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Cloud-Gazing Europeans Misjudge Patriot Act's Pull

By **Greg Ryan**

Law360, New York (January 27, 2012, 8:32 PM ET) -- Anxiety in Europe over the reach of the Patriot Act has grown so intense that European cloud computing providers are advertising their services as a haven from the U.S. law — but attorneys dismiss such fears as overblown, saying security and other issues outweigh the risks posed by the act.

The controversy surrounding U.S. authorities' ability to seize data from the cloud continues to escalate, with a Norwegian data privacy enforcer stepping in on Wednesday to bar the country's public sector from using Google Inc. cloud services after the U.S. State Department sought to downplay Europeans' concerns about the Patriot Act earlier this month.

Reed Smith LLP partner Cynthia O'Donoghue, who is based in London, said one of her clients, a company in the energy sector, pulled out of a deal with a U.S.-based cloud services provider over the country's reach into the cloud. O'Donoghue said she is composing memos on the subject for clients more and more frequently.

“Clients are concerned because the Patriot Act has extraterritorial jurisdiction, and if there is a U.S. parent — even if the data itself is somewhere else — the U.S. can get at the data through the parent,” O'Donoghue said.

The intensive focus on the Patriot Act may be misplaced, however, as many governments, including those in Europe, have similar laws allowing the seizure of data for the purpose of fighting terrorism and other crimes, according to attorneys.

The European Commission's own data protection regulations contain an exemption for national security obligations, said Lisa J. Sotto, the head of the privacy and data security practice at Hunton & Willams LLP. The commission's proposed data protection reforms, released Wednesday, would allow for cross-border data transfers for police cooperation in criminal matters.

The prominence of the Patriot Act is stoked in part by European cloud service providers looking to score business, as well as provocative rhetoric from the continent's data protection authorities, according to Sotto.

“I would characterize this as a bit of a red herring,” Sotto said. “That's not to say it's not a legitimate issue, but it's one that really needs to be considered in a less inflammatory fashion.”

Attorneys said companies should not allow one law to drive them away from an otherwise attractive U.S.-based cloud service provider. Companies need to consider other factors, such as the security of the provider's services, or potential production issues arising from discovery, they said.

Ultimately, companies must weigh all of the costs and benefits of doing business with a cloud service provider before they can determine whether the risks of data seizure under the Patriot Act are tolerable, said Andrew B. Serwin, the founding chair of Foley & Lardner LLP's privacy, security and information management practice.

In the case of Google, for example, the U.S. government requested data from just over 11,000 user accounts in the first half of 2011, a fraction of the company's millions of users worldwide. Google said it complied in part or in full with 93 percent of the requests.

“The Patriot Act is interested in individuals suspected of terrorism,” O'Donoghue said. “What they would be looking at in any potential data set ... would be marginal.”

Though attorneys downplayed the role the Patriot Act should play in deciding where to store data, they admitted jurisdictional issues surrounding cloud computing remained unsettled, a possible reason foreign companies are hesitant to sign on with U.S. cloud service providers.

It is unclear to what degree the U.S. government can force a company under U.S. jurisdiction to produce data stored with a foreign subsidiary, though attorneys agreed that a U.S. company unsure of its legal obligations will comply with U.S. authorities' request in most cases in order to avoid possible punishment.

In addition, European authorities have sometimes said their data protection regulations apply to non-EU residents whose data is imported into the bloc, according to Serwin.

“The question of jurisdiction couldn't be murkier. It's clear as mud,” Sotto said.

The European Commission's proposed data protection reforms do not definitively clarify the legal standards to which U.S.-based cloud service providers are held on the continent, though the regulation does indicate EU members should examine “the international commitments [a] third country or international organization in question has entered into” when considering a transfer of data outside of the bloc.

In any case, it may be years before the reforms are enacted, according to attorneys. For now, “the reticence over the Patriot Act and putting data in the cloud in America remains the same,” O'Donoghue said.

The U.S. government, for its part, held a conference call Jan. 18 in an effort to dispel Europeans' concerns regarding the reach of the Patriot Act.

During the call, Bruce Swartz, a deputy assistant attorney general in the U.S. Department of Justice, echoed Sotto in calling Patriot Act-related fears a “red herring,” saying the law did not alter treaties that govern governments' access to computer data in other countries, such as the 2001 Budapest Convention on Cybercrime.

Swartz insisted during the call that U.S. and EU officials respected each other's commitment to privacy and civil liberties.

Serwin said one of the sources of the tension over the Patriot Act was the differing outlooks the U.S. and EU have regarding privacy. Privacy is almost seen as a property right in the U.S., whereas European authorities see it as a fundamental human right, he said.

“Take the politicking out of it, and part of the problem are those differences in how we view privacy,” Serwin said.

EU Commissioner Viviane Reding said in December that she hoped the U.S. and the bloc could hammer out a data protection agreement by the end of 2012.

--Editing by Sarah Golin.