The EU's Attempts at Setting a Global Data Protection Norm

Mistale Taylor, 26th November 2015

Data Protection Directive (95/46/EC)

Art. 4 National law applicable

1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in ***the context of the activities of an establishment of the controller on the territory*** of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

(b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of ***international public law***;

(c) the controller is ***not established on Community territory*** and, for purposes of processing personal data ***makes use of equipment***, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community. (emphasis added)

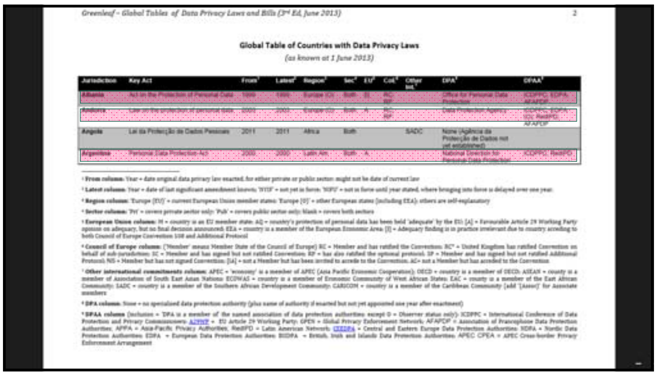
Data Protection Directive (95/46/EC)

Art. 25 Principles [Art. 26 – derogations]

1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the ***third country in question ensures an adequate level of protection.*** […]

4. Where the Commission finds, under the procedure provided for in Article 31 (2), that a ***third country does not ensure an adequate level of protection*** within the meaning of paragraph 2 of this Article, Member States shall take the measures necessary to ***prevent any transfer of data*** of the same type to the third country in question.

5. At the appropriate time, the ***Commission shall enter into negotiations with a view to remedying the situation*** resulting from the finding made pursuant to paragraph 4. […]



Global Table of Countries with Data Privacy Laws

(as known at 1 June 2013)

Jurisdiction	Key Act	From[1]	Latest[2]	Region[3]	Sec[4]	EU[5]	CoE[6]	Other Int.[7]	DPA[8]	DPAA[9]
Albania	Act on the Protection of Personal Data	[illegible]	[illegible]	Europe (O)	Both	[illegible]	RC; RP		Office for Personal Data Protection	ICDPPC; EDPA; AFAPDP
Andorra	Law on the protection of personal data	[illegible]	[illegible]	Europe (O)	Both	A	RC; RP		Data Protection Agency	ICDPPC; EDPA; [illegible]; RedIPD; AFAPDP
Angola	Lei da Protecção de Dados Pessoais	2011	2011	Africa	Both			SADC	None (Agência de Protecção de Dados not yet established)	
Argentina	Personal Data Protection Act	2000	2000	Latin Am	Both	A			National Direction for Personal Data Protection	ICDPPC; RedIPD

[1] **From column:** Year = date original data privacy law enacted, for either private or public sector; might not be date of current law

[2] **Latest column:** Year = date of last significant amendment known; 'NYIF' = not yet in force; 'NIFU' = not in force until year stated, where bringing into force is delayed over one year

[3] **Region column:** 'Europe (EU)' = current European Union member states; 'Europe (O)' = other European states (including EEA); others are self-explanatory

[4] **Sector column:** 'Pri' = covers private sector only; 'Pub' = covers public sector only; blank = covers both sectors

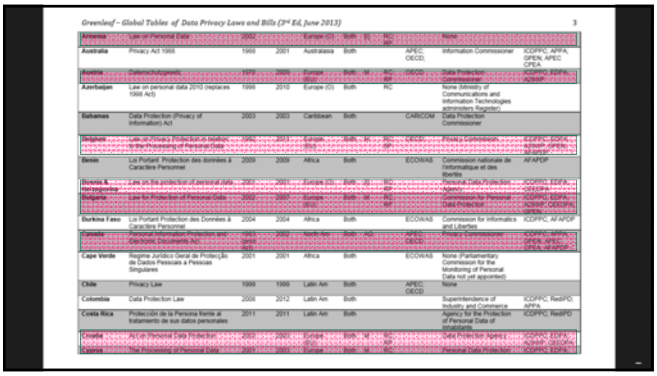
[5] **European Union column:** M = country is an EU member state; AQ = country's protection of personal data has been held 'adequate' by the EU; [A] = Favourable Article 29 Working Party opinion on adequacy, but no final decision announced; EEA = country is a member of the European Economic Area; [I] = Adequacy finding is in practice irrelevant due to country acceding to both Council of Europe Convention 108 and Additional Protocol

