

ARTICLE 29 Data Protection Working Party



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Mr. John Rabiej
Executive Director
of The Sedona Conference

Mr. Quentin Archer
Mr. James Daley
Co-Chairs of Working Group 6
of the Sedona Conference

By e-mail

Dear Mr. Rabiej,
Dear Mr. Archer,
Dear Mr. Daley,

The Article 29 Working Party on Personal Data Protection (hereafter Working Party or WP29), in which all 27 data protection authorities of the European Union are represented, has with great pleasure taken note of the “International Principles on Discovery, Disclosure & Data Protection” (Principles) published by Working Group 6 of the Sedona Conference for public comment in December 2011. The Principles are an important step towards bridging the gap between the different legal systems on civil procedure and data protection which exist in Europe and the U.S. in practice.

The Working Party is pleased to see that the Principles take up a number of issues identified by it in its Working Document on pre-trial discovery for cross border civil litigation of February 2009 (WP158) and offer possible solutions. The Working Party however would like to seize this opportunity to provide you with its comments on the International Principles recently published by the Sedona Conference.

In particular the Principles:

- are based on the belief that *“through cooperation, lawyers, parties, judges and data protection authorities can avoid conflicts of law concerning discovery before they arise and resolve them when the conflict is unavoidable.”*
- acknowledge the relevance of Data Protection Laws of foreign and in particular European states in U.S. courts;

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO59 2/13.

Website: http://ec.europa.eu/justice/policies/privacy/index_en.htm

- underline the requirements of necessity and proportionality when preserving, disclosing and discovering personal data for litigation purposes (Principle 3)
- propose a phased approach to discovery, which would mean that the discovery of data from U.S. sources should be considered prior to the discovery of data from foreign (European) sources and that the discovery of data that are not subject to Data Protection Laws (within or outside the U.S.) should be considered prior discovery of data that are subject to such laws (Principle 3)
- stress the need for minimizing the disclosure of personal data (Principle 3)
- underline the need for controllers to demonstrate compliance with Data Protection Laws (Principle 5)
- highlight the importance of a restrictive data retention policy in view of the fact that “*many organizations worldwide have become electronic data hoarders.*” The Sedona Conference warns of legal risks which may arise from the “over-retention of information”.(Principle 6)
- encourage organizations to implement privacy by design (Principle 6).

Principle 3 is the most important one from a European point of view. The Sedona Conference echoes the position taken by the Working Party that any filtering of data prior to discovery should be carried out locally in the European country in which the personal data is found (WP 158, p. 11; Appendix C, Para. 14 of the Principles).

The scope of the Sedona Principles also covers the discovery and disclosure of data after they have been exported to the U.S. under the Safe Harbor scheme, standard contractual clauses or binding corporate rules. This scenario was mentioned but not addressed by WP 158. The Working Party feels it is appropriate to treat these data in the same way as data which are the object of U.S. discovery requests in Europe. The Principles also address the issue of onward transfer (Principle 5, Comment, p.19).

According to the Working Party another welcome element of the Principles is the proposal of Stipulated Protective Court Orders which should be used to protect personal data after disclosure (Principle 4, Appendix B). Protective Orders have been suggested by the Working Party in WP 158 (p. 12) to ensure the protection of a data subject’s rights in a discovery scenario. Likewise the proposal of a Cross- Border Data Safeguarding Process + Transfer Protocol is an important step towards greater accountability in the discovery procedure (Principle 5, Appendix C).

