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EU/US Data Transfers: Facebook threatens to quit EU?



[Derek Mooney](#) writes: This was the week when the stark reality of the Schrems II judgement became clear. When the rubber hit the road.

In last week's BEERG Newsletter (#29 2020) we portentously observed that the already complex position around Standard Contractual Clauses (SCCs) and other methods of transferring personal data to the US was about to become more complex. Little did we realise how quickly that would happen.

The Irish Data Protection Commission moved to shut down Facebook's use of SCCs to cover the transfer of data from the EU to the US. Facebook has some 400m+ user in Europe. Facebook went to court.

Within days, the text of Facebook's affidavit to the Irish High Court appeared online. Its contents fuelled headline speculation in respected broadsheet [newspapers](#) and reputable media outlets that Facebook was threatening to quit the EU unless its concerns were addressed.

Facebook has since denied the affidavit filed amounted to a threat to quit. “Facebook is not threatening to withdraw from Europe” its spokesperson made clear, saying that the affidavit it filed against the Irish Data Protection Commission (DPC) was merely a simple reflection of reality, adding:

“Legal documents filed with the Irish high court set out the simple reality that Facebook, and many other businesses, organisations and services, rely on data transfers between the EU and the US in order to operate their services. A lack of safe, secure and legal international data transfers would damage the economy and hamper the growth of data-driven businesses in the EU, just as we seek a recovery from Covid-19.”

[Facebook](#) is correct. It calls out the economic consequences of Schrems II.

This is an argument that almost any company could make, but most would probably choose not to make it in such a confrontational style. The most recent Schrems II decision from the European Court of Justice CJEU did not write new law, it interpreted existing laws. These laws have been there for years. The ruling, which ultimately stems from a legal battle between Facebook and the Irish the DPC, has now placed the use of SCCs into a problem area.

So, once again, data transfers between Europe and the US are in a state of confusion. Once again, a legal battle that has been slowly making its way back and forth through the courts in Ireland, though not exclusively, and in Brussels, has left business with more questions than answers. And, once again, the argument is being conducted as if this was only a concern for IT and Social Media behemoths such as Facebook.

We have been here before. Without a doubt a great deal of the legitimate and serious concerns that Facebook has are also felt by many hundreds and thousands of other companies trying to conduct business and requiring regular and secure data transfer process across the Atlantic.

We saw this - first hand -during the initial discussions about the GDPR in 2012 and 2013. Back then the issue of data protection and data privacy was debated and discussed across the EU institutions as if it were a matter that concerned IT giants and social media platforms alone. All too often the issue was seen solely through that prism, to the detriment of the vast majority of companies.

We in BEERG know only too well the difficulties there were in trying to get policy makers to grasp that data privacy and data transfers were issues that affected and impacted almost all companies and that for the vast majority of companies across the EU, the biggest data base they held and operated was their [employee database](#).

We got the message across to some in Brussels. We succeeded in securing changes - but we see, in retrospect, that they were not enough.

To safeguard transfers to the US, there first was Safe Harbour, but that system collapsed upon inspection. Then we had Privacy Shield. It too has failed the test. To add to the general sense of uncertainty, the EU Commissioner with responsibility for data privacy, Didier Reynders (*photo*), told members of the European Parliament three weeks ago that *“there will be no quick fix”* as the *political nature of the issue* would likely hamper progress on a replacement.



This is code for do not expect any progress before the presidential election... or, even for a few months after that, depending on the outcome. In essence, the European Union is asking the United States to make legislative changes to its surveillance laws aligning them with European expectations of privacy.

It is no small ask. The response will be dictated by the political complexion of both the White House and Congress, but it is the key to unlocking this problem in a sustainable and workable manner.

The one small hint of hope from the Commissioner at that meeting with MEPS was his signal that he hoped to have a first draft of the Commission’s plan for “modernized” SCCs later this month.

The EU Commission says that modernized SCCs should be expanded to deal with various data transfers circumstances not currently covered including transfers of data between an EU data processor and a non-EU data processor and allowing multiple parties to sign SCCs and allow the accession of new parties.

The Commission hopes it will be able to finalize the updated SCCs by the end of 2020. It is awaiting the input of the European Data Protection Board (EDPB) on some key aspects, the EDPB is expected set out its position at its upcoming board meetings, either in October or November.

