



Mind the Bridge

GDPR AND BEYOND

RECOMMENDATIONS FROM
A TRANSATLANTIC PERSPECTIVE

2018

POLICY BRIEF



ABOUT SEC2SV

Launched in 2015, Startup Europe Comes to Silicon Valley (SEC2SV) brings together annually the most relevant founders, corporates, investors, and policy-makers from the EU entrepreneurial ecosystem and Silicon Valley in engaging meetings and workshops, forging meaningful long-term relationships.

SEC2SV is the flagship pan-European program in Silicon Valley. A week-long program of high-level activities organized around the European Innovation Day conference.

Past participants have included: the best 15 year EU scaleups expanding to the US; Elżbieta Bieńkowska, EU commissioner for Internal Market, Industry, Entrepreneurship and SME's, Günther H. Oettinger, EU Commissioner for Budget and Human Resources; Julie Hanna, US Presidential Ambassador for Global Entrepreneurship; Toomas Hendrik Ilves (President of Estonia); Betsy Masiello, Head of Public Policy, Uber; and Henry Chesbrough, the Father of Open Innovation.

SEC2SV is a format created and organized by Mind the Bridge as part of the Startup Europe Partnership (SEP) initiative and co-organized with EIT Digital.

For more info: <http://sec2sv.com>

Introduction

During the 2018 edition of SEC2SV European Innovation Day, we organized a Workshop on GDPR/Data Privacy. 48 participants from the US and Europe joined a three-hour hands-on session to share experience and develop a common understanding in two interrelated areas: where we are in global privacy regulation and what technology companies can do to respond to the growing awareness for data protection as well as to the diverging legislative approaches from regulators in Europe, the United States and other markets.

This Policy Brief presents the main insights, key findings and future areas for development that have been brought up in the discussion among participants, who included data protection professionals in technology companies based in the Bay Area, privacy lawyers and European policy-makers.

Looking forward to shortly reconvening together with EU representatives to discuss progress in the respective areas,

Julia Reinhardt

CIPP/E, SEC2SV Public Affairs Coordinator





Sorin Moisa
Member of the European Parliament

The European Union's General Data Protection Regulation (GDPR) that has taken effect in May 2018 was a policy response to widely felt skepticism and fears among Europeans around privacy protection in technology. Policy-makers in EU member states and institutions intended to strike a better balance between promoting innovation and protecting the European citizens' individual autonomy. GDPR is a decent answer to this challenge.

GDPR:

The Context

The European Union's General Data Protection Regulation (GDPR) that has taken effect in May 2018 was a policy response to widely felt skepticism and fears in the European population around privacy protection in technology.

Policy-makers in EU member states and institutions intended to strike a better balance between promoting innovation and protecting the European citizens' individual autonomy.

According to Sorin Moisa, Member of the European Parliament and member of the Committee on International Trade and the Delegation on Relation with the United States, the GDPR was a decent answer to this challenge.

Pēteris Zilgalvis, Head of Unit on Digital Innovation and Blockchain, DG Connect, European Commission, added that GDPR was a deliberately principle-based piece of EU legislation.

It was important to distinguish between a decidedly privacy-rights oriented attitude in Europe and an approach more interested in the monetization of data in the United States.

GDPR's principles were written from a perspective of a silo of data and the idea of a sole controller, and naturally need to be updated as technology around data processing evolves.

Pēteris Zilgalvis also drew attention to a report on GDPR and Blockchain by the EU Blockchain Observatory and Forum (already released), tackling the question how GDPR could be applied to a technology that was still in the making at the time that GDPR was negotiated.



GDPR was a policy response to skepticism and fears in the European population around privacy protection and technology.



Pēteris Zilgalvis

Head of Unit, DG Connect, European Commission

GDPR principles were written from a perspective of a silo of data and the idea of a sole controller, and naturally now need to be applied to more decentralised digital technologies as technology around data processing evolves.

Lessons Learnt and Challenges of Implementing GDPR

Workshop participants mentioned several challenges related GDPR that companies were faced with in the past months, among others:

- more tension around contract negotiations between companies and vendors, both sides trying to anticipate and avoid critical questions from customers about potential interventions from regulators;
- in many cases, a debilitating wait-and-see attitude within companies as GDPR's impact has not always been entirely clear;
- in vendor agreements, preference is increasingly given to bigger, more mature companies that can "afford" compliance although they are more costly – several participants from industry who had been obliged to end contracts with small/mid-sized providers resented the effect as an unfair bias toward small processors and a strengthening of monopolies;

- for international data transfers, the current model clauses were judged excessively complicated and in need of an update (for which the EDPS is currently pushing for very actively);

- a lot of uncertainty around the concept of "consent", with a US definition of "consent" differing from the European, and the need of a clear determination of when exactly legitimate interest can replace consent.

