

## The Potential Impact of Article 48 of the General Data Protection Regulation on Cross Border Discovery From the United States

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THE POTENTIAL IMPACT OF ARTICLE 48 OF THE  
GENERAL DATA PROTECTION REGULATION ON  
CROSS BORDER DISCOVERY FROM THE UNITED STATES

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It is well understood that there is significant tension between the discovery process in the United States (U.S.) and the European Union Data Protection Laws based on the Directive 95/46/EC (the “Directive”) as implemented in the member states.<sup>1</sup> Substantially, much less perfectly, complying with the

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1. Presuming that a U.S. court has jurisdiction over a party, discovery is not limited to documents and electronically stored information (ESI) that are located within the U.S. so long as they are relevant, proportional, and within the party’s possession, custody, or control. Thus, the mere fact that a party has stored relevant ESI in another country does not exclude it from discovery (*e.g.*, at an offshore facility or second home). Likewise, if relevant

laws of all international jurisdictions is a difficult, if not impossible, task for multinational companies doing business in the U.S. and the European Union (EU).

On May 25, 2018, the General Data Protection Regulation (GDPR) will become the law in all the member states and replace laws implementing the Directive. In many respects, the GDPR is similar to the Directive, but certain aspects of the regulation are different and may also impact U.S. discovery and parties' ability to produce responsive information containing personal data of EU data subjects to opposing parties and U.S. courts. This paper focuses on the impact of the newly introduced provision, Article 48 ("Art. 48" or "the Article"):

Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting

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ESI is stored with a third party outside the U.S., a party to U.S. litigation can still be forced to produce the ESI if the party retains control of the data. *See, e.g., U.S. v. Vetco, Inc.*, 691 F.2d 1281 (9th Cir. 1981) (holding that U.S. parent corporations must produce documents located abroad in the possession of foreign subsidiaries).

Thus, ESI sitting in the EU can become subject to both U.S. discovery (because it is relevant, proportional, and within the possession, custody, or control of a U.S. litigant) and the data protection laws applicable in the affected member state (because it contains personal data of an EU data subject and is within the control of an EU data controller). This creates a dilemma as the broad scope of the discovery conflicts with the procedural concepts of most of the member states of the EU (which do not know discovery) and, consequently, with the data protection principles in the EU limiting the transfer of personal data outside the European Economic Area (EEA). Moze Cowper & Amor Esteban, *eDiscovery, Privacy & the Transfer of Data Across Borders: Proposed Solutions for Cutting the Gordian Knot*, 10 SEDONA CONF. J. 263 (2009).

third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.<sup>2</sup>

There is no analogous provision under the Directive. To understand whether or not Art. 48 will complicate discovery requires not only understanding how the EU will interpret and apply this provision and its requirements, but also how courts in the U.S. (and, by extension, U.S. regulators) will interpret the Article. This paper attempts to provide a first analysis of Art. 48 from both perspectives.

#### I. SUBJECT AND CONTENT OF ARTICLE 48 OF THE GDPR

As explained, the legislative bodies have ultimately decided to include Art. 48 in order to specifically regulate requests from a court, tribunal, or administrative authority which is based in a third country (i.e., a country outside of the European Economic Area).

Since such provision cannot be found in the Directive 95/46/EC, as the current data protection regime in the EU which national laws are based on, it is questionable how the new Art. 48 will be interpreted and if and how it will ultimately change the legal requirements when it comes to dealing with discovery requests from third countries.

##### *A. Current Legal Situation in the EU Regarding U.S. Discovery Requests*

When currently dealing with discovery requests from U.S. courts or administrative authorities, companies, which themselves or whose subsidiaries or affiliates are based in the

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2. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

EU, are faced with significant legal hurdles when trying to comply with such requests regarding production of personal data of EU data subjects.

1. Requests by U.S. Courts Through the Hague Evidence Convention

In theory, it is possible for a U.S. court to make its discovery request through the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Convention”) which is an international treaty allowing for legal assistance between different countries. This means that the request would be handled by a public authority in the country in which it is directed to.<sup>3</sup> However, in practice, pursuing discovery through the Hague Convention is not a viable path in most cases involving EU countries because several EU member states have not become a party to the Hague Convention and some other major EU member countries that adopted the Hague Convention, such as Germany, have chosen to opt out of having to comply with discovery requests from third countries.<sup>4</sup>

2. Requests by U.S. Courts and Administrative Authorities Outside of International Treaties

Therefore, the more relevant cases are those where U.S. courts and administrative authorities are requesting personal data from EU-based companies, subsidiaries, or affiliates di-

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3. Article 29 Data Protection Working Party, Working Paper (WP) 158, *Working Document 1/2009 on Pre-trial Discovery for Cross Border Civil Litigation* (Feb. 11, 2009), [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp158\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp158_en.pdf) (hereinafter WP 158).

4. *Id.*; German Implementation Act of the Hague Convention § 14, ¶ 1 (1977).

rectly and without the use of international treaties for legal assistance.<sup>5</sup> The strict requirements of EU data protection laws can make it very difficult to comply with such requests. Under EU data protection law, there are several legal requirements which have to be complied with and considered when dealing with discovery requests.

#### i. Collection and Transfer of Personal Data

The first major issue to analyze under the GDPR is that the collection and transfer of personal data has to be justified under a legal ground of EU data protection law.

##### a) Obtaining Consent of the Data Subjects

The most imminent and appealing legal ground under EU data protection laws is obtaining consent from the affected data subjects in the EU. However, EU data protection authorities (“DPAs”) are reluctant to accept consent of employees in many cases since, due to their obligations they owe to their employers, the DPAs question whether such consent would be based on the employees’ free will as required by EU data protection law.<sup>6</sup> Additionally, employees could refuse to give their consent or withdraw it at a later stage, which is undesirable, because it might lead to the respective collection or transfer of data becoming legally impossible. Therefore, obtaining consent is not a viable option in many cases.

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5. As discussed in detail below, under U.S. law, parties are not required to use the Hague Convention to obtain discovery of responsive materials in the possession, custody, or control of parties in U.S. litigation even if such material is stored outside the U.S.

