ICO Listening Workshop on data transfer Shoosmiths response (sent 24 March 2023)

1. **IDTA:** The IDTA deals with situations where importers are caught by Article 3. The EU SCCs however do not, and so the Addendum is not appropriate in those scenarios. It would be useful to have guidance on whether this understanding is right, and if so, whether the IDTA should *always* be used where an importer is in this situation? Would it be possible to include top-up clauses in the UK Addendum so that its use alongside the EU SCCs is truly the equivalent of the IDTA, and not something short of that?

2. **TRA tool**: The Part 2 of the Appendix to this tool raises concerns for us about the wholesale categorisation of certain sorts of data, where the risks must be highly context-dependent. For example, data about "membership of charitable organisations" "goods and services" "habits" and so on cannot *always* be low risk, and are (in our view) just as likely to contain sensitive information as other categories. Although there is allowance for some moderation of these risk profiles via Table 2, a clear explanation of the risks posed in over-simplification, and some clarification of the risk assessment where data includes special category data, would be welcome.

We are aware that this exercise is not necessarily about **transfers guidance**, but a few points have come to light in trying to apply it in practice:

3. Clarification of the "initiated and agreed" test for determining responsibility for the TRA: if the controller exercises its power of veto over new sub-processors, or even imposes its own, at what point might it take over control of the processing activity from its processor to the extent that it has "initiated and agreed" any resultant new transfer?

4. An explanation of exactly when processor to controller restricted transfers may come into play, given that return of data to a controller is seemingly outside the scope of restricted transfers?

5. The example of UK Retail Ltd and UK Services Ltd is very relevant. However, there seems to be an anomaly in that, in paragraph three of the boxed example, there **is** a restricted transfer when there is a contract between UK Services Ltd and UK Retail Ltd, and in the fourth paragraph there is **not** a restricted transfer, when the same legal relationship is in play (given that - as pointed out in paragraph one - the overseas branch of a company will not be in a position legally to enter into a contract in its own right under English law). Is the suggestion that a transfer to one particular discrete business unit within the same organisation may have a different effect from transfer to another unit, even where the contracting entities remain the same? This is a point which often comes up in practice and clarification would be very helpful.

And a couple of wider concerns:

6. Is the ICO expecting to update any of the tools or guidance in light of changes envisaged in the Data Protection and Digital Information No. 2 Bill?

7. We are generally concerned about the impact of the Retained EU Law (Revocation and Reform) Bill on UK GDPR, the PECRs and NIS regulations. Some reassurance that the ICO is working with government to ensure that there is no inadvertent "sunsetting" of these central pieces of law would be most welcome, particularly given the potentially disastrous effect which an automatic sunset would have on UK adequacy with the EU.