

Dear consumers!

The possibilities for collective redress in the EU still not attuned to the digital world disputes

Comments on Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited*

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On 25 January 2018, the Court of Justice ruled in the second of the [Schrems](#) trials in what seems to be an overhaul of the possibility for collective redress by consumers in the digital settings via a simple transfer of their claims. While Mr Schrems was granted the status of a consumer to bring his own claims against Facebook, the claims assigned to him by seven other concerned consumers were declined the facilitated jurisdictional protection before the Austrian court. As such, this case goes only a half way in protecting consumers. Considering the long-stagnating progress in the policy-development regarding the possibility for collective redress in the EU, the judgment may well be a missed opportunity. On the other hand, this judgment clearly points to the relativity of rights granted under EU law. Indeed, [Advocate General Bobek stated in his Opinion](#), it is the role of the EU legislators to bring the policies in line with the social needs of European citizens. The following comment aims to assess the decision in light of the EU's policy developments towards granting the possibility of collective redress for consumers in Europe.

Background

Maximilian Schrems has fought a persistent battle against the excessive data flows to third countries. While he succeeded greatly with enhancing the EU data protection standards in his first [trial in 2015](#), this time, Mr Schrems aimed at bringing Facebook accountable for claims of numerous other consumers equally concerned. The pressing question in *Schrems v Facebook* therefore touches upon a policy-sensitive and highly underdeveloped area of EU law – the protection of consumers via collective redress.

Collective redress represents an important avenue for large number of similarly affected consumers to be able to bring their claims effectively before the competent authorities. There are several important prerogatives for establishing a possibility for collective actions. The key concern with an effective policy on horizontal application of collective redress across the EU

is striking a balance between ensuring effective access to justice for the affected consumers on the one hand and the need of preventing abusive litigation on the other hand. The former is a highly relevant issue concerning the state of the art in the access to justice in the EU for consumers. Especially, the great complexity and excessive length of the proceedings continually act as impediments to *effective* protection of rights of often-vulnerable consumers, affected irrespective of their country of residence.

To this date, the only existing (soft) authority in European legislative framework regarding collective redress remains the [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. This Recommendation was drafted following several efforts in developing a so-called [European approach to collective redress](#) in the course of 2000s. One of the aims of the instrument is to establish possibilities for collective redress across all policy fields also in the light of the digitalization of the e-commerce. Indeed, the digital world brings about certain difficulties when it comes to enforcing traditional contractual relationships between the consumers and the sellers/ traders. As such, this comment assesses the decision in *Schrems v Facebook* in light of the existing jurisdictional rules for collective redress in the EU.

Facts

An Austrian resident, lawyer and activist, Mr Maximilian Schrems filed proceedings against Facebook Ireland before an Austrian court. His action sought a number of remedies from Facebook, alleging numerous infringements of data protection rules of Austrian, Irish and EU law. In particular, the claim sought a declaratory statement, injunctive relief, a disclosure of the applicants' data, production of accounts and a claim for damages. Seven other consumers from Austria, Germany and India assigned their claims to Mr Schrems following his call to represent consumers against Facebook pro bono, which itself attracted tens of thousands of signatures.

Facebook's defence rested on the claim that Mr Schrems cannot claim his consumer protection rights since he had used Facebook also for professional purposes. Namely, he used Facebook page option for promotion of his activities against Facebook, and raising funds for

the legal actions. Facebook also relied on the lack of jurisdiction of the Austrian courts to decide claims assigned to Mr Schrems.

The Supreme Court of Austria (Oberster Gerichtshof) referring the case to the Court of Justice therefore essentially sought clarification on two points of law. The first concerned the notion of a 'consumer' in EU law. The second question concerned the possibility of the Austrian court exercising international jurisdiction for the claims assigned to Mr Schrems by other consumers.

The Court

The Court of Justice largely followed the opinion of AG Michal Bobek. As such, the decision is a partial success in terms of bringing Facebook accountable. It is a success as long as the consumer status of Mr Schrems was protected by the interpretation of the Court. Although Mr Schrems also pursued professional activities, such as publishing books, giving lectures or fundraising, on the social media platform, this did not strip him off his consumer status. The main rationale for this followed a complex assessment by AG Bobek of the notion of consumer, and especially, consumer of the digital social network services. The Court clarified that in such settings, where the contract entered upon is likely to last for a long period, or even indeterminately, the subsequent changes in the use of those services by the concerned individual must be taken into account. In particular, the consumer status can be retained only insofar as the use of those services remains primarily non-professional.

In response to the second question, however, the Court was not ready to grant the facilitated access to the judicial protection before the Austrian court to the consumers who wished to transfer their claims to Mr Schrems. The Court hesitantly reasoned on the basis of the notion of a consumer forum which it interpreted as existing and aiming only to protect the consumer as a party to a specific contract. Hence, Mr Schrems was allowed only to bring claims in his own personal capacity.