6. WP 158, *supra* note 3.

b) Relying on a Provision of EU Data Protection Law

Since obligations under foreign law are generally not considered to be proper legal obligations under EU data protection law, the central provision which can allow a data transfer to the U.S. because of a discovery request requires such transfer to be in the legitimate interest of the transferring company with no existing overriding interest of the data subject.<sup>7</sup>

Based on this provision, DPAs in the EU generally allow documents to be transferred to the U.S. if personal data, which is not necessarily relevant for the discovery proceedings in the U.S., is redacted (i.e., anonymized).<sup>8</sup>

In addition, opposing counsel requesting discovery and U.S. courts ordering such production usually have to agree for the un-redacted personal data not to be publicized and only to be seen by the parties involved in the discovery proceedings. Furthermore, one has to generally put in place reasonable technical and organizational measures to ensure the security of the handling and especially the transfer of the affected data.<sup>9</sup>

Data protection law in the EU also requires for the affected data subjects to be informed of a transfer to the U.S.,<sup>10</sup> while some European jurisdictions also obligate companies to potentially include a works council when dealing with personal data of employees.

One must keep in mind that EU data protection law considers certain categories of personal data, such as data relating to racial or ethnic origin and religious beliefs, to be especially

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7. *Id.* at 9.

8. *Id.*

9. *Id.* at 12.

10. *Id.* at 11.



sensitive, and handling this type of data is even more restricted and requires further safeguards for the data subjects.<sup>11</sup>

ii. Data Export of Personal Data to the U.S.

Data protection laws in the EU also require specific justification for the data export to a third country, such as the U.S., since they are generally not seen as providing an adequate level of protection from a data privacy standpoint.

Data protection laws also allow for personal data to be transferred for the defense of legal claims. However, the DPAs in the EU for the most part do not consider discovery proceedings as covered by said allowance since, in their opinion, they are just a precursor of the trial itself.<sup>12</sup>

Since its invalidation in October 2015 by a judgment of the Court of Justice of the European Union (CJEU),<sup>13</sup> the Safe Harbor Decision, as the previously preferred solution, cannot be relied on for data exports to the U.S. any longer. The EU Commission is currently working with the U.S. to reach an agreement on a successor to the Safe Harbor Decision or the so called Privacy Shield.<sup>14</sup> Since the CJEU judgment has set a very high bar for a successive agreement, it remains to be seen whether

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11. *Id.* at 10.

12. *Id.* at 13.

13. Case C-362/14, Schrems v. Data Protection Comm'r, 2015 E.C.R. 650 (Oct. 6, 2015), [http://curia.europa.eu/juris/document/document\\_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=169195&occ=first&dir=&cid=441512](http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=169195&occ=first&dir=&cid=441512); see also Press Release No. 117/15, *The Court of Justice declares that the Commission's US Safe Harbour Decision is invalid*, Court of Justice of the European Union (Oct. 6, 2015), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf>.

14. European Commission Press Release IP/16/216, EU Commission and United States Agree on New Framework for Transatlantic Data Flows: EU-US Privacy Shield (Feb. 2, 2016), available at [http://europa.eu/rapid/press-release\\_IP-16-216\\_en.htm](http://europa.eu/rapid/press-release_IP-16-216_en.htm).

and when such solution can be put in place. Consent of the data subjects can generally also legitimize data exports. However, it should not be predominantly relied upon as a viable solution for the reasons stated previously.

Therefore, companies are left with two possible options which lead to additional problems. One of these options is Standard Contractual Clauses (“SCCs”) issued by the EU Commission which have to be signed by the data exporter in the EU and the data importer in the U.S. However, it is very unlikely that opposing counsel and U.S. courts can and will enter into respective transfer contracts with SCCs.<sup>15</sup>

The second option would be consideration of Binding Corporate Rules (“BCRs”), i.e., agreements between several entities of a multinational corporate group which allow for the sharing of personal data between them. However, similar to SCCs, onward transfers of data from the U.S. entity of a corporate group to opposing counsel and U.S. courts can generally not be legitimized through BCRs.

#### *B. Legal Situation in the EU Regarding U.S. Discovery Requests Under the GDPR*

In light of the legal situation under the current EU data protection regime, the question arises as to whether the newly introduced GDPR, especially its Art. 48, will materially change the rules in the EU when dealing with U.S. discovery requests.

##### 1. Legislative History of Article 48

To better understand the impact of Art. 48, it is important to review its specific history based on the legislative process of the GDPR.

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15. See generally Ralf Deutmoser & Alexander Filip, *European Data Privacy versus U.S.(e-) Discovery Obligations—A Practical Guide for Enterprises*, *Zeitschrift für Datenschutz* (6/2012).

The first draft of the GDPR was presented by the EU Commission on January 25, 2012. However, Art. 48 or a similar provision was not included at that time. Only at a later stage of the legislative process, a provision similar to Art. 48 was introduced in the March 12, 2014, draft of the European Parliament under Art. 43a:<sup>16</sup>

Transfers or disclosures not authorised by Union law

1. No judgment of a court or tribunal and no decision of an administrative authority of a third country requiring a controller or processor to disclose personal data shall be recognised or be enforceable in any manner, without prejudice to a mutual legal assistance treaty or an international agreement in force between the requesting third country and the Union or a Member State.
2. Where a judgment of a court or tribunal or a decision of an administrative authority of a third country requests a controller or processor to disclose personal data, the controller or processor and, if any, the controller's representative, shall notify the supervisory authority of the request without undue delay and must obtain prior authorisation for the transfer or disclosure by the supervisory authority.
3. The supervisory authority shall assess the compliance of the requested disclosure with this Regulation and in particular whether the disclosure is necessary and legally required in

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16. European Parliament Draft of the General Data Protection Regulation (Mar. 12, 2014), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0//EN>.

accordance with points (d) and (e) of Article 44(1) and Article 44(5). Where data subjects from other Member States are affected, the supervisory authority shall apply the consistency mechanism referred to in Article 57.

4. The supervisory authority shall inform the competent national authority of the request. Without prejudice to Article 21, the controller or processor shall also inform the data subjects of the request and of the authorisation by the supervisory authority and, where applicable, inform the data subject whether personal data were provided to public authorities during the last consecutive 12-month period, pursuant to point (ha) of Article 14(1).

Article 43a had a broader scope including an obligation to notify the relevant DPA as well as to “obtain prior authorization for the transfer or disclosure” by the relevant DPA<sup>17</sup> which cannot be found in the final version of the provision. The implementation of such provision would have had a profound impact on how European companies dealing with U.S. discovery, while also complying with these provisions, would have been significantly more cumbersome.

