

Hard times for international data exchange

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ECJ

With its decision today (Case C-311/18), the European Court of Justice has declared the so-called Privacy Shield for data transmission to the USA to be ineffective. At the same time, he maintained the validity of the decision on standard contractual clauses. It is to be welcomed that, in the opinion of the highest Union court, there can be no “business as usual” with the Privacy Shield. The relabeling of the predecessor instrument Safe Harbor, which was declared invalid in 2015, with only marginal improvements, has not led to any rethinking in the US government. Nothing was changed in the practice of mass surveillance without cause, nor was a substantial strengthening of the rights of those affected achieved. The ECJ rightly refers to the fact that the introduction of an ombudsperson, which initially sounds like an effective instrument, is unhelpful, but does not have the appropriate powers.

Against this background, the ECJ's decision to retain the Standard Contractual Clauses (SCC) as an appropriate instrument is not consistent. If the invalidity of the Privacy Shield is primarily justified by the escalating secret service activities in the USA, the same must also apply to the standard contractual clauses. Contractual agreements between data exporters and importers are equally unsuitable for protecting data subjects from state access. At least with regard to the conclusion of the SCC with the disputed US company, the ECJ should have come to the same conclusion. However, in his examination he limited himself to the formal suitability in the bilateral relationship between European processors and processors in the third country. At the same time, he made it clear that the legal situation in the respective third country must also be checked, taking into account all the circumstances and with the standards that the GDPR formulates for the examination of adequacy decisions by the EU Commission, in order to enable data transfer via SCC.

The options available to data-exporting companies are now the same as they were five years ago when the Safe Harbor mechanism was declared invalid. In addition to Binding Corporate Rules and individual agreements, it is above all the SCC

that can be used as a basis for transfers to third countries. At the same time, however, uncertainty has increased this time: the ECJ is passing the ball to the European supervisory authorities. He emphasizes their respective duties to suspend or prohibit data transfers based on standard contractual clauses. In doing so, they will have to observe the substantive standards of today's decision. In particular, they must now pay particular attention to the level of data protection in the recipient country. Upon request, the exporter must prove to his locally competent data protection authority that both the proportionality of official access options and the guarantee of functioning legal protection. For their part, the supervisory authorities in the European Data Protection Board are called upon to jointly evaluate the legal and factual situation in the recipient countries. In addition to the USA, this responsibility also applies to the other countries outside the EEA, for which there are no adequacy decisions by the European Commission. The association of data protection supervisory authorities in Germany and Europe must now quickly come to an agreement on how to deal with companies that are now illegally continuing to rely on the Privacy Shield. The same applies to companies that use standard contractual clauses for transfers to the USA and other third countries. Johannes Caspar, Hamburg Commissioner for Data Protection and Freedom of Information: "After today's ECJ decision, the ball is once again in the playing field of the supervisory authorities, who will now be faced with the decision to critically question the overall data transmission via standard contractual clauses. Ultimately, however, this does not only apply to states that, like the USA, have at least made an effort to create the impression of creating adequate data protection structures. For countries like China, such data protection regulations are a long way off. The question of permissible data transmission will also arise with a view to Brexit. Hard times are approaching for international data traffic. The bottom line is that one thing remains clear: in the past few years, neither the USA nor the EU Commission have succeeded in implementing a viable basis for appropriate data protection that corresponds to the European data protection standard. The effects of this judgment affect international data transfers as a whole. Data transfers to countries without an adequate level of data protection will therefore no longer be allowed in the future. Here the supervisory authorities are particularly challenged to develop and implement a common strategy."

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