

## **Important changes in the legal issues of EU-US data transfers**

**The United States has adopted a Presidential Executive Order implementing the EU-US data protection framework, following a ruling by the Court of Justice of the European Union (CJEU) two years ago that declared the Privacy Shield invalid.**

The annulment was based on the fact that the protection guaranteed by the EU in connection with the access of personal data of EU citizens stored in US servers, was not ensured and nor were the adequate safeguards in connection with the mass surveillance practice of US intelligence services.

The Presidential Executive Order answers the data protection issues raised by the Schrems II. decision (C-311/18) of the Court of Justice of the European Union of 16 July, 2020, which was preceded by a long consultation between the European Commission and the US.

One of the CJEU's main concerns was in connection with the Privacy Shield Framework's mechanism regarding the Ombudsman. This allowed the EU citizens to file a complaint about the US intelligent services' monitoring to the national data protection authorities who were obliged to forward these to the ombudsman of the US State Department. After that the ombudsman had to process the complaint and remedy the possible infringements.

Compared to the previous one, the new implementing regulation introduces a two-tier legal remedy mechanism.

The first tier is similar to the previous system. The citizens need to file a complaint at their states' data protection authorities who forward these to the US' competent authorities. Instead of the ombudsman the US' Data Protection Officers of the Intelligence Coordination Centre process these complaints and after the procedure the citizen concerned is notified of the outcome in writing.

If the citizen does not accept the outcome, then it may appeal against the decision to the data protection review court, which, although not part of the judicial system its members shall be fully independent within the executive branch. It should be composed of persons who are not members of the US administration system (for example ex-judges). The person concerned is not directly involved in this procedure either, but is represented by a lawyer appointed by the court.

The new data protection review court may be able to create the legal level of data protection expected by the CJEU. However, it still is an issue if the CJEU will be satisfied with a quasi-judicial college instead of a real one.

The concerned citizens can not affect this secret procedure which raises even more questions regarding the state of rule-of-law (principle of a fair trial, right to be heard in public, right to be heard in court proceedings). Until the European Commission does not release a declaration of compliance the data-controllers have to ensure the lawfulness of the EU-US data transfers, for example by applying the Standard Contractual Clauses (SCC), which were "pre-approved" by the European Commission.

Contact our colleagues for more information on the EU-US data protection framework and the latest executive order.