

REFERENCE:

27 January 2022

Dear Ms. Jelinek,

**RE: Impact of the European Union's Data Protection Regulations on the Activities  
of UN System Organizations**

Thank you for your letter dated 18 November 2021 (Ref: OUT2021-00156), by which you refer to the ongoing dialogue between the United Nations and the European Data Protection Board on the impact of European Union data protection law on the activities of United Nations System Organizations. In your letter, you welcomed the continued participation of representatives of United Nations System Organizations to the Task Force on transfers to international organizations established by the European Data Protection Supervisor, and you welcomed the suggestion that the European Data Protection Board consider addressing the situation of all transfers to United Nations System Organizations in a specific set of guidelines.

In relation to the work of the Task Force, we concur with your assessment that it has been useful as an informal venue for exchange on issues arising in the context of transfers to international organizations, notably from European Union institutions. We look forward to continuing our participation in the Task Force. We would note that, even within the limited scope of transfers from European Union institutions, a one-size-fits-all approach may not be viable given the wide array of possible situations and subjects involved in such transfers. Any envisaged solutions must respect the status, as well as the privileges and immunities of United Nations System Organizations and be compatible with the essential elements of their administrative law.

With respect to the larger issue of transfers to international organizations by parties other than European Union institutions, I am grateful for your remark that consideration will be given by the Board as to the possibility of adopting a set of

Ms. Andrea Jelinek  
Chair  
European Data Protection Board  
Brussels

guidelines concerning specifically the situation of United Nations System Organizations. In that regard, United Nations System Organizations stand ready to participate in any informal initiative you may wish to organize so that such a set of guidelines may prove useful to address the issues that United Nations System Organizations continue to face.

In the spirit of continuing our constructive cooperation, I also take this opportunity to enclose a set of comments that are hereby submitted by the United Nations Secretariat on behalf of United Nations System Organizations in the context of the public consultations on Guidelines 5/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR that were adopted by the Board on 18 November 2021. These comments are intended to be read together with the submission that was made on 14 May 2020 on behalf of United Nations System Organizations in the context of public consultations on Guidelines 2/2020.

I would be most grateful if the enclosed submission could be brought to the attention of Members of the European Data Protection Board and made public on the website of the European Data Protection Board.

A copy of this letter and of the submission will be sent to the following officials of the European Commission: Ms. Ana Gallego, Director-General, Directorate-General Justice and Consumers and Mr. Daniel Calleja Crespo, Director-General, Legal Service.

I look forward to continuing our essential dialogue.

Yours sincerely,



Miguel de Serpa Soares  
Under-Secretary-General for Legal Affairs  
and United Nations Legal Counsel

**Comments of the United Nations Secretariat on behalf of the United Nations System Organizations on the “Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR” adopted by the European Data Protection Board on 18 November 2021**

**27 January 2022**

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## **1. Introduction**

1. On 14 May 2020, the United Nations Secretariat submitted comments on behalf of United Nations System Organizations to the “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” that had been adopted by the Board on 18 January 2020.<sup>1</sup> On that occasion, United Nations System Organizations took the opportunity to address in general terms the legal and practical issues faced by such Organizations in relation to the transfer of personal data between United Nations System Organizations and any third party that deems itself bound by the General Data Protection Regulation of the European Union adopted in 2016 (“General Data Protection Regulation” or “GDPR” hereinafter)<sup>2</sup> and by other instruments of European Union data protection law.<sup>3</sup>

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<sup>1</sup> See the Letter from Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Ms. Andrea Jelinek, Chair, European Data Protection Board, RE: Impact of the European Union’s Data Protection Regulations on the Activities of UN System Organizations, 14 May 2020, available at [https://edpb.europa.eu/sites/default/files/webform/public\\_consultation\\_reply/2020.05.14\\_letter\\_to\\_edpb\\_chair\\_with\\_un\\_comments\\_on\\_guidelines\\_2-2020.pdf](https://edpb.europa.eu/sites/default/files/webform/public_consultation_reply/2020.05.14_letter_to_edpb_chair_with_un_comments_on_guidelines_2-2020.pdf).

