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RESEARCH

Fundamental Rights' Protection in the Digital Environment: Collective Actions Defending Diffuse Interests and Public Interest

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Abstract
In this article, collective action is analysed as a suitable mechanism to protect fundamental rights in the digital environment. Our hypothesis is that collective actions to protect diffuse interests and public interest can be of relevance to enable private but particularly public bodies to (indirectly) protect people's fundamental rights (e.g., data protection, privacy, non-discrimination and freedom of expression and information). To this end, Directive 2020/1828, that specifically addresses representative actions, Article 80 of the GDPR and Article 86 of the Digital Services Act are studied. These last two articles address alternative mechanisms to individual representation to exercise the rights conferred to individuals by the Regulations. Finally, some conclusions are presented.

Highlights

- Some characteristics of the digital sphere guide us into exploring collective action as a mechanism that should be further developed to protect people's fundamental rights.
- Collective action leaded by public bodies for the defense of diffuse interests or public interest can be of significant importance in the digital environment to (indirectly) protect fundamental rights.
- Harm and compensation of certain violations of fundamental rights in the digital environment should be reconceptualised.

Keywords European Union · Collective action · Digital environment · Public interest · Diffuse interests

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Introduction

In the legal culture of continental Europe, following the individualist principles of Roman law and private law, the subjective interest of the owner is taken as the starting point. In terms of fundamental rights, this essentially subjective nature of rights has become increasingly difficult to maintain due to the technological and social transformations of the twentieth and twenty-first centuries. Consumer law and environmental law have resulted in the development of concepts, instruments, and techniques to ensure "diffuse," "supra-individual," "collective," "trans-personal," "group," rights, etc. (Cotino Hueso, 2022). In recent years, the EU has experienced an increase in collective actions for consumer protection, as well as in other areas such as data privacy and digital services (Erixon et al., 2025).

However, legal systems are still far behind social and economic reality, and any attempt to establish rights that do not identify with individual and private structure and instrumentalization encounters a significant amount of resistance (García Alvarez, 2020). Most European Union (EU) Member States have low rates of collective actions, including regulatory redress and consumer ombudsman cases, compared to individual litigation cases (Hodges & Voet, 2024).

The EU has acknowledged this gap and is attempting to promote collective action as a mechanism to empower consumers, creating an EU level playing field for traders and consumers. In this regard, Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers (hereinafter Directive (EU) 2020/1828) has the aim to ensure that at EU and national level at least one effective and efficient procedural mechanism for representative actions for injunctive measures and for redress measures is available to consumers (Recital 7). Specifically, Recital 1 of Directive (EU) 2020/1828 highlights how "globalization and digitalization have increased the risk of a large number of consumers being harmed by the same unlawful practice." In addition, the General Data Protection Regulation (hereinafter GDPR), in its Article 80, and the Regulation (EU) 2022/2065 on a Single Market for Digital Services (hereinafter DSA), in its Article 86, stipulate that individuals have the right to mandate a body, organization, or association to exercise their rights conferred by the Regulations. Particularly regarding Article 80 GDPR, the doctrine established by the CJEU in the case *Meta Platforms Ireland Limited* (C-319/20) is of special interest as it allows associations to take legal action in the absence of a mandate conferred for this purpose and regardless of the violation of specific rights of the persons concerned (Section 83). Later on, this approach was confirmed in the case *Meta Platforms Ireland Ltd* (C-757/22). This doctrine can reduce the burden on people to protect their rights in the digital environment. In addition, it is argued that de-individualizing the protection of rights must lead to public bodies[1] taking on more responsibility

[1] For example, concerning discrimination in the digital environment, Directive (UE) 2024/1499 of 7th May 2024 and Directive (UE) 2024/1500 of 14th May 2024 on standards applicable to equality bodies, oblige in Article 10 of both Directives that Member States to ensure that equality bodies have the right to act in court proceedings in civil and administrative matters concerning the implementation of the principle of equal treatment. The right of the equality body to act in legal proceedings must include either the right to bring legal proceedings on behalf of one or more victims, or the right to participate in legal proceedings in support of one or more victims, or the right to bring legal proceedings in its own name, in order to defend the public interest. This article legitimizes equality bodies to bring collective actions in cases of algorithmic discrimination. It should also be taken into account that Member States may not grant the body the right to initiate legal proceedings in its own name, in order to defend the public interest (according to Article 10.3). Even if equality bodies are legitimate to bring group actions in cases of algorithmic discrimination, group actions to defend diffuse interests or the public interest (without an identified victim) are not guaranteed in all Member States.

regarding the protection of diffuse interests or the public interest[2] (without an identified victim), especially relevant in the online sphere.

Public bodies can access information; their actions are guided by a presumption of public interest; they have expertise in protecting fundamental rights; it is possible for them to coordinate and collaborate with other authorities; and they can play a key role in interrelating harmed people (that can be indeterminate or not easily identifiable). These factors, in our view, make them well-suited to propose collective actions in these fields.[3]

There is a necessity of new regulatory skills and techniques to safeguard those harmed by unlawful practices in the online sphere. As Cohen (2019) points out, digitalization presses for operational accountability that moves beyond subject-centred conceptions.

Moreover, it's important to emphasize that consumer law collective redress procedures are typically associated with economic compensation rather than the discontinuation of illegal practices. On the contrary, this article aims to highlight the importance of using these mechanisms in the digital sphere to prevent and stop illegal practices. The effectiveness of addressing an illegal practice by a large technology company that can affect millions of people from an individual perspective appears to be diminished when compared to addressing it from a collective perspective (in the article are particularly considered infringements that have an impact on the subject's privacy, data protection, non-discrimination and freedom of expression and information rights).

Reasons Why Collective Action Is a Suitable Mechanism for the Protection of People's Fundamental Rights in the Digital Environment

Collective action is a mechanism taken by a group of people to enhance their condition and achieve a common objective. One of its aims is to simplify the litigation process by resolving individual claims that share common legal and factual issues in a single court, preventing therefore multiple lawsuits from being filed (Hornkohl & Ribera Martínez, 2025, p.15).

