In a Member State where a broader regulation is adopted, non-consumers could participate or benefit from such a representative action.

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[45] See CJEU, 30 January 2005, *Gruber*, C-464/01, ECLI:EU:C:2005:32, para. 54.

[46] See CJEU, 25 January 2018, *Schrems*, C-498/16, ECLI:EU:C:2018:37, paras. 10-12.

[47] See CJEU, 25 January 2018, *Schrems*, C-498/16, ECLI:EU:C:2018:37, para. 40. Calvo Caravaca argues that "the ECJ, on this occasion, overlooked the legal consequences of the clever triple division of professional use in «negligible», «relevant» and «pre- dominant» it had previously coined in Judgment ECJ 20 January 2005, C-464/01, Gruber, and changed its mind like a teenager in spring. In fact, according to the ECJ, an individual who contracts a service with a professional or economic operator –in this case, the social network Facebook– solely for private and personal purposes, is a «consumer»; if he subsequently uses such service for professional activities, even to the extent that they become «predominant» and «essential», does not lose his «consumer» status. In other words, now the ECJ indicates that a «relevant» or even «predominant» professional use of the good or service does not prevent qualifying the contract as a "consumer contract" because the subject was a «consumer» when he contracted the service and continues being one even if only marginally or at a negligible level. The ECJ believes that this interpretation should prevail because it is the only one that allows an «effective defence of the rights that consumers enjoy in relation to their contractual partners who are traders or professionals». Earlier, under the Gruber doctrine, a «relevant» or «predominant» professional use of the good or service prevented qualifying the contract as a «consumer contract». With the Facebook doctrine, a contract cannot be described as a "consumer contract" only in case the professional use of the good or service is thourough and complete. If an individual hires the service as a consumer and remains a consumer –even if only in a slight or marginal way–, the ECJ understands that he is a «consumer» and that art. 17 BR I-bis applies: he can sue in the Member State of his domicile". See A. L. Calvo Caravaca, "Consumer contracts in the European Court of Justice Case Law. Latest Trends», *Cuadernos de Derecho Transnacional*, vol. 12, no 1, 2020, p. 95

44. On the other hand, if the representative action claims improper processing of personal data, articles 79 and 80 GDPR and subsequent national legislation could be invoked. Any affected person, whether or not considered a consumer, could participate in or benefit from the representative action.

45. In *Meta Platforms Ireland Limited v. Brundesverband,* the Advocate General, rightly warned of the risk of creating two "different standards"[48]. In this case, the CJEU gives a systematic interpretation of the GDPR and Directive 2020/1828: "that interpretation of Article 80(2) of the GDPR is moreover supported by Directive 2020/1828 which repeals and replaces, as from 25 June 2023, Directive 2009/22. In that context, it must be observed that, in accordance with Article 2(1) thereof, Directive 2020/1828 applies to representative actions brought in relation to traders' infringements of the provisions of EU law referred to in Annex I of that directive, which mentions the GDPR in point 56"[49]. The CJEU adds: "it is true that Directive 2020/1828 is not applicable in the context of the dispute in the main proceedings and its transposition deadline has not yet expired. However, it contains several elements which confirm that Article 80 of the GDPR does not preclude the bringing of additional representative actions in the field of consumer protection"[50].

46. The CJEU also gives a broad interpretation of the concept of "public interest" of the entity with standing to bring injunctive representative actions under article 80 GDPR, and in light of Directive 2020/1828, understanding that national legislation granting standing to a consumer association or federation of associations to bring injunctive representative actions for the benefit of consumers whose rights relating to personal data have been infringed does not preclude the aforementioned article of the GDPR[51]. In short, it is understood that a consumer association may have sufficient "public interest" for the exercise of an injunctive representative action in defense of consumers whose data rights have been violated. It should also be noted that in *Meta Platforms Ireland Limited v. Brundesverband*, a consumer association is not deemed to have standing to bring any injunctive representative action for the protection of personal data, but rather to have standing to bring actions for the benefit of consumers who, in their capacity as such, are harmed by a data mishandling.

47. As we can see, we are still faced with the fact that, in the European Union, there may be two systems of representation action in consumer matters and in data protection matters, something that complicates and hinders the development of this mechanism as an adequate instrument of access to justice. An optimal solution would be for Directive 2020/1828 not to require consumer status in order to benefit from a representative action. Instead, it would have been more appropriate to regulate a certification phase at the beginning of the proceedings in which the judge would determine the viability of the representative action following, among others, a commonality criterion, as regulated in the American procedural system.

