

The End of Privacy Shield... But What's Next?

Background

Mr Schrems, an Austrian lawyer and data privacy campaigner, successfully challenged the validity of the EU-US safe harbor arrangement in 2015. He argued that the legal basis for transferring personal data from Facebook Ireland to Facebook Inc. servers in the US was invalid. Mr Schrems has now (once again successfully!) challenged the European Commission's replacement framework for how personal data flows between EU and US, known as the EU-US Privacy Shield.

Mr Schrem's key issue with Privacy Shield was that his personal data was being transferred to servers in the US and that there was a risk that the US government would be able to access his, and other EU individual's personal data without any recourse for legal action.

Currently, under the GDPR there are some limited circumstances where personal data can be transferred outside of the EU to a third country. One option is on the basis of a European Commission adequacy decision, which the EU-US Privacy Shield relied on for validity. Another option is by agreeing appropriate safeguards such as Standard Contractual Clauses (SCCs) or Binding Corporate Rules (BCRs).

The Schrems II judgment addressed the issue of whether the EU-US Privacy Shield and SCCs were an adequate basis for processing. The ruling decreed that Privacy Shield is not an adequate regime for processing personal data. The ruling did affirm the validity of SCCs, but required more stringent safeguards to be implemented when relying on SCCs. This decision is more than just a change in data protection but is a political statement by the EU condemning the US powers of surveillance.

What do I need to know about the Schrems II judgment?

The key questions answered by the European Court of Justice (ECJ) in Schrems II were as follows:

Q: Does GDPR apply to transfers of personal data to third countries, such as the US, where authorities dealing with national security are likely to process it?

A: Yes, Article 45(2)(a) of the GDPR specifically protects personal data from public authorities in this situation.

Q: Is the EU-US Privacy Shield's level of protection for personal data transferred to the US 'essentially equivalent' to EU law?

A: No, the Privacy Shield does not ensure an adequate level of protection for personal data. Privacy Shield acknowledges that compliance with EU data protection laws may be limited 'to the extent necessary to meet national security, public interest, or law enforcement requirements'. Therefore, the US public authorities have the power to disregard EU protections in favour of national security requirements. Consequently this renders Privacy Shield NOT 'essentially equivalent' to EU laws.

What's next?

The ICO has issued two statements since the ECJ judgment on 16 July 2020, the first stating that it is considering the judgment and its impact on international data transfers. The second, confirming that it is reviewing its Privacy Shield guidance, and if you are currently using Privacy Shield then continue to do so until new guidance is available. However it has recommended that no one new should start to use Privacy Shield during this time.

From the judgment, we already know that companies can continue to use SCCs so long as they include provisions to suspend or prohibit a data transfer if the clauses are breached or are impossible to comply with. A further obligation to verify the third countries level of data protection before a transfer occurs has been imposed, and where necessary provide additional safeguards to those offered in SCCs. Quite what those safeguards will look like remain to be seen. It is unlikely the US will alter its stance to give priority to the rights of EU citizens in relation to their personal data over the protection of the US through its national security regime. This is particularly pertinent in the current social, economic and political environment.

However, until further guidance is released by the ICO there remains great uncertainty for those companies who use or transfer data through the Privacy Shield. The ICO's guidance on this point (as at 29 July 2020) remains as above. However, until further clarity is provided, it is advisable not to enter into any new arrangements for the transfer of personal data to the US under Privacy Shield.

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