

Luzerner Beiträge zur Rechtswissenschaft (LBR)

Herausgegeben von Jörg Schmid im Auftrag der
Rechtswissenschaftlichen Fakultät der Universität Luzern

Band 180

Rahel Schär

Data Protection and Trade in a World without Borders

**The Privacy Shield and Other Mechanisms
to Govern International Data Flows**

Schulthess § 2024

Table of Contents

Preface	VII
Contents	IX
Table of Contents	XI
Bibliography	XXI
Scholarship	XXI
I. Journal Articles	XXI
II. Books	XXXVIII
III. Chapters in Books	XLII
IV. Research Papers	XLVII
V. Unpublished Theses	XLIX
Online Sources and Media	XLIX
I. Newspaper Articles	XLIX
II. Press Releases	LI
III. Databases and Statistical Information	LV
IV. Websites of Governments and International Organizations	LV
V. Blogposts and Online Articles	LVIII
VI. Radio- and Television Shows	LXVII
Materials	LXVII
I. Reports	LXVII
II. Proceedings of International Organizations	LXIX
1. United Nations (UN)	LXIX
2. Human Rights Committee (HRC)	LXX
3. Organisation for Economic Co-Operation and Development (OECD)	LXX
4. Asia-Pacific Economic Cooperation (APEC)	LXX
III. WTO Documents	LXX
IV. EU Documents (Communications and Decisions)	LXXI

Table of Contents

1. European Council.....	LXXI
2. European Commission	LXXII
3. European Parliament	LXXIV
4. Article 29 Data Protection Working Party / European Data Protection Board.....	LXXV
5. European Data Protection Supervisor.....	LXXVII
V. U.S. Documents	LXXVII
VI. UK Documents.....	LXXVIII
VII. Swiss Documents	LXXVIII
Treaties, Legislation and Judgments	LXXIX
I. International Treaties.....	LXXIX
1. WTO Treaties.....	LXXIX
2. Trade Agreements	LXXX
3. Others	LXXXV
II. Legislation.....	LXXXVI
1. Regional Legislation of the European Union	LXXXVI
2. Domestic Legislation.....	LXXXVII
2.1 U.S. Legislation.....	LXXXVII
2.2 UK Legislation	LXXXVII
2.3 Swiss Legislation.....	LXXXVIII
III. Judgments.....	LXXXVIII
1. Human Rights Committee (HRC)	LXXXVIII
2. Permanent Court of International Justice (PCIJ).....	LXXXVIII
3. International Court of Justice (ICJ)	LXXXVIII
4. European Court of Human Rights (ECtHR).....	LXXXVIII
5. Court of Justice of the European Union (CJEU) Decisions and Advocat General Opinions	LXXXIX
6. World Trade Organization (WTO).....	XC
6.1 Panel Reports.....	XC
6.2 Appellate Body Reports	XC
7. Decisions of Domestic Courts	XC
7.1 U.S. Courts	XC
7.2 French Courts	XCI
Others	XCI
I. Letters	XCI

II. Presentations	XCI
List of Abbreviations	XCI
Part One: Introduction and Methodology.....	1
Chapter 1: The Problem	3
Chapter 2: The Hypothesis	7
Chapter 3: Methodology	8
I. The Benefits of a Methodology	8
II. Applied Methods	9
1. Socio-Legal Research.....	9
1.1 The Impact of Contextualizing Law	9
1.2 Significance for this Thesis	11
2. Doctrinal Research	13
III. Implementation	14
IV. Interaction with other Methods: Law and Economics.....	14
Part Two: Digital Trade, Privacy and Governance.....	17
Chapter 1: Structure and Objective of Part Two	19
Chapter 2: Digital Economy and Digital Trade.....	19
I. The Digital Economy	19
1. Economy's New Engine.....	19
2. Businesses Using Data	21
3. Commercially Sharing Data	25
II. Digital Trade	27
1. Changing Trade Patterns	27
2. Definition.....	28
3. Measuring Digital Trade	31
III. Data Localization	32
1. Data Flows	32
2. Measures Limiting Data Flows	34

