

Ius Laboris Webinar

Two months on from the EU 'Schrems II' court ruling – do we know any more?

Thursday 24 September 2020

13:00 – 14:00 BST

14:00 – 15:00 CEST



SPEAKERS



Alexander Milner-Smith, Partner
UK
Lewis Silkin
Alexander.Milner-Smith@lewissilkin.com



Jessica Jacobi, Partner
Germany
Kliemt.HR Lawyers
jessica.jacobi@kliemt.de



Elisa Post Uiterweer, Senior Associate
The Netherlands
Bronsgest Deur
e.postuiterweer@bd-advocaten.nl



Basile Moore, Associate
France
Capstan Avocats
BMOORE@Capstan.fr

OPTIONS FOR TRANSFERRING PERSONAL DATA TO THIRD COUNTRIES

CHAPTER V GDPR

- **ARTICLE 44:** “All provisions [Articles 45, 46/47 and 49] in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by [the GDPR] is not undermined”
- **ARTICLE 45:** Adequacy decisions (note this includes the EU/US Privacy Shield, Japan, Canada, NZ, Israel, Switzerland etc. For the future: the UK?) Presumably these will have to be revisited
- **ARTICLE 46:** Appropriate safeguards (Binding Corporate Rules, Standard Contractual Clauses, plus the currently theoretical *ad hoc* clauses, codes of conduct and certifications)
- **ARTICLE 49:** Derogations for “specific situations” (i.e. explicit consent and contractual necessity)

THE DECISION (IN A NUTSHELL)

1. The 'Privacy Shield' is invalid (whatever company type, whatever data type)
2. Standard Contractual Clauses (SCCs) are technically valid for EU to US transfers but do not mean adequacy without further work. Case-by-case analysis is required before an EU exporter can be comfortable a SCC works
3. Other transfer mechanisms (e.g. Article 49 derogations; Article 46/47 Binding Corporate Rules (BCRs) are apparently valid
4. If no transfer mechanism can be found, the EU exporter must suspend transfer
5. Reiteration of Supervisory Authorities' powers to step in and suspend transfers (including saying the SCCs or BCRs don't work)

<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-07/cp200091en.pdf>

EUROPEAN DATA PROTECTION BOARD GUIDANCE, 24 JULY 2020

HITS KEEP ON COMING

- **NO MATTER HOW IT'S DONE:** European Court's assessment of US law taken into account for transfers to US and all other countries irrespective of the mechanism used (including Binding Corporate Rules)
- **NO GRACE PERIOD**
- **DEROGATIONS LIMITED:** and only *ad hoc*
- **SUPPLEMENTARY MEASURES:** can be used in addition to Standard Contractual Clauses or Binding Corporate Rules (e.g. if they are not sufficient in themselves because of the laws of the receiving country). However, there is no practical help or suggestions about what these measures should be or how to go about this.

SCENARIO 1

INTRA GROUP TRANSFERS

- German company with a US main parent and Singaporean sub-parent
- HR data shared with US parent and Singaporean sub-parent on a daily basis
- US parent is Privacy Shield certified, for transfers to Singapore Standard Contractual Clauses are relied upon

WHAT DOES THE GERMAN COMPANY NEED TO THINK ABOUT?

WHAT DOES IT NEED TO DO?

SCENARIO 2

SERVICE PROVIDERS

- Dutch company uses many different HR-related service providers
- One in the US for HRIS cloud services – Data Protection Authority says “Privacy Shield” validates EEA to US transfers
- One in Japan for HR payroll services – DPA talks about “Japanese adequacy decision”
- One in Brazil for HR expenses services – there is no Data Protection Authority

WHAT DOES THE DUTCH COMPANY NEED TO THINK ABOUT?

WHAT DOES IT NEED TO DO?

WHAT CAN WE DO (HIGH LEVEL)

DON'T PANIC: THEY SAY “NO” GRACE PERIOD, BUT IS THAT THE REALITY?

THREE GROUPS:

1. **INTRA GROUP TRANSFERS:** (more control of “contracts” and easier to see how surveillance and security laws apply)
2. **SERVICE PROVIDERS (AND SUB-PROCESSORS) OUTSIDE EEA:** (C to C, JC to JC, or C to P) – need to understand the mechanisms used and how surveillance and security laws apply to those service providers
 - Need to understand governmental access to your EU and UK personal data sets, both intra group and with service providers (and sub-processors), with a focus on types of companies to which the laws apply, rules on proportionality, any ‘effective’ remedy for data subjects (but this cannot be one size fits all – e.g. laws might not apply to you but they do apply to your cloud serve provider)
 - Keep a paper trail of decisions
 - Laughably simplistic and non-practical suggestion from European Data Protection Board and hinted at by some other regulators – to bring all data within the EU to avoid this issue

WHAT CAN WE DO (HIGH LEVEL)

3. **WHAT ABOUT PROCESSORS:** what should they be doing?

