

Civil Society Actors as Enforcers of the GDPR: What Role for the CJEU?

by Valentina Golunova and Mariolina Eliantonio *

Abstract:

This article examines the interaction between the CJEU and civil society actors in data protection cases. It first reflects on the role of such actors in legal actions concerning the protection of personal data before national and EU courts, stressing their key potential to address power imbalances between individuals and Big Tech companies. Then, it critically assesses the CJEU's contribution to fostering the role of civil society in the GDPR enforcement. It demonstrates that non-governmental organizations are excluded from participation in infringement proceedings against Member States for failing to fulfil their

obligations under the GDPR, which can be launched by the Commission under Article 258 TFEU. Furthermore, such organizations cannot bring direct actions against the Commission's delegated and implementing acts due to the lack of standing under Article 263 TFEU. Additionally, civil society actors have a limited ability to intervene as third parties in the legal proceedings before the CJEU. However, this article contends that a greater involvement of these actors in legal proceedings before the CJEU is key to enhancing its responsiveness to the demands of civil society. It therefore reflects on the ways to make the CJEU a more effective avenue for legal mobilization in the field of data protection.

Keywords: civil society, data protection, GDPR, CJEU, mobilization, standing, preliminary ruling, third-party intervention

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A. Introduction

1 Civil society actors play a vital role in advancing democratic values and paving the way to a more just and equitable society.¹ They draw attention to failures of the legal system and hold both public institutions and corporations accountable for actions which have a negative impact on society at large. Among other endeavours, NGOs, individual

activists, and other watchdogs commonly engage in legal mobilization, which is understood as a strategic use of law and institutional mechanisms to advance a particular cause.² In the EU, such actors are active in many different regulatory domains, including environment,³ migration,⁴ and, more recently, data

* Valentina Golunova is an Assistant Professor of Digital Democracy at the Maastricht University. Mariolina Eliantonio is a Professor of European and Comparative Administrative Law and Procedure at the Maastricht University. The authors would like to sincerely thank Evangelia Psychogiopoulou and Federica Casarosa for their helpful comments on the earlier version of the article.

1 Rachel A Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007).

2 Emilio Lehoucq and Whitney K. Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?' (2020) 45 *Law & Social Inquiry* 166, 168.

3 See, for instance, Dutch Supreme Court (Hoge Raad), *Urgenda Foundation v. the Netherlands*, Judgment of 20 December 2019, No. 19/00135, ECLI:NL:HR:2019:2006; Brussels Court of Appeal (Cour d'appel de Bruxelles), *VZW Klimaatzaak v. the Federal State of Belgium and others*, Judgment of 30 November 2023, No. 2023/8411; Tribunale Ordinario di Roma (Civil Court of Rome), *A Sud et al v. Italy*, writ of summons, filed on 5 June 2021.

4 See, among others, *Sentenza Tribunale di Roma, Prima sezione civile*, n. 22917/2019, RG n. 5615/2016; *S.S. and*

protection.⁵ A growing number of organizations are mobilizing various legal avenues to challenge unfair or exploitative data-driven practices and assist data subjects in exercising their right to an effective remedy.⁶

- 2 As deftly noted by the European Data Protection Supervisor (EDPS) Wojciech Wiewiórowski, civil society actors are the “natural allies of the data protection authorities”.⁷ At the same time, the General Data Protection Regulation (GDPR) explicitly empowers not-for-profit bodies, organizations and associations to bring complaints on behalf of data subjects not only before national supervisory authorities but also national courts of Member States.⁸ The importance of representative actions for addressing the GDPR infringements has also been underscored in the case law of the CJEU.⁹ Indeed, civil society actors have shown remarkable achievements in ensuring that the GDPR not only barks but also bites those who do not comply with its provisions. In May 2023, Meta was fined a record € 1.2 billion by the European Data Protection Board (EDPB) for transferring personal data to the US in breach of the GDPR following an enquiry by the Irish Data Protection Authority.¹⁰ Notably, this enquiry

was originally initiated by noyb – a prominent non-governmental organization (NGO) focusing on data protection. Civil society actors have also helped expose many other major GDPR infringements that would likely remain undiscovered otherwise.¹¹ Yet both EU institutions and Member States have occasionally showed resistance to the participation of civil society actors in the GDPR enforcement. For example, European Commissioner for Justice Didier Reynders has questioned the NGOs’ contribution to enhancing the protection of personal data in the EU, suggesting that some of them bring GDPR complaints “as a business model”.¹² Many civil society organizations also face considerable procedural obstacles when litigating data protection cases at the Member State level.¹³ Accordingly, there is a growing claim that reaffirming and broadening the opportunities for civil society to participate in legal proceedings concerning the rights of the data subjects is crucial for achieving better enforcement of the GDPR.¹⁴

- 3 While there is a vast body of scholarly literature addressing the GDPR implementation in general,¹⁵

Others v Italy App No 21660/18 (ECtHR), communicated on 14 October 2019; UN Human Rights Committee, *Denny Zhao v. the Netherlands*, U.N. Doc. CCPR/C/130/D/2918/2016 (2020).

- 5 ‘Première Sanction Contre Google Suite à Nos Plaintes Collectives’ (*La Quadrature du Net*, 21 January 2019) <<https://www.laquadrature.net/2019/01/21/premiere-sanction-contre-google-suite-a-nos-plaintes-collectives/>> accessed 26 January 2024; ‘Belgian Authority Finds IAB Europe’s Consent Pop-Ups Incompatible with the GDPR’ (*European Digital Rights (EDRI)*, 16 February 2022) <<https://edri.org/our-work/belgian-authority-finds-iab-europes-consent-pop-ups-incompatible-with-the-gdpr/>> accessed 26 January 2024.
- 6 Inbar Mizarhi-Borohovich, Abraham Newman and Ido Sivan-Sevilla, ‘The Civic Transformation of Data Privacy Implementation in Europe’ [2023] *West European Politics* 671, 672–673.
- 7 Wojciech Wiewiórowski, ‘Civil Society Organisations as Natural Allies of the Data Protection Authorities’ (*European Data Protection Supervisor*, 15 May 2018) <<https://edps.europa.eu/press-publications/press-news/blog/civil-society-organisations-natural-allies-data-protection>> accessed 26 July 2023.
- 8 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (GDPR), art 80.
- 9 Case C-40/17 *Fashion ID* [2019] ECLI:EU:C:2019:629; Case C-319/20 *Meta Platforms Ireland* [2022] ECLI:EU:C:2022:322.
- 10 Binding Decision 1/2023 on the dispute submitted by the

Irish SA on data transfers by Meta Platforms Ireland Limited for its Facebook service (Art. 65 GDPR) [2023].

- 11 See, for instance, ‘Wij komen op voor jou: Spotify krijgt boete van 5 miljoen euro’ (*Bits of Freedom*, 13 June 2023) <<https://www.bitsoffreedom.nl/2023/06/13/wij-komen-op-voor-jou-spotify-krijgt-boete-van-5-miljoen-euro/>> accessed 26 January 2024; ‘Digital Rights Ireland Takes DPC to Court Over Facebook’s 530 Million Users’ Data Leak’ (*Digital Rights Ireland*, 10 January 2023) <<https://www.digitalrights.ie/dri-takes-dpc-to-court-over-facebook-data-leak/>> accessed 26 January 2024.
- 12 ‘Open Letter: Commissioner Reynders Asked to Correct Unacceptable Accusations against NGOs’ (11 July 2023) <<https://noyb.eu/en/open-letter-commissioner-reynders-asked-correct-unacceptable-accusations-against-ngos>> accessed 14 July 2023.
- 13 ‘5 Years of the GDPR: National Authorities Let down European Legislator’ (*noyb*, 23 May 2023) <<https://noyb.eu/en/5-years-gdpr-national-authorities-let-down-european-legislator>> accessed 26 July 2023.
- 14 Marie-Pierre Granger and Kristina Irion, ‘The Right to Protection of Personal Data: The New Posterchild of European Union Citizenship?’, *Civil Rights and EU Citizenship* (Edward Elgar Publishing 2018) 292; Maryant Fernández, ‘BEUC’s Recommendations on Harmonising Cross-Border Procedural Matters in the GDPR’ (*European Consumer Organisation* 2023) 2 <https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-034_recommendations_on_harmonising_cross-border_procedural_matters_in_the_GDPR.pdf> accessed 31 October 2023.
- 15 See, among others, Benjamin Greze, ‘The Extra-Territorial Enforcement of the GDPR: A Genuine Issue and the Quest for Alternatives’ (2019) 9 *International Data Privacy Law* 109; Brian Daigle and Mahnaz Khan, ‘The EU General Data Protection Regulation: An Analysis of Enforcement Trends

the interrogation of the role of civil society actors in this area remains rare. Some academic writings have undertaken to examine how NGOs can foster the protection of personal data across the EU.¹⁶ However, these writings focus primarily on the NGOs' participation in legal proceedings before national DPAs and national courts in the Member States. At the same time, the interaction between civil society groups and the CJEU remains largely overlooked.

