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Privacy and Data Security in an Increasingly Globalized World

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26.04 European Union Privacy Directives

Section 26.04 was substantially revised in 2016 by Francoise Gilbert of the Silicon Valley Office of Greenberg Traurig LLP to account for the EU-U.S. Privacy Shield and other recent developments. Francoise may be reached at gilbertf@gtlaw.com.

26.04[1] EU Data Protection Directive—Overview and Scope

26.04[1][A] EU Data Protection Directive—In General

The Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Move-

ment of Such Data[1]—more commonly known as the EU Data Protection Directive—was adopted in 1995 and was premised on the notion that consumers should have the right to consent to the use of certain private information about them. The Directive grew out of laws that pre-date the commercialization of the Internet,[2] but has significant ramifications for the international use of information—especially data gathered on websites. EU and EEA companies find it especially difficult to comply with the provisions implementing Article 25 of the EU Data Protection Directive when attempting to transfer personal data outside the EU or EEA territory because Article 25 prohibits them from transferring personal data outside the EU if it is sent to a territory that does not adequately protect the privacy rights of European residents. The United States is among the countries that do not meet the "adequate protection" requirement. The Directive mandated Member State implementation by Oct. 24, 1998.[3]

The Data Protection Directive was intended to facilitate

[Section 26.04[1][A]]

[1]Directive No. 95/46/EC (Oct. 24, 1995). A copy of the Directive may be viewed at www.open.gov.uk/dpr/insnet2.htm *see also* Gilbert, *Global Privacy and Security Law*, Ch. 6 "1995 EU Data Protection Directive" (Wolters Kluwer Law & Business Publisher).

[2]Most European countries had adopted laws protecting the privacy rights of their citizens with respect to the automatic processing of personal data in accordance with the European Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data, signed on Jan. 28, 1981, Europ. T.S. 108, 20 I.L.M. 317 (entered into force Oct. 1, 1985). The Directive, however, was intended to address divergences in national laws, the lack of any specific legislation on data privacy in at least two Member States (Italy and Greece) and the absence of any EU-wide supervisory authority. Rosario Imperiali d'Afflitto, Symposium, "Recent Development: European Union Directive on Personal Privacy Rights and Computerized Information," 41 Vill. L. Rev. 305, 305 (1996). The EU Directive, although adopted in 1995, grew out of a draft Council Directive adopted in July 1990. Fred H. Cate, Symposium, "Data Protection Law and the European Union Directive: The Challenge for the United States," 80 Iowa L. Rev. 431, 432 (1995).

[3]EU Data Protection Directive Art. 32(2). Member States, however, may provide that processing of data already held in manual filing systems on the date of entry into force of national legislation implementing the Directive need not comply with Articles 6, 7 or 8 of the Directive until Oct. 28, 2007. EU Data Protection Directive Art. 32(2). Moreover, Member States may provide, subject to suitable safeguards, that data kept for the sole purpose of historical research need not be brought into conformity with Articles 6, 7 or 8 of the Directive at all. EU Data Protection Directive

the cross-border transfer of data within the European Union by harmonizing national privacy laws, which otherwise could be viewed as posing an obstacle to economic integration, while at the same time protecting the privacy rights of individuals as a fundamental right.[4] The Directive defined rules for the protections of data on individuals, not legal entities.[5] These rules, in turn affect the handling of personal data of employees and therefore affect the conduct of electronic commerce—especially involving multinational companies. These rules, when implemented in each Member State national laws, apply to the way information about existing or potential customers—including data obtained from websites—may be aggregated, used and transferred.

The Directive primarily addressed the protection of personally identifying information, rather than anonymous—or aggregate statistics—which may have valuable business uses but do not necessarily divulge private information about any given consumer. It applied to "the processing of personal data[6] wholly or partly by automatic means . . ." as well as "the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system."[7] *Personal data* is defined as "any information relating to an identified or

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Art. 32(3).

[4]*See, e.g.,* EU Data Protection Directive Art. 32(2), Preamble.

[5]At least one commentator has argued that existing national laws recognizing the privacy rights of legal entities would remain unaffected by the Directive, which will create uniformity among EU laws only with respect to individuals. *See* Rosario Imperiali d'Afflitto, Symposium, "Recent Development: European Union Directive on Personal Privacy Rights and Computerized Information," 41 Vill. L. Rev. 305, 311 (1996).

[6]The processing of personal data includes any electronic compilation or use of data and is formally defined as:

> [A]ny operation or set of operations which is performed upon personal data, whether or not by automatic means, such as the collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction . . . .

EU Data Protection Directive Art. 2(b).

[7]EU Data Protection Directive Art. 3(1). In 2003, the European Court of Justice held that the act of referring to persons by name or other means (i.e. telephone number, working conditions, hobbies) constitutes "the processing of personal data wholly or partially by automatic means" under Article (3)(1). Case C-101/01, Reference for a preliminary ruling from the Göta hovrätt: Bodil Lindqvist. 2003 E.C.R. 234, *available at* http://curia.europa.edu/juris/document/document.jsf?text=&docid=48382&pageIndex=0&

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