U.S. CHAMBER
Institute for Legal Reform

September 2015

The EU's Data Protection proposals open the door to abusive mass litigation

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

ILR has witnessed first-hand globally, and particularly under the notorious U.S. class action system, 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 not to achieve justice, but to extract a large financial settlement. The main drivers of such abuse are typically third parties, such as law firms, litigation funders or other "investors". It is those parties, rather than individuals or businesses bringing the claims, who are likely to be the main beneficiaries of collective redress. When the funders 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.

ILR has been an active participant in the long-running debate on collective redress in the European Union. ILR 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 on collective redress of 11 June 2013 (the "Recommendation").[1]

However, the proposed General Data Protection Regulation (the "Proposed Regulation")[2] 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. The European Commission, Parliament and Council have now each adopted their positions on the Proposed Regulation and a three-way negotiation or "trilogue" between these institutions commenced on 24 June 2015 with the stated aim to agree and adopt a final text before the end of 2015. All three positions foresee—to some extent—a facility for

[1] 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.

[2] Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

a "representative entity" to take legal action on behalf of multiple data subjects (i.e. a form of class or group action).[3] Although this is not stated to be a classic "class action" in any of the three draft texts, the results will be identical if the criteria for who may be a representative and how and when they may launch actions are not specified. Based on the U.S. experience in data privacy class actions, there are significant risks of law firms or third party investors in litigation seeking to become "representative entities". These firms and funders claim to launch actions in the name of the public at large, when in reality they are bringing cases mainly for their own profit.[4]

I. A top-down regime is inappropriate

Before addressing the substance of the Proposed Regulation, ILR notes that, in the Proposed Regulation, the Commission, Parliament and Council are contemplating measures on collective redress that would involve radical changes to the way some jurisdictions deal with both cross-border and purely domestic disputes. Even if the need for such measures had been demonstrated, which ILR questions, further consideration is needed to determine whether a regime for collective redress should be imposed at the EU level and via the Proposed Regulation, or whether the Member States would be better able to address any need at the national level.

II. Safeguards are necessary to minimize abuse

While ILR remains opposed to any measures aimed at promoting collective litigation in Europe, if the EU does introduce such measures in the area of data protection it is essential that safeguards are included to minimize abuse. These safeguards should include:

a) a requirement to designate representative entities on the basis of clearly defined conditions of eligibility listed in the Commission's Recommendations on collective redress (non-profit making status; sufficient financial and organizational resources and expertise to represent multiple claimants; data protection as a statutory objective);

b) a rule that third party representatives should obtain an express mandate from each and every data subject before acting on their behalf (opt-in principle); and

---

3 For more detail see Annex 1.

4 The class action model is one that has proved very costly to the U.S. economy and is not a model that should be followed in any other jurisdiction. There is ample empirical evidence that individuals in the U.S. are not better off or more protected as a result of the hundreds of privacy class actions that have been filed in recent years. Data privacy lawsuits tend to be opportunistic and are instituted even when there is no harm. Sizeable attorney fee awards have spawned a highly entrepreneurial class of lawyer and a cottage industry in identifying and pursuing lucrative class action claims.

c) a prohibition for third party representatives to seek damages on behalf of data subjects. However, if representative entities could pursue damages, their right to do so should not lead to overcompensation. The availability of punitive or multiple damages should be clearly excluded as it creates an important incentive to potential abusers. Also, third party representatives should not be allowed to claim compensation for non-pecuniary loss, such as stress or emotional harm, which is subjective and can be excessively inflated.

While the Council has come closest to implementing these safeguards in its proposal, so far none of the EU institutions have applied them to the extent necessary to prevent abusive collective litigation. Therefore, to remove this risk, ILR urges the Commission, Parliament and Council to revise their positions.

III. Three areas of concern identified by ILR

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

The criteria to be met by third party representatives. Even in the form adopted by the Commission, Articles 73 to 76 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, organization 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 text, however, goes further, suggesting that *any* body, organization or association "*acting in the public interest*" should be allowed to lodge complaints and seek judicial remedies (including damages) on behalf of others.