The introduction of the provision was a reaction to the Snowden revelations in June 2013 about the National Security Administration’s (NSA) PRISM program and its worldwide mass surveillance.<sup>18</sup> The purpose of its introduction was to avoid mass surveillance and other overly broad monitoring by

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17. *Id.*

18. David Meyer, *Industry Issues Plea Over Data Reform*, POLITICO.COM (Aug. 27, 2015), <http://www.politico.eu/Art./industry-plea-data-reform-protection-privacy/>.

third countries, e.g., the NSA or the Foreign Intelligence Surveillance Court were able to request personal data from EU companies without arguably going through the proper legal channels under international laws.<sup>19</sup>

However, the subsequently released draft of the Council of the European Union dated June 11, 2015, did not contain a provision such as Article 43a.<sup>20</sup> This omission seems to show that there was disagreement between the legislative bodies in the EU on whether to even include a provision such as Article 43a in the GDPR.

Ultimately, and despite a lot of criticism from the U.S. as well as European businesses, it might be difficult if not impossible in some cases to comply with such provision while also complying with U.S. laws.<sup>21</sup> Nevertheless, the EU kept the provision in the final version of the GDPR. However, only the first part of Article 43a within the draft of the European Parliament was retained while the rest of the proposed wording was removed.<sup>22</sup> Furthermore, the clause “without prejudice to other grounds for transfer pursuant to this Chapter” was added as the last part of the provision. Especially the removal of the most restrictive parts of Article 43a shows that the final version of the GDPR does not intend to restrict dealing with discovery requests in the way which might have initially been intended by the draft of the European Parliament.

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19. *Id.*

20. Council of the European Union Draft of the General Data Protection Regulation (June 11, 2015), <http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf>.

21. Meyer, *supra* note 18.

22. European Parliament Draft of the General Data Protection Regulation, *supra* note 16.

## 2. Meaning of Article 48

It is imperative to analyze the meaning of Art. 48. As is generally the case with EU legislation, the GDPR also provides an explanation under Recital 115 as to how Art. 48 is supposed to be interpreted:

Some third countries adopt laws, regulations and other legal acts which purport to directly regulate the processing activities of natural and legal persons under the jurisdiction of the Member States. This may include judgments of courts or tribunals or decisions of administrative authorities in third countries requiring a controller or processor to transfer or disclose personal data, and which are not based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State. The extraterritorial application of those laws, regulations and other legal acts may be in breach of international law and may impede the attainment of the protection of natural persons ensured in the Union by this Regulation. Transfers should only be allowed where the conditions of this Regulation for a transfer to third countries are met. This may be the case, *inter alia*, where disclosure is necessary for an important ground of public interest recognised in Union or Member State law to which the controller is subject.<sup>23</sup>

While the Recital gives an indication as to the interpretation of Art. 48, a thorough analysis is still necessary.

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23. Recital 115, General Data Protection Regulation, *supra* note 2.

- i. “Any judgment of a court or tribunal and any decision of an administrative authority”

Art. 48 appears to only apply to “[a]ny judgement of a court or tribunal and any decision of an administrative authority requiring a controller or processor to transfer or disclose personal data.” It is clear that Art. 48 applies to any disclosure mandated by any order from a third country (read U.S.) court or regulator. Also, it seems equally clear that Art. 48 would not apply to voluntary disclosures or government authorities like those contemplated by the U.S. Department of Justice’s new Foreign Corrupt Practices Act (FCPA) Pilot Program. Nor would data controllers’ internal investigations be affected by Art. 48. Finally, it appears that voluntary disclosures of personal data made to third parties to resolve disputes outside of discovery would not be impacted by Art. 48 because no court, tribunal, or administrative agency is involved.

An open question is whether disclosures to opponents in response to U.S. civil discovery requests technically fall under Art. 48. Under U.S. federal and state civil procedure, discovery is self-executing and not executed through court order, though the failure to reasonably comply with discovery requests is sanctionable.<sup>24</sup> Ideally, discovery between two parties in civil litigation in the U.S. is meant to be undertaken with little or no court involvement. If a court does not order a party to produce documents or if the party is responding to a document request requiring disclosure of personal data because of “[a]ny judgement of a court,” then it should be noted that the language of Art. 48 is narrower than the French blocking statute which uses the phrase “with a view to foreign administrative or judicial proceedings or as part of such proceedings.”<sup>25</sup> Arguably, the

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24. FED. R. CIV. P. 37.

25. French law No. 68-678 of 26 July 1968.

French blocking statute does not require a court order and simply disclosing the information with “a view” that it will be used in third country proceedings violates the statute. However, it appears that Art. 48 requires an operative order that requires the disclosure of personal data. Of course, the court’s scheduling order that opens discovery and applies the rules of discovery that allow for production of data from non-U.S. countries could be considered the operative order.

At present, this remains a highly technical interpretation. Parties may need guidance from the Article 29 Working Party and DPAs, but the safer course of action at the moment is to assume that responding to discovery requests will be considered to be covered by Art. 48.

#### ii. International Agreements

First, a party must determine what kind of “international agreements” are included within the meaning of Art. 48. One could assume that the reference to “a mutual legal assistance treaty” is just meant as one example for applicable international agreements while the legislative bodies of the EU might want to include all sorts of international agreements. However, even though it seems to be the case that “mutual legal assistance treaties” do not solely account for the scope of application of the provision, Art. 48, nevertheless, clearly seems to aim for international conventions which allow for courts or public authorities of one country to officially request assistance (i.e., in this case, information) from another country. In the present context, the provision seems to be tailored towards the Hague Convention which becomes even clearer when analyzing the other parts of Art. 48.



iii. “Without prejudice to other grounds for transfer pursuant to this Chapter”

Because the Hague Convention is not a viable path in many cases involving EU countries, it is more important to understand whether Art. 48 is supposed to limit or prohibit direct information requests from U.S. courts and administrative authorities to EU companies without the use of international treaties for legal assistance.

Especially when reading the first part of Art. 48 which states “may only be recognised or enforceable in any manner if based on an international agreement,” one could very well reason that Art. 48 is supposed to limit or even prohibit any response to discovery requests which occur outside of such agreements. This is supported by the title of the provision referring to “Transfers or disclosures not authorized by Union law.”

However, the last part of Art. 48 and Recital 115 clearly contradict such a restrictive interpretation of Art. 48. “Without prejudice to other grounds for transfer pursuant to this Chapter” most likely is a clarification which states that Art. 48 does not intend to prohibit data transfers which are legally possible through other provisions of the GDPR, although the GDPR is Union law as mentioned in the title of the provision. It, therefore, means that a company might legally be able to comply with an information request by a foreign court if such request falls, e.g. under Article 49, paragraph 1(e), even if it is not based on an international agreement. This analysis corresponds with Recital 115 which explicitly states that “[t]ransfers should only be allowed where the conditions of this Regulation for a transfer to third countries are met.”

