

Expert comment

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Privacy law in Europe is currently being shaped by an interesting and complex set of dynamics. Data protection regulators appear increasingly proactive in their enforcement activity, despite relatively modest enforcement powers. For some time, we have seen them use these powers creatively and to maximum effect. Against this backdrop, individuals are now taking steps to exercise their privacy rights, and are challenging big companies in order to do so. To date, Facebook and Google have been particular targets for action by individuals in Europe, but this may be just the beginning.

On 24th March, the Court of Justice of the European Union ('CJEU') heard arguments in a case referred by the Irish Data Protection Commissioner following a complaint against Facebook by Max Schrems. Mr Schrems asserts that Facebook's transfer of personal data to the US in reliance on the US Safe Harbor mechanism does not meet the 'adequacy' test set out in the Data Protection Directive (95/46/EC), and that the mechanism was illegal when it was adopted by the Commission. The case is being followed closely. Some 4,000 companies are part of the US Department of Commerce's Safe Harbor, and any suspension of it would cause significant disruption.

An aspect of the case that has not been widely discussed is the fact that Mr Schrems' action is being crowd funded, apparently by more than 2000 donors. The cost of litigation is often prohibitive, and the crowd funding option is novel. In another action against Facebook, Mr Schrems has created a class action, again relying on funding by individuals.

The concept of class action litigation is relatively rare in Europe, but in the US it is a routine feature of the legal process, and one of the factors credited with raising the profile and significance of data breaches. The threat of class action litigation in the US has shaped the ways in which companies now respond to data breaches, including decisions to hire external counsel and forensic investigators, what is communicated to affected individuals, and the timing of those communications.

In Europe, class actions are rare, but they may become a standard feature of privacy litigation. The proposed General Data Protection Regulation creates something akin to a class action. Article 73 of the Commission's text in its current form permits an

organisation or association that seeks to protect individuals' rights in their personal data to file a complaint with a supervisory authority on behalf of one or more data subjects. Further, independently of an individual's complaint, an organisation or association may lodge a complaint itself if it considers that there has been a breach of data protection. These provisions will make it easier for groups of individuals to collaborate in bringing claims, and may change the dynamic of privacy enforcement in Europe.

Meanwhile, ahead of the proposed Regulation, there is another case brought by a group of individuals that seeks to challenge privacy enforcement in the UK. Judith Vidal-Hall and two other claimants initiated proceedings in the High Court in 2013, claiming that Google collected their data without their knowledge or consent, through its use of cookies. The substance of the claim has not yet been examined, but in March 2015 the Court of Appeal issued its judgment on several interlocutory questions. Of these, the two key issues are whether the alleged misuse of private information is a tort for the purposes of the Civil Procedure Rules (which in the case is needed to enable Ms Vidal-Hall to obtain permission to serve proceedings out of the jurisdiction), and whether the term 'damages', in Section 13 of the Data Protection Act 1998, includes a claim for compensation without financial loss.

The Court of Appeal held in Ms Vidal-Hall's favour on both points in a decision that looks set to be the subject of considerable debate on the damages point. It is not yet clear whether Google will appeal, but this case provides another example of individuals seeking proactively to shape privacy law, and the wider privacy debate, through the courts.

Privacy claims by individuals are not new. However, in a world in which legislative change seems certain, and data protection regulators are actively exercising their enforcement powers, the added dimension of groups of individuals pursuing privacy claims against large companies adds a very different dimension to the enforcement of privacy law.

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