The absence of consent on the part of data subjects. The Proposed Regulation as adopted by the Commission (see Article 73(3) and Article 76(1)) envisions that action could be taken on behalf of data subjects without their consent. This might include actions taken without their knowledge, or even contrary to their express wishes. As a matter of principle, third parties should not be entitled to take action based on the rights of others without consent. Instead, express consent should be obtained before a complaint is lodged or a remedy is sought. This issue would take on even greater importance if, as laid out by the Parliament, representatives were permitted to seek damages on behalf of data subjects. As a step in the right direction, the Council's text seemingly recognizes the importance of an opt-in system (Article 76(1)). However, in Article 76(2) of the Proposed Regulation, the Council has included an option for the Member States to introduce a model where third parties can pursue claims *independently* of the data subject's mandate, which unnecessarily promotes class actions within the Member States.

The possibility of third party representatives seeking damages. The Proposed Regulation, as adopted by the Commission, would allow third parties to pursue a variety of legal remedies, but it does not explicitly allow a right to seek damages. However, the text adopted by the Parliament (at Article 76(1)) specifically allows for damages to be claimed by third party representatives. 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 collective 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 position that non-pecuniary loss (such as emotional distress) should be specifically identified as recoverable, an issue better left to Member States.[5]

The Council's text is more in line with the Commission's proposal as it does not explicitly allow third party representatives to pursue damages (see Article 76(1)). Furthermore, in Recital 112 of the Council's text it explicitly states that a third party representative "*may not be allowed to claim compensation on a data subject's behalf*". However, the Council's text does allow representative entities to pursue "*an effective judicial remedy*" without specifying what that term means. Absent clarification, this is likely to be interpreted in the Member States as including the possibility of damages, unless that possibility is explicitly excluded. Also, where damages are available, the Council's position provides that it should include non-material damages, which opens the way to the inflation of claims.

IV. Conclusion

ILR has yet to see a convincing case for EU action on compensatory collective redress in relation to data protection or any other area. Even with some safeguards, there can be no guarantee that the problems witnessed with data privacy class actions in the U.S. will not be replicated in Europe, particularly given that the ongoing liberalization of legal services in Member States, and the increasing presence of third party litigation funders, are creating the same incentives which drive abuse in the U.S.

As a result, while encouraging collective litigation may appear in simple terms to benefit data subjects by facilitating the payment of compensation on a mass scale, in reality it will do substantial harm by creating incentives for abuse and raising the

5 ILR believes that regulating at the EU level the types of damages available for data protection infringements would be contrary to the principle of subsidiarity. All Member States have already in place their own rules addressing damages and the EU should not impose any new requirements on their legal systems in that respect. Indeed, any legislation adopted in violation of the principle of subsidiarity may itself be declared invalid by the Court of Justice.

cost of doing business in the EU. Policymakers should therefore seek alternative models for delivering redress outside of the courts rather than rush to introduce untested and ill-defined judicial remedies at the EU-level.

The U.S. Chamber Institute for Legal Reform (ILR) is a comprehensive campaign committed to improving the lawsuit climate in America and around the globe.

ILR's mission is to restore balance, ensure justice, and maintain integrity within the civil legal system. This is done by creating broad awareness of the impact of litigation on society and by championing common sense legal reforms at the state, federal and global levels.

ILR's approach is pragmatic, focused on achieving real change in real time while laying the groundwork for long-term legal reform. ILR's hallmarks are the execution of cutting-edge strategies and a track record of visible success.

ILR is a separately incorporated affiliate of the U.S. Chamber of Commerce.

Annexes:

Annex 1: Articles of the proposed General Data Protection Regulation which risk creating an abuse-prone "class action".

Annex 2: The three-column-side-by-side comparison of the Commission's, Parliament's and Council's texts of the proposed General Data Protection Regulation (relevant articles only).

U.S. CHAMBER Institute for Legal Reform

Annex 1:

Articles of the proposed General Data Protection Regulation which risk creating an abuse-prone "class action"

While the terms "class action" or "collective redress" are not explicitly used, the positions of all three EU institutions—the Commission, the Parliament and the Council—contemplate some form of representative group action. In several important respects, all three proposals contain features of abuse-prone class actions.

I. Right to pursue action and eligibility criteria

All three institutions propose to allow third parties to pursue claims on behalf of data subjects. This is foreseen in **Article 76(1)** of each version of the text of the Regulation.