The first reason why in the digital sphere there is a need to focus on collective action is that harms are dispersed among millions of people[4] who experience different "small" harms, of which the overall societal impact is significant (Citron & Solove, 2022). As Mišćenić and Širola (2025, p. 40) highlight, "a single unlawful practice can cause large-scale consumer detriment." Citron and Solove (2022) describe that these types of injuries do not fit well into judicial conceptions of harm, which have an individualistic focus and heavily favour tangible physical and financial injuries that occur immediately. Moreover, data breach harms (as well as privacy, non-discrimination, and freedom of expression and

[2] It should be noted that legal proceedings protection diffuse interests or the public interest are not possible before the European Court of Human Rights. Article 34 of the European Convention on Human Rights (ECHR) provides that the Court may only receive an application from any natural person, non-governmental organization, or group of individuals claiming to be a victim of a violation.

[3] In France, the LOI n° 2025-391 du 30 avril 2025 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière économique, financière, environnementale, énergétique, de transport, de santé et de circulation des personnes (JORF n°0103 du 2 mai 2025), that transposes the Directive (EU) 2020/1828 in Article 16.C.4 states that the prosecutor's office can bring an action for cessation of the breach as the main claimant: "Le ministère public peut exercer, en qualité de partie principale, l'action de groupe en cessation du manquement. Il peut également intervenir, en qualité de partie jointe, dans toute action de groupe".

[4] To exemplify their arguments, the authors reference a data breach in T-Mobile, a credit company, that affected 7.8 million postpaid subscribers, 850.000 prepaid customers and 40 million past or prospective customers.

information harms) are futuristic (in the sense their impact cannot be foreseen) and hard-to-quantify (Muhawe & Bashir, 2021). Harris (2024) points in this direction as well, arguing that infringements of law in the digital sphere commonly are diffuse, opaque, and occur at scale across millions of people. Whereas in the past, a consumer offense only affected people from a delimitated territory, today it is more plausible that the offense affects many people in the same or different EU Member States. All persons affected won't be able to plead with the traders, but some of them may realize that an infringement has occurred in their particular case, and the search for justice through collective action, can also benefit other people in a similar situation.

Specifically in the field of non-discrimination, digital infringements can be the consequence of massive processing of data that results in prejudicial treatment of a group as a collective, not of any particular person. The collective is therefore affected as a whole. Also, privacy infringements or data protection violations in the digital sphere rarely will be related to particular persons but will have a collective affectation.

Due to the dispersion and amplification of the effects, the difficulty to identify the victims and the fact that they will rarely have a prior relationship to promote a representative action, diffuse interests emerge as suitable to be protected. In this article, diffuse interests in the context of collective action are understood as those collective interests that (i) have a common factual circumstance, (ii) an indivisible object, and (iii) the members of the affected group are undetermined or cannot be easily identified (Souza da Silva Nascimento, 2025). Collective actions aimed at protecting this type of interest have already been used in the EU and Member States. For example, before the Court of Justice of the European Union (CJEU) in discrimination cases *Feryn* (C-54/07) and *Associatia Accept* (C-81/12) or in data protection cases *Meta Platforms Ireland Limited* (C-319/20) or *Meta Platforms Ireland Ltd* (C-757/22).

Diffuse interests must be differentiated from collective interests, where there is a legal relationship before the occurrence of the damage (for example, in situations where the interests of the persons who make up an association or a union are harmed).[5]

In the digital environment, not only collective actions for the protection of diffuse interests can be useful but also collective actions for the protection of the public interest,[6] in other words, the defense of what is beneficial to all members of a community (those values and objectives that go beyond the concrete interests of persons or groups). In this sense, when developing the digital environment (for instance, through artificial intelligence), it is necessary to take into account not only the individual, but also the protection of present and future generations (Cotino Hueso, 2022). Moreover, collective rights should be as important as individual rights, as they shape our current and future society. Therefore, the

[5] Also, interests of an individual nature and exclusive property but with a common factual origin (for example, the case of a mercury spill that causes various health effects on people living at the site of the spill—cancer, dermatological diseases) can be protected with a collective action. In a recruitment procedure, all persons who have been discriminated against by an algorithmic system, that is to say who have been affected by common factual and causal elements, could unite and exercise a group action in order to receive compensation for damages suffered individually.

[6] Examples of public interest in the digital sphere include the prevention of gender or ethnic origin stereotypes, of discourses that promote the exclusion or subordination of certain population, of biased work advertising, or the avoidance of massive privacy violations. While it can be argued that collective action violates individual rights by erasing an individual's cause of action in favour of the collective (Redish, 2009), by acknowledging the slim likelihood of individuals winning a lawsuit against a large technology company, this approach can be rebutted.

public interest is invested in these digital collective actions. Public policies should focus on promoting a collective perspective of problems that inherently affect millions of people.

From our point of view, diffuse interests or public interests are the interests more plausible to be harmed collectively in the digital sphere. This is because groups harmed probably will be indeterminate or not easily identified, and generalized conducts that violate fundamental rights such as privacy, data protection, non-discrimination and freedom of expression will probably have an impact on the shared values and objectives of society as a whole.

Secondly, online marketplaces and transactions are growing exponentially. As a result, digital consumers are exposed not only to more risks (or different risks than the ones in the physical word) but to more potential mass damage situations (Mišćenić & Širola, 2025). The fact that these marketplaces have grown exponentially and have intricated markets from different countries in real time has made it particularly difficult to establish regulation to protect persons from the risks to which they are exposed. This augmented playing field justifies the growing responsibility that public bodies must acquire to protect people (see next Section).

Thirdly, there is a more pervasive power imbalance between consumers and the large technological companies than there was before the explosion and sophistication of the digital environment. Nowadays, you can rarely find a physical store where you can make a complaint or interact with a company's worker. The existing relationship between trader and consumer is more distant, if not non-existent. This digital asymmetry makes consumers more vulnerable in the digital environment, without bargaining power. This lack of power is aggravated by insufficient digital literacy and consumer awareness, cognitive biases, information overload, manipulative designs and practices, the targeting of vulnerable consumers, problems with cancellation and renewal of digital subscriptions, the forced acceptance of terms and conditions, and influencer marketing, among other factors[7] (Digital Fairness Fitness Check, 2024).

