Protect or participate?

The US' wide-reaching mandate for document discovery frequently comes into conflict with European privacy laws. Kristy Grant looks at how the international jurisdictions are attempting to solve the issues

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It's a frequent headache for many a US law firm: a US court or regulator requires a multinational company to turn over records from its international subsidiaries. It can be complex enough to locate relevant information held by custodians employed by numerous subsidiaries and stored on servers in multiple countries around the world, but then the question is asked – is the data collection lawful?

The US parent wants to complete discovery as quickly as possible, mindful of the US court's power to impose sanctions and pronounce judgment for the other side if they fail to comply with their discovery obligations. Management of the European subsidiaries will be concerned whether their instructions to preserve and turn over documents complies with local privacy laws.

If these concerns delay the process, the parent company may harbour a suspicion that data privacy laws are being used as an excuse to justify delay or, worse, to frustrate investigation into the subsidiaries' activities. Local management may feel constrained to take action in such a contracted timeframe that, in some countries, include risks of criminal prosecution (and resulting exposure to fines and even imprisonment) that can be challenging to mitigate.

The European view

Given that discovery often involves processing large volumes of personal data relating to employees, customers and other data subjects, among the main concerns for European respondents to US discovery is whether the discovery exercise may give rise to a breach of the European Union-wide Data Protection Directive. While the Directive complicates the international discovery, it is not an absolute bar to disclosure, and at its heart is the concept of proportionality.

In contrast, a number of countries have passed entirely separate laws, referred to as blocking statutes, which seek to prevent their nationals from complying with overseas court orders. Some of the most commonly encountered of these are in France and Switzerland. While section two of the UK's Protection of Trading Interests Act 1980 gives the Secretary of State a power to block overseas discovery obligations in appropriate cases, the powers granted by the Act have been used sparingly.

The rationale for blocking statutes is to protect the sovereignty prerogatives of the state concerned, and to require litigants and regulators to use formal channels, such as The Hague Convention's letter of request process. Sending data without utilising formal channels can result in criminal prosecution and fines, as occurred in the 2008 Executive Life case, in which a French lawyer was fined €10,000 ($8,100) for trying to obtain information to be used in California litigation.

Finally, a hodgepodge of local laws may apply to subsidiaries depending on the jurisdiction and industry. These may include employment or works council rules,

commercial secrecy requirements or confidentiality obligations. Among the most onerous are Swiss banking secrecy rules that impose personal criminal sanctions on employees of Swiss banks and those who represent them for disclosure of client-identifying data.

The US view

In 1987, the US Supreme Court made it clear that foreign laws created to stop the flow of discovery to the US will not automatically relieve foreign companies and individuals of their obligation to hand over documents during litigation, even when litigants who comply are at risk of fines and imprisonment outside the US.

Although US court decisions include language about the respect for international comity, in practice US courts considering the issue have repeatedly required that documents be produced despite the fact that the complying litigant would violate local law. For instance, in December 2011, a Washington DC court required a litigant to immediately produce documents from its French subsidiaries without using The Hague Convention's letter of request process because the court believed there was little evidence that the French blocking statute was regularly enforced.

THE NEW SEDONA PRINCIPLES

- US courts should show due respect to the data protection laws of sovereign states.
- Where full compliance with discovery obligations and local law is not possible, conduct should be judged under a standard of good faith and reasonableness.
- Preservation or discovery should be limited to that which is relevant and necessary to support any party's claim or defence.
- A court order should be obtained to safeguard data.
- Litigants should document the processes adopted.
- Litigants should retain protected data only as long as necessary to satisfy legal or business needs.

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The Sedona Conference

The Sedona Conference was formed by a group of judges, lawyers and others involved in electronic discovery before the US courts to publish formal guidelines to assist parties to comply with their obligations. Over the last 17 years the group has steadily gained influence and its publications are now cited in over 100 recent US court decisions.

In response to the conflict between US and EU requirements, in December 2011 a working group within The Sedona Conference published the International Principles on Discovery and Data Protection: European Union Edition (Sedona International Principles). The Sedona International Principles are applicable to civil litigation and to certain government investigations.

The six Sedona International Principles begin by requiring that US courts and parties "demonstrate due respect" to the data protection laws of foreign sovereigns. However, they recognise that comity only goes so far, and there may be instances where there is a conflict between "full compliance" with both US discovery obligation and local privacy law.

In these cases, the party's conduct should be judged by courts and data protection authorities under a standard of good faith and reasonableness. In a nod to the proportionality principle at the heart of the Directive, the Sedona International Principles remind parties to request only relevant data that is necessary to support a claim or defence by limiting the scope of the request.

It also recommends phased discovery, filtering and seeking a protective court orders. The Sedona International Principles remind data controllers to be prepared to demonstrate that data protection obligations have been addressed and that appropriate safeguards have been instituted. This might include involving their chief privacy officer or implementing a "legitimisation plan" to document the processes that have been adopted. Litigants should also delete data at the end of the case or when no longer needed.

Because of the influence of The Sedona Conference, the Sedona International Principles are likely to become normative in the US and a litigant's adherence to the Sedona International Principles will likely be highly persuasive in US courtrooms during protracted discovery battles.

The future

Just as The Sedona Conference protocol seeks to address some of the European concerns about data protection in the US, the European Commission is attempting to strengthen the existing data protection rules including restrictions on the disclosure of personal data in response to overseas litigation and regulatory activity.

While the Sedona International Principles do not solve the conflict between European laws and the US' wide-ranging discovery mandate – especially in the case of the blocking statutes – and have not been approved by EU data protection authorities, they provide a possible compass for litigants trying to work through the maze of conflicting laws and obligations.

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