

Centre for Information Policy Leadership (CIPL) and Microsoft Virtual Roundtable on:

Solving Private Right of Action and Preemption in a Federal Privacy Law and Lessons from the EU GDPR Experience

Thursday, February 25, 2021

11:00 AM – 1:00 PM EST | 4:00 PM – 6:00 PM GMT | 5:00 PM – 7:00 PM CET

Stakeholders, including policy makers, CIPL members and other senior privacy and data protection experts from both the U.S. and EU will engage in a moderated discussion on how to address some of the biggest hurdles to the passage of a U.S. federal privacy law: state preemption and the inclusion of a private right of action.

AGENDA

11:00 AM Opening Remarks

- ❖ Bojana Bellamy, President, CIPL
- ❖ Julie Brill, Chief Privacy Officer, Corporate VP and Deputy General Counsel, Microsoft
- ❖ Christine Wilson, Commissioner, Federal Trade Commission

11:25 AM Discussion Topic: Ideas, Alternatives and Solutions for a Federal Private Right of Action

Roundtable participants will discuss:

- *Participants will reflect on the experiences with the private right of action (PRA) in the EU under GDPR Article 82 and how they could inform a U.S. law;*
- *Other potential compliance and enforcement mechanisms (such as codes of conduct and certifications) that could be deployed as alternatives for a PRA or to reduce the scope of a PRA; and*
- *Ways to craft a PRA so that it provides consumers with recourse for serious harms, but does not create perverse incentives or trigger vexatious litigation.*

- ❖ Moderator: Chris Calabrese, Senior Director, Privacy and Data Policy, Microsoft

Discussion Leads:

- ❖ Jared Bomberg, Senior Counsel, Senate Committee on Commerce, Science and Transportation
- ❖ Syd Terry, Legislative Director, Office of Rep. Jan Schakowsky
- ❖ Jerry Jones, EVP, Chief Ethics and Legal Officer, LiveRamp
- ❖ Bridget Treacy, Partner, Hunton Andrews Kurth LLP
- ❖ Hielke Hijmans, Director, Belgian Data Protection Authority
- ❖ Markus Heyder, Vice President and Senior Policy Counselor, CIPL

Potential questions for discussion will include:

Lessons from the GDPR about a Private Right of Action in a Federal Privacy Law

- Have we seen much use of the GDPR's PRA provision since it went into effect?
- Are there any major takeaways from how the GDPR's PRA provision has been used thus far? What are the relevant lessons for a potential US PRA?
- Does the EU PRA experience provide any new arguments for or against including a PRA in a U.S. law?

Enforcement Alternatives to a PRA

- What are the key arguments in support of a PRA (E.g. need broader enforcement options beyond just government enforcement; federal and state enforcers are under-resourced for appropriate enforcement; individuals must be able to obtain redress, etc.)
- How could additional compliance and enforcement mechanisms (such as additional consumer rights, or certifications and codes of conduct) reduce the need for a PRA?

Crafting a Reasonable PRA

- If, after taking into account properly resourced government enforcement augmented by additional enforcement mechanisms and consumer rights would a sensible PRA look like?
- How can a PRA be drafted in a way to protect organizations from vexatious and excessive litigation while also providing redress for consumers? (Limitations on damages? Limiting the PRA to only violations of certain provisions of the law? Limiting use of the PRA to repeated or intentional violations of the law?)
- Would it be possible to sunset the PRA provision after 5-10 years if the FTC and State AGs (and any additional enforcement mechanisms) have met certain enforcement criteria?

12:20 PM

Discussion Topic: The Importance of Preemption in a Federal Privacy Law

Roundtable participants will discuss the need for including a provision to preempt state privacy laws in a federal privacy law. Participants will discuss why federal preemption is such an important component of a federal privacy law and how a preemption provision could be drafted in such a way to preempt truly conflicting laws while also leaving some important state laws in place. Participants will also discuss the concerns about preemption and how a federal law could be crafted to address those concerns in other ways.

- ❖ Moderator: Matthew Starr, Privacy and Public Policy Manager, CIPL

Discussion Leads:

- ❖ Julie Brill, Chief Privacy Officer, Corporate VP and Deputy General Counsel, Microsoft
- ❖ Olivia Trusty, Policy Director, Senate Committee on Commerce, Science and Transportation
- ❖ Florian Thoma, Senior Director of Global Data Privacy, Accenture
- ❖ Fred Cate, Senior Policy Advisor, CIPL
- ❖ Cameron Kerry, Ann R. and Andrew H. Tisch Distinguished Visiting – Governance Studies, Brookings Center for Technology Innovation
- ❖ Chris Docksey, Visiting Fellow, Maastricht University
- ❖ Bruno Gencarelli, Deputy to the Director & Head of Unit Data Protection, DG Justice, European Commission

Potential questions for discussion will include:

Arguments for and against a Preemptive Federal Privacy Law

- Why is the inclusion of preemption of state laws in a federal privacy law so important for organizations?
- Does a preemptive federal privacy law provide benefits for consumers as well?
- What are the arguments against state law preemption?
- Are there any relevant lessons from the EU GDPR experience so far?|

Solutions for a Preemption Provision

- How can the preemption issue be solved?
- Are there any provisions that could be included in a privacy law in addition to preemption to help address the concerns surrounding preemption? Some ideas have included expanded FTC rulemaking and sunseting the preemption provision after some amount of time.
- Is it possible to craft a preemption provision that would create a single U.S. privacy standard but would enable states to retain certain laws or enact new laws to address unforeseen privacy issues not covered by the federal law?
- Are there ways to craft a preemption provision in such a way that would preserve some state laws that are related to, but don't directly conflict with a federal privacy law?

1:10 PM

End