

REFERENCE:

14 May 2020

Dear Ms. Jelinek,

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

Thank you once again for meeting with me and receiving my delegation during the plenary of the European Data Protection Board in February. As I mentioned in my letter to you dated 26 February 2020, I welcome your invitation to provide input on 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.

Please find enclosed a set of comments submitted by the United Nations Secretariat on behalf of United Nations System Organizations in the context of the public consultations on Guidelines 2/2020.

The uninterrupted flow of data between entities subject to the General Data Protection Regulation and United Nations System Organizations is vital to the discharge of the respective mandates of the European Union and of United Nations System Organizations. For the reasons indicated in the enclosed comments, United Nations System Organizations call on the European Data Protection Board to issue comprehensive guidelines specifically addressing the situation of United Nations System Organizations.

We propose that a working group in which United Nations System Organizations would participate be set up for the purpose of developing such specific and comprehensive guidelines. It is essential that an overarching resolution is achieved ensuring legal certainty and the effective and efficient discharge of mandated activities on the part of United Nations System Organizations.

Ms. Andrea Jelinek
Chair
European Data Protection Board
Brussels

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. I also plan to share it publicly.

A copy of this letter will be sent to the following officials of the European Commission: Ms. Salla Saastamoinen, Acting Director-General, Directorate-General Justice and Consumers and Mr. Luis Romero Requena, Director-General, Legal Service.

I look forward to continuing our dialogue in order to find mutually acceptable solutions to our data protection concerns.

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 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” adopted by the European Data Protection Board on 18 January 2020

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1. Introduction

1. The United Nations Secretariat was invited by the European Data Protection Board to provide comments 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” adopted by the Board on 18 January 2020.¹ These Guidelines relate to the implementation of the General Data Protection Regulation of the European Union adopted in 2016 (“General Data Protection Regulation” or “GDPR” hereinafter).²

¹ See 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, 26 February 2020.

² 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).

2. The United Nations Secretariat welcomes this opportunity to provide its comments to the Board on behalf of United Nations System Organizations. In fact, the views expressed below do not pertain solely to the Guidelines currently under development. They address, more generally, the legal and practical issues faced by United Nations System 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 and by other instruments of European Union data protection law.³ In this regard, the United Nations Secretariat notes that it had not been invited to comment on the Guidelines on the territorial scope of the General Data Protection Regulation,⁴ nor on the Guidelines on derogations under Article 49 of the General Data Protection Regulation,⁵ before their adoption by the Board. The comments below also relate to these Guidelines.

3. The United Nations and the European Union agree on the importance of international human rights law, including the right to privacy. As reflected in the Charter, the promotion and protection of human rights is a key purpose and guiding principle of the Organization.⁶ Human rights are one of the four basic pillars of the work of the United Nations, alongside peace and security, the rule of law, and development.⁷ Indeed, all of the core international human rights law instruments of universal application were developed under the auspices of the United Nations.⁸

³ 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.

⁴ 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.

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 Charter of the United Nations, Preamble and Articles 1, 13, 55, 62, 68 and 76.

⁷ Charter of the United Nations, Preamble.

⁸ The so-called International Bill of Human Rights comprises the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the Optional Protocol (1966) and Second Optional Protocol (aiming at the abolition of the death penalty, 1989) to the International Covenant on Civil and Political Rights, and the Optional Protocol to the Covenant on Economic, Social and Cultural Rights (2008). In addition, the core international human rights treaties include the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), the International Convention for the Protection of All Persons from Enforced Disappearance (2006), and the Convention on the Rights of Persons with Disabilities (2006), as well as their respective Optional Protocols.

4. The first recognition of the right to privacy in contemporary international human rights law was enshrined in Article 12 of the Universal Declaration of Human Rights. Subsequently, Article 17 of the 1966 International Covenant on Civil and Political Rights and Article 16 of the 1989 Convention on the Rights of the Child provided for specific rights not to be “subjected to arbitrary or unlawful interference with [one’s] privacy, family, home or correspondence”. The relevance of these rights in the digital sphere was recognized by the United Nations General Assembly as early as in 1989 and in 1990, when the Assembly adopted guidelines for Member States concerning the regulation of personal data files.⁹ The General Assembly continues to consider this issue actively.¹⁰

5. All United Nations System Organizations handle some degree of personal data in the carrying out of their diverse activities, all of which activities arise from mandates received from their respective Member States either through their constituent instruments or through decisions of their intergovernmental organs. A thematic, operation-oriented approach to data protection has emerged over time in light of the mandated activity for which each set of data is held. United Nations System Organizations have developed internal rules and policies that apply to the protection of data concerning, among others, their respective staff and other personnel (including military contingents and police in peace operations), vulnerable populations (such as refugees and migrants), vendors and other entities registered in the United Nations Global Marketplace, delegates and conference attendees, as well as individuals included in the United Nations Security Council Consolidated Sanctions List of those suspected of or involved in terrorism or the financial support thereof.¹¹

Numerous other international human rights law instruments have been adopted under the auspices of the United Nations: see <https://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>.

