STRATEGIC LITIGATION AND EU LAW ON CROSS-BORDER DATA TRANFERS: ON THE PLACE OF EU LAW IN THE WORK OF SCHREMS AND NOYB

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Abstract

This article examines the *place* of EU law in the actions of Schrems and his 'linked' NGO, None of your Business, 'NOYB,' in the context of its predominantly transatlantic nature. Existing literature pays insufficient attention to the narrow focus on Schrems on EU-US data transfers and the ways in which his use of EU law is mostly outside of EU court rooms *and* also outside of EU lobbying channels. The article thus focuses upon the place of EU law in the work of Schrems- often take outside of Court rooms and official lobbying channels when challenging EU data transfers- and beyond. The paper draws attention to the links between lobbying and litigation as to EU data transfers and beyond mirrored in the work of NOYB- where little caselaw exists per se- and where broader aims and means are at stake necessitating a broader reach. Civil society similar to Big Tech use a variety of methods to engage with EU law, but not limited to a courtroom per se, amply demonstrated in the work of Schrems and NOYB. The article also highlights how much scholarship focuses upon the work of Schrems and NOYB as examples of the 'transnational' enforcement of EU law. It argues that existing literature easily overlooks the exclusively *transatlantic* focus of Schrems and the relatively modest number of cases taken by him, less again by NOYB before the CJEU, concentrated elsewhere. The focus upon the '*locus*' adds to research highlighting the procedural limitations of the EU law system. It supports a broader framing of strategic litigation in understanding data transfers and the broader 'Brussels effects' of the work of Schrems.

Overview

Privacy advocacy organisation NOYB – short for 'None of Your Business'[1] is led by one of the EU's leading privacy activist, Austrian Max Schrems, as a student initially, whose focus has been on Big Tech and the enforcement of EU law. Despite a perceived implosion of caselaw on data in EU law, there are a limited number of cases on international data transfers at EU level, with a heavy concentration on EU-US relations.[2] As this paper will outline, they notably involve one individual prominently, data activist or campaigner, Max Schrems rather than NOYB or 'NOYB' hereafter. Despite the changing geopolitics of data transfers, the work of Schrems inside and outside of courtrooms continues to dominate EU law on such transfers, focussing mainly on EU-US relations.[3] As this article will demonstrate, inside the courtroom - of the Court of Justice of the European Union (CJEU) -, NOYB is not to be found in this litigation and Schrems himself has relatively few cases numerically to his name.

[1] See <https://NOYB.eu/en> accessed 1 October 2024.

[2] See CJEU, 'Annual Report 2023 Statistics concerning the judicial activity of the Court of Justice 2019-2023', p 18. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-04/en_ra_2023_cour_stats_web_bat_22042024.pdf> accessed 1 October 2024, outlining approx. 1000 cases per year- data privacy or protection is not listed as a subject matter of cases; Eurlex lists data protection cases at 83 over a 10 year period from 2014- 2024; Search contains: Subject-matter = "Data protection" Court = "Court of Justice"; Period or date = "Date of delivery"; period= "from 01/01/2014 to 01/01/2024"; Cf Karen Yeung and Lee A Bygrave, 'Demystifying the Modernized European Data Protection Regime: Cross-disciplinary Insights from Legal and Regulatory Governance Scholarship' (2022) 16 Regulation & Governance 137.

[3] Kenneth Propp, 'Who's a national security risk? The changing transatlantic geopolitics of data transfers' *Atlantic Council* (29 May 2024) <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/whos-a-national-security-risk-geopolitics-of-data-transfers/?mkt_tok=NjU5LVdaWC0wNzUAAAGTy5lE7n4mcFkmhbN9R9ygb2b_fO292-_mLQ8YPm2B2y439tnLATh6NieQ46Kxiu-yS1JLqjSOEB1GmGVFCrZ2MV4bEzKi32p9g8rvtPU1fQVW> accessed 1 October 2024.

The current EU internal legal framework concerning data transfers, ie flows of personal data to third countries which is provided for in Regulation (EU) 2016/679 (GDPR), occurs predominantly through adequacy decisions, is implemented by the EU Commission and interpreted by the CJEU. According to the GDPR and case law of the Court, an adequacy decision requires an extremely high level of protection and the European has recognised only 15 non-EU States as "adequate".[4] The Court famously found that the fundamental rights of Austrian Law student turned campaigner, Max Schrems, were impaired by US laws on surveillance for national security in respect of data transfers by Meta. The further consequence was the invalidation of the two adequacy decisions known as "Safe Harbour" (2000)[5] and "Privacy Shield" (2016),[6] respectively by Schrems I ruling (2015) and Schrems II rulings (2020). The CJEU notably invalidated Safe Harbour without direction as to its temporary effects. *Schrems v European Data Protection Commissioner (EDPS)* after the NSA, Snowdon and PRISM revelations[7] spurred the development of the Privacy Shield in its wake and significant developments as to other instruments and enforcement regimes, such as an EU-US Umbrella Agreement and the General Data Protection Regulation (GDPR).[8]

In the wake of the invalidation of the "Safe Harbour" and of the "Privacy Shield" Agreements, the European Commission adopted a third measure, the "EU-US Data Privacy Framework (DPF)", in 2023 and an adequacy decision followed thereafter.[9] Litigation of the DPF is underfoot and was expected - explicitly- by former Commissioner Breton on the part of Schrems with plausible success rates.[10] Schrems is himself in his own right a well-known legal 'activist' in the field, confirmed by a CJEU decision on this issue prior to the introduction of the GDPR on his 'right' to take cases on behalf of thousands of consumers qua activist pursuant to the Brussels I Regulation.[11] The Schrems judgments are thus part of a genre of case law where data privacy dominates and leads to significant transatlantic change eg DPF.[12] In the first periodic review of the EU-US Data Adequacy Decision - that was broadly positive of its operation and effects - the Commission nonetheless acknowledged that much work was needed as to its operation.[13] Many such reviews have previously been conducted with very 'light

[4] The European Commission has so far recognised: Andorra, Argentina, Canada, Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Republic of Korea, Switzerland, the United Kingdom, United States and Uruguay as providing adequate protection; See European Commission, 'Adequacy Decisions' (nd) <https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en> accessed 1 October 2024.

[5] Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce [2000] OJ L215/7.

[6] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield [2016] OJ L207/1.

[7] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 (n 7); Case C-362/14 *Maximillian Schrems v Data Protection Commissioner (Schrems I)* ECLI:EU:C:2015:650.

[8] See Council Decision (EU) 2016/920 of 20 May 2016 on the signing, on behalf of the European Union, of the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences [2016] OJ L 154/1; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR) [2016] OJ L 119/1.

[9] Commission Implementing Decision (EU) 2023/1795 of 10 July 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-US Data Privacy Framework [2023] OJ L231/118; See European Parliament, 'European Parliament resolution of 11 May 2023 on the adequacy of the protection afforded by the EU-US Data Privacy Framework (2023/2501(RSP))' (2023).

[10] 'The Invalidation of the EU-U.S. Privacy Shield and the Future of Transatlantic Data Flows' US Senate Hearing (December 2020) <https://www.govinfo.gov/content/pkg/CHRG-116shrg52856/html/CHRG-116shrg52856.htm> accessed 1 October 2024; NOYB, 'European Commission gives EU-US data transfers third round at CJEU' (July 2023) <https://NOYB.eu/en/european-commission-gives-eu-us-data-transfers-third-round-cjeu> accessed 1 October 2024.

