

“This is a request for your customers’  
data...” - A challenge for companies

Dr. Eleni Kosta  
Associate Professor – TILT-Tilburg University

Trust in the Digital World 2015  
Madrid, 25.02.2015



Understanding Society

# Replacement of the Data Protection Directive with a Regulation (GDPR)

## Goals

- Ensure a **consistent level of protection** for individuals among the [28] Member States
- Provide **legal certainty and transparency** for economic operators, including micro, small and medium-sized enterprises
- Ensure **consistent monitoring** of the processing of personal data
- Ensure **equivalent sanctions** in all Member States
- Ensure **effective co-operation** between the DPAs

## Where we are now...



EUROPEAN COMMISSION

Brussels, 25.1.2012  
COM(2012) 11 final

2012/0011 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on the protection of individuals with regard to the processing of personal data and on  
the free movement of such data (General Data Protection Regulation)**

## Where we are now...

### Facts and figures

3,133 amendments were tabled to the proposal for a regulation in the Civil Liberties Committee. Together with the amendments tabled in their opinions by the Industry Committee (417), the Internal Market Committee (226), the Employment Committee (27) and the Legal Affairs Committee (196), they make a total of 3,999 amendments. This is the highest number of amendments ever tabled to a single legislative file in Parliament.

673 amendments were tabled to the draft directive in the Civil Liberties Committee. Together with the amendments tabled by the Legal Affairs Committee in its opinion (98), they make a total of 771 amendments.

## Where we are now...

12 March 2014: Official first reading at the European Parliament.

Jan Philipp Albrecht, a German MEP and LIBE's rapporteur for the Regulation, received 3,133 proposed amendments to the proposed Data Protection Regulation, and confirmed that both postponements stemmed from the volume of contested areas. At the same time, four other parliamentary committees prepared non-binding opinions that proposed numerous changes. The same was done by a number of EU Member States.

## Where we are now...



## Where we are now...



Council of the  
European Union

Brussels, 19 December 2014  
(OR. en)

15395/14

**Interinstitutional File:**  
**2012/0011 (COD)**

**LIMITE**

**DATAPROTECT 165**  
**JAI 860**  
**MI 965**  
**DRS 167**  
**DAPIX 167**  
**FREMP 202**  
**COMIX 604**  
**CODEC 2222**

### **NOTE**

**From:** Presidency  
**To:** Working Party on Information Exchange and Data Protection  
**No. prev. doc.:** 11013/13 DATAPROTECT 78 JAI 496 MI 546 DRS 119 DAPIX 88 FREMP 85 COMIX 380 CODEC 1475  
**No. Cion doc.:** 5853/12 DATAPROTECT 9 JAI 44 MI 58 DRS 9 DAPIX 12 FREMP 7 COMIX 61 CODEC 219  
**Subject:** Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)



Data Protection Directive regulates the processing of personal data by private entities, but not their further use for state surveillance purposes (CJEU in PRN)

Judgment in PNR cases : Cases C-317/04 and C-318/04

## EP amendment (GDPR)

### **Article 43a Transfers or disclosures not authorised by Union law [in short]**

US-based companies will seek approval from European authorities in order to comply with an order by US authorities to deliver data.

The European Parliament (EP), in the aftermath of the Snowden revelations, proposed during its first reading that companies have to notify the European supervisory authority and obtain prior authorisation for any disclosure of personal data to foreign judicial or administrative authorities; it also proposed that data subjects be notified. It is questionable, however, whether US-based companies will seek approval from European authorities in order to comply with an order by US authorities to deliver data.

## Microsoft Case (NY District Court)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
-----: :  
IN THE MATTER OF A WARRANT TO : 13 Mag. 2814  
SEARCH A CERTAIN E-MAIL ACCOUNT :  
CONTROLLED AND MAINTAINED BY : MEMORANDUM  
MICROSOFT CORPORATION : AND ORDER  
: :  
-----: :  
JAMES C. FRANCIS IV  
UNITED STATES MAGISTRATE JUDGE

July 2014

Microsoft Corp must turn over a customer's emails and other account information stored in a data center in Ireland to the U.S. government, a judge ruled on Thursday, in a case that has drawn concern from privacy groups and major technology companies. Microsoft and other U.S. companies had challenged the warrant, arguing it improperly extended the authority of federal prosecutors to seize customer information held in foreign countries.

Following a two-hour court hearing in New York, U.S. District Judge Loretta Preska said a search warrant approved by a federal magistrate judge required the company to hand over any data it controlled, regardless of where it was stored. The judge said she would temporarily suspend her order from taking effect to allow Microsoft to appeal her decision to the 2nd U.S. Circuit Court of Appeals.

# Microsoft Case (US Court of Appeals)

Case 14-2985, Document 164, 12/23/2014, 1401859, Page1 of 13

# 14-2985-cv

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

IN THE MATTER OF A WARRANT TO SEARCH A CERTAIN E-MAIL ACCOUNT  
CONTROLLED AND MAINTAINED BY MICROSOFT CORPORATION,

MICROSOFT CORPORATION,  
*Appellant,*

v.

UNITED STATES OF AMERICA,  
*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF OF AMICUS CURIAE  
IRELAND

12

## Data retention directive at the CJEU

C-293/12: Digital Rights Ireland v  
Minister for Communications  
C-594/12: Seitlinger and others

References for a **preliminary ruling** by  
the Irish High Court and the Austrian  
Constitutional Court

CJEU gap in the protection

§ 58. DRD applies even to persons for whom there is **no evidence** capable of suggesting that their conduct might have a link, even an indirect or remote one, with **serious crime**. Furthermore, it does **not** provide for any **exception**, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy

§ 60. fails to lay down any **objective criterion** by which to determine the limits of the access of the competent national authorities to the data and their subsequent use.

§ 63. wrt the retention period does not make any distinction based on the categories of data

§ 65. DRD does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 **entails a wide-ranging and particularly serious interference** with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary.

## CJEU – 08.04.2014

The EU legislature has **exceeded the limits** imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter:

The Court ruled:

**“DRD is invalid”**



Thank you for your attention!



*"Any society that  
would give up a little  
liberty to gain a little  
security will deserve  
neither and lose both."*  
~ Benjamin Franklin

**Dr Eleni Kosta**

[e.kosta@tilburguniversity.edu](mailto:e.kosta@tilburguniversity.edu)

Associate Professor of Technology Regulation

Tilburg Institute for Law, Technology and Society (TILT), Tilburg University



17