

# The changing EU data privacy landscape and its impact on US businesses

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# The story so far...



- Data Protection Directive 1995
  - Member State-level administrative requirements
  - General rights and obligations
- E-privacy Directive 2002
  - Specific obligations affecting digital media
- Revised e-privacy directive 2009
  - Data breach notification
  - “Cookie consent” rule
- New strategy for modernising European data privacy (November 2010)

# Modernising European data privacy

- Strengthening individuals' rights
- Achieving harmonisation
- Enhancing organisations' responsibilities
- Addressing international data transfers
- Strengthening enforcement



# Strengthening individuals' rights



- Greater transparency
- Data breach notification
- Rights of access, rectification, erasure and blocking
- Strengthening the role of consent

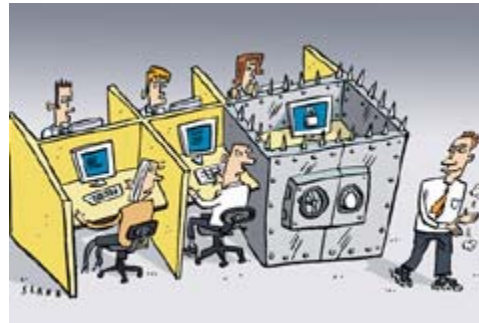
# Achieving harmonisation

- Directive v. Regulation
- Clarifying criteria for determining applicable law
  - Moving from establishment and equipment...
  - ...to citizenship / residency?



# Enhancing organisations' responsibilities

- Mandatory privacy officers
- Privacy impact assessments
- Internal audit mechanisms
- Training



# Addressing international data transfers

- Improving current adequacy mechanisms
- Facilitating the development of 'Binding Corporate Rules'



Safe Harbor Principles:  
Recognition as safe recipients of data based in the USA

Binding Corporate Rules:  
Self-regulatory approach to EU standards

Binding Safe Processor Rules:  
Global principles applied by vendors everywhere and recognised by the EU

# Strengthening enforcement

- Empowering regulators
- Improving international cooperation
- Consistent application of rules via Working Party



# Practical experience on national level: Example Germany

- Mandatory Privacy Officer – pros and cons, experiences
- Safe Harbor – additional obligations for data exporter:
  - check documentation
  - check and document actual implementation.

# Discussions with potential EU impact

## Right to forget

- Origin of the concept and cases
- Data posted by the data subject
- Data posted by third party
- Implications for social networks and for news magazines
  - Right to archive / freedom of press and freedom of access to information
  - Potentially along lines of privacy related process / “old media” laws



# Special Groups

- Children:
  - lack of uniform approach, fragmented in countries
  - asking for a general guidance / regulation
- Employees:
  - Initial testing / research candidates
  - No consent as basis for any use of data unless explicitly allowed
  - Photos – only with consent
  - Use of email / Internet
  - Full data breach notification



# Certifications, Seals and Audits

- Stiftung Datenschutz – federal privacy initiative (Budget €10M)
  - Competition for best level of data protection
  - Enhancement of industry self regulation – shortcomings of regulation
  - Binding decisions?
  - Level of control – discussion with regulator
  - Credibility
- Existing experience “successful in niche” areas, very burdensome (Europrise) or not highly regarded (Trustee)



# Revision of e-privacy directive



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# A bit of history and reason for the change

- Review of existing regulatory framework for electronic communications by EU Commission (October 2006)
  - Five directives adopted in 2002 – including directive 2002/58/EC
  - No recommended changes to rules affecting cookies
- Joint proposal to amend directive 2002/58/EC agreed by European Parliament and EU Council (May 2009)
  - Heavy lobby to the European Parliament by consumer groups
- New directive amending e-privacy directive (November 2009)

# 'Cookie consent' rule

## New article 5(3)

Member States shall ensure that the *[use of electronic communications networks to store]* **storing of** information or *[to gain]* **the gaining of** access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is **has given his or her consent, having been** provided with clear and comprehensive information in accordance with Directive 95/46/EC, inter alia about the purposes of the processing. *[and is offered the right to refuse such processing by the data controller.]* This shall not prevent any technical storage or access for the sole purpose of carrying out *[or facilitating]* the transmission of a communication over an electronic communications network, or as strictly necessary in order *[to provide]* **for the provider of** an information society service explicitly requested by the subscriber or user **to provide the service.**

# Effect of the new requirement

- Exemptions
  - ‘Strictly necessary’ to provide user-requested service
  - Carrying out transmission across a network
- Practical consequences
  - Shopping baskets and secure log-in sessions are OK...
  - ...but everything else needs some form of consent
- Browser and other application settings
  - Recital 66 – “where technically possible and effective”
  - Article 29 Working Party: Current browser settings not enough

# Possible interpretations of consent

- Is it opt-out?
  - “Consent”: freely given specific and informed indication of wishes
- Is it opt-in?
  - Potentially catastrophic effect of “hard opt-in” approach
- Or something in between?
  - Cookies = legitimate purposes
  - It’s all about control + transparency

# Implementation across Member States

<i>No known legislative steps</i>	<i>Opt-in consent implemented (or anticipated)</i>	<i>Consent implemented (or anticipated) and qualified by browser settings</i>
Bulgaria, Iceland, Liechtenstein, Lithuania, Malta, Slovenia	<p><b><u>Anticipated</u></b></p> <p>Austria, Belgium, Cyprus, Denmark, [Estonia], France, Greece, Norway, Poland, Portugal, Slovakia, Romania</p>	<p><b><u>Anticipated</u></b></p> <p>Czech Republic, Germany, Hungary, Ireland, Luxembourg, Spain</p>
	<p><b><u>Implemented</u></b></p> <p>Latvia, Netherlands</p>	<p><b><u>Implemented</u></b></p> <p>Finland, Ireland, Sweden, UK</p>

# Our practical advice

- Assess functionality of cookies on the site
- Identify necessary cookies and level of intrusiveness
- Give detailed disclosure in the Privacy Policy
- Provide direct access to browser settings
- Consider practical ability to respect choices
- Apportion responsibilities amongst parties
- Follow implementation process across the EU

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