[11] Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* ECLI:EU:C:2018:37.

[12] Joined Cases C-293/12 & C-594/12 *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and others and Kärntner Landesregierung and others* ECLI:EU:C:2014:238; Case C-131/12 *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* ECLI:EU:C:2014:317; Joined Cases C-203/15 & C-698/15 *Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson, Peter Brice, Geoffrey Lewis* ECLI:EU:C:2016:970; *Opinion 1/15* ECLI:EU:C:2017:592; Case C-507/17 *Google LLC v. Commission nationale de l'informatique et des libertés* (CNIL) ECLI:EU:C:2019:772.

[13] European Commission, 'Report from the Commission to the European Parliament and the Council on the First periodic review of the functioning of the adequacy decision on the EU-US Data Privacy Framework COM(2024) 451 final.

touch' reviews of such hybrid governance and the conclusions reached may prove to be controversial and costly if proven wrong yet again by the CJEU - via Schrems.[14]

The caselaw of Schrems - and DPF resulting therefrom - may also be said to show unprecedented convergence between EU and US law, possibly demonstrating a form of Bradford's 'Brussels Effect', ie the influence of the EU over third countries rules and regulations.[15] This underscores the importance of the litigation work of Schrems in the complex field of what are understood here to be data transfers, consequences for the place of Big Tech in EU law therein, however numerically limited the number of cases. A strategic use of law and institutional mechanisms to advance a particular cause is a well-used definition of strategic litigation that is relied upon here, to depict some of the work of Schrems, in line with this Special Issue.[16] Some claim that scrutiny of the role of civil society actors in EU law before the CJEU remains rare.[17] However, it can also be said that strategic litigation looks likely to be increasingly common in areas of EU law relating to global challenges, from climate to data and migration, areas that legislators grapple with, where most actionable causes may be possible.[18] Also, in EU law, strategic decisions have been taken by the European Commission to devote considerably fewer resources to the enforcement and implementation of EU law – perhaps consequentially leaving others such as Schrems to 'pick up the pieces.'[19] This can be said to explain the need to understand any shifts in the actions of civil society *towards* the court room.

However, while this article begins from the premise that the work of Schrems has been impactful and important, focussing upon this caselaw may not capture the full effects of the work of such 'activists', not least Schrems, on EU law. There is, accordingly, as will be argued here, flexibility as to the use of EU procedures by individuals such as Schrems, where they can communicate to a range of audiences in other channels better, with litigation as a last-chance saloon. These new modes or sites of engagement include activities outside of courtrooms, but linked to EU law. These include activities such as lobbying using official structures, indirect lobbying or informal lobbying on social media, academic lectures, conferences, training, and interviews on mainstream media. As this paper will outline, Schrems has sought to focus almost exclusively upon transatlantic relations and transatlantic data transfers for their salience, whereas NOYB, the civil society NGO body that he leads, has as an organisation taken a slightly broader stance on the jurisdictions that it lobbies on

Law, practice, procedure and jurisdiction are complex issues in EU data transfer law to isolate because to some they transgress perceived boundaries. Actors such as Schrems and NOYB are thus important sites of study for their work as to the GDPR both inside and outside of courtrooms and for the attention of the former to transatlantic data transfers. The number of cases pending at the time of writing in data privacy issues in EU law at the CJEU is 43.[20] It is also worth remarking that a vast array of key EU caselaw begins before national regulators, DPCs, and does not reach the CJEU.[21] The figure in reality

[14] The effects of the new adequacy decision remain to be seen. It had garnered much negative attention already at its advent. Mikołaj Barczentewicz, 'Schrems III: Gauging the Validity of the GDPR Adequacy Decision for the United States' (International Center for Law and Economics, 25 September 2023) <https://laweconcenter.org/resources/schrems-iii-gauging-the-validity-of-the-gdpr-adequacy-decision-for-the-united-states/> accessed 6 November 2024; NOYB, 'European Commission gives EU-US Data Transfers Third Round at CJEU' (NOYB, 10 July 2023) <https://NOYB.eu/en/european-commission-gives-eu-us-data-transfers-third-round-cjeu> accessed 6 November 2024

[15] Anu Bradford, 'The Brussels Effect: How the European Union Rules the World' (OUP 2020).

[16] See Emilio Lehoucq and Whitney K Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?' (2020) 45 Law & Social Inquiry 166, 168.

[17] See Valentina Golunova and Mariolina Eliantonio, 'Civil Society Actors as Enforcers of the GDPR: What Role for the CJEU?' (2024) 15 JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law.

[18] See Pola Cebulak (ed), 'Special Issue on Strategic Litigation in EU law' German Law Journal, forthcoming.

[19] Dan Kelemen and Tommaso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2023) 75 World Politics 779; Lisa Conant, 'The European Court of Justice and the policy process: The shadow of case law' (2018) 96 Public Administration 628.

[20] Search made using official form at CJEU, 'InfoCuria Case-law' <https://curia.europa.eu/juris/recherche.jsf?language=en#> accessed 1 October 2024, with terms: Subject-matter = "Data protection"; Case status = "Cases pending".

[21] Key data used here is the CJEU website <https://curia.europa.eu/jcms/jcms/j_6/en/> accessed 1 October 2024 and NOYB website <https://NOYB.eu/en> accessed 1 October 2024.

is significantly smaller at EU law level than at national level. It reflects only a very small dimension of the litigation taken at a lower level[22] and covers a vast array of areas. NOYB

This brings us to the broader question of the place of courts and framing of litigation. EU legal scholarship has long tended to adopt a highly 'court-centric' approach of EU law where CJEU caselaw is its dominant metric.[23] However, arguably non-court-centric views need to be considered in any realistic view of contemporary and future EU law, as this account will outline. Big Tech increasingly engages with EU law beyond the court room through eg lobbying, as do civil society bodies.[24] The Transatlantic focus of Schrems is arguably well captured also *other than* in the courtroom, taking an even broader perspective on the work of Schrems- and beyond. Still, Schrems also has limited official lobbying engagement which further demonstrates the need to look even more broadly at EU law usage.

The travel of EU law across the Atlantic is one of the most significant shifts in global privacy developments.[25] It is an empirical study of much complexity and surprise, as to shifting legal instruments. Litigation is also part of this transatlantic matrix to a degree- but not exclusively. Long in advance of the litigation of Schrems and other NGOs, lobbyists have found that the supranational level of government in the EU is not a barrier to opportunity and that the CJEU has proved to be a highly successful venue in which to seek policy change.[26] This paper considers the litigation and lobbying of Schrems and NOYB from this perspective, but also not limited to this, where more avenues are used to seek policy change, including through social and other media.

The paper thus relies upon desk-based doctrinal research on CJEU caselaw and EU data privacy and EU lobbying law related books and articles in particular, as well as press releases and social media posts on X and LinkedIn of NOYB and Schrems between 2014 and 2024. This time-period is selected because it relates to the period of time shortly before and after initial implementation of the GDPR and its enforcement in EU law. It focuses upon the NOYB website and LinkedIn and X accounts of Schrems.[27] It also considers the EU Transparency Register and lobbying activities of NOYB as well as litigation taken by Schrems himself. It thus also draws from desk-based secondary literature research, to identify problems that data transfer provisions may generate in EU law. Insights are additionally drawn from the literature on intermediary liability in the digital economy and from parallels with past research on data governance.

