

Schriften des Augsburg Center for
Global Economic Law and Regulation



Arbeiten zum Internationalen Wirtschaftsrecht
und zur Wirtschaftsregulierung

Mario Egbe Mpame

The General Data Protection Regulation and the effective protection of data subjects' rights in the online environment

To what extent are these rights enforced during
mass harm situations?



Nomos

**Augsburg Center
for Global
Economic Law and Regulation**



Augsburger Zentrum
für Internationales Wirtschaftsrecht
und Wirtschaftsregulierung

Centre pour
le droit international et la régulation
économiques, Augsburg

Schriften des Augsburg Center for
Global Economic Law and Regulation

Arbeiten zum Internationalen Wirtschaftsrecht
und zur Wirtschaftsregulierung

herausgegeben von

Prof. Dr. Thomas M. J. Möllers, Universität Augsburg

Prof. Dr. Matthias Rossi, Universität Augsburg

Band 85

Mario Egbe Mpame

**The General Data Protection Regulation
and the effective protection of data
subjects' rights in the online environment**

To what extent are these rights enforced during
mass harm situations?



Nomos

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Augsburg, Univ., Diss., 2021

Original title: The General Data Protection Regulation (gdpr) and the effective protection of data subjects' rights in the online environment: to what extent are these rights enforced during mass harm situations?

ISBN 978-3-8487-8201-7 (Print)
978-3-7489-2607-8 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-8201-7 (Print)
978-3-7489-2607-8 (ePDF)

Library of Congress Cataloging-in-Publication Data

Mpame, Mario Egbe

The General Data Protection Regulation and the effective protection of data subjects' rights in the online environment
To what extent are these rights enforced during mass harm situations?

Mario Egbe Mpame

320 pp.

Includes bibliographic references.

ISBN 978-3-8487-8201-7 (Print)
978-3-7489-2607-8 (ePDF)



Onlineversion
Nomos eLibrary

1st Edition 2021

© Nomos Verlagsgesellschaft, Baden-Baden, Germany 2021. Overall responsibility for manufacturing (printing and production) lies with Nomos Verlagsgesellschaft mbH & Co. KG.

This work is subject to copyright. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to "Verwertungsgesellschaft Wort", Munich.

No responsibility for loss caused to any individual or organization acting on or refraining from action as a result of the material in this publication can be accepted by Nomos or the author.

Preface

This book is a dissertation submitted and defended at the University of Augsburg in view of obtaining a Ph.D. in Law, in February 2021. Its publication is in fulfillment of the very last requirement for the conferral of a Doctorate Degree upon my humble person.

With GDPR administrative fines making headlines since 2018, it was interesting to see how such justice is rendered vis-à-vis data subjects, especially as infringements of the GDPR usually affect many data subjects. Without a binding Union Act on collective redress, this dissertation examines how Member States vary in their efforts to render collective justice to data subjects, especially in relation to the GDPR. Moreover, the work gives an in-depth overview of the GDPR, especially with an extensive review of the CJEU and ECtHR case law, the national provisions and case law of the Member States, as well as the numerous Opinions of the WP29 and the EDPB and relevant literature. Those interested in EU data protection law, including data protection professionals, would certainly find it useful.

Completing a demanding project of this nature was only possible thanks to the sufficiently available support. In this regard, I would like to avail myself of this opportunity to thank Mrs. Krsitina DOHMEN, for her generous financial support, which enabled me to purchase the numerous required documentations, especially as COVID-19 prevented me from making full use of public libraries. I am equally grateful to Mr. Bobby BOWERS and Mr. Raghavendra REDDY, for the time and energy spent on proofreading this work. To Prof. Michael KORT and his immediate collaborators of the University of Augsburg, I hereby express great satisfaction and profound gratitude for their availability, reliability and cooperation, which enabled me to complete my research within a period shorter than usual.