- 4 The role of the CJEU as a venue of legal mobilization has been subject to academic debate. Some describe it as a promising avenue for bottom-up legal action.¹⁷ Others, on the contrary, have exposed and critiqued the CJEU's scant engagement with civil society organizations.¹⁸ The CJEU's potential is often argued to be circumscribed by the provisions of the Treaty on the Functioning of the EU (TFEU), which strictly defines who, and under what circumstances, can

by EU Data Protection Authorities' (2020) 2020 *Journal of International Commerce & Economics* 1; Giulia Gentile and Orla Lynskey, 'Deficient by Design? The Transnational Enforcement of the GDPR' (2022) 71 *International and Comparative Law Quarterly* 799.

- 16 Peter Rott, 'Data Protection Law as Consumer Law – How Consumer Organisations Can Contribute to the Enforcement of Data Protection Law' (2017) 3 *Journal of European Consumer and Market Law* 113, 113–114; Federica Casarosa, 'Transnational Collective Actions for Cross-Border Data Protection Violations' (2020) 9 *Internet Policy Review* 1; Emilio Lehoucq and Sidney Tarrow, 'The Rise of a Transnational Movement to Protect Privacy' (2020) 25 *Mobilization: An International Quarterly* 161; Woojeong Jang and Abraham L Newman, 'Enforcing European Privacy Regulations from Below: Transnational Fire Alarms and the General Data Protection Regulation' (2022) 60 *JCMS: Journal of Common Market Studies* 283; Mizarhi-Borohovich, Newman and Sivan-Sevilla (n 6).
- 17 Jos Hoevenaars, *A People's Court? A Bottom-up Approach to Litigation before the European Court of Justice* (Eleven Publishing 2018); Virginia Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights' (2021) 58 *Common Market Law Review* 751, 771–772.
- 18 Sergio Carrera and Bilyana Petkova, 'The Potential of Civil Society and Human Rights Organizations through Third-Party Interventions before the European Courts: The EU's Area of Freedom, Security and Justice' in Mark Dawson, Bruno De Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013) 262–263; Mariolina Eliantonio, 'The Role of NGOs in Environmental Implementation Conflicts: "Stuck in the Middle" between Infringement Proceedings and Preliminary Rulings?' (2018) 40 *Journal of European Integration* 753, 763; Kris van der Pas, 'All That Glitters Is Not Gold? Civil Society Organisations and the (Non-)Mobilisation of European Union Law' [2023] *JCMS: Journal of Common Market Studies* 1, 3–4.

bring cases before the CJEU and be involved in the proceedings before it.¹⁹ Accordingly, it is necessary to examine whether and how civil society actors have engaged or could engage with the CJEU in data protection cases. This analysis is especially crucial since procedural obstacles faced by these actors when trying to reach the CJEU could severely impact the latter's receptiveness to their substantive legal arguments.

- 5 The objective behind this article is therefore twofold. On the one hand, it examines the existing pathways for interaction between civil society actors and the CJEU in the data protection context. In this respect, this article analyses how such actors can mobilize the CJEU to remedy the gaps in the GDPR enforcement and whether the CJEU has upheld or rather undermined their efforts to either initiate or participate in relevant proceedings. On the other hand, this article reflects on whether and how a greater involvement of NGOs and individual activists specializing in the protection of personal data in proceedings before the CJEU could strengthen the existing mobilization initiatives at the national level. In this respect, it argues that enhancing the CJEU's capacity to thoughtfully address the claims put forward by civil society is instrumental for bolstering the protection of fundamental rights in the digital realm.
- 6 This article is structured as follows. Section B underscores the essential importance of civil society actors in ensuring the effective implementation of the GDPR. It analyses Article 80 GDPR, which secures the right of NGOs to represent data subjects in legal proceedings and explores the CJEU's case law elucidating the scope of this right. In turn, section C investigates the opportunities and obstacles to the civil society groups' involvement in the proceedings concerning the protection of personal data before the CJEU. On the one hand, it gives examples of how civil society actors and the CJEU have engaged in indirect dialogue in preliminary reference proceedings. On the other hand, it observes that the possibilities for a more direct and hence meaningful interaction between the two remain extremely limited due to the exclusion of civil society groups from infringement proceedings, their inability to bring direct actions against the Commission's delegated and implemented acts, including adequacy decisions, and procedural hurdles to third-party interventions. To conclude, section D considers ways of increasing the CJEU's responsiveness to claims made by civil society groups by ensuring better access of these actors to the proceedings before the CJEU.

19 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, arts 251–281.

B. Civil Society Actors as Mechanisms of Bottom-Up GDPR Enforcement

- 7 The adoption of the GDPR marked a transition from a rigid, top-down regulatory regime to one that relies heavily on bottom-up enforcement. The purpose of this section is to shed light on the role of civil society actors in strengthening the protection of personal data across the EU. Section B.I reflects on the significance of Article 80 GDPR, showing how the involvement of NGOs in proceedings concerning the GDPR infringements can help safeguard the rights of data subjects. Section B.II analyses the CJEU's case law dealing with the right of not-for-profit organizations and other entities to bring action against persons who are potentially responsible for the violations of the GDPR.

I. The role of civil society in enhancing the protection of personal data

- 8 Civil society organizations are increasingly seen as 'decentralized enforcers of EU law'.²⁰ However, until recently, the role of such organizations in ensuring the effective protection of personal data remained limited. The GDPR's predecessor – Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the DPD") – did not expressly envision the right of civil society organizations to bring legal proceedings in relation to the alleged infringements of the protection of personal data.²¹ This blind spot has drawn criticism. Most notably, in its Opinion on the Commission's proposal for a GDPR issued in 2012, the EU Agency for Fundamental Rights (FRA) advocated recognizing the right of non-profit bodies acting in the public interest to lodge complaints regarding breaches of the data protection regime.²² In response to the growing

calls for enabling civil society to take an active part in data protection litigation, the EU legislator undertook to guarantee the right of all entities acting in the public interest and active in the field of the protection of data subjects' rights and freedoms to bring complaints on behalf of data subjects. Article 80 GDPR empowers data subjects to mandate not-for-profit bodies, organizations and associations to lodge complaints with a supervisory authority (Article 77 GDPR) or bring legal proceedings before a competent judicial authority, either against a supervisory authority (Article 78 GDPR) or against a controller or processor (Article 79 GDPR).²³ Additionally, the said entities are entitled to exercise the right to receive compensation (Article 82 GDPR) on behalf of these data subjects where provided for by domestic law of Member States. It is further specified that Member States can recognize the right of not-for-profit bodies, organizations and associations to exercise the said rights independently of the data subject's mandate, which is understood as an authorization issued by the latter to act on their behalf.²⁴

- 9 Article 80 GDPR is a powerful instrument against breaches of data protection rules.²⁵ As extensively argued by scholars, representative actions significantly enhance access to justice for individuals.²⁶ The reasons why data subjects may not be willing or able to engage in litigation on their own are manifold. Many citizens are unaware of their rights under the GDPR as well as legal remedies available to them in case these rights are breached. Even when data subjects suspect that they might have become a victim of a GDPR infringement, they are often discouraged from lodging a complaint against the person responsible for this infringement due to the high costs of litigation or considerable

20 Konstantin Reiners and Esther Versluis, 'NGOs as New Guardians of the Treaties? Analysing the Effectiveness of NGOs as Decentralised Enforcers of EU Law' (2023) 30 *Journal of European Public Policy* 1518.