Besides, this asymmetry of power has its consequences: affected people can encounter difficulties in asserting their rights, namely impediments to plead because the legal costs are excessive or obstacles for obtaining evidence of the infringement given the opacity of the algorithm or the system that has caused it (that can, in the worst case scenario, imply that persons are unaware that there has been an infringement of their rights). In this regard, Harris (2024) has pointed out that in the digital environment infringements do not produce an easily recognizable consumer harm.

This difficulty in pleading implies that the infringement is not ceased nor sanctioned and that the damages are not repaired. Additionally, it has been highlighted that harms caused by algorithmic systems provoke less moral outrage than those caused by human, resulting in people being less likely to consider the organizations using these systems as responsible for the harm caused, which makes it easier for these harms to go unnoticed or unopposed (Bigman et al., 2023). This lack of pleading also implies that there is not a deterrent effect with regard to the supplier or the deployer of the system that has breached the law. A good mechanism of collective action could (i) pressure traders to change their practices; (ii) raise

[7] In this regard, the European Commission stated that "the next Commission will propose specific measures, with reflections towards a Digital Fairness Act to tackle unsolved unethical techniques and commercial practices related to dark patterns, marketing by social media influencers, the addictive design of digital products and online profiling especially when consumer vulnerabilities are exploited for commercial purposes". See European Commission (2024).

awareness; (iii) help seek remedies for many users in a mass claim; and (iv) oblige companies to cease the unlawful practice benefiting many unaware users.

Lastly, affected groups by digital infringements can be diverse, needing a system that interrelates them and brings them together or more plausibly protects them without the need for them to articulate a group for defending their rights (the electronic database created by the Directive (EU) 2020/1828 can be an interesting tool, as it will be explained in the following lines). In this regard, for example, if a system in the digital sphere causes intersectional discrimination[8] (e.g., discriminates people for multiple intertwined factors: disabled gypsy women or lesbian women over 60 years old), a collective mechanism is more suitable to demonstrate a systemic impact.

Comparative Promises and Challenges of Collective Actions Leaded by Public Bodies in the Digital Context

On the one hand, public enforcement, in general terms, refers to state authorities vested with special powers and procedures to investigate an infringement and make decisions regarding this infringement (that are subject to judicial review). On the other hand, private enforcement[9] refers to individually initiated litigation, either as stand-alone or follow-on action, before a court to remedy an infringement (Hüschelrath, 2013).

Collective action has been placed commonly in the private enforcement sphere, as it has been mainly promoted by civil society organizations. However, in the digital context where access to information can be difficult for individuals or civil entities, and affected people can be very isolated, public bodies invested in the protection of fundamental rights should have a leading role in collective action mechanisms. In this sense, the difficulty of gathering together people harmed in the digital context is a meaningful obstacle to the creation of collective action (Katsabian, 2021), taking into account that people cannot meet regularly to share their common difficulties and unite. Mantelero (2017, p. 150) highlights that algorithmically linked individual interests have an atomistic and fragmented dimension that demands a collective representation. In our view, this atomistic and fragmented dimension demands a public body that facilitates the link between all these isolated people and leads the way for the protection of their interests. This links with the doubts van der Sloot (2017) pointed out regarding what should a collective do to challenge the wrongs suffered before court: The whole community submits a complaint? Each member joins as an individual claimant? A legal organization in order to protect community rights? These issues would be simplified if a public body took responsibility for the protection in court of this community and one clear mechanism was identified.

Public bodies are the guardians of public interests, and a main goal of their task should be to protect people's rights in the digital environment, including (or mostly) those rights of minorities or people that do not know that their rights have been infringed. A critic given to current data protection legal mobilization is that it is primarily focused on "the data protection rights of the (more privileged) majority as opposed to minoritized data

[8] Intersectional discrimination is defined as one that occurs when a person is discriminated against at the same time on different grounds that interact and together produce a specific disadvantage (see Bribosia et al., 2021).

[9] Despite this article focuses on the leading role public bodies should take in collective action to protect fundamental rights, public bodies could additionally help the private enforcement of digital rights by sensibilization and information activities on user rights' protection in the digital sphere or the guidance on the mechanisms to obtain information from big technological companies.

subjects" (Tzanou & Vogiatzoglou, 2025, p. 120). This could be addressed by public bodies that should focus on digital violations of fundamental rights of minoritized people.

It could be argued that this can be done through public enforcement, and not specifically through collective action. It is true that data protection authorities, consumer authorities, equality bodies, or market surveillance authorities have specific powers to request information from businesses in public enforcement actions that may resolve some of the issues regarding power imbalances and disclosure of evidence. However, collective action provides for a collaborative dimension of the protection of rights, and it is possible for more people to be included. Furthermore, while some authorities possess the ability to make decisions on the cessation of illegal practices, others do not have it in accordance with EU law, for example, Member States' equality bodies. The EU Directives 1499/2024 and 1500/2024 on standards for equality bodies do not grant equality bodies the competence to make binding decisions or to sanction when there is a violation of the fundamental right to non-discrimination, and therefore collective action can be their only mechanism to stop illegal practices. However, equality bodies have not been granted either the possibility to act in court proceedings in their own name. It could be argued then that some public bodies have the means but not the enforcement to make illegal practices stop—as they are not granted the competence to deliver binding decisions, sanction, or act in their own names in court proceedings.

Lastly, as it has already been highlighted in the environmental field, "the low value of environmental damage suffered individually by each person discourages victims from going to court alone" (Aragão & Celeste Carvalho, 2017, p. 42). This low value is socially constructed. If society gave more value to the environment, privacy, etc., the damage would also be more considered. The low value should not be disregarded by public bodies who aim to protect the public interest. Nonetheless, civil society organizations are the ones responding to the "international neoliberal consensus on the commodification of data" (de Souza & Taylor, 2025, p. 1) and its detrimental effects. From our point of view, even though this is true, it should not hinder the fight and the demand for public bodies entitled with the defense of fundamental rights to find ways to protect people's rights in the digital environment as they should, and collective action is a valuable alternative to explore.

