European Data Protection
an example for the U.S.?

Jan Philipp Albrecht
Member of the European Parliament
Rapporteur for the
General Data Protection Regulation
www.janalbrecht.eu / @janalbrecht
Journalist. Lawyer. Politician.

Representing the region around Hamburg in the European Parliament
EP lead negotiator for the European Union’s data protection regulation
The EU’s data protection reform

Why #EUdataP?

– Update of 1995 rules
– Stricter enforcement
– Closing loopholes
– Trust and legal certainty
– Safeguarding a Fundamental Right
– Setting and exporting an EU standard
– Transformation to digital and global society
Data protection & privacy law

- 1960s: US debate on registers with personal data
- 1970: Datenschutz Act of Hessia (German Land)
- 1974: US Privacy Act (only public authorities)
- 1977 & 1978: data protection acts DE & AT, following EC
- 1980: OECD guidelines on data protection
- 1981: Council of Europe’s Convention 108
- 1983: „Volkszählungsurteil“ German constitutional court
- 1995: EU data protection directive 95/46/EC
- 2002: EU ePrivacy directive 2002/58/EC
- 2006: EU data retention directive 2006/24/EC
inofficial EU Constitution
Article 16 TFEU

1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals (...)

Compliance with these rules shall be subject to the control of independent authorities.
Article 8 EU Charter of Fundamental Rights

1. **Everyone** has the **right to the protection of personal data** concerning him or her.

2. Such data must be processed fairly for **specified purposes** and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the **right of access to data** which has been collected concerning him or her, and the **right to have it rectified**.

3. Compliance with these rules shall be subject to control by an **independent authority**.
The European Union – only bureaucracy
The European Union – only democracy
The European Union – a bureaucratic democracy, but the first above nations

Justice & Home affairs Committee
(European Parliament LIBE Committee)

Lead negotiators:
Jan Philipp Albrecht MEP (Regulation)
Dimitrios Droutsas MEP (Directive)

Justice & Home affairs Council
(Council of ministers JHA Council)

Lead negotiators:
Greek Presidency (First half 2014)
Italian Presidency (Second half `14)
What happened until now? I

- 2009-2011: Consultation process on a possible repeal of the data protection directive from 1995 on basis of Lisbon

- July 2011: EU Parliament Resolution
  - Single EU data protection standard on the basis of directive 95/46/EC
  - Strengthening of individual rights
  - Sharp sanctions and consistent enforcement in and by the EU and its member states
What happened until now? II

- 25 January 2012: EU Commission proposal
  - Regulation (private & public sectors)
  - Directive (law enforcement authorities)
- March 2012: EP rapporteurs appointed
- Since: hearings, meetings, discussions, ...
- January 2013: draft reports & amendments
- 21/10/13 & 12/03/14 Vote on EP position
  - almost unanimously
  - agreement with council after summer?
Some details on process

• Biggest lobbying tsunami ever in Brussels
  – Me & my staff: 168 meetings with lobbyists alone in nine months of 2012
  – Some understandable concerns
    • don’t overburden SMEs, R2BF, ...
  – Some just way over the top
    • „EudataP should not apply to us“, legitimate interest, reduce scope of data protection, …
<table>
<thead>
<tr>
<th>Article, Paragraph/Point</th>
<th>ITRE/IMCO #</th>
<th>Name</th>
<th>Party</th>
<th>Organization</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 79, Paragraph 2</td>
<td>872</td>
<td>Giles Chichester</td>
<td>UK</td>
<td>ECR</td>
<td></td>
</tr>
<tr>
<td>Article 3, Paragraph 2, Point a</td>
<td>157</td>
<td>Rafał Trzaskowski</td>
<td>PL</td>
<td>EPP</td>
<td>11</td>
</tr>
<tr>
<td>Article 4, Point 3</td>
<td>171</td>
<td>Malcolm Harbour</td>
<td>UK</td>
<td>ECR</td>
<td></td>
</tr>
<tr>
<td>Article 4, Point 3</td>
<td>171</td>
<td>Malcolm Harbour</td>
<td>UK</td>
<td>ECR</td>
<td></td>
</tr>
<tr>
<td>Article 4, Point 13</td>
<td>179</td>
<td>Andreas Schwab</td>
<td>DE</td>
<td>EPP</td>
<td>12</td>
</tr>
<tr>
<td>Article 4, Point 13</td>
<td>179</td>
<td>Andreas Schwab</td>
<td>DE</td>
<td>EPP</td>
<td></td>
</tr>
<tr>
<td>Article 4, Point 13</td>
<td>180</td>
<td>Malcolm Harbour</td>
<td>UK</td>
<td>ECR</td>
<td>12</td>
</tr>
<tr>
<td>Article 4, Point 13</td>
<td>180</td>
<td>Malcolm Harbour</td>
<td>UK</td>
<td>ECR</td>
<td></td>
</tr>
</tbody>
</table>
3999 amendments
poor trees...
Core Issues I