21 See, however, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31 (DPD), art 28(4) (obliging supervisory authorities to hear 'claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data').

22 European Union Agency for Fundamental Rights, 'Opinion

2/2012 on the Proposed Data Protection Reform Package' (2012) 29 <<https://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf>> accessed 1 August 2023.

23 GDPR, art 80(1).

24 GDPR, art 80(2). See also GDPR, recital 142.

25 Gloria González Fuster, 'Article 80 Representation of Data Subjects' in Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press 2020) 1143; Jang and Newman (n 16) 294.

26 Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (Sijthoff 1981); Carol Harlow, 'Public Law and Popular Justice' (2002) 65 *The Modern Law Review* 1, 8–9; Rebecca Money-Kyrle and Christopher Hodges, 'European Collective Action: Towards Coherence?' (2012) 19 *Maastricht Journal of European and Comparative Law* 477, 481–482; Fernando Gascón Inchausti, 'A New European Way to Collective Redress? Representative Actions under Directive 2020/1828 of 25 November' (2021) 18 *Zeitschrift für das Privatrecht der Europäischen Union* 61, 79–80.

delays on obtaining effective redress.²⁷ Civil society actors can step in to both clarify the GDPR provisions to data subjects as well as relieve them of the heavy burden of pursuing complaints concerning the alleged GDPR breaches themselves.²⁸ Bringing representative actions by these actors can make data protection litigation more efficient, since data-driven practices violating the GDPR typically affect a broad circle of individuals. Importantly, civil society groups can also help mitigate the power asymmetry between data subjects and Big Tech companies. Many individuals feel intimidated by the prospect of lodging a complaint against powerful market players operating on a transnational basis.²⁹ Having more resources and influence than data subjects, non-profit bodies and organizations specializing in the protection of personal data can effectively confront Big Tech companies before national DPAs or national courts of Member States.

- 10 Yet the role of civil society actors in upholding the protection of personal data is not limited to bringing representative actions on behalf of data subjects. Non-profit bodies and organizations focusing on data protection offer invaluable support to national DPAs tasked with the supervision of the application of the GDPR. DPAs often lack staff, resources and expertise to properly identify and investigate GDPR infringements.³⁰ NGOs can therefore assist with monitoring the compliance with the GDPR and supplying the evidence of the GDPR breaches to DPAs.³¹ Civil society actors have also been actively engaging in legal mobilization in order to advance a stricter enforcement of the

GDPR across in the EU. In this respect, some critique Article 80(2) GDPR for allowing Member States the discretion to determine whether civil society actors can bring complaints without the data subject's mandate under their national law, thus failing to harmonize the right of NGOs to launch strategic litigation.³² Kang and Newman also argue that NGOs are uniquely positioned to “raise awareness and salience of data protection enforcement”.³³ Indeed, apart from bringing complaints against the GDPR infringements, civil society organizations have also successfully leveraged media attention to attract public attention to data protection disputes and put pressure on the EU institutions to enhance the compliance with the GDPR within the EU. Additionally, the work of Lehoucq and Tarrow has provided insight into how civil society groups specializing in data protection have been building mechanisms of transatlantic cooperation, which are expected to stimulate “activism-induced policy making” and secure a higher level of protection of personal data around the world.³⁴ As a result, the active role of representatives of civil society in detecting and acting on infringements of data protection rules both contributes to the effective GDPR implementation across the EU and fosters the respect for fundamental rights of data subjects on a global scale.

II. The CJEU's perspective on the role of civil society actors in enforcing the GDPR

- 27 European Agency for Fundamental Rights, ‘Access to Data Protection Remedies in the EU Member States’ (Publications Office of the European Union 2013) 32 <https://fra.europa.eu/sites/default/files/fra-2014-access-data-protection-remedies_en_0.pdf> accessed 1 August 2023.
- 28 Gloria González Fuster and others, ‘The Right to Lodge a Data Protection Complaint: OK, but Then What? An Empirical Study of Current Practices under the GDPR’ (Data Protection Law Scholars Network, Access Now 2022) 60 <<https://www.accessnow.org/wp-content/uploads/2022/07/GDPR-Complaint-study.pdf>> accessed 1 August 2023.
- 29 See, most notably, Elinor Carmi and Simeon Yates, ‘Data Citizenship: Data Literacies to Challenge Power Imbalance Between Society and “Big Tech”’ (2023) 17 *International Journal of Communication* 19, 3626–3634.3626\ \u0000\u0000\u0000{3634.”;“plainCitation”:
- 30 ‘Data Protection: 80% of National Authorities Underfunded, EU Bodies “Unable to Fulfil Legal Duties”’ (Statewatch, 30 September 2022) <<https://www.statewatch.org/news/2022/september/data-protection-80-of-national-authorities-underfunded-eu-bodies-unable-to-fulfil-legal-duties/>> accessed 1 August 2023.
- 31 Jang and Newman (n 16) 287.

- 11 The case law of the CJEU reveals its firm conviction that enabling civil society actors to take legal action against potential infringers of data subjects’ rights is instrumental for the effective enforcement of the data protection regime in the EU. For the first time, the CJEU turned to this matter in *Fashion ID*, which was decided in 2019.³⁵ The request for a preliminary ruling was made in the course of the national legal
- 32 Orla Lynskey, ‘The Role of Collective Actors in the Enforcement of the Right to Data Protection under EU Law’ in Elise Muir and others (eds), *How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum* (EUI Working Papers 2017/17) 96–97 <https://cadmus.eui.eu/bitstream/handle/1814/49324/LAW_2017_17.pdf?sequence=3&isAllowed=y> accessed 10 August 2023; Fuster (n 25) 1150.”“plainCitation”:
- 33 Jang and Newman (n 16) 292.
- 34 Lehoucq and Tarrow (n 16) 179.
- 35 *Fashion ID* (n 9).

proceedings between the online clothing retailer Fashion ID and the public-service association Verbraucherzentrale NRW, which sued the former for unlawfully transmitting personal data belonging to the visitors of their website to the social network Facebook (now Meta).³⁶ While the Regional Court of Düsseldorf found that Verbraucherzentrale NRW had standing to bring the relevant legal proceedings, the Higher Regional Court of Düsseldorf, to which Fashion ID appealed, was unsure about the conditions upon which the association should be entitled to represent data subjects and referred relevant questions to the CJEU.³⁷ The CJEU ruled that Articles 22 to 24 DPD, which stipulated rules on judicial remedies, liability and sanctions, did not preclude national legislation enabling consumer-protection associations to initiate legal proceedings against a person allegedly responsible for an infringement of this directive.³⁸ It underlined that the possibility to bring actions on behalf of data subjects contributes to the realization of the effective and complete protection of the fundamental rights and freedoms affected by the processing of personal data.³⁹ Even though the DPD did not expressly authorize consumer-protection associations to commence legal proceedings against data protection infringements, neither did it provide for an exhaustive harmonization of judicial remedies, and Member States enjoyed a margin of discretion in implementing that directive.⁴⁰ The CJEU also indicated that the involvement of the said bodies in defending the rights of data subjects would not curtail the independence of supervisory authorities which would still have “freedom to take decisions” and “freedom to act”.⁴¹ Accordingly, it supported the Advocate General Bobek’s view that private actions brought by an association do not impact on the work of the DPAs, making them complement, not undermine public enforcement of data protection rules.⁴²

