INTERNATIONAL REPORT

PRIVACY LAWS & BUSINESS
DATA PROTECTION & PRIVACY INFORMATION WORLDWIDE

EU DP draft Regulation heralds ground-breaking changes

Large fines will drive compliance and organisations need to start preparing now for the new regime which should be in force by 2016. By **Monika Kuschewsky**.

On 25 January 2012, Viviane Reding, Vice-President of the European Commission and Commissioner for Justice, Human Rights and Citizenship, officially announced the long-awaited legislative proposal for a reform of the EU data protection legal framework. The proposal aims to make significant changes to the current legal regime of data protection and privacy within the EU and, in some respects, differs quite considerably from the draft proposal which was leaked to the press at the beginning of December last year.

The legislative proposal consists of a draft Regulation setting out a general framework for data protection, which would replace the

Continued on p.3

New tort for invasion of privacy recognised in Ontario

Recent Canadian court case where the appellant is awarded $10,000 CAD establishes the right to seclusion. **Colin Bennett** and **Robin Bayley** explain why this ruling is so important.

In recent months, litigation involving somebody named "Jones" has resulted in some significant changes in privacy law in both the United States and Canada. The case which has received the most attention is *US v. Jones*, in which the US Supreme Court declared that the installation of a GPS tracking device on a vehicle without a court-ordered warrant violated the Fourth Amendment's prohibition against unreasonable searches and seizures. But equally important, at least for Canadian law, is *Jones v. Tsige*, in which the Court of Appeal for Ontario, Canada's largest province, recognised a privacy tort of "intrusion upon

Continued on p.5

Issue 115 **February 2012**

Koreans embrace social networks largely unaware of privacy risks

Whon-il Park explains the significance of social networking services in Korea.

Internet-based social networks are very familiar to the average Korean. Since 1999 the 'I-Love-School' site has helped the user to find the classmates of the same school. Individual user's mini-homepage site, Cyworld, has provided a confidential communication channel between close friends since 2001. In fact, Korea was an early adopter of social networks – but these were local services.

However Koreans now like to use foreign-operated services like Twitter and Facebook in a quite different manner. Is it because Koreans prefer exotic goods and services? Not exactly. Koreans like to talk to friends, regardless of age and background with the same interest and purpose, in the anonymous world that these international services make possible but local services do not.

In South Korea, the power of social networks has been felt in candle light protests in front of Seoul City Hall against the Korea-US Free Trade Agreement (FTA), shipbuilding layoffs, and the environmental issues of the '4-River projects'. It was felt most dramatically during the by-election in October 2011 in which Seoul citizens in their 20s to 40s voted social activist Park Won-soon to an easy victory. Angry young voters urged their friends and colleagues to head for the voting venues at the last minute. That's why an aide of the ruling party attempted to paralyse the National Election Commission (NEC) webpage showing the location of election venues, by means of a distributed-denial-of-service (DDoS) attack. The secretary of the Speaker of the National Assembly is reported to be connected with the attempted assault on the NEC website. SNS issues have obviously become of major political significance in South Korea.

It is also not unusual for businessmen to take advantage of social networks for marketing and promotional opportunities. More and more clergymen are using smart devices to preach the gospel to young people. Even the judges are not reluctant to express their critical views on the controversial Korea-US FTA via Twitter or Facebook.

A landmark Constitutional Court ruling

Against this backdrop, the Constitutional Court rendered a landmark decision. On 29 December 2011, the Court ruled (2007 Hun-Ma 1001) that the existing provision of the Public Office Election Act, based on which NEC has prohibited pre-election campaigning via Twitter and other social networking services, was unconstitutional because it violates the principle of clarity in statutory interpretation. In March last year, opposition group politicians and a group of civilians filed an appeal to the Constitutional Court arguing that the scope of the words 'like' alongside of other campaigning media in the provision of the Act was too vast and unclear.

As a result of the Constitutional Court decision, the NEC asked lawmakers to revise the provision of the Act, which prohibits circulation and displaying of advertisements, posters, photographs, documents, videos and 'the like' carrying messages in support of or against a specific party or a candidate from being circulated from 180 days before the date of the vote.

The Court held "The Internet is open to everyone and electioneering in cyberspace is virtually costless. So, restricting online campaigning does not serve the purpose of the Public Office Election Act, which is supposed to bridge the gap in election campaigns between rich and poor candidates... The Act overly restricts fundamental human rights... Banning people from expressing their views on the Internet for such a long period of time deprives them of opportunities to criticise policies of the government and political parties. This clearly weakens the principles of the parliamentary system that realises party politics and responsible politics."

