Mind the Gap: Bridging U.S. Cross-border E-discovery and EU Data Protection Obligations
Overview

• The Catch 22 U.S. Discovery – E.U. Data Protection Conundrum

• Imminent changes of the proposed EU regulation affecting cross-border discovery

• U.S. Discovery Obligations:

1. Duty to disclose (Rule 26, FRCP)
2. Duty to preserve and Legal Hold
3. Sanctions for Non-Compliance
• Do US Discovery Obligations Apply to Companies Established outside the US?
Extra-territorial Application of US Discovery Obligation (Rule 34, FRCP) confirmed by case law

- **Rule 34 FRCP:**
  
  (a) In General. A party may serve on any other party a request within the scope of Rule 26(b):
  
  to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control
But, what about the Hague Evidence Convention?

- Request under The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

or

- US Court Order under Rule 34 FRCP?
Aérospatiale (Société Nationale Industrielle Aérospatiale v United States District Court, 482 U.S. 522, 544 n.28 ) (1987)

Court has option to order discovery under FRCP, despite Hague Evidence Convention.

However, “International Comity” demands following balancing test to decide whether Hague Convention is applicable:

1) the importance to the litigation of the information requested; 2) the degree of specificity of request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; (5) the extent to which non-compliance would undermine the interests of the United States or compliance with the request would undermine the interests of a foreign sovereign nation.
Catch 22 Conflict of Obligations for Companies Established in the EU and Subject to U.S. Discovery

• Which obligations to comply with: local data protection obligations or US discovery obligations?

• Proposed Solutions:

   Art. 29 WP 158 on Pre-Trial Discovery for Cross Border Civil Litigation

   The Sedona Conference International Principles on Discovery, Disclosure & Data Protection
2. Imminent changes of the proposed EU regulation affecting cross-border discovery

All changes will affect data controllers/processors involved in cross-border discovery
• Processing

New Rules for Processors (art. 26). Ex. Processors need consent of controller to appoint sub-processor.

Consent of data subject: from “freely given, specific and informed” to “freely given, specific, informed and explicit”
Limitation of use of consent as basis for processing when significant imbalance of power. (employment context)
• Transfer to third countries: (art. 40-44)

Adequacy: Commission may design separate sectors as adequate.

BCRs expressly mentioned. Includes BCRs for processors.

Standard Data Protection Clauses don’t need authorization.

Non-standard Contractual Clauses with authorization.
Transfer to third countries: (art. 40-44)

Is Safe Harbor safe? Yes.

Legitimate interest: no frequent & massive transfers; data controllers & processors must provide documentation of proper safeguards.

Non-Legally Binding Instrument- with authorization. (art. 42 (5))