



IT, NEW MEDIA & PRIVACY WORKING COMMITTEE ROUNDTABLE
Revision of the 1995 Privacy Directive-Implications for Business

Friday, June 10, 2011

The theme of the meeting was the future amendments to the 1995 European Data Protection Directive, and what these changes mean for business.

Guest speakers **Florence Raynal**, Head of the International Division for the French Commission Nationale de l'Informatique et des Libertés (CNIL) and **Christian Pardieu**, Head of Privacy Policy for GE in Europe, shared their points of view regarding the key features that we are likely to see in the revised Directive.

Florence Raynal first explained that reform of the 1995 Privacy Directive is a priority for Commissioner Viviane Reding and that the revisions may take the form of a new Directive and/or a regulation, and that the choice between the two legislative vehicles is not yet clear. The European Commission should circulate initial texts of these measures some time before the end of 2011. The objective of Commissioner Reding is that the new measures would be adopted at the European level by 2014.

Christian Pardieu said that one of the priorities of the new package will be to increase the protection of individuals, via measures such as the "right to be forgotten" and measures relating to consent. Christian Pardieu said that the lack of harmonization in Europe regarding what constitutes sufficient consent creates a significant obstacle for business. Florence Raynal indicated that the Article 29 Working Party will release soon an opinion dealing with the issue of consent.

Both Mrs Raynal and Mr. Pardieu spent a considerable time debating the issue of "accountability". Mrs Raynal indicated that for the CNIL, the accountability principle covers two concepts: first the concept of compliance itself, i.e. putting into place procedures to ensure that a company complies with its obligation under data protection legislation. Second, accountability covers the concept of being able to demonstrate compliance to third parties and data protection authorities through the use of audits and certification procedures for example. Ms. Raynal indicated that accountability is really not something new. It is something a company should already be doing to ensure that it complies with its obligations under data protection legislation. Ms. Raynal pointed out that the new accountability measures obviously would have to take into

account the principle of proportionality. It would be disproportionate to require that a small business put into place obligatory auditing procedures. Mr. Pardieu thought that corporations should be given voluntary incentives to implement accountability measures and that this would be more effective than imposing accountability across the board as an additional layer of obligations. Ms. Raynal did not share Mr. Pardieu's vision of accountability as a *quid pro quo*, but agreed that accountability would have to be implemented in a pragmatic and proportionate manner. Ms. Raynal underlined that the CNIL is not favourable of a regime that would rely solely on self regulation and strict *ex poste* enforcement. According to Ms. Raynal, self-regulation must be a supplement but not a replacement for regulatory supervision. Ms. Raynal said also that the CNIL would not be favourable to eliminating prior notification and authorization requirements entirely.

Ms. Raynal said that that she thought that the current rules were already quite broad and permitted the CNIL to subject to French jurisdiction a number of non-EU services. However, the new rules should make the issue of applicable law to non-EU services much more clear.

One of the participants in the meeting asked about the complexities and delays of putting into place binding corporate rules (BCRs). Ms. Raynal said that the BCR process is getting simpler and quicker. For one thing, the quality of the draft BCR documents that are submitted to the CNIL has increased considerably. Ms. Raynal said that the CNIL originally was confronted with draft corporate policies that were difficult to understand and did not clearly provide for liability of the corporation in case the BCRs are violated. She said that there has been considerable progress in terms of the quality of the documentation submitted to the CNIL, although she urges anyone who wishes to submit BCRs to make the documentation simple and straightforward, and avoid the phenomenon of "Russian dolls" i.e. documentation that refers to other documentation that in turn refers to other documentation. She said that model documentation can be found on the site of the CNIL and that the current time period for approval of BCRs at the French level is 5 to 6 months. If the documentation is prepared correctly, Ms. Raynal thinks that BCRs can be put into place among the various DPAs that participate in the BCR system within one year. Another question related to the possibility of using BCRs for data processors. There, Ms. Raynal indicated that the CNIL is favourable to extending BCRs to data processors, but that some other data protection authorities have still to be convinced. Christian Pardieu indicated that GE was a precursor in implementing BCRs and that the time frames that applied to GE a number of years ago are no longer the norm today.