The article thus focuses upon the place of EU law in the work of Schrems- often take outside of Court rooms and official lobbying channels when challenging EU data transfers. The paper draws attention to the links between lobbying and litigation as to EU data transfers and beyond mirrored in the work of NOYB- where little caselaw exists per se- and where broader aims and means are at stake necessitating a broader reach. Civil society like Big Tech use a variety of methods to engage with EU law, but not limited to a courtroom per se, amply demonstrated in the work of Schrems and NOYB. The article also highlights how much scholarship focuses upon the work of Schrems and NOYB as

[22] Search made using official form at CJEU, 'InfoCuria Case-law' (n 20).

[23] Eg Arthur Dyevre, Wessel Wijtvliet and Nicholas Lampach, 'The Future of European Legal Scholarship: Empirical Jurisprudence' (2019) 26 Maastricht Journal of European and Comparative Law 348; See Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 European Law Journal 292, 313-316.

[24] Emilia Korkea-aho, 'No Longer Marginal? Finding a Place for Lobbyists and Lobbying in EU Law Research' (2022) 18(4) European Constitutional Law Review 682.

[25] Florencia Marotta-Wurgler and Kevin E Davis, 'Filling the Void: How E.U. Privacy Law Spills Over to the U.S.' (2024) 1 Journal of Law and Empirical Analysis 1.

[26] Margaret McCown, 'Interest Groups and the European Court of Justice', in David Coen, and Jeremy Richardson (eds), *Lobbying The European Union: Institutions, Actors, And Issues* (OUP 2009); Pieter Bouwen and Margaret McCown, 'Lobbying versus litigation: political and legal strategies of interest representation in the European Union' (2007) 14(3) Journal of European Public Policy 422; Korkea-aho, 'No Longer Marginal? Finding a Place for Lobbyists and Lobbying in EU Law Research' (n 24).

[27] Accordingly, NOYB Website, <https://NOYB.eu/en> accessed 1 October 2024; Max Schrems Profile on Linkedin, <https://www.linkedin.com/in/max-schrems/?originalSubdomain=at> accessed 1 October 2024; and X, <https://x.com/maxschrems> accessed 1 October 2024.

examples of the 'transnational' enforcement of EU law. It argues that existing literature easily overlooks the exclusively *transatlantic* focus of Schrems and the relatively modest number of cases taken by him, less again by NOYB before the CJEU, concentrated elsewhere. The focus upon the '*locus*' adds to research highlighting the procedural limitations of the EU law system. It supports a broader framing of strategic litigation in understanding data transfers and the broader 'Brussels effects' of the work of Schrems.

It explores these issues as a question of framing, where the EU has many subjects and objects to regulate as to Big Tech generally. EU law is thus argued here to be highly facilitating of global endeavours and there are strong transatlantic dimensions thereto, both bottom-up and top-down. The traditionally top-down focus in human rights scholarship on laws, institutions, and courts has begun to turn towards a bottom-up focus on activists, advocacy groups, affected communities, and social movements.[28] It is arguably the case that many of these characteristics apply to strategic litigation as EU data transfer law, broadly conceived.

Section I outlines Schrems' litigation: considering his building of an exclusively transatlantic focus, Section II assesses the Transatlantic focus, reflecting upon whether it is explained by procedural limitations of EU law?; while Section III considers a lobbying focus- looking outside of the courtroom, examining the concept of direct and indirect lobbying on social media of Schrems and NOYB, followed by Conclusions.

I. The Schrems litigation: building an exclusively transatlantic focus

This section explores the focus of the work of Schrems and NOYB.

The work of Schrems and his NGO, NOYB, expose the challenge of the *framing* relationship of strategic and ordinary litigation and broader strategic activities, where literature generally focusses upon lawyering and lobbying of civil society. Notably, for all of the opposition of the European Parliament e.g. in its Civil Liberties, Justice and Home Affairs 'LIBE' committee, to international data transfers, the European Parliament has rarely engaged in salient litigation- allowing others to step in.[29] It has been argued that patterns of law and regulation in the European Union have been shifting toward a distinctive European variant of American adversarial legalism, 'Eurolegalism' generating a culture with an emphasis on transparent, judicially enforceable legal norms adversarial enforcement by public authorities, and empowerment of private actors to enforce legal norms albeit 'tamer' than that found in the US.[30] Eurolegalism is useful as a prism for exploring the work of Schrems. Yet it further provokes the nuanced question as to the place of EU law inside *and* outside of the Court room.

Schrems is far from the only NGO or civil liberties entity engaging in this type of litigation in the field of data privacy; others include Digital Rights Ireland.[31] Such others have taken important caselaw in the field. While it is far from a household name in the EU as an NGO in the same way as possibly other European counterparts e.g. Dutch NGO 'Urgenda' on climate, NOYB has a high-profile within data privacy circles largely for its links to Schrems. Schrems is a well-known legal 'activist' in his own right, confirmed by a CJEU decision on this issue prior to the introduction of the GDPR on his 'right' to take cases on behalf of thousands of consumers qua activist pursuant to the Brussels I Regulation.[32]

[28] See Grainne De Burca (ed), *Legal mobilization for human rights* (OUP 2022).

[29] Elaine Fahey, 'Of 'One Shotters' and 'Repeat Hitters': A Retrospective on the Role of the European Parliament in the EU-US PNR Litigation' in Fernanda Nicola and Bill Davies (eds) *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (CUP 2017).

[30] R Daniel Keleman, 'The Rise of Eurolegalism' (*The Regulatory Review,* 7 November 2021) <https://www.theregreview.org/2011/11/07/the-rise-of-eurolegalism/> accessed 1 October 2024.

[31] See *Digital Rights Ireland* (n 12); Digital Rights Ireland has also joined as party in case *Schrems I* (n 9).

[32] Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* ECLI:EU:C:2018:37; Claes Granmar, 'A reality check of the Schrems saga' (2021) 4(2) Nordic Journal of European Law 49; Jeffrey Atik and Xavier Groussot, 'A Weaponized Court of Justice in Schrems II' (2021)

Schrems is arguably well known on account of the focus of his litigation upon EU-US relations and US Big Tech, considered below.

The NOYB association describes itself as being initiated by Schrems to bring together a large group of experts and institutions from the privacy, tech and consumer rights sectors from all over Europe and beyond.[33] Schrems is depicted as chairman and founder of NOYB as a 'privacy enforcement platform' that brings data protection cases to the courts under the EU General Data Protection Regulation.[34] In reality, however, Schrems is the key focal point given that it is mainly he that litigates and Schrems alone than has instigated the caselaw bearing his name, rather than the NGO. Schrems is nonetheless an extraordinary character in the EU legal order, himself litigating in Austria and Ireland initially as a law student, using his technology IT knowledge, studies in the US and in-depth knowledge of EU law in practice to take some of arguably the most important litigation of EU law of all time. The starting point of his individual litigation is a diverse portfolio of litigation taken focussed in Ireland mainly at first instance on account of the 'One Stop Shop' procedure under the GDPR and jurisdiction of Ireland as 'home' or European headquarters of all leading Big Tech.[35] This caselaw was derided initially in Ireland for Schrems taking litigation to the CJEU about the interest of the US Government in his Facebook accounts. Yet he ended up successfully overturning the much-maligned Safe Harbour Agreement, and even putting data protection to the top of the CJEU and EU law agenda for a whole generation of lawyers.[36]

As this account will demonstrate, the concept of 'civil society' is increasingly significant in a world of digitalisation and Schrems and NOYB in particular have done important groundwork in this field to justify focus upon it. The impact of digital transformation on different social groups to assess the emergence of new digital inequalities in Europe is increasingly pervasive and challenging. As Van der Pas states, NOYB is said to deploy employees from the different EU Member States in order to engage in forum shopping and select the jurisdiction to make the most impact- but it faces challenges as to staffing.[37] Additionally, NOYB has tech experts in-house, as these are needed for building a litigation strategy. Nonetheless, there is a particularly ad hoc nature to the operation of NOYB and the work of Schrems, often highly responsive, patchy and litigating at its limits, that merits attention for its considerable success as to its global effects.