[6] **Council of Europe column:** ('Member' means Member State of the Council of Europe) RC = Member and has ratified the Convention; RC* = United Kingdom has ratified Convention on behalf of sub-jurisdiction; SC = Member and has signed but not ratified Convention; RP = has also ratified the optional protocol; SP = Member and has signed but not ratified Additional Protocol; NS = Member but has not signed Convention; [IA] = not a Member but has been invited to accede to the Convention; AC= not a Member but has acceded to the Convention

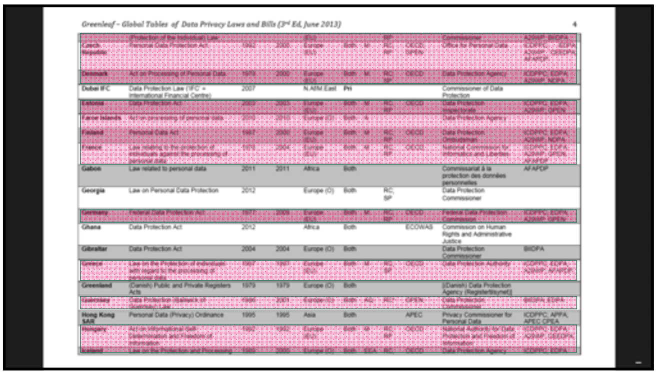
[7] **Other international commitments column:** APEC = 'economy' is a member of APEC (Asia Pacific Economic Cooperation); OECD = country is a member of OECD; ASEAN = county is a member of Association of South East Asian Nations; ECOWAS = country is a member of Economic Community of West African States; EAC = county is a member of the East African Community; SADC = country is a member of the Southern African Development Community; CARICOM = country is a member of the Caribbean Community [add '(Assoc)' for Associate members

[8] **DPA column:** None = no specialized data protection authority (plus name of authority if enacted but not yet appointed one year after enactment)

[9] **DPAA column** (inclusion = 'DPA is a member of the named association of data protection authorities; except O = Observer status only): ICDPPC = International Conference of Data Protection and Privacy Commissioners; A29WP = EU Article 29 Working Party; GPEN = Global Privacy Enforcement Network; AFAPDP = Association of Francophone Data Protection Authorities; APPA = Asia-Pacific Privacy Authorities; RedIPD = Latin American Network; CEEDPA = Central and Eastern Europe Data Protection Authorities; NDPA = Nordic Data Protection Authorities; EDPA = European Data Protection Authorities; BIIDPA = British, Irish and Islands Data Protection Authorities; APEC CPEA = APEC Cross-border Privacy Enforcement Arrangement



Armenia	Law on Personal Data	2002		Europe (O)	Both	[I]	RC; RP		None	
Australia	Privacy Act 1988	1988	2001	Australasia	Both			APEC; OECD;	Information Commissioner	ICDPPC; APPA; GPEN; APEC CPEA
Austria	Datenschutzgesetz	1978	2009	Europe (EU)	Both	M	RC; RP	OECD	Data Protection Commissioner	ICDPPC; EDPA; A29WP
Azerbaijan	Law on personal data 2010 (replaces 1998 Act)	1998	2010	Europe (O)	Both		RC		None (Ministry of Communications and Information Technologies administers Register)	
Bahamas	Data Protection (Privacy of Information) Act	2003	2003	Caribbean	Both			CARICOM	Data Protection Commissioner	
Belgium	Law on Privacy Protection in relation to the Processing of Personal Data	1992	2011	Europe (EU)	Both	M	RC; RP	OECD	Privacy Commission	ICDPPC; EDPA; A29WP; GPEN; AFAPDP
Benin	Loi Portant Protection des données à Caractère Personnel	2009	2009	Africa	Both			ECOWAS	Commission nationale de l'informatique et des libertés	AFAPDP
Bosnia & Herzegovina	Law on the protection of personal data	2001	2001	Europe (O)	Both	[I]	RC; RP		Personal Data Protection Agency	ICDPPC; EDPA; CEEDPA
Bulgaria	Law for Protection of Personal Data	2002	2007	Europe (EU)	Both	M	RC; RP		Commission for Personal Data Protection	ICDPPC; EDPA; A29WP; CEEDPA; GPEN
Burkina Faso	Loi Portant Protection des Données à Caractère Personnel	2004	2004	Africa	Both			ECOWAS	Commission for Informatics and Liberties	ICDPPC; AFAPDP
Canada	Personal Information Protection and Electronic Documents Act	1983 (prior Act)	2002	North Am	Both	AQ		APEC; OECD	Privacy Commissioner	ICDPPC; APPA; GPEN; APEC CPEA; AFAPDP
Cape Verde	Regime Jurídico Geral de Protecção de Dados Pessoais a Pessoas Singulares	2001	2001	Africa	Both			ECOWAS	None (Parliamentary Commission for the Monitoring of Personal Data not yet appointed)	
Chile	Privacy Law	1999	1999	Latin Am	Both			APEC; OECD	None	
Colombia	Data Protection Law	2008	2012	Latin Am	Both				Superintendence of Industry and Commerce	ICDPPC; RedIPD; APPA
Costa Rica	Protección de la Persona frente al tratamiento de sus datos personales	2011	2011	Latin Am	Both				Agency for the Protection of Personal Data of Inhabitants	ICDPPC; RedIPD
Croatia	Act on Personal Data Protection	2003	2003	Europe (EU)	Both	M	RC; RP		Data Protection Agency	ICDPPC; EDPA; A29WP; CEEDPA
Cyprus	The Processing of Personal Data	2001	2003	Europe	Both	M	RC;		Personal Data Protection	ICDPPC; EDPA;



