

Press release of the conference of the independent data protection supervisory authorities of the federal and state governments from July 28th, 2020

Judgment of the European Court of Justice on the transfer of personal data to third countries ("Schrems II") strengthens data protection for EU citizens

No.20200728

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07/28/2020

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In its judgment of July 16, 2020 (case C-311/18), the European Court of Justice (ECJ) declared decision 2016/1250 of the European Commission on the transfer of personal data to the USA (Privacy Shield) to be invalid. At the same time, the ECJ found that Commission Decision 2010/87/EC on Standard Contractual Clauses (SCC) is still valid in principle.

The conference of the independent data protection supervisory authorities of the federal and state governments (DSK) sees this judgment as strengthening the basic data protection rights of citizens in the European Union. According to an initial assessment by the DSK, the judgment has the following effects on the transfer of personal data to the USA and other third countries:

The transfer of personal data to the USA on the basis of the Privacy Shield is not permitted and must be stopped immediately. The ECJ has declared the Privacy Shield invalid because the US law assessed by the ECJ does not offer a level of protection that is essentially equivalent to that in the EU. The US law referred to by the ECJ concerns e.g. B. the intelligence gathering powers under Section 702 FISA and Executive Order 12 333.

In principle, the existing standard contractual clauses of the European Commission can continue to be used for the transfer of personal data to the USA and other third countries. However, the ECJ emphasized the responsibility of the controller and the recipient to assess whether the rights of the data subjects enjoy an equivalent level of protection in the third country as in the Union. Only then can it be decided whether the guarantees from the standard contractual clauses can be realized in practice. If

this is not the case, it should be examined what additional measures can be taken to ensure a level of protection that is essentially equivalent to that in the EU. However, the law of the third country must not affect these additional protective measures in a way that thwarts their actual effect. According to the judgment of the ECJ, standard contractual clauses without additional measures are generally not sufficient for data transfers to the USA.

The assessments of the judgment also apply to other guarantees under Article 46 GDPR, such as binding internal data protection regulations ("binding corporate rules" - BCR), on the basis of which personal data is transferred to the USA and other third countries. Therefore, additional measures must also be agreed for data transfers on the basis of BCR if the rights of the data subjects in the third country do not enjoy an equivalent level of protection as in the Union. These measures must also be able to guarantee an essentially equivalent level of data protection for the transmitted data as in the EU.

The transfer of personal data from the EU to the USA and other third countries according to Article 49 GDPR is still permitted, provided that the conditions of Article 49 GDPR are met in the individual case. The European Data Protection Board has published guidelines on the application and interpretation of this provision.

Controllers who wish to continue to transfer personal data to the USA or other third countries must immediately check whether they can do so under the conditions mentioned. The ECJ has not granted a transitional or grace period.

Even if the ECJ emphasized the primary responsibility of the transmitter of personal data and the recipient in its decision at various points, it has also assigned the supervisory authorities a key role in enforcing the GDPR and other decisions on data transfers to third countries. The German supervisory authorities will coordinate their approach with their colleagues in the European Data Protection Board and will also advise on more specific issues in the future. Following the judgment of the ECJ, the European Data Protection Board has key questions and answers after an initial statement at its meeting on July 23, 2020 (FAQ) published on the implementation of the judgment. The DSK supports the positioning of the European Data Protection Board. The English text of the FAQ can be found on the website of the European Data Protection Board.

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