

## US AG calls for federal breach notification law

US Attorney General Eric Holder called on 24 February for a national data breach notification law, with exemptions if no private data is compromised, in reaction to cyber attacks “becoming all too common.”

“Holder’s comments are unsurprising in light of the Obama Administration’s advocacy of more stringent privacy controls,” said Nick Beermann, Attorney-at-Law at Jackson Lewis P.C.

Currently, the vast majority of states have a form of data breach law, with varying requirements between them. “A national law may make the compliance burden easier [for businesses] because there would be one law to comply with,” said Erin Fonté, Shareholder at Cox Smith. “The trickiest part will be the definition of ‘personal information’ that, if breached, gives rise to notice obligations.”

René Quashie, Senior Counsel at Epstein Becker Green, argues that as “The Federal Trade Commission has called for greater enforcement authority and has requested the power to impose civil monetary penalties on companies for data breach violations, I think a new law at this point may be overkill.”

## EC to review conflicting laws applied to the internet

The European Commission announced that it will conduct an ‘in-depth review’ of the risks presented by conflicting laws and jurisdictions that apply online, in a Communication entitled ‘Internet Policy and Governance’ released on 12 February.

“The review is part of a broader strategy to face the many legal problems that hamper digital development in the EU, but there are also more specific reasons that may have influenced the Commission’s decision to issue this review,” said Konstantin Ewald, Partner at Osborne Clarke, Germany. “In Germany we have seen courts struggle to find a mutual interpretation of the EU regulations on jurisdiction and applicable law.”

The Commission has identified ‘a number of contradictory legal decisions’ applied in an online setting and will assess ‘all

mechanisms, processes and tools available and necessary to solve such conflicts.’ The Commission provides examples of such conflicts with references to cases involving the revocation of domain names on the basis of provisions under another jurisdiction and the challenges presented by cross-border cloud computing.

“There are two issues at play here: different laws and different interpretations of the same laws,” explains Ben Allgrove, Partner at Baker & McKenzie. “If EU law is not harmonised in an area, then what we need to know is whose laws apply and what to do if there are conflicting laws which both apply. Existing conflicts of law principles have long dealt with that challenge. If the concern is that regulators and courts in Member States are interpreting the same law differently, then that is what the CJEU is for.

Both conflicts of law rules and the CJEU process are imperfect beasts, but I am not sure what an in-depth study will tell us that we do not already know.”

Ewald believes that the review is a positive development. “The review is definitely a positive step. Conflicting laws can be a serious issue,” adds Ewald. “Data privacy laws, for example: It is still highly controversial which national laws apply when international companies use personal data in the EU. There are several contradictory court decisions from several EU Member States and the legal situation is completely unclear. So on top of the different data protection levels in the EU there are many cases where we do not even know which national laws apply. You can imagine the efforts that are necessary to ensure compliance when we advise international companies on their expansion to Europe.”

## FCC to craft new net neutrality rules following Verizon decision

The Federal Communications Commission (FCC) announced on 19 February that it will create new regulations around net neutrality, following the 14 January decision by the US Court of Appeals for the District of Columbia Circuit which struck down all but one of the FCC’s Open Internet rules in Verizon v. FCC.

“FCC Chairman Wheeler has spun the Verizon decision not as a loss, but as a reaffirmation of the FCC’s authority to preserve a free and open internet,” said Michelle Cohen, Member at

Ifrah Law. “The FCC asserts that the DC Circuit affirmed its authority under Section 706 of the Communications Act, but that the agency needed to articulate a better legal rationale.”

The FCC has not - for now - attempted to reclassify broadband access providers but indicated that it will enforce the remaining transparency rule, as well as hold ISPs to commitments they made prior to the Verizon decision. The FCC will, following consultation, look to release formal rules in late spring or early summer.

“I think it is important that Chairman Wheeler mentioned holding ISPs to their current commitments,” said Cohen. “This could be powerful in the case of upcoming merger review, such as Comcast’s proposed acquisition of Time Warner. Oftentimes, the FCC will be able to gain commitments from the parties as a condition of approvals. Even as the FCC attempts to craft new net neutrality rules, we could see net neutrality rules happen on a ‘de facto’ basis in connection with merger approvals.”

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