

French CNIL Examines Data Protection Issues Linked To U.S. Litigation Disclosures

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As explained by the authors, a French commission has recently voiced concern over the proliferation of demands for the production and transfer of European data for use in U.S. legal proceedings.

Perceived tension between U.S. litigation disclosure obligations and EU data protection rules is increasingly drawing international attention. When faced with demands to retain or produce information in connection with U.S. legal proceedings, European arms of multinational companies must navigate stringent EU data privacy laws governing the collection, processing, and transfer of personal information. At present, no agreed-upon international framework guides companies in fulfilling their global compliance obligations.

France's national data protection agency, the Commission Nationale de l'Informatique et des Libertés ("CNIL"), is the latest government authority to highlight this issue. The CNIL has recently voiced concern over the proliferation of demands for the production and transfer of European data for use in U.S. legal proceedings.

Under the U.S. civil litigation discovery rules that govern pretrial proceedings, parties to pending or reasonably anticipated litigation are com-

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pelled to collect, preserve, and produce all relevant records within their possession or control. Recent amendments to the federal rules, as well as some state rules, make clear that these obligations also extend to electronically stored information. In addition, U.S. federal and state authorities have the power to require companies to produce information in the course of enforcement investigations. Moreover, obligations to collect and disclose data under U.S. law can extend to foreign subsidiaries or affiliates of U.S. companies, depending on the relevant corporate structures.

In response to requests from several European firms for guidance on the legal implications of complying with U.S. demands for information, the CNIL has undertaken a preliminary examination of the issue. This analysis has led the CNIL to express concerns about potential conflicts with EU data protection principles, and to call for efforts to reach an international consensus on litigation disclosure and data protection matters.

U.S. LITIGATION PRACTICES AFFECTING PERSONAL DATA

The CNIL has identified four aspects of U.S. prelitigation law and procedure that potentially affect data held by European firms:

1. The practice of placing a “litigation hold” or “litigation freeze” on documents that are reasonably likely to be relevant to anticipated legal proceedings;
2. The rules of pretrial discovery, which encourage parties to exchange large amounts of information in advance of litigation and which, as the CNIL has noted, have therefore prompted some to characterize this process as a “fishing expedition”;
3. The obligation to produce and preserve documents responsive to government investigations, such as those carried out pursuant to the Foreign Corrupt Practices Act or the Sarbanes-Oxley Act (“SOX”); and
4. U.S. data destruction laws, such as, for example, Section 802 of SOX,¹ which criminalizes altering or destroying documents with the

intent to impede a federal investigation, and which applies to U.S. companies as well as to their foreign affiliates.

Since a significant amount of EU citizens' personal data may be subject to processing and disclosure in connection with U.S. legal proceedings, the CNIL has observed that these U.S. laws and practices may lead to conflicts with European data protection rules. Moreover, several European companies have reported concerns about the prospect of trade secret theft or economic espionage.

CONSIDERATIONS UNDER EU LAW

The CNIL plans to engage in further analysis and consultation on the matter but has, to this point, highlighted certain issues that are likely to arise under EU data protection laws, in particular with respect to consent of data subjects, proportionality of data collection and processing, and the legality of cross-border data transfers. Specifically, the CNIL has raised concerns about the difficulty of obtaining an employee's consent to disclosure of personal data in cases where the employee is suspected of wrongdoing. In addition, European data protection authorities have in the past questioned the legitimacy of consent proffered in the employment context. The CNIL also emphasized that, absent measures to limit the type or quantity of data to be produced in response to an investigation or discovery request, European companies will risk violating EU proportionality principles. Finally, clear mechanisms do not currently exist for allowing legitimate, wide scale cross-border data transfers in connection with U.S. legal proceedings.

Although the CNIL has acknowledged that U.S. multinationals have a valid need to obtain evidence necessary to support a legal defense where, for example, a suit is initiated by a European employee, the agency has expressed reservations about wholesale transfers of employee data under circumstances in which a legal action is merely anticipated. The CNIL has also observed that the European Commission is currently considering whether to institute procedures akin to those used in U.S. pre-trial discovery to afford claimants greater access to evidence in private

damages actions under EU competition laws. According to the CNIL, this proposal has met with broad opposition throughout the EU.

STEPS TOWARD AN INTERNATIONAL CONSENSUS

The CNIL has called for an interministerial French working group to examine more closely the issues surrounding U.S. litigation disclosure and EU data protection rules. The agency plans to invite affected companies to share their experiences and concerns with the CNIL. These issues are also likely to be the subject of analysis and action by a broader European coalition: the CNIL has worked in conjunction with its other European data protection counterparts to place these matters on the agenda of the EU's Article 29 Data Protection Working Party. The CNIL's president, Alex Türk, has in fact recently been elected chairman of the Article 29 Working Party.

Immediately upon assuming leadership, Türk released a 2008-2009 work plan that identified U.S. litigation disclosure questions as a priority issue for the Working Party. The CNIL itself has also raised the prospect of direct negotiations on these questions between European and U.S. authorities.

At present, the absence of an accepted, bilateral framework on these issues means that multinational companies faced with U.S. information preservation and production demands risk consequences for noncompliance on both sides of the Atlantic.

Given the rather delicate balance that must be struck between the U.S. and EU regimes, the matter is one that is ultimately likely to be resolved through political cooperation. Despite the complexity of the questions raised, the professed differences between the U.S. and European systems are far from insurmountable. A solution that allowed multinationals to meet their obligations under U.S. law while ensuring EU-type protections for any affected European data would respond to concerns like those raised by the CNIL. Such protections could take the form of a set of protocols to be employed in cases involving European data. These "legal process protocols" could include a specially tailored protective order that imposes data protection and minimization obliga-

tions on the parties, a notice and consent regime that is communicated to employees through a specific addendum to corporate privacy policies, and a contractual scheme designed to provide safeguards for data transferred to the U.S. International consensus on a transparent, standardized framework such as this one would promote global corporate compliance with litigation obligations while affording the kind of robust protection for Europeans' personal information that data protection authorities like the CNIL and the Article 29 Working Party are striving to ensure.

A statement summarizing the CNIL's current analysis of these issues is available, in French, at <http://www.cnil.fr/index.php?id=2379&print=1>. A copy of the Article 29 Data Protection Working Party's 2008-2009 work plan is available, in French, at [http://op.bna.com/pl.nsf/id/dapn-7c2nfy/\\$File/ART29%20WP%202008.pdf](http://op.bna.com/pl.nsf/id/dapn-7c2nfy/$File/ART29%20WP%202008.pdf).

NOTE

¹ 18 U.S.C. § 1519.