- 12 The CJEU has reaffirmed its viewpoint in *C-319/20 Meta Platforms Ireland* delivered in 2022.⁴³ The request for a preliminary ruling arose from the dispute between the technology company Meta Platforms Ireland and the Federal Union of German Consumer Organizations (‘the Union’). While the latter succeeded in obtaining an injunction against the former for violating data protection and consumer protection legislation, the Federal Court of Justice hesitated whether the Union had standing to bring legal proceedings before German domestic courts and asked for the CJEU’s input

on this matter.⁴⁴ The CJEU clarified that Article 80(2) GDPR did not preclude domestic law of Member States empowering consumer protection associations to bring legal proceedings concerning the alleged infringements of the GDPR in the absence of a mandate conferred on it for that purpose and regardless of the existence of a specific infringement of rights of the data subjects.⁴⁵ As rightly noted by Yakovleva, the CJEU was called upon to strike a fine balance between precluding fragmentation of not only substantive but also procedural rules and providing conditions for more robust enforcement of data subjects’ rights.⁴⁶ Even though the GDPR aims at maximum harmonization of data protection rules, the CJEU found that Article 80(2) GDPR, being an “open clause”, exceptionally enables Member States to exercise discretion when laying down the rules concerning representative actions in the national law.⁴⁷ The contours of the Member States’ discretion were delineated rather broadly. First, the CJEU indicated that the notion of not-for-profit body, organization or association which has statutory objectives which are in the public interest and is active in the field data protection under Article 80(1) GDPR encompasses a wide range of entities, including consumer protection associations, which seek to stand for the data subjects’ rights.⁴⁸ These entities are neither required to conduct a prior identification of persons concerned by allegedly unlawful data processing nor establish the existence of a specific infringement of these persons’ rights.⁴⁹ Additionally, the CJEU ascertained that Article 80(2) GDPR does not preclude the bringing of a representative action alleging the infringement of data protection rules along with the rules on consumer protection given their interconnected nature.⁵⁰ By affording Member States a wide margin of discretion, the CJEU evidently strived to eliminate any excessive obstacles to representative actions in defence of data subjects’ rights.

- 13 The clarifications provided by the CJEU in its case law did not put a definitive end to uncertainties regarding the interpretation of the rules on representative actions. Even after the German Federal Court of Justice obtained guidance from the CJEU in *Meta Platforms Ireland*, it found that the uncertainty regarding the interpretation of Article 80(2) GDPR persisted and proceeded to request another

36 *ibid* paras 25-29.

37 *ibid* paras 30-42.

38 *Fashion ID* (n 9) para 63.

39 *ibid* para 51.

40 *ibid* para 56.

41 *ibid* para 60.

42 Case C-40/17 *Fashion ID* [2019] ECLI:EU:C:2018:1039, Opinion of Advocate General Bobek, point 44.

43 *Meta Platforms Ireland* (n 9).

44 *ibid* paras 40-44.

45 *ibid* para 83.

46 Svetlana Yakovleva, ‘Standing of Consumer Organizations in Data Protection Representative Actions - Case Note: C-319/20, ECLI:EU:C:2022:322’ (2022) 1 *Mass Claims: An International Journal with a European Focus* 51, 53.

47 *Meta Platforms Ireland* (n 9) paras 57-60.

48 *ibid* paras 64-66.

49 *ibid* paras 67-73.

50 *ibid* paras 77-79.

preliminary ruling.⁵¹ In its judgment delivered on 11 July 2024, the CJEU clarified that Article 80(2) GDPR does not preclude consumer protection associations from bringing representative actions alleging the breach of information obligations under Articles 12 and 13 GDPR. Accordingly, the CJEU further solidified the position of civil society actors as guardians of data subjects' rights.

C. The Interaction between Civil Society Actors and the CJEU in Data Protection Cases

14 As seen in section B, civil society actors play a vital part in the GDPR enforcement by bringing collective actions against persons responsible for GDPR infringements before national DPAs and national courts of Member States. However, the role of these actors is not limited to the representation of data subjects. They also engage in the transnational mobilization efforts to advance a greater protection of personal data and contribute to the appropriate implementation of the GDPR across the EU. The CJEU is an important point of attraction for such efforts.

15 This section reflects on the interplay between civil society actors and the CJEU in order to uncover the opportunities and challenges of using the proceedings before the CJEU as a mechanism of bottom-up GDPR enforcement. It first outlines the role of the preliminary reference procedure by examining how NGOs call upon national courts to send preliminary questions to the CJEU as a means of facilitating effective GDPR enforcement (section C.I). Then, it examines the existing obstacles precluding NGOs from participating in the proceedings before the CJEU (section C.II). It argues that, while NGOs have established pathways for indirectly mobilizing the CJEU to deal with various issues related to the GDPR compliance, their possibilities of directly engaging with the CJEU are extremely limited. However, the exclusion of civil society actors from the proceedings before the CJEU can ultimately compromise the effective protection of personal data in the EU.

I. Preliminary reference proceedings as a means of bottom-up GDPR enforcement

16 Civil society actors play a prominent role not only

51 Case C757/22 *Meta Platforms Ireland*, Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 15 December 2022 (2023/C 104/19).

in the data protection litigation before the national DPAs and courts of the Member States but also before the CJEU itself. This section puts a spotlight on the role of these actors in preliminary reference proceedings (Article 267 TFEU). It focuses on the two objectives pursued by non-profit bodies and organizations when urging national courts to send preliminary questions to the CJEU. On the one hand, the preliminary reference procedure is used to ensure accountability of private companies for GDPR violations (section C.I.1). On the other hand, it allows civil society groups to indirectly mobilize the CJEU to review the validity of EU acts (section C.I.2).

1. Advocating corporate GDPR compliance

17 Civil society actors have successfully mobilized national courts to send a request for a preliminary ruling to the CJEU as a means of ensuring compliance with the data protection rules by private entities. For example, in *Verein für Konsumenteninformation*, the Supreme Court of Austria sent a request for a preliminary ruling in the course of the national proceedings between the Austrian Association for Consumer Information (“the Association”) and Amazon EU.⁵² The latter, while established in Luxembourg, concluded electronic sales contracts with consumers resident in Austria via the website with the domain name extension “.de”.⁵³ The Association applied for an injunction to prohibit the use of all allegedly unfair terms in Amazon’s general terms and conditions, including the term concerning the applicability of Luxembourg law. Given the uncertainty regarding the law that must govern data protection issues, the Supreme Court of Austria asked the CJEU to assist it in the interpretation of Article 4(1)(a) DPD, which codified the rules on the applicability of national laws of Member States to the processing of personal data. The CJEU clarified that the processing of personal data by an undertaking is governed by the law of the Member State to which directs its activities only if such a processing is carried out in the context of the activities of an establishment situated in that Member State.⁵⁴ Notably, CJEU concurred with Advocate General Saugmandsgaard Øe, who indicated that, despite the fact that the notion of “establishment” must generally be interpreted broadly, the undertaking cannot be seen to be established in a Member State merely because its website is accessible there.⁵⁵ In this respect, the judgment was not a win for the

52 Case C-191/15 *Verein für Konsumenteninformation* [2016] ECLI:EU:C:2016:612.

53 *ibid* para 29.

54 *ibid* paras 78–81.

55 *ibid* para 76. See also Case C-191/15 *Verein für Konsumenteninformation* [2016] ECLI:EU:C:2016:388, Opinion of Advocate General Saugmandsgaard Øe, point 117.

Association which primarily strived to establish the applicability of the Austrian Law on data protection (the *Datenschutzgesetz*).⁵⁶ At the same time, the CJEU noted that should the referring court find that the establishment in the context of which Amazon EU carries out the processing of that data is located in Germany, such processing would be governed by German law.⁵⁷ Therefore, the CJEU supported the Association's contention that the determination of law governing the processing of personal data by large e-commerce undertakings calls for a rigorous analysis of whether such processing is carried out in the context of the activities of their primary establishment or may be more closely connected to their establishment in other Member States.