Nonetheless, there are impediments to the inclusion of public bodies as leading actors in collective actions. Firstly, it must be noted that public bodies have limited resources. However, people with no resources will not be able to engage either in private enforcement. Public bodies then should focus on fundamental rights violations that affect those people who do not have resources to engage in a private action. Moreover, the current availabilities for collective actions leave ample room for improvement (Hornkohl & Ribera Martínez, 2025, p. 59). From our point of view, in order to improve collective action, it is important to consider better mechanisms to incorporate public bodies into collective action processes.

After presenting the reasons why collective action is a suitable mechanism for the protection of people's fundamental rights in the digital sphere and why public bodies have a good position to lead collective actions, the current EU legal mechanisms established for this purpose must be examined.

Collective Action for Fundamental Rights Violations Occurred Online in the EU

Particularly regarding the ability for public bodies to engage in collective action (or lead a collective action), it must be taken into account that there is no obligation in EU law for member states to ensure that public bodies are able to engage in collective action. It is a possibility in the RGPD and the DSA, but not an obligation: article 80 and article 86 refer respectively to the following: "not-for-profit body, organization or association," and

"body, organization or association," not specifically public bodies. Article 10 of Directives 1499/2024 and 1500/2024 on standards applicable to equality bodies gives the possibility that equality bodies of member states have the right to act in court proceedings in civil and administrative law matters, but it is not an obligation either. However, Directive (EU) 2020/1828 includes public bodies as possible qualified entities.

Although these bodies are not expressly considered in the EU legal instruments that will be analysed in the following section, Directive (EU) 2020/1828 (3.1), the GDPR (3.2), and the DSA (3.3), they can contribute to users' fundamental rights' protection.

Directive (EU) 2020/1828 on representative actions

Representative actions are mainly addressed by Directive (EU) 2020/1828, which sets out rules to ensure that a representative action mechanism to protect the collective interests of consumers is available in all Member States. Despite a representative action mechanism to protect collective interests being available in all Member States (will, because the Directive has not yet been transposed to all Member States[10]), its flexibility permits that non-harmonized national rules persist, remaining the potential for forum shopping, as some EU countries adopt a more permissive approach than others (Erixon et al., 2025).

The Directive applies to representative actions brought against unlawful practices by traders as provided in the EU instruments listed in the Annex of the Directive, such as the GDPR (Annex I, point 56 from Directive (UE) 2020/1828), the DSA (Article 90), the Digital Markets Act (Article 42), and the Artificial Intelligence (AI) Act (Article 110). This means that violations of these regulations, which in turn undermine the collective interests of consumers, can be challenged by the representative action provided for in Directive (EU) 2020/1828.

While it covers a wide sphere of consumer law, going beyond the abrogated Injunctions Directive 2009/22/EC, it does not cover all instances of collective redress concerning the entirety of EU law,[11] meaning that if the infringement falls outside the consumer domain, a collective action mechanism is not ensured. EU law has followed most EU Member States' collective redress regimes where it only can be utilized in certain areas (e.g., consumer law, competition law). An exception is the Netherlands where the 2020 Collective Damages Act establish no restrictions regarding the subject matter of claims that can be brought or settled collectively (Fairgrieve & Salim, 2022). It would have been interesting for the EU to broaden the areas where collective action can be utilized and oblige all Member States to develop mechanisms suitable for all matters of claims.[12]

Moreover, the concept "collective interests" must be specifically addressed for clarity purposes because it can be diversely interpreted. Injunctions Directive 98/27/EC

[10] For example, the Directive has not yet been transposed in Spain. In France, the law transposing the Directive was approved on the 30th of April 2025.

[11] This is specified in the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ L201/60, 26.7.2013).

[12] As Stöhr (2020) points out, this might be because of the limited legislative power of the EU. Article 4.1 of the Treaty on the Functioning of the European Union (TFEU) states that the EU has full legislative power in the field of consumer protection. On the contrary, in the field of civil procedure, its legislative power is limited to the access to justice (through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters (Article 67.4 TFEU) and of judicial cooperation in civil matters having cross-border implications (Article 81 TFEU).

(abrogated by Directive 2020/1828) defined them as "interests which do not include the cumulation of interests of individuals who have been harmed by an infringement.[13]" Directive (EU) 2020/1828 defines them as "the general interest of consumers and, in particular for the purposes of redress measures, the interests of a group of consumers." In this regard, the general interest of consumers can be identified as the protection of their privacy rights, data protection rights, non-discrimination rights, or freedom of expression and information rights. If only cessation measures are demanded in the representative action, the general interests of consumers are sufficient to initiate the action; however, if there is a need for redress measures, the interests of an *identified group* of consumers must be recognized. The Directive (EU) 2020/1828 protects the interests of consumers regardless of whether those consumers are referred to as consumers, travellers, users, customers, retail investors, retail clients, data subjects, or something else.[14]

The Directive and its potential to address digital environment infringements will be analysed in the following sections, addressing particularly the role of qualified entities, the public and information mechanisms, the injunctive and redress measures, and the disclosure of evidence.

Qualified Entities

Qualified entities are the ones that can intend representative actions according to Directive (UE) 2020/1828. These entities are defined in the Directive as any organization or public body representing consumers' interests which has been designated by a Member State (Article 3.4). Individual identification of every consumer concerned by the representative action is not needed (Recital 49). This is particularly interesting because in the digital environment, as previously stated, it cannot be expected to identify all affected or potentially affected consumers.

The qualification of the entity by the Member State can be to bring domestic representative actions, cross-border representative actions, or both (Article 4.2). The Directive does not establish the criteria that must comply qualified entities for domestic representative actions. Alternatively, for cross-border representative actions, qualified entities must comply with a set of obligations listed in Article 4.3 (e.g., the entity has 12 months of actual public activity in the protection of consumer interests prior to its request for designation, has a non-profit-making character, or is not the subject of insolvency proceedings). The non-profit-making character of the qualified entity aims to avoid what has been warned about the United States of Northen America's class action: "the lack of compensation for consumers, even in cases that are settled, contrasts sharply with the benefits reaped by plaintiffs' lawyers" (Pincus & Brown, 2017, p. 6). The Directive has been criticised because as a result of its transposition in Member States' law, there is "a kaleidoscope of different procedural requirements for the designation of qualified entities, standing and financing" (Mišćenić & Širola, 2025). Regulation regarding the funding of qualified entities is left to Member States (Article 10). This is a controverted matter because, as previously referred to, collective action has benefited legal professionals and third-party funders rather than consumers (Erixon et al., 2025). Also, this question is related to the fact that

[13] This is specified in the Recital 2 of Directive (EU) 2020/1828.

