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What does Schrems II mean for the transfer of employee data by Swiss businesses abroad?

In its long-awaited landmark decision «Schrems II», the CJEU invalidated the EU-US Privacy Shield while imposing additional requirements on the use of Standard Contractual Clauses. The decision also has implications for Swiss employers when transferring employee data to countries without an adequate level of data protection.

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The CJEU partially upheld the claim of data protection activist Max Schrems against Facebook. In its decision C-311/18 of 16 July 2020 the CJEU invalidated the EU-US Privacy Shield. The Swiss Federal Data Protection Commissioner has already started to examine the judgment. It is likely that Swiss companies may no longer rely on the Swiss-US Privacy Shield for data transfers from Switzerland to the US. Swiss employers who engage affiliates or third parties abroad with, for example, expense accounting, issuance of pay slips or the maintenance of employee directories are advised to promptly examine how employee data may be transferred to third countries in compliance with data protection law in the future.

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The Shrems II decision

In its decision C-311/18 of 16 July 2020, the CJEU invalidated the EU-US Privacy Shield with immediate effect. Until now, the EU-US Privacy Shield guaranteed an adequate level of data protection (i.e., a level comparable to the General Data Protection Regulation ("GDPR")) according to the adequacy decision of the EU Commission of 12 July 2016. Art. 45(1) GDPR legalized data transfers from the EU to any US corporation self-certified under the Privacy Shield. Yet, the CJEU now reasoned that no adequate protection was offered to personal data of EU citizens due to the broad surveillance of personal data by US public authorities (e.g. NSA, FBI, CIA) and the lack of sufficient remedies.

The Standard Contractual Clauses of the European Union, however, remain valid. A transfer of personal data outside the EU based on these clauses remains admissible according to art. 46(2)(c) GDPR. The CJEU stated that the exporting controller or processor is bound to verify on a case-by-case basis whether the law of the destination country ensures adequate protection. Where necessary, the controller or processor is required to provide additional safeguards to ensure an adequate protection. In case such additional contractual measures are not able to ensure such protection, the controller or processor is required to suspend or end the transfer of personal data. Thus, the Standard Contractual Clauses remain valid, but given they do not necessarily meet the required protection standard any more, the term "standard" may no longer be appropriate.

Implications for Switzerland

Swiss-US Privacy Shield. Switzerland likewise entered into a Swiss-US Privacy Shield regulating transatlantic exchanges of personal data from Switzerland to the US. The Swiss-US Privacy Shield mirrors the EU-US Privacy Shield to a great extent. Based on the Swiss-US Privacy Shield, the Swiss Data Protection and Information Commissioner ("FDPIC") deemed self-certified US corporations ensured an adequate level of data protection. Consequently, the FDPIC amended the state list (in German and published in accordance to art. 7 Federal Data Protection Ordinance ("FDPO")) in favor of these self-certified US corporations. The transfer of employee data from Switzerland to a US corporation self-certified (for such employee data) under the Swiss-US Privacy Shield was, accordingly, lawful under art. 6(1) Federal Data Protection Act ("FDPA"), provided the recipient of the data recognizes the FDPIC as its regulatory authority.

In light thereof, the question arises what the implications of the CJEU's decision are for Swiss employers. First of all, the Swiss-US Privacy Shield is (legally) not invalidated by the CJEU's decision. Yet the FDPIC is expected to amend its state list in view of the CJEU's decision. The FDPIC has been following the legal assessment of the CJEU in the past, irrespective of the

fact that the adequacy assessment differs (while the CJEU based its reasoning on the Charter of Fundamental Rights, the FDPIC's assessment will be based on the European Convention 108). In case the FDPIC qualifies the USA as a country with inadequate protection, data transfers to the USA that simply rely on the Swiss-US Privacy Shield are no longer necessarily legally permissible. Yet, the state list is only indicative. Accordingly, Swiss corporations exporting data may continue to rely on the Swiss-US Privacy Shield if they are of the opinion it ensures adequate protection in the given case. They may argue that the US authorities' surveillance measures referenced in the CJEU's decision primarily target cloud and software service providers (in contrast to employers that transfer employee data). In the case of employee data, the Privacy Shield may thus still be a valid legal ground for the transfer. In practice, however, US corporations will likely turn their backs on the Privacy Shields, presumably, because a data recipient will not feel bound by the Privacy Shield after Schrems II.

Standard Contractual Clauses. Swiss Employers can continue to rely on the Standard Contractual Clauses of the European Union that the FDPIC deemed to ensure "sufficient safeguards" for an "adequate level of protection abroad" (cf. art. 6(2)(a) FDPA). Against the CJEU's interpretation on how the Standard Contractual Clauses should be used, it is advisable for Swiss corporations not to blindly trust the Standard Contractual Clauses. It is important to note, however, that the CJEU did not focus on the surveillance of employee data, but on personal data of consumers. In most cases, the Standard Contractual Clauses will thus be sufficient for the transfer of employee data abroad.

Advisable steps

Swiss employers who only rely on the Swiss-US Privacy Shield for data transfers abroad should take the necessary steps in good time in order to mitigate the risk of an illegal data transfer and to base the transfer on Standard Contractual Clauses. In case Standard Contractual Clauses are already in place, their level of protection should be assessed and, where necessary, supplemented by additional contractual guarantees. We do not advise to abruptly end data transfers to the USA and do not expect such suspensions.

Records of processing activities. Corporations should, in line with the requirements set by the CJEU, assess and maintain a record of all data transfers under their responsibility, including all parties involved and the purpose of each transfer. This also applies to framework agreements on intragroup data transfer. Additionally, it should be assessed whether the US recipient takes sufficient technical and organizational measures to ensure an adequate level of security.

Supplements to the Standard Contractual Clauses. In case the Standard Contractual Clauses are inadequate, the controller/processor is required to supplement them by additional guarantees (art. 6(2)(a) FDPA). For example, the Swiss corporation and the US recipient may agree on a common approach for requests from US-authorities for the disclosure of personal data of Swiss citizens.

Consent / prevailing public interest. A transfer based on previous consent (art. 6(2)(b) FDPA) or a transfer essential to safeguard an overriding public interest (art. 6(2)(d) FDPA) remains legally valid, but will often not come into consideration in practice. A recourse to (where necessary, supplemented) Standard Contractual Clauses will generally be the better alternative.

Binding Corporate Rules. The revised Federal Data Protection Act (not yet in English and not yet in force) continues to recognize Binding Corporate Rules ("BCR") as a legal basis for data transfers abroad, provided these BCR have been approved by the FDPIC. Such BCR that also legalize a data transfer abroad under European law (art. 47 GDPR) are not directly affected by the CJEU's decision. Just as with the Standard Contractual Clauses, however, it should be assessed if the BCR ensure an adequate level of protection, in particular, regarding transfers to the USA.

Future developments. Swiss employers should closely follow the legal developments in the aftermath of Schrems II. The FDPIC declared he is assessing the CJEU's decision in detail and will comment it in due course. Moreover, the European Commission announced its intent to amend or supplement the Standard Contractual Clauses. We will keep you up to date, e.g. on datenrecht.ch (in German) or via this newsletter.

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