Interestingly, these challenges were viewed as very similar in type whether the company affected was EU- or US-based.

The "dimension" of being affected by GDPR's territorial scope did not make a difference in how companies experienced implementation so much as the type of product and branch of industry.

Figure 1
CHALLENGES OF IMPLEMENTING GDPR



More tension around contract negotiations

between companies and vendors, both sides trying to anticipate and avoid critical questions from customers about potential interventions from regulators.



A debilitating wait-and-see attitude

within companies, as GDPR's impact has not always been entirely clear from the beginning.



Preference to bigger, more mature companies

in vendor agreements, as they can "afford" compliance, although they are more costly, resulting into ending contracts with small/mid-sized providers.



International data transfers

the current model clauses are excessively complicated and require update.



Missing universal code of conduct

to demonstrate GDPR compliance.



Uncertain use of the concept of "consent"

as the US definition differs from the European one, and it is difficult to determine when exactly legitimate interest can replace consent.

ePrivacy Regulation

Tech industry representatives lamented the still fragmented legislation in this field in Europe and described negative effects of prolonged uncertainty.

As negotiations among EU member states on this “additional layer” of European privacy regulation are still ongoing, workshop participants were eager to discuss with the EU officials present whether the EP would postpone final decisions until after European elections in May 2019.

MEP Moisa shared his insight into plans of the Austrian EU Presidency for the rest of second semester 2018: given the current state of negotiations, he considered it a mature project in the pipeline of EU decision-making and concluded that in a best-case scenario, with negotiations possibly being concluded next year, the new ePrivacy Regulation could come into effect in 2020.

Figure 2
ePRIVACY REGULATION CURRENT STATE OF THE PROCESS



Global Privacy Landscape

New privacy laws are proposed and take effect in many different countries, potentially creating a mosaic of different and partially conflicting pieces of legislation. Stephanie Hanson (OneTrust) gave an overview of new and upcoming privacy legislation in several US states (California, Colorado and Vermont are noteworthy examples) and globally, from Brazil to India, Chile and New Zealand.

While many of them feature some elements similar to the European GDPR, there are striking differences as well, for instance a more limited focus on breach rules or on consumer rights.

Figure 3
GLOBAL PRIVACY LANDSCAPE





Mark Webber

CIPP/E, US Managing Partner and Privacy Lawyer, Fieldfisher

The summer of 2018 saw the introduction of the General Data Protection Regulation (GDPR).

This was a significant milestone for privacy but also any entity collecting or using data in Europe. The SEC2SV event provided an opportunity for Silicon Valley's tech businesses to reflect on the GDPR, its impact on business, compliance, standard and peers. In particular, an opportunity to discuss the GDPR's challenges in an open and tech savvy environment. What's more, policy makers from Europe were present so the group could raise concerns with the GDPR, the available Guidance and compliance challenges. The group could also look ahead to the ePrivacy Regulation and the relative uncertainty in regard to a new law that would have as seismic impact as the GDPR but which, as of the event, was unclear and potentially posed even more compliance and business model challenges.

A Case in the Tech Industry: The California Consumer Privacy Act

The California Consumer Privacy Act (CCPA) will be of extreme importance for the tech industry. Adopted in June 2018, it can still undergo amendments until it takes effect in January 2020. However, workshop participants expected only clarifying amendments, e.g. clearer definitions of concepts like consumer information or households, not changes in its core principles. In addition, CCPA will only be enforceable six months after taking effect in July 2020. Given the timeline, Industry is therefore split between intense lobbying for changes in their favor and adopting a wait-and-see attitude.

Workshop participants based in the US shared insights of efforts to lobby the federal government - mainly through trade associations - for a federal privacy law that would help overcome the current sectoral and increasingly regional patchwork of privacy regulation in the US. On behalf of the European Parliament liaison office in Washington DC, João Rodrigues contributed observations of US Congress moves on this matter.

