

Uncertainty after Schrems II judgment: LfDI Baden-Württemberg offers assistance

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On July 16, 2020, the European Court of Justice declared the EU-US Privacy Shield Agreement invalid. With immediate effect, it is no longer possible for US companies to process the personal data of EU citizens on this basis. Without a transitional period and – as is now evident – without an adequate alternative. And this in an economically tense situation, where almost all companies in Europe rely on service providers in the USA when it comes to data processing, or are dependent on data transfers with trading partners or their group companies. Of course, users and companies are unsure about this vacuum.

Therefore, the State Commissioner for Data Protection and Freedom of Information (LfDI) Baden-Württemberg is now providing guidance. This explains what the judgment means, what consequences it entails on the part of the supervisory authority and how users and companies must now react. A checklist also helps with the upcoming steps.

What is correct about the ECJ decision is that the Privacy Shield Agreement negotiated by the EU Commission with the USA did not effectively protect EU citizens from US secret services collecting data from Europeans from service providers acting as service providers without cause, for an unlimited period of time and without effective earmarking US companies can tap into. But it also presents European companies with an almost impossible situation. If they cannot get service providers such as Microsoft, Zoom and Co. to effectively protect the data on servers in the EU member states from access by the US authorities, they should no longer use these service providers. Otherwise, the companies based here are threatened with fines from the data protection authorities. Companies that have a location in the USA or ongoing business relationships there are even harder hit - they have no alternative and see their trade relationships in the USA in acute danger. Together with their US contractual partners, they would have to persuade the US government to change the law that protects European data from unrestricted access by the secret services and grants the persons concerned effective legal remedies for the US courts to review access. A promising venture...

"Of course, in an ideal world, changing the law in the US would be the perfect solution and a real improvement in privacy. However, it is highly doubtful that the ECJ's domino game will work. Even if we regulators - following the logic of the domino game - bring down the economic relations between German/European companies and US companies, it remains to be seen whether this will trigger the desired chain reaction and ultimately persuade US security policy to give in." according to LfDI Dr. Stefan Brink. "Nevertheless, it is clear to us supervisory authorities: The ECJ ruling applies, we must implement it immediately - and we will do so. However, we will do this with a sense of proportion according to the principle of proportionality and will always ask whether there is no alternative to data transfers to the USA or not. The focus will therefore be on the question of whether, in addition to the service provider chosen by the respective German company, there are also reasonable alternative offers without transfer problems. If a company cannot convince us that the service provider it

uses with transfer problems is irreplaceable in the short and medium term by a reasonable service provider without transfer problems, then the data transfer will be prohibited by the LfDI Baden-Württemberg.” For dealing with the other cases the LfDI is still working on convincing solutions together with the companies and associations and in accordance with the European supervisory authorities - but they are not easy to find.

Detailed information on the legal situation and the subsequent steps by the supervisory authority as well as a checklist for companies in Baden-Württemberg can be found in the orientation guide published today by the LfDI Baden-Württemberg.

If you have any questions, you can reach us on the telephone number 0711/615541-11.

Further information on data protection and freedom of information can be found on the Internet at www.baden-wuerttemberg.datenschutz.de or at www.datenschutz.de.

The press release is available on the Internet at <http://www.baden-wuerttemberg.datenschutz.de>.

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