



The E.U.-US Privacy Collision: A Turn to Institutions and Procedures

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EU under pressure for new data, privacy law changes; U.S. tech firms breathe sigh of relief

Summary: *After major U.S.-based technology companies lobbied European member states and politicians, many will wake up today able to breathe a sigh of relief, as the European Commission is forced to climb down on certain elements of the new proposed data protection and privacy law.*



By Zack Whittaker for [Between the Lines](#) | March 7, 2013 -- 08:30 GMT (00:30 PST)

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Just over a year after the European Justice Commissioner Viviane Reding lifted the lid on new plans to reform the data protection and privacy laws in the region, Brussels is facing its greatest challenge yet by no other than its own member states.



Life. Well played.

RESIDENCES FROM \$1.2 TO OVER \$15 MILLION

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Silicon Valley Companies Lobbying Against Europe's Privacy Proposals


By KEVIN J. O'BRIEN

Published: January 25, 2013

Silicon Valley technology companies and the United States government are pushing hard against Europe's effort to enact sweeping privacy protection for digital data.

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Data Protection Directive of 1995



The Data Protection Directive (1995)



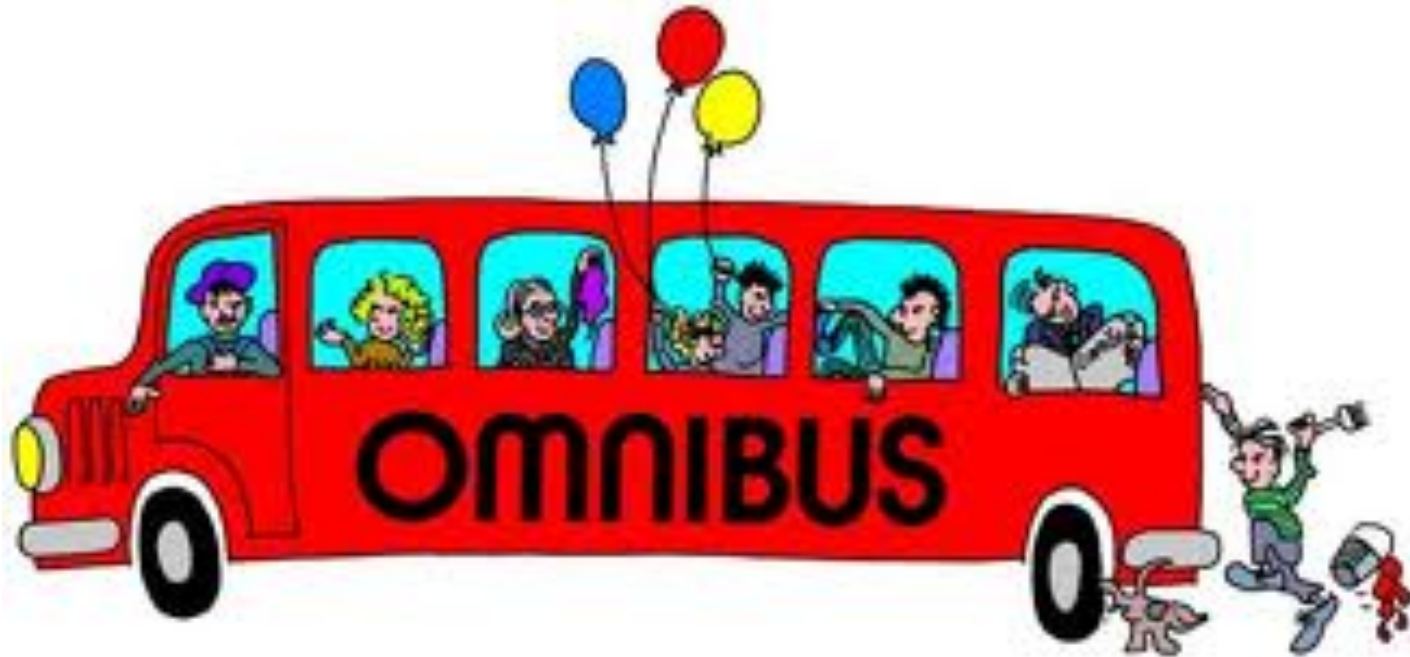
- Goals:
 - (1) Facilitate the free flow of personal data within the EU
 - (2) Ensure an equally high level of protection within all countries in the EU for “fundamental rights and freedoms of natural persons, and in particular the right to privacy”
 - (3) Protect the privacy of the information of EU citizens worldwide by permitting data transfers only to third countries with “adequate” protection

The Data Protection Directive (1995)



- Impact:
 - Shaped the *form* of numerous laws, inside and outside the EU
 - Contributed to the development of a *substantive* EU model of protection
- The US has proven to be an outlier

EU: Omnibus Privacy Laws, US: Sectoral Privacy Laws



Fair Information Practices (FIPs)

- Both the EU and US legal systems share an approach around FIPs for personal information



Fair Information Practices (FIPs)

- EU emphasizes:
 - (1) Limits on data collection
 - (2) Data quality principle
 - (3) Notice, access, and correction rights for individual

