

# The European Union is Not “Getting Over” Data Privacy: the Data Protection Gulf Between the European Union and the United States

by Nicole B. Boehler and Marla R. Weston

The chairman of Sun Microsystems said in 1999, “You have zero privacy anyway. . . . Get over it.” Polly Sprenger, Sun on Privacy: ‘Get Over It’, Jan. 26, 1999, <http://www.wired.com/politics/law/news/1999/01/17538>. Although recent trends show that this may indeed be the case for individuals in the United States, European Union citizens find otherwise. The talks at the DRI Europe data protection conference in April 2009 brought home the tremendous difference between Americans’ and E.U. citizens’ respective sensibilities about data privacy. Truth be told, Europeans do have comparatively stronger expectations of data privacy, even in the workplace.

In the context of electronic discovery in particular, attention should be paid to the various data protection rights enjoyed by citizens of particular Member States. For example, under the French implementation of Directive 95/46/EC (the E.U. directive regarding data protection), it has been suggested that data privacy rights may be violated at the moment the litigation hold notice is distributed. If so, a litigant, or its representative, may inadvertently violate multiple individuals’ data privacy rights simply by fulfilling its duty in U.S. litigation to preserve electronically stored information by sending notification that it must be preserved. This potential for inadvertent encroachment upon privacy rights is enhanced in the e-discovery context, because the potential data subjects are often numerous and could be of diverse nationalities.

In determining the circumstances under which issuance of a litigation hold notice would violate the French Act implementing the Directive—Law No. 78-17 of Jan. 6, 1978 on Data Processing, Data Files and Individual Liberties (as amended by the Act of Aug. 6, 2004)—it is necessary to examine several provisions. First, the Act defines the “processing” of data to include “obtaining” the data (Law No. 78-17, art. 2), which may be interpreted broadly to include all acts taken by a litigant or practitioner in furtherance of responding to a request for discoverable information. Second, the Act requires,

For the purposes of the processing mentioned in [the Act], the data controller shall notify the ‘Commission nationale de l’informatique et des libertés’ (CNIL) of the appointment of a representative established on French territory who shall represent him for the fulfilment of the duties required by this Act.

Law No. 78-17, art. 5, § II. Thus, a litigant or its representative may have a duty to inform the CNIL *before* distributing a litigation hold notice.

A related blocking statute comports with the theory that liability can attach at the time a litigation notice is implemented:

Subject to treaties or international agreements and the laws and regulations in force, it is prohibited for any person to *request*, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith.

C. Pen. Law No. 80-538, art. 1A (emphasis added).

E.U. Member States had leeway in implementing the data protection Directive, leading to differences in implementation—as well as interpretation—among laws of the various Member States. Therefore, the best practice in cross-border discovery is to review the implementations of the Directive, both in the jurisdictions where the data resides and the jurisdictions where the data processors reside. In addition, it is advisable (and, in some cases, perhaps mandatory) to contact those countries' respective data protection authorities regarding the specific data processing and transfer plans, even before sending the litigation hold notice.

On the other hand, practitioners must balance E.U. Member States' requirements, such as contacting the data protection authorities prior to issuance of a litigation hold, with the requirement under U.S. law to implement the litigation hold promptly upon becoming aware of the potential for litigation. Since data protection authorities may significantly affect the discovery process, it is important that they recognize the potential need for haste in informing the data controller of their decisions concerning the need to block implementation of the subject litigation hold.

Contacting the CNIL might have prevented the unfortunate fate of “Christopher X,” a French attorney employed by a U.S. law firm. Christopher X was criminally prosecuted under a French blocking statute for attempting to informally collect data in France for purposes of U.S. litigation. See *In re Advocat “Christopher X”*, Chambre Criminelle [Cass. Crim.] [highest court of ordinary jurisdiction] Paris, Dec. 12, 2007, Juris-Data [No. 2007-332254]. The blocking statute provides for the imposition of monetary penalties or imprisonment or both. Christopher X was sentenced to a € 10,000 criminal penalty. His crime consisted of telephoning an individual at a French company seeking to discover information for use in U.S. litigation. The French court held that by doing so, Christopher X infringed data protection rights. Contacting the CNIL before conducting discovery might have prevented such a result.

Consider another possible scenario: If a litigant or practitioner violates the Directive (or a law implementing it) at an early stage by issuing a litigation hold notice prior to contacting the data protection authority, and then later attempts to argue to a U.S. court that transferring data to the U.S. would violate the Directive, the argument against data transfer for fear of prosecution may be considerably weakened—even though the litigant may still face prosecution in the Member State for the violation.

That being the said, the CNIL has signaled a willingness to assist data processors in

navigating its requirements as applied to particular data processing situations. In fact, this summer, the CNIL plans to publish recommendations to help businesses comply with both E.U. and U.S. laws in responding to international discovery requests.

We can also expect a summary of data protection rules for all of the G20 countries from the Sedona Conference.

Finally, on February 11, 2009, the E.U.'s Article 29 Data Protection Working Party published its "Working Document 1/2009 on Pre-trial Discovery for Cross Border Civil Litigation" (available at [http://ec.europa.eu/justice\\_home/fsj/privacy/index\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm)). That document makes frequent reference to the similarly-titled Sedona Conference report of August 2008 (available at [http://www.thesedonaconference.org/dltForm?did=WG6\\_Cross\\_Border](http://www.thesedonaconference.org/dltForm?did=WG6_Cross_Border)). The E.U. Working Document may be the E.U.'s attempt at seeking a solution for the conflicts between discovery requirements in the U.S. and data protection laws in the E.U. At the moment, the E.U. Working Party recommends using the procedures of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (23 U.S.T. 2555, T.I.A.S. No. 7444, Mar. 18, 1970), codified at 28 U.S.C. § 1781) if applicable, but it invites comments and is sure to receive some. Although the acknowledgement of the problem will not close the gap, it is possible that cooperation among data protection authorities and the various working groups may eventually result in a safer way to bridge it.

*Nicole B. Boehler and Marla R. Weston are both partners in the Stuttgart office of Carroll, Burdick & McDonough international (formerly Smith & Partners). Both are litigators with particular experience regarding the discovery of electronic information. Marla is a member of the California Bar and the Stuttgart RAK (Attorney-at-Law). Nicole is a member of the Bars of Virginia and Washington D.C. and of the Stuttgart RAK (Attorney-at-Law).*

*Published in*

Defense Research Institute E-Discovery Connection 2009.

*The article can also be downloaded from:*

[http://www.imakenews.com/admiralaw/e\\_article001456833.cfm?x=0,b11,w](http://www.imakenews.com/admiralaw/e_article001456833.cfm?x=0,b11,w)