



EU-U.S. Privacy Shield Invalidated

On July 16, 2020, the Court of Justice of the European Union (“CJEU”) invalidated the EU-U.S. Privacy Shield program in the so-called “Schrems II” case.

[Click here](#) for the press release, and [click here](#) for the court decision.

The Court concluded that (i) the EU-U.S. Privacy Shield program (“Privacy Shield”) does not provide adequate safeguards and the European Commission’s adequacy decision which facilitates the ability of participating companies to transfer personal data from the European Union (EU) to the United States is invalid; and (ii) Standard Contractual Clauses (SCCs) remain a valid mechanism for such transfers, although a case-by-case evaluation of their sufficiency may be required by local data protection authorities as well as controllers and processors.

Standard Contractual Clauses

While the SCCs have been upheld as a general matter, the CJEU found that data protection authorities, as well as the parties to the SCCs themselves, could conclude that in light of all of the circumstances, the law of the third country involved does not provide adequate protection for the personal data involved. Companies utilizing standard contractual clauses should consider whether there are additional safeguards that might be implemented to help insulate data transfers using the clauses from case-by-case challenges. While transfers of personal data from the EU to the United States were the specific focus of the case before the CJEU, use of the SCCs to transfer personal data to any country that does not have an EU adequacy decision is potentially subject to similar challenges.

Current State of the EU-U.S. Privacy Shield as well as the Swiss-U.S. Privacy Shield

The Privacy Shield is currently in use by thousands of companies as a legal basis for transferring personal data from the EU to the United States. According to a statement ([click here](#)) from the U.S. Department of Commerce (“DOC”), the DOC will continue to administer the Privacy Shield program despite the CJEU’s decision, and all participants must continue to meet their obligations under the program. The Swiss-U.S. Privacy Shield program currently remains unaffected by the CJEU’s decision, however, Swiss authorities may choose to adopt the EU’s stance. The decision also did not address Binding Corporate Rules (BCRs) and derogations, which therefore currently remain means for international data transfers under the EU’s General Data Protection Regulation (“GDPR”). Companies currently operating under Privacy Shield should consider transitioning to another international data transfer method.

Whether European Union data protection authorities will exercise enforcement discretion as Privacy Shield participating companies transition to other data transfer methods, and whether the European Commission and the United States will attempt to negotiate a new program to replace Privacy Shield, remains unclear at this time.