	(Protection of the Individual) Law			(EU)			RP		Commissioner	A29WP; BIIDPA
Czech Republic	Personal Data Protection Act	1992	2000	Europe (EU)	Both	M	RC; RP	OECD; GPEN	Office for Personal Data	ICDPPC; EDPA; A29WP; CEEDPA; AFAPDP
Denmark	Act on Processing of Personal Data	1978	2000	Europe (EU)	Both	M	RC; SP	OECD	Data Protection Agency	ICDPPC; EDPA; A29WP; NDPA
Dubai IFC	Data Protection Law ('IFC' = International Financial Centre)	2007		N.Afr/M.East	Pri				Commissioner of Data Protection	
Estonia	Data Protection Act	2003	2003	Europe (EU)	Both	M	RC; RP	OECD	Data Protection Inspectorate	ICDPPC; EDPA; A29WP; GPEN
Faroe Islands	Act on processing of personal data	2010	2010	Europe (O)	Both	A			Data Protection Agency	
Finland	Personal Data Act	1987	2000	Europe (EU)	Both	M	RC; RP	OECD	Data Protection Ombudsman	ICDPPC; EDPA; A29WP; NDPA
France	Law relating to the protection of individuals against the processing of personal data	1978	2004	Europe (EU)	Both	M	RC; RP	OECD	National Commission for Informatics and Liberties	ICDPPC; EDPA; A29WP; GPEN; AFAPDP
Gabon	Law related to personal data	2011	2011	Africa	Both				Commissariat à la protection des données personnelles	AFAPDP
Georgia	Law on Personal Data Protection	2012		Europe (O)	Both		RC; SP		Data Protection Commissioner	
Germany	Federal Data Protection Act	1977	2009	Europe (EU)	Both	M	RC; RP	OECD	Federal Data Protection Commission	ICDPPC; EDPA; A29WP; GPEN
Ghana	Data Protection Act	2012		Africa	Both			ECOWAS	Commission on Human Rights and Administrative Justice	
Gibraltar	Data Protection Act	2004	2004	Europe (O)	Both				Data Protection Commissioner	BIIDPA
Greece	Law on the Protection of individuals with regard to the processing of personal data	1997	1997	Europe (EU)	Both	M	RC; SP	OECD	Data Protection Authority	ICDPPC; EDPA; A29WP; AFAPDP
Greenland	(Danish) Public and Private Registers Acts	1979	1979	Europe (O)	Both				[(Danish) Data Protection Agency (Registertilsynet)]	
Guernsey	Data Protection (Bailiwick of Guernsey) Law	1986	2001	Europe (O)	Both	AQ	RC*	GPEN	Data Protection Commissioner	BIIDPA; EDPA
Hong Kong SAR	Personal Data (Privacy) Ordinance	1995	1995	Asia	Both			APEC	Privacy Commissioner for Personal Data	ICDPPC; APPA; APEC CPEA
Hungary	Act on Informational Self-Determination and Freedom of Information	1992	1992	Europe (EU)	Both	M	RC; RP	OECD	National Authority for Data Protection and Freedom of Information	ICDPPC; EDPA; A29WP; CEEDPA
Iceland	Law on the Protection and Processing	1989	2000	Europe (O)	Both	EEA	RC;	OECD	Data Protection Agency	ICDPPC; EDPA;

