

Press release of the conference of the independent data protection supervisory authorities of the federal and state governments of June 21, 2021

Data protection supervisory authorities: Additional checks and measures necessary despite new EU standard contractual clauses for data exports

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With the implementation decision of June 4, 2021, the European Commission issued new standard contractual clauses that are intended to enable the legally compliant transfer of personal data to third countries. The conference of the independent data protection supervisory authorities of the federal and state governments (data protection conference, DSK), like the European Data Protection Board (EDSA), points out that even when using the new EU standard contractual clauses, an examination of the legal situation in the third country and additional supplementary measures is required.

In its decision, the EU Commission addressed, among other things, the “Schrems II” decision of the European Court of Justice (ECJ). In its judgment of July 16, 2020 (case C 311/18 – Schrems II), the ECJ determined that transfers of personal data to the USA can no longer be based on the so-called Privacy Shield. In principle, the standard contractual clauses adopted by the EU Commission can still be used as the legal basis for the transfer of personal data to third countries. However, all those responsible must also carry out a check as to whether the legal situation or practice in the respective third country can have a negative impact on the level of protection guaranteed by the standard contractual clauses. If this is the case, for example because the authorities of the third country have excessive access rights to the processed data, those responsible must take additional measures before the data is transferred to the third country in order to ensure a level of protection that corresponds to the level guaranteed in the European Union is equivalent in substance. If this is not possible, the transmissions must be stopped.

To check the legal situation in the third country and the additional measures, those responsible can refer to the "Recommendations 01/2020 on measures to supplement transmission tools to ensure the Union legal level of protection for personal data". The EDPB decided on its final version after a public consultation on June 18, 2021 (https://edpb.europa.eu/system/files/2021-06/edpb_recommendations_202001vo.2.0_supplementarymeasurestransferstools_en.pdf). The new standard contractual clauses have not changed the situation described and the resulting obligations. These now regulate the requirements that previously only followed from the case law of the ECJ much more explicitly (Clause 14). The EU Commission and the EDPB have deliberately coordinated the new standard contractual clauses and the recommendations 01/2020. This means that even when using the new clauses, the data exporter must check the legal situation and practice in the third country and, if necessary, take additional protective measures or, if this does not succeed, refrain from the transfer.

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