<sup>2</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

<sup>3</sup> See e.g. Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA; and Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC.

2. Despite the ongoing constructive dialogue with the European Union, the issues faced by United Nations System Organizations have unfortunately not yet been resolved. In that regard, the comments submitted in May 2020 must be deemed to be hereby restated in full. At this juncture, the United Nations Secretariat is further pleased to provide, on behalf of United Nations System Organizations, some brief general comments in relation to the “Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR” that were adopted by the European Data Protection Board on 18 November 2021 and opened for public consultation. The comments below are provided in the spirit of maintaining a constructive dialogue with the European Data Protection Board and without prejudice to the legal position of United Nations System Organizations on this or any other instrument or guideline on which United Nations System Organizations may or may not similarly provide or have provided comments.

## **2. The overarching legal position of United Nations System Organizations**

3. The overarching legal position of United Nations System Organizations in relation to European Union data protection law was articulated in detail in the May 2020 memorandum mentioned above.<sup>4</sup> For ease of reference, it may be recapitulated as follows.

4. All United Nations System Organizations activities are based on the Charter of the United Nations, their respective constitutive instruments, the internal regulations, rules, and procedures adopted by virtue of such instruments, and the mandates received from their Member States from all regions of the world, coming together in these Organizations’ intergovernmental organs. Since their establishment, United Nations System Organizations have had among their key purposes and guiding principles the promotion, protection of, and respect for human rights, including the right to privacy.

5. Over the years, United Nations System Organizations have adopted internal regulations, rules, and procedures on the protection of personal data, in conformity with the Charter of the United Nations and their respective constituent instruments. As a matter of law, it is only such internal regulatory frameworks that may apply to the handling of data by United Nations System Organizations. An external regulatory framework, such as that arising from European Union data protection law, may not be imposed, directly or indirectly, on the activities of United Nations System Organizations. Under international law, several obligations exist, both under the Charter of the United Nations and under other international agreements, that require States not to interfere with the governance of United Nations System Organizations by seeking to regulate their internal workings outside of the established intergovernmental processes intended to do so.

6. Furthermore, as part of the “archives” and “documents” of these Organizations, all data processed by or on behalf of United Nations System Organizations fall under the category of their

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<sup>4</sup> See above fn. 1, pp. 7-18.

“property and assets”, and they are therefore immune from any form of interference, including by legislative action. All data transfers between such Organizations and their vendors or implementing partners must equally be free from such legislative interference. This is a result of the privileges and immunities of United Nations System Organizations, which are enshrined in the Charter (Article 105), in their respective constitutive instruments, in the Conventions on the Privileges and Immunities of the United Nations and of its Specialised Agencies,<sup>5</sup> and in other bilateral and multilateral treaties.<sup>6</sup>

7. While the exact formulation of such privileges and immunities provisions may slightly differ among the various instruments that are applicable to each United Nations System Organization, these provisions must generally be interpreted as exempting all data processed by or on behalf of United Nations System Organizations, wherever located and by whomsoever held, from any type of search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action. In addition, such Organizations usually enjoy immunity from every form of legal process, and all their archives and documents are inviolable wherever they may be located, including throughout the territory of the European Union.

8. Although the European Union acknowledged that European Union data protection law does not apply, directly and as such, to United Nations System Organizations,<sup>7</sup> several challenging issues have arisen because of the attempted indirect application of European Union data protection law to United Nations System Organizations by third parties coming into relation with such Organizations. Such third parties often deem themselves obliged, under European Union law, to ensure that the provisions of European Union data protection law are in fact also applied by United Nations System Organizations. This amounts to an attempted indirect regulation of the activities of United Nations System Organizations.

9. To the extent that the General Data Protection Regulation is interpreted as seeking to indirectly regulate the handling of data by United Nations System Organizations, such legislative interference would be incompatible with the obligations of European Union Member States under the relevant provisions of international law governing such immunities. In the case of the

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<sup>5</sup> Convention on the Privileges and Immunities of the United Nations (1946), United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1); Convention on the Privileges and Immunities of the Specialized Agencies (1947), United Nations, *Treaty Series*, vol. 33, p. 261.

