



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Changes In EU Data Protection Regime Could Repel US Cos.

By **Allison Grande**

Law360, New York (January 09, 2013, 11:21 PM ET) -- As part of an ongoing data protection overhaul, the European Parliament on Tuesday proposed to adopt a privacy regime that attorneys call extraordinarily restrictive, saying it could drive international companies like Google Inc. and Facebook Inc. from the bloc.

In a 215-page report, Parliament member Jan-Philipp Albrecht offered revisions to a privacy proposal the European Commission put forward in January 2012, seeking to replace the bloc's current 1995 directive with a modernized regulation that would apply to all member states uniformly. As things are now, each member state implements the privacy directive individually, through its own national laws.

Attorneys said there were a number of troubling changes in the 215-page report Albrecht prepared for the Civil Liberties, Justice and Home Affairs Committee, which floated 350 amendments to the EC's plan.

"While there are good and bad amendments from a business perspective, this isn't an amendment that makes the regulation more pragmatic and usable for businesses," U.K.-based Latham & Watkins LLP partner Gail Crawford told Law360 on Wednesday. "On the whole, they probably come out worse than they were with the European Commission's proposal."

Albrecht proposed limiting a common exception that companies use to process data without users' consent, as well as setting an expiration date for the safe-harbor program that allows for data transfer between the U.S. and European Union. He aimed to draw more companies into the regulation by clarifying that it applies to non-EU companies that offer free services to EU citizens and companies that process data relating to more than 500 subjects.

"The members of Parliament have removed any ambiguity as to when data such as [Internet Protocol] addresses are personal data, so those companies [that] rely on such data are more likely to become subject to its provisions," said Chris Pounder, the director of U.K.-based Amberhawk Training Ltd. "This has resulted in a knee-jerk reaction — which is understandable, because such organizations see the regulation mainly as a restriction on their profitability."

Albrecht's proposal would make it more difficult for international companies to operate in the bloc by limiting their ability to process data and stunting the flow of information between the EU and foreign companies, according to attorneys. This could lead international companies to leave the bloc rather than comply with the new rules.

"Imagine Facebook pulling out of Europe, for example, because it was too expensive to comply with the right to be forgotten and the fines were too great a risk," Susan Foster, a London-based member of Mintz Levin Cohn Ferris Glovsky & Popeo PC.

While companies perceived the original "right to be forgotten" proposal in the European Commission's draft to be "too burdensome," the latest amendments eased some of these concerns by adding the qualification that the data processor must get third parties to erase data transferred by it where the transfer was "without legal justification," Foster noted.

But several other proposals still raise cause for concern and could repel international companies, according to attorneys.

The Association for Competitive Technology — a trade association representing more than 3,000 application software developers and small and midsize technology companies in the U.S. and Europe — echoed this concern Tuesday. The rules, if adopted, "will undeniably reduce innovation in the market and lead more entrepreneurs to escape Europe's hostile regulatory environment," it said.

The draft amendment's support of extending the regime's scope outside the EU could have a significant effect on international business, attorneys say. Its clarification that the regulation would apply to data protection activities "aimed at" EU citizens "irrespective of whether payment for these goods or services is required" is also expected to cast a long shadow.

"The proposed extension of jurisdiction is problematic on several levels ... [and] is likely to create direct conflicts with other jurisdictions' rules," said Christopher Wolf, Hogan Lovells' privacy and information management practice group director.

U.S.-based companies could also experience new difficulties receiving data from EU business partners and clients, due to a proposed amendment that would allow existing EC decisions on international data transfers to remain in effect for only two years after the regulation is enacted. This includes the popular U.S.-EU Safe Harbor program, which aims to bridge gaps between the privacy policies of the two regions.

"The proposal to force renegotiation of the safe harbor is very troubling," Wolf said. "At a time when the EU should be moving towards recognition of the U.S. privacy framework as adequate and working on interoperability and cooperation, the notion that the safe harbor must be re-examined is a harbinger of serious trade conflict."

The amendment could shut companies out of Europe, forcing them to renegotiate contracts with European clients as well as divisions of their own organization that have offices in the bloc, Crawford noted.

Companies in both the U.S. and Europe are also wary of the proposal to severely scale back a widely used exception that allows them to rely on "legitimate interests" as a basis for processing personal data, according to attorneys.

"The committee's proposal restricts the availability of the legitimate interests ground, and removes the possibility of relying on it where the data are to be processed for additional purposes," said Bridget Treacy, leader of the U.K. Privacy and Information Management practice at Hunton & Williams LLP. "These changes, together with a general ban on profiling ... would severely restrict the use of 'big data' and analytics."

Despite these concerns, Francoise Gilbert of the IT Law Group countered that several of the provisions could benefit companies because they use "more precise, technical language." The new proposal's suggestion to remove a significant amount of the EC's power to change the regulation without a long legislative process would "bring a more

balanced approach than the current draft regulation," she said.

Attorneys cautioned that the proposed amendments are by no means the last word on the issue. Parliament is set to consider them through April, before they head to the EC and the European Council for further discussion.

"We have some doubts that the proposal will be approved by the European Parliament as such," Brussels-based Covington & Burling LLP special counsel Monika Kuschewsky said. "Rather, we expect that a lot of changes to the report will be made in an effort to strike a better balance, taking account of practicalities and business needs."

--Editing by Kat Laskowski and Elizabeth Bowen.

All Content © 2003-2013, Portfolio Media, Inc.