48. In the United States, Rule 23(b)2 of the Federal Rules of Civil Procedure provides for a certification phase in the early stages of the class action. In this phase, the judge verifies certain aspects of the matter to be dealt with, such as its mootness, notice to the class members, predominance of common

[48] See Opinion of the Advocate General J. Richard de la Tour, 2 December 2021, *Meta Platforms Ireland Limited v. Brundesverband,* C-319/20, ECLI:EU:C:2021:979, para. 66.

[49] See CJEU 28 April 2022, *Meta Platforms Ireland Limited v. Brundesverband,* C-319/20, ECLI:EU:C:2022:322, para. 80.

[50] See CJEU 28 April 2022, *Meta Platforms Ireland Limited v. Brundesverband,* C-319/20, ECLI:EU:C:2022:322, para. 81.

[51] Article 80.1 GDPR states: "the data subject shall have the right to mandate a not-for-profit body, organisation 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 to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law". The CJEU states: "It must be held that a consumer protection association, such as the Federal Union, may fall within the scope of that concept in that it pursues a public interest objective consisting in safeguarding the rights and freedoms of data subjects in their capacity as consumers, since the attainment of such an objective is likely to be related to the protection of the personal data of those persons". See CJEU 28 April 2022, *Meta Platforms Ireland Limited v. Brundesverband,* 319/20, ECLI:EU:C:2022:322, para. 65.

issues over individual issues, and the standing of the plaintiff. However, prior to this phase, and referring to the prerequisites for class action certification, the judge must verify the adequacy of representation of the class. Rule 23(a)2 also requires that there must be "questions of law or fact common to the class". This is the requirement that doctrinally has been called commonality, which is nothing more than the search for certain homogeneity in the cases underlying the class action[52].

49. With this certification phase in the EU representative action in the framework of a unique proceeding for all types of representative actions, we would avoid a consumerist position that would create two standards of representative actions and, in addition, this type of representative action could also be used in the field of antitrust law, avoiding the repetition of quasi-identical lawsuits with injured parties who, on many occasions, do not have the status of consumer, as has been happening in many Member States in relation to the truck cartel case[53]. Although Directive 2020/1828 does not refer to a certification phase, we could interpret that nothing prevents Member States from including it in their regulations on representative actions[54].

50. Together with this certification phase, it would have been desirable, in order to avoid the occurrence of these two "different standards", to regulate in Directive 2020/8128 more flexible criteria for standing to sue. By establishing controls for the proper functioning of representative actions, it would not have been problematic to regulate the legal standing of *ad hoc* groups and not to grant the monopoly of legal standing to qualified entities.

51. In *Meta Platforms Ireland Limited v. Brundesverband*, the representative action is for injunction, but the question arises as to what happens if it is a redress representative action[55]. A systematic interpretation of the GDPR and Directive 2020/1828 may also be made in relation to redress measures. Article. 82.1 GDPR provides that any person harmed by a data-related wrongdoing can file a claim for damages or "compensation" (in the wording of the GDPR). The same issue is also recalled in article 80 GDPR, thus providing for an injunctive and redress type of representative action.[56] For its part, Directive 2020/1828, as already indicated, introduces for the very first-time consumer representative redress actions throughout the whole European Union.

52. We can conclude from this section that it is necessary to interpret the data protection representative actions regulated in the GDPR in conjunction with Directive 2020/1828, both for injunctive and redress actions. However, this systematic interpretation may not be sufficient to avoid the creation

[52] Note that the rule establishes an alternative requirement. It does not require both factual and legal elements to be present, but one or the other. See A. B. Spencer, "Class actions, heightened commonality, and declining access to justice," *Boston University Law Review*, vol. 93, no. 2, 2013, pp. 442-444

[53] On the private enforcement of competition law in the EU following the implementation of the EU Antitrust Damages Directive 2014/104/EU, and with references to the truck cartel, see B.J. Rodger, M. Sousa Ferro and F. Marcos, "A panacea for competition law damages actions in the EU? A comparative view of the implementation of the EU Antitrust Damages Directive in sixteen Member States", *Maastricht Journal of European and Comparative Law*, vol. 26(4), 2019, pp. 480-504. See also F. Gascón Inchausti, "Aspectos procesales de las acciones de daños derivados de infracciones de las normas sobre defensa de la competencia: apuntes a la luz de la Directiva 2014/104 y de la propuesta de ley de transposición", *Cuadernos de Derecho Transnacional*, vol. 9, no 1, 2017, pp. 125-152.

