Schrems II verdict released

July 16, 2020

In today's "Schrems II" judgment, the Court of Justice of the European Union (CJEU) annulled Decision 2016/1250 on the adequacy of the protection provided by the EU-US Privacy Shield. Decision 2010/87 *on Standard Contractual Clauses for the transfer of personal data to processors established in third countries* remains valid but supervisory authorities are obliged to assess the compliance of the clauses in third countries.

The context

According to Art. 44 et seq. GDPR, data transfers to recipients outside the European Economic Area are only permitted if a level of data protection comparable to that in the EU is ensured for the recipient. The European Commission can certify this for entire jurisdictions through adequacy decisions under Art. 45 GDPR. Where there is no such adequacy decision, the exporter and recipient can conclude so-called "EU Standard Contractual Clauses" by which the recipient undertakes to provide adequate data protection.

The decision 2016/1250 on the Privacy Shield is an adequacy decision. US companies listed on **https://www.privacyshield.gov/list** may receive personal data from the EU without having to implement further guarantees such as EU Standard Contractual Clauses.

Data transfers to recipients in the US, which are based solely on this agreement, now no longer fulfil the conditions for a legitimate data transfer and must be suspended.

Recourse to EU Standard Contractual Clauses is possible; the CJEU has confirmed the legality of EU Standard Contractual Clauses for transfers to processors in third countries. However, supervisory authorities now have the explicit duty to suspend or prohibit data transfers if they consider that the clauses cannot be effectively implemented within the recipient's jurisdictions.

The "Schrems II" procedure follows on from its predecessor "Schrems I", which led to the repeal of the then predecessor of the *Privacy Shield*, the *Safe Harbor* regime. The background to both proceedings is a legal dispute presented to the CJEU between the Austrian lawyer and data protection activist Max Schrems and Facebook before the Irish High Court.

Immediate action points

Companies should immediately review their data transfer operations to the US. Are these transfers based on the Privacy Shield Agreement? If so, the transfers must be suspended to avoid fines. Instead, standard contractual clauses should be concluded with the recipients immediately. This may particularly concern data processing via web cookies, since no separate contracts are usually concluded there, and the transfers are rather based on the

safeguarding provided by the Privacy Shield.

In the short term, data transfers to third countries based on the EU Standard Contractual Clauses should also be reviewed. Following the request of the CJEU, it is to be expected that there will be an increasing number of official investigation proceedings, which will now also specifically examine data protection in recipient jurisdictions. This will particularly affect data transfers to countries that provide for strong rights of intervention by their authorities, such as China, Russia and the US. In order to be armed against a halt to any transfer by authorities, critical transfers should be identified at an early stage and alternative security mechanisms in accordance with Art. 44 et seq. GDPR should be prepared. Here, attention must be paid to official announcements by the authorities. It is to be feared that the examination procedures and views on the local enforceability of the EU Standard Contractual Clauses will vary considerably between the EU Member States. In Germany, this can also vary from one Federal State to the other.

Your Key Contacts

Dr. Christian Schefold
Partner, Berlin
D +49 30 264 73 246
christian.schefold@dentons.com

Sebastian von Haldenwang
Associate, Berlin
D +49 30 26473 434
sebastian.vonhaldenwang@dentons.com

Dr. Constantin Rehaag
Partner, Frankfurt
D +49 69 45 00 12 248
constantin.rehaag@dentons.com

Christoph Zieger
Partner, Munich
D +49 89 244408 447
christoph.zieger@dentons.com