After *Schrems*, how lawful is cloud storage?

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THE *SCHREMS* DECISION.

1. On 6 October 2015 the Court of Justice of the European Union delivered its judgment in Case C-362/14 Schrems v. Data Protection Commissioner. It annulled an earlier decision of the European Commission (**"the Safe Harbour Decision"**) that had decided that the United States of America ensures an adequate level of protection for data transmitted from the European Union to the USA.

2. Many of the largest cloud data providers use servers located in the USA. For UK businesses who use those providers to store their customer data, the annulment of the Safe Harbour Decision raises the question whether, and if so how, they can continue do to so.

3PB'S ANALYSIS OF THE CASE.

3. The US Safe Harbour is a voluntary data protection scheme that operates on a self-certification basis. Organisations choose to sign up to the scheme and, having done so, self-certify to the US Department of Commerce that they adhere to its privacy principles.

4. For UK businesses the scheme had the benefit of certainty. Organisations have to disclose that they subscribe to the scheme within their published privacy policy. It is therefore easy to tell who has signed up. Most of the largest cloud server providers currently adhere to it, including Dropbox, Microsoft, Apple, Google, Amazon, Hewlett-Packard, EMC2 and Teradata.

5. Schrems is an important decision for any organisation that is a data controller under the Data Protection Act 1998 (**"the Act"**), because:

6. First, a data controller cannot transfer another's personal data to a country or territory outside the European Economic Area unless that country or territory ensures an "*adequate level of [data] protection*" (Act, s.4(4); Sch. 1, 8th principle: **"the Adequacy Obligation"**). A contravention of the Adequacy Obligation may lead the Information Commissioner's Office (**"ICO"**) to serve an enforcement notice (and, if not complied with, subsequent criminal proceedings), and to civil claims for compensation.

7. Secondly, under the European Directive (95/46/EC) to which the Act gives effect, the European Commission has the power to determine which countries outside the EU do, and which do not, provide adequate levels of protection. Once the Commission takes such a decision all of the Member States of the EU are bound to take the measures necessary to comply with it (art. 25 of the Directive).

8. In relation to the USA the European Commission had determined in the Safe Harbour Decision that the Safe Harbour Scheme provided adequate protection. Consequently, a UK business that was a data controller only needed to look at a service provider's privacy policy to verify that it adhered to the scheme, in order to be satisfied that the use of its services did not breach the Adequacy Obligation.

9. By annulling the Safe Harbour Decision, Schrems removes that certainty. A data controller must now satisfy itself, before transferring customers' personal data to servers in the USA, that the USA provides adequate data protection. In light of the reasoning in Schrems, that will be very difficult to do. Protection will be 'adequate' if it is "*essentially equivalent to that guaranteed by the European Union*" (Schrems, para. [73]).

10. Schrems therefore creates the risk that a UK business who uses USA-based cloud storage services will unwittingly breach the Act and expose itself to enforcement proceedings, and civil claims for damages from the customers whose data is transferred.

11. What gave rise to the proceedings was a complaint by Mr Schrems that Facebook—with which he had an account—stored his account on servers in the US. Revelations by the former National Security Agent, Edward Snowden, had shown that the US authorities had wide intrusive powers of mass and indiscriminate data surveillance and interception. By the use of those powers subscribers to the Safe Harbour Scheme such as Facebook could be required to disregard the scheme's privacy principles. Moreover, the US authorities themselves had no obligation to comply with the Safe Harbour Scheme, and were not subject to control by any judicial authority to which EU citizens had access.

12. The Court held that those factors compromised the essence of the fundamental right to respect for private life that is guaranteed by EU law. The Commission's decision that the USA ensured an adequate level of protection was accordingly invalid.

IMPACT OF THE *SCHREMS* DECISION

13. The very operation of transferring data from the UK to a third country—therefore, the uploading of it from the UK to servers in another country—amounts to "processing" (Schrems, para [45]). That transfer is subject to the supervision, in the UK, of the ICO.

14. A UK business wishing to use cloud data providers can comply with the Act in a number of ways.

15. First**, use a cloud provider that locates its servers within in the EEA or within a safe country**. Transfers of data to another country within the EEA is permissible. The European Commission has also decided that certain other countries have an adequate level of protection for personal data (they currently include Andorra, Argentina, Canada, Faroe Islands, Guernsey, Isle of Man, Israel, Jersey, New Zealand, Switzerland, and Uruguay; a full list is available on its website).

16. It will be prudent to assume that the USA will not be one of those countries for the foreseeable future. Bear in mind that there was no suggestion in Schrems that Facebook had done anything wrong, or that its servers were inherently unsafe. It was simply that their servers were exposed under US law to the risk of state access on a generalised basis. It seems unlikely that that will change overnight.

17. Secondly, if personal data is to be stored in the USA, the transferor may rely on a number of statutory exceptions to the Adequacy Obligation (Sch. 1, para 14; and Sch. 14 of the Act). The most relevant are:

18. Obtaining the **data subject's express consent to the transfer** of data to servers in the USA. A suitably worded term in your terms and conditions, which also gives reasonable prominence to any perceived risk, will provide protection.

19. If the **transfer is necessary** for: (a) the performance of a contract between the data subject and the data controller; (b) the taking of steps at the request of the data subject with a view to his entering into a contract with the data controller. This exception is likely to be limited in scope.

20. Thirdly, it is open in theory for a business to comply with the Adequacy Obligation by itself assessing the risk to, and safety of, data sent to the USA. Given the reasoning in Schrems that will be difficult in practice. A sufficiently large business may be able to include **model contract clauses** in its contracts with the US service provider. The European Commission has authorised a series of model clauses, which are available on its website. While in force, those model clauses establish adequate safeguards; they are however vulnerable because they preserve the ICO's power to prohibit or suspend data flows to any third country where its laws require the service provider to derogate unacceptably from data protection laws. A business that nevertheless uses the model clauses should remember that they deal with data protection, and that it would be good practice to insert additional clauses to ensure assistance from the provider in the event of a dispute.

21. The ICO has issued a response to Schrems, indicating that it will review its position and issue further guidance for businesses in due course. Its guidance on sending data outside the EEA can be expected to change in the near future.

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