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# GDPR, BDSG, & Discovery in U.S. Courts Under Hague Evidence Convention

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Multiple U.S. district courts have weighed the needs of U.S. discovery against privacy rights protected by foreign statutes, including the EU General Data Protection Regulation (GDPR) and German Federal Data Protection Act or Bundesdatenschutzgesetz (BDSG). These privacy laws are typically much stricter than their U.S. counterparts, and generally have been interpreted by European companies to require any personal information—e.g., names, addresses, and email addresses—to be redacted from any documents produced in U.S. litigation, absent some exceptions.

Courts have taken different approaches to dealing with these foreign privacy laws. Some ordered disclosure of unredacted versions of documents containing personal information of foreign citizens, despite foreign privacy statutes. In contrast, at least one court has ordered that parties redact all personal information of foreign citizens. This article examines the contrasting cases, with a focus on considerations of international comity.

Finally, this article highlights an international route for discovery through the Hague Evidence Convention that satisfies U.S. discovery demands while providing assurances to the foreign party that the requirements of their privacy statutes are met.

## National Privacy Statutes Evolving

Following the enactment of the GDPR, and implementations of it like the BDSG, the framework of national privacy statutes continues to evolve. The GDPR went into effect in [May 2018](#). It broadly protects personal data of EU citizens—i.e., “any information relating to an identified or identifiable natural person”—from transmission to the U.S. GDPR Article 4(1).

Through use of opening clauses in the GDPR, EU member states can supplement or modify the GDPR by enacting their own national privacy statutes modeled after the GDPR. For example, Germany enacted a new version of its BDSG contemporaneously with the GDPR. Further modifying its framework of privacy statutes, Germany also updated its Telemedia and Telecommunications statutes in May 2021 to align with the GDPR.

U.S. courts continue to adapt to this evolving framework of national privacy statutes.

## International Comity Analysis

Under Supreme Court precedent, U.S. courts apply an international comity analysis to determine if foreign statutes may prevent discovery in U.S. courts. Liberal discovery in U.S. courts conflicts with the protections provided by the GDPR, BDSG, and other foreign privacy statutes. To address the conflict, U.S. courts often apply a five-factor international comity analysis prescribed by the Supreme Court, which considers: the importance to the litigation of the information requested, the degree of specificity of the request, whether the information originated in the U.S., the availability of alternative means of securing the information, and the balance of national interests between the U.S. and the foreign nation. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, [482 U.S. 522](#) n.28 (1987).

Courts interpret and apply these factors differently. For example, some courts interpret the first factor, “importance,” to mean that the litigation stands or falls on the information requested, while others apply a standard like “critical or compelling.” *In re: Xarelto (Rivaroxaban) Prod. Liab. Litig.*, No. MDL 2592, at \*14 (E.D. La. July 21, 2016).

Likewise, with respect to the third factor (whether the information originated in the U.S.), some courts consider “the place where the documents originated, while others look to the place where the documents are stored.” *Behrens v. Arconic, Inc.*, 2:19-CV-02664, ECF No. 163, at \*9 (E.D. Pa. 2020). The different approaches to the five-factor international comity analysis in part explains the different outcomes in cases balancing U.S. discovery needs with EU privacy laws.

## Unredacted Personal Data

Several U.S. courts acknowledge the conflict between U.S. discovery and the GDPR, but have still ordered production of EU citizens’ unredacted personal data.

In *In re Mercedes-Benz Emissions Litig.*, the District of New Jersey ordered Daimler to produce unredacted documents that contained personal data of current and past employees. No. 16-CV-881 (KM) (ESK), at \*8 (D.N.J. Jan. 30, 2020). After stepping through the international comity analysis, the court prohibited “redacting the names, positions, titles, or professional contact information of relevant current or former employees of any Defendant or third parties identified in relevant, responsive documents, data, or information produced in discovery.”

The court reasoned that producing this information under the “Highly Confidential” designation of a protective order was sufficient to protect the personal information of Daimler’s current and former employees. The court also rejected Daimler’s argument that a mere listing of employees’ names and data was not relevant to litigation regarding whether Daimler misled consumers into purchasing vehicles by misrepresenting their environmental impact.

In *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, the Eastern District of Pennsylvania did not allow GlaxoSmithKline to redact personal identifying information from its documents under the GDPR. 484 F. Supp. 3d 249, 267 (E.D. Pa. 2020). The court explained its view that the “United States has a deep interest in preserving the common law right of access,” which demands full production of unredacted materials.

In *Philips v. Ford Motor Co.*, the Northern District of California ordered Ford to produce unredacted versions of German documents despite the German BDSG implemented at the time. No. 14-CV-02989 LHK (NC), at \*4 (N.D. Cal. June 10, 2016). The court found that principles of international comity did not require any redactions of personal data because the documents would be produced under a protective order.

Some courts have also found that so-called “litigation exemptions” in privacy laws—which allow for the production of personal identifying information in certain contexts, such as in the context of a legal obligation—apply to U.S. discovery. For example, in *Knight Capital Partners Corp. v. Henkel AG & Co.*, the Eastern District of Michigan found that the then-current BDSG included a “litigation exception,” which allows for the unredacted production of documents with personal information. 290 F. Supp. 3d 681, 691 (E.D. Mich. 2017).