[54] Recital 11 of Directive 2020/1828 states: "taking into account their legal traditions, it should leave it to the discretion of the Member States whether to design the procedural mechanism for representative actions required by this Directive as part of an existing or as part of a new procedural mechanism for collective injunctive measures or redress measures, or as a distinct procedural mechanism, provided that at least one national procedural mechanism for representative actions complies with this Directive" and article 7 regulates: "Member States shall ensure that courts or administrative authorities are able to dismiss manifestly unfounded cases at the earliest possible stage of the proceedings in accordance with national law".

[55] See CJEU 28 April 2022, *Meta Platforms Ireland Limited v. Brundesverband,* 319/20, ECLI:EU:C:2022:322, para. 36.

[56] Article 82.1 GDPR states: "any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered". Article 80.1 GDPR refers to the exercise "of the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law".

of two "different standards" of representative actions, especially due to issues relating to standing to sue. It would have been desirable to institute in Directive 2020/1828 a certification phase at the beginning of the proceedings and to allow greater flexibility as regards the bodies entitled to bring representative actions. This approach could, however, still be adopted by national legislators.

V. International jurisdiction in cross-border representative actions

1. Representative actions and heads of jurisdiction in Regulation 1215/2012

53. Article 5 of Directive 2020/1828 requires each Member State to inform the European Commission on which entities have standing to bring what the Directive itself calls "cross-border" representative actions, i.e. representative actions brought by an entity in a Member State other than its Member State of designation. The Directive distinguishes them from purely national representative actions, in which the entity designated by a Member State acts in that Member State only. The inclusion in this list is relevant in the case of cross-border actions because, in accordance with Article 6 of the Directive, the instance of another Member State hearing the representative action can determine that the entity bringing the action has standing to sue.

54. Although Directive 2020/1828 refers to national and cross-border representative actions, these are notions specific to the Directive that in principle do not affect existing Private International Law instruments. Nevertheless, Regulation 1215/2012 does not include a forum for representative actions so we will have to stick to the already existing forums, designed rather for individual litigation[57].

55. In the *Schrems* case, Maximilian Schrems succeeded in getting other Facebook users, domiciled in different Member States of the European Union or even outside the European Union, to assign to him their claims against the social network so that he could exercise, together with his own legal action deriving from his claim, the actions of all assignors[58].

56. In this regard, Maximilian Schrems brought before the Regional Civil Court of Vienna, Austria, the place of his domicile, a "representative action" arising from an assignment of claims against Facebook on the basis of the forum of the consumer's domicile provided for in Section 4 of Regulation 44/2001. This section states that a claim filed by a consumer against another contracting party may be brought either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

57. The Austrian court referred a question to the CJEU for a preliminary ruling asking whether Maximilian Schrems should be considered a consumer given that, although he initially used the social network for private purposes, he later used it to sell his books and promote his activism. The Austrian

[57] In this section of the paper we will refer only to consumer representative actions. Although in the previous section we have defended a non-consumerist position of the representative action, the most widespread type of representative action and the one referred to in Directive 2020/1828 is the representative action in defense of consumers.

[58] See CJEU 25 January 2018, *Schrems*, C-498/16, ECLI:EU:C:2018:37, paras. 2 and 16. Advocate General Bobek stated that under Austrian national law he did not consider that we were before a "class action", i.e. representative action. See Opinion of the Advocate General Michal Bobek, 14 November 2017, *Maximilian Schrems v Facebook Ireland Limited*, C-498/16, ECLI:EU:C:2017:863, para 69. What happened in the *Schrems* case could be assimilated to what we know in Spanish law as assignment of receivables for collection purposes (in Spanish, *cesión de créditos con fines de cobro*). Pantaleón Prieto explains that when what is intended is to assign the receivable with the economic function of collection as the cause of the assignment contract, we are dealing with an assignment of receivables with a collection function. This author specifies that if the economic function that the parties wish to achieve with the assignment is the collection of the receivable in question, the ownership of the receivable will not be transferred from the assignor to the assignee. The assignor shall remain for all purposes the sole and true creditor. The assignment will not produce any other legal consequence than that of giving power to the assignee to enforce the receivable, i.e to demand from the debtor the performance in the assignnor´s name. See F. Pantaleón Prieto, "Cesión de créditos", *Anuario de derecho civil*, vol. 41, no 4, 1988, p. 1039.

court also asked whether Maximilian Schems can use the consumer protection forum (Section 4 Regulation 44/2001) to bring his action and those of the other assignors against Facebook.

