

Available online at [www.sciencedirect.com](http://www.sciencedirect.com)
[www.compseconline.com/publications/prodclaw.htm](http://www.compseconline.com/publications/prodclaw.htm)


---



---

**Computer Law  
&  
Security Review**


---



---



# Online dispute resolution: Settling data protection disputes in a digital world of customers

Damian Clifford <sup>a,\*</sup>, Yung Shin Van Der Sype <sup>b</sup>

<sup>a</sup> The Research Foundation – Flanders (FWO) – (FWO Aspirant), KU Leuven Centre for IT & IP Law, Belgium

<sup>b</sup> KU Leuven Centre for IT & IP Law, Belgium

## A B S T R A C T

### Keywords:

Online dispute resolution  
Alternative dispute resolution  
Data protection  
Enforcement  
European Union

In this article online dispute resolution (ODR) and alternative dispute resolution (ADR) are assessed in relation to the protection of personal data. ODR and ADR schemes are mechanisms to settle low-cost e-commerce disputes out-of-court. The purpose of this analysis is to examine the suitability of online dispute resolution as an additional means to the existing mechanisms for data protection enforcement. In this discussion particular attention is given to services offered to users as ‘free’, but which instead process personal data as a condition on access (e.g. social networking sites). The second section examines data protection in the digital age, highlighting the key principles of data protection and the challenges associated with the existing enforcement mechanisms. The third section questions the suitability of online dispute resolution as a solution for data protection enforcement in the European Union. In order to avail of the EU regulated ODR mechanism to resolve data protection issues, data protection disputes must fall under the scope of the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation. Following an analysis of the applicability of the framework in this context, the final part of this article focuses on the challenges associated with the application of ODR schemes to the enforcement of online data protection disputes.

© 2015 Damian Clifford and Yung Shin Van Der Sype. Published by Elsevier Ltd. All rights reserved.

## 1. Introduction

Data are digital gold and the mining and exploitation of this asset has become the key business model of countless companies. Ubiquitous internet access and increasing computing capacity mean that there are growing numbers of users online.

At the same time, the cross-border indifference of internet technologies has brought with it a plethora of jurisdiction and conflict of laws issues. Territoriality based concepts of regulating have failed to adequately deal with these borderless challenges.

The analysis provided in this paper is based on Article 38 (1) (h) of the proposed General Data Protection Regulation<sup>1</sup>

\* Corresponding author. University of Antwerp, KU Leuven Centre for IT & IP Law, Sint-Michielsstraat 6, box 3443, Leuven 3000, Belgium. Tel.: +32 16 37 62 11.

E-mail addresses: [damian.clifford@law.kuleuven.be](mailto:damian.clifford@law.kuleuven.be) (D. Clifford), [yungshin.vandersype@law.kuleuven.be](mailto:yungshin.vandersype@law.kuleuven.be) (Y.S. Van Der Sype).  
<http://dx.doi.org/10.1016/j.clsr.2015.12.014>

0267-3649/© 2015 Damian Clifford and Yung Shin Van Der Sype. Published by Elsevier Ltd. All rights reserved.

<sup>1</sup> Original proposal: Proposal for a Regulation of the European Parliament and of the Council of 25 January 2012 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (COM(2012) 11 final) C7-0025/12.

(hereinafter the GDPR). This stipulates that EU Member States, the supervisory authorities and the European Commission should encourage the use of “out-of-court proceedings and other dispute resolution procedures for resolving disputes between controllers and data subjects with respect to the processing of personal data”<sup>2</sup>. Accordingly, the purpose of this analysis is to examine online dispute resolution mechanisms as additional means for data protection enforcement.

The main research question assesses whether the Online Dispute Resolution Regulation<sup>3</sup> and Alternative Dispute Resolution Directive<sup>4</sup> are valuable (in terms of applicability and, to a lesser degree, in a practical sense) for the protection of personal data under the EU data protection framework. For this study, primary and secondary sources of EU law were examined in line with the territorial focus of the article. These sources were searched and selected based on their material relevance in relation to the scope of the ODR Regulation and ADR Directive and their influence and impact in an assessment of current data protection enforcement mechanisms. In addition, the analysis has been formulated through a reliance on results of reports produced by the European Union Agency for Fundamental Rights (the FRA), as they provide empirical evidence in support of key contentions presented in this article.