Augsburg, 01 March 2021

Mario Egbe MPAME

Inhaltsverzeichnis

List of Abbreviations	17
Chapter 1- INTRODUCTION	19
1. ABSTRACT	19
2. BACKGROUND	19
3. THE GDPR AND THE NOTION OF PERSONAL DATA	21
4. SOME HARM ASSOCIATED WITH INADEQUATE DATA PROTECTION	27
5. DATA PROTECTION AND COMPETITION IN THE INTERNAL MARKET	28
6. JUSTIFICATIONS FOR THE ENACTMENT OF THE GDPR	30
A. The conferral of the status of fundamental Human Right on the right to data protection	32
B. Technological advancements	35
C. The preparatory role of the Data Protection Directive (DPD)	36
D. The need to correct some inherent weaknesses of the DPD	38
7. MASS HARM SITUATIONS AND DATA PROTECTION	41
8. THE SCOPE AND STRUCTURE OF THIS WORK	44
Part I: GUARANTEES FOR THE EFFECTIVE PROTECTION OF PERSONAL DATA UNDER THE GDPR	47
Chapter 2- THE GDPR AND THE PROTECTION OF PERSONAL DATA: OBLIGATIONS PLACED ON THE CONTROLLER AND PROCESSOR	50
1. THE CONTROLLER'S LEGAL OBLIGATIONS WHEN PROCESSING NON-SENSITIVE PERSONAL DATA	50
A. The data subject has given consent to the processing of his or her personal data for one or more specific purposes(Art. 6(1) (a) GDPR)	51
I. Freely given consent	51
a. The substantial understanding of the data subject	51
	7

Inhaltsverzeichnis

b. Imbalance of power	52
c. Detriment	54
d. Conditionality in relation to the execution of a contract	55
II. Specific consent	56
III. Informed Consent	57
IV. Unambiguous consent	59
B. The processing is necessary for contract-related purposes	60
I. Processing is necessary for the performance of a contract to which the data subject is party	60
II. Processing is necessary in order to take steps at the request of the data subject prior to entering into a contract	62
C. The processing is necessary for compliance with a legal obligation to which the controller is subject (Art. 6(1)(c) GDPR)	63
I. The existence of a legal obligation	63
II. Emanation of the legal obligation from a Member State law	65
D. The processing is necessary in order to protect vital interests	66
I. Protecting the vital interests of the data subject	66
II. Protecting the vital interests of a third-party	67
E. Processing for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller	67
I. Processing is necessary in performing a task in the public interest	68
II. Processing is necessary in the exercise of official authority vested in the controller	69
F. The processing is necessary for the purposes of the legitimate interests pursued by the controller or a third party (Art. 6(1)(f) GDPR)	70
I. The existence of a legitimate interest	71
II. Legitimate interests of third parties	73
III. The 3-step test	74
IV. Factors determining the outcome of the balancing exercise	76
a. The categories of personal data involved	76
b. The impact of the processing on the data subject	77
c. Transparency and fairness of the processing	78

d. The category of data subjects involved	78
e. Processing that is subject to the ePrivacy Directive	79
f. The scope of the processing	80
g. Security of the processing	80
h. The benefits of the processing	80
i. The reasonable expectations of the data subject	81
j. Balancing of interests in the context of press freedom	82
V. The particularity of online marketing communications: the relationship between the GDPR and the ePrivacy Directive	85
a. Specific provisions regulating unsolicited commercial communications	86
b. Specific provisions regarding the use of cookies and similar technologies	87
c. Specific rules regulating the processing of traffic data	88
d. Specific requirements for the processing of location data	89
G. Additional requirements for the processing of personal data relating to criminal records	91
2. CONTROLLER'S LEGAL OBLIGATIONS WHEN PROCESSING SPECIAL CATEGORIES OF PERSONAL DATA (SENSITIVE PERSONAL DATA)	92
A. The explicit consent of the data subject	95
I. The explicit character of consent	95
II. The ability to prove explicit consent	96
III. Other areas where explicit consent is required	96
B. Processing is necessary in the field of employment and social security and social protection law	98
C. Vital interests	99
D. Processing within the scope of legitimate activities of appropriate opinion bodies	100
E. Publicly available personal data	102
F. The establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity	102
G. Substantial public interest	103
H. Processing is necessary for the purposes of preventive or occupational medicine, the assessment of the employee's aptitude and other health-care related purposes	105
I. The processing is necessary for reasons of public interest in the area of public health	106

