



# Transatlantic issues in privacy policy: Laws (GDPR, the CLOUD Act) and implementation

Considerations from an ICT R&I perspective

PICASSO Policy Expert Group



# GDPR and the CLOUD Act

Transatlantic tensions in the development of privacy-related policies

**New laws, technologies and levels of public attention have raised the stakes and uncertainties regarding privacy.**

**Focus is on constraints and opportunities for joint research, new challenges for joint research into 'compliance by design' and prospects for coordinated policy responses.**

# Policy Expert Panel

Moderator:

- Maarten Botterman, GNKS, The Netherlands, and ICANN Board of Directors

Panelists:

- Jonathan Cave, GNKS, University of Warwick, Alan Turing Institute and UK Regulatory Policy Committee, United Kingdom
- Avri Doria, Association for Progressive Communications (Researcher), and ICANN Board of Directors
- Glenn Ricart, Founder and CTO, US Ignite, US
- Dan Caprio, The Providence Group, US, and AEGIS project representative

# Background

## > The EU setting – some main developments

- PDPD to GDPR (focus on data privacy)
  - ★ Scope and extraterritoriality (destination, effects, subjective)
    - Art 3. protection against foreign powers (where effects are felt)
    - Art 48 data transfers (where data are stored)
  - ★ Emphasis on shared data controller/processor responsibility
  - ★ Legal bases for processing: consent and legitimate interest
  - ★ The penalty regime
- ePrivacy I,II (focus on confidentiality and electronic communications) –
  - ★ Natural *and legal* persons
  - ★ Spam, NW security, cookies, breach notifications, extension to metadata

## > The US setting

- Stored Communications Act to CLOUD
  - ★ From warrants to subpoenas: also extraterritoriality by nature (formulaic reference to legal ‘home’ of data controller – possession, custody or control)
  - ★ 3 elements:
    - Moots Microsoft case: requirement to disclose, preserve and back up)
    - (Judicial, *ex ante* discretionary) comity protections extend access to ‘qualifying’ foreign governments unless subject is not a US citizen or resident and disclosure would break foreign law;
    - Executive Agreements with foreign countries (not for data on US folks, which requires former Mutual Legal Assistance mechanism;

## Background: EU-US

- Challenge: GDPR and CLOUD may be incompatible
- EU has announced plans for its own version of CLOUD (a race to the bottom in protection against government access?)
- European Parliament LIBE committee has called for suspension of Privacy Shield (GDPR compliance, competitive harm, remedies for EU citizens against US entities)
  - Institutional: support for oversight on US side (partially resolved)
  - Commercial: false self-certifications; scope for automated decision-making
  - National security: FISA Sec. 702 surveillance (bulk collection?); CLOUD and EU counterparts, bypass MLA safeguards; standing/redress rights
- Practical aspects of implementation
- Treating people as rational; proportionality

# Relevance to technology development

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- Basic protections and carve-outs for science and government purposes
- Definition(s) of 'processing' and consent
- Extraterritoriality and data handling (esp. Cloud and Big Data)
- Specific rights issues: erasure, automated processing, explication
- Repurposing and retention of 'flow' data (anonymisation, differential privacy)
- Machine learning and private inference from public data

# Relevance to research collaboration

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- Ethical and legal constraints on data-relevant R&I
- Data access and IPR implications
- Beyond privacy interests, how is R&I affected?

# Policy implications

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- Evolution of access control policies
  - Competing policy drivers
  - Range of stakeholder/actor interests
  - Technical and technological responses to legal requirements
- Processes of law-making
  - What do we learn from the rocky history of these acts?
  - Can we create a protected space for scientific data use?
- Can technology be used to address the challenges of the law (by design and/or default)?

# The road ahead

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- Privacy and security
- Agreements or common frameworks
- Adequacy of carve-outs and protections for
  - International collaborations
  - Global data collection
  - Commercial application
  - Security policies
- A side issue: algorithms, AGI and machine learning – are the new rules already obsolete?

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# QUESTIONS?

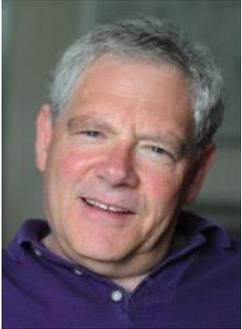
# Maarten Botterman's bio



## Maarten Botterman Director GNKS Consult, Netherlands

- **Maarten Botterman** is Founder and Director of GNKS, a company known for its policy research on information society issues (“where technology meets society”). He is also Director on the Board of ICANN, Chairman of the Supervisory Board of NLnet Foundation, Chair of the IGF Dynamic Coalition on the Internet of Things, and Director on the Board of the Institute for Accountability in the Digital Age.
- Maarten is independent strategic policy advisor to governments and corporates on European, US and global information society policy issues related to the emergence and evolution of the Internet.
- He has been involved in Information Security policy, Data protection, Future Internet and Internet Governance, both as policy analyst (RAND, GNKS) and as Chairman on the Board of the third largest general Registry in the world (Public Interest Registry, serving .ORG and .NGO, a USA based non-profit business). He has been involved in studies and impact assessments around future internet and other ICT policy related studies since 1999.
- In the project PICASSO “ICT Policy, Research and Innovation for a Smart Society: towards new avenues in EU-US ICT collaboration“, he chairs the EU-US ICT Policy Expert Group.