- 18 The implicit interaction between the CJEU and civil society actors also occurred in *Planet49*, where the CJEU addressed the request for a preliminary ruling made by the Federal Court of Justice in Germany in the proceedings between the German Federation of Consumer Organizations ("the Federation") and the German online gaming company Planet49.⁵⁸ The dispute revolved around latter's use of a pre-ticked checkbox indicating the user's consent to the storage of cookies in a promotional lottery.⁵⁹ The CJEU was clearly sympathetic to the Federation's concern that such checkboxes would not allow to establish whether data subjects have given their consent to the processing of their personal data both willingly and unambiguously as some of them might be reluctant to read the text accompanying the checkbox.⁶⁰ Accordingly, it interpreted Articles 4(11) and 6(1)(a) GDPR as meaning that the consent to the processing of personal data is not valid where the user is expected to deselect a pre-checked checkbox in order to refuse their consent.⁶¹ Therefore, the Federation managed to utilize the preliminary reference procedure as a means of resisting a GDPR-infringing practice implemented by the data controller.

2. Challenging legal acts of the EU institutions and Member States

- 19 Apart from seeking to hold private companies accountable for their GDPR-infringing practices, NGOs have also been active in challenging EU acts incompatible with the fundamental rights to privacy and data protection. The involvement of

civil society actors is particularly prominent in data retention cases. In its landmark judgment in *Digital Rights Ireland*, the CJEU invalidated the controversial Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.⁶² The request for a preliminary ruling made by the High Court in Ireland originated from the legal action launched by the NGO regarding the legality of national measures on the retention of data relating to electronic communications. Most recently, in *Ligue des droits humains*, the CJEU was called upon to provide an interpretation of several EU acts, including the GDPR, as well as rule on the validity of Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime ("the PNR Directive") and Council Directive 2004/82/EC on the obligation of carriers to communicate passenger data ("the API Directive").⁶³ The domestic proceedings were initiated by the NGO which challenged the Belgian law transposing into domestic law the PNR Directive and the API Directive. In both cases, the CJEU was highly receptive to the arguments made by the NGOs, leading it to prioritise the protection of personal data over national security concerns voiced by the Member States.

- 20 Apart from challenging EU legislative acts that are allegedly incompatible with the fundamental right to data protection, civil society actors have also contributed to the bottom-up GDPR enforcement by indirectly mobilizing the CJEU to review the validity of non-legislative acts. The GDPR grants the Commission implementing powers in respect of cross-border transfers of personal data. Most importantly, the Commission may issue decisions determining that a third country, a territory or one or more specific sectors within a third country (no longer) ensures an adequate level of data protection (Articles 45(3) and (5) GDPR). The Commission is also empowered to adopt standard data protection clauses providing safeguards for the transfer of personal data to a third country alleging in the absence of an adequacy decision (Article 46(2)(c) GDPR). The regulation of data transfers to third countries is, however, a highly sensitive political matter, and the Commission's adequacy decisions are typically subject to fierce criticism.⁶⁴

56 *Verein für Konsumenteninformation*, Opinion of Advocate General Saugmandsgaard Øe, point 27.

57 *ibid* para 80.

58 Case C-673/17 *Planet49* [2019] ECLI:EU:C:2019:801.

59 *ibid* paras 25–31.

60 *ibid* paras 54–55.

61 *ibid* para 65.

62 Joined cases C-293/12 and C-594/12 *Digital Rights Ireland* [2014] ECLI:EU:C:2014:238.

63 Case C-187/19 *Ligue des droits humains* [2022] ECLI:EU:C:2022:491.

64 Peter Blume, 'EU Adequacy Decisions: The Proposed New Possibilities' (2015) 5 *International Data Privacy Law* 34, 35–36; Barbara Sandfuchs, 'The Future of Data Transfers to

21 Civil society actors have played a crucial role in mobilizing the CJEU to review and ultimately invalidate the two Commission's implementing decisions confirming that the US ensured an adequate level of protection of personal data provided by the safe harbour privacy principles and the EU-US Privacy Shield in 2015 and 2020 respectively.⁶⁵ In both cases, the CJEU was called upon to rule on the interpretation and validity of these decisions by the High Court in Ireland in the course of the domestic proceedings initiated by Max Schrems, the privacy activist and the founder of noyb. Despite the action being brought in his personal capacity, Schrems engaged in litigation with a clear public interest objective – to enhance the protection of personal data in cross-border data transfers.⁶⁶ He first filed a complaint concerning the transfer of his personal data by Facebook Ireland to the US before an Irish DPA, which was rejected on the ground that, according to the Commission's Decision 2000/520, the US was found to ensure an adequate level of protection. Schrems then brought judicial review proceedings against the rejection of his complaint before the High Court in Ireland, which submitted a request for a preliminary ruling to the CJEU. After the Commission's adequacy decision was declared invalid, the rejection of Schrems' complaint was annulled by the High Court, after which he submitted a reformulated complaint to the Irish DPA, this time raising the validity of both the new adequacy decision – Commission Implementing Decision (EU) 2016/1250 ("the Privacy Shield Decision") – as well as Commission Decision 2010/87/EU on standard contractual clauses for the transfer of personal data to processors established in third countries ("the SCC Decision"). While the CJEU confirmed the validity of the latter decision, the former was declared invalid. Hence, the CJEU was responsive to the plea for a more far-reaching protection of data subject rights in the context of transfers of personal data outside the EU. Notably, on 10 July 2023, the Commission adopted its third adequacy decision for the EU-US Data Privacy Framework.⁶⁷ noyb has already indicated its intention to challenge the

new framework.⁶⁸ Therefore, preliminary reference proceedings serve as a prominent pathway for civil society actors to resist legal acts and practices of both the EU institutions and Member States which violate fundamental rights of data subjects.

II. Challenges to the civil society actors' participation in the proceedings before the CJEU

22 Section C.I has demonstrated how NGOs instrumentalize preliminary reference proceedings as a way of indirectly inducing the CJEU to offer the interpretation of various provisions of the GDPR as well as review the validity of EU acts. At the same time, the implicit dialogue between civil society actors and the CJEU highlighted above cannot take place unless the former succeed in convincing a national court to turn to the CJEU to provide an interpretation of EU law. Where national courts fail to acknowledge the soundness of the legal arguments presented by civil society organizations and proceed with requesting a preliminary ruling, legal mobilization efforts of such organizations become futile.

23 At the same time, the possibilities of civil society actors to directly engage with the CJEU are severely constrained, which inevitably interferes with the CJEU's responsiveness to their claims. The next section examines the three substantial hurdles encountered by civil society groups when trying to access the proceedings before the CJEU, namely their exclusion from infringement proceedings (section C.II.1), the lack of standing in actions for annulment (section C.II.2), and limited possibility to intervene in proceedings before the CJEU as third parties (section C.II.3). As civil society actors face significant hurdles when trying to reach the CJEU, the latter is often unable to properly engage with the former's legal arguments, which could ultimately weaken the effective protection of fundamental rights in the digital domain.

1. Exclusion of civil society actors from infringement proceedings

24 Being a regulation, the GDPR is directly applicable across Member States. However, Member States are required to implement the GDPR in their domestic legal systems by bringing their national legislation

Third Countries in Light of the CJEU's Judgment C-311/18 – Schrems II' (2021) 70 GRUR International 245, 248.

65 Case C-362/14 *Schrems I* [2015] ECLI:EU:C:2015:650; Case C-311/18 *Facebook Ireland and Schrems* [2020] ECLI:EU:C:2020:559.

66 Marta Requejo Isidro, 'Max Schrems against Facebook' (2018) 4 MPILux Research Paper Series 2018 9–10 <https://www.mpi.lu/fileadmin/user_upload/Requejo_Isidro_Schrems_Facebook_02July18.pdf> accessed 6 February 2024.

67 Commission Implementing Decision of 10 July 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-US Data Privacy Framework C(2023) 4745 final.