Inhaltsverzeichnis

J. Processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes subject to a appropriate safeguard	107
I. Processing for research-related purposes	108
II. Processing for statistical purposes	109
3. ADDITIONAL OBLIGATIONS TO ENSURE THE EFFECTIVE PROTECTION OF PERSONAL DATA	110
A. Compliance with other data protection principles	110
I. Fairness and transparency	111
II. Purpose limitation	112
III. Data Minimization	113
IV. Accuracy	114
V. Storage limitation	115
VI. Integrity and confidentiality	116
VII. Accountability	118
B. Processor's obligations under the GDPR	119
C. Additional obligations on controllers and processors under certain circumstances	121
I. The designation of an EU Representative	121
II. The designation of a Data Protection Officer	122
D. Additional requirements for international data transfers	125
I. The notion of data transfer under the GDPR	126
II. The notion of onward transfers under the GDPR	128
III. Preconditions for data transfers	129
a. Data transfers based on an adequacy decision from the Commission	129
b. Data transfers based on appropriate safeguards (Art. 46 GDPR) and post Schrems II considerations	133
c. Transfers based on derogations for specific situations (Art. 49(1) GDPR)	136
d. Transfers necessary for purposes of compelling legitimate interests pursued by the controller (Art. 49(1) GDPR)	138
i. The not-repetitive character of such transfers	139
ii. Must concern a limited number of data subjects	139
iii. The balancing of interests	140
iv. The provision of additional information to the data subject	141
v. The obligation to inform the DPA	141

Chapter 3 - THE GDPR AND THE PROTECTION OF PERSONAL DATA: RIGHTS ACCORDED TO THE DATA SUBJECT	143
1. DATA SUBJECTS' RIGHTS VIS-À-VIS THE DATA CONTROLLER IN RELATION TO THE PROCESSING OF PERSONAL DATA	143
A. The right to transparent communication and information	143
I. Information to be provided where personal data are collected from the data subject	144
II. Information to be provided where personal data have not been obtained from the data subject	146
III. Other circumstances where information provision obligations may arise	148
a. Information relating to processing for a new purpose	148
b. Breach notifications	149
c. Whenever the data subject exercises his right	150
d. Whenever the provision of information is required by Member State Law	151
IV. How to provide information	152
a. Layered notices	152
b. Tools and icons	153
c. "Push" and "pull" notices	154
d. Information challenges	154
B. The right of access	155
I. Information to be provided when a data subject exercises the right of access	156
II. Limitations to the right of access	157
C. Right to rectification	159
D. The right to erasure	160
I. Grounds for exercising the right to erasure	161
II. Limitations of the right to erasure	163
E. Right to restriction of processing	165
F. Right to data portability	166
I. The scope of the right to data portability	167
II. Limitations of the right to data portability	168
a. Limited to data concerning the data subject	168
b. Limited to personal data provided by the data subject	169
c. Limited to processing activities that have consent or contract as legal basis	170