[14] The definition leaves margin of appreciation. For example, "something else" includes persons integrating a collective that has been discriminated against in the digital environment.

collective action can be seen as a revenue generator instead of a means of defending rights. If public bodies would have a leading role in collective action, financing wouldn't be an issue, given that the public body would not have any particular [economic] interest, beyond protecting a fundamental right.

In addition, the existence of qualified entities aims to prevent litigation abuse[15] even though it is implausible in Member States with dysfunctional collective redress systems, where the number of initiated collective actions is very low or non-existent (Mišćenić & Širola, 2025). Moreover, the argument of litigation abuse hinders people from more flexible, easy, and efficient collective redress mechanisms necessary in the digital environment. In addition, certain authors affirm that the loser pays principle (that Recital 13.c of the Directive (EU) 2020/2024 recommends being implemented) has contributed to prevent abusive actions (Stöhr, 2020, p.1621; Coffee, 2025). Some authors (Amaro et al., 2018) defend, however, that this principle can be problematic in an opt-out system where all members can be liable for a counterparty's expenses if they lose the case. On the contrary, in an opt-in system, only those opting in are responsible. In the digital sphere, where a majority of people are affected, due to the fact that the effects of an infringement can be experienced by millions of people, it is not plausible to consider liable all those persons that could have participated in the collective action. In this regard, it should be the entity that initiated the action that is responsible for paying the counterparty's expenses.

Article 4.7 of Directive (EU) 2020/1828 states that Member States may designate public bodies as qualified entities for the purpose of bringing representative actions. This Article is especially relevant in online infringements where public bodies (that can access more information than individuals[16]) can initiate representative actions (such as EU equality bodies in regards of discrimination occurring in the digital environment or data protection authorities for data breaches).

Lastly, Recital 23 of the Directive (EU) 2020/1828 explains how domestic and cross-border representative actions are classified, placing as the deciding criterion the Member State in which the representative action is brought, being as a result impossible to change the classification during the course of the proceedings. Where a qualified entity brings a representative action in a Member State other than the one in which it is designated, that representative action should be considered cross-border. Alternately, where a qualified entity brings a representative action in the Member State in which it is designated, that representative action should be considered domestic, even if that representative action is brought against a trader domiciled in another Member State and even if consumers from several Member States are represented within that representative action. For cross-border representative actions, a leading role of a public body in the collective action could benefit from the coordination (already in place) with public bodies of other EU countries to gather information and establish mechanisms to raise awareness among people from other countries of the existence of the collective action.

[15] Article 3.a of the EU Commission's 2013 Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States granted the right or capacity to bring an action to two or more natural or legal persons or an entity entitled to bring a representative action. In this respect, a more open legitimation regime was envisaged in the Recommendation.

[16] For instance, through article 77 AI Act, national public authorities or bodies which supervise or enforce the respect of obligations under Union law protecting fundamental rights shall have the power to request and access any documentation created or maintained under this Regulation in accessible language and format when access to that documentation is necessary for effectively fulfilling their mandates within the limits of their jurisdiction.

Publicity and Information Mechanisms

For a group action to be effective, it is necessary to have a good publicity and information mechanism (Chocrón Giráldez, 2022) with the aim of reaching as many people as possible who are interested in the litigation and who may wish to join the collective action (García Alvarez, 2020). For instance, in algorithmic discrimination cases, Wachter (2020) argues that notification to individuals whose data is used in profiling or automated decision-making could facilitate the creation of a harmed group and representative action.

In this regard, Article 14 of Directive (EU) 2020/1828 obliges Member States to set up national publicly accessible through websites electronic databases with the aim to provide information on qualified entities and general information on ongoing and concluded representative actions[17] (in order to avoid representative actions having the same object and the same cause brought against the same trader). In addition, information could include, in plain and understandable language, the purpose, possible legal consequences, description of the group, and issues regarding the preservation of evidence (García Alvarez, 2020). With the proper dissemination, this tool can be very useful for those people harmed by companies in the digital environment. However, time will tell if it proves to be useful. People must first acknowledge its existence and be more aware of collective redress measures and representative actions' operationality.

In addition, the European Commission (EC) has set up an information technology tool "EC-REACT." This tool is an electronic database (Article 14.3) with the aim to centralize all communications regarding information and monitoring of qualified entities between Member States and the Commission and promoting the cooperation between the qualified entities for the exchange and dissemination of their best practices and experience. In addition, the tool aims to increase the cooperation between judges and administrative authorities dealing with actions (European Commission, 2022). In a digital environment, where there are no territorial borders, this is a positive initiative to establish cooperation and coordination mechanisms between Member States and the EC.[18]

Injunctive Measures and Redress Measures

The Directive (EU) 2020/1828 envisages that qualified entities are at least entitled to seek injunctive measures and redress measures.

Injunctive measures can be provisional or definitive and aim to cease a practice or, when appropriate, to prohibit a practice, where that practice has been deemed to constitute an infringement. These measures are relevant in the digital sphere where a lot of people can be affected by the same unlawful practice without noticing (e.g., data protection breach, privacy violation, algorithmic discrimination). In this regard, the measure to cease a practice can benefit both those that are aware their rights are being vulnerated and those that are unaware. Injunctions may be aimed at stopping an ongoing practice or at prohibiting a

[17] National and cross-border.

[18] The EC-REACT tool has the purpose to promote and facilitate the cooperation and coordination among Member States. However, it seems necessary the development of an organism with more powers and competences in the digital environment where affected people can be in many different EU Member States. In this regard the European Public Prosecutor's Office (EPPO), that has the power to investigate, prosecute and bring to judgment crimes against the EU budget, could be a good scheme to emulate concerning the violation of rights enshrined in the EUCFR in the EU digital environment.

practice in the event that it has not been implemented yet but risks causing serious harm (e.g., if an AI system tested in an AI regulatory sandbox (Article 57 AI Act) shows risks to privacy and measures to mitigate the risks are not applied).

