avocado
rechtsanwälte

Newsletter IT Law and Data Protection Law
July 2020

The "Schrems II" decision of the European Court of Justice (ECJ): "Privacy Shield" between EU and USA invalid - what now applies to international data transfers?

On 16 July 2020, the ECJ published the long-awaited decision in the "Schrems II" case (press release and full text). While the ECJ declared the "Privacy Shield" decision invalid, the use of EU standard contractual clauses (SCCs) to secure data transfers to third countries remains possible under certain conditions.

avocado rechtsanwälte
thurn-und-taxis-platz 6
60313 **frankfurt am main**
t +49 69 913301-0
f +49 69 913301-19
frankfurt@avocado.de
www.avocado.de

avocado rechtsanwälte

Newsletter IT Law and Data Protection Law

July 2020

The decision

In its decision, the ECJ declared the Privacy Shield Agreement between the EU and the USA invalid. According to the judges, this agreement does not sufficiently protect personal data in the USA from access by US authorities. This possible access to personal data by US authorities is disproportionate and not limited to what is absolutely necessary. Therefore, the level of data protection provided by the Privacy Shield could not be assessed as equivalent to the EU General Data Protection Regulation (GDPR). Moreover, the ombudsman mechanism was not sufficient to provide EU citizens with an adequate legal remedy.

The use of SCCs to secure data transfers to third countries may, however, still be allowed under the judgment. The ECJ explicitly emphasizes that when using SCCs, data exporters and recipients must check in advance whether the required level of data protection can be maintained in the third country in question. If this is not the case, the parties must suspend the data transfer and withdraw from the SCCs. Combining this argumentation with the justification for the suspension of the privacy shield, SCCs may not justify a data transfer to the USA (or other countries where the authorities have extensive access rights to personal data) in its current form.

Background

The case was brought before the ECJ by the Irish High Court after Austrian lawyer Max Schrems had filed a lawsuit against Facebook's data transfers to the USA. Max Schrems is a well-known Austrian data protection activist, whose lawsuit had already initiated the "Schrems I" ruling in October 2015. In this case, the ECJ had declared the then valid Safe Harbour Agreement between the EU and the USA invalid. As a result of the ruling, the USA and the EU put the Privacy-Shield Agreement into force, which has now also been declared invalid on similar grounds.

Legal Background

With the GDPR, the EU member states have created a uniformly high data protection standard. To ensure that personal data within the scope of the GDPR (EU/EEA) is also protected accordingly when data is transferred to a location outside the EU/EEA, the GDPR provides for certain safeguards under which personal data may be transferred to such third countries. An exception is made for those countries for which the EU Commission has determined that the level of data protection there is comparable to that in the EU. This decision

in relation to the Privacy Shield has now been declared invalid. In addition to the SCCs under Art. 46 GDPR, which are still possible under certain conditions, companies or groups of companies also have the option of creating binding corporate rules under Art. 47 GDPR.

Assessment of Schrems II

The ECJ ruling is very unsatisfactory for companies, although an international exchange of personal data on the basis of SCCs remains possible. However, the SCCs offer only a low level of legal certainty, as the parties themselves remain responsible for compliance with the rules of the SCCs in the respective third country. If the EU Commission does not manage to oblige the USA to comply with corresponding standards, the possibilities for companies are very limited. Thus, the ruling creates a great deal of legal uncertainty for companies.

Summary and Recommendations

Companies should take the following measures in the short term:

» **Privacy shield:** In any case, companies should examine the extent to which they or their appointed processors transfer data to the USA on the basis of the Privacy Shield alone. Companies must in any case introduce other mechanisms.

» **Review and, if necessary, extend SCCs:** If companies use SCCs without any further review and, if necessary, additional regulations, they risk that data transfers that are not compliant with the GDPR. Particularly for data transfers to the USA, there is a considerable risk that a supervisory authority may consider the SCCs to be an inadequate safeguard. Additional safeguards can be provided by amendments to the SCCs, for example, by wording that obliges the recipient to use all permissible legal remedies against access by authorities.

avocado
rechtsanwälte

Imprint

Responsible for the content:
Jan Peter Voß and Dr. Lukas Ströbel

avocado rechtsanwälte
thurn-und-taxis-platz 6
60313 **frankfurt**, germany
t +49 [0]69.9133010
f +49 [0]69.91330119
frankfurt@avocado.de
www.avocado.de

www.brak.de

VAT nr. de 814 17 29 76
Tax nr. 13/225/62722
Tax Authority Berlin-Charlottenburg

Berger, Figgen, Gerhold, Kaminski, Voß Rechtsanwälte Part mbB and their partners are registered in the partnership register of the Berlin-Charlottenburg Local Court under PR 331 b. Salary Partner, Counsel, Of Counsel and Associates are not partners of the partnership company.

This publication is distributed to our clients and contacts and informs them from time to time about legal developments and/or services of our law firm which we believe may be of interest to them. If you do not wish to receive such communications, please inform us by e-mail to k.kuehn@avocado.de (Katja Kühn) to be removed from our mailing list.