In conjunction with the last sentence of Recital 115, which refers to Article 49, paragraph 1(d), of the GDPR as one of the cases where disclosures are supposed to be permitted, one has to conclude that Art. 48 is not supposed to be the only provision

allowing data transfers in response to discovery requests from courts or administrative authorities in third countries. As opposed to that, the explicit mentioning of “other grounds for transfer pursuant to this Chapter” in the wording of Art. 48 has to be understood as a referral to other provisions within the GDPR which also allow for data transfers to third countries. Therefore, the GDPR does not intend to prohibit any data transfer outside of international treaties for legal assistance.

It seems to be surprising that the effect of the newly introduced Art. 48 could be limited. However, the legislative process of the GDPR indicates that there was a disagreement between the legislative bodies on whether a provision such as Art. 48 should even be part of the GDPR. As could be seen during the fallout of the NSA revelations, the European Parliament seemed to have taken a restrictive position on this topic. As opposed to that, the final version of Art. 48 appears to be a compromise between the legislative bodies while its primary purpose probably lies in the clarification that foreign courts and administrative bodies shall not circumvent the data export obligations set out in the GDPR.

This clarification looks like what the legislative bodies were ultimately able to agree on while they did not seem to be able to find an agreement on the more restrictive suggestions of the European Parliament. This is supported by Recital 115 of the GDPR, “[t]ransfers should only be allowed where the conditions of this Regulation for a transfer to third countries are met,” which states the obvious. Furthermore, and in light of the effect that the reason for its introduction was the NSA revelations,<sup>26</sup> it is not very likely that Art. 48 will severely limit the ability of European entities to comply with requests based on discovery proceedings in civil litigations outside of the EU.

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26. Meyer, *supra* note 18.

On the other hand, and in light of the judgment by the CJEU on the Safe Harbor Decision,<sup>27</sup> one cannot rule out that a European court might still have a different view about Art. 48. Based on the unusual wording of Art. 48—which seems to be a result of the legislative process involving different drafts from several legislative bodies—as well as its headline, the provision is open for different interpretations of its meaning and effect.

### 3. Effect of Article 48 and the GDPR on the Legal Situation in the EU

Based on the above as well as an analysis of the GDPR as a whole, the legal situation when it comes to dealing with U.S. discovery requests under the obligations of EU data protection law will most likely not materially change in many cases compared to the legal situation under the current legal regime in the EU.

#### i. Requests by U.S. Courts and Administrative Authorities Outside International Treaties

In light of the fact that the wording of the majority of the respective legal provisions within the GDPR have not materially changed compared to the current law, it is not likely that the previously expressed guidance by European DPAs will change significantly. This conclusion is also based on the fact that the most relevant authority when it comes to interpreting the GDPR will still be the DPAs of the EU member states. The DPAs will cooperate in the European Data Protection Board (Article 68 of the GDPR), which despite the different name is quite similar to the current Article 29 Working Party (Article 29 Directive) in many regards.

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27. *Supra* note 13.

Therefore, companies will most probably face the same issues when trying to rely on consent of data subjects.

When it comes to relying on a provision of the law, a data transfer to the U.S. because of a discovery request will also in the future require such transfer to be in the legitimate interest of the transferring company while no overriding interest of the data subjects exists. In many cases, this leads to the applicability of the already outlined approach which to a certain extent requires the redaction of personal data while similar additional requirements would also apply under the GDPR. Furthermore, the GDPR also considers similar categories of personal data like the current Directive 95/46/EC to be especially sensitive and includes additional restrictions for them as well.

Finally, the legal grounds for allowing data exports to the U.S. apart from the introduction of Art. 48 are also similar to the ones outlined above regarding the current legal situation. However, apart from already outlined and still applicable data export options under the GDPR, note that Article 49, paragraph 1, sentence 2 of the GDPR may also allow for data exports:

if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data.

As stated by Recital 113 of the GDPR, one can only rely on this provision “where none of the other grounds for transfer are applicable.” Since the invalidation of the Safe Harbor Deci-

sion in October 2015, data exports under the remaining legal options provided by European data protection law can be very difficult. One might be able to argue in favor of the applicability of Art. 49, paragraph 1, sentence 2 of the GDPR in discovery cases which is also supported by the fact that data exports for the purpose of complying with discovery requests are generally non-repetitive while concerning only a limited number of data subjects. In particular, this derogation may be ideal for those cases where personal data needs to be provided to U.S. courts or regulators who cannot sign SCC as these disclosures are almost always miniscule when compared to discovery generally and certainly non-repetitive.

Relying on this data export option could also be compelling for affected companies since they will want to rely on their legitimate interest under European data protection law when collecting and transferring the data while having to implement suitable safeguards in many cases anyway. However, it should be taken into account that Article 49 at paragraphs 1, 3, and 4, includes an obligation to inform the competent DPA as well as additional notification obligations regarding the affected data subject.

#### ii. Significant Increase of Possible Fines under the GDPR

Even though it seems that the legal requirements and issues which companies are facing when it comes to dealing with U.S. discovery requests will not materially change under the regime of the GDPR, the most important change is the very significant increase regarding possible fines for non-compliance with EU data protection law.

Article 79 of the GDPR allows DPAs to impose fines of up to 4% of a company's entire worldwide turnover for the previous financial year for any violations. While it still remains to

be seen whether and to what extent DPAs will in practice impose such fines, this could become a game changer since some companies in the past would rather choose to accept non-compliance regarding their EU data protection obligation and potential fines in order to avoid significantly higher financial losses for not complying with U.S. discovery obligations. As the delta between the threatening penalties is reduced, this decision will become a tougher one.

*C. Opt-Out Option Via the United Kingdom*

The Treaty on the Functioning of the European Union (TFEU) is amended by several protocols, which contain specific regulations for individual EU member states. Protocol 21 to the TFEU, for example, relates to the position of the United Kingdom (UK) and Ireland with respect to the areas of freedom, security, and justice. Article 3 of Protocol 21 to the TFEU provides that:

the United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State shall be entitled to do so.

With respect to Article 43(a) of the GDPR (now Art. 48), the UK already decided and announced not to opt-in to the parts of Art. 48 which trigger the Protocol 21.<sup>28</sup> Hence, if this action

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28. Baroness Neville-Rolfe, General Data Protection Regulation: Written Statement, HLWS500 (Feb. 4, 2016), <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2016-02-04/HLWS500/>.

would be lawful, Art. 48 would not have any effects in relation to the UK. While other countries, for example Germany, do not have a similar option, one could consider if a transfer of data via the UK would allow circumventing the limitations of Art. 48.