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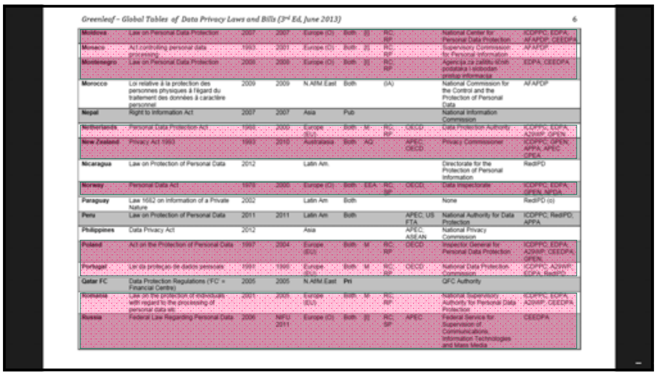
	of Personal Data						SP			
India	Rules under s43A (2008 Amendt), Information Technology Act 2000	2011	2011	Asia	**Pri**				None	
Ireland	Data Protection Act	1988	2003	Europe (EU)	Both	M	RC, RP	OECD	Data Protection Commissioner	ICDPPC, EDPA, A29WP, OPEN, BIIDPA
Isle of Man	Data Protection Act	1986	2002	Europe (O)	Both	AQ	RC		Data Protection Registrar	BIIDPA, EDPA
Israel	Privacy Protection Act 1981	1981	1981	N.Afr/M.East	Both	AQ		OECD	Law, Information and Technology Authority	ICDPPC, OPEN
Italy	Consolidation Act regarding the Protection of Personal Data	1996	2003	Europe (EU)	Both	M	RC, SP	OECD	Data Protection Authority	ICDPPC, EDPA, A29WP, OPEN
Japan	Act on the Protection of Personal Information	2003	2003	Asia	Both			APEC, OECD	None	
Jersey	Data Protection (Jersey) Law	1987	2005	Europe (O)	Both	AQ	RC		Data Protection Registrar	ICDPPC, EDPA, BIIDPA
Kosovo	Law on the Protection of Personal Data	2010	2010	Europe (O)	Both				National Agency for the Protection of Personal Data	EDPA (O)
Kyrgyz Republic	Law on Personal Data	2008	2008	Central Asia	Both				None	
Latvia	Law on Protection of Personal Data of Natural Persons	2000	2002	Europe (EU)	Both	M	RC, RP		State Data Protection Inspectorate	ICDPPC, EDPA, A29WP, CEEDPA, OPEN
Liechtenstein	Gesetz über die Abänderung des Datenschutzgesetzes (2002)	2002	2008	Europe (O)	Both	EEA	RC, RP		Data Protection Commissioner	ICDPPC, EDPA
Lithuania	Law on Legal Protection of Personal Data	1996	2003	Europe (EU)	Both	M	RC, RP		State Data Protection Inspectorate	ICDPPC, EDPA, A29WP
Luxembourg	Data Protection Law	1979	2002	Europe (EU)	Both	M	RC, RP	OECD	National Data Protection Commission	ICDPPC, EDPA, A29WP, AFAPDP
Macao SAR	Personal Data Protection Act	2006	2006	Asia	Both				Office for Personal Data Protection	APPA, OPEN
Macedonia (FYROM)	Law on Personal Data Protection	2005	2005	Europe (O)	Both	(I)	RC, RP		Directorate of Personal Data Protection	ICDPPC, EDPA, CEEDPA
Malaysia	Personal Data Protection Act	2010	NIFU 2013	Asia	**Pri**			APEC, ASEAN	None (Personal Data Protection Commissioner in Act not appointed)	
Malta	Data Protection Act	2001	2001	Europe (EU)	Both	M	RC		Data Protection Commissioner	ICDPPC, EDPA, A29WP, BIIDPA
Mauritius	Data Protection Act	2004	2004	Africa	Both			SADC	Commissariat à la protection des données personnelles	AFAPDP
Mexico	Federal Law on the Protection of Personal Data Held by Private Parties	2010	2010	Latin Am	Both			APEC, OECD;	Federal Institute for Access to Information and Data Protection	ICDPPC, APPA, OPEN, APEC CPEA, RedIPD