Directive (EU) 2020/1828 states that injunctive measures may include a measure establishing that the practice constitutes an infringement or an obligation to publish the decision on the measure in full or in part, in such form as the court or administrative authority considers appropriate, or an obligation to publish a corrective statement (Article 8). In this sense, for example, the Court of Bologna, in judgment no. 2949/2020, of 31 December, after ordering Deliveroo to pay 50,000 euros in damages to the applicant trade union, ordered the publication of the text of the judgment in a national newspaper in order to guarantee its visibility (Fernández Sánchez, 2021). Currently, where companies' reputation is highly important in online markets, dissuasive measures should be given a more central role in legal proceedings where there's a violation of a fundamental right, always being especially protective of the victim.

Article 19 Directive (EU) 2020/1828 obliges Member States to lay down the rules on penalties applicable to the failure or refusal to comply with an injunctive measure of provisional or definitive cessation of a practice or an obligation to publish the decision on the measure in full or in part. In addition, penalties must be imposed also if the trader, required by the court or the administrative authority, does not inform the consumers concerned by the representative action of any final decisions providing for injunctive or redress measures or any approved settlement (Article 13). Lastly, penalties must be imposed if the qualified entity or the defendant refuses to disclose evidence requested by the other party according to Article 18.

The failure or refusal to comply with redress measures is not envisaged in Article 19. Turning our attention to redress measures, they require a trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination, or reimbursement of the price paid. In representative actions with the aim to obtain redress measures, Member States must provide for an opt-in mechanism, or an opt-out mechanism,[19] or a combination of the two (Recital 47 Directive (EU) 2020/1828).

In the digital environment, due to the lack of contact between harmed people, the different places where they might be and the difficulty of creating a consistent group, the opt-out mechanism seems to be the more suitable. In addition, the opt-out principle permits that damaged parties exert stronger pressure on the tortfeasor (Stöhr, 2020), in our view, one of the more relevant functions of collective action in the digital environment. Also, as Amaro et al. (2018) highlight, the opt-out principle could be appropriate in cases where there are potential claimants who because of to the inconsequential amount of individual damages are not interested in pursuing their claims. Inconsequential amounts of individual damages can be those produced regarding the rights to non-discrimination, privacy, data protection, or freedom of expression and information. Taking as an example privacy damages, as Citron and Solove (2022) point out, the injury may appear small when viewed in isolation, but it becomes bigger when experienced by millions of persons and done by thousands of companies. In this sense, some damages to fundamental rights in the digital sphere are not easily economically quantifiable. This is an issue that should be addressed in further research because, as Wörle and Gstrein (2024, p. 308) point out, "the compensation

[19] Opt-out mechanisms mean that people benefit from the litigation if it is successful unless they opt-out of participating. Opt-in mechanism requires that people actively opt-in to benefit.

of non-material damages remains a major roadblock for data protection [and other fundamental rights] litigation."

Furthermore, as it is stated in the CJEU case *Baathens Regional Aviation AB* (C-30/19), although the judicial system gravitates mainly around the idea of economic compensation, in many cases, perhaps, it is not the most appropriate mechanism as a measure of redress. In cases where their impact cannot be foreseen or restored by economic compensation (e.g., racial profiling in online housing services or the promotion of gender stereotypes online), maybe the primary interest of that person is "to obtain a ruling on the reality of the facts alleged against the defendant and their legal classification" (Section 47). A sum of money cannot ensure a satisfactory remedial function and a truly dissuasive effect. The defendant generally considers it more advantageous in terms of costs and image to pay the compensation requested by the applicant, while thus avoiding the court studying the case in depth (Section 49). Redress and dissuasive requirements would be met if there were a link between the payment of compensation and a prior declaration of violation of a fundamental right (Maneiro Vazquez, 2022).

Going beyond, González Cazorla (2021) hypothesizes about the possible existence of a collective moral damage (which can be applied in cases where there are determinable persons), affecting the people who are part of the collective and harming their conditions and quality of life (for example, if they suffer discrimination in the digital sphere because of their pertinence to a specific social collective), regardless of the damage suffered individually.

Muhawe and Bashir (2021) argue that it cannot be demanded of people to traduce the privacy (or data protection, discrimination, or freedom of expression and information) harms suffered in the digital sphere in economically quantifiable injuries in order to have access to justice. They propose the recognition of a legal duty of private and public entities (that stand in a privileged position of technical know-how and have available vast resources for collecting, storing, and processing data) to adequately secure and process the data subjects' information. Therefore, the failure to accomplish this duty should translate into a violation of the data subjects' privacy (or data protection or non-discrimination right). They justify the recognition of this duty considering that entities have access to the most personal and private information, and it can be expected that it is processed in a socially responsible manner (see, regarding the expectation of privacy, Roig Batalla, 2024).

Power Imbalance and Disclosure of Evidence

Article 18 of Directive (EU) 2020/1828 is particularly relevant because in the digital universe, there is a clear power asymmetry between traders and consumers and there are obstacles that hinder consumers to access relevant information that, without this article regarding the disclosure of evidence, would be impossible to obtain. However, the disclosure of evidence is subject to the applicable Union and national rules on confidentiality and proportionality and requires that the qualified entity has provided reasonably available evidence sufficient to support a representative action. In most cases, without digital companies' information, it is impossible to construct a representative action because the consumer has almost no information. It remains to be seen how strictly the sentence "reasonably available evidence sufficient to support a representative action" is interpreted. As Fairgrieve and Salim (2022) point out, this article seems to be limited to the acquisition of additional evidence. Public bodies that have the prerogative to access

more evidence should be in a better position to provide reasonably available evidence sufficient to support a representative action.

In a field where it is evident that there is an asymmetry of power, this article is not enough to outweigh the privileged and vulnerable position of the actors. From our perspective, the approach proposed by Fairgrieve and Salim (2022) to impose an obligation on both parties to declare evidence which has a bearing on the issues in the claim seems more plausible given that consumers can benefit more from this scheme.

