but it is a very good start to have a position that does not threaten its own EU data protection standards, that ensures the consistency of EU law, basically, before you enter a negotiation.

While I am not saying that EU data protection law is in every aspect a gold standard for how to do things with privacy online—and I have criticism here and there about this or that—it is at least a standard. Having a standard is sometimes better than having none. And I am convinced that we should not institute data flows without effectively protecting privacy online, also within the trade diplomacy.

And with that I leave you. Thank you for your attention, and I am very much looking forward to the panelists' comments. Thank you very much.

Paul Schwartz

Thank you, Kristina. We are now going to introduce our respondents. We will hear next from Hugh Stevenson, who is at the Office of International Affairs at the FTC, and then from Lisl Brunner, who is at AT&T and doing global privacy there. And then after that we will hear from Kurt Wimmer, who heads the data privacy and cybersecurity practice at Covington & Burling here in D.C. So, Hugh, share your thoughts with us.

Remarks by Hugh Stevenson*

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When I checked in I asked, "Well, where is this session taking place?" and they said, "In the Hall of Battles," which I thought sounded a little ominous, because there are some tensions involved in this topic of privacy, and particularly privacy and the free flow of information.

I very much appreciate being part of this discussion, and it is really fascinating to hear all of the issues that have been raised. It is a real challenge to respond. The paper here covers such a sweeping scope of issues with such erudition, and it is challenging to get into a lot of it, but I would like to focus on a couple of things.

I do have to provide the disclaimer that my views are my own, not necessarily those of the Federal Trade Commission. And I also want to disclaim that I am not a trade lawyer, despite working for the Federal Trade Commission. For those of you unfamiliar with the distinction, there is the U.S. Trade Representative that leads the U.S. trade efforts, and Kristina referred to them.

Our role is really more focused on consumer protection and privacy as part of that function. And we have an enforcement function. We bring cases. We have brought over, I think, five hundred cases of various sorts involving privacy issues. We have a summary online—I will not go on more about that—of the kinds of things that we have been involved in. We also have done a number of reports and conferences on all sorts of privacy cutting-edge issues.

I am from the international office, and we follow with great interest the developments in the EU, both on the policy and enforcement sides. We work with a number of the DPAs, well, around the world, but including in the EU. We have memoranda of understanding with three of them, I think, on data protection issues—UK, Ireland, and the Netherlands. We have been involved in the Safe Harbor for many years and the Privacy Shield negotiations and implementation, and followed the GDPR with interest.

There is so much here, both to, I think, agree with and to disagree with. It is a very large area and there are a number of different kinds of issues, and some of the criticisms actually I think Kristina had touched on. There are some commonalities too. I mean, if you look at the GDPR, which was the product of extensive legislative discussion, you see some things that are really very familiar—

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in fact, maybe in some cases, inspired by United States developments. The data breach notifications, for example, referred to the Brussels Effect. There is also the California Effect, and California had the data breach law, and now I see Alabama has checked in as number fifty of the states that have enacted such laws. That is one example of an export of that idea. The accountability work that has been done in the United States is another example. There are other areas, on the other hand, where there are more substantial differences. Maybe the right to be forgotten issues that you mentioned, or data portability; perhaps, some other areas.

One of the interesting things about this paper is focused on the issue in particular of data transfers, and in general European law, it is fair to say, has had a focus on geographical destinations of data. That has been an issue. Indeed, I am not sure it is a new paradigm. In fact, I think it is the old paradigm that we have had some tension between data transfers and privacy. I was looking back last night at the Council of Europe convention and the provisions there. And, in fact, there was one scholar who said, the convention contains this article stating that "despite the need to protect privacy, a free transborder flow of data should not be obstructed." That was not a USTR representative. That was Spiros Simitis, one of the leading names in European data protection.

Similarly, in the OECD guidlines in the 1980 version, you see that language both about the protection of privacy but also the free flow of data. Similarly, in the 2004 APEC privacy framework you see an acknowledgement of the need both to protect privacy and the free flow of data.