This issue as to the focus of this litigation- and quantity thereof matters. Political scientists as much as lawyers focus upon the evolution of the 'transnational' character of EU data privacy regimes- mainly on account of the GDPR *and* the actions of Schrems.[38] Some advocate how EU civic engagement has served to mitigate cross-border policy implementation disparities, while preserving considerable regulatory discretion nationally. Integrating NGOs into privacy policy implementation is argued to have helped in highlighting issues.[39] It is, however, arguably difficult as this paper will contend, to characterise Schrems and his litigation as being transnational in any sense on account of his *sole* focus upon *transatlantic or EU-US* relations data transfers. NOYB by contrast rarely takes cognisance of developments outside the borders of the EU and rarely again expresses any interest in lobbying on

(2021) 4(2) Nordic Journal of European Law 1; T Ehs, 'Democratisation Through Participation in Juristocracy: Strategic Litigation Before the ECJ' in Markus Pausch (ed), *Perspectives for Europe: Historical Concepts and Future Challenges* (Nomos 2020) 119.

[33] See eg NOYB, 'Making Privacy a Reality' (2020) <https://NOYB.eu/sites/default/files/2020-03/concept_NOYB_public.pdf> accessed 1 October 2024.

[34] Recently NOYB has announced it has filed a complaint against the ChatGPT creator OpenAI on the basis that OpenAI openly admits that it is unable to correct false information about people on ChatGPT as the company cannot say where the data comes from;

[35] See Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (OUP 2020).

[36] See Elaine Fahey, 'The Supreme Court Preliminary Reference in *DPA v Facebook And Schrems:* Putting National and European Judicial Independence At Risk?' (2019) 1 Irish Supreme Court Review 408.

[37] XXX, in this issue.

[38] Woojeong Jang and Abraham L Newman, 'Enforcing European privacy regulations from below: Transnational fire alarms and the general data protection regulation' (2022) 60(2) JCMS: Journal of Common Market Studies 283; Giulia Gentile and Orla Lynskey, 'Deficient by Design? The Transnational Enforcement of the GDPR' (2022) 71 International and Comparative Law Quarterly 799.

[39] Inbar Mizarhi-Borohovich, Abraham Newman, and Ido Sivan-Sevilla, 'The civic transformation of data privacy implementation in Europe' (2024) 47(3) West European Politics 671.

those issues. Indeed, the only non-EU data transfer regime of interest to NOYB/ Schrems relates to the *US*. In fact, much attention is unduly focused upon disparities at national level rather than the locus of NGO activity. This is despite many significant examples existing as to other third countries and regions with which the EU has e.g. adequacy decisions.[40] In fact, it draws attention to the esoteric place of the transatlantic to a degree, which is alluded to here throughout.

As noted above, the CJEU has opined three times on the key legal standards that must be met for data transfers under the GDPR and Schrems is involved in most of them: Schrems I (Case C-362/14), its second Schrems decision dealing with international data transfers ('Schrems II', Case C-311/18), and Opinion 1/15.[41] In the two Schrems judgments, a Commission adequacy decision was invalidated, and in Opinion 1/15 it was held that a proposed international agreement could not be entered into.[42] The political and legal salience of data transfers has rocketed on account of Schrems and continues to, with a new adequacy decision emerging, as outlined above. However, statistically this may not be entirely 'logical'. In 2020, NOYB claimed to have filed 101 complaints on EU-US data transfers but all before national authorities.[43] NOYB claims to have over 800 cases at the time of writing in 2024 pending before national authorities, including in its calculations two before the European Data Protection Supervisor (EDPS)- albeit none on EU-US transfers.[44] A search of curia.eu reveals zero cases for NOYB and one for Schrems between 2014 and 2024, showing relatively little litigation in this time period of the rollout of the GDPR, ie before and after.[45] At the same time, there were over 80 cases on the GDPR brought by other actors.[46] In short, the statistics suggest limited courtroom activity by Schrems and NOYB, and a heavy transatlantic focus.

This draws attention, firstly, to the esoteric place of the '*transatlantic*' in this context.[47] For many in EU law, the transatlantic relationship is key in understanding the present and future of fundamental rights, given the many pressures and opportunities that the digital era has presented for some of the West's most advanced cultures and disciplines.[48] The use of EU law by Big Tech through its lobbying, litigating and lawyering constitutes a significant example of private order of the transatlantic space by global governance actors. The absence of a concept of civil society in transatlantic relations has long been lamented by scholars of comparative law, political science and public administration.[49] The drive towards a digitised society across the Atlantic has seen an unprecedented development of the transatlantic consumer.[50] It is both a practical and conceptual development. Transatlantic understandings of digital rights have in no small part possibly emanated from the vast infrastructure of institutionalisation that the GDPR has put in place, at least at the outset. The litigation of Schrems has generated many curiosities of transnational governance and promoted shifts in public and private synergies and the subject and object of analysis as to Big Tech is frequently a moving target. The term transnational is normally used to describe companies or business activities that exist or take place in

[40] Ie Andorra, Argentina, Canada, Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Republic of Korea, Switzerland, the United Kingdom, United States and Uruguay.
[41] *Schrems I* (n 9); Case C-311/18 Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems (*Schrems II*) ECLI:EU:C:2020:559; Opinion 1/15 of the Court (Grand Chamber) of 26 July 2017, ECLI:EU:C:2016:656.
[42] Fahey, 'The Supreme Court Preliminary Reference in *DPA v Facebook and Schrems'* (n 36).
[43] NOYB stated that: 'Some complaints were filed with the (likely) relevant Lead Supervisory Authority (LSA) at the establishment of the controller directly. Others with the Austrian DPA, at the residence of the data subjects. These complaints will likely be forwarded to the relevant LSA under the "One Stop Shop" (OSS)'; See NOYB, '101 Complaints on EU-US transfers filed' (*NOYB,* 17 August 2020) <https://NOYB.eu/en/101-complaints-eu-us-transfers-filed > accessed 1 October 2024.
[44] See 'Overview of NOYB's GDPR complaints by DPA': <https://NOYB.eu/en/project/dpa> accessed 1 October 2024.
[45] Search made using official form at CJEU, 'InfoCuria Case-law' (n 18) with terms: Court = "Court of Justice"; Period or date = "Date of delivery"; Period = "from 01/01/2019 to 01/09/2024"; Name of the parties = schrems and repeating the search with 'NOYB' and NOYB.
[46] Search made using official form at CJEU, 'InfoCuria Case-law' (n 18).
[47] See Elaine Fahey and Deirdre Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (CUP 2014).
[48] Eg Oreste Pollicino, 'The Transatlantic Dimension of the Judicial Protection of Fundamental Rights Online' (2022) 1(2) The Italian Review of International and Comparative Law 277.
[49] Francesca Bignami and Steve Charnovitz, 'Transnational civil society dialogues' in Mark A Polack and Gregory C Shaffer (eds), *Transatlantic Governance in the Global Economy* (Rowman and Littlefield 2001).
[50] Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (OUP 2023)

more than one country.[51] Big Tech has in general availed of the EU's 'One Stop Shop' OOS and thus contributes to this context significantly where the EU is a first-mover regulator. Even in the EU, scholars across disciplines question the depth of how seriously fundamental rights are being taken in the realm of digital governance; and how and where to change this.[52] The place of the transatlantic in this movement towards rights and regulation is thus a curious one, generated by Schrems.[53] If we look beyond political science understandings of power and actors in law-making processes to the diverse ways in which EU law is engaged across the Atlantic, a broader array of engagement is possible, beyond *formal* law-making processes. Secondly, the character of the evolution of EU law here is important, enabling, centralising and being open to participation, *inside and outside* of the Court, where the focus of Schrems and NOYB alike has largely taken effect.