58. The CJEU concluded that Maximilian Schrems should continue to be considered a consumer[59] ; but ruled that Section 4 of Regulation 44/2001 does not apply to an action brought by a consumer seeking to enforce before the court of the place where he or she is domiciled not only his or her own rights, but also rights assigned by other consumers domiciled in the same Member State, in other Member States or even in third States.

59. In other similar, but not identical, cases, the CJEU has also rejected the application of the consumer protection forum: in the *Henkel* case it was a consumer association that brought the action in the interest of the consumers[60]; and in the *Shearson Lehmann Hutton* case, similar to the *Schrems* case, a legal person was the assignee of rights of a group of consumers[61].

60. In all these cases, in essence, the CJEU interprets that the consumer protection forum in Regulation 44/2001 and its successor, the current Regulation 1215/2012, is intended for strictly individual litigation and that it does not apply to consumer representative actions for several reasons[62]: because a consumer association is a legal person and legal persons cannot make use of the forum for consumer protection[63]; because the entity representing consumers is not a party to the original consumer contract from which the dispute arises, taking into account the procedural situation and not the material situation on which the claim is based[64] ; and because Section 4 of Regulation 44/2001 is an exception to the general rule of Art. 4

[59] See section IV of this paper.

[60] See CJEU, 1 October 2002, *Henkel*, C-167/00, ECLI:EU:C:2002:555.

[61] See CJEU, 19 January 1993, *Shearson Lehmann Hutton*, C-89/91, ECLI:EU:C:1993:15. Jiménez Blanco argues that the *Shearson Lehman Hutton* case and the *Henkel case* are based on different factual assumptions and that, therefore, the CJEU has incorrectly transposed the *Shearson Lehman Hutton* doctrine into the *Henkel* case. In *Shearson Lehman Hutton*, a legal person brings an action by virtue of an assignment of claims in its favor by a group of consumers. It therefore acts in its own interest as the new owner of the claims it has acquired by assignment. In *Henkel,* however, there is no assignment of claims, but the consumer association, by virtue of its legal standing, acts in the interest of a group of consumers and not in its own interest. In the *Henkel* case, the consumer association brings the action in the interests of consumers. See P. Jiménez Blanco, "El tratamiento de las acciones colectivas en materia de consumidores en el Convenio de Bruselas", *Diario la Ley, Sección Unión Europea*, 2003, pp. 2-3.

[62] Paredes Pérez points out that the case law of the CJEU has stated that Section 4 of Regulation 215/2012 has an "intuitu personae" nature and that, consequently, group and representative actions are excluded from its sphere of application. J.I. Paredes Pérez, "La noción de consumidor a efectos de la aplicación de los foros de protección del Reglamento de Bruselas I bis a litigios relativos a instrumentos financieros y de inversión. Judgment of the Court of Justice of 3 October 2019, Case C-208/18: Petruchová*", La Ley Unión Europea*, no. 73, 2019, p. 5.

[63] In *Henkel*, the CJEU stated that "a legal person which acts as assignee of the rights of a private final consumer, without itself being party to a contract between a professional and a private individual, cannot be regarded as a consumer within the meaning of the Brussels Convention and therefore cannot invoke Articles 13 to 15 of that convention. That interpretation must also apply in respect of a consumer protection organisation such as the VKI which has brought an action as an association on behalf of consumers". See CJEU, 1 October 2002, *Henkel*, C-167/00, ECLI:EU:C:2002:555, para. 33. Tzakas states that the CJEU understands that the consumer association or similar entity bringing the representative actions is not considered to be a consumer. See D.P. L. Tzakas, "International Litigation and Competition Law: the Case of Collective Redress", in J. Basedow, S. Francq and L. Idot (eds.), *International antitrust litigation. Conflict of Laws and Coordination*, Oxford, Hart, 2011, p. 184. However, we can consider that the CJEU uses a dual basis: on the one hand, it seems to require that the consumer is a natural person and not a legal person, and, on the other hand, the consumer shall be a party to the contract from which the dispute arises.