In all three cases, the criteria to be met by third party representatives to be eligible to pursue actions are vague and could allow self-interested and profit motivated entities to pursue collective claims for their own ends. The (minimal) eligibility criteria for third party representatives are contained in **Article 73(2)** of the Commission's and Parliament's texts. In the Council's text they are contained in **Article 76(1)**. None of the proposed texts follows the eligibility requirements set out in the Commission's Recommendations on collective redress, which, for example, require third party representatives to have a non-profit making character, sufficient financial and organizational resources and expertise to represent multiple claimants, and a requirement for a direct link between the main statutory objectives of the entity and the rights being pursued.

II. Data subjects consent for pursuing claims

In **Article 76(1)** the Commission proposes a model whereby third parties can pursue claims without the individual's permission. This is a serious flaw because it would permit a third party representative to start proceedings without a real mandate or actual support from individual claimants. Not only is the representative action not "opt-in" (i.e. where data subjects can choose to participate if they wish), there appears to be no mechanism for opting out even if the data subject affirmatively does not wish to be represented. Actions could therefore be taken on behalf of data subjects, despite those actions being contrary to their express wishes.

In the Parliament's and Council's versions of **Article 76(1)** some form of mandate is required, though the requirement for an explicit ("opt-in") affirmative choice to be represented needs to be much clearer in the final text.

III. <u>Damages</u>

The Commission's text does not explicitly allow third parties to seek damages on behalf of data subjects (though does not exclude that possibility either). However, in the Parliament's version **Article 76(1)** specifically references **Article 77** (the right to compensation) as being among the representative entities' prerogatives. Furthermore, the Parliament suggested (at **Article 77**) that damage should be defined to include "*non-pecuniary damage*", presumably meaning damages for unquantifiable elements such as stress or emotional harm, potentially swelling claims considerably and allowing punitive damages.

The Council's text does not explicitly list the ability to pursue damages as being among the representative entities' prerogatives (see **Article 76(1)**) and it states that a third party representative "*may not be allowed to claim compensation on a data subject's behalf*". However, the Council's position does allow "*an effective judicial remedy*" to be pursued, which does not seem to exclude damages and, where damages are available, the Council's position provides that these should include "*material and immaterial*" (read "non-material") damages (see **Article 77**).

Where third parties are allowed to pursue damages on behalf of others, they may wish to do so for a fee or a "cut" of the award. This is precisely the self interest that fuels abusive litigation across the globe. It should be excluded entirely in the Data Protection regulation.

****

Annex 2: The three-column-side-by-side comparison of the Commission's, Parliament's and Council's texts of the proposed General Data Protection Regulation (relevant articles only)

PARLIAMENT		COMMISSION	COUNCIL
ART 73			
Art. 73 (1)	Without prejudice to any other administrative or judicial remedy ***and the consistency mechanism***, every data subject shall have the right to lodge a complaint with a supervisory authority in any Member State if they consider that the processing of personal data relating to them does not comply with this Regulation.	Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a supervisory authority in any Member State if they consider that the processing of personal data relating to them does not comply with this Regulation.	Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a single supervisory authority, in ~~any~~particular in the Member State ~~if they consider~~ of his or her habitual residence, place of work or place of the alleged infringement, if the data subject considers that the processing of personal data relating to ~~them~~him or her does not comply with this Regulation.
Art. 73 (2)	~~Any body, organisation or association which aims to protect data subjects' rights and interests concerning the protection of their personal data and has been properly~~ Any body, organisation or association which ***acts in the public interest*** and has been properly constituted according to the law of a Member State shall have the right to lodge a complaint with a supervisory authority in any Member State on behalf of one or more data subjects if it considers that a data subject's rights under this Regulation have been infringed as a result of the processing of personal data.	Any body, organisation or association which aims to protect data subjects' rights and interests concerning the protection of their personal data and has been properly constituted according to the law of a Member State shall have the right to lodge a complaint with a supervisory authority in any Member State on behalf of one or more data subjects if it considers that a data subject's rights under this Regulation have been infringed as a result of the processing of personal data.	(…)~~Any body, organisation or association which aims to protect data subjects' rights and interests concerning the protection of their personal data and has been properly constituted according to the law of a Member State shall have the right to lodge a complaint with a supervisory authority in any Member State on behalf of one or more data subjects if it considers that a data subject's rights under this Regulation have been infringed as a result of the processing of personal data.~~