The next section considers why this is the case, examining the procedural place of EU law, starting with the 'Court room' and litigation at EU level.

II. A transatlantic focus explained… by the many procedural and other limitations of EU law?

Both instruments struck down through the litigation of Schrems at the CJEU were enshrined in EU law in an 'adequacy decision' adopted by the European Commission on the basis of the EU legislation on data protection, a form of complex hybrid governance.[54] There are 8 data transfer agreements, not all international agreements, some hybrid regimes, comprising an array of legal bases.[55] NOYB itself claims that there are a wide range of procedural avenues in the GDPR for it to pursue its cases.[56] This section then considers the legal issues relating procedural and other limitations of EU law as to data transfers. As regards procedural areas of focus, NOYB states that with the many enforcement possibilities under the GDPR, it is able to submit data protection complaints with local authorities and file procedures in national courts.[57] It expressly states that it thus follows the idea of 'targeted' and 'strategic litigation' to strengthen privacy.[58] Yet practical issues are not inconsequential when discussing strategic litigation as to data transfers when focussed exclusively upon the US where complex hybrid governance mechanisms are applicable. There are arguably a limited number of legal procedural avenues in reality despite the general openness of the EU legal order. The right to the protection of personal data is enshrined in Article 6 TFEU and is underpinned by a significant enforcement regime under EU law; but one that has been developed by key cases with a transatlantic focus, ie by Schrems.[59] It is arguably difficult to legally define EU law data rights, which may be said to fall within am umbrella of rights flowing from Article 16 TEU, introduced since the Treaty of Lisbon, given effect to in legislation in the form of the GDPR, a number of years later.[60] This fountain of rights relates to a vast range of areas, from consumer to privacy to competition law *and* international data

[51] See Cambridge English Dictionary, <https://dictionary.cambridge.org/dictionary/english/transnational> accessed 1 October 2024.
[52] Giancarlo Frosio and Christophe Gieger, 'Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime' (2023) 29 European Law Journal 31.
[53] See Mark Pollack and Gregory Shaffer (eds), *Transatlantic Governance in the Global Economy* (Rowman and Littlefield 2001).
[54] Elaine Fahey and Fahey Terpan, 'The Future of the EU-US Privacy Shield' in Elaine Fahey (ed) *Routledge Research Handbook on Transatlantic Relations* (Routledge 2023) 221.
[55] Theodore Christakis and Fabien Terpan, 'EU–US negotiations on law enforcement access to data: divergences, challenges and EU law procedures and options' (2021) 11(2) International Data Privacy Law 81.
[56] See 'NOYB Projects', <https://NOYB.eu/en/projects> accessed 1 October 2024: 'With the many enforcement possibilities under the European data protection regulation (GDPR)'.
[57] ibid.
[58] ibid.
[59] Eleni Kosta, Ronald Leenes and Irene Kamara (eds), *Research Handbook on EU Data Protection Law* (Edward Elgar Publishing 2022); Chris Jay Hoofnagle, Bart van der Sloot and Frederik Zuiderveen Borgesius, 'The European Union general data protection regulation: what it is and what it means' (2019) 28 Information & Communications Technology Law 65; Paul De Hert and Serge Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxemburg: Constitutionalisation in Action' in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer 2009); Anastasia Iliopoulou-Penot, 'The construction of a European digital citizenship in the case law of the Court of Justice of the EU' (2022) 59 Common Market Law Review 969; Thomas Streinz, 'The Evolution of European Data Law' in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021) 902.
[60] Iliopoulou-Penot (n 60).

transfers. It is difficult to pinpoint one specific case but standard leading texts on data privacy point to a wave of post-GDPR litigation, from *Google v. Spain* 'Right to be forgotten' caselaw to the Schrems litigation. Schrems mostly has generated key litigation of EU law using the Article 267 TFEU preliminary reference procedure, a key part of the system of EU remedies, alleging infringements of fundamental rights.

This section thus briefly breaks down this 'success' and next considers two sub-themes as to this transatlantic focus, it examines avenues of the system of remedies in EU law for litigating data transfers and legal bases, powers and values. It reflects briefly upon the array of legal avenues that are possible and their challenges: the GDPR, Article 218 TFEU on international agreements, Article 258 TFEU infringement actions, Article 267 TFEU preliminary references, and the Charter of Fundamental rights. The aim overall is to explain the limited number of cases taken by Schrems and the other avenues pursued as a result.

GDPR

The GDPR is a highly sophisticated 'legalisation' of the operation of data protection law, implemented since May 2018 and provides a vast array of procedural bases, beyond that previously existing.[61] Of salience to the question of data transfers and civil society, any not-for-profit body, organisation or association whose statutory objectives are in the public interest and which is active in the field of the protection of data subjects' rights and freedoms may lodge a complaint to a DPA on behalf of a data subject or exercise the right to judicial remedy and the right to seek compensation on behalf of data subjects on account of Article 80 GDPR. This is a new development in the GDPR, with profound possible effects at transnational level.[62] It progresses the law significantly beyond previous case law. Prior to this, the CJEU had permitted Schrems to take class actions despite their data activist role having regard to an interpretation of the Brussels Regulation.[63] Article 80 also enables a more transnational legal culture to emerge as noted above, not per se limited to the territory of the EU. Thus, the Court in *Meta Platforms Ireland* (on Article 80(2) GDPR) held that EU law did not preclude national legislation allowing consumer protection association to bring legal proceedings absent a mandate and independently of breach of data subject rights on consumer protection grounds.[64]

However, arguably, Schrems and his litigation affords a more complex 'take' on this from a legal perspective, where his focus is individual and transatlantic rather than via NOYB in Court. NGOs are considered to be playing a 'bottom-up' role in transforming policy implementation e.g. through so-called new governance tools such as transnational fire alarms.[65] Groups like noyb are said to have adopted a 'mission', which seeks to take advantage of Article 80 and the transnational level, to put pressure on national and EU regulators. Yet their lack of litigation must be said to be notable on key areas such as data transfers.[66]

[61] See Elaine Fahey, *EU as a Global Digital Actor* (Hart Publishing 2022).

[62] See extensively: Florence D'ath, 'Meta v. BVV: The CJEU Clarifies The Scope of the Representative Action Mechanism of Article 80 (2) GDPR Whereby Not-for-Profit Associations Can Bring Judicial Proceedings Against a Controller or Processor' (2022) 8 European Data Protection Law Review 320; Inbar Mizarhi-Borohovich, Abraham Newman, and Ido Sivan-Sevilla, 'The civic transformation of data privacy implementation in Europe' (2024) 47(3) West European Politics 671; Emilio Lehoucq and Sidney Tarrow, 'The Rise of a Transnational Movement to Protect Privacy' (2020) 25(2) Mobilization: An International Quarterly 161; Jang and Newman (n 38); Noah Page and others, 'Culture-Minded GDPR Recommendations for an NGO' (2022) <https://digital.wpi.edu/downloads/05741v89c> accessed 1 October 2024.

