



## LEGAL UPDATE

Harlay Avocats | July 2020 | Newsletter N°71

### The CJEU cancels the Privacy Shield but validates the use of standard contractual clauses

In its ruling no.C-311/18 dated 16 July 2020, the CJEU invalidates the **Privacy Shield**, on the grounds that the US law applicable to national security and the public interest allows the protection of the **Privacy Shield** to be set aside and all personal data transferred to be retained without differentiation, limitation or exception. In particular, the implementation of an ombudsman by the **Privacy Shield** does not ensure an effective procedure of appeal, due to its lack of independence and to the its decisions are not binding on the US services.

This decision is of applicable immediately: the CJEU states that transfers initially covered by the **Privacy Shield** can only continue if they can be covered by one of the exceptions in Article 49 of the GDR. On the other hand, the ruling validates the use of the European Commission's standard contractual clauses, which offer greater safeguards than the **Privacy Shield**.

In addition, the CJEU clarifies the obligations for data controllers and data recipients: not only must they secure the transfer to a third country with appropriate safeguards in line with the GDPR but they must actually ensure that the legislation of said third country allows the data recipient to comply with the safeguards selected, whether these are standard contractual clauses or decisions such as the **Privacy Shield**.

If the applicable law of the third country seems insufficient, companies may add additional measures to the selected safeguards. Alternatively and following a data subject's complaint, the supervisory authorities may carry out such an examination themselves and (i) either suspend or interrupt the transfer based on the standard contractual clauses, or (ii) ask the CJEU to do so for a decision such as the **Privacy Shield**.

Companies that have entered into contracts providing for transfers to the United States under the **Privacy Shield** must therefore verify the lawfulness of their transfers, either by going through the exceptions of Article 49 of the PGRD, or by changing guarantees (for example, through the implementation of a contractual agreement based on the standard contractual clauses) or providers.

\* \* \*

For further information or if you have any questions, feel free to contact Fabrice Perbost, Partner, at [fperbost@harlaylaw.com](mailto:fperbost@harlaylaw.com) or Sabine Lipovetsky, Partner, at [slipovetsky@harlaylaw.com](mailto:slipovetsky@harlaylaw.com).



**Harlay Avocats**