In ‘Section 2: Data protection in the digital age’, the current data protection enforcement mechanisms are examined in light of their suitability and accessibility. This is followed by ‘Section 3: ODR as a solution for data protection enforcement’ in which online dispute resolution is proposed as a potential improvement or (at least) an addition to the existing enforcement mechanisms for data protection. Finally, Section 4 concludes the findings.

## 2. Data protection in the digital age

Data protection is one of the most debated human rights of the 21st Century. The increasing importance of data protection and its development into a fundamental human right under Article 8 of the EU Charter<sup>5</sup>, reflect the necessity for effective means of adequate enforcement. Recently, much at-

tention has focused on the business models of social networking sites and their use of personal data. Often these services are offered as ‘free’, but as a condition of use the personal data of the users are traded in exchange for access. The increasing number of reported misuses of personal data by these services has raised serious questions in relation to the effectiveness of the existing mechanisms to enforce personal data protection legislation and the implementation disparities between EU Member States.

In this section, the data protection requirements for the processing of personal data are first briefly introduced. Thereafter, a short overview of the existing safeguards for non-compliance under the EU legal framework is presented.

### 2.1. Main principles of EU Data Protection Directive (Directive 95/46/EC)

The increasing importance of data protection and its development into a fundamental human right under Article 8 of the Charter reflect the necessity for effective means of adequate enforcement. The rights and obligations provided for by Directive 95/46/EC<sup>6</sup> place clear responsibilities on the shoulders of data controllers, and consequently, defined rights in the hands of data subjects. Since the adoption of Directive 95/46/EC its application has become much more ambiguous. This ambiguous application coupled with the disparities in national implementations has been a definite motivating factor in the European Commission’s decision to propose modifications in the form of the proposed General Data Protection Regulation. However, even though clear technological advances have hastened the need for legal development, the core of the EU framework has endured and the essence of data protection has remained straightforward.<sup>7</sup>

Data subjects are guaranteed certain rights *vis-a-vis* their personal data, while data controllers are subject to strict rules and regulations in relation to their data processing activities. A failure to comply with *inter alia*, the data quality principles,<sup>8</sup> the security requirement,<sup>9</sup> and the data subject rights,<sup>10</sup> may result in wrongful processing and any damage stemming from this should be compensated (cfr. *infra*).

In particular in relation to the data quality principles, although there is debate surrounding their continuing relevance in the big data era, their importance has not wavered in the proposed General Data Protection Regulation. The data

<sup>2</sup> However, it should be noted that this is not the first suggestion of the application of ADR mechanisms in relation to data protection as the Safe Harbour procedure contains an ADR mechanism. See: Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU, accessed on 15/04/2015 at: [www.ec.europa.eu/justice/data-protection/files/com\\_2013\\_847\\_en.pdf](http://www.ec.europa.eu/justice/data-protection/files/com_2013_847_en.pdf).

<sup>3</sup> European Parliament and Council Regulation (EU) 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/1.

<sup>4</sup> European Parliament and Council Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63.

<sup>5</sup> Charter of Fundamental Rights of the European Union [2010] OJ C83/389-403.

<sup>6</sup> European Parliament and Council 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 [1995] OJ L 281/31. In addition see also: European Parliament and Council Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L201/37.

<sup>7</sup> P. De Hert and V. Papakonstantinou, ‘The Proposed Data Protection Regulation replacing Directive 95/46/EC: A sound system for the protection of individuals’ (2012) 28 Computer Law and Security Review 130.

<sup>8</sup> Article 6 Directive 95/46/EC.

<sup>9</sup> Article 17 Directive 95/46/EC.

<sup>10</sup> More specifically those of information, access, rectification, erasure and to object as enunciated under Article 11 and 14 Directive 95/46/EC.

Download English Version:

<https://daneshyari.com/en/article/466375>

Download Persian Version:

<https://daneshyari.com/article/466375>

[Daneshyari.com](https://daneshyari.com)