[64] In *Henkel*, the CJEU stated: "in a situation such as that in the main proceedings, the consumer protection organisation and the trader are in no way linked by any contractual relationship. Admittedly, it is likely that the trader has already entered into contracts with a number of consumers. However, whether the court action is subsequent to a contract already concluded between the trader and a consumer or that action is purely preventive in nature and its sole aim is to prevent the occurrence of future damage, the consumer protection organisation which brought that action is never itself a party to the contract. The legal basis for its action is a right conferred by statute for the purpose of preventing the use of terms which the legislature considers to be unlawful in dealings between a professional and a private final consumer". See CJEU 1 October 2002, *Henkel*, C-167/00, ECLI:EU:C:2002:555, paras. 38 and 39. The CJEU applies a strict interpretation of the principle of the relativity of contracts. See R. Arenas García, "La distinción entre obligaciones contractuales y extracontractuales en los instrumentos comunitarios de Derecho internacional privado", *Anuario Español de Derecho Internacional Privado*, no VI, 2006, p. 401.

and, consequently, must be interpreted restrictively, taking into account that with the representative actions there is a rebalancing of power between consumers and their counterparty in the contract[65].

61. Besides preventing the application of Section 4 of Regulation 1215/2012, the CJEU does not allow the use of the special forum for contractual matters of article 7.1 of Regulation 1215/2012 because, as said, the qualified entity is not a party in the contracts that generate the dispute[66]. It could

[65] The CJEU ruled that "under the system of the Brussels Convention, the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction and it is only by way of derogation from that principle that the Brussels Convention provides for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Contracting State. Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention (...)". See CJEU, 5 February 2004, *Frahuil*, C-265/02, ECLI:EU:C:2004:77, para. 23. See also CJEU, 3 July 1997, *Benicasa*, C-269/95, ECLI:EU:C:1997:337, para. 13. Also in CJEU, 19 January 1993, *Shearson Lehman Hutton*, C-89/91, ECLI:EU:C:1993:15, para. 16, it is specified that "the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention". In CJEU, 17 June 1992, *Jakob Handte*, C-26/91, ECLI:EU:C:1992:268, para. 14, it was stated that "the rules on special and exclusive jurisdiction and those relating to prorogation of jurisdiction thus derogate from the general principle, set out in the first paragraph of Article 2 of the Convention, that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction. That jurisdictional rule is a general principle because it makes it easier, in principle, for a defendant to defend himself. Consequently, the jurisdictional rules which derogate from that general principle must not lead to an interpretation going beyond the situations envisaged by the Convention". Danov opts for a broader interpretation, but acknowledges, in line with the case law of the CJEU, that the special forum of Section 4 of Regulation 1215/2012 is therefore not to be applied expansively to legal situations that are not a contract concluded with a consumer. M. Danov, "The Brussels I Regulation: Cross-border collective redress proceedings and judgments", *Journal of Private International Law*, 2010, p. 373. Audit explains that the protection forums formulate special rules for certain matters, in which a party is considered weaker and therefore requires protection against the risk of having to litigate in a distant forum. Audit reasons that the purpose of protection of a party in a state of economic inferiority requires the limitation of the scope of application of the protective provisions. See B. Audit (with the concurrence of L. D´Avout), *Droit International Privé*, Paris, Economica, 2010 p. 477. Kessedjian states that the equality of arms between the plaintiffs, as understood by the European Court of Human Rights under article 6.1 of the European Convention on Human Rights, is based on the simple fact that the consumer regroups with others to attempt the action. A protective jurisdiction, in her opinion, is no longer justified. See C. Kessedjian, "L´action en justice des associations de consommateurs et d´autres organisations representatives d´interets collectifs en Europe", *Rivista di diritto internazionale privato e processuale*, vol. 2, 1997, p. 289.