Taking a slightly different approach, the District of Massachusetts in *Anywherecommerce, Inc. v. Ingenico, Inc.* explained that U.S. courts should assume a conflict between U.S. law and foreign law in its international comity analysis, despite the argument that a litigation exception exists in the GDPR. No. 19-CV-11457-IT, at \*2 n.1 (D. Mass. Aug. 31, 2020). However, the *Anywherecommerce* court still compelled production of unredacted information, finding that, even if a conflict existed, the international comity analysis allowed for documents to be produced without redaction in the U.S. in that case.

## Court-Ordered Redactions

At least one U.S. court ordered redactions necessitated by foreign privacy laws. In *Securities and Exchange Commission v. Telegram Group Inc. et al*, the Southern District of New York ordered defendants to produce relevant bank records, but allowed defendants to make redactions that were necessary under foreign privacy laws if they also produced a log explaining the redactions. 1:19-CV-09439, ECF No. 67 (S.D.N.Y. Jan. 13, 2020). The court allowed these redactions under foreign privacy laws, in addition to the bank records being protected by a confidentiality order.

## The Behrens Compromise

Regardless of how courts have addressed the international comity factors in specific cases, the sensitivity of compliance with the GDPR and like privacy statutes, and the potentially strict sanctions of noncompliance will continue to lead foreign entities to resist production of questionably relevant personal identifying information. To address this very real concern, at least once court has found a compromise that both ensures open discovery and assuages the concerns of foreign defendants who want, in good faith, to comply with applicable privacy laws.

Specifically, in *Behrens v. Arconic, Inc.*, 487 F. Supp. 3d 283, 300-01 (E.D. Pa. 2020), survivors and the estates of those who died in an England apartment fire filed a product liability action against building material supplier Arconic, among others. The Eastern District of Pennsylvania appointed a French law expert to serve as special master and prepare a report on how French law conflicted with U.S. discovery of the information requested from Arconic’s French subsidiary. Based on the report, the court ordered the parties to comply with the Hague Evidence Convention during discovery.

Both parties agreed to appoint the special master as a commissioner to review discovery documents for consistency with French law under the court’s order defining what was relevant and responsive. Along with determining some documents

were not relevant, the commissioner determined some documents “contained personal data that implicated the GDPR.” This compromise ensured that all relevant information was produced, but was done so in a way so as to not violate privacy laws.

## Fair Solution

The *Behrens* court's approach to the international comity analysis and focus on privacy concerns presents a fair solution. The court's analysis of the conflict between EU privacy laws and U.S. discovery is notable for two reasons.

First, the court did not view the question of whether documents should be produced in unredacted form or redacted as necessary under foreign privacy laws in vacuum. Instead, the court considered the creative option of ordering discovery through the Hague Evidence Convention.

Second, in addition to the five-factor test for international comity discussed above, the *Behrens* court considered modern privacy concerns embodied in foreign statutes by referencing principles from the Sedona Conference—a thought-leading organization on law and policy, and in particular on intellectual property rights, data security, and privacy—including:

### Sedona Principle 1

With regard to data that is subject to preservation, disclosure, or discovery in a U.S. legal proceeding, courts and parties should demonstrate due respect to the Data Protection Laws of any foreign sovereign and the interests of any person who is subject to or benefits from such laws.

### Sedona Principle 2

Where full compliance with both Data Protection Laws and preservation, disclosure, and discovery obligations presents a conflict, a party's conduct should be judged by a court or data protection authority under a standard of good faith and reasonableness.

### Sedona Principle 3

Preservation, disclosure and discovery of Protected Data should be limited in scope to that which is relevant and necessary to support any party's claim or defense in order to minimize conflicts of law and impact on the Data Subject.

Sedona Conference Traditional and Rationally-Issued Principles on Discovery Disclosure and Data Protection (Transitional Edition, Jan. 2017).

In considering these principles, along with the option to order discovery under the Hague Evidence Convention, *Behrens* presents an effective solution to resolve the conflict between the demands of U.S. discovery and the evolving framework of foreign privacy statutes. Indeed, the *Behrens* court cited with approval the defendant's expert's statement that “[t]he Hague Convention has always been interpreted by the French government as binding,” so it is logical that Hague procedures help safeguard defendants subject to French privacy laws.

Even where discovery of documents may not be technically possible through the Hague Evidence Convention, courts may still employ *Behrens'* approach of using a special master to resolve the conflict. Some foreign nations maintain Article 23 reservations to the Hague Evidence Convention, preventing document discovery through the Hague Evidence Convention, but still enforce privacy laws.

For example, Germany maintains an Article 23 reservation, but still applies the BDSG. If Article 23 reservations apply, courts may appoint a special master to analyze compliance with foreign privacy laws, as in *Behrens*, without taking the extra step of formally appointing the Special Master as a Commissioner under the Hague Evidence Convention. Moreover, this technicality regarding Article 23 reservations would only apply to discovery of documents, and not other discovery, such as depositions.

Thus, *Behrens'* use of a special master experienced in foreign privacy law both satisfies U.S. discovery demands and provides assurances to foreign defendants that they will not inadvertently violate privacy statutes that could subject them to severe sanctions and reputational harm in their home countries, and this equitable solution should be encouraged.