

July 14, 2014

EU, Others Shouldn't Let Surveillance Issues Burden Global Data Transfers, Speakers Say

by Stephen Gardner

Because the global economy increasingly relies on data exchanges, European Union lawmakers reacting to surveillance concerns by considering new data transfer limitations for the proposed EU data protection regulation should understand that existing options for companies to transfer personal data out of the EU aren't sufficient, speakers said July 8 at a seminar in Brussels.

The problem is broader than just the transfer of data outside the EU. Unless regimes governing transfers of data for commercial purposes are streamlined, global economic growth could be held back, placing limitations especially on smaller data-driven companies that struggle to comply with the complex rules on data transfers, speakers said at a joint German Marshall Fund of the United States/U.S. Chamber of Commerce seminar.

Adam Schlosser, director of the U.S. Chamber of Commerce Center for Global Regulatory Cooperation, said that the revelations from former U.S. National Security Agency contractor Edward Snowden about government surveillance of personal data transferred for commercial purposes had “muddied the waters” for companies wanting to transfer data, and the debate about rules for data transfers should be “reset” to become more “sensible and pragmatic.”

Lawmakers, including those working on a revision of the EU data protection regime, should “make sure they are addressing the right concerns” and should separate discussions about transfers of data for commercial purposes from the debate on government access to personal data, Schlosser said.

Current Shortcomings

Bridget Treacy, a partner with Hunton & Williams LLP in London, speaking at the same seminar, said that companies engaged in data transfers are “concerned about the future legal landscape” and believe that no current mechanism is “a particularly good match for what they wanted to do.”

Speaking to Bloomberg BNA after the meeting, Treacy said that standard contractual clauses for transfers of data outside the EU, which are available to companies under the 1995 EU Data Protection Directive (95/46/EC), are “really clunky in practice.”

The clauses assume “point-to-point transfer” and aren't appropriate for, for example, cloud computing, Treacy said.

She added that binding corporate rules (BCRs) for multinational companies involve a “lengthy process of negotiation with regulators.” Transfers based on the consent of data subjects are often complex in practice, she said, because companies can be left needing to find alternative mechanisms if consent isn't given, or is given and later revoked.

Questions About Safe Harbor

Some EU member states have questioned the U.S.-EU Safe Harbor Program “for a period of time,” making some companies wary of it, Treacy said.

The Safe Harbor Program has been under fire in the wake of the Snowden leaks. The European Commission, the EU's executive arm, published in November 2013 a list of 13 reform requirements for the continuation of the program (12 PVLR 2012, 12/9/13).

On June 6, European Commission Vice-President and Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding said that the U.S. Department of Commerce, which administers the Safe Harbor Program in the U.S., had agreed to 12 of the 13 requirements (13 PVLR 992, 6/9/14). U.S. and EU trade officials said June 24 that negotiations are moving forward over changes to the program (13 PVLR 1171, 6/30/14).

The High Court of Ireland June 18 referred a case involving Facebook Inc. to the EU Court of Justice for a ruling on the adequacy of the Safe Harbor Program (13 PVLR 1093, 6/23/14).

Search for New Ideas

Speakers at the seminar said that some alternative approaches for data transfers are starting to be developed and should be considered further by EU lawmakers as part of the EU data protection reform.

The European Commission published in January 2012 a proposed data protection regulation to replace the Data Protection Directive (11 PVLR 178, 1/30/12).

Most recently, EU justice ministers June 6 agreed in principle to maintain in the regulation the mechanisms for international transfers that are contained in the Data Protection Directive, but they added language that would allow countries to limit transfers “for important reasons of public interest” (13 PVLR 992, 6/9/14).

Martin Wrigley, general manager, Europe, for the industry group Application Developers Alliance, speaking at the July 8 seminar, said that the mechanisms in the directive and proposed regulation largely overlook the needs of smaller companies.

Many small companies, such as app developers, find the rules on transfers too complex and are “in a fog of uncertainty and doubt” about data protection law, Wrigley said.

OECD, APEC Approaches

Potentially better approaches to data transfers highlighted by seminar speakers include the Organization for Economic Cooperation and Development's “Guidelines on the Protection of Privacy and Transborder Flows of Personal Data” and the Asia-Pacific Economic Cooperation's Cross Border Privacy Rules System.

Treacy said the OECD guidelines are a “helpful framework” under which data controllers remain responsible for personal data, wherever processing takes place.

Schlosser said the APEC rules are flexible and can be “scaled up and scaled down.”

“We do need to look around and look beyond the borders of the U.S. and the EU” for ideas to improve data transfer frameworks, Treacy said.