- Proactively reaching out to controllers?
- Proactively working out their own position re government access to your data?
- Doing everything they can to help controllers be able to sign Standard Contractual Clauses or Binding Corporate Rules with you?
- Note: Microsoft message to customers: PR and branding is important for processors – but is this realistic for anyone, apart from, literally, 10-20 companies in the world?

WHAT IF “SUPPLEMENTARY MEASURES” ARE REQUIRED?

1. CONTRACTUAL MECHANISMS

- Warranties that Standard Contractual Clauses work
- Promises to implement further measures to ensure they work
- Notification to exporter requirements if the recipient outside the EEA is ever approached by governments
- Challenges to government approaches (i.e. recipient outside the EEA should not just hand over data)
- Liability clauses, indemnities, termination/suspension rights

2. SECURITY

- Increase encryption
- Minimise data
- Anything else you can think of to reduce surveillance measures

3. DUE DILIGENCE

- Add into procurement, due diligence questions re what the service provider view is of their exposure to public body requests/security laws/other laws that might affect the ability of an EU data subject to seek redress for breach of rights under the EU Charter etc.
- Are there questions about previous approaches from government?
- Are there any previous successful challenge to government approaches?

ARTICLE 49

CAN WE USE IT FOR HR DATA?

ARTICLE 49 – Derogations for “specific situations” (explicit consent, contractual necessity)

- Explicit consent?
- Contractual necessity?
- Does this really help?



HORIZON SCANNING

NEW STANDARD CONTRACTUAL CLAUSES FROM THE EUROPEAN COMMISSION

- Timings?
- Yes, modernised
- Yes, GDPR compliant
- Yes, there will be a Processor to Sub-Processor Standard Contractual Clause
- But will they be Schrems proof?

PRIVACY SHIELD MARK II – SAFE SHIELD/PRIVACY HARBOUR?

- How likely?
- Timings?
- US election?

WHAT NEXT FOR SCHREMS?

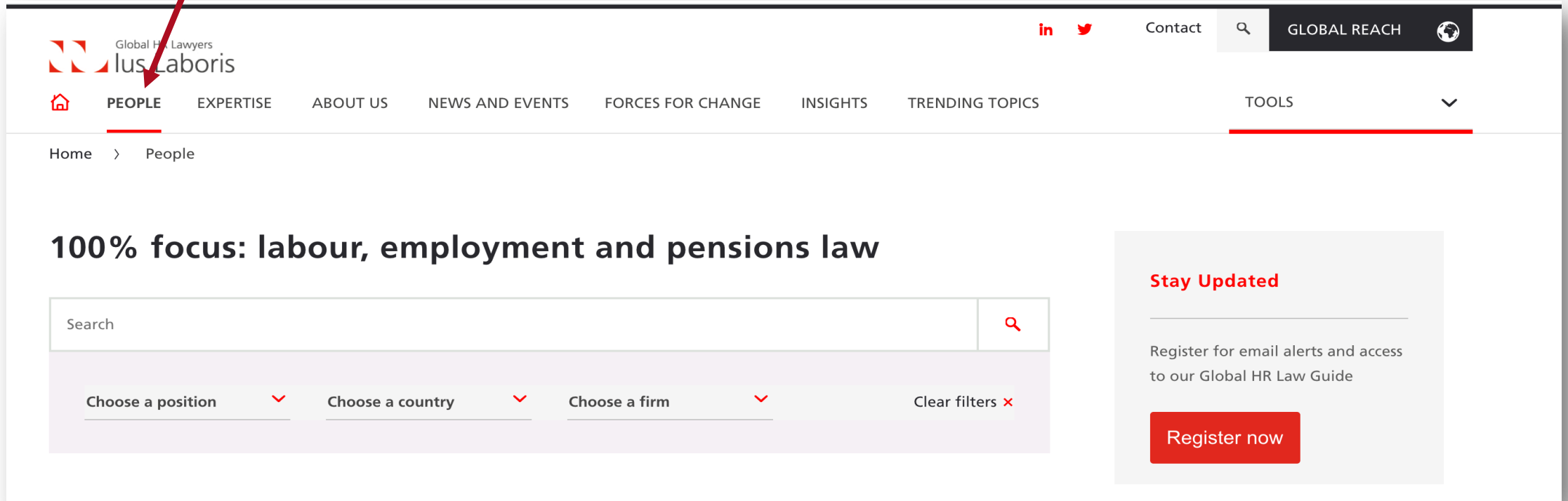
- Irish court challenge and the Irish Data Protection Commission preliminary notice
- Claims against 101 companies already?
- Nyob.eu website (“My privacy is none of your business”)

BREXIT

- Impact on adequacy – can only be negative and bearing in mind the European Court's decision, and the state of Brexit notifications so far, we could see a political decision not to grant adequacy, not based specifically on any law
- Impact on EU of UK Standard Contractual Clauses and Binding Corporate Rules – who knows?
- But Schrems II is part of UK law now, so technically, post Brexit, UK companies need to consider everything we have discussed re transfers outside the EEA
- What about future UK decisions on Adequacy? E.g. to Poland or Hungary...