Consumers should have a beneficial scheme to plead due to the power imbalance, as in other areas of law where an unequal power relationship has been recognized. For instance, in Spanish labour law, despite the Spanish Constitution requires the principle of equality to be applied, the original inequality between workers and employers (based on the different economic conditions and the special legal relationship that binds them) has led to certain disparities being incorporated into the judicial proceedings (Garrido Pérez, 2019). This has the objective of removing procedural obstacles that the worker may encounter due to their condition. Consumers, particularly in the digital environment, could face similar challenges.

Digital consumer law cases should be treated according to the power imbalance that exists between the parties, based on the different economic conditions, risk bearing of the outcome of the judicial process, special knowledge, and process experience (in these last two cases, it can be argued that due to the fact that large technological companies deal with many judicial cases, they have more knowledge and experience of the judicial process' idiosyncrasies). As Stöhr (2020, p. 1609) points out, "collective redress can be a way of levelling the playing field for economically less powerful individuals." The referred power imbalance can also justify more thorough attention by public bodies to cases of violation of fundamental rights in the digital environment and a clear positioning in favour of the disadvantaged party.

However, as Bessa e Venda (2025) highlights, Article 18 of Directive (EU) 2020/1828 implies that the main evidence to build the case must be obtained by the collective action representatives on their own, signifying in practice that consumers will have to be identified because they will presumably be in possession of most of the evidence needed for this purpose. Taking collective actions to defend diffuse or public interests can be more challenging due to this.

Article 80 GDPR

The GDPR establishes in its Article 80.1 the right of the data subject to mandate a non-profit body, organization, or association (…) to assert their rights. These rights include the submission of a complaint on their behalf, the exercise of the rights referred to in Articles 77, 78, and 79 GDPR, and the exercise of the right to obtain compensation referred to in Article 82 where the law of a Member State so provides. In addition, its Article 80.2 establishes that Member States may provide that any body, organization, or association (…) independently of any mandate given by a data subject, has, in the Member State in question, the right to submit a complaint with the supervisory authority (…) and to exercise the rights referred to in Articles 78 and 79 of the Regulation.

It is relevant to highlight the judgment of the CJEU of 28 April 2022 *Meta Platforms Ireland* (C-319/20). In the case, Meta Platforms Ireland made available to users free games provided by third parties. Users were informed that by using some of those applications, they allowed them to collect various personal data, gave them permission to publish on their behalf some of those data, and accepted the general conditions of those applications and their data protection policy. The Federal Union (a German entity) considered that the information provided by the games applications was unfair, in particular

in terms of the failure to comply with the legal requirements to obtain valid consent from the user.

The CJEU ruled in the case *Meta Platforms Ireland Limited* (case 319/20) that "article 80(2) of the GDPR must be interpreted as precluding national legislation which allows a consumer protection association to bring legal proceedings, in the absence of a mandate conferred on it for that purpose and independently of the infringement of specific rights of a data subject" (Section 83). The entity can bring the representative action when "considers" that the rights of a data subject laid down in that regulation have been infringed (Section 71).

Additionally, the CJEU stated in the subsequent case *Meta Platforms Ireland Ltd* (case 757/22) that the consideration is circumscribed to the fact that the violation cannot be merely hypothetical, and the entity must have reasonable grounds to believe an infringement occurred (Section 44). Concerning the possibility for an entity to bring a representative action in the absence of a mandate conferred on it for that purpose, the CJEU specified in the same case that the condition for the entity to bring a case when the infringement is caused "as a result of the processing," is satisfied where that entity asserts that the infringement of the data subject's rights occurs in the course of the processing of personal data and results from the controller's infringement of its obligation to provide the data subject, in a concise, transparent, intelligible, and easily accessible form, in clear and plain language, with information relating to the purposes of that data processing and to the recipients of such data, at the latest when they are collected (Section 65).

These judgments are specially relevant regarding the defense through collective action of diffuse interests and the public interest, as they establish that Article 80 enables entities that pursue a public interest objective consisting of safeguarding the rights and freedoms of data subjects in their capacity as consumers to bring legal action when they *consider* that an infringement of the GDPR has occurred with the absence of a mandate conferred on it for that purpose and independently of the infringement of specific rights of a data subject. This is particularly interesting because this entity has protected data protection rights of all users of these free games made available from Meta Platforms Ireland, a lot of them, surely unaware that their data protection rights were violated.

According to Vrbljanac (2024), these cases demonstrate the CJEU's commitment to strengthening private enforcement of collective redress mechanisms, crucial for the protection of consumer's right to privacy and personal data (and non-discrimination or freedom of expression or information) in the digital environment. From our point of view, it is not only private enforcement to collective redress mechanisms but also public enforcement collective redress mechanisms that can be influenced by these judgements. Public bodies that have the objectives to protect fundamental rights can access more information on digital services than private entities or particulars. Additionally, the case law of the CJEU concedes a deeper understanding of the significance of collective redress and the procedural aspects of collective access to justice for the enforcement of substantive consumer rights. In this respect, the CJEU judgements should be extrapolated to all cases of collective redress in the digital environment—not only data protection ones.

Article 86 DSA

The Digital Services Regulation establishes harmonised rules for a safe, predictable, and reliable online environment that facilitates innovation and in which fundamental rights are effectively protected. In its Article 86, it is established that the recipients of intermediary services have the right to mandate a body, an organization, or an association which operates on a non-profit basis, which has been duly constituted in accordance with the law of a Member State and with statutory objectives including a legitimate interest in ensuring

compliance with the Regulation, to exercise the rights conferred by regulation on their behalf.[20] These rights include the possibility for users to lodge complaints against the decision taken by the provider of the online platform upon the receipt of a notice or against the following decisions taken by the provider of the online platform on the grounds that the information provided by the recipients constitutes illegal content or is incompatible with its terms and conditions (Article 20 DSA); the possibility to select any out-of-court dispute settlement certified body in order to resolve disputes relating to those decisions or initiate, at any stage, proceedings to contest those decisions by the providers of online platforms before a court (Article 21 DSA).