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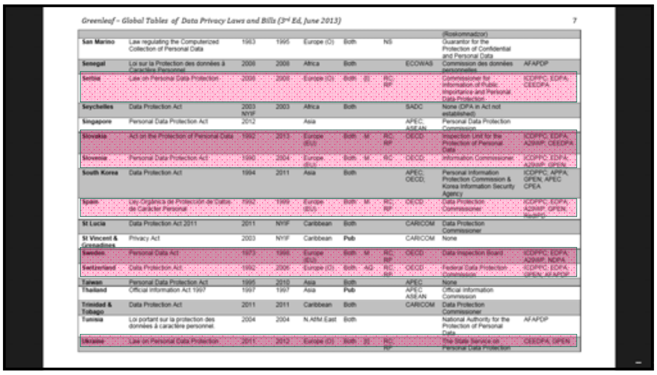
Moldova	Law on Personal Data Protection	2007	2007	Europe (O)	Both	(I)	RC, RP		National Center for Personal Data Protection	ICDPPC, EDPA, AFAPDP, CEEDPA
Monaco	Act controlling personal data processing	1993	2001	Europe (O)	Both	(I)	RC, RP		Supervisory Commission for Personal Information	AFAPDP
Montenegro	Law on Personal Data Protection	2008	2009	Europe (O)	Both	(I)	RC, RP		Agencija za zaštitu ličnih podataka i slobodan pristup informacija	EDPA, CEEDPA
Morocco	Loi relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel	2009	2009	N.Afr/M.East	Both		(IA)		National Commission for the Control and the Protection of Personal Data	AFAPDP
Nepal	Right to Information Act	2007	2007	Asia	Pub				National Information Commission	
Netherlands	Personal Data Protection Act	1988	2000	Europe (EU)	Both	M	RC, RP	OECD	Data Protection Authority	ICDPPC, EDPA, A29WP, OPEN
New Zealand	Privacy Act 1993	1993	2010	Australasia	Both	AQ		APEC, OECD	Privacy Commissioner	ICDPPC, OPEN, APPA, APEC CPEA
Nicaragua	Law on Protection of Personal Data	2012		Latin Am.					Directorate for the Protection of Personal Information	RedIPD
Norway	Personal Data Act	1978	2000	Europe (O)	Both	EEA	RC, SP	OECD	Data Inspectorate	ICDPPC, EDPA, OPEN, NPDA
Paraguay	Law 1682 on Information of a Private Nature	2002		Latin Am	Both				None	RedIPD (o)
Peru	Law on Protection of Personal Data	2011	2011	Latin Am	Both			APEC, US FTA	National Authority for Data Protection	ICDPPC, RedIPD, APPA
Philippines	Data Privacy Act	2012		Asia				APEC, ASEAN	National Privacy Commission	
Poland	Act on the Protection of Personal Data	1997	2004	Europe (EU)	Both	M	RC, RP	OECD	Inspector General for Personal Data Protection	ICDPPC, EDPA, A29WP, CEEDPA, OPEN
Portugal	Lei da proteção de dados pessoais	1991	1998	Europe (EU)	Both	M	RC, RP	OECD	National Data Protection Commission	ICDPPC, A29WP, EDPA, RedIPD
Qatar FC	Data Protection Regulations ('FC' = Financial Centre)	2005	2005	N.Afr/M.East	**Pri**				QFC Authority	
Romania	Law on the protection of individuals with regard to the processing of personal data etc.	2001	2005	Europe (EU)	Both	M	RC, RP		National Supervisory Authority for Personal Data Protection	ICDPPC, EDPA, A29WP, CEEDPA
Russia	Federal Law Regarding Personal Data	2006	NIFU 2011	Europe (O)	Both	(I)	RC, SP	APEC	Federal Service for Supervision of Communications, Information Technologies and Mass Media	CEEDPA