However, it is already disputed whether the UK can in fact rely on Protocol 21.<sup>29</sup> Furthermore, even a centralization of data storage and processing within the UK would not allow data controllers within another EU country to ignore Art. 48 as the GDPR is applicable for controllers and processors with an establishment in the EU irrespective of whether the processing takes place in the Union or not (Article 3, paragraph 1 of the GDPR).

## II. HOW U.S. COURTS WILL INTERPRET ARTICLE 48

If Art. 48 simply requires data controllers to establish their legitimate interest in processing personal data to comply with U.S. discovery requests and to be more transparent and more proportional in their processing, then not much will change for U.S. courts, and they will not necessarily need to consider Art. 48. However, if a party refuses because of Art. 48 to produce responsive documents from the EU because they contain personal data of EU data subjects, then U.S. courts will need to apply their own lens to the issue. The question is whether U.S. courts will excuse a failure to produce if it is because of Art. 48 of the GDPR.

### A. *Where the Tension with EU Data Protection Starts*

As mentioned, the conflict between the discovery obligations in U.S. court proceedings and the EU data protection laws

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29. See, e.g., Deutscher Bundestag, "Ausschuss Digitale Agenda" Voßhoff, Ausschussdrucksache 18(24)93 (Feb. 24, 2016) <https://www.bundestag.de/blob/409392/af981344cf08dd553d52c36030bc1fb2/a-drs-18-24-93-data.pdf>.

is not new. In 1987, the U.S. Supreme Court in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*<sup>30</sup> attempted to resolve the dilemma for U.S. litigants seated within the EU. The Supreme Court held that a requesting party was not *required* to use the Hague Convention.<sup>31</sup> The defendants in *Aerospatiale* were aircraft manufacturers that were owned by the Republic of France and sued in federal court in the U.S. In response to discovery requests, the defendants moved for a protective order asserting that the Hague Convention was the exclusive source for obtaining foreign discovery.

The Supreme Court disagreed. The Supreme Court held that the Hague Convention does not provide exclusive or mandatory means for litigants in the U.S. to obtain information located in a foreign country. The Supreme Court further concluded that international comity does not require litigants to first resort to the Hague Convention before pursuing discovery under the Federal Rules of Civil Procedure. It also held that the French penal statute, known as a "*blocking statute*," did not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence. Thus, the Supreme Court has already decided that from the U.S. perspective, courts and requesting parties are not obligated to do what Art. 48 arguably requires.

The Supreme Court did not completely disregard the tension it was creating. Understanding that U.S. discovery was broad and on occasion could be intrusive, the court instructed district courts to be careful when weighing the needs of the requesting party and the impact of U.S. discovery in foreign countries:

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30. 482 U.S. 522 (1987).

31. *Id.* at 534.



American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses. For example, the additional cost of transportation of documents or witnesses to or from foreign locations may increase the danger that discovery may be sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence. Objections to “abusive” discovery that foreign litigants advance should therefore receive the most careful consideration. In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.<sup>32</sup>

To help courts provide “due respect for any special problem confronted by the foreign litigant,” the Supreme Court refrained to create a specific line, but rather held that comity “requires in this context a more particularized analysis of the

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32. *Id.* at 546 (emphasis supplied) (internal citations omitted).

respective interests of the foreign nation and the requesting nation.”<sup>33</sup> The Supreme Court did not lay out specific rules to help guide resolution of problems arising in the international discovery context. Instead, it commented that “[t]he nature of the concerns that guide a comity analysis is suggested by the Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986) (Restatement),”<sup>34</sup> which lists the following factors as determinative of whether “to order foreign discovery in the face of objections by foreign” litigants:

- 1) “the importance to the . . . litigation of the documents or other information requested;”<sup>35</sup>
- 2) “the degree of specificity of the request;”<sup>36</sup>

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33. *Id.* at 524.

34. *Id.* at 544 n.28.

35. Under this factor, a court may analyze the importance of discovery that is being requested. Some courts have found that the information that is requested must meet a high level of importance in order for the factor to weigh in favor of proceeding with foreign discovery. *See, e.g., In re Activision Blizzard, Inc. Stockholder Litigation*, 86 A.3d 531, 544 (Del. Ch. 2014) (“This factor calls on the court to consider the degree to which the information sought is more than merely relevant under the broad test generally for evaluating discovery requests.”); *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 400 (E.D.N.Y. 2008) (“Because the scope of civil discovery in the US is broader than that of many foreign jurisdictions, some courts have applied a more stringent test of relevancy when applying the Federal Rules to foreign discovery.”). Other courts have only required relevance as a basis for determining that this factor weighs in favor of proceeding with international discovery under the Rules. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992).

36. The *Aerospatiale* Court emphasized “exercise [of] special vigilance” to ensure that foreign discovery is not abused and that foreign parties are not placed “in a disadvantageous position” by “unnecessary, or unduly burdensome discovery.” 482 U.S. at 546. Courts often analyze to which degree international discovery requests are appropriately “tailored” to the claims and defenses of the litigation. *See, e.g., In re Cathode Ray Tube (CRT) Antitrust*

- 3) “whether the information originated in the United States;”<sup>37</sup>
- 4) “the availability of alternative means of securing the information;”<sup>38</sup> and
- 5) “the extent to which noncompliance with the request would undermine important interests of the

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Litig., 2014 U.S. Dist. LEXIS 41275, at \*70 (N.D. Cal. Mar. 26, 2014) (“courts are less inclined to ignore a foreign state’s concerns” about the conflicts in discovery where discovery seeks cumulative evidence); *In re Vitamins Anti-trust Litig.*, 120 F. Supp. 2d 45, 54 (D.D.C. 2000) (“Since plaintiffs have alleged a prima facie basis for jurisdiction and their revised requests are narrowly tailored and are not the type of blind fishing expeditions of concern to these signatory nations, the Court finds that the signatory defendants’ sovereign interests will not be unduly hampered by proceeding with jurisdictional discovery under the Federal Rules.”).

37. If the requested information and people involved are in a foreign country, this factor often weighs against conducting foreign discovery under the Federal Rules, particularly where there is evidence that the foreign laws in the country have provisions prohibiting disclosure of information. *Richmark*, 959 F.2d at 1475 (“The fact that all the information to be disclosed (and the people who will be deposed or who will produce the documents) are located in a foreign country weighs against disclosure, since those people and documents are subject to the law of that country in the ordinary course of business.”).