Annex 2: The three-column-side-by-side comparison of the Commission's, Parliament's and Council's texts of the proposed General Data Protection Regulation (relevant articles only)

	PARLIAMENT	COMMISSION	COUNCIL
		ART 75	
Art. 75 (1)	Without prejudice to any available administrative remedy, including the right to lodge a complaint with a supervisory authority as referred to in Article 73, every natural person shall have the right to a judicial remedy if they consider that their rights under this Regulation have been infringed as a result of the processing of their personal data in non-compliance with this Regulation.	Without prejudice to any available administrative remedy, including the right to lodge a complaint with a supervisory authority as referred to in Article 73, every natural person shall have the right to a judicial remedy if they consider that their rights under this Regulation have been infringed as a result of the processing of their personal data in non-compliance with this Regulation.	Without prejudice to any available administrative or ***non-judicial*** remedy, including the right to lodge a complaint with a supervisory authority ~~as referred to in~~***under*** Article 73, ~~every natural person~~ ***data subjects shall*** have the right to ~~a~~***an effective*** judicial remedy if they consider that their rights under this Regulation have been infringed as a result of the processing of their personal data in non-compliance with this Regulation.
Art.75 (2)	Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has its habitual residence, unless the controller is a public authority ***of the Union or a Member State*** acting in the exercise of its public powers.	Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has its habitual residence, unless the controller is a public authority acting in the exercise of its public powers.	Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment (…). Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has ~~its~~***his or her*** habitual residence, unless the controller ***or processor*** is a public authority (…) acting in the exercise of its public powers.
Art. 75(3)	Where proceedings are pending in the consistency mechanism referred to in Article 58, which concern the same measure, decision or practice, a court may suspend the proceedings brought before it, except where the urgency of the matter for the protection of the data subject's rights does not allow to wait for the outcome of the procedure in the consistency mechanism.	Where proceedings are pending in the consistency mechanism referred to in Article 58, which concern the same measure, decision or practice, a court may suspend the proceedings brought before it, except where the urgency of the matter for the protection of the data subject's rights does not allow to wait for the outcome of the procedure in the consistency mechanism.	~~Where proceedings are pending in the consistency mechanism referred to in Article 58, which concern the same measure, decision or practice, a court may suspend the proceedings brought before it, except where the urgency of the matter for the protection of the data subject's rights does not allow to wait for the outcome of the procedure in the consistency mechanism.~~(…)
Art.75 (4)	The Member States shall enforce final decisions by the courts referred to in this Article.	The Member States shall enforce final decisions by the courts referred to in this Article.	~~The Member States shall enforce final decisions by the courts referred to in this Article.~~ (…)

PARLIAMENT		COMMISSION	COUNCIL
ART 76			
Art. 76 (1)	Any body, organisation or association referred to in Article 73(2) shall have the right to exercise the rights referred to in Articles 74 ~~and~~***,*** 75 ~~on behalf of~~***and 77 if mandated by*** one or more data subjects.	Any body, organisation or association referred to in Article 73(2) shall have the right to exercise the rights referred to in Articles 74 and 75 on behalf of one or more data subjects.	~~Any~~ ***The data subject shall have the right to mandate a*** body, organisation or association ~~referred to in Article 73(2) shall have the right~~***, which has been properly constituted according to the law of a Member State and whose statutory objectives include the protection of data subjects' rights and freedoms with regard to the protection of their personal data, to lodge the complaint on his or her behalf*** and to exercise the rights referred to in Articles ***73,*** 74 and 75 on ***his or her*** behalf ~~of one or more data subjects~~.
Art. 76 (2)	Each supervisory authority shall have the right to engage in legal proceedings and bring an action to court, in order to enforce the provisions of this Regulation or to ensure consistency of the protection of personal data within the Union.	Each supervisory authority shall have the right to engage in legal proceedings and bring an action to court, in order to enforce the provisions of this Regulation or to ensure consistency of the protection of personal data within the Union.	~~Each supervisory authority shall have the right to engage in legal proceedings and bring an action to court, in order to enforce the provisions of this Regulation or to ensure consistency of the protection of personal data within the Union~~***Member States may provide that any body, organisation or association referred to in paragraph 1, independently of a data subject's mandate (…), shall have in such Member State the right to lodge a complaint with the supervisory authority competent in accordance with Article 73 and to exercise the rights referred to in Articles 73, 74 and 75 if it considers that the rights of a data subject have been infringed as a result of the processing of personal data that is not in compliance with this Regulation***.
Art. 76 (3)	Where a competent court of a Member State has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, it shall contact the competent court in the other Member State to confirm the existence of such parallel proceedings.	Where a competent court of a Member State has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, it shall contact the competent court in the other Member State to confirm the existence of such parallel proceedings.	~~Where a competent court of a Member State has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, it shall contact the competent court in the other Member State to confirm the existence of such parallel proceedings.~~***(…)***