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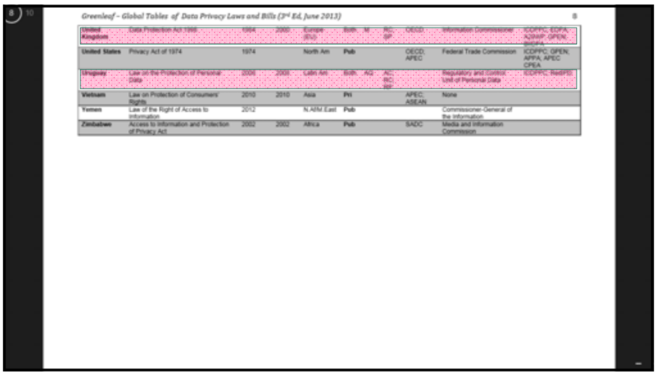
									(Roskomnadzor)	
San Marino	Law regulating the Computerized Collection of Personal Data	1983	1995	Europe (O)	Both		NS		Guarantor for the Protection of Confidential and Personal Data	
Senegal	Loi sur la Protection des données à Caractère Personnel	2008	2008	Africa	Both			ECOWAS	Commission des données personnelles	AFAPDP
Serbia	Law on Personal Data Protection	2008	2008	Europe (O)	Both	(I)	RC, RP		Commissioner for Information of Public Importance and Personal Data Protection	ICDPPC, EDPA, CEEDPA
Seychelles	Data Protection Act	2003 NYIF	2003	Africa	Both			SADC	None (DPA in Act not established)	
Singapore	Personal Data Protection Act	2012		Asia				APEC, ASEAN	Personal Data Protection Commission	
Slovakia	Act on the Protection of Personal Data	1992	2013	Europe (EU)	Both	M	RC, RP	OECD	Inspection Unit for the Protection of Personal Data	ICDPPC, EDPA, A29WP, CEEDPA
Slovenia	Personal Data Protection Act	1990	2004	Europe (EU)	Both	M	RC	OECD	Information Commissioner	ICDPPC, EDPA, A29WP, OPEN
South Korea	Data Protection Act	1994	2011	Asia	Both			APEC, OECD;	Personal Information Protection Commission & Korea Information Security Agency	ICDPPC, APPA, OPEN, APEC CPEA
Spain	Ley Orgánica de Protección de Datos de Carácter Personal	1992	1999	Europe (EU)	Both	M	RC, RP	OECD	Data Protection Commissioner	ICDPPC, EDPA, A29WP, OPEN, RedIPD
St Lucia	Data Protection Act 2011	2011	NYIF	Caribbean	Both			CARICOM	Data Protection Commissioner	
St Vincent & Grenadines	Privacy Act	2003	NYIF	Caribbean	**Pub**			CARICOM	None	
Sweden	Personal Data Act	1973	1998	Europe (EU)	Both	M	RC, RP	OECD	Data Inspection Board	ICDPPC, EDPA, A29WP, NDPA
Switzerland	Data Protection Act	1992	2006	Europe (O)	Both	AQ	RC, RP	OECD	Federal Data Protection Commissioner	ICDPPC, EDPA, OPEN, AFAPDP
Taiwan	Personal Data Protection Act	1995	2010	Asia	Both			APEC	None	
Thailand	Official Information Act 1997	1997	1997	Asia	**Pub**			APEC ASEAN	Official Information Commission	
Trinidad & Tobago	Data Protection Act	2011	2011	Caribbean	Both			CARICOM	Data Protection Commissioner	
Tunisia	Loi portant sur la protection des données à caractère personnel.	2004	2004	N.Afr/M.East	Both				National Authority for the Protection of Personal Data	AFAPDP
Ukraine	Law on Personal Data Protection	2011	2012	Europe (O)	Both	(I)	RC, RP		The State Service on Personal Data Protection	CEEDPA, OPEN



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United Kingdom	Data Protection Act 1998	1984	2000	Europe (EU)	Both	M	AC; BP	OECD;	Information Commissioner	ICDPPC; [illegible]
United States	Privacy Act of 1974	1974		North Am	**Pub**			OECD; APEC	Federal Trade Commission	ICDPPC; GPEN; APPA; APEC CPEA
Uruguay	Law on the Protection of Personal Data	2008	2008	Latin Am	Both	AQ	AC; BC; BP		Regulatory and Control Unit of Personal Data	ICDPPC; [illegible]
Vietnam	Law on Protection of Consumers' Rights	2010	2010	Asia	**Pri**			APEC; ASEAN	None	
Yemen	Law of the Right of Access to Information	2012		N.Afr/M.East	**Pub**				Commissioner-General of the Information	
Zimbabwe	Access to Information and Protection of Privacy Act	2002	2002	Africa	**Pub**			SADC	Media and Information Commission	

THE EU'S ATTEMPTS AT SETTING A GLOBAL DATA PROTECTION NORM

Contents

1. Introduction

The law of one jurisdiction, namely the EU, has become and is becoming the rule in other places for several reasons, including economic ease, accession goals, convenience, regulatory arbitrage and potentially the protection of human rights. This legal diffusion even suggests an overriding data protection norm; however, there is no clear evidence of the existence of such an all-encompassing, widely-accepted norm outside the EU. Indeed, diverse attitudes to data protection and corresponding laws have caused jurisdictional tensions between the EU and third States, most notably the US.

2. Diverse conceptual approaches to data protection in international instruments

Two of the first international instruments regulating data protection, the non-binding FIPs (1973) and the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980), facilitated global data flows for economic, not human rights, purposes. The Council of Europe Convention 108, (1981), however, focused more on protecting human rights, including the free flow of information, but also, and notably, the right to privacy.[1]

The original 1973 United States Federal Trade Commission's Fair Information Practices (FIPs)[2] codified widely-accepted practices on maintaining informational privacy in an electronic marketplace.[3] The FIPS are simply recommendations. Accordingly, they are not legally enforceable, but have been highly influential on subsequent legal instruments on protecting personal data to enhance the free flow of information. The relevant organisations that drew up the 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data and the 1981 Council of Europe Convention 108 consciously followed and expanded the major principles in the FIPs.[4] In view of this, some might argue that the FIPs, being the core of early data protection principles and quickly enshrined in legal instruments, are neither controversial nor contested around the world. In other words, the FIPs could be evidence of a widely-accepted data protection norm. This research argues, however, that the FIPs were more a short set of principles linked to the free flow of information and trade that unsurprisingly influenced subsequent such instruments. Diverse national data protection laws and no existing global data protection instrument confirms that a globally-accepted data protection norm does not exist.