Securing progress on SCCs in the short term is crucial to the continuation of EU/US data transfers. Getting EU/US inter-governmental movement (and in reality we are talking about movement on the US side) on US

surveillance laws and their application to the data of EU citizens is vital for the medium to long term survival of EU/US data transfers.

Just how these half-hearted Facebook threats to quit help to deliver these twin strategic goals is beyond us, though they perhaps offer an insight into how Facebook's current public affairs chief managed to almost wipe the UK party he once led off the electoral map.

As LBJ famously advised: *never tell a man to go to Hell, unless you can send him there.*

Gig economy: New US rules in prospect



Last Tuesday, the US Department of Labor (DOL) released details of proposed new regulations on how businesses can classify workers as independent contractors. The new regulations would appear to be more helpful to businesses which operate a “gig economy” model than some of the legislation under consideration, or already enacted, by a number of states, such as California.

According to *Bloomberg*,

“the [proposed regulation](#), unveiled provides a model for when businesses may legally classify workers as independent contractors rather than employees, who are covered by federal minimum wage and overtime law. The DOL is proposing a more employer-friendly interpretation of employee status under the Fair Labor Standards Act than it applied during the Obama administration.”

In the US, the issue of worker classification has taken on greater significance amid the rise of the gig economy, where independent contractors are central to the business models of leading companies such as *Uber*, *Lyft* and *Doordash*.

Being classified as an employee opens the door to certain benefits which are not available to the self-employed.

The proposed rule adopts an “economic reality” test for determining which workers qualify as independent contractors. It says that contractors must be in business for themselves, rather than being economically dependent on the possible employer for work.

The rule explains the “inquiry into economic dependence is conducted through application of several factors, with no one factor being dispositive, and that actual practices are entitled to greater weight than what may be contractually or theoretically possible,” according to the DOL’s Wage and Hour Division rule. DOL proposes narrowing this test into five factors, less than the number used by various courts, and previously used by DOL.

The agency proposed giving greater weight to two core factors as determinative of status: the nature and degree of the employer’s control over the work and the worker’s opportunity for profit or loss based on personal initiative or investment. They’re complemented by three additional “guideposts,” which would be useful in the analysis when the initial two core factors are conflicting, a senior DOL official said on a media call Tuesday. Those three criteria are the amount of skill required in the work, the degree of permanence in the work relationship, and whether the work is part of an integrated unit of production.

In **Europe**, the European Commission is currently looking at ways of making it clear that platform economy workers will be entitled to organise and bargain collectively. However, whether or not it is possible to do

this could turn on being able to define workers who fall somewhere between the categories of “employees” and “self-employed.”.

But drawing that distinction may not be straightforward. In *Yodel*, the European Court (CJEU) ruled that it’s up to national courts to make decisions about employment status, but that a courier working for Yodel in the UK appeared to them to have been correctly classified as self-employed, given the latitude he had over accepting jobs, working for competitors, providing substitutes and deciding his work schedule. The deciding factors were independence and subordination. [See here](#)

To explore these issues, HR Policy + BEERG are hosting a webcast on Thurs, Sept 24 at 1700h [Paris time]. Speakers will discuss developments relating to the gig economy on both sides of the Atlantic, and possible spill-over effects for independent contractors more generally.

To register for the conference, email Heungsup Jeong: hjeong@execcomp.org

Unions: CWU launch “tech branch”



The UK’s Communication Workers Union (CWU) has said it plans to launch a new national branch for technology and digital sector workers.

According to the union’s website “...programmers, graphic designers, game developers, specialist product teams, testers and more, from small start-ups to tech giants such as Google, Facebook and Microsoft are joining the union as part of its new United Tech and Allied Workers (UTAW) National Branch.”

And the union has said that the new branch will have links with the US-based Tech Workers Coalition (TWC), which originated in the Bay Area of San Francisco in 2014.

According to the CWU:

After rapid growth since its launch in 2019, the U.K. branch of the TWC approached the CWU to provide details on the background of their organisation, their current working environment and the issues that come with working in a sector where little to no union recognition currently exists. They also cited the close relationship between US tech workers and one of our sister unions, The Communication Workers’ of America, and made the case for why tech workers here in the U.K. should join forces with the CWU.