<sup>6</sup> See e.g. Privileges and Immunities Agreement of the International Atomic Energy Agency, adopted by its Board of Governors on 1 July 1959, available at <https://www.iaea.org/sites/default/files/publications/documents/infcircs/1959/infcirc9.pdf>.

<sup>7</sup> Note Verbale 2018/56 from the European Union Delegation to the United Nations to the United Nations Office of Legal Affairs, 3 July 2018. See also: Summary Record of 15th meeting of the Asylum, Migration and Integration and Internal Security Funds Committee of 5 February 2019, available at <https://ec.europa.eu/transparency/comitology-register/screen/documents/061562/1/consult?lang=en>, p. 7, as well as Guidelines 3/2018 on the territorial scope of the General Data Protection Regulation (Article 3), as adopted by the European Data Protection Board after public consultation on 12 November 2019, p. 23.

United Nations, as well as all its funds and programmes, such interference would run counter to Article 105 of the Charter. Under Article 103 of the Charter, obligations under the Charter must prevail over obligations of Member States under any other international agreements, including the European Union Treaties.

10. In light of the above, the General Data Protection Regulation must instead be interpreted and applied in a manner that is compatible with the privileges and immunities of United Nations System Organizations, thereby reducing the possible confusion that may arise for third parties attempting to indirectly apply its provisions to United Nations System Organizations.

11. In their important role in adopting guidelines on the interpretation of the General Data Protection Regulation and other relevant instruments, the European Data Protection Board and all Data Protection Authorities in the European Union **are urged to espouse interpretations of European Union data protection law that fully comply with the privileges and immunities of United Nations System Organizations.**

### 3. General comments on Guidelines 05/2021 and proposed way forward

12. The privileges and immunities of United Nations System Organizations appear to be undermined by the conflation, in the current draft of Guidelines 05/2021, of their status with that of private entities in a third country. By their own terms, Guidelines 5/2021 seek to clarify the interplay between Article 3 of the GDPR and Chapter V thereof on international transfers “in order to assist controllers and processors in the EU in identifying whether a processing constitutes a transfer to a third country or to an international organisation”.<sup>8</sup> Inasmuch as it purports to relate to United Nations Systems Organizations, this objective suffers from a fundamental flaw. As the processing of data by United Nations System Organizations is clearly beyond the purview of the application of “Member State law... by virtue of public international law” as is recognized under Article 3(3) of the GDPR, neither Article 3(2), nor Article 3(3), nor any other provision of the GDPR can validly purport to regulate the processing of personal data by United Nations System Organizations. As already acknowledged by the Commission,<sup>9</sup> the GDPR does not apply to United Nations System Organizations and, as such, it would follow that there is no risk of confusion between Chapter V and Article 3 of the GDPR in relation to United Nations System Organizations. As further evidence of such a fundamental flaw, the current version of the Guidelines appears to treat international organizations at times as if they were akin to States (as Chapter V of the GDPR envisages), and at other times as if they were controllers (or even processors) located in third States

<sup>8</sup> “Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR”, adopted by the European Data Protection Board on 18 November 2021, para. 4.

<sup>9</sup> Note Verbale 2018/56 from the European Union Delegation to the United Nations to the United Nations Office of Legal Affairs, 3 July 2018. See also Guidelines 3/2018 on the territorial scope of the General Data Protection Regulation (Article 3), as adopted by the European Data Protection Board after public consultation on 12 November 2019, p. 23.

(for example, in part 2.3). International organizations should never be construed or treated as entities established in a third State. Thus, to avoid any unintentional ambiguity on this matter, the scope of Guidelines 5/2021 should specifically exclude transfers concerning United Nations System Organizations, or international organizations generally. The situation of United Nations System Organizations should be addressed in the comprehensive guidelines discussed below. Alternatively, Guidelines 5/2021 could explicitly be limited to entities in third States only.

