

# ***CJEU declared the invalidity of "Privacy Shield"***

*Since 2016, the transfer of personal data from Europe to the United States ("US") has been governed by European Commission Decision Nr. 2016/1250 of 12 July, that has become known as the "Privacy Shield" decision.*

*On 16 July 2020, the Court of Justice of the European Union ("CJEU") issued a judgment on international data protection policy, in Case C-311/18, known as the "Schrems Case II", where the CJEU declared the Privacy Shield invalid with immediate effect.*

*In this law suit initiated by a Facebook user resident in Austria, who intended to object to the transfer of his personal data processed by Facebook Ireland, to the United States ("US"), the court has concluded that the laws and practices in the US do not offer a level of protection of data subjects personal data essentially equivalent to that guarantee in the European Union ("EU") pursuant to Regulation nr. 2016/679 ("GDPR"). The concept of level of protection for the purpose of the GDPR, is assessed considering the existence, or not, of appropriate safeguards, enforceable rights and effective legal remedies for data subjects.*

*Based on that understanding, and on the general principle applicable to data transfers to third countries laid down in article 44 of the GDPR, that shall assure the same level of protection for data subjects as such that arises from the GDPR, the Court has declared the invalidity of the Privacy Shield decision.*

*The CJEU concluded that US organizations did not offer privacy protections equivalent to those of the EU, as US law enables the access of US public authorities to personal data*

*transferred from the EU for national security purposes, that result in limitations to the protection of the privacy of data subjects incompatible with the GDPR. Thus, as the Privacy Shield continued to allow the prioritization of US law enforcement and national security needs in relation to the rights of European citizens over their personal data, the CJEU considered it invalid with immediate effect.*

*Nevertheless, the Standard Contractual Clauses (“SCC”) decision (European Commission’s decision 2010/87/EC) was also assessed by the CJEU in that judgment, and was considered valid. The Court recognizes that the SSCs, being of contractual nature, do not bind the authorities of third countries to which data may be exported. Therefore, although they are valid, the use of SCCs must be combined with additional data protection measures, in order to ensure a level of protection equivalent to the European level.*

*The additional measures that shall be adopted together with SCCs, must ensure that the circumstances of cross-border data transfer are appropriate and ensure the same level of European data protection laws, not compromised by US law.*

*Within the scope of data exporters using SCCs, they are now invited to demonstrate, before transferring data to the US, that the data transferred will have equivalent levels of protection as in the EU. US organizations receiving personal data from Europe under SCCs shall inform the data exporter of any inability to guarantee equivalent levels of protection, in which case the exporter will be obliged to suspend or terminate the transfer of data under SCCs, or to take additional data protection measures.*

*The CJEU advises entities transferring personal data to countries outside the European Union to implement additional protection measures to the mechanisms adopted, such as SCCs, and to check if the law of the third country will not undermine their effectiveness.*

*In the FAQ’s issued by the European Data Protection Board (“EDPB”) on Schrems Case II[1], the EDPB refers that the supplementary measures to adopt besides the use of SCC’s in order to assure compliance with the GDPR in transfers of data to third countries, will have to be provided on a case by case basis. The EDPB does not specify examples of measures to implement to this effect, and refers in the FAQ’s document that further guidance on this topic will be provided.*

[1] [https://edpb.europa.eu/sites/edpb/files/files/file1/20200724\\_edpb\\_faqoncjeuc31118\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/20200724_edpb_faqoncjeuc31118_en.pdf)

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