

Legal admissibility and practical possibilities of data transfers to third countries

Jana Klauke

Band 36

FH Bielefeld
University of
Applied Sciences

Legal admissibility and practical possibilities of data transfers to third countries

Masterarbeit vorgelegt von Jana Klauke

Matrikelnummer: 1093526

Angefertigt im Studiengang Wirtschaftsrecht Vertragsgestaltung

an der Fachhochschule Bielefeld

Fachbereich Wirtschaft

Sommersemester 2021

Erstprüferin oder Erstprüfer: Prof. Dr. jur. Christiane Nitschke

Zweitprüferin oder Zweitprüfer: Prof. Dr. jur. Axel Benning

Bielefelder Schriften zur wirtschaftsrechtlichen Praxis

herausgegeben vom
Fachbereich Wirtschaft und Gesundheit
der Fachhochschule Bielefeld
Prof. Dr. Axel Benning

Band 36

Jana Klauke

**Legal admissibility and practical possibilities
of data transfers to third countries**

Shaker Verlag
Düren 2021

Bibliographic information published by the Deutsche Nationalbibliothek

Die Deutsche Bibliothek lists this publication in the Deutsche
Nationalbibliografie; detailed bibliographic data are available in the internet at
<http://dnb.d-nb.de>.

Copyright Shaker Verlag 2021

All rights reserved. No part of this publication may be reproduced, stored in a
retrieval system, or transmitted, in any form or by any means, electronic,
mechanical, photocopying, recording or otherwise, without the prior permission
of the publishers.

Printed in Germany.

ISBN 978-3-8440-8246-3

ISSN 1860-3882

Shaker Verlag GmbH • Am Langen Graben 15a • 52353 Düren

Phone: 0049/2421/99011-0 • Telefax: 0049/2421/99011-9

Internet: www.shaker.de • e-mail: info@shaker.de

Foreword by the editor

The master's degree program (LL.M.) in Business Law Contract Drafting at the Department of Economics at Bielefeld University of Applied Sciences is largely oriented to requirements of practice. The students are qualified to draft and negotiate business contracts. Legal support in the drafting and processing of contracts is one of the central tasks of corporate lawyers.

This series of publications was brought into being in order to intensify the exchange between the university on the one hand and practice on the other. In addition, students who have written an excellent master's thesis should be given the opportunity to communicate their innovative and creative thoughts to a wider public. Finally, with the publication series, the department would like to thank the students for their particularly outstanding achievements and motivate future generations to also complete their studies with good results.

Jana Klaukes work was supervised by Prof. Dr. Christiane Nitschke as the first reviewer and me as the second reviewer.

Bielefeld, September 2021

Prof. Dr. Axel Benning
Editor

Inhaltsverzeichnis

Inhaltsverzeichnis.....	I
Abkürzungsverzeichnis.....	III
A. Introduction	1
B. Data protection in the European Union.....	3
I. Principles.....	3
II. The scope of the GDPR	3
III. Controller pursuant to Art. 4 (7) GDPR.....	5
IV. Processor pursuant to Art. 4 (8) GDPR	5
C. Chapter 5	5
I. Principles.....	5
1. Distinction from Art. 3 (2) GDPR.....	6
2. International data transfers and the Charter of the Fundamental Rights	6
3. Definition third country	7
4. Definition data transfer	7
II. Two-step approach.....	8
1. 1st step: other provisions of this Regulation	8
2. 2nd step: conditions from Chapter 5.....	9
III. Adequacy decision according to Art. 45 GDPR	9
1. Adequacy requirements.....	10
a) Art. 45 (2) (a) GDPR	10
b) Art. 45 (2) (b) GDPR	10
c) Art. 45 (2) (c) GDPR	11
2. Monitoring and reviewing of the level of data protection	11
3. Legal consequences.....	12
4. Adequacy decisions with the United States	12
IV. Standard data protection clauses pursuant to Art. 46 (2) (c) GDPR.....	13
1. Principles	14
2. Types of standard contractual clauses	15
3. Impact of Schrems II on standard data protection clauses	15
a) 3rd step of the two-step approach	16
aa) Know your transfers and data mapping.....	17
bb) Search for alternatives	18
cc) Audit of the guarantees used	18
dd) Evaluation of the legal situation in the third country	18
ee) Implementation of supplementary measures	21
ff) Undertaking further procedural steps	22

Inhaltsverzeichnis

gg) Regular monitoring	23
b) Examples for supplementary measures	23
aa) Technical measures	23
bb) Contractual measures	25
cc) Organizational measures	26
4. New draft of the standard data protection clauses	27
5. Standard data protection clauses for data transfers to the US	29
a) Data protection law in den US	29
b) Schrems II	32
c) CLOUD Act	32
d) Case-by-case examination	33
e) Supplementary measures	34
V. Different standards for the level of data protection	35
VI. Personal comment and criticism	36
VII. Further appropriate safeguards according to Art. 46 GDPR	38
D. Art. 49 GDPR	38
I. Consent pursuant to Art. 49 (1) (a) GDPR	39
a) Explicitness	39
b) Informedness	40
II. Consent as a means of lawful data transfer	40
III. Consent and Google Analytics	41
E. Cloud computing	43
F. Data transfers and the Brexit	50
G. Information obligation and right of access	52
H. Infringement of Chapter 5	52
I. Conclusion	53
Literaturverzeichnis	V
Rechtsprechungsverzeichnis	XI
Internetquellen	XII