• Definition of personal data
  – IP#, RFID ID, etc covered
  – „can be identified or singled out“ (identifiable)
• Consent: „specific, informed and explicit“
• Scope of application:
  – Market location principle
  – EU institutions covered
  – private / household use: incl. gainful interest
Core Issues II

• Legitimate interest
  – Must meet reasonable expectations based on the relationship with the data controller
  – Direct marketing:
    • Internet: only for own or similar goods & services
    • Snail mail: everything (transaction cost barrier)
  – Opt-out always possible (Do Not Track)
• Profiling: limited; *highly visible* information
• Privacy by design & default; data minimisation
Core Issues III

• Corporate data protection officer
  – Threshold at XYZ employees doesn’t make sense
  – Now: 5000 persons per year
  – Can be part-time!
  – Helps compliance
  – Less consultation with DP authorities instead
Core Issues IV

• International transfers based on EU law

• Consistency
  – One-stop-shop for data controller and for us
  – Coordination in European Data Protection Board
  – Final decision in case of conflict: EDPB, \( \frac{2}{3} \) majority
  – No loophole in Ireland anymore
Legal Procedure against "Facebook Ireland Limited"

For years the shortcomings of Facebook’s privacy practice have been discussed, thought and talked about. Besides a couple of individual law suits there have been almost no consequences. Oftentimes we read that Facebook is a US company and therefore we cannot do too much within Europe. Are you sure?

"If you are a resident of or have your principal place of business in the US or Canada, this Statement is an agreement between you and Facebook, Inc. Otherwise, this Statement is an agreement between you and Facebook Ireland Limited. References to "us," "we," and "our" mean either Facebook, Inc. or Facebook Ireland Limited, as appropriate."

(Facebook’s Terms, Chapter 18. "Other")
The Snowden Effect

Welcome European Negotiators

The NSA thanks you for sharing your negotiating positions.

The Snowden Effect (strategic)

- Data Protection as competitive advantage
The Snowden Effect (immediate)

- Privacy high on the political agenda
- Lots of promises, but little meat
- Article 42 \(\rightarrow\) 43a
- Sunset clause for Safe Harbour etc.
- No BCRs for processors
- Whistleblower provisions
- Fines up to 5% of global annual turnover
- But no real impact on core issues...
After half a year of negotiations...
Overall result in Parliament

• Very good compromise
• Compared to the lobbying and amendments, much better than hoped for
• Structural majority of conservatives & market liberals!
• Result: support from all political groups
• Understandable that EDRi and others are not 100% happy, but others are even less
What’s next?

• Waiting for Council of Ministers to adopt their position
• Going around in circles
• Helpful allies: FR, PL, AT, EL (Greece) ...
• Delaying countries:
  – UK, DK, HU, SI don’t want regulation at all
  – DE, some others: „lots of questions“
    (Diplomat speak for „delay until it’s dead“)
COUNCIL CALLS IN COUNSELLORS TO COUNSEL COUNCILLORS
Big Picture

• #EUdataP won’t solve all issues,
  – but level playing field & data control for us
• Watch out for #Epinquiry report in Jan `14
  – Workshop: Day 3, 14:00-15:00,
    Noisy Square Assembly
• Need joint effort for EU IT capabilities
  – whole stack, from processor design to OS
  – free and open approach helps security
• Digital New Deal (investing in privacy)
Safeguard self determination
Digital Declaration of Independence

- Someone has to do a start!
- We do not have the majority on global level
- But we can have power & majorities in EU/US
- Privacy activists around the world watching
- EU Data protection reform: best chance we get
- Race against the clock: Forum shopping, TTIP, …
- Possible legislation also in the US?
- Data Protection getting competitive advantage
Questions?

Documents & more:
ec.europa.eu
europarl.europa.eu

www.janalbrecht.eu
@janalbrecht
#EUdataP
#EPinquiry