

THE EUROPEAN COURT OF JUSTICE STRIKES DOWN INTERNATIONAL DATA TRANSFERS MADE UNDER THE PRIVACY SHIELD AGREEMENT

The European Court of Justice ("ECJ") has ruled in its judgment in the *Data Protection Commissioner v Maximilian Schrems and Facebook Ireland* case (C-311/18) that the Privacy Shield agreement ("*Privacy Shield*") does not provide an adequate level of protection, according to the standards of the Charter of Fundamental Rights of the European Union (the "**Charter**") and the General Data Protection Regulation (the "**GDPR**"). In its ruling, the ECJ considered, on one hand, the validity of the European Commission's Decision 2010/87 on standard contractual clauses, and, on the other hand, the validity of the *Privacy Shield* agreement itself.

With respect to the validity of European Commission Decision 2010/87 on standard contractual clauses, the ECJ declared that, in its opinion, it complies with the guarantees set out in the Charter and in the GDPR, but noted that there are certain obligations that both the exporter and the importer of data must fulfil, such as, for example, and by way of illustration, checking that the country of destination of the data complies with minimum-security standards.

The ECJ has determined that the *Privacy Shield* agreement, just like its predecessor, the *Safe Harbor* agreement, cannot be considered valid because it does not comply with the privacy requirements and standards established by the GDPR. This decision is primarily based on the infringement upon certain fundamental rights of citizens by US domestic regulations. Specifically, the ECJ noted the lack of respect for the guiding principles of data protection in the access to data transferred by the US authorities, determining that *they are not regulated in accordance with requirements that are substantially equivalent to those required, under European Union law, by the principle of proportionality, insofar as the surveillance programmes based on the aforementioned regulations are not limited to what is strictly necessary.*

Although this is a decision that profoundly alters relations between Europe and the United States, it cannot be described as unexpected. In recent years, there has been much debate about the requirements of the *Privacy Shield* and the lack of consistency with those requirements established by the European Union, precisely because of the domestic policy of the United States, which in many cases clashed head-on with European regulations.

This landmark judgment directly affects all companies that transfer and/or receive data. The practical issues to be taken into account are the following:

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Legal implications of the judgment

The United States loses its status as a secure recipient under the European Commission and, therefore, international transfers made under the *Privacy Shield* lose their legitimacy, and it will be necessary to base such transfers on one of the other mechanisms provided by data protection regulations.

How does this judgment affect companies that transfer and receive data?

American companies that had already adapted their internal systems to the requirements of the *Privacy Shield* must legitimise such transfers by signing standard contractual clauses, taking into account the nuances provided by the ECJ, or by one of the other mechanisms provided for by the GDPR. For their part, European companies that transfer data outside the European Economic Area must reliably verify that both the company importing the data and the country of destination comply with minimum-security standards and guarantee all the rights and protection mechanisms set out in the GDPR.

In practice, how can American companies adapt to this new situation?

They will have to adapt their organisation to the security standards and guiding principles of European data protection, taking into account the criteria adopted by the different data protection agencies and the specific circumstances of their own business.

This Legal Briefing has been prepared by Andy Ramos Gil de la Haza and Andrea Sánchez, Counsel and Associate in the Intellectual Property, Industrial and Technology practice.

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