Its ruling is expected to pave the way for social network users, largely in their 20s and 30s, to freely express their views on certain political parties and candidates in the general and presidential elections in April and December 2012, respectively. The ruling is also expected to provide a boost to liberal camp candidates. So it's quite natural that an increasing number of politicians have begun to turn to social network platforms to reach out to voters ahead of two key elections.

Pros, cons and privacy dangers

It is true that social networks have their merits in enhancing the development of participatory democracy. People don't have to rely on traditional media to set agendas. As the Constitutional Court Judges admitted, social networks allow ordinary people to be a one-man medium sending their messages simultaneously to many people. But critics pointed out possible distortion of views transmitted through such networks. It is questionable that public opinion from say Twitter of Facebook represents the rank and file of the society. And the free speech issues are significant.

Korean social network users are also relatively insensitive to their privacy. They are used to giving their private information such as national ID numbers, and home and email addresses to most local websites. The Korean government also requires citizens to use their real names when posting comments or video clips on Korean-based websites. But these rules do not apply to foreign-operated websites, so the privacy and free speech implications are quite different. It is frequently reported that some celebrities have fallen victim to social network account thieves who wrongfully dis-

seminate false statements about the account holder. Concerns have also been raised on the dangers of giving out too much personal information to others.

Now the Korean Communications Commission (KCC), in charge of broadcasting and communications policy-making is waging a campaign "Be aware of your privacy when using SNS (Social Networking Services)." The Commission is proposing some privacy guidelines via an online poll. For example, the guidelines for social network users include "Be selective of your personal information being posted on the SNS", "Be careful of posting or forwarding a friend's personal data", "Turn off the location function when not in use because your location can be easily tracked by unwanted merchants" and so on. In addition, there is a perceived threat to privacy because placing too much personal information in the hands of big corporations or governmental agencies could lead to unwanted commercial promotion or ideological censorship.

In Korea, it remains to be seen whether SNS power will be limited to a storm in a teacup in the next elections or will grow to a Tsunami which could change the direction of the nation. Also at issue is whether SNS can be effectively self-regulated or whether a high level of privacy standards will be enforced by the authorities concerned.

A new Data Protection Commission

In the midst of this social turmoil, a new authority in Korea will have to develop policies to deal with privacy issues, in addition to the KCC. As anticipated for years since 2004, the new Personal Information Protection Act entered into force on 30 September 2011 in spite of several problems with the timely inauguration of the Data Protection Commission, an independent watchdog for privacy enforcement. A deadlock in the National Assembly, which is entitled to elect five Commissioners of the 15-member Commission, resulted in delays in their appointment. The nomination of the First Chairperson, and full-fledged deliberation of the Basic Plan for the initial three years and the Implementation Plan for 2012 were postponed accordingly. Finally the Commission's composition was completed in early January, and held its first meeting on 9 January 2012.

AUTHOR

Whon-il Park is Professor of Law at Kyung Hee University, South Korea.

Users not informed of LinkedIn privacy changes

LinkedIn has updated their privacy settings so that, by default, LinkedIn may use their name and photo in their advertisements.

LinkedIn privacy policy says: "LinkedIn may sometimes pair an advertiser's message with social content from LinkedIn's network in order to make the ad more relevant. When LinkedIn members recommend people and services, follow companies, or take other actions, their name/photo may show up in related ads shown to you. Conversely, when you take these actions on LinkedIn, your name/photo may show up in related ads shown to LinkedIn members. By providing social context, we make it easy for our members to learn about products and services that the LinkedIn network is interacting with."

"Users may opt out by going to their account and selecting the option 'Manage Social Advertising'."

Facebook Ireland, audited by the Irish Commissioner in 2011 (see p.14) was caught by having a similar practice. The Commissioner requested that if Facebook Ireland considers providing individuals' profile pictures and names to third parties for advertising purposes, users would have to provide their consent.

Google Apps ban in Norway's public sector

A case against Narvik Municipality, which was using Google's Cloud Computing services to process the municipality's emails, has resulted in a public sector ban for the use of Google Apps. The Data Inspectorate decided that Google Apps fails to comply with Norway's Personal Data Act, in particular because of the Cloud Computing services.

"If Google, or other international companies, wish to offer Cloud Computing services to Norwegian enterprises, they will need to develop services that take Norwegian and European data protection legislation into consideration", said Bjørn Erik Thon, Director of the Data Inspectorate in Norway.

Enterprises that use Google Apps cannot check that security and data protection are sufficiently safeguarded, the authority says. For example, they have no idea where in the world the personal information is stored or who is able to access it. The Data Inspectorate is of the opinion that Google may not offer this type of service to Norwegian municipalities, public bodies or certain other enterprises.

• *The decision of 16 January is at http://www.datatilsynet.no/Global/english/2012_narvik_google_eng.pdf*