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ECJ: EU US Privacy Shield invalid

With the current ruling of the European Court of Justice (ECJ) in Case C-311/18 dated July 16, 2020 (Schrems v Facebook), it is now clear that companies can no longer rely on the EU Commission's adequacy decision on the EU-US Privacy Shield when transferring personal data to the US. The US continues to be classified as an "unsafe" third country in terms of data protection law.

Under a data protection perspective, any transfer of personal data to a third country (countries outside the EU/EEA) is only permissible if the data protection provisions set out in Art. 44 et seq. of the GDPR are complied with. According to these provisions, a data transfer to the US was possible, if the company concerned was included in the list of companies "certified" under the EU-US Privacy Shield and thus subject to the conditions contained therein, securing the EU's required level of data protection. This is no longer the case.

However, a transfer of data to the US is still possible, for example, by the consent of the person concerned, or through "binding corporate rules" approved by the data protection authorities or by incorporating the EU standard contractual clauses of the EU Commission. These "instruments" are intended to ensure compliance with the European data protection principles and security requirements for the protection of personal data outside the EU/EEA.

The background to the ECJ judgement is a lawsuit filed by the author and data protection activist Maxmilian Schrems, who opposed the transfer of data on the basis of the EU-US Data Protection Shield and the EU standard contractual clauses in connection with the use of Facebook. He questioned whether personal data of EU citizens is processed in the US or on servers of US companies securely and in accordance with data protection laws. In our opinion, the main issue was that US companies are able to issue a "self-certification" or self-declaration of compliance with the regulations of the EU standard contract clauses, which is not generally checked.

In 2018, the Irish High Court had already referred a whole series of questions to the ECJ in a preliminary ruling procedure on the security of data of EU citizens in the US.

Yesterday's decision by the ECJ first of all states that EU standard contractual clauses, which Facebook is invoking in the specific proceedings, are generally valid. Since Facebook's European subsidiary is based in Ireland, the Irish data protection authority is now obliged to review the compliance with these provisions and suspend or prohibit the transfer of personal data to a third country such as the US if the standard contractual clauses are not complied with. It now remains to be seen how the Irish data protection authority will react to the ECJ ruling. Based on the decision, tough, the EU-US Privacy Shield and the EU Commission's adequacy decision can no longer serve as a legal basis for the transfer of personal data to the US in compliance with data protection regulations.

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As a result of this ECJ decision, the transfer of data within the framework of a contractual cooperation between companies with a connection to third countries, which is usually secured by binding corporate rules or EU standard contract clauses, will probably be subject to examination by national data protection supervisory authorities. Most importantly, however, the decision has consequences for the transfer of data to the US or to US companies through the use of marketing/tracking tools such as Adobe Analytics, Google Analytics, or when operating company pages on Twitter, Facebook and YouTube and using cloud services/platforms like AWS, Microsoft and Apple, which generally involves the transfer of data to the US or US servers.

For compliance reasons, we therefore strongly recommend to check the requirements for data transfer to the US in order to avoid legal consequences (e.g. the sanctioning of a possible data protection violation by data protection authorities or based on the complaint of a competitor). In particular, the marketing tools and web tracker software used on company websites and platforms as well as their cloud services should be reviewed. The use of tracking/marketing tools could be implemented in a legally compliant manner by obtaining the (anyway required) consent of the site visitor for advertising cookies with transparent reference to the transfer of the data to the US.

In conclusion, the data transfer to the US remains permissible under certain conditions. We will be happy to advise your company on all questions arising regarding the legally compliant transfer of personal data to the US (and other third countries).

If you have any questions, please do not hesitate to contact us.

Best regards from Heidelberg, Germany

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