38. If the information sought from a foreign country can easily be obtained elsewhere, then courts find that there is “little or no reason to require a party to violate foreign law.” *Richmark*, 959 F.2d at 1475. However, courts have found this factor weighing in favor of discovery under the Federal Rules where the requested information is in the complete control of the foreign party resisting discovery and where the party requesting the information cannot obtain it elsewhere. The effectiveness of the Hague Convention is often a consideration, and courts generally find that the Hague Convention is not an available and alternate means for obtaining foreign discovery. *In re Automotive Refinishing Paint.*, 358 F.3d 288, 300 (3d Cir. 2004) (“*Aerospatiale* notes that in many situations, the Convention procedures would be unduly time-consuming and expensive, and less likely to produce needed evidence than direct use of the Federal Rules of Evidence.”).

United States, or compliance with the request would undermine important interest of the state where the information is located.”

Although courts apply and analyze all these factors when determining how to proceed with international discovery, it is the fifth factor that is the most important and “is a balancing of competing interests, taking into account the extent to which the discovery sought serves important interests of the forum state versus the degree to which providing the discovery would undermine important interests of the foreign state.”<sup>39</sup> It is also this factor that plays a greater role in getting a better understanding of how courts in the U.S. will react to Art. 48 as the others are dependent on the facts of the case. The fifth factor is the only one that weighs the importance of the EU’s interest in Art. 48.

*B. How U.S. Courts Have Analyzed the Fifth Factor*

Applying the fifth factor, most courts have concluded that discovery should proceed under the Federal Rules as opposed to the Hague Convention. For example, in *Wultz v. Bank of China*,<sup>40</sup> plaintiffs were victims of a suicide bombing and brought suit against defendant for providing material support and resources to the alleged terrorist organization. To prove their claims, plaintiffs sought various documents from the defendant located in China. The court ordered defendant to produce the documents after evaluating the *Aerospatiale* factors. Under the fifth factor, the court considered the extent to which the

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39. *In re Activision Blizzard*, 86 A.3d at 547; see also *Motorola Credit Corp. v. Kemal Uzan*, 73 F. Supp. 3d 397, 402 (S.D.N.Y. 2014) (“[I]t must not be forgotten that what we are concerned with here is a comity analysis, and from that standpoint the most important factor is the fifth factor.”).

40. 942 F. Supp. 2d 452 (S.D.N.Y. 2013).

defendant's compliance to discovery would undermine important Chinese interests. The Chinese laws are concerned with "depriving international terrorist and other criminal organizations of funding," and the court recognized that there is a risk that ordering production of documents could have a chilling effect on future communications by Chinese banks, leading suspicious transactions to go unreported.<sup>41</sup> Nevertheless, the court gave greater weight to U.S. interests. The court considered that if the defendant was liable and did not produce the requested materials, this would allow a bank that recklessly or knowingly funded terrorists who murdered an American citizen to operate with impunity in the U.S.

A similar outcome resulted in *Strauss v. Credit Lyonnais, S.A.*,<sup>42</sup> where plaintiffs were victims of a terrorist attack and sued Credit Lyonnais, a French bank. The court decided in that case that

[the fifth] factor weighs strongly in favor of plaintiffs. The interests of the United States and France in combating terrorist financing, as evidenced by the legislative history of the ATA, codified at 18 USC § 2331 et seq., Presidential Executive Orders, and both countries' participation in international treaties and task forces aimed at disrupting terrorist financing, outweigh the French interest, if any, in precluding Credit Lyonnais responding to plaintiffs' discovery requests.<sup>43</sup>

The defendant argued that "France has an obvious and undeniable national interest in protecting bank customer privacy and enforcing its internal banking, money laundering and

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41. *Id.* at 467.

42. 242 F.R.D. 199 (E.D.N.Y. 2007).

43. *Id.* at 213.

terrorism laws, as well as its laws regarding criminal investigation.”<sup>44</sup> However, the U.S.’s interest in protecting against terrorism outweighed these interests.

In the antitrust context, U.S. interests have also been upheld and discovery has been compelled. In *In re Air Cargo Shipping Servs. Antitrust Litig.*,<sup>45</sup> plaintiffs involved in an international antitrust litigation moved to compel defendant French air service to produce documents that defendant had withheld on the ground that the production was prohibited by the French blocking statute. The court granted the motion to compel, finding that “this is a case involving violations of antitrust laws whose enforcement is essential to the country’s interests in a competitive economy,” “enforcement through private civil actions such as this one is a critical tool for encouraging compliance with the country’s antitrust laws,” and “the interest in prohibiting price-fixing of the type alleged here is shared by France.”<sup>46</sup> By way of contrast, “the only French interest is a sovereign interest in controlling access to information within its borders, fueled at least in part by a desire to afford its citizens protections against discovery in foreign litigation.”<sup>47</sup>

On the other hand, though very infrequently, courts have found under the fifth *Aerospatiale* factor that discovery must proceed under the Hague Convention or should be blocked. In *In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litigation*,<sup>48</sup> plaintiffs sought information from an investigation conducted by the EU Commission. The court emphasized the

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44. *Id.* at 219.

45. 278 F.R.D. 51 (E.D.N.Y. 2010).

46. *Id.* at 61–62.

47. *Id.* at 61.

48. No. 05-MD-1720, 2010 U.S. Dist. LEXIS 89275, at \*27 (E.D.N.Y. Aug. 27, 2010).

fifth *Aerospatiale* factor. The court noted that the EU Commission has “strong and legitimate reasons to protect the confidentiality” of the investigation which outweighed the “plaintiffs’ interest in discovery of the European litigation documents.” The confidentiality of the EU Commission was found to be important in encouraging voluntary cooperation by third parties, and the court determined that the EU Commission’s interests would be significantly undermined if its confidentiality rules were disregarded by American courts.<sup>49</sup>

In *In re Perrier Bottled Water Litigation*,<sup>50</sup> the court also ordered discovery through the Hague Convention. The plaintiff citizens sought to compel discovery of documents by the defendant water producer. One of the producers sought a protective order requiring that any discovery requests be made through the Hague Convention. The federal district court held that the Hague Convention applied because the discovery requests were intrusive and not narrowly tailored and that application of the federal rules would breach French sovereignty. The court noted that France in particular has been “emphatic” about expressing disfavor towards private litigants’ use of the Federal Rules for discovery. The court gave importance to the fact that “France has even amended its civil and penal codes to incorporate the Hague Evidence Convention,” which weighs heavily in favor of the use of those procedures.<sup>51</sup>

### C. U.S. Courts’ Reactions to Other Rules that Impact International Discovery

The thread that emerges from *Aerospatiale* and the cases that have followed that have earnestly examined the interests of

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49. *Id.* at \*29.