[66] In our opinion, the Brussels System may admit an alternative interpretation that allows the use of the consumer protection forum of section 4 of Regulation 1215/2012 regarding consumer representative actions: if the action represents consumers, (i) it should not be taken into account that the qualified entity is a legal person. Even if it is legal person, it is not comparable to a for-profit company, a case for which this criterion makes sense. (ii) A coincidence of the procedural situation with the material situation should not be required; the fact that the qualified entity is not a party to the contract from which the dispute arises does not mean that it is not bringing the action for the benefit of the interests of persons who actually are party to these contracts. See F.J. Garcimartín Alférez, *Derecho Internacional Privado*, Cizur Menor, Civitas Thomson Reuters, 2017, p. 115. (iii) Section 4 should not be interpreted so restrictively as an exception to the general rule of Art. 4 of Regulation 1215/2012 or could even be considered not to be, in fact, an exception to the general rule at all. See J. Carrascosa González, "Foro del domicilio del demandado y reglamento Bruselas I-BIS 1215/2012. Análisis crírico de la regla actor sequitur forum rei", *Cuadernos de Derecho Transnacional*. Vol. 11, no 1, 2019, pp. 112-138. (iv) There is no rebalancing of power between consumers and defendant by the mere intervention of a qualified entity. It is true that representative actions seek a rebalancing of power, but this only occurs when a judgment is finally issued. There is no point in implementing mechanisms such as this if they are frustrated when it comes to determining jurisdiction and qualified entities are forced to litigate in other countries whose procedural law they are unfamiliar with and taking into account that representative actions are highly complex processes. Virgós Soriano and Garcímartín Aférez stated in 2007 that when the action is brought by a group of consumers itself (not a qualified entity), Section 4 of Regulation 1215/2012 may be applicable. See M. Virgós Soriano and F.J. Garcimartín Alférez, *Derecho procesal civil internacional*, Cizur Menor, Thomson Civitas, 2007, p. 175-176. In this alternative interpretation, the qualified entity with standing will exercise the representative action before the courts of its own domicile which must coincide with the domicile of the injured consumers because if consumers are domiciled in other States, they could not be represented by this representative action exercised in that first State. On the contrary, there could be a breach of the principle of protection sought by Section 4 of Regulation 1215/2012. González Beilfuss and Añoveros Terradas explain that a concentration of international jurisdiction in a single forum would generate discrimination between consumers. The authors recall that it is necessary to differentiate the criterion followed for the establishment of the consumer protection forum from the special forums in contractual matters of art. 7.1 of Regulation 1215/2012. In the special forum of protection the criterion is, precisely, the protection of consumers so it is understood that they will be more protected if they have the possibility of suing before the courts of their domicile. However, the special forum in contractual matters has its raison d'être in a criterion of proximity: the court that is deemed to be closest to the contract. See C. González Beilfuss and B. Añoveros Terradas, "Compensatory Collective Redress and The Brussels I Regulation (Recast)", in A. Nuyts and N. Hatzimihail, *Cross-Border Class Actions. The European Way*, Munich, Sellier, 2014, p. 254.

only therefore be contemplated the use of the general forum of article 4 and, in some cases, the special forum for non-contractual matters of art. 7.2 of Regulation 1215/2012[67].

62. Given this interpretation of the CJEU, in which no jurisprudential change is foreseen, a forum on representative actions should be included in the possible reform of Regulation 1215/2012 in order to make European Private International Law consistent with the European Directive 2020/1828, which aims to ensure that in all Member States consumers have at least an effective and efficient procedural mechanism for representative actions to obtain injunctions and redress. The existence of such a mechanism would enhance consumer confidence and empower citizens to exercise their rights, contribute to fairer competition and create a level playing field for businesses operating in the internal market[68]. This new forum could provide for the exercise of the representative action before the courts of the place of domicile of the qualified entity in those circumstances where such domicile coincides with that of the consumers. The general rule of the domicile of the defendant would remain available for the cases where consumers are domiciled in different States. This new forum would only be applicable if within the certification phase or similar stage of the proceedings it is proven that all the represented individuals are consumers.

2. Representative actions and the new heads of jurisdiction contained in the GDPR

63. The GDPR also seems to include jurisdictional forums that could be applicable to data representative actions in addition to those contained in Regulation 1215/2012 analyzed in the previous section. Thus, art. 80.1 GDPR regulates that the entity entitled to represent data subjects may "lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law".

