

Privacy Update – Transferring Data To The US Post-Schrems

On 6 October 2015 the European Court of Justice (ECJ) issued a landmark decision in the Schrems¹ case which stated that UK businesses could no longer rely on the Safe Harbour scheme for the transfer of personal data to companies in the US.

Background

The European Commission had previously confirmed that the Safe Harbour scheme between the EU and US provided adequate protection of personal data. This meant that personal data could be freely transferred to any US company which had signed up to the Safe Harbour principles. However, in Schrems, the ECJ declared that the previous decision recognising the Safe Harbour scheme was invalid and could no longer be relied upon.

Who does this affect?

Any UK business that transfers or allows personal data to be transferred to the US - this may include employee, customer and supplier details. Data transfers may take place for a variety of reasons including:

- to outsource elements of data processing or storage to a third party who handles or stores data in the US
- if a UK business is owned by a US parent company or is part of an international group and data is processed by the US parent
- if a UK business transfers data to a US trading partner as part of its normal business activities

What is the effect of the Schrems decision?

The Schrems decision does not mean that personal data cannot be transferred to the companies in the US - its effect is to remove the automatic presumption that data will be adequately protected if the US recipient has signed up to the Safe Harbour framework. It is therefore now up to the UK businesses to review the adequacy of protection for any data transfer and ensure there are sufficient safeguards in place. Failure to do so may make the UK business liable to financial penalty for breach of data protection legislation.

What should businesses do now?

UK businesses should review the arrangements they have for the transfer, processing, storage and handling of personal data and any other contracts under which data may be transferred. If any of these allow data to be transferred out of the EU to the US, contractual arrangements or data protection policies under which a transfer may take place should be reviewed to assess whether data will be adequately protected. Factors to take into consideration include:

- the nature of the data and whether it contains any sensitive personal data
- the purpose of the transfer
- what security measures are in place

If the business considers that further measures are necessary to safeguard data to be transferred, legally binding agreements and policies may be used which use "model clauses" (standard clauses which have been approved by the Commission) or "binding corporate rules" (policies to deal with data transfers within corporate groups which have been approved by the Commission).

The new EU-US Privacy Shield

The Commission recognises that it is a key priority to establish a new framework to replace the Safe Harbour scheme. Political agreement was reached between the EU and US on 2 February 2016 for a new scheme known as the "EU-US Privacy Shield". Initial documents were published on 29 February 2016 and are currently going through a consultation process.

The Commission is aiming for the Privacy Shield to be adopted later this year. Whilst there is no guarantee that this will happen and it is likely to face resistance from opponents who do not feel that the new framework goes far enough to safeguard personal data, there is a clear impetus from the Commission to put a new scheme in place as soon as possible. However, in the meantime, businesses should assess all data transfers on a case by case basis.

¹ Case C-362/14 Maximilian Schrems v Data Protection Commissioner, EU:C:2015:650

If you would like to discuss any of the issues raised in this update please call:
Anneliese Aulton (Solicitor in the Commercial Team) on 01582 390486
Alternatively you can contact Anneliese via email at anneliese.aulton@taylorwalton.co.uk

The information given in this update was, at the time of publication, believed to be a correct statement of the law. However, readers should seek specific legal advice on matters arising, and no responsibility can be accepted for action taken solely in reliance upon such information.