



## UvA-DARE (Digital Academic Repository)

### Governing cross-border data flows

*Reconciling EU data protection and international trade law*

Yakovleva, S.

### Publication date

2021

[Link to publication](#)

### Citation for published version (APA):

Yakovleva, S. (2021). *Governing cross-border data flows: Reconciling EU data protection and international trade law*. [Thesis, fully internal, Universiteit van Amsterdam].

### General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

### Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, P.O. Box 19185, 1000 GD Amsterdam, The Netherlands. You will be contacted as soon as possible.

Governing Cross-Border Data Flows: Reconciling EU Data Protection and  
International Trade Law

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor  
aan de Universiteit van Amsterdam  
op gezag van de Rector Magnificus  
prof. dr. ir. K.I.J. Maex

ten overstaan van een door het College voor Promoties ingestelde commissie,  
in het openbaar te verdedigen  
op woensdag 21 april 2021, te 14.00 uur

door Svetlana Iakovleva  
geboren te Ryazan

***Promotiecommissie***

<i>Promotor:</i>	prof. dr. I. Venzke	Universiteit van Amsterdam
<i>Copromotor:</i>	dr. J.V.J. van Hoboken	Universiteit van Amsterdam
<i>Overige leden:</i>	prof. dr. mr. M.M.M. van Echoud	Universiteit van Amsterdam
	prof. dr. C. Eckes	Universiteit van Amsterdam
	dr. K. Irion	Universiteit van Amsterdam
	dr. G. Vidigal	Universiteit van Amsterdam
	prof. dr. C.B. Kuner	Vrije Universiteit Brussel
	prof. dr. J.T. Kurtz	European University Institute

Faculteit der Rechtsgeleerdheid

## Concise Table of Contents

<b>LISTS OF FIGURES</b> .....	<b>8</b>
<b>LIST OF ABBREVIATIONS</b> .....	<b>9</b>
<b>ACKNOWLEDGEMENTS</b> .....	<b>10</b>
<b>1. INTRODUCTION</b> .....	<b>11</b>
<b>2. PERSONAL DATA TRANSFERS IN INTERNATIONAL TRADE AND EU LAW: A TALE OF TWO ‘NECESSITIES’</b> .....	<b>28</b>
<b>3. PRIVACY PROTECTION(ISM): THE LATEST WAVE OF TRADE CHALLENGES ON REGULATORY AUTONOMY</b> .....	<b>70</b>
<b>4. RECONCILING DATA PRIVACY AND GLOBAL DATA FLOWS THE EU WAY</b> .....	<b>132</b>
<b>5. EU FRAMEWORK FOR TRANSFERS OF PERSONAL DATA: CRITIQUE AND DIRECTIONS FOR REFORM</b> .....	<b>183</b>
<b>6. CONCLUSIONS</b> .....	<b>245</b>
<b>REFERENCES</b> .....	<b>257</b>
<b>SHORT SUMMARY</b> .....	<b>311</b>
<b>SAMENVATTING</b> .....	<b>320</b>