64. Article 79.2 GDPR assigns, as a first criterion, the jurisdiction of the courts of the Member State in which the controller or processor of personal data "has an establishment"[69]. In many cases the place where the defendant has an establishment will coincide with the place where it is domiciled for the purposes of application of the general forum of article 4 of Regulation 1215/2012 but this may not always be the case. The fact that Regulation 1215/2012 refers to the "domicile of the defendant" and the GDPR to the "establishment" of the defendant may have different effects on the application of the two instruments, as the concepts mentioned are different legal categories[70].

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[67] See CJEU, 9 July 2020, *VKI v. Volkswagen*, C-343/19, ECLI:EU:C:2020:534, para. 30. Article 7.2 could be applicable regarding preventive representative actions, where no harm to any individual is known to have occurred yet. Mankowski reasons that the introduction in Regulation 1215/2012 of the harmful event that may occur is related to future damages and is specially designed for preventive actions. See P. Mankowski, "Article 5", in U. Magnus and P. Mankowski (eds.): *Brussels I regulation. European Commentaries on Private International Law*, Munich, Sellier, 2012, p. 271. However, the application of the forum of article 7.2 may also present some peculiarities regarding representative actions. Tang states that "since the tortious activity gives rises to all damages, the country where the event giving rise to the damage occurred has connections to all the harm that originates from this country; the place of damage, on the other hand, only has connections to the harm particularly existing in the specific country, and not to the harm existing in any other countries". See S. Tang, "Consumer collective redress in European Private International Law", *Journal of Private International Law*, vol. 7, no 1, 2011, p. 119.

[68] Directive 1828/2020, recital 7. On the possible reform of Regulation 1215/2012, see B. Hess, , "La reforma del Reglamento Bruselas I bis. Posibilidades y perspectivas", *Cuadernos de Derecho Transnacional*, vol. 14, no. 1, pp. 15-16. For an alternative proposal to include a new forum in the future reform of Regulation 1215/2012, see F. Rielander, "Aligning the Brussels regime with the representative actions directive", *International and Comparative Law Quarterly*, vol. 71, no 1, 2022, pp. 107-138.

[69] *See*. I. Revolidis, "Judicial jurisdiction over internet privacy violations and the GDPR: a case of «privacy tourism»", *Masaryk University Journal of Law and Technology*, vol. 11, no 1, 2017, p. 22.

[70] Rodríguez Pineau and Pato argue that "the Directive on Representative Actions and the General Regulation on Data Protection (Art. 80) (…) partially overlap" (…) and "their application might generate conflicting legal responses. Moreover, identifying the private international law rules on jurisdiction applicable to those actions is a tricky exercise (…)". See E. Rodrí-

65. On the one hand, article 63 of the Regulation 1215/2012 states that a legal person is domiciled in a Member State when its statutory seat, central administration or principal place of business is located there[71].

66. On the other hand, recital 22 of the GDPR states that "establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect". Furthermore, article 3.1 GDPR regulates that this instrument shall apply regardless of whether the data processing takes place in the Union or not. Thus, the concept of "establishment", broadly defined in the GDPR, could also be interpreted in a broad and flexible manner in the sense that the courts of a Member State may hold international jurisdiction provided that the defendant has an establishment in that Member State, and even if this establishment has not been the one that directly or indirectly stored or processed the data that have been alledgely mishandled.

67. It could be argued that a stricter interpretation of the concept of "establishment" should be made and that jurisdiction should not be conferred to the courts of a Member State when the establishment is located in its territory and has not stored or processed the data. In other words, when the establishment is completely unrelated to the wrongful act giving rise to the dispute. This is based on the fact that the defendant could not foresee where the lawsuit could potentially be filed and on the possibility of forum shopping scenarios taking place. Nevertheless, the CJEU has stated that the concept of establishment should not be interpreted in a strict manner[72].

68. Thus, with the current regulation, theoretically, a representative action could be brought in any Member State in which the defendant has an establishment, which could generate situations of forum shopping and lack of predictability in the exercise of the action, which could compromise the defendant's position[73]. As an alternative criterion, article 79.2 provides that the "data subject" may bring the action before the courts of the Member State in which the data subject has its habitual residence, unless the data controller or processor is a public authority of a Member State acting in the exercise of its public authority functions[74].

69. Regarding data protection and other possible non-consumerist representative actions, article 4 of Regulation 1215/2012 should apply. It would perhaps be interesting to amend the GDPR and instead of establishing its own forum of jurisdiction, refer directly to the criterion of the domicile of the defendant of article 4 of Regulation 1215/2012, thus avoiding forum shopping situations and providing clarity and predictability to the rules of Private International law.

