



Friedrich Naumann  
STIFTUNG **FÜR DIE FREIHEIT**

A Ludwig von Mises Institute – Europe report on

## **“Data Transfer Regulations for Cloud Computing”**



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A **Ludwig von Mises Institute – Europe** Report

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# “Data Transfer Regulations for Cloud Computing”

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# “Data Transfer Regulations for Cloud Computing”

## Programme

### Organizers:

The Ludwig von Mises Institute Europe

The Friedrich Naumann Stiftung für die Freiheit

### Time and venue:

November 27<sup>th</sup> 2012, 7.30 – 10.00 pm

Hotel Leopold, Rue du Luxembourg 35, Brussels



# “Data Transfer Regulations for Cloud Computing”

## Speakers and Moderator

### Speakers:



**Annette Godart – van der Kroon**

*President of the Ludwig von Mises Institute – Europe*



**Sophie In 't Veld**

*Member of the European Parliament for ALDE*



**Prof. Dr. Christopher Kuner**

*Fellow of the Centre for European Legal Studies, Cambridge, and Editor in Chief of the law review International Data Privacy Law*



**Dr. Carl-Christian Buhr**

*Member of the Cabinet of Ms Neelie Kroes, European Commission Vice-President for the Digital Agenda.*



**Jean Gonié**

*Director of Privacy Policy Europe, Middle East and Africa for Microsoft*



**Hans Stein**

*Director of the Friedrich Naumann Stiftung für die Freiheit*

**Moderator:**

**Daniela Vincenti**

*Editor-in-Chief at EurActiv*



# “Data Transfer Regulations for Cloud Computing”

## Description of the topic

The Commission’s proposed general data protection regulation is currently undergoing its first reading in the Parliament. Among other elements, the proposal includes provisions that will govern **data transfer** – the flow of data within the EU, and to and from third countries. This is a critical dimension of the data protection discussion.

Being able to move data across borders safely and effectively is a precondition for the successful uptake of **cloud computing** in Europe, and for the realization of the economic benefits and innovative services that cloud computing is expected to bring.

As Commissioner Neelie Kroes has said in connection with the recent creation of the European Cloud Partnership, “Europe has to become not only Cloud-friendly but Cloud-active”. The proposed regulation needs to facilitate the safe, effective transfer of data internally within the Union, and to and from third countries, and to encourage industry players to compete to offer users better and more innovative data protection technologies.

As the Parliament prepares to propose amendments to the Commission’s text, a roundtable brought together experts from academia, industry and local government to outline their views on what provisions are needed to “future proof” the EU legislative framework.





## Introduction

The President of the Ludwig von Mises Institute Mrs. **Annette Godart – van der Kroon** welcomed the participants to the dinner debate and started her speech with reminding that the EU is currently revising its general data protection framework. She posed the question what kind of rules on the electronic transfer of data – within the European Union and to third countries – would give Europe the best chance of reaping the benefits of the move to cloud computing, while providing strong protection to EU-based users, both individuals and companies.

As Danny Palmer<sup>1</sup>, online and broadcast journalist, wrote in his article “Making a Europe fit for the cloud”:

“While Europe teeters on the brink of financial Armageddon, the European Commission (EC) claims that a coherent cloud strategy for the bloc could generate £127 billion per year and create 3.8 million jobs.

In its *Unleashing the Potential of Cloud Computing in Europe* report<sup>2</sup>, the European Commission suggests that implementing a coherent cloud strategy across the region could cut the operational costs of IT departments for all types of organizations, along with boosting productivity and growth.”

For Europe to reap the full economic benefit of cloud computing it will require clear and workable guidelines for data transfer in the EU’s reformed Data Protection Package – the subject of the debate.



<sup>1</sup> <http://www.computing.co.uk/author/profile/2485/danny-palmer>

<sup>2</sup> [http://ec.europa.eu/information\\_society/activities/cloudcomputing/docs/com/com\\_cloud.pdf](http://ec.europa.eu/information_society/activities/cloudcomputing/docs/com/com_cloud.pdf)



Talking about reducing market fragmentation, the fragmentation of the “digital single market” also needs to be addressed before a coherent cloud strategy can be implemented across Europe. Currently, the different national legal frameworks across member states, combined with uncertainties over how digital content and data laws operate when crossing borders, stand in the way of a single European standard.