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[1] Hondius, F. W., 'A Decade of International Data Protection', *Netherlands International Law Review*, Vol. 30, 1983, p. 106; OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980); CoE, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data Strasbourg (Convention 108), 28.I.1981.

[2] They have subsequently been updated and are now called the Fair Information Practice Principles.

[3] See the principles https://epic.org/privacy/consumer/code_fair_info.html as extracted from U.S. Department of Health, Education and Welfare, Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens viii (1973).

[4] Gellman, R., 'FAIR INFORMATION PRACTICES: A Basic History', 2015, *available at* http://bobgellman.com/rg-docs/rg-FIPShistory.pdf, p. 8; see OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980); CoE, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data Strasbourg (Convention 108), 28.I.1981.

In terms of diverse conceptual approaches, we can agree that historical experiences, societal values and traditions influence countries' privacy laws (if any exist at all). The EU Charter consolidated the right to protection of personal data as an autonomous right based on constitutional traditions common to Member States. EU representatives often use fundamental rights rhetoric to promote the Union's data protection law. Both of these developments highlight its increasing legal importance. We can accept, too, that the EU has the strictest data protection laws, affording a high level of protection to its citizens' personal data. As such, in the absence of a global data protection norm or a global data protection treaty, the EU has become something of a trend-setter or leader in this area.

3. In the Data Protection Directive[5]

Scope of Application: Article 4, DPD (admits of a degree of external/extraterritorial effect of EU data protection law)

> National law applicable
>
> 1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:
>
> (a) the processing is carried out in *the context of the activities of an establishment of the controller on the territory* of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;
>
> (b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of *international public law*;
>
> (c) the controller is *not established on Community territory* and, for purposes of processing personal data *makes use of equipment*, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community. (emphasis added)

Adequacy Decisions: Article 25 (Article 26 – derogations)

> Principles
>
> 1. The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the *third country in question ensures an adequate level of protection*. […]
>
> 4. Where the Commission finds, under the procedure provided for in Article 31 (2), that a *third country does not ensure an adequate level of protection* within the meaning of paragraph 2 of this Article, Member States shall take the measures necessary to *prevent any transfer of data* of the same type to the third country in question.
>
> 5. At the appropriate time, the *Commission shall enter into negotiations with a view to remedying the situation* resulting from the finding made pursuant to paragraph 4. […]

3(a). Reactions to the adequacy standard

[5] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995.

When the Directive was introduced, the concept of reciprocity in the adequacy standard was promoted.[6] Non-EU officials deemed this approach protectionist and suggested it had an undesirable extraterritorial effect.[7] Since then, however, the EU's approach to data protection has proven largely successful and effective in using legal diffusion to set a high-level data protection norm around the world.[8]

3(b). Direct effects of the adequacy standard

A 2013 geopolitical study of the then 101 States with data protection laws demonstrated that European data protection standards "have had far more influence outside Europe than has been realised" and asserted this influence was only increasing.[9] Here, we look at the quantity and reach of influence, and not necessarily the quality or substance of the laws.

- EU Member States
- EEA – data protection laws consistent with DPD
- Adequacy decisions or close to obtaining them
- Ratified CoE Convention 108 and its Additional Protocol, which is roughly at the DPD standard
- Roughly 53/101 → one jurisdiction's wide sphere of influence
- E.g. US exception – Commission in negotiations (to be discussed using *Schrems* example below)

The EU's clear influence on other States' data protection laws and its open goal to be influential is a key example of a form of the EU (territorially extending its law by) influencing the content of third State law.[10]

3(c). Indirect effects of the adequacy standard

The DPD's adequacy decision clause, as well as its applicable law provisions, directly or indirectly provide for territorial extension of EU data protection law, whereby EU citizens and potentially third State citizens are subject to EU protections. As its regulation is highly influential and many third States have enacted data protection laws to mirror those of the EU's in order to obtain adequacy decisions, the EU is purposefully extending an EU-level of data protection to citizens of third States.

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[6] Moerel, L., *Binding Corporate Rules: Corporate Self-Regulation of Global Data Transfers*, Oxford University Press, Oxford, 2012, p. 19 at fn 9. See also, Prins, C., 'Should ICT Regulation Be Undertaken at an International Level?' in Bert-Jaap Koops et al (eds.), *Starting Points for ICT Regulation. Deconstructing Prevalent Policy One-Liners*, TMC Asser Press, The Hague, 2006, p. 172.

