



January 29, 2013

Viviane Reding
Vice-President of the European Commission
Rue de la Loi 200
B-1049 Brussels
Belgium

Dear Vice-President Reding,

Collective Redress and the Draft Data Protection Regulation

I am writing to you to express the U.S. Chamber Institute for Legal Reform's deep concerns about the draft General Data Protection Regulation's approach to collective redress.

These concerns have recently been heightened by the draft report of Mr. Jan Philipp Albrecht MEP, which suggests the introduction of a loosely drawn mechanism for mass damages actions before the Commission has even published its upcoming communication on issues relating to collective redress in the EU. ILR's main concerns (which are set out in greater detail in the enclosed note) are as follows:

1. The draft Regulation, as adopted by the Commission, refers to third parties seeking "*judicial remedies*" on behalf of data subjects, but Mr. Albrecht has suggested they should also be allowed to seek damages. This would create an incentive for profit-driven third parties to seek out and promote mass litigation.
2. Even in the form adopted by the Commission, the draft Regulation would permit an almost unlimited range of third parties to act on behalf of data subjects. Mr. Albrecht has suggested an even more relaxed criterion for establishing that a representative has standing: that it must be "*acting in the public interest.*"

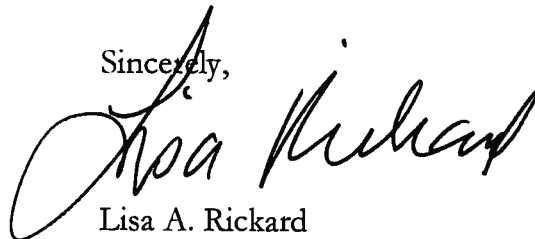
3. The draft Regulation envisages that legal action could be taken by third parties on behalf of data subjects without their consent. This should not be allowed as a matter of principle and would be especially controversial if those third parties were permitted to seek damages.

As you are aware from our previous communications, the U.S. Chamber Institute for Legal Reform has been an active participant in the debate on collective redress in the EU. We have yet to see the case made for EU measures on collective redress and, since there is no guarantee that the problems of the U.S. class action system would not be replicated, it is imperative that any EU measures that are adopted include certain essential safeguards.

Collective redress raises many issues on which the Commission, the European Parliament and stakeholders have expended considerable effort over the past several years. That effort is in danger of being rendered irrelevant if flawed measures are adopted without proper consideration. As the Commission's draft Regulation works its way through the legislative process, we urge the Commission to use its influence to guide the debate in a way that takes into account the concerns outlined above.

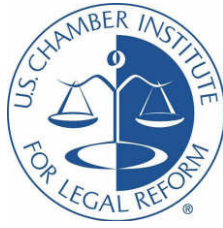
I would be delighted to meet with you next time you are in Washington or, if convenient for you, when I travel to Brussels. In the meantime, if there is anything ILR can do to assist you or your staff in considering the options for reform, then please do not hesitate to ask.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa A. Rickard". The signature is fluid and cursive, with a large initial "L" and "R".

Lisa A. Rickard

Enclosure



January 29, 2013

Comments of the U.S. Chamber Institute for Legal Reform on Proposals for Collective Redress as Part of the European Union 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 Institute for Legal Reform (“ILR”) is extremely concerned by developments regarding the reform of European Union data protection law, particularly that the creation of a U.S.-style class action system for data protection is now under discussion.

ILR’s experience with 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 which 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 looks forward to the European Commission’s forthcoming communication on the issue. ILR has been encouraged by the emerging consensus that the EU should avoid replicating the U.S. system and the widespread recognition of essential safeguards such as the “loser pays” principle.

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/ilresponseconsultationoncollectiveredress_29april2011.pdf

However, the proposed General Data Protection Regulation (the “Proposed Regulation”)² includes elements that threaten to undermine the Commission’s careful approach to collective redress and its initiatives on alternative dispute resolution.

Articles 73 to 77 of the Proposed Regulation would, even in the form 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 processors are protected from abusive complaints or legal actions; and (b) any action taken by representatives is taken for the benefit of data subjects. The stakes have now been raised even higher by the draft report on the Proposed Regulation prepared by Mr. Jan Philipp Albrecht MEP.

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

The possibility of third party representatives seeking damages. The Proposed Regulation, as adopted by the Commission, would allow third parties to seek “*judicial remedies*”, which ILR understands would not include awards of damages. However, the draft report prepared by Mr. Albrecht suggests that third parties should be able to claim damages on behalf of one or more 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 Mr. Albrecht’s suggestion that non-pecuniary loss (such as distress) should be specifically identified as recoverable, an issue better left to Member States. Mr. Albrecht’s suggested amendments threaten to undermine in one fell swoop the Commission’s deliberations on collective redress before its position has even been settled.

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*

² 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.

interests concerning the protection of their personal data.” Mr. Albrecht’s draft report, 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. 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 taking place in the Netherlands.

The absence of consent on the part of data subjects. It is envisaged by the Proposed Regulation as adopted by the Commission (see Article 73.3) 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 envisaged by Mr. Albrecht’s draft report, representatives were permitted to seek damages on behalf of data subjects. Whether collective redress should operate on an “opt in” or “opt out” basis – and, indeed, whether there should be any EU measures on compensatory collective redress at all – are issues to which the Commission, the European Parliament and stakeholders have devoted much attention in recent years. Those efforts will be rendered irrelevant if compensatory collective redress is rushed through in the Proposed Regulation.

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 it is essential that provision is made for safeguards which would seek at least to minimize abuse. These safeguards would include: robust criteria for certification of collective cases; carefully considered restrictions on who may act as lead or representative claimants; a mechanism to ensure that only claimants who actively “opt in” are bound by the outcome; the “loser pays” principle; and prohibitions on contingency fees and third party litigation funding.

ILR is aware that the Proposed Regulation attempts to address 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. Strong leadership will therefore be required to steer the Proposed Regulation away from attempting to deal with collective redress. This applies in particular to the suggestions set out by Mr. Albrecht in his draft report but also to the aspects of the Commission's original which are identified above.

ILR is yet to see a convincing case for EU action on compensatory collective redress. There can be no guarantee that the problems witnessed with collective redress 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, risk 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 cost of doing business in the EU.

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