3. Economic Damage	37
IV. Conclusion	39
Chapter 3: Privacy and Privacy Law.....	40
I. The Value of Privacy.....	40
1. Individual Value.....	41
2. Societal Value	44
3. Privacy and Identity Online.....	46
4. Common Misconceptions about Privacy	48
II. Legal Conceptualizations of Privacy.....	49
1. Privacy in the U.S.....	49
1.1 Privacy Conception: Privacy as Control.....	49
1.2 Afforded Protections	51
a Against the State.....	51
b Against Private Actors.....	53
c Tort Claims.....	57
d Definition of Personal Data in U.S. Law	58
1.3 Enforcement	59
a FTC’s Role	59
b Scope of Action.....	60
c Notice-and-Choice Enforcement Approach.....	61
1.4 Enactment of Comprehensive Legislation.....	62
2. Privacy in the EU	64
2.1 Privacy Conception: Privacy as Dignity.....	64
2.2 Omnibus Approach.....	66
a CFREU and TFEU	66
b DPD and GDPR.....	68
c E-Privacy Directive	72
2.3 Personal Data According to the GDPR	73
3. Privacy in International Law	75
3.1 Universal Declaration on Human Rights	76
3.2 International Covenant on Civil and Political Rights	77
3.3 European Frameworks.....	78
a European Convention on Human Rights	78
b Convention 108	81
III. Regulation for a Digital Future	84
1. Technology Spurring Privacy Considerations	84

2. Privacy Threats by Information Technology	88
2.1 Extensive Collection of Personal Data	88
2.2 Perilous Use of Personal Data	90
a Function Creep	90
b Profiling	91
c Automated Decision-Making	93
d Surveillance	94
2.3 Resulting Social Challenges	95
a Chilling Effects	95
b Inequalities	97
c Social Fragmentation by Echo Chambers and Filter Bubbles	99
3. A Future-Oriented Privacy Regulation	100
3.1 Control as an Unfit Concept	100
3.2 Legal Reforms to Adequately Address Data Protection in Digital Innovation	102
a Acknowledging Privacy as a Digital Human Right	102
b Acknowledging the Societal Value of Privacy	104
c Acknowledging that Privacy Might Not Be Economically Damaging	105
IV. Conclusion	107

Part Three: Governing Extraterritorial Jurisdiction Concerning Data Privacy 111

Chapter 1: Structure and Objective of Part Three..... 113

Chapter 2: Governments Regulating Data in Cyberspace..... 114

I. Discussions about Regulating Cyberspace	114
II. Extraterritorial Jurisdiction in Privacy Law	118
1. Doctrine of Jurisdiction	118
2. Jurisdiction and Data Flows	121
3. Example: The EU Conditional Flow Regime	122
3.1 Extension of EU Privacy Legislation	122
3.2 Conditional Flow Regime	123
a Adequacy Decision	124
b Appropriate Safeguards	130
c Derogations	133

3.3 Brussels Effect..... 134
III. Rethinking Jurisdiction in Cyberspace 136
IV. Conclusion 138

Chapter 3: Facilitating Data Flows through Governance of Data

Privacy 139

I. Working towards Regulatory Convergence 139
II. Global Governance through Regulation..... 143
III. Governing Privacy and Data Flows Globally 145
IV. Legal Governance Conceptions to Remedy the Effects of
Extraterritorial Jurisdiction Concerning Data Privacy..... 148
1. Global Constitutionalism..... 148
2. Non-Binding Transnational Governance..... 151
3. Global Legal Pluralism..... 154
V. Conclusion 156

Part Four: Legal Governance Solutions for Data Flow

Hinderances from Privacy 159

Chapter 1: Structure and Objective of Part Four 161

Chapter 2: Trade Law..... 163

I. The WTO 163
1. Claims of the WTO Constitution..... 163
2. The WTO and Digital Trade..... 167
2.1 Mandate..... 167
2.2 Discussions on E-Commerce..... 169
3. Issues with WTO Law and Digital Services..... 173
3.1 Distinguishing them from Goods 173
3.2 Positive-List Approach..... 175
3.3 Classification of Services 177
3.4 Modes of Supply of Services..... 180
4. Reconciling Extraterritorial Privacy Legislation 181
4.1 Challenging Privacy 181
4.2 Privacy Exception under Article XIV GATS 184
II. Trade Agreements 187
1. Relationship to the WTO and WTO law 187

1.1 Forum Shifting	187
1.2 Integration into the WTO Architecture.....	190
2. Rule Makers for Digital Trade in Trade Agreements	192
2.1 Dissemination of Regulatory Approaches	192
2.2 The EU’s Focus on Data Protection	195
2.3 The U.S. Eliminating Digital Protectionism.....	204
2.4 Other APEC Rule Makers Supporting U.S.-Interests.....	207
3. Trendsetting Agreements	209
a TPP/CPTPP	209
b USMCA.....	210
c U.S.-Japan DTA	211
d DEPA	211
e RCEP	212
4. Reconciling Extraterritorial Privacy Legislation	213
4.1 Provisions of Interest.....	214
a Digital Trade Provisions.....	214
b Data Flow Provisions	215
c Privacy and Data Protection Provisions.....	217
4.2 Provisions Furthering Convergence or Compatibility Mechanisms.....	221
4.3 Provisions Allowing for Data Flows as an Exception to a Privacy Rule	223
a Provisions on Information Transfers for the Conduct of Business	223
b Provisions Prohibiting Data Localization	224
4.4 Provisions Allowing for Data Privacy as an Exception to a Data Flow Rule.....	226
a General Exceptions for Privacy	226
b Specific Exceptions for Privacy.....	227
c Specific Exceptions on Information Transfers for the Conduct of Business	228
d Specific Exceptions on Data Localization	230
e Risk Assessment for Privacy-Inflicted Restrictions on Data Flows	233
III. Conclusion	235
Chapter 3: Soft Law Solutions.....	237
I. OECD.....	237
1. OECD and Privacy	237

