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In France, the fight against discrimination in the workplace and improving workplace diversity are priorities. The *Commission Nationale de l'Informatique et des Libertés* ("the CNIL") (the French independent administrative authority protecting privacy and personal data) issued on May 16, 2007, ten recommendations that should assist employers to better fight against discrimination and provide methods that can be used to measure diversity.

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France's Measures on Diversity and Data Protection: The Ten Recommendations of the CNIL

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Everyone agrees - In France, the fight against discrimination in the workplace and the improvement of diversity are priorities. However, until recently, improving diversity in France was not an easy task. French employers have no real possibility of knowing the extent of discrimination in their workplaces, and they have no real means and/or tools available to fight against discrimination. The French data protection law of 1978 (*loi informatique et libertés*) prohibits the collection and processing in France of personal data which directly or indirectly shows a person's racial or ethnic origin, except in certain limited cases. For historical reasons,¹ France is extremely reluctant to authorize the collection of data regarding ethnicity and/or religion. Thus, employers in France are left with no real means to measure the extent of discrimination, let alone address it to improve diversity. Employers that did want to improve the diversity of their workforce and fight against discrimination were left with no choice but to develop and implement their own tools to measure the diverse origins of their employees. However, such tools were often times developed on the edge of legality and, if not illegal per se, were not in conformity with the "spirit" of the law.

In order to address and improve the situation, the *Commission Nationale de l'Informatique et des Libertés* ("the CNIL") (the French independent administrative authority protecting privacy and personal data) issued, on May 16, 2007, 10 recommendations

(the "Recommendations") that should assist employers to better fight against discrimination and provide methods that can be used to measure diversity.²

The CNIL's Methodology

Prior to issuing its Recommendations, the CNIL consulted with the main players concerned with discrimination and diversity issues: statisticians, researchers, trade unions, representatives of the main religions, representatives from various associations, managers and executives from many companies. The CNIL conducted more than sixty meetings regarding those subjects between November 2006 and February 2007. The CNIL's research was not limited only to those sessions; it also sought the opinions of France's citizens through a questionnaire posted on its website.

On May 16, 2007, the CNIL finally issued its Recommendations with the hope that they would become a useful tool for politicians, unions and employers to measure diversity. The CNIL and French employers hope the Recommendations will prove to be a concrete step toward the improvement of diversity in France's workplaces and in the fight against discrimination.

The 10 Recommendations

The 10 Recommendations released by the CNIL are:

Recommendation No. 1: Expand the use of current sources of information that exist to authorize researchers to more easily access personnel files, administrative files and

¹ The Regime de Vichy collected data regarding religion and ethnicity during World War II.

² See *Mesure de la diversité et protection des données personnelles – Les dix recommandations de la CNIL*.

available State statistical data.

Recommendation No. 2: Use “objective” data pertaining to the ancestry of persons (nationality and/or place of birth of their parents) in surveys measuring diversity.

Recommendation No. 3: Not integrate in companies’ personnel files and administrative files, data on the ancestry of persons.

Recommendation No. 4: Develop surveys/ studies on discriminatory experiences (survey could include data on the physical appearance of the persons).

Recommendation No. 5: Authorize, under certain conditions, the analysis of first and last names to detect potential discriminatory practices.

Recommendation No. 6: Modify the French data protection laws to guarantee: (1) a better protection of the sensitive data collected and analyzed in diversity and discrimination studies; and (2) the scientific nature of the research performed.

Recommendation No. 7: Refuse to create an “ethno-racial” frame of reference.

Recommendation No. 8: Expand the use of experts and other trusted third parties to conduct studies on the measure of diversity.

Recommendation No. 9: Guarantee the confidentiality and the anonymity by relying upon anonymous submission techniques.

Recommendation No. 10: Guarantee the effectiveness of privacy rights (“*les droits informatiques et libertés*”)

What Can Be Learned From These Recommendations?

The main points of the Recommendations are as follows:

- One of the first recommended steps is to extend the scope of utilization of the sources of information that exist to authorize researchers to more easily access personnel files, the files of the administration and available State statistical data. Of course, utilization of such files must be made while still respecting the principles governing French data protection.
- In order to measure the reality of the discrimination experienced, the CNIL recommends that surveys be developed.

Those surveys are to be answered by the person who has experienced or suffered from discrimination in the past. However, the Recommendations do not give *carte blanche* regarding what can be done with those surveys. The Recommendations lay out the criteria that the surveys must meet to be lawful. These surveys will be acceptable so long as they are optional, based on a voluntary declaration from the person answering and provided that confidentiality of the responses given is guaranteed. According to the Recommendations, questions on the nationality and the place of birth of the individuals and their parents can be asked. The CNIL also recommends that it is important that the person who has experienced discrimination be provided an opportunity to indicate the type of discrimination suffered/experienced (i.e., whether based on language, name, physical appearance, etc.).

- For the CNIL, the analysis of first names and last names under certain conditions, (i.e., as long as it does not lead to “ethno-racial” categories), can be authorized because such analysis may be useful to detect potential discriminatory practices. The CNIL expressed its concerns about the creation of an “ethno-racial” frame of reference. According to the CNIL, although attitudes have evolved and are continuing to evolve, most of those consulted by the CNIL during the development of the Recommendations were still hostile to the creation of such frame of reference.
- The CNIL recommends that French data protection laws (in particular its articles 8 and 25) be modified to guarantee: (1) a better protection of the sensitive data collected and analyzed in diversity and discrimination studies; and (2) the scientific nature of the research performed. According to the CNIL, this can be done through the reinforcement of the monitoring powers of the CNIL.
- The CNIL also considers that public agencies should encourage a more automatic and generalized used of statistics and anonymity with respect to public data.

A Necessary Step with Immediate Consequences for the Improvement of Diversity?

It is too early to determine the ultimate impact of the recent CNIL Recommendations. Although well intentioned, the Recommendations may end up being too small a step (although a helpful and necessary one) in the general fight against discrimination and for the improvement of diversity in France. Employers with operations in France will have to observe how the French legislature modifies its Data Protection laws (if at all), and will have to consult with their employment counsel to ensure compliance in any future attempt to measure diversity. Although employers with operations in France may in the future be required to provide the French government with a count of their employees by job category, and then by ethnicity, race and gender (as is the case in the United States), this day is yet to arrive.

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