⁹ General Assembly resolution 44/132, Guidelines for the Regulation of Computerized Personal Data Files, 5 December 1989; and General Assembly resolution 45/95, Guidelines for the Regulation of Computerized Personal Data Files, 14 December 1990.

¹⁰ See General Assembly resolutions 68/167, 69/166, 71/199, and 73/179, The Right to Privacy in the Digital Age, 18 December 2013, 18 December 2014, 19 December 2016, and 17 December 2018, respectively. See also General Assembly resolution 2741/XXV, Electronic Data Processing in the Organizations of the United Nations System, 17 December 1970; General Assembly resolution 55/63, Combating the criminal misuse of information technologies, 4 December 2000; General Assembly resolution 58/199, Creation of a Global Culture of Cybersecurity and the Protection of Critical Information Infrastructures, 23 December 2003; and General Assembly resolution 64/211, Creation of a Global Culture of Cybersecurity and Taking Stock of National Efforts to Protect Critical Information Infrastructures, 21 December 2009.

¹¹ General policies concerning data protection are included in ST/SGB/2007/6, Information sensitivity, classification and handling, and ST/SGB/2007/5, Record-keeping and the management of United Nations archives. In addition, specific data protection rules are included, inter alia, in: ST/SGB/103/Rev.1, Rules Governing Compensation to Members of Commissions, Committees or Similar Bodies in the Event of Death, Injury or Illness Attributable to Service with the United Nations; ST/SGB/2003/18, Policy on HIV/AIDS in the workplace; ST/SGB/2006/6, Financial disclosure and declaration of interest statements; ST/SGB/2006/7, Records of the Serious Crimes Unit of the Office

6. These policies have been periodically reviewed to ensure they are fit for purpose. Examples include the Data Protection Principles adopted by the International Organization for Migration in 2009 and corresponding Data Protection Manual¹² and the “Policy on the Protection of Personal Data of Persons of Concern to UNHCR” issued by the Office of the United Nations High Commissioner for Refugees (UNHCR) in 2015 setting forth the rules and principles relating to the processing of personally identifiable data of persons under UNHCR’s protection.¹³

7. More recently and at a system-wide level, the United Nations High-Level Committee on Management adopted a set of Personal Data Protection and Privacy Principles in 2018, setting out a basic framework for the processing of personal data by, or on behalf of, the United Nations System Organizations in carrying out their mandated activities.¹⁴ These principles include “fair and legitimate processing”, “purpose specification”, “proportionality and necessity”, data “retention”, “accuracy”, “confidentiality”, “security”, “transparency”, appropriate safeguards concerning “transfers”, and “accountability”.¹⁵

8. Details concerning the existing regulations, rules, policies, and procedures were shared by the United Nations Office of Legal Affairs with the European Union in 2018¹⁶ and directly with the European Data Protection Board in early 2020.¹⁷

9. In the context of the new data strategy for the United Nations, the Secretary-General has recently initiated a process aimed at harmonizing and further improving these rules and procedures throughout the United Nations system, with due regard to human rights and new technologies.

10. As a matter of policy, the United Nations fully supports the efforts by its Member States, as well as by regional organizations to which they belong, in the promotion and protection of the

of the Prosecutor General of Timor-Leste; ST/SBG/2009/12, Records and archives of the United Nations Monitoring, Verification and Inspection Commission; ST/SGB/2010/3, Organizations and terms of reference of the Office of Administration of Justice; ST/SGB/2012/3, International Criminal Tribunals: information sensitivity, classification, handling and access; ST/SGB/2014/3, Employment and accessibility for staff members with disabilities in the UN Secretariat; ST/SGB/2016/7, Terms of reference for the Office of the UN Ombudsman and Mediation Services; ST/SGB/2016/11, Organization of the Office of Information and Communications Technology; and ST/SGB/2018/1, Staff Regulations and Rules, Appendix D. Several Administrative Instructions are also relevant to data protection, including ST/AI/2010/2, Request for rectification of date of birth or of other personal data, and ST/AI/341, Confidentiality of mailing lists and registers.

¹² See https://publications.iom.int/system/files/pdf/iomdataprotection_web.pdf.

¹³ See <https://www.refworld.org/docid/55643c1d4.html>.

¹⁴ See <https://www.unsystem.org/personal-data-protection-and-privacy-principles>.

¹⁵ Ibid.

¹⁶ See Letter from Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Mr. Joao Pedro Vale de Almeida, Head of Delegation of the European Union to the United Nations, 28 December 2018.

¹⁷ See 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, 26 February 2020.

right to privacy. The leading role of the European Union in this regard has been repeatedly recognized by the Secretary-General.¹⁸ He referred to the General Data Protection Regulation as “the most consequential regulatory framework on protection of data privacy”, that “will influence legal standards worldwide and support the rights of the person in the virtual world”.¹⁹

11. As a practical matter, however, the General Data Protection Regulation and other instruments²⁰ of European Union data protection law have had adverse impact on the activities of United Nations System Organizations. Overall, three types of difficulties have arisen. First, United Nations System Organizations have experienced difficulties in the context of existing relationships with third parties, including European Union Member States, implementing partners, and vendors. These third parties have sometimes refused to share personally identifiable information with United Nations System Organizations, despite this information being collected on behalf of the United Nations or being necessary to implement United Nations mandates as established by its Member States. Second, United Nations System Organizations have experienced difficulties in concluding, or have been unable to conclude, agreements with service providers, for services that are indispensable to the carrying out of mandated activities. This occurred both in relation to new contracts and the renewal of existing contracts. Third, difficulties have arisen in relation to receiving voluntary funding from the European Commission and from European Union Member States, with potential irreversible damage to the mandates established by the Member States of both the United Nations and the European Union.