Inhaltsverzeichnis

d. The right is only available in automated processing activities	170
e. The right may be limited by the rights and freedoms of other natural persons	170
G. Right to object to processing	172
H. Right not to be subject to automated individual decision-making and profiling	174
I. The scope of the right not to be subject to automated decision-making and profiling	176
a. ‘decision producing legal effects’	177
b. ‘similarly significantly affects him or her’	177
c. ‘a decision based solely on automated processing’	178
II. Derogations to the general prohibition of automated decision-making and profiling	179
2. THE POSSIBILITY OF LIMITING THE DATA PROTECTION PRINCIPLES AND DATA SUBJECT’S RIGHT UNDER UNION OR MEMBER STATE LAW	181
A. The scope of data protection restrictions	181
B. The form of data protection restrictions	183
3. THE DATA SUBJECT’S RIGHT TO ENFORCEMENT ACTION	185
A. Right to lodge a complaint with a data protection authority	185
I. Tasks of a data protection authority	187
II. The remedies available at the supervisory authority	188
III. Administrative fines	190
IV. Factors determining the amount of fine	192
V. Examples of administrative fines already imposed by supervisory authorities	195
a. Minor administrative fines	195
b. Some major administrative fines	197
VI. Additional considerations for the enforcement of the GDPR: penalties provided by Member States for violations that fall outside the scope of administrative fines	199
VII. Limitations of the remedies provided by the DPAs	200
a. Remedies do not include compensation for the data subject	200
b. Not all DPAs are authorized to impose administrative fines	201

c. Certain entities may be exempted from administrative fines	201
d. Decisions of DPAs are subject to appeal	202
B. The right to an effective judicial remedy against the DPA	203
C. The right to effective judicial remedy against a controller or processor	204
D. The right to compensation	206
E. The right to representation	207
Part II: THE ENFORCEMENT OF DATA SUBJECTS' RIGHTS IN MASS HARM SITUATIONS	209
Chapter 4- UNION TEXTS REGULATING COLLECTIVE REDRESS	213
1. Directive 98/27/EC of 19 May 1998 (Injunctions Directive I)	213
2. Directive 2009/22/EC of 23 April 2009 (Injunctions Directive II)	215
3. The corrective powers of the DPAs: a mitigation of the absence of collective injunctive relief for data protection matters	217
4. The Parliament Resolution No. 2011/2089(INI) of 2 February 2012 on an EU Collective Redress	218
5. Directive 2013/11/EU of 21 May 2013 (Directive on consumer ADR)	221
6. Commission Recommendation of 11 June 2013 on common principles of collective redress (2013/396/EU)	223
7. Proposal for a Representative Actions Directive (RAD) of 11 April 2018	225
Chapter 5- COMPENSATORY COLLECTIVE REDRESS IN MAJOR EU ECONOMIES AND THEIR POSITIONS ON DATA PROTECTION-RELATED MASS HARM SITUATIONS	229
1. COMPENSATORY COLLECTIVE REDRESS IN BELGIUM	229
A. Consumer Compensatory Collective Redress under the Code of Economic Law (CEL)	229
B. Eligible fields for compensatory representative action in Belgium	231
C. Compensatory Collective Redress for SMEs under the CEL	232

Inhaltsverzeichnis

D. Compensatory collective redress for harm resulting from the infringement of the GDPR	233
E. ADR in the Belgian collective compensatory redress system	234
F. Case Law	235
G. Summary of the Belgian compensatory collective redress system	236
2. COMPENSATORY COLLECTIVE REDRESS IN ENGLAND AND WALES	237
A. Group Litigation Orders	237
B. Representative Actions	239
C. Compensatory Collective redress for mass harm resulting from the infringement of the GDPR	242
D. ADR in the English compensatory collective redress system	244
E. Case Law	245
F. Summary of the English compensatory redress system	246
3. COMPENSATORY COLLECTIVE REDRESS IN FRANCE	246
A. Class action before the civil court under Law No.2016-1547	247
B. ADR in the French compensatory collective redress mechanism	249
C. Class Action before the administrative judge under Law No.2016-1547	250
D. Compensatory Collective redress for mass harm resulting from the infringement of the GDPR	251
E. Case Law	253
F. Summary of the French collective redress system	253
4. COMPENSATORY COLLECTIVE REDRESS IN ITALY	254
A. Compensatory Collective redress under the ICC	254
B. Representative action procedure under the ICC	256
C. Collective redress under Legislative Decree No. 117 of 3 July 2017	257
D. Compensatory Collective Redress for damage resulting from the infringement of the GDPR	258
E. ADR in the Italian compensatory collective redress system	259
F. Case Law	259
G. Summary of the Italian compensatory collective redress mechanism	260
H. Recent developments: Law No. 31 of 12 April 2019	261