50. 138 F.R.D. 348 (D. Conn. 1991).

51. *Id.* at 355.

the foreign jurisdiction is that while courts in the U.S. are loathe to excuse a failure to produce, they do make exceptions.

### 1. Blocking Statutes

Foreign data protection laws that appear designed simply to thwart U.S. jurisdiction and discovery and provide no real substantive rights to their citizens are not given credit by courts in the U.S. Essentially, most courts simply quote *Aerospatiale*: “[i]t is clear that American courts are not required to adhere blindly to the directives of such a statute. Indeed, the language of the statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge.”<sup>52</sup>

Thus, blocking statutes, like French law discussed in *Aerospatiale* and *Strauss*, are unlikely to be seen as a good excuse to not produce responsive, relevant, proportional documents in the possession, custody, or control of a party before a court in the U.S. Generally speaking, courts do not believe that thwarting U.S. discovery is a legitimate interest of foreign governments.<sup>53</sup> The Supreme Court has stated that noncompliance with a discovery order for fear of foreign prosecution still constitutes nonproduction and can subject a person to discovery sanctions; however, dismissal is an inappropriate sanction “when it has

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52. 482 U.S. 522, 544 n.29 (1987).

53. *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 258 (M.D.N.C. 1988) (stating that the French blocking statute is “overly broad and vague and need not be given the same deference as a substantive rule of law”); *Compagnie Francaise D’Assurance Pour Le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 30 (S.D.N.Y. 1984) (declining to apply the French blocking statute and noting that “the legislative history of the statute gives strong indications that it was never expected to nor intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts”) (internal citations omitted).



been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of [the party].”<sup>54</sup>

Although courts recognize that forcing a party to produce documents in violation of the French blocking statute may result in criminal sanctions, including imprisonment and payment of sizeable monetary fines, “there is little evidence that the statute has been or will be enforced.”<sup>55</sup> Moreover, where the plaintiffs are the party being compelled to make a production, the plaintiffs have a choice: “[t]hey can withdraw the complaint voluntarily at any time or produce the requested documents and risk prosecution under French law.”<sup>56</sup>

#### i. Banking and Other Secrecy Laws

Banking and state secrecy laws have also been analyzed by courts in the U.S. and sometimes guide a court’s decision on whether to allow foreign discovery.<sup>57</sup>

In *Reinsurance Co. of Am. Inc. v. Administratia Asigurarilor de Stat*,<sup>58</sup> for example, the court determined that Romania’s interest in its national secrecy laws outweighed American interests in enforcing judicial decisions. Unlike the French blocking

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54. *Societe Internationale v. Rogers pour Participations Industrielles et Commerciales, S.A.*, 357 U.S. 197, 212 (1958).

55. *Phillips Petroleum*, 105 F.R.D. at 31; *see also* *Bodner v. Banque Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000) (“As held by numerous courts, the French Blocking Statute does not subject defendants to a realistic risk of prosecution, and cannot be construed as a law intended to universally govern the conduct of litigation within the jurisdiction of a US court.”).

56. *Phillips Petroleum*, 105 F.R.D. at 31.

57. *Rogers*, 357 U.S. at 203 (dismissal of the case was not justified where the plaintiff Swiss bank failed to comply with pretrial production, in that its failure was “not due to inability fostered by its own conduct or by circumstances within its control but because production of documents might violate Swiss laws” that included criminal penalties).

58. 902 F.2d 1275 (7th Cir. 1990).

statute, the court stated that “Romania’s law appears to be directed at domestic affairs rather than merely protecting Romanian corporations from foreign discovery requests.”<sup>59</sup> In *Minpeco, S.A. v. ContiCommodity Servs.*,<sup>60</sup> the court examined the Swiss national interest in bank secrecy statutes, which imposed penal sanctions on agents of a bank who disclosed a customer’s identity or any other information about a customer. The court determined that the “Swiss interest in bank secrecy [was] ‘substantial’ because the prohibition on disclosure of customer information was expressed in criminal statute and the secrecy laws had the legitimate purpose of protecting commercial privacy inside and outside Switzerland.”<sup>61</sup>

These decisions may be a minority because, most frequently, courts in the U.S. do not use banking laws or other similar secrecy laws to block discovery.<sup>62</sup> In *Strauss*, the court stated that “courts in this Circuit have already examined the French bank secrecy law . . . and denied [it’s] applicability to preclude

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59. *Id.* at 1280.

60. 116 F.R.D. 517 (S.D.N.Y. 1987).

61. *Id.* at 524–525.

62. *See, e.g., In re Am. Int’l Group, Inc.*, 2008 Secs. Litig., No. 08-cv-4772, 2010 U.S. Dist. LEXIS 127660, at \*8 (S.D.N.Y. Dec. 1, 2010) (“Under the circumstances of this case, this due process interest outweighs the French interest in protecting the secrecy of banking records, given that all of the records in question have already been disclosed to governmental agencies without redaction and much of the information contained in those records has already been disclosed to the public.”); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1476 (9th Cir. 1992) (declining arguments related to Chinese secrecy laws because the interest in confidentiality was not raised prior to the litigation and because “Beijing routinely disclosed information regarding its assets, inventory, bank accounts, and corporate structure to the general public, for example through a trade brochure, and to companies with whom it did business”).

discovery,” because the bank secrecy law is not intended to apply to litigation in which the bank is a party.<sup>63</sup> In *Linde v. Arab Bank*,<sup>64</sup> the court concluded that the U.S.’s interests in combating terrorism trumped the foreign state’s interest in bank secrecy. Plaintiffs moved for an order compelling discovery and sanctioning defendant bank for nonproduction. Defendant declined to comply with the request because doing so would violate the bank secrecy laws in Jordan, Lebanon, and Palestine, violation of which involved criminal fines and incarceration. Although the court acknowledged that maintaining bank secrecy is an important interest, it held that this interest must yield to the interests of fighting terrorism and compensating victims. The court directed defendant to secure permission from foreign authorities to provide the discovery and deferred further action pending outcome of this process.

