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The EU Court of Justice in the *Schrems II* case: the invalidation of the Privacy Shield and reconsideration of the SCCs Decision

On 16 July 2020, the EU Court of Justice issued its awaited preliminary ruling in the *Schrems II* case (C-311/18), concerning the rules governing data transfers between the EU and the US, pursuant to the principles set out in the GDPR.

In a case originating from proceedings initiated before the Irish Data Protection Commissioner ('DPC') by Mr. Maximillian Schrems - an Austrian Facebook user and data activist - the CJEU addressed the issues of the validity of the European Commission's Decision 2010/87/EC on Standard Contractual Clauses ("SCCs") and of the Privacy Shield Decision (Decision 2016/1250 on the adequacy of the protection provided by the EU-U.S. Privacy Shield).

The Court considered the SCCs Decision valid, whilst it invalidated the Privacy Shield adequacy Decision.

Indeed, the Court considered that the requirements of U.S. domestic law, and namely certain programmes enabling access by U.S. authorities to personal data transferred from the EU to the U.S. for national security purposes, result in limitations on the protection of personal data. Those limitations, the Court explained, are not circumscribed in a way that satisfies requirements that are essentially equivalent to those under EU law. Besides, the CJEU stressed that the relevant legislation does not grant data subjects actionable rights against U.S.' authorities.

As a consequence, the Court declared the Privacy Shield adequacy Decision invalid.

Now, as far as the **SCCs Decision** is concerned, albeit declaring it valid, the Court specified that **regard should be given to the inclusion of effective mechanisms that make it possible, in practice, to ensure compliance with the level of protection essentially equivalent to that guaranteed within the EU by the GDPR.**

As a matter of fact, the CJEU held that t**ransfers of personal data pursuant to SCC clauses are to be suspended or prohibited, in the event of breach of such clauses**, or if it is impossible, in practice, to respect them.

As pointed out in the ruling - and as also explained in the Advocate General's Opinion (see our comment here) - the SCCs Decision imposes an obligation on both the data exporter and the data importer to verify, prior to any transfer, whether that level of protection is respected in the third country concerned.

Further, the Decision at hand requires the data importer to inform the exporter of any inability to comply with the standard data protection clauses, and, where necessary, with any supplementary measures to those offered by those clauses, with subsequent obligation, placed on the data exporter, to suspend the transfer of data, and/or to terminate the contract with the data importer.

In view of the above, it is easy to understand that the ruling at issue will have far reaching effects.

Of course, it will strongly impact the transfer of personal data from the EU to the US, as, with the invalidation of the Privacy Shield - i.e. the Adequacy Decision in place between the two blocs, after the invalidation of the previous one, the so called Safe Harbour, following the ruling in *Schrems I* (case C-362/14) - and the new, strict interpretation of the SCCs Decision.

Besides, the emphasis put by the Court on the actual existence of effective mechanisms that ensure compliance, in the data importer's country, with the level of protection guaranteed within the EU, suggests that **any business wishing to import or export EU data subjects' data in a third country relying on SCCs should have to carefully consider if that third country does respect an adequate level of protection.**

Soon after the issue of the ruling at hand, national supervisory authorities and the EDPB - the European Data Protection Board - started working on a practical interpretation of its reasoning and conclusions, in order to provide guidance to data controllers and data processors in and out of the EU.

Notably, on 23 July, the EDPB issued a document including answers to frequently asked questions (F.A.Q.s), coming from national supervisory authorities, as to provide businesses and persons with a first set of practical guidelines, covering some of the most predictable issues arising from the ruling of the CJEU.

In the months to come, everyone involved in personal data transfers to non-EU countries will better watch out for any further steps to be taken by the competent bodies and authorities.

Note: this briefing is only intended as a general statement and is not legal advice. Please feel free to contact your usual point of reference at Jacobacci or send an email to infotorino@jacobacci-law.com