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Litigation Technology News

An ePublication of Iris Data Services

APRIL 2009

Volume 2, Number 1

European Union Committee Establishes Working Document Regarding Cross-Border Handling of EDD

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In an effort to address the increased conflict between disclosure obligations established by United States courts and regulatory bodies, and the application of data protection requirements of the European Union, the Article 29 Data Protection Working Party of the EU ("Working Party") recently adopted a pre-trial discovery Working Document for cross border civil litigation. (To access the full text of this document visit: [Working Document 1/2009 on Pre-Trial Discovery for Cross Border Civil Litigation](#))

The Working Document provides guidance to individuals and organizations who manage data subject to EU laws in dealing with requests to transfer personal data to other jurisdictions for use in civil litigation. Specifically, the document addresses two issues: pre-emptive document preservation in anticipation of proceedings before U.S. courts (or in response to request for litigation hold), and pre-trial

discovery requests in U.S. civil litigation.

Regarding pre-emptive document preservation, the Working Party discusses "blocking statutes" that have been enacted by certain EU countries in an attempt to thwart the possible dissemination of data to the U.S. They acknowledge that these laws do little to impede dissemination of data, as the U.S. has not accepted them as providing a legitimate defense against discovery. U.S. courts may order any person subject to its jurisdiction to produce evidence, even if located outside of the United States. The document supports the use of a balancing test to determine whether a trial court should rule on a party's request to produce abroad. This balancing test weighs such issues as the importance to the litigation of the information requested, the degree of specificity of the request, the availability of alternative means of securing the information, and issues germane to undermining the mutual

independence of sovereign nations.

With regard to retention policies, the Working Party opines that data controllers in the European Union have no legal ground or obligation to store personal data at random for an unlimited period of time due to the "remoteness" of possible litigation in the United States. The Working Party supports this argument by citing to the recent trend to adopt more restrictive retention policies to reduce the likelihood of discovery requests in the U.S. Nevertheless, the committee does adhere to the principle that when personal data is relevant, or is to be used in a specific or imminent litigation process, that data should be retained until the conclusion of the proceedings and any period allowed for an appeal in the particular case.

With respect to pre-trial discovery requests, the Working Party pays careful consideration to the core differences between Common Law and Civil Code jurisdictions.

Particularly, the Working party discusses ways to reconcile these differences through established means such as The Hague Convention and the Articles of Directive 95/46/EC of the European Parliament.

Throughout this analysis, special importance is paid to the protection of fundamental rights and freedoms of the originator of the data, even in those situations where the individual is an agent of a party to the litigation through employment. Extremely sensitive to "fishing expeditions" in discovery, the Working Party follows the jurisprudence of the EU courts in requiring that in order for pre-trial discovery procedure to take place, the processing of personal data need be legitimate. Mere consent of production is not final. Consent necessitates a real opportunity to withhold consent without suffering penalty, or to withdraw consent subsequently if the party changes its mind.

Defending its approach towards protecting fundamental liberties, the Working Party agrees that while the interests of justice are served when organizations are not limited to act in promoting or defending their legal rights, these aims must be duly weighed against the rights and freedoms of the originator of the data. The Working Party notes that an individual's involvement may only be by virtue of the fact that their personal data is held by one of the litigation parties and is deemed relevant to the issues. This places an importance on the proportionality and the balance

of the rights of the different interests.

The Working Party goes further in describing the means by which data controllers should handle data. For instance, the Working Document states that only "relevant" data can be transferred outside of the EU, and the filtering or culling of data should be carried out locally before being transferred abroad. This of course brings about potential difficulties in determining who the "appropriate" party to determine relevancy is, and further may aggravate tight discovery schedules imposed by U.S. courts. To remedy these concerns, the Working Party is reliant on the language of Rule 26(f) of the U.S. Federal Rules of Civil Procedure, urging the use of "meet and confer" conferences, as well as the use of data protection officers or third party intermediaries, at the onset of litigation.

The Working Party stresses that when using third parties, all reasonable technical and organizational precautions to preserve the security of data and protect it from unlawful destruction, loss, or unauthorized disclosure must be implemented. This requirement is imposed not only on the individual and/or organization in control of the data, but also the law firms who are involved in the litigation in tandem with any litigation support service providers or experts involved with the collection or review of the information. These external parties must comply with all principles of Directive 95/46/EC,

and ensure that the information is collected and processed in accordance with proper principles outlined. Further all parties must ensure any information is only used for the specific purposes for which it was collected and abide by strict confidentiality obligations.

Conclusion

Even in this time of global economic decline, the potential sources of international litigation and dispute continue to grow. Along with this expansion comes the increased need for reconciliation of divergent regulations as it pertains to matters of electronically stored information across jurisdictional lines. The information outlined by the Article 29 Data Protection Working Party is vital for all U.S. corporations and law firms whose practice will touch member states of the European Union. As observers of the process and analysis undertaken by the Working Party, we must be resolute to examine our own practices and work towards improving policies and procedures surrounding ESI to better work in concert with our global partners.

About The Author: *Marco S. Nasca, Esq.* is a licensed attorney in the state of Illinois and Regional Director of Iris Data Services, an international electronic discovery and forensics provider. Mr. Nasca advises law firms, corporate legal departments and their staff on legal technology issues regarding electronically stored information, as well as best practices on handling said data for litigation.

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Iris Data Services is a national litigation consulting firm specializing in computer forensics, e-Discovery, and online hosting/review for law firms and corporate counsel. For more information, visit [**www.irisds.com**](http://www.irisds.com).