

Privacy Shield invalidated – What now? – sequel

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As already described in a previous article, the European Court invalidated the Privacy Shield on July 16 2020 in the so-called **Schrems II Judgment II**. This agreement related to data protection in the context of data transfers from Europe to the US had been made following the prior invalidation of the Safe-Harbor program.

On November 11, 2020, the European Data Protection Board has issued the following two drafts referring to the transfer of personal data from the European Union to third countries:

- Recommendation 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data („**Recommendation 01**“) and
- Recommendation 02/2020 on the European Essential Guarantees for surveillance measures („**Recommendation 02**“).

Initial position

Data controllers that rely on standard contractual clauses in case of data transfers in third countries must verify, in particular cases, together with the recipient, if the protection level of the personal data in the respective third country is similar to the one in the European Economic Area. The European Court has entitled data exporters to take additional measures on the standard contractual clauses in order to ensure an appropriate protection level whenever standard contractual clauses are not sufficient.

In order to facilitate this process, the European Data Protection Board wants to help and has issued the abovementioned recommendations. These are not yet final.

Recommendation 01

Recommendation 01 provides data exporters with six steps they need to follow if they transfer personal data to third countries:

1. Know your transfer

The data exporter must perform a record tracking of all data transfers to third countries, i.e. they must identify and document them.

2. Legal grounds for the transfer to a third country

In case there is an adequacy decision of the EU- Commission for the third country, it needs no further verifications. Otherwise, the data exporter must guarantee the fact that appropriate safeguards according to art. 46 GDPR, such as binding corporate rules (art. 47 GDPR), standard contractual clauses etc. are provided.

In exceptional cases, the conditions according to art. 49 GDPR apply, such as the consent of or the performance of a contract with the data subject.

3. Assessment of the legal basis

The data exporter must verify whether the legal basis under No. 2 ensures an appropriate data protection level. More information on this subject is available in the sum up of Recommendation 02.

4. Implementation of additional measures

In case the assessment according to no. 3 shows that no appropriate protection level is granted, additional measures will have to be taken. A list of such measures can be found in Annex 2 to Recommendation 01 made available by the European Data Protection Board.

5. Procedures for the implementation of additional measures

Depending on the measures to be taken according to no. 4, certain particular procedural steps must be set forth and documented for their implementation, in order for them to be observed internally by the parties involved.

6. Re-assessment

A regular assessment of the data protection level in the third country is required in order to determine possible changes and take the measures needed.

Recommendation 02

The data exporter must perform a legality check in order to make sure that the applicable provisions of the third country ensure an appropriate protection level for the data transferred in each particular case. For this purpose, the following essential guarantees have to be checked:

1. The processing of data must be based on clear, accurate and accessible rules;
2. The necessity and proportionality of the legitimate purpose of the processing must be proved;
3. There must be an independent monitoring mechanism in the third country (for instance the court);
4. The person concerned must be provided with effective legal remedies.

Conclusion

The two recommendations provide partial solutions to the gap resulting from the Schrems II Judgement. At the same time, companies will face the challenge of performing the abovementioned verifications – these must be documented accordingly, so that evidence of the fulfillment of the accountability principle can be presented in case of an inspection of the data protection authorities.

Since we are still only talking about drafts, the final versions are to be expected. For Recommendation 01, a feedback can be submitted on the website of the European Data Protection Board. We are eagerly waiting for further news.

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