5. COMPENSATORY COLLECTIVE REDRESS IN SPAIN	261
A. Compensatory collective redress under Law 1/2000 of 07 January 2000 on Civil Procedure	262
B. Other relevant provisions on the Spanish class action	264
C. Compensatory collective action for harm resulting from the infringement of the GDPR in Spain	265
D. Consumer ADR in the Spanish collective redress mechanism	266
E. Case law	268
F. Summary of the Spanish compensatory collective redress	268
6. COMPENSATORY COLLECTIVE REDRESS IN GERMANY	269
A. Early attempts of the German compensatory collective redress	269
B. Compensatory Collective Redress under Sec.79 of the Code of Civil Procedure (ZPO)	272
C. Compensatory collective redress under Law of 12 July 2018 on Model Declaratory Action	273
D. ADR in the German compensatory collective redress mechanism	275
E. The German Compensatory collective redress mechanism and mass harm resulting from the infringement of the GDPR	276
F. Case Law	276
G. Summary of the German Compensatory collective redress system	278
Chapter 6 - COMPENSATORY COLLECTIVE REDRESS IN THE EU AND ITS ASSOCIATED CHALLENGES	280
1. GENERAL OVERVIEW OF COMPENSATORY COLLECTIVE REDRESS IN THE EU	280
2. THE ABSENCE OF A LEGALLY BINDING UNION ACT: A JUSTIFICATION FOR THE INCONSISTENT COMPENSATORY COLLECTIVE REDRESS APPROACHES IN THE EU	282
3. OTHER CHALLENGES RELATING TO THE IMPLEMENTATION OF COMPENSATORY COLLECTIVE REDRESS IN THE UNION	285
A. Consumer awareness	285
B. Challenges relating to cross-border mass harm situations	286
I. The inability of representative entities to bring action in a Member State other than their home country	286

Inhaltsverzeichnis

II. Challenges relating to individual participation in collective actions in another Member State	287
C. Challenges relating to the funding of representative organizations	288
D. Fears relating to the abuse of collective redress	292
Chapter 7- CONCLUSION	294
1. GENERAL SUMMARY	294
2. PERSPECTIVES PERTAINING TO THE PROPOSED REPRESENTATIVE ACTIONS DIRECTIVE	296
Bibliography	299

List of Abbreviations

ACJ	French Administrative Code of Justice
ADR	Alternative Dispute Resolution
BDSG	German Federal Data Protection Act
CAT	UK Competition Appeal Tribunal
CEL	Belgian Code of Economic Law
CFR	EU Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CPR	UK Civil Procedure Rules
DPA	Data Protection Authority
DPAAct	UK Data Protection Act
DPD	Data Protection Directive
DPO	Data Protection Officer
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDPB	European Data Protection Board
GDPR	EU General Data Protection Regulation
GLO	UK Group Litigation Orders
GWB	German Competition Act
ICC	Italian Consumer Code
KapMuG	German Capital Market Model Claims Act
LEC	Spanish Civil Procedure Act
LED	Law Enforcement Directive
OECD	Organization for Economic Cooperation and Development
PSD2	Payment Services Directive II
RAD	Representative Actions Directive
SMEs	Small and medium-sized enterprises
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UKDPA	UK Data Protection Authority
UKDPAAct	UK Data Protection Act

List of Abbreviations

UKlaG	German Injunctions Act
UWG	German Act against Unfair Competition
WP29	Article 29 Working Party
ZPO	German Code of Civil Procedure