

Congress Aims To Convert EU Skeptics With New Privacy Law

By Allison Grande

Law360, New York (February 11, 2016, 10:20 PM ET) -- The U.S. House of Representatives on Wednesday sent to the president's desk legislation that will give European Union citizens the right to sue the U.S. government for alleged privacy violations, a modest olive branch that jump-starts the process of rebuilding confidence that data moving across the Atlantic is secure.

The House's action came only a day after the Senate approved the same version of H.R. 1428, the Judicial Redress Act. The bill is designed to empower citizens of designated foreign countries to request access to records shared by their governments with a U.S. federal agency in the course of a criminal investigation, amend the records when they are incorrect and pursue redress when the records are unlawfully disclosed by an agency.

That Congress was willing to pass such a measure bodes well for businesses, attorneys say.

"It's sending a signal to the rest of the world that we are serious about cooperating internationally and being a very good trading partner," said Bradley S. Shear, the managing partner of Shear Law LLC. "Extending the same rights that our citizens have to others gives our partners assurance that the U.S. is stepping up its game and doing what it can from a legal standpoint to ensure that we're protecting their citizens' information."

The ability of both the government and companies in the U.S. to keep foreign citizens' data safe has been sharply called into question since former National Security Agency contractor Edward Snowden began leaking documents in 2013 that revealed the broad scope of U.S. intelligence agencies' surveillance efforts.

The European Court of Justice heavily relied on information culled from the leaks in handing down its earth-shattering decision in October to invalidate the popular EU-U.S. safe harbor data transfer mechanism on the grounds that it failed to adequately protect EU citizens' privacy by allowing the U.S. government unfettered access to their data.

In laying out its reasons for finding the old pact inadequate, the Court of Justice pointed out that EU citizens have no judicial means of redress in the U.S. for perceived misuses of their data. Negotiators attempted to address this in a new trans-Atlantic "Privacy Shield" deal floated on Feb. 2 that would allow Europeans to raise complaints about data misuse through several different channels.

EU regulators are expected to decide in the coming months whether they believe the new mechanism is

viable. While officials have said that the Judicial Redress Act is not a requirement for the Privacy Shield pact to win that approval, the legislation is widely viewed as an influential piece of the puzzle, and the relative ease with which the bill passed through Congress should help to improve the Privacy Shield's odds.

"The act's passage is welcome news for U.S. businesses who are all holding their breath that the Privacy Shield will become a viable data transfer mechanism," said Proskauer Rose LLP special counsel Jeremy Mittman. "We can't pop the cork yet, but perhaps we can start putting the bottle on ice."

Congress' willingness to take action on an issue of importance to the EU population is especially comforting to the more than 4,000 businesses that relied on the 15-year-old safe harbor pact and have been scrambling since its suspension to make sense of the uncertain legal landscape for trans-Atlantic data transfers, according to Amar Sarwal, the vice president and chief legal strategist at the Association of Corporate Counsel.

"It's vital to have cooperation between the U.S. and EU on privacy," Sarwal said. "It's very hard for in-house counsel to navigate and do business with rules that contradict each other, so it's gratifying to see the two sides working together to harmonize their approach."

The Judicial Redress Act was first floated in March, but pressure on Congress to extend to foreign citizens the redress rights that U.S. nationals currently have under the Privacy Act of 1974 didn't begin to mount until the Court of Justice came out with its ruling in October.

The House moved quickly, passing the bill two weeks after the high court's ruling, but the Senate Judiciary Committee failed to vote on the measure before its year-end recess.

The ACC attempted to spur the process along by sending a letter signed by more than 280 general counsel to Senate leadership Dec. 17. In the letter, the attorneys called the bill a "critical step" toward re-establishing the safe harbor program, whose demise had led to increased compliance costs and greater legal liability for companies that have had to navigate a complex array of data privacy laws for each member state.

"Companies have been waiting for certainty, and they've been deeply impacted by this environment where safe harbor has been invalidated," Mayer Brown LLP cybersecurity and data privacy counsel Kendall Burman said. "The passage of the Judicial Redress Act is a very positive step and a good sign that the U.S. government is taking very seriously the privacy interest of Europeans."

The legislation also injects a measure of hope that the European Court of Justice will find the U.S. privacy framework to be essentially equivalent to the EU's when it is inevitably asked to review the new Privacy Shield, and that differences that have long put a crimp in relations between the U.S. and EU can be quickly smoothed as they arise.

"The bill demonstrates that the U.S. is a very capable partner regarding the protection of personal information and that it is willing to go the extra step to literally make a trading partner feel comfortable with how we do business, so it's likely to have a positive effect," Shear said.

The bill's passage is also a requirement for finalizing a separate "umbrella" data privacy agreement between the EU and U.S. covering shared law enforcement information.

But despite broad support for the bill from industry groups such as the Computer and Communications Industry Association, the U.S. Chamber of Commerce, and the Internet Association, attorneys stressed that it wasn't all smooth sailing ahead.

A significant wrench was thrown into the works by the Senate Judiciary Committee, which in advancing the bill last month tacked on a controversial amendment that would extend the bill's benefits only to countries that agree to permit commercial data transfers with the U.S. under a framework such as a revamped safe harbor and agree to refrain from impeding the national security interests of the U.S.

"In supporting the Privacy Shield agreement through to a successful conclusion, the Commerce Department and other U.S. government agencies should make EU officials aware of these important reciprocity requirements," said Alan Charles Raul, who leads Sidley Austin LLP's privacy, data security and information law practice. "The Judicial Redress Act effectively calls upon the attorney general to determine the EU is 'adequate' in terms of cooperating with the U.S. on these privacy issues."

Such a demand, which Sen. John Cornyn, R-Texas, said he had crafted to address concerns that the U.S. was giving up too much to its EU counterparts, could mar its reception by EU policymakers and further cloud the waters that multinational companies had hoped the legislation would clear, attorneys say.

"This express linkage between security and commercial activities is likely to complicate final approval of the Privacy Shield," said Mary J. Hildebrand, the founder and chair of Lowenstein Sandler LLP's privacy and information security practice. "And anything that slows or impairs progress on the Privacy Shield exacerbates the uncertainty for U.S. companies seeking to legally export personal data from the EU to the U.S. for commercial purposes."

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