68 'European Commission Gives EU-US Data Transfers Third Round at CJEU' (noyb, 10 July 2023) <<https://noyb.eu/en/european-commission-gives-eu-us-data-transfers-third-round-cjeu>> accessed 2 August 2023.

in compliance with its provisions. Furthermore, Member States are responsible for ensuring that the GDPR is applied correctly by their national supervisory authorities. The failure to either implement or comply with the GDPR can result in infringement proceedings that can be launched against a Member State by the Commission under Article 258 TFEU. According to this provision, the Commission shall first deliver a reasoned opinion on the non-compliance of a specific Member State with EU law. However, if the Member State in question does not comply with the Commission's opinion in a timely manner, the latter has the right to bring the case before the CJEU.

25 So far, the Commission has never started infringement proceedings for the failure to ensure the correct implementation of the GDPR by the Member States before the CJEU. However, the Commission has triggered Article 258 TFEU in respect of some Member States which have not ensured the adapt their national legal systems to the EU-wide rules stipulated by the GDPR.⁶⁹ Certain Member States have appropriately modified their national legislation in line with the GDPR but do not fully comply with it in practice. For instance, the Commission is continuously urged to investigate the systemic failures of the Member States to enforce the GDPR against powerful market players, particularly Big Tech giants.⁷⁰ For example, on 19 December 2022, the EU Ombudsman issued a decision on the complaint lodged by the Irish Council for Civil Liberties (ICCL) against the Commission for the failure of the latter to adequately monitor Ireland's application of the GDPR, recommending that the Commission requests a bi-monthly overview

69 See, for instance, 'June Infringements Package: Key Decisions' (European Commission, 9 June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743> accessed 1 August 2023 (an infringement procedure against Belgium for violating Article 52 GDPR); 'February Infringements Package: Key Decisions' (European Commission, 9 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/inf_22_601> accessed 1 August 2023 (an infringement procedure against Slovenia for failing to authorize its DPA to use all the corrective powers under the GDPR); 'April Infringements Package: Key Decisions' (European Commission, 6 April 2022) <https://ec.europa.eu/commission/presscorner/detail/EN/inf_22_1769> accessed 1 August 2023 (letters of formal notice to Germany, Greece, Finland and Sweden for failing to ensure the correct implementation of the GDPR provisions in their domestic law).

70 See, for example, Johnny Ryan and Alan Toner, 'Europe's Enforcement Paralysis (2021 GDPR Report): ICCL's Report on the Enforcement Capacity of Data Protection Authorities' (Irish Council for Civil Liberties 2021) <<https://www.iccl.ie/wp-content/uploads/2021/09/Europes-enforcement-paralysis-2021-ICCL-report-on-GDPR-enforcement.pdf>> accessed 1 August 2023; Gentile and Lynskey (n 15) 820.

from the Irish Data Protection Commission on its handling of cases involving Big Tech companies.⁷¹ The Ombudsman also explicitly acknowledged the role of civil society actors in putting a spotlight on the inadequate application of the GDPR in Ireland.⁷² In response, the Commission has committed to a new monitoring scheme, whereby it will request all DPAs to share information on large-scale cross-border investigations on a bi-monthly basis.⁷³ It is therefore likely that the new approach to monitoring compliance with the GDPR would lead the Commission to discover the breaches of the GDPR and launch infringement proceeding against the Member States responsible for these breaches.

26 Admittedly, infringement proceedings before the CJEU are not the only means of addressing issues of non-compliance with the GDPR by Member States. Both data subjects or NGOs representing their interests can invoke its provisions before national courts in order to challenge potentially unlawful actions or omissions of the Member States. However, the bringing of domestic proceedings arguably has a rather limited effect on stimulating the effective GDPR implementation across the EU. Decisions of national courts confirming that a Member States is in violation of the GDPR would only have an *inter partes* effect and are unlikely to lead Member States to remedy systemic infringements. Infringement proceedings, on the contrary, are more effective for putting pressure on non-compliant Member States to take measures to address structural compliance issues affecting the interests of a wide circle of persons. In 2016, the Commission indicated that, when launching infringement proceedings, it would put "particular emphasis on those infringements that have a significant impact on the attainment of important EU policy objectives".⁷⁴ This "strategic" approach indicates that infringement proceedings are not just an enforcement mechanism but also a powerful political tool.⁷⁵ Accordingly,

71 Decision on whether the European Commission collects sufficient information to monitor Ireland's implementation of the EU's General Data Protection Regulation (GDPR) (Case 97/2022/PB).

72 *ibid* 2–3.

73 European Commission, 'Comments of DG Justice and Consumers on a Request for Information from the European Ombudsman - Complaint by the Irish Council for Civil Liberties (ICCL), Ref. 97/2022/PB' <https://www.iccl.ie/wp-content/uploads/2023/01/FOLLOW_UP_202200097_20230124_122005.pdf> accessed 1 August 2023.

74 Commission, 'Better Regulation: Delivering better results for a stronger Union' (Communication) COM(2016) 615 final 2016, 9.

75 Olivier De Schutter, 'Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union' (Open Society Foundations 2017) 65 <<https://www.>

the commencement of such proceedings could serve a strong incentive for improving the GDPR implementation in Member States.

- 27 The involvement of civil society actors in infringement proceedings against Member States could significantly enhance the effectiveness of this mechanism for strengthening the protection of personal data in the EU. Scholars have long argued that the Commission has almost no investigative power of its own, making it unable to effectively monitor infringements of EU law.⁷⁶ For this reason, the Commission's new approach to monitoring the GDPR infringements by means of biannual checks has drawn skepticism. In order to reduce the workload, the Commission refused to collect information on large-scale cross-border investigations for the full period of the GDPR's application.⁷⁷ As a result, there is a risk that the Commission would be unable to determine and take action on numerous infringements of the GDPR by various Member States which have occurred since the GDPR's entry into force. In this respect, NGOs are much better placed to uncover such infringements. When bringing complaints before the DPAs and domestic courts, they gain unique insight into how the GDPR is implemented or applied by various Member States. Therefore, the participation of civil society organizations in infringement proceedings could help address the instances of the Member States' non-compliance with the GDPR, strengthening the protection of fundamental rights of data subjects.
- 28 However, the possibilities for civil society groups to be involved in infringement proceedings are extremely limited. Importantly, NGOs can inform the Commission of GDPR infringements by Member States. The Commission has reiterated the important role played by private complainants, such as civil society organizations, in assisting with the detection of infringements of EU law.⁷⁸ However, the Commission enjoys full discretion to decide whether to launch an infringement procedure against Member States. Even if such a procedure

opensocietyfoundations.org/publications/infringement-proceedings-tool-enforcement-fundamental-rights-european-union> accessed 9 August 2023.

- 76 Tanja A Börzel and others, 'Obstinate and Inefficient: Why Member States Do Not Comply With European Law' (2010) 43 *Comparative Political Studies* 1363, 1374.
- 77 Johnny Ryan, 'Europe-Wide Overhaul of GDPR Monitoring Triggered by ICCL' (*Irish Council for Civil Liberties*, 31 January 2023) <<https://www.iccl.ie/digital-data/europe-wide-overhaul-of-gdpr-monitoring-triggered-by-iccl/>> accessed 1 August 2023.
- 78 Commission, 'EU law: Better results through better application' (Communication) C(2016)8600, 16; Commission, 'Enforcing EU law for a Europe that delivers' (Communication) COM(2022) 518 final, 21.

is eventually opened, civil society actors acting as complainants do not have any influence on its course.⁷⁹ Accordingly, they also have no role in the infringement proceedings before the CJEU should the Commission decide to initiate them. While the Commission has acknowledged the need for greater transparency of the infringement procedure (especially in regard to the successive steps taken by the Commission in the procedure), the general public still has very limited knowledge of the motives for the Commission's enforcement actions.⁸⁰ Article 40 of the Statute of the CJEU ("the Statute") precludes the intervention of natural or legal persons in cases between Member States and EU institutions. As a result, the CJEU is effectively precluded from obtaining the civil society actors' unique perspective on the potential GDPR infringements by the Member States. The exclusion of these actors from infringement proceedings may therefore negatively affect the CJEU's potential to effectively repair the flaws of the GDPR implementation and thereby enhance respect for fundamental rights to privacy and data protection.

