

Pensions Team Case Law Bulletin

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The Court of Justice of the European Union's Decision in Case C-311/18 - Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems (Schrems II case)

The Court of Justice of the European Union has issued a significant decision in a case concerning the transfer of personal data from the EU to the US. The decision has potential ramifications for all overseas transfers of data. Trustees should confirm with their advisers whether any scheme personal data is currently being processed outside of the EU and, if so, the impact of the decision on the legality of those transfers.

What is the case about?

The case concerns the circumstances in which personal data may be transferred from the EU to the US and, in particular, the validity of the EU-US Privacy Shield and the EU's Standard Contractual Clauses (SCCs).

Under the General Data Protection Regulation, personal data may be transferred to a third country located outside the EU where:

- the European Commission has decided that the third country ensures an adequate level of protection (referred to as an adequacy decision), or
- the controller or processor has provided appropriate safeguards in the form of Binding Corporate Rules (BCRs) or by incorporating the SCCs into a binding agreement with the data importer, or
- a derogation applies, including where the data subject has explicitly consented to the transfer.

N.B. BCRs are approved data protection policies which are adhered to by controllers or processors established in the EU for transfers of personal data to other controllers or processors established in third countries where both parties belong to a group of undertakings engaged in joint economic activity.

Mr Schrems challenged the validity of the SCCs which are used by Facebook to transfer his personal data to the US.

What did the Court decide?

The Court confirmed the validity of the SCCs, but stressed that it is the responsibility of the data exporter and the data importer to assess whether the level of protection required by EU law is respected in the third country in order to determine if the guarantees provided by the SCCs can be complied with in practice. The obligation on parties to carry out this “assessment” applies equally to the use of BCRs.

The Court declared that the adequacy decision in favour of the US and based on the EU-US Privacy Shield is invalid because the requirements of US domestic law do not afford the same level of protection to personal data as EU law.

What are the implications for pension schemes?

Following the decision in Schrems, any transfers of scheme personal data outside the EU should be re-examined to determine their validity under the GDPR. In particular, trustees should contact their scheme administrators to identify (1) any instances in which personal data is being transferred outside the EU, and (2) the basis on which overseas transfers are made. Trustees should consider suspending any transfers of personal data to the US which are made on the basis of the EU-US Privacy Shield adequacy decision, BCRs or SCCs whilst they explore the ramifications of the decision with their advisers. Trustees may also wish to suspend transfers of personal data to other third countries where BCRs or SCCs apply as these provisions alone will no longer be sufficient to meet the requirements of the GDPR (as trustees must also verify that the guarantees provided by the BCRs / SCCs can be complied with in practice by reference to the requirements of the third country’s domestic law).

In our experience, it is not uncommon for the administration agreement to permit the scheme administrator to transfer scheme personal data outside the EU without seeking the trustees’ consent where certain safeguards are in place. The terms of scheme administration agreements should be urgently reviewed to assess the adequacy of these safeguards. Following the decision in Schrems, it is vital that trustees understand the extent to which personal data may be transferred pursuant to these provisions, how such transfers are impacted by the Court’s decision, and take steps to amend the terms of the agreement as necessary. As data controllers, trustees are ultimately responsible for ensuring that any transfers of personal data occur within the limits of the GDPR.

Please get in touch with your usual contact in the pensions team if you would like to discuss the impact of the decision on your scheme.

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