

PAUL
HASTINGS

RESPONSES TO THE DECISION IN CASE C-311/18 (SCHREMS II)

How Are Governments Reacting
To The Invalidation of Privacy Shield?



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DPA	Response	Source
Denmark	<ul style="list-style-type: none"> Acknowledged the decision and referred to the statement from the European Data Protection Board (discussed below). DPA will continue to monitor and provide updates on the decision. 	Click here
Estonia	<ul style="list-style-type: none"> Organisations relying on Privacy Shield need to review current transfers of personal data and consider implementing replacement mechanism to transfer affected personal data, including the SCCs. 	Click here
Finland	<ul style="list-style-type: none"> Acknowledged the decision and concluded to provide further information on the effects of the judgement in due course. 	Click here
France	<ul style="list-style-type: none"> Acknowledged the decision and confirmed it is currently conducting a precise analysis of the judgment. 	Click here
Germany – Berlin	<ul style="list-style-type: none"> Transfers of personal data to the U.S. are currently not possible since U.S. law does not provide for an adequate level of protection. Controllers who are subject to the supervision of the Berlin DPA are encouraged to switch immediately to service providers within the EU or a country providing an appropriate level of protection. 	Click here
Germany – Federal Commissioner for Data Protection and Freedom of Information (BfDI)	<ul style="list-style-type: none"> The decision has confirmed and strengthened the role of data protection supervisory authorities. Transfers of personal data to the U.S. are still possible subject to implementing the additional safeguards explained by the CJEU. Both companies and authorities as well as the supervisory authorities now have the complex task of practicing the judgment. The BfDI will make further comments in due course with the main focus being on the revision of the standard contractual clauses by the European Commission, as well as the need for the U.S. to ensure that the fundamental rights of the EU citizens are assimilated to those of U.S. nationals. 	Click here

DPA	Response	Source
Germany – Hamburg	<ul style="list-style-type: none"> • The decision by the CJEU is welcomed by the DPA as the improvements made by Privacy Shield to Safe Harbor (Privacy Shield’s predecessor which was also invalidated) were only marginal. No changes were made with respect to mass surveillance without cause and the rights of individuals were not substantially strengthened. • The DPA considers the decision to maintain the SCC as an appropriate instrument to be inconsistent when considering transfers to the U.S.. • The EDPB will have to evaluate the legal and factual situation in recipient countries (especially in the U.S. and third countries for which no adequacy decision has been made), taking into consideration data access by local authorities and effective legal remedies for data subjects. • The DPAs have a significant role to play in developing and implementing a common strategy. 	Click here
Germany – Rhineland-Palatinate	<ul style="list-style-type: none"> • The decision by the CJEU strengthens the rights of individuals. • Data transfers made using Privacy Shield are now illegal, and those organisations relying on Privacy Shield should immediately switch to another mechanism. If no other mechanism is available, the transfer must be suspended. • No “grace period” is being provided – transfers made using Privacy Shield have been illegal since the verdict. • SCCs are still an option to transfer personal data to the U.S. if used in compliance with the CJEU’s decision. • Proposes a five-step assessment for companies that wish to use SCCs: <ol style="list-style-type: none"> 1. Do I transfer data to countries outside of the EU/EEA? 2. If yes: Do I use SCCs for this third country data transfer? 3. If yes: Is the data importer in the third country, or one of its sub-contractors, subject to obligations that violate Article 7 or Article 8 of the Charter? 	Click here

DPA	Response	Source
Germany – Rhineland-Palatinate (cont.)	<ul style="list-style-type: none"> a) Generally the case for telecommunication companies in the U.S. because of FISA 702. b) Unencrypted data over transatlantic cables may be monitored in the U.S. according to Executive Order 12333. 4. If yes: Can an alternative transfer instrument be used in accordance with Chapter V GDPR or does Art. 49 GDPR apply? 5. If no: Data transfers to this recipient are no longer possible. • The DPA prepared a list of initial FAQs and confirmed it would provide a fuller understanding of the implications of the decision in due course. 	Click here
Germany – Thuringia	<ul style="list-style-type: none"> • The decision by the CJEU is welcomed by the DPA, in particular with respect to the shortcomings of the ombudsperson mechanism. • Deems it unlikely that it is still possible to legally transfer data to the U.S. using SCCs. • DPAs will need to increase their enforcement activities on this issue. 	Click here
Ireland	<ul style="list-style-type: none"> • The decision by the CJEU is welcomed by the DPA, noting that the judgment firmly endorses the substance of the concerns expressed by the DPA in the original proceedings. • The use of the SCCs to transfer personal data to the U.S. is “questionable”. This an issue that will require further examination. • Acknowledges the central role for supervisory authorities across the EU and looks forward to giving the judgment meaningful and practical effect. 	Click here
Liechtenstein	<ul style="list-style-type: none"> • Data transfers made using Privacy Shield are no longer permitted, and those organisations relying on Privacy Shield should immediately switch to another mechanism. • The DPA refers the possibility of a replacement agreement between the U.S. and the EU Commission relating to data transfers. • The DPA is in the process of analysing the decision and its consequences for data transfers to third countries and will publish further instructions on this shortly. 	Click here