## Prof. Dr. J.A.K. Cave's bio



### Prof. Dr. J.A.K. Cave

**Full Professor at Warwick University, United Kingdom**

**Economist member of the UK's Regulatory Policy Committee**

- **Prof. Dr. J.A.K. Cave** is Professor in Economics at Warwick University. Jonathan Cave holds degrees from Yale (B.Sc.), Cambridge (MA), and Stanford (Ph.D.). In his position as Senior Economist at RAND Europe (up to February 2015), he has led projects on a variety of issues in telecommunications (transition from rate-of-return to price-cap regulation, legal issues arising on the electronic highway, universal service and the Internet), social policy (effects of aging European populations), industrial policy, and government's evolving role (passing on costs of government activity to private parties, market failure in the waste disposal industry, use of government procurement as a tool to spur innovation).
- Many of these projects involved international comparisons and teams spread across different organizations and nations. He is recently appointed as Economist member of the UK's Regulatory Policy Committee.
- Prof. Dr. J.A.K. Cave is member of the EU-US ICT Policy Expert Group in the project PICASSO "ICT Policy, Research and Innovation for a Smart Society: towards new avenues in EU-US ICT collaboration".

# Glenn Ricart's bio



## Glenn Ricart Founder and CTO of US Ignite, USA

- **Dr. Glenn Ricart** is a technologist, businessman, CTO, computer networking and security specialist, and academic / educator. He has worked at the intersection of business, policy, and technology for more than 30 years. Among other accomplishments, he started what might be viewed as the first Internet Service Provider (ISP), has founded or co-founded 3 successful startups, served as EVP and CTO of Novell, and been DARPA's liaison to the Clinton White House. Areas of computer technology interest include: networking, security, wireless, and distributed algorithms. Dr. Ricart's most requested talks are on the future of technology and the application of that future to business or policy.
- Glenn previously served on the boards of the Internet Society, Public Interest Registry, BITNET, CACI, First USA Financial Services, Santa Cruz Operation, and NASULGC. He was inducted into the Internet Hall of Fame in 2013
- Dr. Glenn Ricart is member of the EU-US ICT Policy Expert Group in the project PICASSO "ICT Policy, Research and Innovation for a Smart Society: towards new avenues in EU-US ICT collaboration".

# Avri Doria's bio



## Avri Doria Researcher, Technicalities; Director on the ICANN Board

- **Avri Doria** is a contractual researcher, and is the current Principal Researcher with Technicalities, a research group supporting human rights and public interest concerns. Since June 2012 she has been a Policy & Governance Advisor with dotgay LLC. She is also Member of the ICANN Board of Directors.
- She has been involved with ICANN and GNSO since 2005. In 2005 she was elected to the GNSO council to represent the NCSG. In 2013 she served as a member of the ATRT. She has previously served as the chair of the GNSO Council as a Nomcom appointee to the Council and the NCSG Executive Committee. In June 2014 at ICANN 50 in London, Avri was announced as the first ever recipient of the ICANN Multistakeholder Ethos Award. The award is given to a community member in recognition of his/her work in ICANN groups, programs, and participation in the Internet Governance community in general. Avri was recognized for her work in ICANN Working Groups and various constituencies as well as her participation in IGF, IETF, ISOC, and others.
- Avri Doria is member of the EU-US ICT Policy Expert Group in the project PICASSO "ICT Policy, Research and Innovation for a Smart Society: towards new avenues in EU-US ICT collaboration".

# Dan Caprio's bio



## Dan Caprio Co-Founder and Executive Chairman, The Providence Group

- **Dan Caprio**, Co-Founder and Executive Chairman of The Providence Group, is an internationally recognized expert on privacy and cybersecurity.
- He has served as the Chief Privacy Officer and Deputy Assistant Secretary at the Commerce Department, a transatlantic subject matter expert for the European Commission's Internet of Things formal expert group, a Chief of Staff for a Federal Trade Commission Commissioner and a member of the Department of Homeland Security Data Privacy and Integrity Advisory Committee. In 2002, Dan was a representative for the United States delegation revising the OECD Security Guidelines that formed the basis for the first White House Strategy to Secure Cyberspace.
- Dan Caprio is member of the EU-US ICT Policy Expert Group in the project PICASSO "ICT Policy, Research and Innovation for a Smart Society: towards new avenues in EU-US ICT collaboration".