# Table of Contents

<b>LISTS OF FIGURES</b> .....	<b>8</b>
<b>LIST OF ABBREVIATIONS</b> .....	<b>9</b>
<b>ACKNOWLEDGEMENTS</b> .....	<b>10</b>
<b>1. INTRODUCTION</b> .....	<b>11</b>
<b>1.1 Setting the scene: background and problem definition</b> .....	<b>13</b>
1.1.1 International trade in data: what’s at stake?.....	13
1.1.2 EU data privacy framework.....	15
1.1.3 Tension between external trade policy and domestic data privacy framework .....	16
1.1.4 Restrictions on personal data flows: a barrier to digital trade? .....	18
1.1.5 Clash between EU Charter and EU international trade commitments .....	19
<b>1.2 Research questions and methodology</b> .....	<b>22</b>
<b>1.3 Outline of the thesis</b> .....	<b>26</b>
<b>2. PERSONAL DATA TRANSFERS IN INTERNATIONAL TRADE AND EU LAW: A TALE OF TWO ‘NECESSITIES’</b> .....	<b>28</b>
<b>2.1 Introduction</b> .....	<b>28</b>
<b>2.2 EU data protection and international trade law</b> .....	<b>28</b>
2.2.1 The EU regime for transfers of personal data outside the EEA .....	28
2.2.1.1 Historical background .....	29
2.2.1.2 The notion of transfer .....	34
2.2.1.3 Restrictions on transfers .....	38
2.2.2 Compatibility of the EU regime for data transfer with international trade law .....	42
<b>2.3 Two necessities: a catch-22 for the EU</b> .....	<b>47</b>
2.3.1. Framing the Issue.....	47
2.3.2 Trade law necessity and EU Restrictions on data transfers .....	54
2.3.3 Necessity under EU law .....	64
2.3.4 The incompatibility of two ‘necessities’ .....	66
<b>2.4 Ways forward</b> .....	<b>67</b>
<b>2.5 Conclusion</b> .....	<b>69</b>
<b>3. PRIVACY PROTECTION(ISM): THE LATEST WAVE OF TRADE CHALLENGES ON REGULATORY AUTONOMY</b> .....	<b>70</b>
<b>3.1 Introduction</b> .....	<b>70</b>
<b>3.2 The expansion of the notion of ‘protectionism’</b> .....	<b>76</b>
3.2.1 Defining protectionism: key disagreement.....	78
3.2.2 Protectionism and the classical free trade idea .....	79
3.2.3 Protectionism and ‘embedded liberalism’ of GATT 1947 .....	81
3.2.4 The new protectionism and the neoliberal discourse: towards an ever-broader conceptualisation of ‘protectionism’ .....	85
3.2.4.1 The ‘new protectionism’ .....	85
3.2.4.2 ‘Fair trade’ .....	86
3.2.4.3 Neoliberal discourse.....	90

3.2.4.4 The impact of neoliberal discourse on the formation and functioning of the international trading system.....	92
<b>3.3 Digital protectionism: the latest wave of trade constraints on regulatory autonomy .....</b>	<b>98</b>
3.3.1 The digital trade discourse(s).....	100
3.3.2 Framing data protection as ‘digital protectionism’ in the digital trade discourse.....	102
3.3.3 Business interests behind the ‘digital trade’ discourse.....	107
3.3.4 Measures banning ‘digital protectionism’ in recent trade agreements .....	110
3.3.5 The ‘Digital protectionism’ label as a trigger to redefine ‘barriers to trade’ .....	115
<b>3.4 The baseline between privacy protection and protectionism: the role of discourse.....</b>	<b>117</b>
3.4.1 Normative approaches to privacy and data protection.....	118
3.4.2 Limitations of the economic approach to privacy and data protection.....	121
<b>3.5 Concluding remarks: towards a new digital trade regime .....</b>	<b>128</b>
<b>4. RECONCILING DATA PRIVACY AND GLOBAL DATA FLOWS THE EU WAY.....</b>	<b>132</b>
<b>4.1 Introduction.....</b>	<b>132</b>
<b>4.2 EU horizontal provisions: a critical evaluation.....</b>	<b>139</b>
4.2.1 Background .....	139
4.2.2 Relationship with the general exception .....	140
4.2.3 An undesirable parallel with the national security exception .....	145
4.2.3.1 Interpretation of the national security exception at the WTO .....	146
4.2.3.2 Interpretation of the digital trade exception for privacy and data protection .....	151
4.2.4 A different threshold for digital trade exceptions .....	152
4.2.5 Undermining the goal of liberalisation of cross-border data flows .....	156
4.2.6 Downsides of the EU-centric approach.....	158
<b>4.3 Thresholds alternative to ‘necessity’, ‘it considers necessary’ and ‘it deems appropriate’ tests ....</b>	<b>161</b>
4.3.1 Non-circumvention .....	162
4.3.2 Non-avoidance .....	165
4.3.3 Reasonableness .....	169
4.3.4 Prohibition of ‘arbitrary or unjustifiable discrimination’ or a ‘disguised restriction on international trade’.....	171
4.3.4.1 Blurring the borderline between the chapeau and necessity test of the general exception	173
4.3.4.2 Chapeau as an expression of the principles of good faith and prohibition of abuse of right	174
4.3.4.3 Factors in assessment of ‘arbitrary or unjustifiable discrimination’ .....	175
4.3.5 Towards the goldilocks exception for privacy and data protection in future EU trade agreements .....	176
4.3.5.1 Undesirability of replicating the standard of chapeau in digital trade exception for privacy and data protection .....	176
4.3.5.2 The need for a restrictive mechanism in the digital trade exception for privacy and data protection .....	179
<b>4.4 Conclusion.....</b>	<b>182</b>
<b>5. EU FRAMEWORK FOR TRANSFERS OF PERSONAL DATA: CRITIQUE AND DIRECTIONS FOR REFORM .....</b>	<b>183</b>
<b>5.1 Introduction.....</b>	<b>183</b>
<b>5.2 Constitutional contours of the EU’s framework for transfers of personal data .....</b>	<b>185</b>
5.2.1 The relationship between the EU Charter and EU secondary data protection law.....	185
5.2.2 ‘Essential equivalence’: from EU secondary law to EU Charter and then back again.....	189

