

39 ESSEX CHAMBERS

**GDPR: INTERNATIONAL DATA TRANSFERS &
DAMAGES IN DATA PROTECTION CLAIMS**

A webinar on 16.06.20

Jonathan Bellamy, Barrister
Jennifer Thelen, Barrister

39 ESSEX CHAMBERS

GDPR: INTERNATIONAL DATA TRANSFERS

A webinar on 16.06.20

Jonathan Bellamy FCIArb, C.Arb
Barrister & Arbitrator

International Data Transfers

General Principles

GDPR Article 44

General principle for transfers

Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country shall take place only if, subject to the other provisions of this Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country to another third country or to another international organisation. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.

Adequacy Decisions

GDPR Article 45

A transfer of personal data to a third country may take place where the Commission has decided that the third country ... ensures an adequate level of protection. Such a transfer shall not require any specific authorisation.

Appropriate Safeguards

GDPR Article 46

- Binding corporate rules (GDPR Arts 46.2(b) & 47)
 - “group of undertakings”
 - “group of enterprises engaged in a joint economic activity”
 - Legally binding
 - Specify categories of data, purpose of processing, identity of third country
 - Liability of exporter for activities of importer
- Standard data protection clauses (GDPR 46.2(c))
 - the Commission
 - Supervisory Authority
 - referred to as standard contractual clauses (SCCs)

Appropriate Safeguards Standard Contract Clauses (SCCs) (GDPR 46.2)

- Commission Decision 2010/87/EU
 - Third Party Beneficiary Clause (cl.3)
 - Obligations of data exporter (cl.4)
 - Obligations of data importer (cl.5)
 - Liability clause (cl.6)
 - Jurisdiction and governing clauses (cl.7 & 9)
- Estimate: 80-90% of international data transfers: IAPP Survey

Data Protection Commissioner v Facebook Ireland (Case C-311/18)(Schrems II)

- Judgment of CJEU – expected 16.07.20
- Opinion of A-G published on 19.12.20
- 128. “In that regard, Article 46(1) of the GDPR provides that a transfer on the basis of appropriate safeguards can take place only ‘on condition that enforceable data subject rights and effective legal remedies for data subjects are available’. It will be necessary to ascertain whether the safeguards provided for in the clauses in the annex to Decision 2010/87, supplemented by the powers of the supervisory authorities, make it possible to ensure that that condition is met. That, in my view, is the position only in so far as there is an *obligation* — placed on the controllers…… and, where the latter fail to act, on the supervisory authorities …… — to suspend or prohibit a transfer when, because of a conflict between the obligations arising under the standard clauses and those imposed by the law of the third country of destination, those clauses cannot be complied with.”

Schrems II – Practical Consequences (so far)

- **Exporters:**
 - are not able to use SCCs as a “free pass”. SCCs are not per se guaranteed safeguards
 - are required to assess on a case-by-case basis and prior to the transfer whether the law of the destination country constitutes an obstacle to the implementation of the SCCs
 - are obliged to prohibit or suspend data transfers where the implementation of the SCCs cannot be guaranteed
 - may be subject to judicial challenge in the event of inaction
- **Supervisory Authorities:**
 - are obliged to prohibit or suspend data transfers where the implementation of the SCCs cannot be guaranteed and exporter fails to act
 - may be subject to judicial challenge in the event of inaction
 - may be inclined to take a more interventionist approach, if resources permit
 - may be inclined to blacklist certain data importing countries

Transfers Not Authorised by EU Law (GDPR 48)

“Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner if based on an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer pursuant to this Chapter.”

- A blocking provision to place a duty on data controllers/processors not to comply with court orders from third-countries; e.g. documentary discovery.
- Intention is to oblige third-country courts to use international conventions; e.g. for US courts to use the Hague Evidence Convention.
- Applies to orders of public courts and tribunals and not to private law entities, including arbitration tribunals.
- Applies to court orders and not to requests by private parties.
- A transfer may still be made if permitted by Chapter V; e.g. Art 49.
- Application to UK uncertain after BREXIT.

Derogations for specific situations (GDPR Art 49)

- Absent an adequacy decision or appropriate safeguards, a transfer is permitted only where:
- (a) “the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards”
- (b) “the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request”
- (c) “the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person”
- (d)
- (e) necessary for the establishment, exercise or defence of legal claims

Derogations for specific situations: Consent, legal proceedings

- A list of safety valves, an exclusive list and to be construed restrictively.
- Transfer(s) must be specific or at most occasional.

Consent:

- Consent must be explicit, fully informed and may not be blanket.
- Consent may be revoked.

Legal claims:

- Includes arbitration proceedings and regulatory proceedings (Recital 111).
- Applies to formal documentary disclosure procedures in civil dispute resolution
- Applies to a data exporter bringing and defending claims outside the EU.
- Data transfer must be necessary and relevant. Mere possibility of future proceedings not enough.
- EDPB: *“A close link is necessary between a data transfer and a specific procedure....”*

39 ESSEX CHAMBERS

**GDPR: INTERNATIONAL DATA TRANSFERS &
DAMAGES IN DATA PROTECTION CLAIMS**

A webinar on 16.06.20

Jonathan Bellamy, Barrister
Jennifer Thelen, Barrister