

New adequacy decision for the USA - free pass for data transfer across the Atlantic?

On July 10, 2023, the European Commission presented a new adequacy decision for the transfer of personal data to the United States ("EU-US Data Privacy Framework"). After the European Court of Justice (ECJ) declared the previous decision ("Privacy Shield") invalid at the initiative of Austrian lawyer Max Schrems in July 2020, a data transfer on the basis of an adequacy decision pursuant to Art. 45 GDPR is now possible in principle.

The ECJ criticized at the time in particular the far-reaching possibilities for U.S. authorities to access personal data and the lack of a judicial supervisory authority. The Commission has now addressed these concerns by limiting access by U.S. authorities to necessary and proportionate cases and by providing for the establishment of a court, the so-called Data Protection Review Court.

The adequacy decision applies to transfers to US companies that have had their participation in the EU-US Data Privacy Framework certified. At this point in time, almost two and a half thousand companies in the USA are already participating, including large companies such as Google, Microsoft and Amazon.

For European companies, the new adequacy decision remedies the considerable legal uncertainties that have existed to date in connection with the transfer of data to the USA (an everyday occurrence for many companies). Companies can now again rely on the Commission's assessment that the U.S. ensures an adequate level of data protection for the transfer. This means that recourse to the standard contractual clauses that have been widely used in recent years is no longer necessary.

However, it is uncertain whether the ECJ will also consider the new adequacy decision to be sufficient and whether the data transfer can take place on a legally secure basis in the long term. Criticism has already been voiced in the political arena that the decision is still not sufficient to ensure secure data processing and that particularly, there is still a risk of mass surveillance by security authorities in the U.S. Mr. Schrems has also already announced that he will have the new decision judicially reviewed for its legality.

For the moment, however, companies can trust in the effectiveness of this decision. Nevertheless, each individual processing operation must be reviewed for its legality. In the case of data transfer to third countries, in particular, the question of necessity for the specific processing purposes must always be taken into account.

SNB will be happy to assist you with any questions regarding this topic and any other data protection issues.