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EU Data Protection EC Considering Cloud Safe Harbor Program As Data Directive Amendment, Reding Says

by Julian Hale

BRUSSELS—The European Commission is considering creating a system for non-EU cloud services providers and other firms to accept personal data from the European Union in compliance with the EU Data Protection Directive (95/46/EC) by voluntarily agreeing to adhere to the directive's data protection requirements, European Justice Commissioner Viviane Reding said May 18.

“Such a mechanism would be possibly linked to certification and with guarantees for auditing and enforcement. Over time, this could become an ‘EU Safe Harbour’ system,” Reding said in a presentation at the European Business Summit in Brussels.

Reding said she is looking to develop a uniform European approach toward cloud computing to generate efficiency, accelerate innovation and produce cost savings for economic operators but wants “to make sure that our data protection rules cover the use of cloud computing services provided from outside the EU for EU citizens.”

The idea is expected to be considered as part of the formal legislative proposals to amend the 15-year-old Data Directive, which are due out in June.

In November 2010, the European Commission released an official communication outlining its preliminary proposals to revise the EU's Data Protection Directive to take account of new technologies, such as social networking websites, and to create a harmonized approach among the 27 EU member states (9 PVL 1527, 11/8/10). The communication only cites cloud computing as an example of challenges new technology poses for data protection and does not discuss a self-certification process for providers of such services.

Easier Route to Approved Data Transfers

“The fact that non-EU cloud service providers active in the EU will be covered by EU data protection rules will enhance the confidence of individuals, who would be encouraged to take up cloud services,” said Reding. “The new rules will enhance legal certainty and reduce the compliance costs of businesses processing data. They will boost the competitiveness of EU economic operators internationally, as they will find it easier to transfer personal data outside of the EU,” she said.

The Data Directive requires adequate safeguards to protect the privacy of EU citizen personal information transferred outside of the European Economic Area. Commission approval of the adequacy of privacy regimes of non-EU countries, as well as Binding Corporate Rules and Model Contract Clauses for non-EU corporations already exist to approve data transfers.

In addition, the EU-U.S. Safe Harbor Program administered by the U.S. Department of Commerce was granted adequacy approval by the Commission. But that system only applies to certain U.S. firms that register their voluntary compliance with EU data protection law. Reding envisions a system under which other countries could similarly register their compliance under an EU-run safe harbor system.

Wim Nauwelaerts of Hunton & Williams, in Brussels, told BNA May 19 that he does not expect to see any safe harbor system as a replacement for the EU's adequacy procedure because it "will focus more on private companies or organizations."

But Reding's idea would provide an advantage over BCRs and contract clauses, he said, explaining "the difference is that the company, for example a cloud computing service provider in India, would have to certify only once, perhaps via an organization, rather than having to enter into different contracts with different customers. This seems to be a more centralized and efficient approach."

He added, however, that the "central open question is who will manage the system and certify the safe harbour mechanism."

Other Data Directive Amendments

Reding said that the Commission is considering many other issues in coming up with the official legislative proposals to amend the Data Directive.

Other changes that Reding said the Commission is expected to present to update the Data Directive would:

- require companies outside the European Union that directly target their activities to EU citizens to abide to the new EU data protection rules;
- embed a principle of "data protection by design;"
- reinforce existing rules on security of data processing;
- affirm the privacy liability of those who control and process data;
- revise the current rules on adequacy and simplify data transfers; and
- streamline and strengthen procedures for international data transfers.