Additionally, users have the right to be informed that an illegal product or service has been offered by a trader through the provider's online platform (Article 32 DSA). Also, users have the right to lodge a complaint against providers of intermediary services alleging an infringement of the Regulation with the Digital Services Coordinator (DSC) of the Member State where the recipient of the service is located or established (Article 53 DSA), including rights to be heard and receive information on the complaint's status. The DSA does not include a right to judicial review of DSC decisions (a right that is included in the GDPR). Moreover, recipients have also the right to seek compensation from providers of intermediary services in respect of any damage or loss suffered due to an infringement by those providers of their obligations under the Regulation (Article 54 DSA).

In the article, it is specified that "recipients of intermediary services shall have the right to mandate (…)." At first sight, this redaction excludes the possibility for entities to stand when diffuse interest or public interest are at stake (in the scoop of the DSA, mainly regarding people's right to freedom of expression and of information). Additionally, the article does not give the possibility for stand without the mandate of the recipient of the intermediary service (as it is done in Article 80.2 GDPR). Nevertheless, the CJEU jurisprudence on *Meta Platforms Limited* (C-319/20) and *Meta Platforms Ltd* (C-757/22) should be extrapolated to this field due to its significance for the (indirect) protection of recipients' fundamental rights.

Lastly, Article 80 of the DSA is interesting (concerning the dissuasive effect in relation to Article 8 of Directive (EU) 2020/1828), because it establishes that the Commission shall publish the decisions regarding the following: interim measures against the provider of the very large platform or the very large online search engines on the basis of a prima facie finding of an infringement (Article 70.1 DSA); the fact that there are no further grounds for action when the platforms or search engines commit to the compliance of the regulation (Article 71.1 DSA); the non-compliance of the provider (Article 73 DSA); or the periodic penalty payments (Article 76 DSA). Article 80 DSA exemplifies the intention of the EU to give more importance to the deterrent effect as relevant for companies interacting in the digital environment.

[20] With regard to the control of intermediary services that may produce algorithmic discrimination, Article 34 of the Digital Services Regulation states that providers of very large online platforms and very large online search engines must assess risks arising from the design or operation of their services and related systems, including algorithmic systems, including (b) any actual or foreseeable adverse effects on the exercise of fundamental rights (including the right to non-discrimination).

Conclusions

So far, the digital environment is being addressed by regulators as the real environment, when in fact, it has its own characteristics. Among other elements, there is the difficulty in obtaining evidence of infringement of rights, the obstacles to plead (for instance, due to the ignorance of rights infringement, the multiplicity (millions) of people harmed by the same practice), or the absence of territorial delimitations.

The digital environment is currently regulated by multiple overlapping yet distinct pieces of EU legislation causing a variation in legal opportunity structures within their enforcement architecture (Harris, 2024). When referring to collective action, fragmentation is a two-fold problem. Firstly, the collective mechanisms are previewed in different norms with different applicability in the Member States. While the GDPR and the DSA are Regulations, in the consumer field, the regulatory mechanism is a Directive. As a result, in this last case, collective redress mechanisms adopted (or maintained) by the Member States are different.[21] Secondly, each legal instrument is issued to address different harms. Directive (EU) 2020/1828 only addresses consumer issues. The GDPR addresses harms regarding data protection (that collaterally can have an impact on subject privacy and non-discrimination rights), and the DSA only addresses harms in the context of the relationship between consumers and intermediary services (mainly regarding users' rights to freedom of expression and information).

A particular drawback for collective action is that it has not been properly explored what leading role public bodies invested in the protection of fundamental rights could have to address violations in the digital environment. Particularly, there is not any EU legislation that specifically addresses the potential for public bodies to engage in [or lead] collective actions.

Concerning the measures that can be achieved with collective action, our main focus has been injunctive measures in the defense of diffuse interests or public interests that can ensure that the ban on performing a practice extends to all present and future people who may be affected. None of the regulations studied in this article refers specifically to collective action for the defense of diffuse interests or public interest which can be paramount in the digital environment where all victims harmed by the same practice rarely can be identified. In contrast, the CJEU in its jurisprudence has affirmed the possibility for entities to bring cases where there was no mandate of an identified victim or a violation of a person's specific rights (the CJEU cases *Meta Platforms Limited* (C-319/20) and *Meta Platforms Ltd* (C-757/22)). Golunova and Eliantonio (2024, p. 186) have highlighted that these CJEU rulings promote that civil society actors engage in transnational mobilization efforts to advance a greater protection of personal data [or other fundamental rights] and contribute to the appropriate implementation of the GDPR [or other legislation] across the EU. From our point of view, it is plausible to expect not only civil society actors but also public bodies—that have a more advantageous position—to engage in efforts to provide greater

[21] This fragmentation has been seen before, for example with the obligation for Member States in non-discrimination EU law to ensure that associations, organizations, or other legal entities can engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of the Directive's obligations (Article 7.2 Directive 2000/43/CE; 9.2 Directive 2000/78/CE; 8.3 Directive 2004/113/CE; 17.2 Directive 2006/54/CE and 9.2 Directive 2010/41/UE). It was highlighted then that each Member State has adopted a different set of processes and safeguards for collective redress, based on national political debates (Hodges, 2019) creating more or less protective regimes (Farkas, 2010).

protection. This jurisprudential doctrine can have a direct impact in the (indirect) protection of fundamental rights in the digital environment. From our point of view, EU policies should encourage and facilitate public collective action in defense of diffuse interests with the aim to oblige big technological companies to cease illegal practices attempting people's right to privacy, data protection, equality and non-discrimination, or freedom of expression and information. The purpose would be to find effective mechanisms that can prevent or stop some illegal practices from happening and, eventually, seek compensation without the need to coordinate *all* the people affected and articulate an arduous mechanism.

This, however, is narrowly related to people's conceptualization of harm and compensation. Currently, remedial measures are largely focused on individual compensation, but in our opinion, when it comes to mass damages related to privacy, data protection, non-discrimination, or freedom of expression and information in the digital environment, more attention should be given to the public declaration of violation of a fundamental right in order to ensure that there is a deterrent effect.

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