[63] See Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* ECLI:EU:C:2018:37

[64] Case C-319/20 *Meta Platforms Ireland* ECLI:EU:C:2022:322.

[65] Jang and Newman (n 38).

[66] See n 62; See also Gloria Gonzalez Fuster, 'Article 80 Representation of data subjects' in Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020; Laima Jančiūtė, 'Data protection and the construction of collective redress in Europe: Exploring challenges and opportunities' (2019) 9(1) International Data Privacy Law 2; René Mahieu and Jef Ausloos, 'Recognising and Enabling the Collective Dimension of the GDPR and the Right of Access' (2020) Submission as feedback to the European Commission's two-year evaluation of the implementation of the GDPR, pp 13 et seq, <https://osf.io/preprints/lawarchive/b5dwm> accessed 1 October 2024.

Charter of Fundamental Rights

Procedure aside, Schrems has successfully relied upon the EU's Charter of Fundamental Rights substantively in various cases taken as to data transfers as part of his preliminary reference proceedings.[67] The EU's Charter of Fundamental Rights encompasses a broad range of civil, political, social and economic rights, together with rights peculiar to EU citizens, such as free movement within the EU or the right to privacy and the right to data protection.[68] Yet the gradual hybridization of Internet governance blurs the lines between the limits of power and makes it more difficult to uphold the public interest and necessary safeguards for the digital society. It has challenged the context of understanding rights in the digital age.[69] The Charter has featured in much key litigation overall as to the EU-Privacy Shield Agreement as much as the EU-Passenger Name Records (PNR) litigation and has thus been of much significance.[70] The CJEU, in the Case of *Schrems* II, in particular held that the Commission's finding that US law was of an adequate level of protection essentially equivalent to EU law under the GDPR read in light of the Charter, was called into question by US law because they authorised surveillance programmes without limitations on powers or conferring enforceable rights on EU citizens against the US authorities.[71] This violated the principle of proportionality because surveillance programmes could not be regarded as limited to what was strictly necessary. Moreover, the Ombudsman could not remedy deficiencies which the Commission had found (e.g. lack of a redress mechanism) as to the transfers impugning findings as to adequacy with respect to essential equivalence as guaranteed by Article 47 of the Charter.

Article 258 TFEU

Any individual or organisation may also lodge a complaint with the Commission if a measure or an administrative practice in a Member State appears to violate EU rules. However, it is only the Commission that may initiate the procedure under Articles 258 and 260 TFEU. Non-governmental organizations are excluded from participation in Article 258 TFEU, a key remedy in the Treaties where complaints can be made to the Commission as to the enforcement of EU law. NGOs are excluded thus from infringement proceedings against Member States for failing to fulfil their obligations under the GDPR, which can be launched by the Commission under Article 258 TFEU.[72] This additional exclusion arguably 'feeds 'more actors towards the preliminary reference process, itself without added value to interest groups and actors subject to complex national locus standi rules, discussed next.[73]

Article 267 TFEU

Schrems has mainly gained access to the CJEU through Article 267 TFEU, the main way in which individual litigants can access the CJEU albeit not by 'right'. National courts which consider a decision on the question necessary to enable them to give judgment, may, or in the case provided for in Article 267 TFEU, must, request the Court of Justice to give a preliminary ruling on the interpretation of Union law, as one of the common and key elements of the system of remedies in the EU Treaties.[74] Most key litigation in the first and second wave of litigation notably derives from private parties or NGOs as first plaintiff. Big Tech while usually involved tends to be the defendant or opponent. Indeed, Tech organisations outside of EU Member States having OOS jurisdiction have been able make amicus

[67] Eg *Schrems I* (n 9) and *Schrems II* (n 41).
[68] Giulia Gentile and Daria Sartori, 'Interim Measures as "Weapons of Democracy" in the European Legal Space' (2023) 1 European Human Rights Law Review 18; Giulia Gentile, 'Effective judicial protection: enforcement, judicial federalism and the politics of EU law' (2023) 2 European Law Open 128; Gentile and Lynskey (n 38).
[69] Giovanni De Gregorio and Roxana Radu, 'Digital constitutionalism in the new era of Internet governance' (2022) 30 International Journal of Law and Information Technology 68.
[70] Fahey, *EU as a Global Digital Actor* (n 61).
[71] Fahey and Terpan (n 54).
[72] See Golunova and Eliantonio (n 17).
[73] Marta Morvillo, and Maria Weimer, 'Who shapes the CJEU regulatory jurisprudence? On the epistemic power of economic actors and ways to counter it' (2022) 1(2) European Law Open 510.
[74] Case C-645/19 *Facebook Ireland Ltd and Others v Gegevensbeschermingsautoriteit* ECLI:EU:C:2021:483.

curiae submissions in some key EU law litigation. Moreover, as Van der Pas and Krommedijk have shown, the legal possibilities for interested natural or legal persons, including NGOs, to intervene in EU law proceedings, particularly in the context of the preliminary ruling procedure (Article 267 TFEU) are rather limited.[75]

Article 218 TFEU

Article 218 TFEU, which details the procedural requirements for Treaty-making at the EU level, lays down a single procedure of general application for the negotiation, conclusion and implementation of international agreements by the EU. It deals with the different stages of the life of an international agreement, from negotiations, signature, termination, execution and suspension of contractual commitments as a form of constitutional code of the EU.[76] International data transfer issues have exposed for some the constitutional fragility of international relations given the complexity of Article 218 TFEU and its highly separate existence to the EU's system of adequacy decisions under the GDPR involving a different institutional set up, character and legal sources.[77] In general, individuals have hardly any rights or entitlements as to the Article 218 TFEU process where their interests instead are conveyed (rarely) through the EU institutions i.e. the European Parliament, and the Member States to a lesser extent. The CJEU can hear opinions on the legal character of an agreement.[78] Overall, however, international data transfer issues have not taken effect using Article 218 TFEU agreements.[79] However, it is often mooted as a likely collective legal base for future agreements and needs further reflection for its consequences.

While in theory there are a variety of ways for litigation to take effect here and challenge data transfers, the paucity of such caselaw warrants further attention. Arguably, the actions and successes of Schrems highlight the technical expertise needed to challenge an adequacy decision as well as the resources to do so, and interest in achieving outcomes of salience.

This leads to the final discussion here, on the actual practice of Schrems and how they engage in actions in EU law generating global convergence or causing the global reach of EU law, looking outside the court room.

III. A lobbying focus? Looking outside of the court to capture the EU law 'work' of Schrems/ NOYB?

Much of the work of Schrems is argued here to be conducted o*utside* of the Court room - if the small number of cases he has taken is considered from a broader perspective of EU law. To discern where Schrems is in fact engaging more regularly and actively with EU law, this article reflects next upon his official *lobbying* of the EU institutions. It considers this work through his think tank, NOYB and then individually in other channels, arguing that it appears to take place in the form of informal lobbying as to EU law issues, still with global effects.

[75] See in the context of migration: Jasper Krommendijk and Kris van der Pas, 'Third-party interventions before the Court of Justice in migration law cases' (*EU Migration Law Blog,* 29 February 2022) <https://eumigrationlawblog.eu/third-party-interventions-before-the-court-of-justice-in-migration-law-cases/#more-8551> accessed 1 October 2024.

