

# Schrems 2.0 – what now?

## ACT NOW TO PROTECT VITAL DATA FLOWS

**On 19 December 2019, the Advocate-General in the 'Schrems 2.0' case gave his legal opinion on standard contractual clauses (SCCs).**

SCCs are EU-approved template terms which allow businesses to transfer personal data from the UK to certain countries and territories outside the EEA. They mean individuals have the peace of mind of knowing that their data is protected according to the high standards of the EU's data protection regime, such as the GDPR.

In his legal opinion, the Advocate-General surprisingly validated SCCs as still being an appropriate method to protect personal data but only on the basis that the country of destination to which data is being sent or accessed also has a right of action against the data controller which they can and should enforce, and that it is a requirement on the data controller or supervisory authorities to suspend such transfers where the laws of the country to which the data is flowing to or accessed from conflicts with the SCCs. In other words the Advocate-General has reminded everyone about the limitations of SCC's and the need for data controllers and supervisory authorities to suspend or prohibit such transfers where SCCs conflict with local laws.

The decision is in the context of transfers to the US but does not provide a view from the Advocate-General about whether the US privacy laws generally conflict with the SCC's or not, which will be considered in the Schrems case specifically again later. There is no reassurance therefore that transfers to the US using SCC's will not be challenged. The Advocate General was prepared to indicate at this stage, however, concern about an alternative safeguard used for transfers to the US. The privacy shield is a self-certification procedure found to provide an adequate level of protection of such transfers to organisations that sign up to it. The Advocate General expressed doubts as to its conformity with the GDPR predicting, perhaps, problems in the future for the privacy shield.

While this is only the opinion of the Advocate-General, it may well be that the Court of Justice of the European Union does not endorse his approach when it gives its judgment on SCCs in the first half of 2020. The result of all this? Businesses have been put on notice that SCCs do not have the automatic validity for global transfers that everyone thought they did (even assuming the Court of Justice follows this opinion) and businesses need to put in place a more robust and longstanding process to legitimise some or all of their data transfers, like BCRs.

# So what now?

## Binding Corporate Rules (BCRs)

BCRs are a collection of global policies and procedures that a multinational signs up to apply globally. There are crucial advantages in achieving this status:

- **Customer perception:** Your customers will see you as being "best in class" when it comes to having BCR status, which in turn will significantly save time on negotiations and queries about your privacy compliance and assist in tender processes
- **Relationships with DPAs:** By virtue of your negotiations with data protection authorities on BCRs you can foster good relationships with them, which will be beneficial for future compliance (cf the US relationship with regulators)
- **Accountability under GDPR:** One of the key tenets of GDPR compliance is to show how you are accountable under GDPR. Having BCRs, which you can show on your website, will prove your accountability to regulators, customers and employees. All your GDPR requirements can flow under the BCRs
- **Global applicability:** We have been working on producing BCRs that are GDPR compliant since late 2017 and this will enable you to have the benefit of the BCRs plus all of your GDPR requirements in one place as well as accommodating other privacy laws such as CCPA, Brazil, Turkey etc
- **Structural framework:** BCRs mandate a form of structural internal compliance, unlike GDPR, which will help future ongoing privacy compliance and mitigate against the risk of apathy post implementation.

## Other safeguards

If there is no adequacy decision by the European Commission, you may be able to transfer personal data to a third country or an international organisation if you have provided appropriate safeguards.

There is likely to be fresh impetus for certain key safeguards to be developed such as:

- **Code of conduct:** this is where you adhere to an approved code of conduct drawn up by, if applicable, your trade association or representative body and approved by the ICO (none have been approved yet)
- **Certification:** this is where you adhere to an approved certification mechanism as provided for in the GDPR (again, none have been approved yet)

There are also derogations for specific situations, such as where an individual has **explicitly consented** to the proposed transfer (after having been informed of the possible risks of that transfer that arise from the absence of an adequacy decision or appropriate safeguards) or where the transfer is **necessary to perform a contract** between you and the individual.

There are other derogations that you may be able to rely on. These are often narrowly construed and must be considered carefully. Our experienced Privacy and Data team can help you determine what works best for you so that you can protect your vital data flows.

## How Shoosmiths can help:

Shoosmiths' Privacy and Data team has a wealth of experience advising on strategic data protection issues. We can help you unlock your data and keep it flowing post-Schrems so that, whatever happens, your business is on a robust footing.

### In particular, we can help you:

- set up and manage binding corporate rules (BCRs), a powerful tool which allow groups of companies to transfer data both within and outside of the EEA (including the UK post-Brexit). We are currently helping a large number of multinationals in implementing BCR's around the world
- work out whether any exceptions in the GDPR apply to your business
- assess global data privacy laws and any risks to your data flows post the Schrems decision
- deal with other Schrems-related data protection matters

## Be global with Shoosmiths

We have a large privacy and data team assisting both UK and multinational clients around the world on global privacy compliance and, with the help of our network of experienced legal experts, we can help you navigate through your global privacy and data challenges to find the solutions that work right for you across your business. What's more, we

can also help you strategise how you use and protect your global data in the longer term. At Shoosmiths, we speak business sense and offer innovative ideas that can make a real commercial difference. Whatever the size of your business and whatever your goals, the team can help you prepare for all eventualities.