That’s not to say the strategy is based around a “European Super-Cloud,” a suggestion the EC is keen to refute. Instead, the aim of the policy is to provide an umbrella organization. This European Cloud Partnership will bring together industry experts and public-sector agencies – such as those responsible for the government services focused G-Cloud in the UK and Andromede, its equivalent in France – in order to help provide a cloud infrastructure that all member states will benefit from. Identifying the key needs of the public sector is seen as a vital issue in successful implementation of an EU cloud strategy.

The EC is also seeking to promote the adoption of similar standards in countries outside of its jurisdiction. Its report makes reference to the need for a “reinforced international dialogue” in a world that’s increasingly free of borders, due to the spread of the internet.

American businesses, including Amazon, Google and Microsoft, already have a major cloud presence within the EU, meaning that the US potentially has much to gain from a Europe-wide cloud strategy as its’ companies, too, will be able to take advantage of improvements in infrastructure and clarity of the regulations.

While welcoming the effort to achieve an integrated market, US companies may be worried that the free flow of data between Europe and the US will not actually be facilitated by the new rules.

There has long been tension between the US and the EU when it comes to transferring data, not least because the United States Patriot Act – signed by George W Bush in the aftermath of 9/11 – overrides EU data protection laws, allowing the US government potentially to access personal data stored anywhere on the globe.

In a world which depends increasingly on the global flow of capital, goods and services, ensuring appropriate mechanisms to facilitate safe and secure flows of data would seem to be a key challenge in building the knowledge-based economy.

A recent Study<sup>3</sup> on the Reform of the Data Protection Package commissioned by the European Parliament's Committee on Internal Market and Consumer Protection recommends taking into account, among other things, a dedicated cloud Safe Harbour, binding Corporate Rules as well as self-regulatory instruments and industry standards to facilitate the international transfer of data.

To enhance the free exchange of capital, goods and services and in this case exchange of data information and preserve the freedom and protection of the customer in the same time, is a challenge. Freedom is always and only possible in the framework of the Rule of Law. Freedom, in fact, presupposes that the individual has some private sphere, that there is some set of circumstances in his environment with which others cannot interfere.

Freedom is not self-evident, but we have to accept the reality that freedom has two faces: we want to be free to act and in the same time we want to be protected. To find this thin line is very difficult, but not impossible.

## **Speakers' interventions**

**Sophie in't Veld**, MEP for ALDE, started her speech about cloud computing with the motto: "the sky is the limit". Ms. In't Veld said that so far legislation was limited and determined nationally. These borders are fading and therefore the legislation cannot be applied just for a specific geographical territory as "the clouds are drifting". In her view, we should not see data protection rules as an obstacle for the business, but instead it should be regarded as a pre-condition for free trade. The MEPs by itself don't have a solution; there are no individual, national and even European solutions. We need global ones, and the only way to make it is to cooperate with different people in all the continents. The rules,

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<http://www.europarl.europa.eu/document/activities/cont/201209/20120928ATT52488/20120928ATT52488EN.pdf>

regulations and directives approved until now by the European Parliament and the European Commission are a minimum standard, and in fact, what we need is to raise up a culture of data protection and in that context trust and transparency are very important. The Europeans want to find the ultimate solution and, in order to do that, we need to be leading and run away from the thought that data protection is limitation. That should help to give an advantage to the European companies and let them be more competitive. The American companies are lobbying very hard for Europeans not to have a regulation. In Mrs. In't Veld's opinion, data protection should be a standard agreement for free trade agreements.

All in all, the main points that Ms. Sophie in't Veld has covered are that data protection has no geographical boundaries and the decisions have to be made globally and in cooperation. Therefore a new culture has to be developed and trust is one of the most important things as data protection is not a limitation, but rather a guarantee of freedom of speech, anonymity and even a means to consumer's choice. Data protection is also vital for the competition policies.

Given the impact of cloud computing, data protection is becoming more important and consequently people want to benefit from its' use. Thus we need more data protection. The more clouds we have – the better it is.

