Managing personal data transfers inside a company

WTO Trade Dialogues:
Different models to facilitate the cross-border exchange of personal data
10 November 2020
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Factors in selection of transfer mechanisms

Factors:

- **Jurisdictions**
  - Country pairings
  - Multi-party

- **Operational Efficiency**
  - Ease
  - Repeatability
  - Continuity

- **Cost**
  - Advisory fees
  - Documentation fees
  - Auditors

- **Human resources**
  - In house vs outside assistance
  - Relationship with vendors

- **Legal Certainty**
  - Vulnerability to court challenge/litigation

- **Brand**
  - Government
  - Consumers
  - B2B

- **Time**
  - How quickly will a mechanism bring compliance?
Chapter V: Transfers of personal data to third countries or international organisations

Article 45 – Transfers on the basis of an **adequacy decision**
- Commission decides that a third country ensures an adequate level of protection

Article 46 – Transfers subject to **appropriate safeguards**
- Binding Corporate Rules ("BCRs")
- Standard Contractual Clauses ("SCCs")

Article 49 – **Derogations** for specific situations
- Explicit consent
- Necessary for a contract
- Public interest
- Legal claims
- Vital interests
Adequacy

• The European Commission has so far recognised Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland and Uruguay as providing adequate protection.

• Adequacy talks are ongoing with South Korea.

• These adequacy decisions do not cover data exchanges in the law enforcement sector which are governed by the "Police Directive" (article 36 of Directive (EU) 2016/680). See Commission website here.

• Impact of Schrems II on US Privacy Shield
Binding Corporate Rules ("BCRs")

- Must be binding and enforceable inside a group
- Must be approved by a supervisory authority
- Each jurisdiction takes a different amount of time to process applications
- Requires another compliance mechanism while waiting
- No guarantee of approval/template – each determination is bespoke
- Soft audit
- Cost
- Favored by regulators
- Good B2B brand value
Standard Contractual Clauses

- Off the shelf
- Minor negotiation – customized appendices
- Cannot be substantively altered
- No approved clauses for processor-subprocessor transfers (yet)
- Impact of Schrems II: additional safeguards, country-specific assessment

- New (updated) clauses expected to be issued by the Commission soon
• Data subject must be informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards.

• In order for a consent to be valid, it must remain revocable by the data subject at any time.
APEC CBPRs (and PRPs)

- Member economy adherence
- Trust agents/auditors

  - 39 participants, of which
    - USA (34)
    - Singapore (2)
    - Japan (3)
  - 4 agents, of which
    - Truste (31)
    - Schellman & Co (2)
    - Infocom Media Dev’t Authority (2)
    - JIPDEC (3)
    - Other (1)


  - 17 participants, of which
    - USA (17)
  - 2 agents, of which
    - Truste (15)
    - Schellman & Co (2)

- Member economy adherence:
  - USA
  - Mexico
  - Japan
  - Canada
  - Singapore
  - Republic of Korea
  - Australia
  - Chinese Taipei
  - Phillipines
2019 IAPP-EY Survey

SCCs are by far the most common method to transfer data outside the EU; 6 in 10 use Privacy Shield

Methods Used for Data Transfer Outside of EU
(Base: transfer data outside EU)

- Standard contractual clauses: 88%
- Privacy Shield: 60%
- Adequacy: 37%
- Consent: 33%
- Other statutory derogations, such as fulfillment of contract: 29%
- Binding corporate rules: 24%
- Adherence to a code of conduct: 2%
- Certification or seal framework to be determined under GDPR: 2%
- None: 2%

24: What mechanisms does your company currently use to transmit data outside the EU?

Small businesses, B2C firms, and government agencies are the least likely to transfer data from EU

BY COMPANY REVENUE

Transfer data from EU outside
Under $100M | $100M-$999M | $1B-$24.9B | $25B+
---|---|---|---
61% | 66% | 80% | 84%

BY INDUSTRY SEGMENT

Transfer data from EU outside
Regulated | Unregulated | Government
---|---|---
62% | 78% | 27%

BY TARGET

Transfer data from EU outside
B2B | B2C | Both
---|---|---
78% | 50% | 72%

BY EMPLOYEE SIZE

Transfer data from EU outside
<5K | 5K-24.9K | 25K-74.9K | 75K+
---|---|---|---
64% | 68% | 88% | 86%

Significantly different than other segments | Small sample size

IAPP-EY Annual Privacy Governance Report 2019
Data Transfers and Potential Impact of Brexit
Thank you

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