Similarly, in *In re Air Crash at Taipei*,<sup>65</sup> the court found defendant’s implication of Taiwan secrecy laws unpersuasive. The plaintiffs moved to compel discovery that defendants argued it could not produce because Taiwan prohibited release of all accident investigation documents. The court held that although countries generally have a strong interest in enforcing their secrecy laws, there was no evidence that Taiwan’s interest would be implicated or infringed. Defendant offered a letter arguing that foreign law prohibited disclosure, but failed to address the specific document requests at issue. In addition, defendant failed to provide “persuasive proof” that defendant or its officers would be criminally prosecuted for complying with an order of the court, or evidence regarding the manner and extent to which Taiwan enforces its secrecy laws.

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63. *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 220 (E.D.N.Y. 2007).

64. 463 F. Supp. 2d 310 (2006).

65. 211 F.R.D. 374, 379 (D. Cal. 2002).

## ii. Substantive Data Protection Laws

Where courts in the U.S. are most likely to excuse, or limit, discovery under the Federal Rules, is where they believe that discovery is infringing on substantive rights of foreign governments or citizens, particularly non-parties.

For example, in *Cascade Yarns, Inc. v. Knitting Fever, Inc.*,<sup>66</sup> the court granted a motion for issuance of letters rogatory finding that the “[u]se of Hague Convention procedures is particularly relevant where, as here, discovery is sought from a non-party in a foreign jurisdiction.” Similarly, the court in *Tulip Computers Int’l B.V. v. Dell Computer Corp.*<sup>67</sup> stated that “[r]esort to the Hague Evidence Convention in this instance is appropriate since both Mr. Duynisveld and Mr. Dietz are not parties to the lawsuit, have not voluntarily subjected themselves to discovery, are citizens of the Netherlands, and are not otherwise subject to the jurisdiction of the Court.” Courts routinely find that “[w]hen discovery is sought from a non-party in a foreign jurisdiction, application of the Hague [Evidence] Convention, which encompasses principles of international comity, is virtually compulsory.”<sup>68</sup>

The question remains whether courts in the U.S. will view Art. 48 more as a “blocking statute” or the articulation of a substantive right of an EU data subject. This is not an easy question to address because the answer may be both.

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66. No. C10-861, 2014 US Dist. LEXIS 8285, at \*6 (W.D. Wash. Jan. 17, 2014).

67. 254 F. Supp. 2d 469, 474 (D. Del. 2003).

68. See *Orlich v. Helm Brothers, Inc.*, 160 A.D.2d 135, 143 (N.Y.S.2d 1990).

*D. Predicting U.S. Courts' Reaction to Article 48*

The problem with trying to predict how much respect courts in the U.S. will give Art. 48 is that it is inexorably intertwined within the larger GDPR. On its own (and excluding its final clause), it reads very much like a blocking statute attempting to force international courts to use treaties like the Hague Convention to conduct discovery. As such, one would quickly predict that courts in the U.S. will immediately dismiss Art. 48 and not accept it as a valid excuse to not produce responsive documents, in particular if the affected member state of the EU is not a party to or does not comply with discovery request under the Hague Convention at all (like, for example, Germany). However, this superficial analysis ignores what role Art. 48 plays in the GDPR.

It is inarguable that the GDPR is a substantive piece of legislation that clearly establishes the EU's interest in protecting the data of its subjects. While the interests at issue—and the great weight the EU member states put on them—may be foreign to American courts and lawyers (pun intended), Art. 48 is an express statement by the EU about how it values data protection and data privacy and how it prioritizes these issues above other national and commercial concerns. Moreover, the enactment of the GDPR not only significantly increases the potential penalties for non-compliance (both civil and criminal), but EU data protection authorities are expected to increase enforcement.

Thus, on the whole, the GDPR is a weighty substantive data protection law that expresses an “important state interest” of the EU and its member states and that, in the words of the *Aerospatiale* Court, “American courts should . . . take care to demonstrate due respect.” Therefore, the GDPR would appear

to be in that rare class of laws that American courts would seriously consider accepting as a legitimate excuse for non-production (or limited production).

Arguably, Art. 48 is only an extension of the larger GDPR purpose. It could be read to protect data subjects (namely employees and individual third parties) whose personal data may be exported out of the EU by data controllers who will likely judge their interests in resolving foreign litigations and investigations higher than the rights of data subjects. On the other hand, Art. 48 appears aimed completely outside the jurisdiction to limit U.S. style discovery and, perhaps most importantly, does not provide a solution for transferring relevant personal data in cases where treaties either do not exist (or are not applied with regard to discovery request as the Hague Convention in Germany) or are impractical (in internal investigations and voluntary disclosures).

At the end of the day, one would expect that U.S. courts following *Aerospatiale* would provide due respect to the GDPR and under the principles of proportionality, comity, and possession, custody, or control limit and narrow discovery in the EU. U.S. courts should place greater emphasis on protecting the personal data of EU data subjects that are drawn into U.S. litigations and investigations through protective orders, redactions, and sealing orders that will allow parties to resolve their disputes using necessary information, but provide confidence that personal data will not be misused or unnecessarily disclosed.

However, it is also likely that most U.S. courts will view Art. 48 more as a blocking statute and less a substantive rule of data protection and, as such, are unlikely to regularly excuse production or require requesting parties to use the Hague Convention or other treaties to obtain documents from the EU. This is especially true if a party claims that it could produce the personal data but for Art. 48 (and not other provisions of the

GDPR). Therefore, it will be incumbent upon responding parties to develop discovery processes that comply (or at least substantially comply) with “other grounds for transfer pursuant to this Chapter” if they do not want to be stuck between the rock of complying with U.S. discovery obligations and the hard place of complying with the GDPR.

### III. A NEW APPROACH TO DISCOVERY UNDER THE GDPR?

In summary, it appears that the introduction of Art. 48 may not result in major changes to the way data transfers between the EU and the U.S. in the course of discovery proceedings can be justified. Rather, Art. 48 seems to codify and confirm the legal situation as it existed prior to the adoption of the GDPR. This is because (1) the Hague Evidence Convention has not been applicable with respect to international legal assistance in terms of discovery proceedings for some of the key countries in the EU already before the implementation of Art. 48 and (2) the provision explicitly leaves room for alternative solutions as developed under the previous legal regime. Hence, Art. 48 should not exclude or limit the legitimate transfer practices as conducted and accepted by the authorities in the EU under the current legal regime. This is supported by the fact that the European Data Protection Board, which will be the primary authority providing guidance as to the interpretation of the GDPR, is structured in a similar way to the Article 29 Working Party. However, it will be up to the courts, and ultimately the CJEU, to decide on the interpretation of the relevant provisions of the GDPR. In any case, due compliance with the GDPR when fulfilling discovery requests will be of high importance considering the increased risk of violation following from the new penalty scheme.