



January 25, 2012

Cybersecurity

EC to Release Final Draft Privacy Regulation Jan. 25, Following Agreement to Lower Fines

by Emma Portier Davis, Alexei Alexis

The European Commission is slated Jan. 25 to release its proposals for a data protection regulation to replace its 16-year-old Data Protection Directive (95/46/EC), after officials agreed to lower fines for companies that breach the law.

European Commission spokesman Matthew Newman told Bloomberg BNA Jan. 24 that the heads of the EC's cabinets reached a deal at a Jan. 23 meeting, although he added that there could still be "minor changes" on other points in the regulation before its publication.

According to sources that are party to the negotiations, the cabinet chiefs agreed to lower the maximum fine from 5 percent of a company's worldwide gross income. The individuals familiar with the talks were unwilling to specify the upper limit.

A leaked draft of the regulation had prompted fears among analysts about the impact the regulation could have on global business because of a high maximum fine.

Member States to Get Discretion on Fines

According to Newman, the regulation will allow member states' national data protection authorities discretion in the levying of fines. The previous leaked draft stated in its preamble that there should be "equivalent sanctions" for offenders in the member states.

"There's a discretion for national authorities to rule on each individual case. There could be a warning rather than a fine. Suppose a company processes data illegally but unintentionally. The member state authority can give a warning," Newman said.

Although even the leaked draft stipulated that fines would come from member state authorities rather than from the commission (as is the case with fines for a breach of EU competition law), the final proposals are likely to offer more leeway to member states.

"There will be sanctions and the possibility of discretion and proportionality based on the circumstances. The important thing for us is that there are sanctions. Some member states don't even have those," said Newman.

Once the proposals are made public, they will be passed to the European Parliament and the Council of the European Union, which is comprised of delegations from each of the bloc's 27 member states. Both institutions must approve the regulation before it passes into law.

Significant Changes Proposed

The effort has significant implications for U.S. businesses that handle data on EU subjects, according to Christopher Wolf, director of the privacy and information management practice group at Hogan Lovells LLP.

Among other changes, the draft proposal, circulated in December, called for companies to provide data breach notification to relevant data protection authorities and individuals within 24 hours of the discovery of a breach.

“As the proposed regulation proceeds to be considered by lawmakers in the EU, it will be important to perform a cost-benefit analysis,” Wold told Bloomberg BNA. “The test should be whether the advances in privacy are worth the costs.”

Lisa Sotto, head of the privacy and information management practice at Hunton & Williams, said it was “heartening” to see a shift in the proposal “toward rules that seek to bring about real compliance and harmonization in the EU.”

“I applaud the massive effort of the European Commission to update rules that so desperately need updating given the current digital environment,” Sotto told Bloomberg BNA. “The challenge during the next few years of debate around the proposal will be to ensure that new bureaucratic rules are not created.”

Sotto added that U.S.-based businesses would be well-advised to pay close attention to the debate. “Most U.S. companies operate in a global arena and thus will be deeply affected by any changes to the privacy rules in the EU,” she said.

A leaked U.S. Federal Trade Commission paper raises concerns about various parts of the draft EU proposal, including the data breach provisions. The paper was leaked by European Digital Rights (EDR), a Brussels-based privacy group.

FTC spokeswoman Claudia Farrell confirmed that the paper was written by the agency's Office of International Affairs staff. However, the document has not been voted on by the commission, she said.