[76] Panos Koutrakos, 'Institutional balance and sincere cooperation in treaty-making under EU law' (2018) 68 International and Comparative Law Quarterly 1.

[77] Theodore Christakis and Fabien Terpan, 'EU–US negotiations on law enforcement access to data: divergences, challenges and EU law procedures and options' (2021) 81 International Data Privacy Law 81.

[78] Marise Cremona, 'The Opinion procedure under Article 218(11) TFEU: Reflections in the light of Opinion 1/17' (2020) 4(1) Europe and the World: A Law Review.

[79] Another way to see this is how much hybridity and complex legal constructions as to the predecessor to the GDPR have governed international data transfers because of the complexity of Article 218 TFEU. See Fahey and Terpan (n 54).

The EU has a Transparency Register, which is a publicly accessible data, with over 12000 entries in the form of registrations at the time of writing.[80] The Register is understood to have highly up-to-date information about those actively engaged in activities aimed at influencing EU policies. Public reports indicate that of the approx. 12000 entries, roughly half are in-house lobbyists — those who work for companies and groups — or people representing trade or professional associations including trade unions. About one third represent non-governmental organisations.[81] This leaves a vast genre of 'other entities'. The vastness of this data register is itself a challenge and as a result there is a considerable literature from EU administrative law to EU public law and governance on these complex parameters. There are actually many actors *outside* of the scope of lobbying legislation in the EU - law firms and consultancies, trade unions and employers' organisations, third countries' governments, and regional public authorities, leading to accusations of selective transparency to the neglect of basic democratic values.[82]

Despite most major Big Tech companies having US origins, Big Tech does not equate easily with the US Government. Big Tech has stopped lobbying in the EU though the US government in Brussels a long time ago.[83] Research on transparency in the EU and at the European Parliament, has extensively examined the adoption and implementation of transparency initiatives as well as the conditions under which interest groups have access to and influence on EU policy-making. However, others suggest that the question of whether even Members of the European Parliament (MEPs) are transparent regarding their interactions with interest group representatives has also been overlooked by the literature.[84] Indeed as Ammann states, the current narrow focus of EU lobbying law is unduly centred upon transparency which appears misguided where it neglects other fundamental democratic values such as equality, generally at the expense of duties of integrity.[85]

Although lobbying is about influencing law-making and legislation, the interpretation of lobbying is not traditionally seen as the work of lawyers.[86] As a result, lobbying is not a priority as a research topic in EU law scholarship.[87] One feature of the study of Big Tech that emerges through the prism of lobbying and EU law is the phenomenon of 'lobbying non-lobbying.' [88] This entails that Big Tech operates officially at the margins of existing transparency and lobbying laws. It exists 'on the margins' precisely because not all aspects of lobbying are regulated, the concept of lobbying is not universally agreed or defined and the EU's efforts at lobbying registration are error prone.[89] The extent to which NGOs and activists linked to them such as Schrems falls into this category of lobbying non-lobbying remains to be seen but appears certainly to be a possibility for the following reasons.

The transatlantic evolution of lobbying in the EU is a relatively recent and increasingly professionalised affair and Schrems is arguably a part of this curious landscape. There is a well-documented surge in professional US lobbyists in Brussels, often US qualified lawyers working at Brussels-based law firms,

[80] European Commission, 'Transparency Register' <https://commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/transparency-register_en> accessed 1 October 2024.
[81] See Emilia Korkea-aho, '"Mr Smith Goes To Brussels": Third Country Lobbying and the Making of EU Law and Policy' (2016) 18 Cambridge Yearbook of European Legal Studies 45.
[82] Odile Ammann and Audrey Boussat, 'The Participation of Civil Society in EU Environmental Law-Making Processes: A Critical Assessment of the European Commission's Consultations in Relation to the European Climate Law' [2022] European Journal of Risk Regulation 1.
[83] See Anthony Gardner, *Stars with Stripes: The Essential Partnership between the European Union and the United States* (Palgrave 2020).
[84] Nuria Font and Ixchel Pérez-Durán, 'Legislative Transparency in the European Parliament: Disclosing Legislators' Meetings with Interest Groups' (2023) 61 Journal of Common Market Studies 379.
[85] Odile Ammann, 'Transparency at the Expense of Equality and Integrity: Present and Future Directions of Lobby Regulation in the European Parliament' (2021) 4 European Papers 239, 243; Alberto Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy' (2014) European Law Review 72, 81.
[86] Korkea-aho 'No Longer Marginal? Finding a Place for Lobbyists and Lobbying in EU Law Research' (n 24).
[87] ibid.
[88] 'Big Tech Turns Its Lobbyists Loose on Europe, Alarming Regulators' *New York Times* (2020) <https://www.nytimes.com/2020/12/14/technology/big-tech-lobbying-europe.html> accessed 1 October 2024
[89] Nikolaj Nielsen, 'EU lobby register still riddled with errors' (*EUObserver,* 31 January 2023) <https://euobserver.com/eu-political/156664> accessed 1 October 2024.

with sizeable departments dedicated to following sectoral EU law and policy developments.[90] Some even describe a Brussels ecosystem with its own properties and informal rules.[91] In fact, political scientists argue now that even if the so-called 'GAFAM' (ie Google, Amazon, Facebook, Apple, Meta etc) negotiate 'Brussels in pitch perfect fashion', it is highly unlikely they can escape intervention from the EU. However, these developments on lobbying are not limited to EU law, where the complexity of the role of non-state actors in rule-making systems and their participation is equally challenging, with the risk from profit-seeking business capturing the public interest. This transatlantic dimension thus becomes more difficult to unpick / unpack but features prominently, with US companies 'Europeanising' their practices.

These challenges are readily 'transposeable' to Schrems and NOYB. NOYB has been legally registered since 2021 as an NGO for the purposes of the EU's Transparency Register.[92] NOYB states its aims are to use best practices from consumer rights groups, privacy activists, hackers, and legal tech initiatives and merge them into a stable European enforcement platform.[93] NOYB is mainly focussed upon international data transfers in the areas of its work but has a limited official lobbying record to date, focussing on only two areas of law, reflecting its scale perhaps and the strength of Schrems in other forums, where the 'threat' of Schrems litigation against EU instruments has been outlined by EU Commissioners in public forums.[94] This arguably shows the salience of Schrems and his work however 'niche' its study might appear. Schrems in fact rarely lobbies 'officially' using EU law lobbying procedures, nor thus does NOYB statistically at least. Schrems has also established an NGO with a view to enabling lobbying and litigating against Big Tech in favour of the enforcement of EU law, arguably defining the conditions for good lobbying as per Alemanno.[95] Schrems has also used a wide variety of social media posts, conference presentations, responses in press releases to CJEU decisions and public discussions of non-lobbyists, Governments and the European Commission to direct a series of communications on the appropriate and correct direction of EU law. Schrems thus uses newer modes of communication extensively, in particular Schrems uses social media e.g. Twitter/X, LinkedIn, NOYB press releases, and conference panels.[96] Searches for press releases by NOYB and Schrems' social media accounts reveal a regular and active set of perspectives on the direction of GDPR enforcement and the future of EU-US data transfers over a decade at least.[97] Thus statistically, Schrems is not to be found much on the EU Lobbying Register and officially is hard to be identified in EU lobbying law as a

[90] 'Big Tech Turns Its Lobbyists Loose on Europe, Alarming Regulators' (n 88).

[91] David Coen, Alexander Katsaitis, and Matia Vannoni, *Business Lobbying in the European Union* (OUP 2021); See also Andy Tarrant and Tim Cowen, 'Big tech lobbying in the EU' (2022) 93 The Political Quarterly 218.