Implications

This second aspect of the decision embodies a pressing concern in the development of EU law in the field of consumer protection. The Court refrained from granting a facilitated consumer privilege to assigned claims and thereby de facto refused a possibility for kind of collective

redress in this case. Instead, as AG Bobek also reasoned, the Court viewed this as a policy-matter which is to be settled by the EU legislators. The rather textual reading of Article 16 of the [Council Regulation \(EC\) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters](#) is perhaps too careful, however. Especially such judicial constraint can be criticized in the view of the stagnating progress in establishing collective redress possibilities in situations of cross-border violations of consumers' rights by powerful businesses. Indeed, from the perspective of constitutional principles of EU law, namely the effective judicial protection codified under Article 47 of the Charter, the matter deserves a greater reflection.

Moreover, the strict reading of Article 16 of the Regulation No 44/2001 in this decision also somewhat undermines the aim and purpose stated in Article 169 of the TFEU. The provision instructs the EU's commitment to "ensure a high level of consumer protection" by promoting "consumers' health, safety and economic interests, as well as their right to information, to education and to organise themselves in order to protect their interests". Hence, a limited reflection upon the notions of Article 47 CFR and Article 169 TFEU rather points to a missed opportunity from the Court by giving an impetus towards further development in EU's consumer protection via granting of collective redress possibilities. And this is despite the fact that one could say the time is ripe for the efforts in establishing collective redress in the EU to materialize. This situation demonstrates a classic source of tension between the roles of the EU judiciary as either a keen standard setter or rather as a pure watchdog of the Institutions' activities.

While the *Court might not be able* to exert further influence in this regard, considering the "law as it stands today", the *EU as a whole is clearly not ready* yet to fulfil its promise of effective protection of consumers by following up with the provisions for horizontal collective redress possibilities. This is troubling. And the Commission knows. The EU's initiative for collective redress across all policy fields in the EU has recently regained its attention against the background of numerous incidents of cross-border or even EU-wide infringements of consumer rights. An example is the recent wave of cancellations of flights that affected thousands of passengers in the EU and abroad. It is interesting however to highlight that passengers' rights represents an area where possibility for collective redress is granted in most Member States and also one highly developed under the [EU law](#).

The case of *Schrems v Facebook* therefore highlights the discrepancy in EU's consumer protection depending on the kind of commercial sector concerned. The EU seems to be a long-way from being capable to deal with the modern breaches of consumer rights characteristic of a digital social media services and those related to data protection. This is also highlighted in the [report](#) published by the Commission coincidentally on the day of *Schrems v Facebook* decision. The report is a result of a consultation and collection of the evidence regarding the possibilities for collective redress in the Member States. The report finds that the implementation of the principles for collective redress advanced in the Commission's Recommendation is still far from successfully achieved in the Member States. The progress, therefore remains too slow to effectively provide for access to justice for consumers subject to the wrongdoings of commercial entities, especially in the modern contractual settings.

The need for collective redress for consumers becomes ever more important in light of the cross-border implications of the digital services. The key concern is therefore the effective access to justice for consumers, considering the difficulties associated with litigating against powerful businesses, not the least because of the lengthy and costly proceedings before domestic and Union courts. In addition, the objective of providing an EU policy regarding the collective redress rests on the rationale of establishing clear rules relating for instance to the standing of individuals, the definition of the representatives who can bring such claims, the costs of such proceedings, etc., in order to prevent fraudulent litigation. It is therefore in the interest of both the consumers and the defendants to be parties to tightly regulated collective actions in increasingly cross-border or even EU-wide disputes.

Indeed, the Recommendation addresses the issue of cross-border collective redress. Namely, it acknowledges that individuals need to have the right to join forces in enforcing their claims, reaffirming the principle of non-discrimination. The objective of this proposal is contrasted with the risk of forum shopping, i.e. establishing the jurisdiction where the success of a collective redress is greatest, a risk also advanced by AG Bobek in his opinion.

Nevertheless, I fail to see how this reasoning can stand against the very notion of *effective* protection of consumers via the *effective* provision of access to justice. Indeed, in the Union built on the values of democracy and human rights, the acknowledgement of existing variance in the levels of protection of European citizens in the different jurisdictions contradicts the objectives of equality and equal protection before the Union Courts. It is against this

background that granting the horizontal possibility of collective redress for consumers is a way towards fulfilling the EU's promise of unity, equality and effective protection of European citizens.

To sum up, perhaps the timing of the pleas raised in *Schrems v Facebook* were too ahead of the EU's real commitment to a complete consumer protection. It is therefore a very important decision that shall act as a critical reminder for the competent Institutions, and indeed the Member States, that the time is ripe for the latent promises to translate into clear policy steps. Perhaps, the [New Deal for Consumers](#) proposed in the [Commission's work programme](#), planned to begin in the spring of this year, will finally be the *Right Deal* the European consumers need.