2. Lack of standing in actions for annulment

- 29 The *Schrems* saga discussed in section C.I.2 reveals how civil society actors have leveraged the preliminary reference procedure as an instrument of challenging EU acts incompatible with the fundamental right to data protection. However, this legal route has several compelling disadvantages. As argued by Advocate General Jacobs in Case C-50/00 P *UPA*, the possibility to bring issues of validity of the EU measures indirectly via national courts is incapable of providing full and effective judicial protection.⁸¹ Indeed, in order to challenge the Commission's implementing decisions, NGOs have to engage in lengthy and costly proceedings before the national DPAs and national courts. Moreover, they are always dependent on the national court's willingness to send their request for a preliminary ruling to the CJEU.⁸² As also underscored by

- 79 Ludwig Krämer, 'EU Enforcement of Environmental Laws: From Great Principles to Daily Practice – Improving Citizen Involvement' (ClientEarth 2013) 3 <<https://www.clientearth.org/latest/documents/eu-enforcement-of-environmental-laws-from-great-principles-to-daily-practice-improving-citizen-involvement/>> accessed 8 August 2023; Eliantonio (n 18) 756.
- 80 Commission, 'Enforcing EU law for a Europe that delivers' (n 79) 29.
- 81 Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, Opinion of Advocate General Jacobs.
- 82 Stefan Thierse and Sanja Badanjak, 'Legal Mobilization Against the Data Retention Directive—Opportunity Structures, Actors and Strategies' in Stefan Thierse and

Advocate General Jacobs in the abovementioned opinion, if national courts err in their preliminary assessment of the validity of the EU acts, they can refuse to send a request for a preliminary ruling to the CJEU, leaving the applicant's claims entirely unaddressed.⁸³ Therefore, the preliminary reference procedure cannot be seen as a fully adequate means of bottom-up GDPR enforcement.

- 30 The primary reason why civil society actors have called upon national courts to send preliminary questions concerning the validity of EU acts to the CJEU despite the imperfections of this route is rooted in the extremely limited possibility for individuals and civil society organizations to challenge acts of the EU institutions with a direct action.⁸⁴ Per Article 263 TFEU, natural and legal persons can only institute proceedings against an act addressed to them or which is of direct and individual concern to them, or against a regulatory act (i.e. a non-legislative act of general application) which is of direct concern to them and does not entail implementing measures. Commission's implementing decisions under the GDPR fall into the category of "regulatory acts" which do not entail any implementing measures.⁸⁵ Even though it means that civil society actors are only required to demonstrate that the said act is of direct concern to them, they are likely to encounter serious obstacles when proving their standing. As explained by the CJEU, the requirement of a direct concern means that there should be a direct causal link between the act in question and the negative consequences suffered by the applicant.⁸⁶ In practice, it would be nearly impossible for civil society actors to obtain standing in actions for annulment of the Commission's implementing decisions since they do not have a direct adverse effect on them.⁸⁷ For instance, on 6 September 2023, the French parliamentarian Philippe Latombe brought an action for annulment of the Commission's adequacy decision relating to the EU-US Data Privacy Framework mentioned in section C.I.2.⁸⁸ According to Latombe,

the decision violates, *inter alia*, Articles 7 and 8 of the Charter in view of the concerns regarding the "bulk" collection of personal data as well as Article 32 GDPR read in conjunction with Article 45(2) GDPR given the lack of safeguards concerning the security of personal data. However, the admissibility of this action remains highly uncertain since Latombe is expected to demonstrate which specific negative consequences were suffered by him due to the said adequacy decision.⁸⁹ Since civil society actors are precluded from engaging with the CJEU by bringing actions for annulment, the latter is unable to properly hear and consider their legal arguments, which could ultimately undermine effective judicial review of the Commission's implementing decisions and the protection of fundamental rights affected by them.

3. Limited possibility of third-party interventions in preliminary ruling proceedings

- 31 As demonstrated in section C.I, the preliminary reference procedure allows civil society actors to indirectly mobilize the CJEU to review the validity of the EU acts. However, these actors have significant interest not only in mobilizing courts of Member States to make them refer preliminary questions to the CJEU but also in participating in such proceedings as third parties. Third-party intervention – a robust mechanism of legal mobilization – allows civil society actors to advise courts on important legal aspects of the case or highlight its broader societal implications.⁹⁰
- 32 Civil society actors eagerly venture to intervene in various, including high-profile, cases dealing with the interpretation and application of the protection of personal data before domestic courts of Member States.⁹¹ Their submissions seek to

Sanja Badanjak (eds), *Opposition in the EU Multi-Level Polity: Legal Mobilization against the Data Retention Directive* (Springer International Publishing 2021).

83 *P Unión de Pequeños Agricultores v Council*, Opinion of Advocate General Jacobs (n 82) 6693.

84 Mariolina Eliantonio, 'Towards an Ever Dirtier Europe? The Restrictive Standing of Environmental NGOs before the European Courts and the Aarhus Convention' (2011) 7 *Croatian Yearbook of European Law and Policy* 69, 79.

85 Case T-262/10 *Microban International Ltd* [2011] ECLI:EU:T:2011:623, paras 21–25.

86 *Joined Cases 41-44/70 International Fruit Company BV v Commission* [1971] ECR 411.

87 Case T-600/15 *Pesticide Action Network Europe* [2016] ECLI:EU:T:2016:601, paras 55–62.

88 Action brought on 6 September 2023 – Latombe v Commission (Case T-553/23).

89 See, for example, Mikołaj Barczentewicz, 'Schrems III: Gauging the Validity of the GDPR Adequacy Decision for the United States' (International Center for Law & Economics Issue Brief 2023) 4 <<https://laweconcenter.org/resources/schrems-iii-gauging-the-validity-of-the-gdpr-adequacy-decision-for-the-united-states/>> accessed 12 February 2024.

90 Jasper Krommendijk and Kris van der Pas, 'To Intervene or Not to Intervene: Intervention before the Court of Justice of the European Union in Environmental and Migration Law' (2022) 26 *The International Journal of Human Rights* 1394, 1396–1397.

91 'Submission Filed by ORG and Privacy International in *David Davis MP and Tom Watson MP v Secretary of State for the Home Department*, CO Ref: CO/3794/2014' <<https://www.openrightsgroup.org/publications/submission-filed-by-org-and-privacy-international-in-dripa-case/>> accessed 9 August 2023; 'Amicus Curiae Submissions of the Co-

promote a more fundamental rights-inspired of the GDPR. For example, in its submission to the dispute between the Irish DPA, on the one hand, and Facebook Ireland and Max Schrems, on the other, the Electronic Privacy Information Center (EPIC) dealt with the issues of US privacy and surveillance law and the availability of legal remedies in the US for EU citizens, ultimately concluding that it did not provide adequate safeguards for personal data and private communications.⁹² In some cases, civil society actors have also advocated a more restrictive interpretation of the GDPR with a view to ensure appropriate respect for other conflicting rights and legitimate interests at stake. For example, a wide range of NGOs submitted their observations in the dispute between Google and the French DPA CNIL before the Conseil d'Etat, arguing that the fundamental right to data protection should be properly balanced against freedom of expression.⁹³ The possibility of civil society actors to become parties to the dispute depends, however, on the national procedural rules in these Member States. As shown by Krommendijk and van der Pas, such rules differ significantly, with some Member States taking a rather strict approach to defining the circumstances under which third parties can intervene in the domestic court proceedings.⁹⁴ As a result, representatives of civil society do not enjoy

equal opportunities to intervene in national disputes across Member States.