[7] *Ibid*.

[8] *Ibid*.

[9] Greenleaf, G., 'Scheherazade and the 101 data privacy laws: Origins, significance and global trajectories', *Journal of Law, Information & Science, Special Edition: Privacy in the Social Networking World*, Vol. 23, No. 1, 2014; Greenleaf, G., 'The influence of European data privacy standards outside Europe: Implications for globalisation of Convention 108?', University of Edinburgh School of Law Research Paper Series No 2012/12, 2012, abstract.

[10] Scott, J., 'Extraterritoriality and Territorial Extension in EU Law', *American Journal of Comparative Law*, Vol. 62, No. 1, 2014, *available at* http://ssrn.com/abstract=2276433, pp. 87-125, at p. 87.

Whilst this is largely due to trade reasons, as third States would then easily meet the EU's adequacy standard required for cross-border data flows, this might evolve if the EU views its role as something of a norm-setter, promoting the right to data protection abroad.

4. In recent CJEU jurisprudence

4(a). *Schrems* case[11]

Schrems claimed US privacy laws offered no protection from security agencies using EU citizens' data for mass State surveillance. He also sought to highlight the general failings of the 2000 US-EU Safe Harbour agreement at ensuring EU residents' data adequate protection when processed in the US. The Safe Harbour agreement purports to ensure that US companies apply EU-level data protection standards, which are more stringent than those in the US, to EU personal data when it is exported to the US. US companies can join the Safe Harbour agreement voluntarily; they then self-certify their compliance with its provisions. It has always been controversial. In March 2014, the European Parliament called for its suspension. The European Commission is currently attempting to renegotiate the agreement.

On 6th October 2015, the CJEU declared the Safe Harbour agreement invalid, in line with the Advocate General's opinion. The Court ruled that national supervisory authorities may consider whether data transfers to a third State comply with the relevant DPD and EU Charter provisions, even if the European Commission has found that State to provide an adequate level of data protection. Only the CJEU, however, may declare an adequacy decision invalid.

On the Safe Harbour agreement, the Court stated that the US needed to protect EU citizens' fundamental rights to an "essentially equivalent" degree as in the EU.[12] This protection is required by the DPD read together with the EU Charter. The Court found that the Safe Harbour agreement did not prevent US authorities from interfering with EU citizens' fundamental right to data protection, especially as US security and law enforcement requirements overrule protections in the Safe Harbour agreement. For this and other reasons, the Court declared the agreement invalid.

What qualifies as "essentially equivalent"? Is this a higher standard than "adequate"? Would changing the Safe Harbour agreement to better protect EU citizens' data exemplify norm diffusion? A form of soft law?

5. The struggle between the EU and external actors

[11] CJEU (GC), Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*, 6 October 2015.
[12] *Ibid.*, paras. 73, 74 and 96.

Scott asserts it is erroneous to suggest that the EU strives to export its own norms through the territorial extension of its law.[13] This research, however, takes the approach that the EU *is* a norms-setter that sets norms through leading by example, instead of through coercion.[14] The Union is attempting to set a data protection norm, of which no global norm exists. As no such norm exists, external actors are wont to contest the EU's stringent approach to data protection law. The Union's domestic law might appear internationally, whilst what appears internationally might also have an effect on the EU domestically: there is a constant struggle with the EU's attempts at norm setting and external reactions to this.[15]

6. Conclusion

As the fundamental right to data protection morphs to carry more weight in the EU, this could amplify the EU's obligations under fundamental rights law to protect its citizens' personal data when such data is processed outside EU territory. It is doing this through the soft power and legal diffusion implied in its adequacy decision requirement and resultant negotiations of data transfer agreements. To extrapolate this further, the EU appears to be moving beyond being simply an economic and political union to something closer to a global fundamental rights actor or norm setter, especially in the data protection realm.

[13] Scott, J., 'Extraterritoriality and Territorial Extension in EU Law', *American Journal of Comparative Law*, Vol. 62, No. 1, 2014, *available at* http://ssrn.com/abstract=2276433, pp. 87-125, at p. 87.
[14] "The EU has been, is and always will be a normative power in world politics." -Manners, I., 'The normative ethics of the European Union', *International Affairs*, Vol. 84, No. 1, 2008, pp. 45-60, pp. 45-46, *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2346.2008.00688.x/epdf. Thank-you to Dr. Kolja Raube for his helpful comments on this topic at a KU Leuven PhD Colloquium, 8th May, 2015.
[15] Gourevitch, P. 'The Second Image Reversed: The International Sources of Domestic Politics', *International Organization*, Vol. 32, No. 4, 1978, pp. 881-912.