5.2.3 The concept of the ‘essence’ of fundamental rights .....	193
5.2.4 The ‘essence’ of the fundamental rights to privacy, protection of personal data and judicial remedy.....	195
5.2.5 The ‘essence’ and restrictions on transfers of personal data outside the EEA.....	201
<b>5.3 Weaknesses of the EU’s framework for transfers of personal data from the EU Charter perspective</b> .....	<b>203</b>
5.3.1 The foreign surveillance issue after Schrems II.....	208
5.3.2 Inadequacies of adequacy decisions.....	216
5.3.2.1 Adequacy decisions: between protection of fundamental rights and trade politics.....	216
5.3.2.2 Limitations of adequacy decisions inherent in legal instruments with extraterritorial application.....	220
5.3.3 Limited scalability of EU framework for transfers of personal data .....	228
<b>5.4 Directions of thought on how to improve the EU framework for transfers of personal data outside the EEA .....</b>	<b>234</b>
5.4.1 Improving the operation of the current framework .....	235
5.4.2 Greater scalability .....	237
5.4.3 Redesign.....	241
<b>5.5 Conclusion .....</b>	<b>244</b>
<b>6. CONCLUSIONS .....</b>	<b>245</b>
<b>REFERENCES.....</b>	<b>257</b>
<b>Secondary sources .....</b>	<b>257</b>
<b>Primary Sources.....</b>	<b>289</b>
Legal Texts .....	289
International Treaties and Conventions.....	289
Proposed International Agreements.....	291
Council of Europe .....	292
European Union: Treaties and Charter .....	292
European Union: Regulations and Directives.....	293
European Union: Proposed Legislation .....	293
European Commission Implementing Decisions: Adequacy Decisions .....	293
European Parliament .....	294
EU Council Decisions .....	295
EU Member States National Legislation .....	295
The Netherlands: Parliamentary Documents.....	295
Foreign legislation.....	295
Russia .....	295
China .....	295
Canada .....	295
Official Documents.....	295
United Nations .....	295
Organisation for Economic Co-operation and Development (OECD) .....	295
Asia-Pacific Economic Cooperation (APEC) .....	296
World Trade Organization (WTO) .....	296
General Agreement on Tariffs and Trade (GATT).....	296
European Union .....	297
European Commission .....	297
Council of the European Union .....	299
Council of Europe .....	299
Article 29 Working Party .....	299
European Data Protection Board (EDPB) .....	300

European Data Protection Supervisor (EDPS) .....	301
National Data Protection Authorities .....	301
Netherlands .....	301
Germany .....	301
Foreign Data Protection Authorities .....	301
Canada .....	301
United States Trade Representative .....	302
<b>Case Law .....</b>	<b>303</b>
Court of Justice of the European Union (CJEU): Judgements .....	303
Court of Justice of the European Union (CJEU): Advocate General (AG) Opinions .....	304
European Court of Human Rights (ECtHR) .....	304
World Trade Organization (WTO) .....	305
General Agreement on Tariffs and Trade (GATT) .....	307
International Centre for Settlement of Investment Disputes .....	307
National Cases .....	308
Germany .....	308
Ireland .....	308
<b>Electronic Sources .....</b>	<b>308</b>
<b>SHORT SUMMARY .....</b>	<b>311</b>
<b>SAMENVATTING .....</b>	<b>320</b>

## **Lists of Figures**

Figure 1: Overlap between the EU Charter and Trade ‘Necessities’ .....	63
Figure 2: Protectionism in economic and pluralist discourses .....	70

