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European Shift to Concrete Cost Analysis of Data Protection



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Following meetings held Feb. 24-25, the Council of the European Union released its “Conclusions”¹ in response to the EU Commission’s Nov. 4, 2010 “Communication”² proposing “a comprehensive approach on personal data protection in the European

¹ See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/119461.pdf.

² See http://ec.europa.eu/justice/news/consulting_public/0006/com_2010_609_en.pdf.

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Union.” The Council is the main decision-making body of the European Union, comprising the ministers of the Member States. Depending on the issue on the agenda, each country is represented by the minister responsible for that subject (foreign affairs, finance, social affairs, transport, agriculture, etc.).

These developments from the Council and the Commission are of considerable potential significance to EU and multinational businesses because they signal an intention of the European Union—as distinct from the Data Protection Authorities of each Member State—to overhaul the regulation of data protection in the European Union. Moreover, the Council’s embrace of “concrete cost analysis” for new data protection measures and lowering of regulatory burdens for data controllers may represent a new policy perspective for the European Union

The Council’s emphasis on reducing the cost burden on business would seem to be a direct response to a provision in the Commission’s Communication indicating that “One of the main recurrent concerns of stakeholders, particularly multinational companies, is the lack of sufficient harmonisation between Member States’ legislation on data protection, in spite of a com-

mon EU legal framework. They stressed the need to increase legal certainty, lessen the administrative burden and ensure a level playing field for economic operators and other data controllers.”

In addition, the Commission’s Communication, and thus the Council’s Conclusions, should be read in the light of a recent statement by the EU Commissioner in charge of data protection, European Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding.³ For example, she wrote the following about the approach the European Union should adopt toward cloud computing:

“The underlying approach should be a ‘cloud-friendly’ environment. Having cloud-friendly rules can only help technology companies—many of which in Europe are small businesses—to know exactly what is allowed and what is not. This may mean simpler, harmonized measures, such as the registration forms for notification purposes. We also want to encourage self-regulatory initiatives. Codes of conduct or codes of practice like the ‘binding corporate rules’ for international data transfers are good solutions. Regulatory certainty is essential: companies must know what the rules are about the flow of data within the EU and at a global level.”

Specifically, the Council supports significant reform to deal with advent of globalization and technological developments, such as cloud computing, and has encouraged the Commission to provide greater legal certainty for “data controllers” and those involved with cross-border activities. The Council’s conclusions call for introduction of a “privacy by design” principle, the expansion of the scope of personal data that may be considered sensitive, the addition of an “accountability” principle, use of EU standard privacy information notices, a new right to be forgotten, and the extension of the Directive into the realms of cooperation with law enforcement.

Significantly, however, the Council would balance data protection objectives against the following conclusions that it also expressly endorsed:

- the importance of reducing administrative burdens of data controllers;
- the economic importance of international data transfers to the European Union; and,
- the need for the EU’s new legal framework for data protection to contain a concrete cost analysis for all the new measures.

The Council also encouraged the European Commission to seek international cooperation on data protection standards.

POLICY THEMES

Other significant conclusions of the Council include the following:

- The Treaty of Lisbon establishes a new legal basis for the adoption of personal data protection legislation with regard to the processing of personal data by EU institutions, and in particular allows the Directive’s extension into police cooperation and judicial cooperation in criminal matters

³ Viviane Reding, *The Digital Forecast Is Cloudy: European Consumers Need Protection Against Misuse of Their Information in the Online “Cloud,”* Wall St. J. Euro. Ed., Jan. 25, 2011, at 13

- Lack of proper harmonization has led to a situation where the Data Protection Directive’s objective of the free movement of data is not fully achieved. Better harmonization at a high level of data protection would be beneficial for both data subjects and data controllers.
- The Commission should explore the possibility of including a provision on the “privacy by design” principle in the new legal framework and to favor privacy-enhancing technologies.
- Special attention should be given to data sharing by minors.
- EU certification schemes and self-regulatory initiatives should be introduced with data protection authorities to enhance compliance.
- The impact of new technologies on the protection of personal data must be carefully examined, in particular with regard to the need to inform data subjects in simple language about the impact of new technologies on their privacy and to provide “privacy by default” options.
- The impact assessment for a new proposal by the Commission for a new data protection legal framework should contain a concrete cost analysis for all the new measures proposed therein.
- Privacy legislation should reflect the economic importance to the European Union of international data transfers.
- The special protection of sensitive personal data (including genetic and biometric data) will remain and may be expanded against the background of new technological developments.
- The EU Commission should seek cooperation with third countries and the development of an approach which is compatible with international organizations such as the Organization for Economic Cooperation and Development and the Council of Europe.
- Consideration should be given to the possible use of EU standard privacy information notices to increase data subjects’ awareness of the implications of data sharing.
- The concept of accountability should be explored with a view to diminishing the administrative burden on data controllers, for instance by simplifying or tailoring adequate notification requirements.
- The Commission should explore the possibilities of using the principle of accountability and instruments of self regulation which may be conducive to smoother functioning of the internal market in order to achieve a higher level of compliance with data protection rules.
- The Commission should more precisely define the rights of data subjects and explore the opportunity as well as the costs to business and EU competitiveness in extending data breach notification obligations to sectors other than the telecommunications sector.
- Data breach notification should only apply only if the risks stemming from the breach can impact negatively on the individual’s privacy.
- The Commission should explore the introduction of a right to be forgotten, as an innovative legal instrument, insofar as the exercise of such a right is enabled by new technologies.

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- In the interest of lessening the administrative burdens of data controllers, the Commission should review the current requirements of notification.
 - The Commission should enhance the data controller's responsibility and include in its impact assessment an evaluation of the possible appointment of data protection officers
 - Data protection authorities should harmonize their activities more extensively to assist data subjects in the exercise of their rights and promote greater certainty.

CONCLUSION

The conclusions and themes set out by the Council will certainly need to be considered by the European Commission as it develops a new legal framework for data protection and privacy. The themes, once devel-

oped into the new EU legal framework, undoubtedly will have a significant impact on businesses.

The development of the new legal framework will be closely watched by regulators across the world and particularly in the United States where these themes are worthy of careful consideration by Congress, the Department of Commerce and Federal Trade Commission as they proceed with their current focus on policy frameworks for privacy in the United States. In particular, the concept that a new framework for data protection should be developed in light of a "concrete cost analysis" is consistent with the recent reaffirmation of the Obama administration that new and existing regulations should be tested against rigorous cost-benefit analysis, and that unduly burdensome regulations will threaten economic prosperity and technological innovation.