

Privacy Laws & Business Panel - International Transfers of Data

9 May 2019

COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG LONDON LOS ANGELES

NEW YORK PALO ALTO SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

www.cov.com

Agenda

- Discuss some real-world concerns with Chapter V regime
 - Concerns over application
 - Concerns with uncertainty
 - Concerns with delay

Concerns with the Transfer Regime – Applicability

- GDPR liabilities has refocused the minds of many
- Transfer scenarios formerly overlooked, now raising concerns
- Traditional mechanisms often presume an EU data controller pushing data to a non-EU data importer
- The GDPR's applicable law rules bring non-EU controllers (and now processors) within scope

Concerns with the Transfer Regime – Applicability

- Non-EU data controller targeting/monitoring EU data subjects
 - Engage services of EU representative? Employ affiliate?
 - Data transfer where data controller subject to GDPR?
- Non-EU data controller with EU-established branch offices or otherwise having same legal personality
 - Model clauses often amount to a contract with oneself
- Non-EU data controller engaging data processor in EU
 - Processors increasingly resistant to executing model clauses citing GDPR risks

Concerns with the Transfer Regime – Certainty

- Industry grappling with uncertainties regarding historical transfer mechanisms, including potential invalidations
- Challenges pending involving EU-US Privacy Shield and EU Model Clauses
 - Adjudication not expected until late this year or next
- Expectation that EU model clauses will be updated in light of GDPR

Concerns with the Transfer Regime – Certainty

- Continued absence of “processor”-based EU model clauses, for processor-initiated data transfers
- Uncertainty surrounding Brexit terms and status of UK as an “adequate” third country
- Interpretations of GDPR, Article 48 and foreign LEA requests
 - Anticipate EU DPAs adopting divergent approaches on use of MLATs
- Application of derogation for “compelling legitimate interests”
 - Clear guidance yet to emerge on appropriate use
- Commercial terms increasingly made conditional on certain events and contingencies occurring or not occurring

Concerns with the Transfer Regime – Delay

- Adequacy determinations, including Brexit, continue to move ahead at a glacial pace
 - GDPR offers more particular criteria, but narrowing of timeframes not expected
- Binding Corporate Rules under GDPR
 - Involves application of “consistency mechanism”
 - Are timeframes realistic in current environment?
- Certifications and industry codes, although industry has yet to embrace these options

Conclusions

- EU cross-border data transfer regime remains problematic in certain respects
- Legal certainty often unobtainable, causing issues for private sector
- Additional mechanisms, like codes, certifications and non-national adequacy determinations, yet to be fully developed



Daniel Cooper
Partner, London
+44 20 7067 2020
dcooper@cov.com

COVINGTON

BEIJING BRUSSELS DUBAI FRANKFURT JOHANNESBURG LONDON LOS ANGELES
NEW YORK PALO ALTO SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

www.cov.com