IUS LABORIS – GLOBAL HR LAWYERS

<https://www.iuslaboris.com/en-gb/lawyers/>



The screenshot displays the Ius Laboris website interface. At the top, the navigation bar includes the Ius Laboris logo, social media icons for LinkedIn and Twitter, a 'Contact' link, a search icon, and a 'GLOBAL REACH' button with a globe icon. Below this, a secondary navigation bar features links for 'PEOPLE', 'EXPERTISE', 'ABOUT US', 'NEWS AND EVENTS', 'FORCES FOR CHANGE', 'INSIGHTS', and 'TRENDING TOPICS'. The 'PEOPLE' link is highlighted with a red underline. To the right of these links is a 'TOOLS' link with a dropdown arrow. Below the navigation bar, a breadcrumb trail shows 'Home > People'. The main content area features a large heading: '100% focus: labour, employment and pensions law'. Below this heading is a search bar with the placeholder text 'Search' and a magnifying glass icon. Under the search bar, there are three filter buttons: 'Choose a position' with a dropdown arrow, 'Choose a country' with a dropdown arrow, and 'Choose a firm' with a dropdown arrow. To the right of these filters is a 'Clear filters' button with a red 'x' icon. On the right side of the page, there is a 'Stay Updated' section with a red heading. Below the heading, it says 'Register for email alerts and access to our Global HR Law Guide'. At the bottom of this section is a red button labeled 'Register now'.

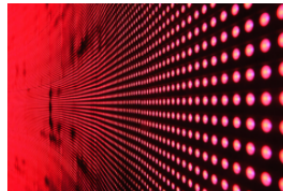
WEEKLY WEBINAR SERIES

<https://theword.iuslaboris.com/hrlaw/webinars-podcasts>

WEBINARS

We bring together the best international employment lawyers to discuss the issues shaping the future of the working world.

Two months on from the EU 'Schrems II' court ruling – do we know any more?



Alexander Milner-Smith, Jessica Jacobi, Basile Moore, Elisa Post Uiterweer

24 September 2020
14:00 – 15:00 CEST

In this informal panel discussion, experts from the UK, Germany, France and the Netherlands will discuss the European Court of Justice decision in the case of Schrems II handed down in July, and its impact on workplace data transfers. The Court ruled the EU-US Privacy Shield invalid, and although model clauses can still be used for cross-border data transfers, the level of data protection must be equivalent in the receiving country to that provided in the EU.

[Register](#)

PAST WEBINARS



Speed dating seminar: employee access to personal data in the EU

Alexander Milner-Smith, Jessica Jacobi, Marco Sideri, Linda Hynes, Wouter Van Loon, Ilse Baijens, Søren Terp Kristophersen, Sean Illing

July 16 2020 | [Download the slides](#)



Restructuring across the APAC region following COVID-19

Kathryn Weaver, Vijay Ravi, Nobuhito Sawasaki, Heidi Fairhall

July 10 2020 | [Download the slides](#)



Coronavirus: Getting back to the new normal

Colin Leckey, Inês Reis, Linda Hynes, José Miguel Mestre Vázquez

July 2 2020 | [Download the slides](#)



Coronavirus: Getting back to work

Orly Gerbi, Dimitrios Kremalis, Nicos Panayiotou, Batuhan Sahmay

June 25 2020 | [Download the slides](#)



North America: Canada - Mexico - United States

Central & South America: Argentina - Brazil - Chile - Colombia - Panama - Peru - Venezuela

Western Europe: Austria - Belgium - Cyprus - Denmark - Finland - France - Germany - Greece - Ireland - Italy
Luxembourg - Malta - Netherlands - Norway - Portugal - Spain - Sweden - Switzerland - United Kingdom

Eastern Europe: Belarus - Bulgaria - Croatia - Czech Republic - Estonia - Hungary - Latvia - Lithuania - Poland - Romania - Russia - Serbia - Slovakia - Slovenia -
Turkey - Ukraine

Middle East & Asia Pacific: Australia - Bahrain - China - Hong Kong - India - Israel - Japan - Kazakhstan - New Zealand - Papua New Guinea - Saudi Arabia -
Singapore - South Korea - Thailand - United Arab Emirates

www.iuslaboris.com