

Memorandum

EU High Court Invalidates Major EU-U.S. Data Transfer Program

July 20, 2020

On July 16, 2020, the European Court of Justice struck down an agreement known as the “Privacy Shield” that is utilized by thousands of companies to transfer data from the European Union to the United States in compliance with the EU’s General Data Protection Regulation (“GDPR”).¹ In its decision, the EU’s top court concluded that the Privacy Shield pact failed to adequately protect the privacy concerns of EU citizens, due to the potential for U.S. authorities to intercept transferred data. However, the court declined to invalidate Standard Contractual Clauses (“SCCs”), an alternate mechanism that many U.S. companies use to transfer data out of the EU.²

Effects of This Decision

This ruling, which is not appealable, affects more than 5,000 multinational business that relied upon the Privacy Shield program to transfer the personal data of EU residents to the U.S. in compliance with the GDPR.³ Under the Privacy Shield, companies can self-certify to the U.S. Department of Commerce that they comply with certain privacy measures, and such self-certification made such data transfers permissible under GDPR Article 45(1). Going forward, unless a replacement program is negotiated between the EU and U.S., Privacy Shield participants will have to use another GDPR-approved method to transfer EU residents’ personal data to the U.S. The court ruling upheld one of those methods—Standard Contractual Clauses—but called upon data controllers to assess the data protection afforded by the recipient country, suggesting that data transfers to the U.S. under SCCs may be a litigated issue in the future.

Remaining Data Transfer Options Under GDPR

After this ruling, companies who wish to transfer the personal data of EU residents from the EU to the U.S. have several other options that comply with the GDPR:

- Have the data sender and recipient execute “Standard Contractual Clauses” that protect data privacy in a form that the EU has pre-approved. GDPR Article 46(2)(d). These model clauses are publicly available on the EU’s [website](#) and are brief and straightforward.

¹ See *Data Protection Commissioner v. Facebook Ireland Limited and Maximilian Schrems* (Case C-311/18). This decision only applies to the EU-U.S. Privacy Shield Program and does not apply to the separate Swiss-U.S. Privacy Shield program.

² This memorandum provides a high-level summary of the cited law. For a more detailed discussion, please consult one of the authors of this memorandum.

³ <https://www.commerce.gov/tags/eu-us-privacy-shield>.

- Get “explicit consent” from the data subject, which is a less preferable method, because such consent can be withdrawn and is not valid if it is deemed gained by coercion. GDPR Articles 49(1)(a) and 7.
- The data transfer is necessary to perform a contract to which the data subject is a party or that is in the data subject’s interest. GDPR Article 49(1)(b) & (c).
- For intra-company transfers, use binding corporate rules approved by an EU supervisory authority. GDPR Article 47.
- The data transfer is necessary for important reasons of EU public interest. GDPR Article 49(1)(d).

Case Background

The history of this case begins with the 2013 leaks of alleged U.S. government surveillance practices involving former National Security Agency contractor Edward Snowden. The main plaintiff in the original lawsuit, Austrian privacy activist Max Schrems, argued to the High Court of Ireland that Facebook should not be allowed to transfer its EU users’ data to the U.S., because that information could be turned over pursuant to secret U.S. government requests. In 2015, after referral to the EU Court of Justice, Schrems successfully convinced the EU courts to invalidate the “Safe Harbor,” a permissive EU-U.S. data transfer agreement that was in place at the time. This invalidation led to the establishment of the Privacy Shield agreement, which had more privacy protections for EU residents. However, Schrems contended in the instant litigation that privacy protections for EU citizens were still inadequate in the U.S., and that SCCs used by Facebook should be invalidated. His challenge was ultimately pursued by the Irish Data Protection Commissioner in front of the Irish High Court and then referred to the European Court of Justice, where additional questions were posed regarding the particular adequacy of the EU-U.S. Privacy Shield pact. As noted above, the final ruling in this case struck down the Privacy Shield pact, but upheld Standard Contractual Clauses as a means of EU-U.S. data transfer.

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