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guez Pineau and A. Pato, *Le droit international privé à l'épreuve des actions collectives en matière de protection des données*, https://blogdroiteuropeen.com/2021/04/06/le-droit-international-prive-a-lepreuve-des-actions-collectives-en-matiere-de-protection-des-donnees-par-alexia-pato-et-elena-rodriguez-pineau/ (latest consultation 15 July 2022).

[71] *See*. A. Dutta, "Domicile, habitual residence and establishment", in J. Basedow, G. Rühl, F. Ferrari and P. De Miguel Asensio, P., *Encyclopedia of Private International Law*, Cheltenham (UK), Edward Elgar Publishing, 2017, p. 555.

[72] In CJEU, 1 October 2015, 2022, *Weltimmo*, C-230/14, ECLI:EU:C:2015:639, para. 31, the CJEU stated: "in addition, in order to attain that objective, it should be considered that the concept of 'establishment', within the meaning of Directive 95/46, extends to any real and effective activity — even a minimal one — exercised through stable arrangements". Note that Directive 95/46/EC was the data protection legal framework applicable prior to the GDPR.

[73] Pato states that "even assuming that representative entities could rely on the favourable special fora contained in Article 79(2) GDPR, not all problems regarding private international law and international civil procedure would be solved. In particular, the lack of an additional connecting factor in the first prong of Article 79(2) GDPR, allocating jurisdiction to the courts where the controller/processor has an establishment, would lead to unreasonable forum shopping". See A. Pato, "The Collective Private Enforcement of Data Protection Rights in the EU", *working paper*, 2018, p. 20.

[74] Pato argues that "as for the second prong of Article 79(2) GDPR, according to which the courts where the data subject has his/her habitual residence have jurisdiction, it favours centralisation of claims at the national level. However, territorial centralisation will actually depend on the presence of a national provision allowing for such possibility". See A. Pato, "The Collective Private Enforcement of Data Protection Rights in the EU", *op.cit.* p. 20.

VI. Final remarks

70. Data protection mechanisms of public and private enforcement are parallel, but they feed and interact with each other. With the introduction of the obligation to inform the injured individual of the data protection offence on the part of the controller or processor responsible, any data offence becomes known, at least to the injured individuals who, in turn, may bring it to the attention of entities with legal standing, so that they may exercise the corresponding representative actions —where regulated—, without prejudice to their individual action which remains intact. In this scenario, the instance hearing the representative action may request from the data authority the sanctioning file and all the documents contained therein. In this sense, the data wrongdoing could be accredited in the jurisdictional venue by what was resolved in the administrative venue.

71. Regarding private enforcement, it is necessary to interpret the data protection representative actions regulated in the GDPR in conjunction with Directive 2020/1828, both for injunctive and redress actions. However, this systematic interpretation may not be sufficient to avoid the creation of two "different standards" of representative actions, especially due to issues relating to standing to sue. It would have been desirable to institute in Directive 2020/1828 a certification phase at the beginning of the proceedings and to allow greater flexibility as regards the bodies entitled to bring representative actions. This approach could, however, still be adopted by national legislators.

72. As for international jurisdiction, a forum on representative actions should be included in the possible reform of Regulation 1215/2012 in order to make European private international law consistent with the European Directive 2020/1828 which aims to ensure that in all Member States consumers have at least an effective and efficient procedural mechanism for representative actions to obtain injunctions and redress. The existence of such a mechanism would enhance consumer confidence and empower consumers to exercise their rights, contribute to fairer competition and create a level playing field for businesses operating in the internal market. This new forum could provide for the exercise of the representative action before the courts of the place of domicile of the qualified entity in those circumstances where such domicile coincides with that of the consumers. The general rule of the domicile of the defendant would remain available for the cases where consumers are domiciled in different States. This new forum would only be applicable if within the certification phase or similar stage of the proceedings it is proven that all the represented individuals are consumers.

73. With respect to data protection and other possible non-consumerist representative actions, article 4 of Regulation 1215/2012 should apply. It would perhaps be interesting to amend the GDPR and instead of establishing its own forum of jurisdiction, refer directly to the criterion of the domicile of the defendant of article 4 of Regulation 1215/2012, thus avoiding forum shopping situations and providing clarity and predictability to the rules of Private International law.