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An invitation to abuse: proposals for Class Actions within the EU's Data Protection Regime

Having campaigned across the globe for over a decade in support of simple, efficient and fair legal systems, the U.S. Chamber of Commerce Institute for Legal Reform ("ILR"), is extremely concerned by elements of the reform of European Union data protection law, particularly the proposed creation of a U.S.-style class action system for data protection.

ILR's experience of collective redress, including the notorious U.S. class action system, is that mechanisms for the aggregation of lawsuits are inefficient and inherently prone to abuse. This abuse often takes the form of claims which are brought, or drawn out, to extract a financial settlement that is unrelated to achieving justice in a case. The main drivers of such abuse are typically third parties, such as law firms, litigation funders or other "investors" in the disputes of others. It is those parties, rather than individuals or businesses with claims, who are likely to be the main beneficiaries of collective redress. Wherever those parties are permitted to aggregate claims, and especially where they are permitted to share directly in the proceeds, costly and often abusive litigation is likely to follow.[1]

ILR has been an active participant in the long-running debate on collective redress in the European Union and has been encouraged by the emerging consensus that the EU should avoid replicating the U.S. system and the widespread recognition of the need for safeguards, as reflected in the Commission's Recommendation regarding collective redress mechanisms of 11 June 2013 (the "Recommendation").[2]

However, the proposed General Data Protection Regulation (the "Proposed Regulation")[3] includes elements that threaten to undermine the EU's own emerging consensus on the appropriate approach to collective redress, and in places run directly counter to the Recommendation.

Articles 73 to 77 of the Proposed Regulation would, even in the form originally proposed by the Commission, empower an almost limitless range of third party representatives to seek legal remedies without introducing the safeguards necessary to ensure that: (a) data controllers and

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[1] ILR's concerns about collective redress are set out in detail in its response to the European Commission's 2011 consultation: "*Towards a coherent European approach to Collective Redress*". A copy of ILR's response is available here: http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/international/ilrresponseconsultationoncollectiveredress_29april2011.pdf

[2] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law OJ L 201, 26/07/2013, p. 60–65

[3] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 25.1.2012, COM(2012) 11 final.

processors are protected from abusive complaints or legal actions; and (b) any action taken by representatives is actually taken for the benefit of data subjects. The stakes were raised significantly by the amendments to the Proposed Regulation proposed by the Parliament's LIBE Committee and subsequently endorsed by a plenary vote of the European Parliament in March 2014. While the Commission has claimed that the reforms are now "irreversible" following the European Parliament's vote,[4] the Regulation must be adopted by both the Parliament and Council, and the Council continues to consider its position.

ILR's three main areas of concern are as follows:

- ***The possibility of collective actions for damages.*** The Regulation, as proposed by the Commission, would allow third parties to seek "*judicial remed[ies]*", which would not include awards of damages. The text adopted by the Parliament, however, would specifically allow for damages to be claimed by third parties, including potentially on behalf of whole classes of data subjects. It thus envisages an unprecedented EU-wide mechanism for collective damages actions, completely devoid of effective safeguards. Such a mechanism would be an invitation to self-interested third parties (such as law firms, litigation funders and other investors) to seek out and promote mass litigation. The complexity of these cases could be enormous given the need to establish data subjects' losses on an individual basis, and the scale would be exacerbated by the Parliament's proposal that compensation should specifically be available for non-pecuniary loss such as distress (an issue better left to Member States).

  The suitability criteria to be met by third party representatives. Even in the form proposed by the Commission, Articles 73 to 77 of the Proposed Regulation would allow an almost unlimited range of third party representatives to lodge complaints and seek judicial remedies on behalf of others. There would be few practical or legal obstacles to prevent anyone, including a self-interested investor, from forming a body, organisation or association and immediately holding itself out as aiming "*to protect data subjects' rights and interests concerning the protection of their personal data*". The Parliament's position, however, goes further, suggesting that *any* body, organisation or association "*which acts in the public interest*" should be allowed to lodge complaints and seek judicial remedies (including damages) on behalf of others. For example: would an association formed especially to take legal action on behalf of data subjects be considered (merely in light of that purpose) to be acting in the public interest? If so, there would be nothing to stop law firms, litigation funders, or any other third parties, creating special purpose litigation vehicles as profit-making enterprises – a phenomenon already being witnessed in the Netherlands.

  Lack of clarity about the need for explicit consent from all data subjects represented. The text adopted by the Parliament proposes that persons who have suffered damage shall have the right to claim damages. Article 76(1) provides that any of the third party representatives referred to above (i.e., those "*acting in the public interest*") shall have the right to exercise the same rights to claim compensation "*if mandated by one or more data subjects.*" While the requirement for a mandate is an improvement to the text proposed by the Commission, the risk of misinterpretation remains. The text would be greatly improved by clarifying that having a mandate from one data subject does not create an entitlement to represent any other data subject, preventing representative bodies claiming that a mandate from "*one or more data subjects*" equates to a mandate to represent the public at large. Instead they should be entitled to represent only those that

4 Commission Memo/14/186 of 12 March 2014 "Progress on EU data protection reform now irreversible following European Parliament vote": http://europa.eu/rapid/press-release_MEMO-14-186_en.htm

have explicitly opted-in at the beginning of any action. Absent this clarification, this part of the Regulation risks being inconsistent with the Commission's own stated preference for collective litigation only to occur on an opt-in basis.

Mechanisms to safeguard recoveries for claimants and prevent abuse. While we remain opposed to any measures aimed at promoting collective litigation in Europe, if the EU does legislate in this area then it is essential that provision is made for safeguards which would seek to minimize abuse, and at the very least would reflect the minimum safeguards envisaged in the Recommendation. These safeguards would include: criteria for certification of collective cases; carefully considered restrictions on who may act as a representative claimant; a mechanism to ensure that only claimants who actively "opt-in" are bound by the outcome; the "loser pays" principle; prohibitions on punitive damages; and prohibitions on contingency fees and third party litigation funding.

ILR is aware that the Proposed Regulation attempts to addresses an ambitious range of issues and is fearful that, with so many issues being hotly debated, EU measures on compensatory collective redress are in danger of being adopted with insufficient regard for the consequences and in a manner inconsistent with the Commission's own Recommendation.

ILR is yet to see a convincing case for EU action on compensatory collective redress in relation to data protection. The Proposed Regulation, in the form adopted by the European Parliament already envisages hugely burdensome fines for non-compliance of up to 5% of annual worldwide turnover or €100 million, whichever is greater. On their own, these fines will represent a significant threat and burden to businesses seeking to do business in and with the EU. Adding the prospect of class actions, with all of the risk this entails, would do substantial harm by creating incentives for abuse and raising the cost of doing business in the EU.

EU policymakers should therefore be seeking alternative models for delivering redress outside of the courts rather than rushing to introduce court-based mechanisms which contain none of the essential safeguards identified above.