**Dr. Christopher Kuner** emphasized, that this topic concerns all of us, as individuals and in order to make it less complicated, defined that the data we need to protect are the data on the internet.

The first thing to realize is that there are problems related with data protection not only in the EU but also in South America, Asia and other continents, in



international organizations, such as the OECD. This means that the regulations should be adopted not in the small European bubble but worldwide. But then, there is a problem: how to create a regular framework which would work for everyone? And what kind of regulation structure is needed? How can an individual protect his data in the third countries if, even within Europe, the regulation does not fully work? So, the first thing needed is to create a system that works in Europe.

Mr. Kuner also mentioned that the question remains of whether people are willing to give up their national constitutional rights in favor of EU constitutional rights. On the other hand, governments should follow the same rules as they want the companies to follow. Another point of criticism was that the discussion is focused too much on legal regulation rather than on practical issues: there is a lack of practical tools. Dr. Christopher Kuner showed some skepticism regarding the legislative proposals made by the Commission, and noted that given the current financial crisis, economic growth is an important factor of concern. In his opinion, despite the fact that the current legislation on data protection is 15 years old, it is not working so badly. Despite that, he admits that's some changes may be developed, as long as companies are asking themselves to whom they should turn if they have a problem concerning the data protection. The authorities lack resources and they are not fully regulatory independent. Since January 2012 the European Commission is working on this issue.



## The Panel

During the panel discussion, **Dr. Carl-Christian Buhr**, European Commission, emphasized that cloud computing really could be a competitive advantage, as new opportunities of business shall arise and new interesting things can be done to make data much more secure.

Mr. **Jean Gonié**, the Microsoft representative for this debate, mentioned it was key to make privacy a competitive advantage at Microsoft. It is in Microsoft's DNA to "think privacy" and propose services in a privacy-compliant way.

He stated that it is up to companies to make a difference and initiate change, and the new EU regulatory framework ought to maximize the incentives for them to do this. For example, the new general data protection regulation could provide for EU-wide codes of conduct and schemes to award "trust marks" that would reward companies that innovate in the area of privacy and data protection. Mr. Gonié explained that customers want trust and transparency and they want to see concrete proof of the location of the data. Companies must be responsible for the data. SMEs role is essential in the EU market. Cloud computing is about doing more with less, so to achieve a full success SMEs should notice its importance. Mr. Gonié at the end of his speech highlighted the link between helping the EU embrace the cloud and promoting a "culture of data protection".

Mr. Gonié recalled that during Q & A, the question of how long the process will take to pass the regulation through the European Parliament had been raised. In fact it does take time for the process to move and it faces difficulties but it is important to develop a new culture of privacy, accountability, credibility, trust and transparency. These are the words that should be linked with data protection. Codes of conduct, trust-marks and the like are potentially important instruments to demonstrate that a company is trustworthy. Ideally the future EU regulation will provide a legal framework to encourage their emergence.

Mrs. **Daniela Vincenti**, the moderator of this debate, referred to the speech on data protection of the US Ambassador to the European Union, Mr. William Kennard. With this comment Mrs. Vincenti stated that, although the US and the

European systems are structurally different, both have the chance to build the foundation for a transatlantic digital single market. Those structural differences relate to the fact that in the US there is a well-developed privacy system but rooted in many statutory authorities and are therefore more sector-specific, while by contrast, the EU's legal tradition favors a single statutory framework, with centralized enforcement by national and EU-level data privacy authorities. According to Mr. Kennard, "The United States government is engaged with the EU on a wide range of data privacy issues". Again, the issue is assuring that all the personal data shared by consumers with companies doing business in both Europe and in the US is provided with high standards of protection.

## Conclusion

In his concluding remarks **Hans Stein**, Director of the Friedrich Naumann Stiftung für die Freiheit, urged the institutions to decide on a coherent regulation that opens up business opportunities while not harming privacy rights. He also repeated the quote that the "sky is the limit", but that he hoped we will be able to avoid the "skyfall".





# “Data Transfer Regulations for Cloud Computing”

## List of Participants

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**Jasper Bergink**

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**Henry Borzi**

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zeroemission.eu

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# “Data Transfer Regulations for Cloud Computing”

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