



EUROPEAN Justice Forum

Proposal for a Regulation on EU Data Protection Reform - COM(2012)11

Introduction

The European Justice Forum (EJF) is a non-profit coalition of businesses, individuals and organisations that are working to promote fair, balanced, transparent and efficient civil justice laws and systems in Europe. Its aim is to ensure that the legal environment in Europe protects both individuals and businesses alike, and that those with a legitimate grievance have not just access to justice but efficient means of redress. We wish to see a system in which innovation and enterprise can flourish and which enhances the international competitiveness of Europe.

Summary

EJF recognises, and fully endorses, the principles that the rights and freedoms of individuals must be protected whenever businesses, or public authorities, process personal data, and that data protection should be modernised, and made consistent, across the EU in response to technology changes (especially social media).

However, EJF has serious misgivings about the **system of collective complaints and remedy contained in Chapter VIII (Articles 73 to 79) of the Commission's proposal. These concerns are heightened by the amendments suggested to this Chapter by MEP Jan Albrecht in his Draft LIBE Committee report.**

These concerns fall into three main categories:

- **Lack of coherence in policy** – Parliament has rejected a sectoral-only approach to collective procedures¹ and this proposal comes before the Commission has released its forthcoming Communication 'outlining the general principles of an EU framework for collective redress';
- **The proposed articles as they stand are an invitation to speculative and abusive litigation and lack any form of safeguards.** They encourage capture of the litigation process by actors who use litigation as an investment model, such as third party funders. They fail to encourage alternative forms of dispute resolution. All this helps neither individuals to pursue their rights effectively nor businesses to defend theirs. MEP Albrecht's proposed amendments make the position worse;
- **The proposal for a fining regime is not well designed for the specificities of data protection infringements and fails adequately to encourage a culture of compliance.**

Lack of coherence

The proposal's recommendations for collective mechanisms for complaint and remedy are premature. There is a much bigger EU consumer redress policy debate that the proposal simply fails to take into account, a debate on which the Commission, Parliament and EU stakeholders have, cautiously, expended so much time and energy over the past few years. A Communication 'outlining

¹ See the European Parliament's 2012 Report 'Towards a coherent European approach to collective redress'.

- Contingency fees and third party litigation funding must not be allowed in the representative action. They create conflicts of interest between attorney and client or with the organisation providing the funding. They also create economic motivation to bring actions other than the receipt of normal attorney fees. They can also create streams of income from series of cases that could be securitised and marketed as financial instruments – a commercialisation of legal actions that should not be permitted, in our view;
- The 'loser pays rule' whereby the liability for costs falls on the unsuccessful party, must apply. This is the most significant deterrent against speculative litigation;
- Alternative Dispute Resolution (ADR) – the proposals reference the need for speedy resolution of problems, but currently do not encourage the use of ADR. Research has shown that ADR can deliver acceptable outcomes for consumers seeking collective redress in mass claims, in many sectors, and in many Member States.⁷ There is every reason to think it would be appropriate in the context of data protection, though consumer's rights to take court action must be preserved.

Unspecific damages

Civil justice in Europe is a restorative system, not a punitive one. A claimant generally recovers in a successful court action compensatory damages that put him or her in the same position that he or she would have been in had the breach not occurred. That is a simple principle that does not offend against any system of law within the EU, and leaves it up to the courts of each Member State to determine the level of compensation. Compensation for the damage suffered correctly lies at the heart of Article 77.

The proposed amendments by MEP Jan Albrecht introduce the inclusion of non-pecuniary losses "such as distress". This suggests such a head of loss is not compensatory. The correct assessment of what is compensatory, and what is recoverable, should be left to the courts of the Member States in accordance with Article 15 Rome II Regulation (EC) No 864/2007.

The fining regime and compliant behaviour

Articles 78 and 79 raise a number of fundamental policy objections, and need to be revised:

- A regulatory model with a deterrence-based approach at its heart will not incentivise businesses to create long-term compliant behaviours. It is a matter of obvious and common sense that prevention is better than cure/punishment;
- A mandatory fining regime does not assist in delivering redress to data subjects who have suffered damage. It does not allow supervisory authorities to use the power and threat of fines to encourage business to "do the right thing" in the event of a breach;
- Having a mechanism that allows the supervisor to take into account the compliance regimes of the data controller before the breach, and the plans of the data controller to put things right or pay compensation, will radically increase compliance if the data controller can get a significant reduction in the fine. Or, in other words, businesses that have made little or no effort at compliance ought to face more significant and greater penalties than a business that has taken care to avoid problems in the first place;

⁷ *Ibid* 5

EJF COMMENTS AND SUGGESTIONS

Committee on Civil Liberties, Justice and Home Affairs
2012/0011(COD)
16.1.2013

DRAFT REPORT
on the proposal for a regulation of the European Parliament and of the Council
on the protection of individual with regard to the processing of personal data
and on the free movement of such data (General Data Protection Regulation)
(COM(2012)0011 – C7-0025/2012 – 2012/0011(COD))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Jan Philipp Albrecht