



25 March 2022

International Transfers in 2022 and Beyond

Rohan Massey
Ropes & Gray

William Malcolm
Google

Vivienne Artz OBE
International Regulatory Strategy Group Data Committee

Joe Jones
Department for Culture, Media & Sport

Alex Greenstein
US Department of Commerce

International Data Transfers in 2022 and Beyond



Approaches to international, especially transatlantic, data transfers are frequently being challenged and disrupted.

This panel will discuss and debate the issue of data transfers and the challenges organizations, whether service users or service providers, face in seeking to rely on SCCs but be GDPR compliant post-Schrems II.

The panel will also explore potential solutions being considered for transatlantic dataflow.

Where we are post-Schrems II?

- Following Schrems II, the EU-US Privacy Shield was rendered invalid and could not be relied upon for transatlantic data transfers. Further, SCCs were held to be valid, but required enhancement –
 - *the data exporter must also ensure adequate protection of the data in the recipient country.*
- Cases in Austria and France illustrate the difficulties relying on SCCs for transatlantic transfer, even where technical and organisational measures (“TOMs”) are implemented.
 - In January 2022, the Austrian Data Protection Authority decided in a model case brought by NOYB that EU-US transfers of personal data by Google Analytics were not GDPR-compliant, even with the implementation of certain TOMs.
 - In February 2022, the French Data Protection Authority ruled the transfer of EU personal data to the US through the use of the Google Analytics cookie to be unlawful. The organisation using Google Analytics was ordered to comply with Art 44 GDPR and, if necessary, stop using Google Analytics
- Is the EU legislating for an impossible position?

A new transatlantic agreement?

- Data flows from the EU to the US are important for businesses on both sides of the Atlantic, as well as for broader commercial and political relationships between the two markets.
- Can a deal be found that addresses the requirements set out in Schrems II while preserving transatlantic commercial efficacy?
- Negotiations between the US and EU are ongoing to protect data transfers – it is reported that agreement on a new data transfer pact is close.

What should the focus be on?

- If lawful international transfers are too challenging for commercial parties, should there be a change of focus?
- Access by the recipient country's national government is currently the key factor – is this the right focus?
- Is government access for national security a necessary evil that must remain, but with appropriate guardrails to protect society without restricting commercial and societal benefits?
- If national security issues cannot be addressed, do all attempts to solve the problem lead to Schrems III, IV and V?

Is now the time to consider a different approach?



- In a digital society, do “data transfers” even exist? Is this an outdated concept?
- Do we need to change the vocabulary?
 - “Data sharing” over “data transfers”
 - Regulated data / non-regulated data flows
 - Is “adequacy” the right way of thinking?
- Does the approach need to change?
 - Sectoral approach (e.g. standards and certification for healthcare, finance etc.) which allows for international data flows. What would the criteria be?
 - BUT BEWARE - does a transition away from the omnibus approach that leads to greater fragmentation and data isolation?

Questions + Contact



Rohan Massey
Partner
Ropes & Gray



William Malcolm
Director Privacy, Legal
Google



Vivienne Artz OBE
Chair
International Regulatory
Strategy Group Data
Committee (UK)



Joe Jones
Deputy Director
Int'l Data Transfers Data
Policy Directorate
Dept. for Culture, Media &
Sport (UK)



Alex Greenstein
Director
Privacy Shield at US
Department of Commerce

Reference Materials

- CJEU judgment in case C-311/18 “Schrems II”
 - <https://curia.europa.eu/juris/document/document.jsf;jsessionid=CF8C3306269B9356ADF861B57785FDEE?text=&docid=228677&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=9812784>
- EDPB Recommendations on supplementary measures post-Schrems II
 - https://edpb.europa.eu/news/news/2021/edpb-adopts-final-version-recommendations-supplementary-measures-letter-eu_en
- US Dept of Commerce - Information on U.S. Privacy Safeguards Relevant to SCCs and Other EU Legal Bases for EU-U.S. Data Transfers after Schrems II – White Paper
 - <https://www.commerce.gov/sites/default/files/2020-09/SCCsWhitePaperFORMATTEDFINAL508COMPLIANT.PDF>
- National Data Protection Authority Decisions in Google Analytics cases:
 - Austria: https://noyb.eu/sites/default/files/2022-01/E-DSB%20-%20Google%20Analytics_EN_bk.pdf
 - France: <https://www.cnil.fr/en/use-google-analytics-and-data-transfers-united-states-cnil-orders-website-manageroperator-comply>
- EDPB Guidelines on Codes of Conduct as tools for transfers
 - https://edpb.europa.eu/system/files/2020-03/edpb_guidelines_codes_conduct_transfers_after_public_consultation_en_1.pdf