Fair Information Practices (FIPs)

- EU exclusive FIPs:
 - (4) A processing of personal data made only pursuant to a legal basis
 - (5) Regulatory oversight through an independent data protection authority
 - (6) Restrictions on data exports to countries that lack sufficient privacy protection
 - (7) Limits on automated decision-making
 - (8) Additional protection for sensitive data

Fair Information Practices (FIPs)

- US heightened interest in free flow of information due to First Amendment



The “Brussels Effect” – Anu Bradford



- Preconditions for “de facto unilateralism” are in place
- But Brussels negotiates with US. Why?
- Other competing interests in place:
- Interest in free flow of information to expand international trade
- Centrality of global information economy

Hier
iPhone 5



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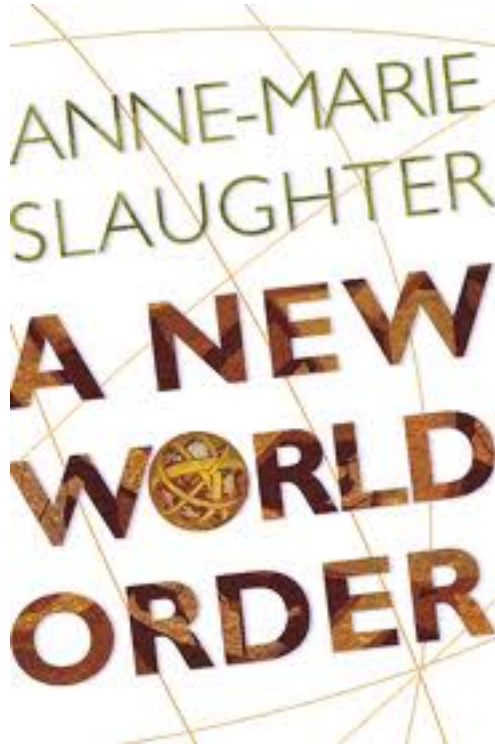
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Büro. Schule. Schreibkultur.

SW/M
Wir arbeiten am
Fernwärme- und Fernkältenetz
Projekt Färbergraben - Sendlinger
Str. - Fürstenfelder Str. - Rosen-
straße
Mai 2012 bis Oktober 2012
Verhalten und Verständnis für
Eingriffe während der Bauzeit

Alles Was Bist, Und nicht mehr.
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“Harmonization Networks” – Anne- Marie Slaughter



- Role of “Harmonization networks”: states now interact through a variety of de-aggregated channels involving different kinds of contacts, institutions, officials— and even NGO’ s
- Result is a cross-fertilization of policy models

Bottom line: Directive

- In absence of adequacy, Member States “to prevent any transfer of data ... to the third country in question” (Directive, Article 25)



Negotiated EU-US Solutions

- Safe Harbor
- Model Contractual Clauses
- Binding Corporate Rules



The Safe Harbor



Model Contractual Clauses

- 2001 Set:
 - Requirement of joint and several liability between the data exporter and data imported.
 - Must provide redress, support, and other help to affected individuals.
- 2004 Set:
 - Makes each party liable for the damages that it caused.
 - Contains a due diligence clause

Binding Corporate Rules

ARTICLE
29
WORKING PARTY



Binding Corporate Rules



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The Proposed Data Protection Regulation (2012)



Proposed Regulation: Heightened Individual Rights

- Right to be Forgotten
- Right to Erasure
- Heightened protection for “sensitive data” (new protection for genetic data, and “criminal convictions or related security measures)
- “philosophical beliefs” no longer protected; rather protection is now for “religion or other [spiritual] beliefs”



The right to be forgotten



Proposed Regulation: Centralization of Regulatory Power

- Role of the Commission
 - Power under the “consistency process”
 - Power to adopt “implementing acts” and “delegated acts”
- European Data Protection Board (EDPB)
 - Upgrades status of Article 29 Committee
 - EDPB provides a useful forum for national supervisory authorities to reach consensus about important issues
 - But Commission has last word

Proposed Regulation: Paths to Accommodation

- Article 45: Call for collaboration in data protection among European officials, national regulators, and non-governmental organizations
- Consolidates many of the policies negotiated post-Directive
- Incorporates a number of privacy policy innovations
 - Some with roots outside the EU: e.g. Privacy by Design

Averting the Privacy Collision Ahead

- “Harmonization networks” matter
 - Accountability through transparency
 - Checks-and-balances on EU institutions, such as the Commission
 - Subsidiarity: Jean Monnet meets Louis Brandeis



Averting the Privacy Collision Ahead

- **Accountability through transparency**

- FTC and EU contacts?
- Too much power to Commission in Proposed Regulation

- **Checks and balances**

- Role in consistency process for a new entity: an “EU Data Protection Authority” located within EU Parliament, and not Commission

- **Subsidiarity**

- A Minimalized Regulation that concentrates on key “field definitions,” that is basic conceptual categories (e.g. “personal information”).
- More power remaining with Member States



Thank you

