

Broader Implications of the Standard Contract Clause Case

By Peter Swire

This essay is part of a five-part series that highlights critical issues in my 300-page testimony that explains U.S. surveillance law and related issues in the Standard Contract Clause case before the Irish High Court concerning data flows between the US and the EU. An overview of the testimony can be found at www.alston.com/en/resources/peter-swire-irish-high-court-case-testimony.¹

In the current case, the Irish High Court is considering whether [Standard Contract Clauses \(SCCs\)](#) will continue to be a lawful basis for transfer of personal data from the EU to the US. Max Schrems, in his complaint to the Irish Data Protection Commissioner and on appeal, questioned whether there are adequate safeguards against surveillance by the US government for data transferred to the US.

SCCs are used pervasively for transfers of personal data to the US. An inadequacy finding in the case would have a great impact even if the finding applies only to a single country (the United States) under a single basis for cross-border data flows (SCCs). My testimony, however, explains why an inadequacy finding in this case likely would have far greater implications.

As summarized in this blog post, the implications would appear to be far greater geographically. The testimony explains the basis for concluding that safeguards against surveillance are stronger in the US than in the BRIC countries – Brazil, Russia, India, and China. For those countries, and other countries whose safeguards are less than in the US, it would appear that a finding of inadequate protections in the US would logically mean that transfers from the EU to these countries would similarly be prohibited.

The testimony also explains why an inadequacy finding for SCCs may also apply to other legal bases for transfer of personal data, including Privacy Shield and Binding Corporate Rules. Those seeking to understand the implications of the pending Irish case, which may subsequently be appealed to the European Court of Justice, should thus consider these potentially far broader implications.

¹ Swire is the Elizabeth and Thomas Holder Chair and Huang Professor of Law and Ethics at the Georgia Tech Scheller College of Business, and Senior Counsel at Alston & Bird. Swire's expert report was submitted to the Irish High Court in the current litigation where Max Schrems is challenging whether transfers of personal data under Standard Contract Clauses are adequately protected under European Union privacy law. Under Irish rules, Swire was an expert selected by Facebook, but required to give his independent opinion about U.S. law, and Swire retained complete editorial control over the content of the testimony. The decision to make the report public was made by Swire, and was not the decision of Facebook. The full report is available [here](#), with other explanatory material [here](#). This essay summarizes material in Chapter 1 of the testimony, paragraphs 90 to 123.

“BRIC” Countries and International Implications beyond BRIC

The implications of a finding of US inadequacy can be illustrated using examples of the four countries referred to as “BRIC” – Brazil, Russia, India, and China – who are large and important nations and trading partners of the EU.

Beginning with China, there is an unmistakable contrast between the pervasive surveillance and information control accompanying the “Great Firewall of China” and the US system of checks and balances under the its Constitution. One recent study described the Chinese approach as “unbounded surveillance,” and reported that “the Chinese government has a huge appetite for Internet surveillance and for the technological facility to spy undetectably.”²

The lack of surveillance safeguards in Russia has been documented in detail by the European Court of Human Rights in the 2015 *Zakharov* case.³ That case involved the so-called SORM surveillance system in Russia, which provides direct, hardwired access to electronic communications for numerous government agencies. As noted by Privacy International, “the direct access mandated under the SORM model represents a departure from American and European Lawful Interception protocols and a considerable challenge to the protection of individual human rights.”⁴

The legal systems of India and Brazil fall between China and Russia, on the one hand, and the set of systemic safeguards and individual remedies in the US. Indian surveillance practices after Snowden have a “current state of opacity,” with relatively little public documentation of actual communications surveillance practices.⁵ There is little reason, however, to believe that India has nearly as robust a system of systemic safeguards as the US. A detailed 2015 study on Brazil’s surveillance practices indicates a system that appears to be closer to the EU and US approaches than the three other BRIC countries.⁶ The study expresses concern, however, that surveillance is

² Ann Bartow, *Privacy Laws and Privacy Levers: Online Surveillance Versus Economic Development in the People’s Republic of China*, 74 OHIO ST. L.J. 853, 854, 893 (2013), <http://digitalcommons.pace.edu/lawfaculty/922>.

³ *Zakharov v. Russia*, App. No. 47143/06 (Eur. Ct. H.R. 2015), Grand Chamber (Dec. 4, 2015), <http://hudoc.echr.coe.int/eng/?i=001-159324>; see also GLOBALVOICES, *As Russia insulates itself from human rights bodies, state surveillance decision looms* (Dec. 17, 2015), <https://advox.globalvoices.org/2015/12/18/as-russia-insulates-itself-from-human-rights-bodies-state-surveillance-decision-looms/>.