33 The third-party intervention of civil society actors in data protection cases could be of great value not only in proceedings before national courts of Member States but also in the preliminary reference proceedings before the CJEU. Having vast knowledge and expertise, such actors could provide the CJEU with helpful guidance on complex matters relating to the protection of personal data, thus contributing to a more nuanced, data subject-oriented interpretation of the GDPR. Furthermore, being involved in data protection litigation and advocacy “on the ground”, NGOs and other similar entities could inform the CJEU of the challenges relating to the interpretation of the GDPR at the Member States level and propose effective ways of resolving them. Yet the possibility of representatives of civil society to intervene in the preliminary reference proceedings before the CJEU is extremely narrow. Section C.II.1 has already touched upon the mechanism of third-party interventions in infringement proceedings before the CJEU, noting that natural or legal persons are fully excluded from participating in them. In contrast, the intervention in the preliminary reference proceedings by NGOs is only possible where they have timely intervened in the proceedings before a national court of the Member State.⁹⁵ Should they miss the opportunity to intervene in the domestic proceedings, NGOs no longer have access to the preliminary reference proceedings once the case is pending before the CJEU. Per Article 23 of the Statute, the right to submit statements of case or written observations as third parties is reserved to the Member States, the Commission and, where appropriate, the EU institution, body, office or agency which adopted the act the validity or interpretation of which is at stake.

34 The restrictive rules on third-party interventions before the CJEU creates a situation in which civil society actors are once again fully dependent on the national courts’ receptiveness towards motions to join the dispute as a third party. Given the lack of harmonized rules on the admission of intervening parties to proceedings before national courts of Member States, many of such actors may be ultimately precluded from participating in both domestic proceedings as well as the preliminary reference proceedings before the CJEU. Furthermore, when the possibility is foreseen by national law, some representatives of civil society can be simply unable to timely submit a request to join the dispute as a third-party to national courts to be able to engage with the CJEU. In this respect, enhancing the CJEU’s responsiveness to third-party interventions in the preliminary reference proceedings could enable a greater range of civil society actors to submit their

Interveners Open Rights Group and Privacy International, *Dalma Dojcsak v Telenor Magyarország Zrt*, Case Ref: III./537/2015’ <https://www.openrightsgroup.org/app/uploads/2020/03/ORG_PI_Hungarian-Constitutional-Court-submissions_final.pdf> accessed 9 August 2023; ‘En l’affaire N° 2023-850 DC Concernant La Constitutionnalité de La Loi Relative Aux Jeux Olympiques et Paralympiques de 2024 et Portant Diverses Autres Dispositions, Contribution Extérieure Commune de 7 Organisations Non-Gouvernementales Internationales et Étrangères’ <<https://files.inclo.net/content/pdf/84/amicus%20French%20OG.pdf>> accessed 9 August 2023.

92 Electronic Privacy Information Center (EPIC), ‘Amended Outline Submissions on Behalf of the Amicus Curiae (EPIC) in *Data Protection Commissioner v Facebook Ireland Ltd and Maximilian Schrems*, Record No: 2016/4809P’ <<https://epic.org/wp-content/uploads/privacy/intl/schrems/02272017-EPIC-Amended-Submissions.pdf>> accessed 9 August 2023.

93 See, among others, ‘Written Observations of Internet Freedom Foundations and Others, *Google LLC v Commission Nationale de l’Information et Des Libertés (CNIL)*’ <[https://web.karisma.org.co/wp-content/uploads/download-manager-files/Google%20v%20CNIL%20Internet%20Freedom%20Foundation%20and%20other%20intervention%20brief%20\(EN\).pdf](https://web.karisma.org.co/wp-content/uploads/download-manager-files/Google%20v%20CNIL%20Internet%20Freedom%20Foundation%20and%20other%20intervention%20brief%20(EN).pdf)> accessed 9 August 2023; ‘Written Observations of ARTICLE 19 and Others (2017), *Google LLC v Commission Nationale de l’Information et Des Libertés (CNIL)*’ <<https://www.article19.org/wp-content/uploads/2017/12/Google-v-CNIL-A19-intervention-EN-11-12-17-FINAL-v2.pdf>> accessed 9 August 2023.

94 Krommendijk and van der Pas (n 91) 1406–1407.

95 Rules of Procedure of the Court of Justice, OJ L173, art 97.

written observations on important GDPR-related enquires, stimulating a more effective protection of fundamental rights in the digital domain.

D. Conclusion

35 This article has analysed the interplay between civil society actors and the CJEU in data protection cases. It has revealed that the role of these actors in the GDPR implementation stretches beyond the lodging of collective actions regarding the GDPR violations before national DPAs and national courts of the Member States since they also aspire to indirectly engage with the CJEU in preliminary reference cases. However, the opportunities for more direct interaction between civil society actors and the CJEU in cases concerning the protection of personal data remain severely constrained. Even though the CJEU has come to explicitly acknowledge the role of NGOs in tackling GDPR infringements by bringing legal actions on behalf of data subjects, the NGOs' involvement in the proceedings before the CJEU are extremely limited. Civil society actors, though essential for the Commission in their roles as complainants, are largely precluded from participating in infringement proceedings. They also do not have standing in actions for annulment of the Commission's acts, particularly implementing decisions relating to cross-border transfers of personal data. Additionally, civil society actors are often unable to intervene in preliminary reference proceedings dealing with data protection issues. The obstacles to the participation of civil society actors in the proceedings before the CJEU stand in stark contrast to the idea of the bottom-up GDPR enforcement and curtail the latter's ability to lend a sympathetic ear to these actors' claims. Therefore, it is necessary to empower civil society actors to mobilise the CJEU to both ensure the uniform and correct implementation of the GDPR and ensure an appropriate level of protection of other fundamental rights affected by the process of digitalization.

36 Enhancing a bottom-up approach to the GDPR enforcement by facilitating civil society actors' access to the proceedings before the CJEU should not be a single means of tackling the GDPR infringements. As rightly argued by Reiners and Versluis, the issue of non-compliance with EU law is complex and calls for both centralized and decentralized enforcement mechanisms.⁹⁶ In this respect, the Commission's recent proposal for a new regulation aimed to facilitate the cooperation between DPAs when enforcing GDPR in cross-border cases is welcome.⁹⁷ However, several steps can be taken in

order to ensure that civil society actors can play a more prominent role in the proceedings before the CJEU. First, it would be necessary to enhance these actors' engagement in infringement procedure. This can be done – from the side of the Commission – by increasing transparency regarding the complaint process, so representatives of civil society, though unable to participate in the judicial proceedings, are at least made aware of the decision made on their complaint. Additionally, Article 40 of the Statute could be reconsidered so that civil society actors can participate in the infringement proceedings before the CJEU. As suggested by De Schutter, in order to overcome institutional constraints, the CJEU could also request a person or an entity which acted as a complainant to provide an expert opinion in line with Article 25 of the Statute.⁹⁸ Second, it would be beneficial if NGOs were granted standing to challenge the Commission's implementing decisions with a direct action. While the overhaul of Article 263 TFEU is rather unlikely, the CJEU could nevertheless soften its approach to the interpretation of the notion of "direct concern" in respect of civil society organizations. Finally, it is important to ensure that NGOs have a possibility to intervene in preliminary reference proceedings before the CJEU even after the request for a preliminary ruling has been submitted by a national court (and regardless of the national procedural rules applicable to third-party interventions) so as to promote a more robust and well-substantiated interpretation of the GDPR. In line with the suggestions made by Krommendijk and van der Pas, third-party interventions can be facilitated not only through the reform of the Statute but also through more informal means, such as by enabling natural and legal persons to provide the EU courts with factual and legal information relevant for the interpretation of certain provisions of EU law.⁹⁹ These measures are expected to pave the way towards a more profound interaction between the CJEU and civil society actors, enabling the former to be more receptive to the contentions made by the latter and ensuring greater protection to fundamental rights affected by the data-driven economy.

⁹⁶ Reiners and Versluis (n 20) 1533.

⁹⁷ Commission, Proposal for a Regulation of the European

Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679 [2023] COM/2023/348 final 2023.

⁹⁸ De Schutter (n 76) 67.

⁹⁹ Krommendijk and van der Pas (n 91) 1406.