Annex 2: The three-column-side-by-side comparison of the Commission's, Parliament's and Council's texts of the proposed General Data Protection Regulation (relevant articles only)

	PARLIAMENT	COMMISSION	COUNCIL
Art. 76 (4)	Where such parallel proceedings in another Member State concern the same measure, decision or practice, the court may suspend the proceedings.	Where such parallel proceedings in another Member State concern the same measure, decision or practice, the court may suspend the proceedings.	(…)~~Where such parallel proceedings in another Member State concern the same measure, decision or practice, the court may suspend the proceedings.~~
Art.76 (5)	Member States shall ensure that court actions available under national law allow for the rapid adoption of measures including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.	Member States shall ensure that court actions available under national law allow for the rapid adoption of measures including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.	(…)~~Member States shall ensure that court actions available under national law allow for the rapid adoption of measures including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.~~

	PARLIAMENT	COMMISSION	COUNCIL
ART 77			
Art. 77 (1)	Any person who has suffered damage, ***including non-pecuniary damage,*** as a result of an unlawful processing operation or of an action or of an action incompatible with this Regulation shall have the right to receive***claim*** compensation from the controller or the processor for the damage suffered.	Any person who has suffered damage as a result of an unlawful processing operation or of an action incompatible with this Regulation shall have the right to receive compensation from the controller or the processor for the damage suffered.	Any person who has suffered ***material or immaterial*** damage as a result of an unlawful***a*** processing operation ***which is not in compliance*** with this Regulation shall have the right to receive or of an action incompatible with this Regulation shall have the right to receive compensation from the controller or the processor for the damage suffered.
Art. 77 (2)	Where more than one controller or processor is involved in the processing, each ***of those controllers*** or ***processors*** shall be jointly and controller or processor shall be jointly and severally liable for the entire amount of the damage***, unless they have an appropriate written agreement determining the responsibilities pursuant*** the damage***to Article 24***.	Where more than one controller or processor is involved in the processing, each controller or processor shall be jointly and severally liable for the entire amount of the damage.	***Any controller (…) involved in the processing shall be liable for the damage caused by the processing which is not in compliance with this Regulation. A processor shall be liable for (…) the damage caused by the processing only where it has not complied with obligations of this Regulation specifically directed to processors or acted outside or contrary to lawful instructions of the controller.*** Where more than one controller or processor is involved in the processing, each controller or processor shall be jointly and severally liable for the entire amount of the damage.
Art. 77 (3)	The controller or the processor may be exempted from this liability, in whole or in part, if the controller or the processor proves that they are not responsible for the event giving rise to the damage.	The controller or the processor may be exempted from this liability, in whole or in part, if the controller or the processor proves that they are not responsible for the event giving rise to the damage.	TheA controller or the processor may***shall*** be exempted from this liability, *in* whole or in part, if the controller or the processor*accordance with paragraph 2, (…) if (…) it proves that* they are*it is not in any way responsible (…) ,* for the event giving rise to the damage.

PARLIAMENT		COMMISSION	COUNCIL
Art. 77 (4)			***Where more than one controller or processor or a controller and a processor are involved in the same processing and, where they are, in accordance with paragraphs 2 and 3, responsible for any damage caused by the processing, (…) each controller or processor shall be held (…) liable for the entire damage.***
Art. 77 (5)			***Where a controller or processor has, in accordance with paragraph 4, paid full compensation for the damage suffered, that controller or processor shall be entitled to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage in accordance with the conditions set out in paragraph 2.***
Art. 77 (6)			***Court proceedings for exercising the right to receive compensation shall be brought before the courts competent under national law of the Member State referred to in paragraph 2 of Article 75.***