DPA	Response	Source
Lithuania	<ul style="list-style-type: none"> Acknowledged the decision and concluded to provide further information on the effects of the judgement in due course. 	Click here
Luxembourg	<ul style="list-style-type: none"> Acknowledged the decision and concluded to provide further information on the effects of the judgement in due course. In doing so, the DPA will work closely with its counterparts across the EU. 	Click here
The Netherlands	<ul style="list-style-type: none"> Organisations currently relying on Privacy Shield must consider what other mechanisms may be used to transfer personal data to the U.S. Currently examining the practical consequences of the decision and next steps within the EDPB. 	Click here
Norway	<ul style="list-style-type: none"> Organisations currently relying on Privacy Shield must consider what other mechanisms may be used to transfer personal data to the U.S. The DPA will, in collaboration with other DPAs, provide further guidance on how companies can comply with the decision. 	Click here
Poland	<ul style="list-style-type: none"> The DPA underlines the necessity of a “coherent approach” to the assessment of the consequences of the CJEU decision throughout the EU and the necessity of joint actions in this respect by national supervisory authorities cooperating within the EDPB, in which the DPA is involved. 	Click here
Romania	<ul style="list-style-type: none"> Organisations currently relying on Privacy Shield must consider what other mechanisms may be used to transfer personal data to the U.S. SCCs are still a valid mechanism for transferring personal data to the U.S. 	Click here
Slovenia	<ul style="list-style-type: none"> Organisations currently relying on Privacy Shield must ensure that an alternative transfer mechanism is implemented as soon as possible to transfer personal data to the U.S. If this is not possible, personal data must not be transferred to the U.S. 	Click here

DPA	Response	Source
Spain	<ul style="list-style-type: none"> The DPA indicates the importance of the CJEU decision regarding the fundamental right of data protection, particularly in the framework of international transfers to third countries. The DPA will continue to work together with the other the DPAs on a harmonized response at an EU level and will participate in the work carried out to adopt a common approach, thus guaranteeing a consistent application of the judgment in all the countries of the EU. 	Click here
Sweden	<ul style="list-style-type: none"> Transfers of personal data pursuant to Privacy Shield are no longer allowed. 	Click here
United Kingdom	<ul style="list-style-type: none"> Acknowledged the decision and concluded to provide further information on the effects of the judgement in due course. Those organisations currently using Privacy Shield can continue to do so until new guidance becomes available. 	Click here - Statement Click here - Privacy Shield

Other Body	Response	Source
European Commission	<ul style="list-style-type: none"> • The Commissions welcomes the decision as “valuable guidance”, with Commission Reynders confirming the validity of the SCCs. • The Commission “will continue our work to ensure the continuity of safe data flows” in line with the CJEU’s decision, in full respect of the EU law and in line with the fundamental rights of the citizens. • It is essential to have a “broad toolbox” for international transfers. • The Commission has already been working “intensively” to ensure that this toolbox is fit for purpose, including the modernisation of the SCCs. • Priorities of the Commission are: <ol style="list-style-type: none"> 1. Guaranteeing the protection of personal data transferred across the Atlantic. 2. Working constructively with U.S. counterparts with an aim of ensuring safe transatlantic data flows. 3. Working with the EDPB and national DPAs to ensure our international data transfer toolbox is fit for purpose. 	Click here
European Data Protection Board (EDPB)	<ul style="list-style-type: none"> • The EDPB welcomes the CJEU’s decision as it highlights the right to privacy in the context of the transfer of personal data to third countries, and is “one of great importance”. • The EDPB notes that it previously questioned Privacy Shield in its reports. • With respect to the assessment of whether the countries which data are sent offer adequate protection, the EDPB states that the exporter shall take into consideration the content of the SCCs, the specific circumstances of the transfer, as well as the legal regime applicable in the importer’s country. The examination of the latter shall be done in light of the non-exhaustive factors set out under Art 45(2) GDPR. • The EDPB is looking further into what the additional measures could consist of. 	Click here

Other Body	Response	Source
European Data Protection Supervisor (EDPS)	<ul style="list-style-type: none"> • The EDPS welcomes the CJEU's decision as it reaffirmed the importance of maintaining a high level of protection of personal data transferred from the EU to third countries. • DPAs have the duty to diligently enforce the applicable data protection legislation and, where appropriate, to suspend or prohibit transfers of data to a third country. • As the supervisory authority of the EU institutions, bodies, offices and agencies, the EDPS is carefully analysing the consequences of the judgment on the contracts concluded by EU institutions, bodies, offices and agencies. 	Click here
U.S. Department of Commerce	<ul style="list-style-type: none"> • The U.S. Department of Commerce will continue to administer the Privacy Shield program, including processing submissions for self-certification and re-certification to the Privacy Shield Frameworks and maintaining the Privacy Shield List. 	Click here

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