PRESS RELEASE

The Hamburg Commissioner for
Data Protection and Freedom of Information

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Hard Times for International Data Exchange - ECJ Suspends Privacy Shield and Confirms Standard Contractual Clauses

With its decision today (Case C-311/18), the European Court of Justice declared the so-called Privacy Shield for data transfers to the USA to be ineffective. At the same time, it has maintained the validity of the decision on standard contractual clauses. The fact that, in the opinion of the highest EU court, there can be no "business as usual" with the Privacy Shield is to be welcomed. The re-labelling of the previous Safe Harbor instrument, which was declared invalid in 2015, with only marginal improvements, has not led to any rethinking in the US government. Neither has anything been changed in the practice of mass surveillance, nor has any substantial strengthening of the rights of those affected been achieved. The European Court of Justice rightly refers by way of example to the fact that the introduction of an ombudsperson was not helpful in practice. At first this sounds like an effective instrument, but does not have adequate powers.

Against this background, the ECJ's decision to maintain standard contractual clauses (SCC) as an appropriate instrument is not consistent. If the invalidity of the Privacy Shield is primarily justified by the excessive intelligence activities in the USA, the same must also apply to the standard contractual clauses. Contractual agreements between data exporter and importer are equally unsuitable for protecting data subjects from governmental access. At least with regard to the conclusion of the SCC with the US company in dispute, the ECJ should have come to the same conclusion. However, in its examination it limited itself to the formal suitability in the bilateral relationship between the European processor and that in the third country. At the same time, it made it clear that the legal relationships in the respective third country must be additionally examined in the light of all the circumstances and with the standards established by the GDPR for examination by the EU Commission in the case of adequacy decisions, in order to enable data transfers via SCC.

The options available to data-exporting companies are now the same as they were five years ago when the safe harbour mechanism was declared invalid. In addition to Binding Corporate Rules and individual agreements, it is above all the SCC that can be used as a basis for transfers to third countries. At the same time, however, uncertainty has increased this time: The ECJ is passing the ball to the European supervisory authorities. It stresses their respective roles in suspending or prohibiting data transfers on the basis of the standard contractual clauses. In doing so, they will have to take into account the content of today's decision. In particular, they must now pay attention to the level of data protection in the recipients' country. Both the proportionality of access by the authorities and the guarantee of functioning legal protection must be demonstrated by the exporter to his local data protection authority on request. For their part, the supervisory authorities in the European Data Protection Board are called upon to jointly evaluate the legal and actual situation in the recipients' countries. In addition to the USA, this responsibility applies in particular to the other states outside the EEA for which no adequacy decisions have been taken by the European Commission. Data protection supervisory authorities in Germany and Europe must now swiftly come to a common understanding on how to deal with companies that are now illegally continuing to rely on the Privacy Shield. The

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same applies to companies that use standard contractual clauses for transfers to the USA and other third countries.

Johannes Caspar, Hamburg Commissioner for Data Protection and Freedom of Information: "After today's ECJ decision, the ball is once again in the court of the supervisory authorities, who will now be faced with the decision to critically examine data transfers via standard contractual clauses. Ultimately, however, this will not only affect states which, like the USA, have at least made an effort to give the impression that they are creating adequate structures for data protection. For countries like China, such data protection standards are a long way off. With regard to Brexit, too, the question of permissible data transfer will arise. Hard times are dawning for international data traffic. The bottom line is that in recent years the USA, but also the EU Commission, has not succeeded in implementing a viable basis for adequate data protection that meets European data protection standards. The consequences of this ruling affect international data transfers as a whole. Data transfers to states without an adequate level of data protection will therefore no longer be allowed in the future. Here, the supervisory authorities are particularly called upon to develop and implement a common strategy.“

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