Furthermore, the Principles appropriately state that “*involving a company’s Data Privacy Officer, from the start, in developing protocols for processing and transfers of Protected Data, and then validating them with local Data Protection Authorities, reflects well on the company’s commitment to protect the rights of the Data Subject.*”(Principle 5, Comment, p.19)

However, the Working Party sees the following caveats when applying the Principles:

1. With respect to Principle 2 which calls on courts and data protection authorities to judge a party's conduct in cases of conflict between Data Protection Laws and preservation, disclosure and discovery obligations under the U.S. Federal Rules of Civil Procedure, it should be kept in mind that both the European Data Protection Authorities and the U.S. civil courts enjoy complete independence. However, U.S. courts can take into account a statement by a European Data Protection Authority that discovery would be in conflict with European law and have done so in the past. But neither the U.S. judiciary nor the Data Protection Authorities in Europe are formally obliged to apply the Principles. With respect to the European Data Protection Authorities this has recently been stressed by the European Court of Justice in the case of *Commission v. Germany*. Furthermore, there is as yet no international agreement between the U.S. and the European Union in place which would give a legal basis for such an involvement of European Data Protection Authorities in U.S. litigation and would guarantee that their views would be respected by U.S. courts (and vice versa). However, in the absence of such an agreement the Principles give European Data Protection Authorities the opportunity to intervene in matters of data protection in discovery proceedings if they consider it necessary to do so. This is to be welcomed.
2. Although the Principles mention sensitive data as a special category of Protected Data which should be identified by the controller and only disclosed (if at all) in a later phase (Principle 3, Comment C 2, p. 15, Principle 5, Comment 4, p.19), they do not afford special protection to data subjects who are not parties to the litigation (employees, customers) in which discovery is sought. The legitimate interests of "non-parties" have to be taken into account when considering the legality of discovery under EU law (WP 158, p. 9).
3. In particular the protection of employee data may be an issue where there is still a great difference between the legal systems in Europe on one side and in the U.S. on the other. As WP 158 points out an employee's consent in particular is a questionable basis for disclosing his or her personal data (p. 9). In some European Member States e-mail correspondence by employees may be protected against discovery by telecommunications secrecy. Disclosure may amount to a criminal offence in these countries. On the other side in the U.S. workplace correspondence may not even be considered to include personal data of the employee initiating or receiving such correspondence (cf. the Letter by the Legal Adviser to the Department of State to the Chair of the Art. 29 Working Party of January 25, 2011). A solution may be found in the separation of workplace and private e-mail correspondence (see State Department Letter, p.7). However, very often companies neglect this issue and consequently private e-mail correspondence is in danger to be disclosed illegally (according to EU law) due to U.S. discovery obligations.
4. Technically there may be an issue how to establish a link between the data which are disclosed under discovery rules and the Protocol suggested by Principle 5. If this Protocol is to function like a modern day bill of lading (Comment to Principle 5, p.19) then it should be impossible to separate this Protocol from the datasets. How this could be achieved should be investigated. One possible method could be Digital Rights Management systems.
5. With regard to the issues of cloud computing referred to by the Principles (cf. Preface, p. v) the Art. 29 Working Party is currently drafting an Opinion on the questions linked

to cloud computing in general which should be taken into account with respect to discovery as well.

The Principles – in line with the jurisprudence of the U.S. Supreme Court – do not attach much importance to international agreements such as the Hague Convention. They describe such international agreements concerning cross-border discovery, made in the age before personal computers and the Internet, as “severely outdated.” (p.V). The Working Party on the other hand in WP 158 referred to the Hague Convention but recognized the fact that not all EU Member States have ratified the Convention and even some of those who have did make reservations.

The Working Party in their recent Opinion on the data protection reform proposals (WP 191) called for the obligatory use of Mutual Legal Assistance Treaties once they are in place. This could resolve conflicts between European Data Protection Authorities and U.S. courts (cf. also No. 1 above). As long as no new international agreement (replacing or modifying the Hague Convention) is in sight, the Working Party considers to be necessary to resolve the underlying issues (cf. WP 158 Introduction, p.2) the Principles are a valuable practical step in the right direction.

The Article 29 Working Party shares the view taken by the Sedona Conference Working Group 6 that through cooperation conflicts of law and their practical effects can and should be minimized. To this end the Art. 29 Working Party welcomes the opportunity to comment on the International Principles and looks forward to continue the discussion.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman of the Article 29
Working Party