⁴ PRIVACY INT’L, *Privacy Interests: Monitoring Central Asia* (Nov. 2014), https://www.privacyinternational.org/sites/default/files/Private%20Interests%20with%20annex_0.pdf.

⁵ WORLD WIDE WEB FOUNDATION, *INDIA’S SURVEILLANCE STATE: COMMUNICATIONS SURVEILLANCE IN INDIA* (undated, but content indicates publication post June 2013 Snowden disclosures), <http://sflc.in/wp-content/uploads/2014/09/SFLC-FINAL-SURVEILLANCE-REPORT.pdf> [hereinafter “INDIA’S SURVEILLANCE STATE”]; Pranesh Prakash, *How Surveillance Works in India*, N.Y. TIMES (July 10, 2013), <http://india.blogs.nytimes.com/2013/07/10/how-surveillance-works-in-india>; see also CENTER FOR DEMOCRACY AND TECHNOLOGY, *National Security Standards by Country* (2013), <https://govaccess.cdt.info/standards-ns-country.php> [hereinafter “National Security Standards by Country”]; VODAFONE, *Law Enforcement Disclosure Report: Legal Annex* (June 2014), http://www.vodafone.com/content/dam/sustainability/2014/pdf/operating-responsibly/vodafone_law_enforcement_disclosure_report.pdf [hereinafter “Vodafone Law Enforcement Report”].

⁶ DENNY ANTONIALLY AND JACQUELINE DE SOUZA ABREU, *STATE SURVEILLANCE OF COMMUNICATIONS IN BRAZIL AND THE PROTECTION OF FUNDAMENTAL RIGHTS*, ELECTRONIC FRONTIER FOUNDATION, 13 (Dec. 2015), https://www.eff.org/files/2015/12/17/brazil-en-dec2015_0.pdf [hereinafter “STATE SURVEILLANCE IN BRAZIL”]; see also *National Security Standards by Country*, and *Vodafone Law Enforcement Report*.

“limited in theory but extensive in practice.”⁷ For intelligence and national security surveillance, “little is known” about the relevant agencies’ operations in Brazil.

It thus appears difficult to make the case that the systemic safeguards for national security surveillance are stronger in any of the BRIC countries than for the US. Based on my extensive experience, and the Oxford findings of the US as the “benchmark” for surveillance safeguards,⁸ few other countries in the world are candidates for having stronger safeguards than the US.

As a legal matter, if the US is held to lack adequate protections against surveillance, then only countries whose safeguards are demonstrably stronger than those in the US would appear to have a lawful basis to receive personal data from the EU. The logical import of this conclusion apparently would remove the lawful basis for substantial portions of global transborder data flows from the EU.

Potential Effect on Privacy Shield and BCRs

In the testimony, “I make no statement about whether a finding of inadequacy for SCCs would entail a finding of inadequacy for Privacy Shield or BCRs.” The testimony “does support the possibility that an inadequacy finding for SCCs may have implications for other lawful bases for data transfers.” I refer to that broader possibility as a “categorical finding of inadequacy” – a finding of inadequacy that would apply not only to SCCs but also to Privacy Shield and BCRs.

The case specifically concerns whether SCCs provide adequate protection with reference to US surveillance practices. The testimony, for instance, discusses the PRISM and Upstream programs under Section 702 of the Foreign Intelligence Surveillance Act (FISA), as well as other U.S. surveillance authorities. The SCC decision may have implications for Privacy Shield and BCRs because the operation of Section 702 and the other laws appears to be the same no matter whether the transfer takes place under SCCs, Privacy Shield, or BCRs.

If a categorical finding of inadequacy were to occur, it would appear to have significant implications for the overall EU/US relationship, affecting the foreign relations, national security, economic, and other interests of the Member States and the EU itself.

In summary, the potential implications of the current case may well be far broader than limits on the use of one legal mechanism (SCCs) for transfers to one country (the US). If the US is found to have inadequate legal safeguards against government surveillance, then it would appear that other countries would need to show stronger legal safeguards than those existing in the US in order to reach adequacy. In addition, there is the possibility of a “categorical finding of inadequacy,” which would extend a finding of inadequacy of SCCs to Privacy Shield and BCRs. Taken together, a finding of inadequacy in the current case in Ireland could have far more sweeping ramifications than many observers have contemplated.

⁷ STATE SURVEILLANCE IN BRAZIL.

⁸ IAN BROWN, MORTON H. HALPERIN, BEN HAYES, BEN SCOTT, AND MATHIAS VERMEULEN, TOWARDS MULTILATERAL STANDARDS FOR SURVEILLANCE REFORM, https://cihr.eu/wp-content/uploads/2015/01/Brown_et_al_Towards_Multilateral_2015.pdf.