[92] See as of 11 May 2021 (date of registration) the stated by NOYB in the EU's Transparency Register: 'The Association has a non-profit aim and promotes public awareness in the areas of freedom, democracy and consumer protection in the digital sphere with a focus on consumer rights, the fundamental rights to privacy and self-determination, data protection, freedom of expression, freedom of information, human rights and the fundamental right to an effective remedy. The Association also aims to promote relevant adult education (popular education), research and science'; See Transparency Register, <https://transparency-register.europa.eu/searchregister-or-update/organisation-detail_en?id=488900342587-15> accessed 1 October 2024.

[93] See NOYB Projects (n 56).

[94] 'NOYB's Comments on the proposed Standard Contractual Clauses for the Transfer of Personal Data to Third Countries pursuant to Regulation (EU) 2016/67' (*NOYB,* December 2020) <https://NOYB.eu/sites/default/files/2020-12/Feedback_SCCs_nonEU.pdf> accessed 1 October 2024; See also 'NOYB's Comments on EDPB Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data' *EDPB,* <https://edpb.europa.eu/sites/default/files/webform/public_consultation_reply/noybs_comments_on_edpb_guidance_on_additional_measures_final_.pdf> accessed 1 October 2024.

[95] Per Alemanno: 'Big tech companies are responding in an equally remarkable manner, with a type of lobbying that is characterised by 1) overspending; 2) aggressivity; 3) levering expertise and brand recognition, and 4) opacity in terms of their funding'; See Alberto Alemanno, *Lobbying for Change: Find Your Voice to Create a Better Society* (ICON Books 2017); See also The Good Lobby Organisation's strategies and projects: 'Big-Tech Lobbying: How tech giants lobby and why it is concerning' (*The Good Lobby,* nd) https://www.thegoodlobby.eu/hi-tech-lobbying-how-tech-giants-lobby-and-why-it-is-concerning/#> accessed 1 October 2024.

[96] Schrems LinkedIn profile expressly states: 'Hardly using LinkedIn, send an email instead. // (Luckily not only) Law, Privacy and Politics'. His LinkedIn Profile has nearly 25,000 followers, although with intermittent postings and interventions every few months in 2024. Most of their activity is on X social media, with over 800 hundred of posts and over 56k followers; NOYB is a most 'active' platform on X mainly. In early September, Schrems addressed in a LinkedIn post the Irish DPAs light-touch enforcement of EU data protection law as a topic. See respectively, Max Schrems profiles on LinkedIn (n 27) and on X (n 27); NOYB Profile in X, <https://x.com/NOYBeu> accessed 1 October 2024. See also Max Schrems' profile on Mastodon, <https://mastodon.social/@maxschrems> accessed 1 October 2024.

[97] See ibid.

lobbyist or engaged in direct lobbying, although engaging in such lobbying through NOYB in only a very small number of instances. He also takes relatively few cases, albeit more than NOYB and still of significance despite the quantity. Yet Schrems has been engaging actively and successfully e*lsewhere*.

This paucity of official data, on lobbying, but also in litigation perhaps, reflects the depth and breadth of Schrems and NOYB activities in *other* forums and warrants its attention as a future research agenda as to the effects and usage of EU law as to civil society and strategic litigation. It reinforces the importance of considering the limits of the term '*lobbying*' from an EU law perspective and where *other* engagement with EU law takes place, such as in the case of *indirect lobbying*. Schrems appears to mainly uses social media e.g. Twitter/X, less so LinkedIn and more indirectly NOYB press releases to leverage much success. To similar effect, his own NGO is far from easily being deemed to be highly active or present with the EU Transparency Register but still has prominence. While NOYB regularly publishes press releases on a vast array of issues, with Schrems' personal enforcement or support, Schrems also independently pursues such activities. NOYB appears less regularly to engage with transatlantic issues on any platform or in any medium. The span of this other successful albeit indirect forms of lobbying are nonetheless highly significant for EU law and engage with EU law. It shows the esoteric but still important place of EU law in the development of key data transfer law generated through the actions of Schrems

Conclusion

Data transfers form part of the development of the global reach of EU law and this article has considered the place of the transatlantic therein. The article has outlined the many procedural challenges of EU law as to data rights where they relate to data transfers and the limitations of avenues for Schrems and NOYB- yet where he surmounts them in a limited number of key cases before and after the GDPR. Schrems- rather than NOYB- does notably more than litigation- but both are relatively absent from official data on lobbying. The outcome of litigation with a transatlantic dimension- or not- is of significance for the political and legal influence that it leveraged upon policy-makers. The effects of Schrems' litigation initiatives are thus not inconsiderable. They have arguably widened the global effects of EU law by having high-profile and high-impact, e.g. in the case of the EU and US establishing a Transatlantic Data Privacy Court under the DPF in order to implement the Schrems rulings. The article has also considered the locus of the energy and attention of Schrems, mainly focussing upon data transfers outside of the EU, ie to the US. This article has demonstrated that court-centric understandings of EU integration as a modus operandi of EU law or place the Court as the ultimate subject and object of the data analysis may not be the only means of framing important developments in data transfers, with Schrems litigating only a tiny handful of salient cases. This paper shows how broader views of EU law which would advocate a non-court centric perspective in framing international data transfers would capture better the work of Schrems in particular.

Schrems acts as a significant lobbyist on EU data transfers. Neither Schrems nor NOYB are arguably adequately 'reflected' for their significant in official lobbying channels, emphasising how their effects are initiated elsewhere, to similar effect in litigation output. A focus upon the work of Schrems in EU data transfer law aides debates as to the global effects of EU law and contemporary debates on US convergence to EU standards. The consequences of the implementation of enforceable rights relating to cross-border data transfers has brought about an extraordinary array of legal consequences. These also include a range of 'Brussels Effect' type developments**.**

The evolution of EU law's power over and in relation to Big Tech, not limited to data privacy, is also an important story of transatlantic litigation; begun in lower-level EU courts by an individual, harnessing the power of preliminary references and individual rights enforcement as to data transfers, and ultimately leading to the invalidation of EU laws. The outcome of such litigation has arguably also been to embolden the individual to litigate further- to a point. The actions here of NOYB/ Schrems as litigant

are notable in that they are actively supported and sustained through 'good lobbying' conducted in parallel to litigation. NOYB has itself no litigation at CJEU level to its name. Schrems continues to be a significant 'threat' to EU legislators, reminding them and highlighting shortcomings, explicitly enunciated in the form of litigation. Schrems is distinctive for his broad engagement in many academic, scholarly, policy-led and other fora, ie his reach is significant. The precise nature of the relationship here between lawyering and lobbying is complex in so far as Schrems personally engages much in social media campaigns directed often at the EU but not utilising formal lobbying channels. Rather, the activities of Schrems support the views of political scientists that the judicialization of interest groups is becoming more prominent and important to policymakers.[98] Yet such actions are highly significant for the way in which they affect the shape and direction of EU law and its procedural capacity to effect change. The article demonstrates the significance of the work of Schrems particularly before and after the introduction of the GDPR, within the confines of the courtroom of the CJEU and in lobbying, directly to the EU institutions and indirectly in other communication channels as a broad spectrum of the place of EU law in his work, with immense consequences for the global dimension to EU law.

[98] Andreas Hofmann and Daniel Naurin, 'Explaining interest group litigation in Europe: Evidence from the comparative interest group survey' (2021) 34(4) Governance 1235.