2.	Reconciling Extraterritorial Privacy Legislation	240
2.1	Furthering Convergence	240
a	International Implementation	240
b	Domestic Implementation.....	241
2.2	Rules on Data Flows.....	242
2.3	Rules on Accountability	244
II.	APEC	246
1.	APEC and Privacy.....	246
2.	Reconciling Extraterritorial Privacy Legislation	249
2.1	Furthering Convergence	249
a	International Implementation	249
b	Domestic Implementation.....	251
2.2	Rules on Data Flows.....	253
2.3	Rules on Accountability	255
III.	Conclusion	258

Chapter 4: Safe Harbor Agreements like the EU-U.S. Data

Privacy Framework..... 261

I.	The Safe Harbor Agreement.....	261
1.	Nascency and Content.....	261
2.	The PRISM Scandal	264
2.1	Data Collection.....	264
2.2	Reviewing the Safe Harbor	265
2.3	Commission’s Insights and other Criticism.....	267
II.	Schrems I.....	272
1.	Background	272
2.	CJEU Proceedings.....	274
3.	Reception of the Judgment.....	277
4.	The Influence of Schrems I on the GDPR	279
III.	Privacy Shield Agreement.....	282
1.	Negotiations	282
2.	Content 283	
2.1	Voluntary Self-Certification	283
2.2	Privacy Shield List	284
2.3	Privacy Shield Principles.....	287
2.4	Enforcement	291
a	Regarding Commercial Aspects	291

b	Regarding Surveillance.....	298
c	Annual Joint Review Mechanism.....	299
3.	Legal Nature.....	300
3.1	Constituting Documents.....	301
3.2	Treaty or Memorandum of Understanding.....	303
3.3	Interpreting the Privacy Shield.....	306
a	Principles of Treaty Interpretation.....	306
b	Textual Interpretation.....	306
c	Intentionalist Interpretation.....	309
d	Teleological Interpretation.....	312
3.4	Unilateral Actions in Connection to the Privacy Shield.....	313
a	Unilateralism.....	314
b	U.S. Unilateral Actions and the Umbrella Agreement.....	315
c	Legal Effects of these Unilateral Actions.....	323
4.	Relationship to the GDPR.....	323
IV.	Critical Reflections.....	325
1.	Evolution from the Safe Harbor.....	325
2.	Missing Treaty Status and Review Mechanism.....	327
3.	Commercial Aspects.....	328
3.1	Lack in Clarity.....	328
3.2	Key Principles.....	329
3.3	Oversight and Enforcement.....	331
4.	Surveillance.....	336
4.1	Derogations for National Security Purposes.....	336
4.2	Protection of EU Citizens under U.S. Law.....	336
4.3	Functioning of Mechanisms to Oversee Surveillance.....	339
4.4	No Concrete Assurance.....	341
V.	Schrems II.....	341
1.	Background.....	341
2.	Opinion of the Advocate General.....	344
3.	CJEU Judgment.....	346
4.	Reception of the Judgment.....	350
VI.	Future of Transatlantic Data Flows.....	352
1.	A New Diplomatic Solution: The New EU-U.S. Data Privacy Framework.....	352
2.	Alternatives to an Adequacy Decision under the GDPR.....	357
3.	A Change in U.S. Law.....	363

VII. Conclusion 365

Part Five: Conclusions and the Way Ahead 371

Chapter 1: Problem and Answers 373

Chapter 2: Answering the four Sub-Questions 374

I. Question 1: How do the digital economy and digital trade work? 374

II. Question 2: Why is privacy relevant in general and specifically in cyberspace? 375

III. Question 3: What are the issues with domestic legislation and specifically extraterritorial privacy regulation concerning cyberspace? 376

IV. Question 4: How can these issues be remedied (with (legal) governance conceptions)? 377

Chapter 3: Answering the Main Research Question 381

Chapter 4: The Way Ahead for Policymakers 382

I. The WTO as a Forum 382

II. Acknowledging Privacy as a Digital Human Right and a Societal Value 385

III. Bridging Divergences Between the EU and the U.S. 386

 1. Overarching Privacy Framework in the U.S. 386

 2. Assessing the EU's Assertion of Digital Sovereignty 387

Subject Index 389