The new union branch will be headed by Ray Ellis, the union’s Head of Recruitment and Organising. Speaking to CWU News, the unions internal news magazine, Ellis said:

“These tech-sector workers are leading the way as a new generation realise the value of collectivising struggle and begin to self-organise to build industrial strength, and we are delighted they believe the CWU is the best union to help them achieve this.

“It’s clear from the meetings we’ve had with these activists and tech workers that they’re keen to both organise and unionise – and that they want to do this within the CWU.”

Brexit: UK warns of 7,000 truck tailbacks in worst-case scenario



The UK government is warning of 7,000 truck-long queues in Kent in a “reasonable worst case” scenario due to Brexit, a stark assessment of the potential chaos when Britain leaves the European Union’s single market and customs union at the end of the year.

In a letter to Britain’s border industry, Cabinet Office Minister Michael Gove said the flow of freight between Dover and Calais could be reduced by up to 80% compared to normal levels. The government’s worst-case assessment is that as many as 70% of trucks traveling to the EU may not be ready for new border controls, according to the letter.

“The biggest potential cause of disruption are traders not being ready for controls implemented by EU Member States on 1 January 2021,” Gove wrote in the letter dated Tuesday. “It is essential that traders act now and get ready for new formalities.”

Gove’s letter is the first time that a government minister has put their name to the predictions of significant upheaval at the U.K.-EU border in Jan. 2021. Last week, the Guardian newspaper [reported](#) on a briefing document from civil servants which forms the basis of Gove’s intervention, warning of long queues and disrupted freight flow.

Key to the government’s plan to minimize disruption is a new IT system -- the Smart Freight Service -- which would issue trucks with a permit indicating that they have the right paperwork to enter the EU. Trucks entering Kent without a permit would be fined 300 pounds (\$382). However, the government acknowledges the system will still be in testing mode in January, and users risk encountering bugs.

Meanwhile, a new report from the academic thinktank *UK in a Changing Europe* says that the most immediate and visible impact of a no deal Brexit with the EU will be seen at the border, with risks of queues and shortages of food.



The report, [What would no deal mean?](#) finds no deal will also mean hassle for British citizens who will need to do more preparation before travelling to the EU. This includes the need to bring an international driving permit and green card to drive or take a car to EU countries. European Health Insurance Cards will no longer be valid, so travel insurance will be required. Older travellers, or people with pre-existing conditions, may find it harder and more costly to travel.

No deal will also mean no agreement on aviation or other transport links; no agreement on fishing and no agreement on security and judicial cooperation.

Of particular concern to BEERG members, the thinktank says that no deal might also mean the UK is not given the go-ahead on data adequacy or on equivalence for financial services – decisions that are down to the EU to make alone, which it has linked to the negotiations.

The thinktank further says that “in many respects, the outcomes in a no-deal scenario are close to the deal the prime minister wants... any deal will be relatively ‘thin’ given the UK’s red lines. Both sides accept that it will cover little more than tariff- and quota-free access for most goods.”

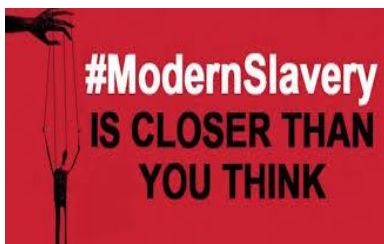
Consequently, deal or no deal, there will inevitably be disruption on 1 January and there will be significant new barriers to trade involving customs checks, regulatory barriers, an end to mutual recognition across a

wide variety of products and services. But no deal will be more disruptive because it means tariffs on trade both ways.

That will affect producers in exposed sectors, especially cars and agri-food, but also consumers. All businesses who trade with EU will be affected by extra bureaucracy.

The EU may implement some mitigating measures – but the UK cannot depend on them, particularly if the talks break down acrimoniously. If they do, and especially if the UK proceeds with the [UK Internal Market Bill](#), the EU is less likely to put in place the unilateral mitigations that it had ready last year in areas such as air and road transport. There is a risk each side might seek to maximise economic damage to the other in retaliation – so there's potential for significant disruption.

UK: Government to tighten modern slavery law



Organisations will be required to regularly publish their modern slavery statements via a new government reporting service and must be transparent about how they conduct their risk assessments and due diligence.

Large organisations, government departments and local authorities in England and Wales with an annual turnover or budget of £36 million will need to publish their statements on a portal similar to that used for gender pay gap reporting, which will be launched in early 2021.

