

THE EU TRANSFER TWO-STEP: MASTERING THE EVER-CHANGING DATA DANCE

E-discovery experts at ILTACON discussed how to navigate the changing EU data transfer landscape and make regulations work for you.

BY ZACH WARREN

Managing data in the European Union has a whole lot of questions, and perhaps not that many answers. Given the rapid shift in regulations from Safe Harbor to the Privacy Shield and beyond, many counsel that rely on the transfer of EU data are left wondering if they can even do their daily jobs.

“There are some matters where there are no answers, where you can’t stick your hand up and say, ‘That’s what’s going to happen here.’ ... But I don’t want you to go away thinking nothing is possible,” said Chris Dale of the E-Disclosure Information Project.

So how can counsel learn the steps to EU data transfer in a regulatory environment where the mood is always changing? Three experts tried to guide the 50-person room on Tuesday at ILTACON. The “Managing Data from the EU During Litigation” panel featured, alongside the moderator Dale, Mollie C. Nichols, a senior attorney at Cleary Gottlieb Steen & Hamilton; Ben Rusch, a vice president, review solutions, Europe and APAC at Consilio; and Jonathan Wilan, a partner at Baker McKenzie.

Speaking on the practical issues that can occur with these transfers, Rusch noted the numerous different



Shutterstock.com

parties with whom counsel may need to work with to actually move data—regulators, Works councils, private citizens, etc. From there, counsel will need to learn how to redact personal information, which is an undertaking that can’t always be done using technology alone.

“You may be able to train a machine to recognize Social Security numbers, but you may not be able to train a machine to recognize religious beliefs,” Rusch noted.

That means a lot of time, and likely a lot of heartache, for those trying to transfer data. Rusch added

that questions often arise earlier on than many attorneys may even expect.

“In practice, you get bogged down by questions that are far more basic. It’s great if you can use analytics, but to use analytics, you have to process data. ... In most companies, you have personal information mixed with business information, and if you’re looking at business information only, it’s tough to even get to the analytics before there are questions.”

Once those practical issues are solved, though, counsel are still not

out of the woods. Wilan pointed to the famous 30-year-old *Aerospatiale* case nearly every court cites when discussing data transfers. Notably, the decision observes that the Hague Convention is slow.

“The important thing is that the *Aerospatiale* case doesn’t say that the Hague Convention isn’t important. It says that there is a balancing act,” Wilan said. Ever since then, courts have been applying this test to data privacy issues, and courts have generally ordered that discovery is necessary.

However, Wilan noted different ways that *Aerospatiale* can be used for those engaged in the legal side of discovery:

- Being proactive early on and offering reasons why your client could actually fear criminal penalties for production, and not just using *Aerospatiale* as a shield, can lead to courts being more amenable.

- It’s important to have well-developed evidence and experts providing what the law actually is—“it can’t be thrown together,” Wilan warned. Judges will ask if anybody’s actually been prosecuted under applicable data protection laws in practice.

- Finally, use proportionality concerns, particularly under the new Federal Rules of Civil Procedure amendments, to work for you. As Wilan said, “Do we really need these documents? Is there any other way that we can get to this evidence?” And, Dale added, it’s important to

lay out explicitly what about the discovery request is actually going to make the document production expensive.

But those questions are on the U.S. side. On the European side, Nichols said, there is a holding pattern. Once the Safe Harbor was invalidated, many companies looking to transfer data didn’t want to dive in to the Privacy Shield and model clause replacements.

Nichols explained, “It wasn’t necessarily that the clients didn’t want these additional protections. The question was, ‘Is this law going to be changed?’”

Many law firms and legal departments are worried these days that if they change their procedures for data transfers, they don’t know if all their work is going to be for nothing. Notably, there are currently two challenges to the Privacy Shield and to the model clauses in court right now, causing hesitance, Nichols said.

But the upcoming General Data Protection Regulation (GDPR), which goes into effect in May 2018, has many of the same compliance requirements as the Privacy Shield. As a result, the panel explained, many companies and law firms are overcoming this hesitance. On the Privacy Shield website, there have been 30 new companies that have been Shield-certified within the past week alone, and there are 2,400 companies total that have been certified.

Nichols said that some of her clients that originally said they weren’t getting certified have changed their

minds. “It’s an interesting environment now,” she said. “Companies are starting to take advantage of it, it’s a great mechanism to use, but there is a lot of work to be done to comply with the Privacy Shield. Don’t do it just because it’s easy to do; there’s a lot of leg work to be done.”

Regulators will go through a company’s Privacy Policy with a fine-tooth comb and will specifically point out where it’s deficient. It’s tougher than Safe Harbor, Dale added, where companies could check the box.

So there are certainly options for companies, but they’re not necessarily easy, and they could require a decent amount of risk. There has been only moderate enforcement so far, Wilan noted, but the potential penalties are high, particularly for the GDPR.

“They see that number, and it definitely scares them into action,” Wilan said.

Nichols added that there has been a lot of discussion on the risk management question as well, saying, “Clients are sufficiently concerned with the potential sanctions if they don’t comply, so they are building in the processes that are necessary.”

Contact Zach Warren at zwarren@alm.com.



Ben Rusch, Vice President
Email: ben.rusch@consilio.com
Phone: +44 (0)203 695 0200