Effects of a Complex Regulatory Environment

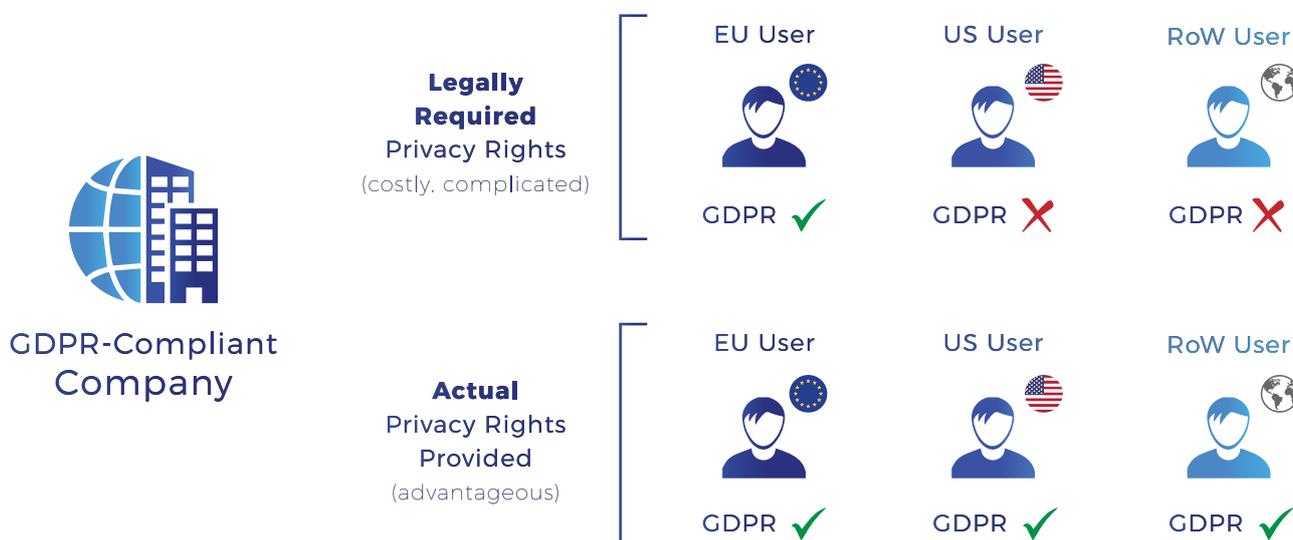
Workshop participants considered data portability and data transfers between legal constituencies an essential element of international trade.

A major consequence of GDPR being the trailblazing regulation that it is today, workshop participants concluded, is that in practice, companies often offer privacy rights under GDPR to all their customers, no matter whether they reside in Europe or elsewhere.

Distinguishing them on the basis of their actual residence would simply be too costly and complicated.

A company well prepared for GDPR compliance on a global level therefore had an advantage internationally compared with others that prepared only in a compartmentalized way.

Figure 4
THE ADVANTAGE OF GDPR COMPLIANCE ON A GLOBAL LEVEL



Effects on International Trade

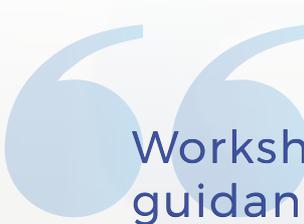
With more conflicting national privacy laws coming up, workshop participants saw detrimental effects on international trade. Particular burden would be created by the "localization principle" included in some national laws (e.g. draft Personal Data Protection Bill in India), prescribing that certain data, or at least their "primary version", will have to remain domestic.

Given the very interconnected nature of the Indian economy compared to the Russian, where similar rules exist, this would be hard if not impossible to implement. A risk-based approach would not be advisable under these circumstances.

Conclusions

Concluding the rich discussion, workshop participants therefore called for guidance from regulators on how to concretely implement these rules in a globalized world. This guidance will have to be international by nature, and a

multi-stakeholder approach will be necessary to convene regulators together with tech industry, academia and civil society and harmonize approaches among countries.



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Fieldfisher's growing European network of offices supports an international client base and, alongside a Silicon Valley and Chinese presence, offers a scaled support across time zones.

Fieldfisher's Silicon Valley lawyers do not practice US law but offer on-the-ground expertise in data privacy, technology transactions, consumer law, employment, trade, EU competition and inward investment, allowing our clients to receive advice and conduct negotiations during business hours.

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<http://fieldfisher.com>



Mind the Bridge

About Mind the Bridge

Mind the Bridge is a global organization that provides innovation advisory services for corporates and startups. With HQs in San Francisco (CA) and offices in London, Italy and Spain, Mind the Bridge has been working as an international bridge at the intersection between Startups and Corporates since 2007.

Mind the Bridge scouts, filters and works with 2,000+ startups a year supporting global corporations in their innovation quest by driving open innovation initiatives that translate into curated deals with startups (namely POCs, licensing, investments, and/or acquisitions).

Mind the Bridge publishes curated reports on the status of the scaleup ecosystems in different geographies, as well as M&A and innovation market trends in various verticals.

Mind the Bridge has strong partnerships with entities such as the London Stock Exchange and the European Commission, for whom it runs the Startup Europe Partnership (SEP) open innovation platform.

Mind the Bridge is the organizer of the Startup Europe Comes to Silicon Valley (SEC2SV) and Startup Europe Comes to Israel (SEC2IL) missions and the European Innovation Day conference.

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