This, the Home Office said, would make it easier for organisations to be held accountable for the steps they take to ensure modern slavery does not exist in their supply chains.

The government is soon to publish guidance outlining the areas modern slavery reports must cover. Mandatory reporting areas will include the parts of the business and its supply chains where human trafficking and modern slavery is a risk; its due diligence process; modern slavery policies; effectiveness in ensuring modern slavery does not take place, measured against performance indicators; staff training around modern slavery; and the organisation's structure.

Remote working: Developments across Europe

UK: Prime Minister, Boris Johnson, has confirmed that people should work from home if they can in a statement to the House of Commons, Tuesday of this week. He also announced that retail and hospitality staff will be required to wear face masks among a series of tighter restrictions designed to curb rising coronavirus infection rates.



He said: *"We are once again asking office workers who can work from home to do so. In key public services and in all professions where home working is not possible such as construction or retail, people should continue to attend their workplaces."* Johnson added that people should assume the new rules will stay in force for six months.

France: [Planet Labor](#) reports that Medef, France's largest employers' organization, has said that it will agree to open negotiations on remote working with trade unions. Following a series of meetings involving

the employers and unions in which they sought to agree a joint diagnosis on the lessons to be learned from recent developments in remote working the employers' organization has agreed to a union request to negotiate on the matter.

The purpose of these negotiations “would be to recall the main principles of the relevant legislation, identify the new questions that need to be asked, and also to shed some light on them », the Medef leader stated both as an indication that his organization did not intend to carry out an in-depth review of the current regulatory framework and as a warning that the agreement would be « neither prescriptive nor normative ». Medef believes that the issue should be dealt with at the level of the companies and sectors that are already negotiating on the subject.



Spain: This week, the Spanish government approved a decree-law on remote working, the major elements of which were negotiated with trade union and employers' organizations. The text defines remote work and provides a framework for ways in which; businesses can make the means for remote working available, compensation can meet the related expenses incurred, and employees' working activity can be managed. *We will come back to this when fuller details are available.*

Austria: the government has said it will publish a bill on remote working in early 2021. In the meantime, it will consult extensively with employers and unions.

BEERG Bytes: Like a BEERG meeting... but online and byte-sized



Check out recent additions to our series of [BEERG Bytes](#) videocasts.

A *BEERG Byte* is a deconstructed Brussels or Sitges BEERG meeting... served online in “bite-sized” pieces. These are not a replacement for our meetings, just our bid to capture the BEERG meeting vibe while we wait to get together again in 2021.

In the latest episode (#14) Tom Hayes and Annemarie Muntz, MD Global Public Affairs, Randstad and WEC President discuss the future of work with, and after, Covid-19. Annemarie argues that the future of work is now. Today. Changes in the world of work over the past few have already multiplied. The Covid-19 pandemic has accelerated this evolution, not created it. Go to: www.beerg.com/beergbytes to view this episode.

While you will not need a password to view episode #14, you will need a BEERG password to view *BEERG member only* broadcasts. If you require a password, contact us at BEERG.

CORONAVIRUS

COVID-19

Some useful URLs for BEERG members

<https://beerg.com/covid-19/>

BEERG Meetings 2020/21

All now cancelled due to COVID 19 pandemic

It is clear we will not be able to hold our October members' meeting, or the October training program, in Brussels or Barcelona this year.

We regret this very much, but the continuing uncertainty on international travel arrangements and the fluctuating community infection rates make it unwise to attempt to run these physical BEERG events.

Our next BEERG newsletter, which should reach you on September 10th will contain a schedule of the range of online events we plan to run from Sept – Dec 2020.

This schedule will be regularly updated so watch this page in future newsletters.

We will make decisions on the 2021 schedule of BEERG meetings and training programs events later this year. All 2021 BEERG physical meetings and programmes will conform with all Covid-19 regulations and with health and safety restrictions in place at that time.

All BEERG 2020 physical meetings are cancelled:

Date	Event	Venue
14 – 16 Oct	BEERG October Training Programme	Hotel Estela, Port d'Aiguadolc, Sitges, Barcelona, Spain

cancelled

TBC BEERG 2021 Dates for your Diary:

Events are subject to confirmation

Date	Event	Venue
TBA	BEERG Members' Network Meeting	TBC
TBA	BEERG Training Programme	TBC