

CORPORATE COUNSEL

February 2019

IN THIS ISSUE

In the first part of this article, I described a developing tension, or perhaps even open disagreement between US Tech giants, including Google and others, on the one hand, and EU regulators charged with the responsibility for enforcing the new EU General Data Protection Regulation on the other hand. That was in November 2018. Since that time events and conflicts have intensified regarding compliance with the GDPR. This article describes a dispute that has openly broken out between Google and the French government culminating in a very large fine against Google for violations of the GDPR data protection provisions. As you will see, the potential dispute is no longer potential....it is real. All in-house counsel as well as their key outside advisors must place this issue at the forefront of what I know are very important matters to deal with. Nothing short of a global data protection “war” may be developing.

As we gather in Santa Barbara later this month, this issue should and will be a point of significant discussion amongst IADC members whose clients have GDPR responsibilities. Don't miss the Midyear Meeting!

What Single Client Counsel Should Know About Worldwide Data Protection and GDPR Compliance - Part II

A GDPR Compliance Action Threatens to Become a Global Privacy Compliance Dispute

ABOUT THE AUTHOR



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ABOUT THE COMMITTEE

The Corporate Counsel Committee is composed of in-house counsel and others who, although in private practice, serve as general counsel for corporate clients. The Committee provides its members with educational programs and networking opportunities to address common concerns of corporate counsel. It also works to ensure that the IADC and its committees, through their work and offerings, meet the needs of corporate counsel. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

“...you don’t need a weatherman to know
which way the wind blows.”

Subterranean Homesick Blues

Bob Dylan

On 27 October 2018 Wall Street Journal writer Christopher Mims wrote that US Tech giants, including Google, Apple, Facebook, and Amazon, were experiencing a backlash against their size and power in the form of several policy and regulatory proceedings, including a strong focus by EU regulators on compliance by the US companies with the data protection provisions of the EU GDPR. [Wall Street Journal, “A Global Tech Backlash”; Christopher Mims, October 27-28, 2018, Section B, page B4].

On 24 January 2019, *The Economist* magazine print edition, published an article entitled “The French Fine Against Google Is The Start of a War” in which they disclosed that on 21 January 2019, the French data protection regulator, CNIL, published a finding that Google’s data collection and protection practices were found to be in breach of the EU General Data Protection Regulation (GDPR). The CNIL issued a fine against Google of \$57 million, the largest fine yet levied under the GDPR. [*The Economist* magazine, “The French Fine Against Google is the Start of a War”, 24 January, 2019, print edition].

The findings of the CNIL indicated a “failure to be clear and transparent when gathering data from users.” The findings went into detail about complex, “eight click deep” (eight pages of documents) to even allow a potential user to understand what data about the applicant Google was attempting

to collect. [*The Economist* magazine, 24 January 2019, cited above.] Essentially, the findings were a sharp focus on the multitude of paragraphs of “words” that were accompanying an application to Google for access to its process. This is not unlike the pages upon pages of mind numbing information that banks demand for mortgage approvals and similar types of data, except this is to merely gain use of Google’s system. This really seems to be aimed at the very business model upon which Google and many other online services are based. It could be deemed a fundamental strike at how internet processes work globally.....not just US Tech companies. [*The Economist* magazine, 24 January 2019, cited above].

CNIL posted their findings on 21 January 2019 in their official website. The findings included two major violations:

1. A violation of the obligations of transparency and information;
2. A violation of the obligation to have a legal basis for ads personalization processing.

The finding also notes the violations are “still ongoing” breaches of the GDPR. This is important as the fine is much more serious and more difficult to abate if violations are ongoing. [[CNIL website](#)]

The history of the complaint traces back to the result of a collective action filed by an Austrian not-for-profit association “None Of Your Business” (NOYB) filed on 25 May 2018. The proceedings on the complaints suggest that CNIL “pushed” the issue and attendant

proceeding to the “front of the line” for review and decision. This is not unlike many if not all regulatory agencies in the US. [Privacy & Information Security Blog, Hunton, Andrews Kurth, www.huntonprivacyblog.com 23 January 2019.]

Google has indicated it will appeal the findings and the fine including the basis for finding “an illegal act” by Google based upon what the CNIL deems a violation of the principle of “informed consent” and related notions imbedded within the GDPR. Concerns are being privately expressed that CNIL is using a different, more aggressive approach to “informed consent” when dealing with “Silicon Valley” Tech giant companies as opposed to EU based, smaller “adtech” companies whose practices are essentially identical to Google’s approach regarding gaining consent from digital customers. [Economist Magazine, cited above.]

There is a darker side to this developing dispute. What this really may be about, or a large part of the reason for the dispute, is a focus on the business model and supporting software upon which Google and many other online service companies are based. A final, non-appealable finding by EU Courts that the Android operating system violates, per se, the GDPR would be a serious strike at how internet processes work globally. This is a very serious matter. Perhaps, that is why a respected publication such as *The Economist* used “War” versus some less provocative word in its article title.

Much will be written and said about this developing issue in the next weeks and

months. At the IADC Midyear Meeting a CLE presentation is scheduled on EU Enforcement Action relating to the GDPR. I am certain this issue will be a part of a very thorough and well-presented program. It is scheduled at 8:45 am on Monday, 25 February. If you are attending the Midyear Meeting, plan to attend this program. If not, either consider attending or seek the presentation packages for your use from the panel members.

The Role of Single Client Counsel in This Matter

In Part I of this article series, I discussed the EU approach to facilitating Block Chain technology into GDPR compliance. It was clear the EU is sensitive to issues created by new technologies on privacy and data protection. It may be, in this second part that we become acquainted with another, much more aggressive approach the EU might take regarding GDPR compliance and existing, broad based and sophisticated operating systems.

In-house counsel need to become fully knowledgeable regarding the data handling and privacy features of all technologies their client uses, or is considering using in the future. The risk management process within their company must ensure that legal counsel are fully engaged in analyzing the type of issues set out above in this article. In house counsel, at their best, are vigilant and intimately knowledgeable of every aspect of how their client operates, where, what technology is being used, what protections are needed (before it become apparent they are needed) including proper contractual protections as well as regulatory

responsibilities. An attorney is a very well trained risk manager. They have to be viewed and utilized that way by their client. That is your initial job. Get your role established. Use the expertise of experienced outside counsel in that process.

In the near future we will talk about existential events and risks for the single client counsel. Depending upon how events partially out of your control develop, this topic could be such an event.

Be Careful Out There!

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