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Google Unfazed By EU's Toothless Privacy Threat

By **Allison Grande**

Law360, New York (February 21, 2013, 8:43 PM ET) -- Europe's privacy regulators said Monday that they would soon take action against Google Inc. for supposedly flouting repeated demands for better disclosure of its data collection practices, but attorneys predict the Internet giant and others will ignore such warnings as long as the regulators lack the ability to level hefty fines.

The regulators' hackles were raised by a recent revision to Google's privacy policy that enabled it to combine and track user information across all its platforms. The Article 29 Working Party, which consists of data protection officials from the European Commission and European Union member states, vowed Monday to take action before summer to remedy the company's alleged failure to address their concerns.

The regulators have recommended that the search giant improve its data retention procedures, provide precise retention periods and clarify how data is shared across its services. In October, the regulators gave Google four months to address their recommendations and bring its practices into compliance with EU law.

The authorities said this week that they were pushed to act because "no answer has been given."

The regulators are sending a strong message that they are serious about making sure that Google, Facebook Inc., Twitter Inc., Microsoft Corp., Yahoo Inc. and other Internet giants that collect user data follow the bloc's laws, according to attorneys.

"With sophisticated technology available today, data can be combed, aggregated and contextualized instantly," Robert J. deBrauwere, co-chair of Pryor Cashman LLP's digital media practice group, told Law360. "The privacy police in the EU view this as a threat."

But attorneys predict that the crusade will be undermined by the EU's current data protection regime, which gives authorities limited and inconsistent powers to issue fines.

"Fortunately for Google, while the EU's data privacy laws are strict as to what is covered and protected — actually stricter than those of the United States — they don't really have significant teeth from a sanctions perspective," Michelman & Robinson LLP senior counsel Torin Dorros told Law360.

The member states have individually implemented the bloc's data protection directive, adopted in 1995, through their own laws. As a result, regions have varying remedies, and some states lack fining capabilities entirely.

The EU regulators' handling of recent privacy concerns over Google's Street View service illustrates the problems with this disjointed enforcement regime.

While data protection authorities in the U.K. and other countries found that the Street View vehicle's collection of personal data through unsecured Wi-Fi networks violated their data protection laws, they declined to impose fines. France's regulator, on the other hand, did choose to impose a penalty in March 2011 — but the fine totaled only €100,000 (\$123,000).

In January 2012, the European Commission proposed replacing the current regime with a modernized and more restrictive regulation that would apply to all member states uniformly.

The proposal, now in the midst of a multiyear approval process, would give regulators the power to impose fines of up to 2 percent of a company's global turnover, a change that attorneys say would give substantially more weight to authorities' actions.

"The potential for these much higher fines is being welcomed by many in Europe and could be a concern to enterprises in the U.S., particularly those with massive revenues, like Google," said Snell & Wilmer LLP partner Timothy Toohey.

The regulators' most recent clash with Google stems from the company's announcement last year that it was amending its privacy policy, effective March 1, to share users' data across platforms.

The revelation drew interest from the working party, which tapped CNIL — a French data protection authority — to lead an EU-wide investigation into the changes.

Frustrated with Google's allegedly inadequate response to several letters requesting more information, regulators issued an ultimatum in October giving the company four months to revise the policy to enhance user notice and choice about how Google uses their information.

"[Transparency] is of particular concern, given the tremendous amount of information that can be gleaned about users when data is combined across many services, including search, user-generated content sites, email and social networking activities," deBrauwere said.

Google didn't make the requested changes, and issued a statement Tuesday continuing to defend its policy's legality.

"Our privacy policy respects European law and allows us to create simpler, more effective services," the company said. "We have engaged fully with the CNIL throughout this process, and we'll continue to do so going forward."

While Google may have little reason to fear financial repercussions now, a change to regulators' enforcement authority could cause concern for companies — especially in the face of authorities that have already shown themselves eager to enforce privacy laws, attorneys noted.

"The importance of this action is that it again reflects the strong stance that European regulators are taking regarding data protection matters in the EU," Toohey said. "If the new regulation were to become law, it would be likely that [regulators] would not only continue this approach but, in some instances, be even more active in this area, particularly if armed with significantly higher fines."

--Editing by Kat Laskowski and Katherine Rautenberg.

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