

Miguel de Serpa Soares
Under-Secretary-General for Legal Affairs and United Nations Legal Counsel
United Nations
N.Y. 10017
United States

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Dear Mr. de Serpa Soares,

Thank you for the constructive discussion in Brussels last February and your follow-up letters of 26 February 2020 and of 14 May 2020, by which you also provided comments on the “Guidelines 2/2020” referred to as “Guidelines on Articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies”. These comments provide valuable input for the further work of the European Data Protection Board on these guidelines.

Let me note that in the "Non-Paper (point (3))" accompanying your letter of 26 February 2020, reference is made to the explanations given by the European Commission in its letter dating from 3 July 2018 on the privileges and immunities of international organisations. In its guidance¹, the European Data Protection Board has also clarified that the application of the GDPR is without prejudice to the provisions of international law, such as the ones governing the privileges and immunities of international organisations. At the same time, this guidance highlights that entities subject to the GDPR that exchange personal data with international organisations have to comply with the GDPR, including its rules on international transfers (Chapter V of the GDPR).

As a preliminary observation, the European Data Protection Board notes that, indeed, pursuant to Article 45 GDPR, transfers from the EEA to a third country or an international organisation can take place where the third country or the international organisation ensures a level of protection considered adequate by the European Commission. Such a finding is based on a comprehensive assessment by the European Commission which takes into account a number of elements, e.g. the legal data protection framework of such a third country or international organisation as a whole, in order to determine if that third country or international organisation ensures a level of protection essentially equivalent to that ensured within the European Union. Whilst this assessment focuses on different elements, such as the substantive privacy rules and individual rights provided by the legal system of the third country or international organisation, as well as their effective implementation, the main purpose of this assessment is, *inter alia*, to verify that effective independent data protection supervision and enforceable rights and effective legal remedies for data subjects are provided by the

¹ Guidelines 3/2018 on the territorial scope of the GDPR (Article 3), p.23.

third country or international organisation², it does not mean that, in practice, those have to be provided in the same way as they are in under the GDPR.

The European Data Protection Board has already issued guidance on several other instruments for international transfers, which is also relevant for data transfers to international organisations. For example, transfers to United Nations System Organisations from EU public bodies subject to the GDPR can be performed relying in particular on a legally binding and enforceable instrument under Article 46 (2) (a) or on administrative arrangements under Article 46 (3) (b) of the GDPR. On this issue, the EDPB has, as you know, issued draft Guidelines³, which can provide useful clarifications also having regard to transfers to United Nations organisations. These guidelines, for instance, recognise that certain safeguards, e.g. ensuring judicial redress or independent oversight through external bodies, may not be available for international organisations and provide examples of possible alternative mechanisms that could be developed.⁴ The guidelines will now be finalised following the public consultation.

Useful clarifications on international transfers have also been provided by the European Data Protection Board in the Guidelines on derogations pursuant to Article 49 of the GDPR⁵, which clarify e.g. when personal data may be transferred in specific situations if necessary for important reasons of public interest.⁶ This may, for instance, be the case if there is an international agreement to which the EU or its Member States are a party that recognises a certain objective and provides for international cooperation to foster that objective.

With respect to exchanges of data with service providers in the EU, to which your letter specifically refers, I would also like to point to the clarifications already provided by the European Data Protection Board. In particular, the guidelines on the territorial scope of the GDPR clarify the specific (and limited) obligations of service providers established in the EU that carry out processing on behalf of an entity that is not subject to the GDPR.⁷

At the same time, I understand that certain questions remain. I would, therefore, like to inform you that the European Data Protection Board will explore ways to further clarify how the rules on international transfers under the GDPR apply when personal data is transferred to international organisations. Please note that this may require some time due to the judgment of the Court of Justice of the European Union in case C-311/18 (*Schrems II*) issued on 16 July 2020. As you have probably

² See recital 104 GDPR.

³ Guidelines 2/2020 on Articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies.

⁴ Guidelines 2/2020 on Articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies - version for public consultation, p. 11 (para 47) referring to judicial redress and p.12 (para 57) referring to oversight mechanism.

⁵ Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, as adopted by the European Data Protection Board on 25 May 2018.

⁶ Guidelines 2/2018 on derogations of Article 49, p. 10 et. seq.

⁷ Guidelines 3/2018 on the territorial scope of the GDPR (Article 3), p.12 et seq.

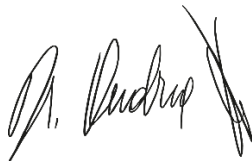
noted, the European Data Protection Board has started working on the follow-up of this judgment⁸, relevant for any transfer question, and will continue to do so in the upcoming months.

The Board is ready to engage with international organisations in this context.

The regular workshops with international organisations organised by the European Data Protection Supervisor, which next edition is scheduled for 8-9 October 2020, seem to be the appropriate venue to continue the discussions. United Nations representatives already took part to these workshops in the past and have already been invited to this edition.

The European Data Protection Board remains available to further engage with the United Nations System Organisations on our shared mission of protecting international human rights, including the right to privacy.

Yours sincerely,



Andrea Jelinek

⁸ See in particular FAQs on the judgment of the CJEU in case C-311/18, adopted on 23 July 2020.