13. Additionally, it should be noted that Guidelines 5/2021 may mistakenly be interpreted by third parties as mandating the application of Chapter V of the GDPR in relation to the processing of data carried out on behalf of United Nations System Organizations by third parties in the territory of the European Union. According to “Example 3” at paragraph 13, the re-transmission of data after processing in the European Union on behalf of an entity in a third country would constitute a transfer to which Chapter V of the GDPR would apply. If such an interpretation of Chapter V were extended to international organizations, and international organizations were to be erroneously treated as ‘entities in a third country’, it would further lend credit to the idea that processors acting on behalf of United Nations System Organizations would be subject to the whole gamut of Chapter V of the GDPR in relation to processing of data on behalf of international organizations. This would lead to such processors presuming to be obliged, under European Union law, to make invasive inquiries or attempt to impose European Union data protection law obligations concerning the processing of data by United Nations System Organizations prior to transferring data to them. Such an interpretation of the GDPR would clearly run counter to the privileges and immunities of United Nations System Organizations. As mentioned above, all data transfers between such Organizations and their vendors or implementing partners must be free from any executive, administrative, judicial or legislative interference.

14. In particular, for example, paragraph 23 of Guidelines 5/2021 appears to imply that more protection and safeguards are needed if a controller is not subject to the GDPR for a given processing, as is the case for United Nations System Organizations. Without a specific carve out for United Nations System Organizations in light of their privileges and immunities, such an implication would also exacerbate the practical problems faced by United Nations System Organizations in recent years.

15. As a possible way forward, it is suggested that it would first be important for Guidelines 5/2021 to **reiterate the basic principle that the GDPR does not apply to United Nations System Organizations and that, as already previously recognized by the European Data Protection Board, “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”**.<sup>10</sup>

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<sup>10</sup> Guidelines 3/2018 on the territorial scope of the General Data Protection Regulation (Article 3), as adopted by the European Data Protection Board after public consultation on 12 November 2019, p. 23.

16. Second, the European Data Protection Board is urged to either limit the scope of **Guidelines 5/2021 solely to the processing of data by entities in third States, or, at the very least, to explicitly exclude the question of transfers concerning United Nations System Organizations (or all international organisations) from the scope of the guidelines.**

17. Third, the suggestion is reiterated here that **a set of comprehensive and overarching guidelines be adopted by the European Data Protection Board addressing specifically the situation of United Nations System Organizations.** Such guidelines should recognize the regulatory framework of United Nations System Organizations governing the processing of data, including data protection and privacy, and, at a minimum:

(a) clarify that European Union institutions and European Union Member States will interpret the GDPR in conformity with their obligations under international law and the status of United Nations System Organizations, including the privileges and immunities of United Nations System Organizations;

(b) clarify that the GDPR is not applicable to nor enforceable (even indirectly) against United Nations System Organizations, nor its data wherever located and by whomsoever held, including at the origin and in transit;

(c) give third parties, including partners and vendors of United Nations System Organizations, assurances that when dealing with United Nations System Organizations, they would not be subject to the risk of sanctions or other enforcement measures when such transfers take place for the implementation of the mandates of United Nations System Organizations;

(d) concerning the possibility of using derogations as a legal basis for transfers, give public confirmation that, in case of transfers concerning United Nations System Organizations:

(i) there is no limit on how often transfers for important reasons of public interest can occur; and

(ii) transfers of data in furtherance of the mandates of United Nations System Organizations have per se been recognized by all of the Member States of the European Union as being for a public interest of the kind contemplated in the derogation.

(e) provide for an overarching resolution that ensures legal certainty and the effective and efficient discharge of mandated activities on the part of United Nations System Organizations.

18. United Nations System Organizations wish to underline the urgency of the issuance of such comprehensive guidelines once again, to avoid adverse implications on the mandated activities of United Nations System Organizations, including for vulnerable populations, and to ensure the uninterrupted flow of data between entities subject to the GDPR and United Nations System



Organizations. Indeed, it is simply unthinkable for data flows to be interrupted or delayed on account of this issue.

19. United Nations System Organizations look forward to continuing their constructive engagement with the European Union, including the European Commission and the European Data Protection Board, and are confident that United Nations System Organizations will be able to find a mutually acceptable way forward with our European partners in the near future.