

Morgan Lewis

**BITE-SIZED**

# **BANKING BULLETIN**

**INTERNATIONAL DATA PRIVACY V. US  
DISCOVERY**

Tess Blair

June 6, 2022



# Presenters



**Tess Blair**  
Partner | Philadelphia

**Morgan Lewis**



# Agenda

- Quick Refresher on GDPR
- Anatomy of GDPR Cross-Border Provisions
- Current state of US/EU transfer mechanisms
  - Schrems II
  - Pending Trans-Atlantic Data Privacy Framework
- Current practice

# Quick Refresh on GDPR

## Overview:

- Enacted May 25, 2018, replacing 1995 Privacy Directive
- Under EU law, personal data can only be gathered **legally** under specified conditions, and only for a **legitimate purpose**.
- Organizations that collect and manage personal data **must protect it** from misuse and **must respect certain rights** of the data subjects which are guaranteed by EU law.
- The nationality or the residence of the data subject doesn't matter.

## Scope:

- Governs all personal data in and from the EU.
- Personal data is defined as all data relating to an individual and includes all data that, directly or indirectly, can be used to identify a person.
- Special categories of sensitive data, such as health data require heightened protection.
- <https://www.morganlewis.com/pubs/2018/07/the-edata-guide-to-gdpr-what-is-personal-data-under-the-gdpr>

# Anatomy of GDPR Cross-Border Provisions

- Article 45: GDPR prohibits the transfer of personal data from the EU to any jurisdiction that does not provide “adequate” protection for personal data.
  - EU Commission has not deemed the US an adequate jurisdiction.
- Article 46: Describes alternative mechanisms organizations may implement to provide “appropriate safeguards” for cross-border transfer.
  - These include binding corporate rules, approved codes of conduct or (until recently) certification under the US/EU Privacy Shield Framework.
  - These mechanisms are designed to be used for routine, repetitive cross-border transfers.

# Anatomy of GDPR Cross-Border Provisions

- Article 49: Provides a list of derogations or exceptions to the prohibition on cross-border transfer that may be used in specific situations (but not for repetitive or routine transfers):
  - Consent;
  - Contractual obligation;
  - Public interest;
  - Exercise or defense of legal claim;
  - Vital interest;
  - Public register.
- Derogation of last resort: Legitimate Interest

# Current State of US/EU Transfer Mechanisms

- **US Privacy Shield:** provided self-certification mechanism governed by Department of Commerce, a mechanism used by hundreds of US organizations.
- Court of Justice of the European Union (CJEU) in the '*Schrems II*' decision of 16 July 2020 **invalidated the Privacy Shield** (*Data Protection Commissioner v Facebook Ireland and Maximillian Schrems, Case C-311/18*)
- **US Courts:** repeatedly reject GDPR as a means to block US discovery
  - <https://www.morganlewis.com/pubs/2020/08/the-edata-guide-to-gdpr-schrems-ii-could-disrupt-us-courts>
- The Trans-Atlantic Data Privacy Framework (TADPF) announced 02/2022
  - Would replace US Privacy Shield

# Current State of US/EU Transfer Mechanisms

- TADPF, per joint statement of US and EC
  - New safeguards to limit access to data by US surveillance agencies to what is **necessary** and **proportionate** in the pursuit of defined national security objectives.
  - A two-tier redress system to investigate and resolve complaints of EU individuals on access of data by US surveillance agencies, which includes an independent Data Protection Review Court.
  - Enhance oversight of intelligence activities.
  - Particularly concerned with the Foreign Intelligence Surveillance Act .

## **BUT:**

- March 2022 US Supreme Court decision in **FBI v. Fazaga** → **the Court** ruled that the US Federal government could invoke its state-secret privilege to prevent disclosure of information to individuals who claimed they had been subject to illegal surveillance from US authorities under FISA.



# US/EU Transfer Mechanisms

- **Maximilian Schrems**, lead litigant in the CJEU's decisions 'Schrems I' and 'Schrems II' and founder of the NOYB association, has promised to challenge the TADPF.
- **Cumbersome approval process** at the EC:
  - EU Commission is required to provide the **European Data Protection Board** with all necessary documentation, including correspondence with the U.S. government.
  - The EDSA must then issue an **opinion** assessing the adequacy of the level of protection provided in the US.
  - Thereafter, the **Member States** must be involved as part of the comitology procedure.
  - The Commission will not adopt the adequacy decision as an implementing act if the weighted **majority in the Committee representing the Member States delivers a negative opinion** on the draft. In this case, it must renegotiate and resubmit the new result to the committee or refrain from further pursuing the draft.

# Current Practice

- **Current Practice: After *Schrems II*, Article 46 safeguards remain available but have been enhanced by guidance from EDPB:**
  - Recently updated Standard Contract Clauses
  - EDPB recommends addition of “appropriate supplementary measures”
  - Specifically recommends Data Transfer Impact Assessment
    - Evaluate specific risk of contemplated data transfer

## Our Global Reach

Africa  
Asia Pacific  
Europe  
Latin America  
Middle East  
North America

## Our Locations

Abu Dhabi  
Almaty  
Beijing\*  
Boston  
Brussels  
Century City  
Chicago  
Dallas  
Dubai  
Frankfurt  
Hartford  
Hong Kong\*  
Houston  
London  
Los Angeles  
Miami  
New York  
Nur-Sultan  
Orange County  
Paris  
Philadelphia  
Pittsburgh  
Princeton  
San Francisco  
Shanghai\*  
Silicon Valley  
Singapore\*  
Tokyo  
Washington, DC  
Wilmington



# Morgan Lewis

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

# THANK YOU

© 2022 Morgan, Lewis & Bockius LLP  
© 2022 Morgan Lewis Stamford LLC  
© 2022 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.