## List of Abbreviations

<b>AI</b>	Artificial Intelligence
<b>APEC</b>	Asia-Pacific Economic Cooperation
<b>APEC CBPR</b>	Asia-Pacific Economic Cooperation Cross-Border Privacy Rules
<b>BCR</b>	Binding Corporate Rules
<b>CCPA</b>	California Consumer Privacy Act
<b>CETA</b>	Comprehensive Economic and Trade Agreement
<b>CJEU</b>	Court of Justice of the European Union
<b>CPTPP</b>	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
<b>DG</b>	Directorate General
<b>DPA</b>	Data Protection Authority
<b>ECEFP</b>	Executive Committee on Economic Foreign Policy
<b>ECHR</b>	European Convention on Human Rights
<b>ECIPE</b>	European Centre for International Political Economy
<b>ECtHR</b>	European Court of Human Rights
<b>EDPB</b>	European Data Protection Board
<b>EDPS</b>	European Data Protection Supervisor
<b>EEA</b>	European Economic Area
<b>EU</b>	European Union
<b>EU Charter</b>	Charter of the European Union
<b>GATS</b>	General Agreement on Trade in Services
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GDPR</b>	General Data Protection Regulation
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICT</b>	Information and Communications Technology
<b>ITO</b>	International Trade Organisation
<b>JEFTA</b>	EU-Japan Economic Partnership Agreement
<b>KORUS FTA</b>	United States-Korea Free Trade Agreement
<b>MFN</b>	Most Favoured Nation
<b>NAFTA</b>	North American Free Trade Agreement
<b>NGO</b>	Non-Governmental Organisation
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OPC</b>	Office of the Privacy Commissioner
<b>PIPEDA</b>	Personal Information Protection and Electronic Documents Act
<b>PNR Agreement</b>	Personal Name Records Agreement
<b>SCC</b>	Standard Contractual Clauses
<b>TBT Agreement</b>	Agreement on Technical Barriers to Trade
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TiSA</b>	Trade in Services Agreement
<b>TRIPS</b>	Agreement on Trade-Related Aspects of Intellectual Property Law
<b>TTIP</b>	Transatlantic Trade and Investment Partnership
<b>UDHR</b>	Universal Declaration of Human Rights
<b>USITC</b>	United States International Trade Commission
<b>USMCA</b>	United States–Mexico–Canada Agreement
<b>VCLT</b>	Vienna Convention on the Law of Treaties
<b>WTO</b>	World Trade Organization

## **Acknowledgements**

Although writing a PhD thesis can be at times an isolating experience, I was privileged to be guided, supported and encouraged by multiple people.

I would like to thank my PhD supervisors, Professors Joris van Hoboken and Ingo Venzke for having faith in me being able to lift this project up while working part time at De Brauw Blackstone Westbroek, for their time and effort in guiding me along the way, and for their thorough reading of my drafts. Their input was invaluable in bringing the quality of my work to the next level. I am also grateful to them for their positive reinforcement and encouragement. My sincere gratitude also goes to my parents for always being there for me, for their unconditional love and support throughout yet another study and research project of mine as well as for their support with my relocation to the Netherlands, without which this project would have never been possible. I am deeply indebted to Daniel for his patience, constant support and encouragement to make small steps towards completing this project and for letting me see the light at the end of the tunnel even when that light was meek and far away. I would also like to thank my friends for their support throughout this project, and in particular, Olga Zrilina, Radmila Nikitina, Svetlana Romaniko, Maria Taylor, Momchil Tsonev, Maya and Oleg Zupnik. I would like to acknowledge my current and former colleagues from the University of Amsterdam and De Brauw Blackstone Westbroek for the insightful conversations, collaboration and support. I would particularly like to single out Ot van Daalen, Sarah Eskens, Marco Fabbri, Kristina Irion, and Joao Pedro Quintais from the University of Amsterdam; and Axel Arnbak, Ties Boonzajer Flaes, Maaïke Boomgaard, Wessel Geursen, Salima Guettache, Christien de Kruif (who also helped with proofreading the Dutch summary), Geert Potjewijd, Esther Rosenkrantz, and Helma van der Wal (who also helped with designing the visuals) from De Brauw Blackstone Westbroek. I am also grateful to Alice Garner for her meticulous proofreading of this manuscript. Last but not least, I am grateful to my cat Charlie for radiating positive vibes while sleeping on my work table at almost all times of me working on this thesis.