One interesting aspect of the paper that Kristina touched on here is thinking about how you measure those benefits, which I think is a really interesting subject, although, at the same time, it is something that has been part of the calculus going along. Exactly how one thinks about that is an interesting issue, and how one evaluates those numbers. It did prompt me to think about some numbers that we have seen in connection with Safe Harbor and Privacy Shield. Some of the data transfers involved the large sort of operations that are a focus of great interest and in the news and so forth. But there are also a lot of the data transfers that involve HR data, which is not necessarily a cutting-edge issue so much as a necessary part of certain multinational operations in transferring data. And similarly, the number of small-to-medium enterprises that have been involved in those transfers is a substantial one. One thing about the Safe Harbor and Privacy Shield systems is you can see exactly who is on it, who is using it, what the companies are, in a way that you cannot see in one of the other major measures used, the model contracts provisions.

The focus on data transfers is interesting also because there are two mechanisms that are particularly noteworthy here. I think that Kristina mentioned both. One is the extraterritorial application. The '95 directive really did not focus so much on the extraterritorial reach as a strategy, let us say. The new law does. And that is something that, in some ways, is familiar to us in certain U.S. contexts, to antitrust law in certain extraterritorial reaches. When we amended the FTC Act to deal with consumer and privacy issues, in fact, one of the things we did was we wanted to clarify that we had extraterritorial jurisdiction to protect organizations operating outside the United States, if they were victimizing Americans. And similarly, the other way around, if there was substantial conduct in the United States targeting others.

The other strategy, though, I think is less familiar to us, and that is the "adequacy" determination that was mentioned, and I think this is an area that may be a good example of the application of the criticism Kristina mentioned about being overly formalistic—well, she used a number of adjectives that I will not repeat, but I liked hearing them. One of the things worth looking at about that sort of frame is that this is the system of determining the adequacy at large of a country, and this, I think, has been subject to some criticism. The former Canadian Privacy Commissioner wrote an article recently, for example, looking at this, and had a number of critiques of them. One, the sort of extraneous issues that might affect who was in line to get the evaluation.

She did a chart correlating when a country hosted the International Conference of Data Protection and Privacy Commissioners compared to when they got adequacy.

Similarly, one might not think that the Faroe Islands and Andorra would be at the top of the list for these kinds of evaluations, and other scholars have pointed out that, for example, Argentina got adequacy before they had brought any enforcement action or, in fact, implemented their law. She points out a number of other issues, including the indeterminacy of the calculations. At the time, the Quebec Privacy Commissioner asked, for example, why the EU authorities involved at that time took initiatives to help Monaco adjust its system but did not do the same for Quebec.

And this is a system, in a larger sense, that I think one would ask, it has been around in the form of the '95 directive since '98, and written in '95, and yet we still have a really small percentage of the world population that really has had even the question of adequacy addressed. Part of the paper here is talking about, if there is a conflict between trade law and these privacy issues is that a problem with the trade law? I cannot answer that, in terms of the trade law analysis, really. I mean, I followed it.

But the other question is, is this really that bad a result to say that this part of the approach here, which has been criticized by various scholars, is that really the thing that needs to survive? And one thing that was interesting to me is that this was the main example that is often given, and I am not sure, though, that it is really the item that is most fundamental about the fundamental rights that we are talking about.

The last point I want to make is, to think about that: what is fundamental here about this fundamental right? I do not ask that rhetorically but rather [showing a copy of the legislation]—this is a copy of the GDPR. It is a big thing. Is it all fundamental? I mean, there are certain provisions that are fundamental. There are, I think, about four sentences in the EU Charter, a sentence in the European Convention on Human Rights, and there are clearly key issues. But is all the implementation fundamental? Is the implementation of the registration of databases fundamental? Apparently not, because it used to be in the law and now it is not. Is it important to areas at the margin, because the '95 directive gave some margins of maneuver for various states? Some required things that others did not. Were those fundamental? Well, apparently not because they were not required of every state.

I think one issue to think about here is what is it that, in substance—and maybe this is not so much the trade lawyer's point but the privacy lawyer's point—is really fundamental here to protect, and is it a mechanism, for example, like "adequacy," or are there the other values that really are the ones that are keyed on and might properly be the focus?

I will stop there. I do have to acknowledge this paper—I see it was not written for me. It is about what the EU negotiation position should be in connection with the Americans, of which I am one. But I think it is a very interesting topic, and I appreciate it being pursued.

Thank you.

Paul Schwartz

Thank you. What I have proposed is we will hear from Lisl and then Kurt and then we will give Kristina a chance to respond.

Remarks by Lisl Brunner*

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Great. Well thank you to ASIL for inviting me, thank you to Joel and Paul for inviting me, and thanks for the chance to read the paper, which I really enjoyed. I thought it was really thought-

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