12. Detailed examples of these difficulties were provided to the European Union in 2018 and directly to the European Data Protection Board in early 2020.²¹ Representative cases include

¹⁸ See e.g. Address at the International Charlemagne Prize of Aachen for the Unity of Europe, Aachen (Germany), 30 May 2019, <https://www.un.org/sg/en/content/sg/speeches/2019-05-30/address-international-charlemagne-prize-of-aachen-for-unity-of-europe>; Secretary-General’s remarks to the Internet Governance Forum, Berlin (Germany), 26 November 2019, <https://www.un.org/sg/en/content/sg/statement/2019-11-26/secretary-generals-remarks-the-internet-governance-forum-delivered>; Secretary-General’s Remarks on Multilateral Solutions to Global Challenges at the Italian Senate, Rome (Italy), 18 December 2019, <https://www.un.org/sg/en/content/sg/statement/2019-12-18/secretary-generals-remarks-multilateral-solutions-global-challenges-the-italian-senate-delivered>.

¹⁹ Address at the International Charlemagne Prize of Aachen for the Unity of Europe, Aachen (Germany), 30 May 2019, <https://www.un.org/sg/en/content/sg/speeches/2019-05-30/address-international-charlemagne-prize-of-aachen-for-unity-of-europe>.

²⁰ 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; 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.

²¹ See Letter from Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Mr. Joao Pedro Vale de Almeida, Head of Delegation of the European Union to the United Nations, 28 December 2018.

adverse impact on: i) the flow of data between the office of the United Nations High Commissioner for Refugees and resettlement agencies as well as providers of essential and vital care for refugees; ii) the transfer of data from European research agencies and the International Agency for Research on Cancer of the World Health Organization; iii) the transfer of personal data from European Union Member States to the International Organization for Migration for purposes such as labour market integration of refugees and assisted voluntary return and reintegration of migrants; iv) the conclusion of contracts concerning cloud-computing and other IT services for the United Nations Secretariat and other entities.

13. In these cases, United Nations System Organizations were requested to represent either that they complied with the General Data Protection Regulation or that the degree of protection afforded to individuals in relation to their personal data was essentially equivalent to that provided by European Union data protection law. In other cases, such as in relation to the transfer of data from nuclear energy facilities to the International Atomic Energy Agency, European Union operators have raised concerns in relation to the handling of personal data by United Nations System Organizations that have impeded essential transfers of data. United Nations System Organizations have also been asked by third parties to assume liability for any breaches of the General Data Protection Regulation, including any potential fines that may be imposed by national Data Protection Authorities.

14. These issues appear to have arisen because of the unprecedented reach of the General Data Protection Regulation, which has frequently been interpreted as requiring all entities subject to European Union law to ensure that substantive rules of the General Data Protection Regulation have also been applied by international organizations they come into relation with. In the academic literature, this situation has been referred to as “soft enforcement” or “application by proxy” of the General Data Protection Regulation.²²

15. As will be discussed below, it is not entirely clear whether such requests for international organizations to demonstrate that they are acting consistently with the standards set by European Union data protection law are in fact required by the General Data Protection Regulation or are due to a form of “over-implementation” of the actual requirements under European Union law. United Nations System Organizations have not yet received any clear indication by the European Union as to how to handle such requests.

16. A dialogue aimed at addressing these obstacles was initiated by the Legal Counsel of the United Nations, also on behalf of other United Nations System Organizations, in May 2018.²³

²² See Christopher Kuner, International Organizations and the EU General Data Protection Regulation: Exploring the Interaction between EU Law and International Law, in *International Organizations Law Review*, Vol. 16 (2019), pp. 158-191, at p. 182.

²³ Letter from Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, to Mr. Joao Pedro Vale de Almeida, Head of Delegation of the European Union to the United Nations, 29 May 2018.

In July 2018, the European Union Delegation to the United Nations in a Note Verbale to the United Nations Office of Legal Affairs noted what is a fundamental principle of international law, i.e., that, in light of the privileges and immunities of the United Nations, European Union data protection law rules “are not, as such, applicable to the UN, including to its Funds, Programmes, subsidiary organs and Specialised Agencies”, that “UN entities can process the data required in their functioning without being bound by EU law” and that “[t]his is the case even if the relevant offices may be situated in the territory of a Member State such as for instance the Food and Agriculture Organisation of the United Nations (FAO), headquartered in Italy”.²⁴ In addition, the European Data Protection Board also explicitly noted this fundamental principle in its Guidelines on territorial scope, when it asserted 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”.²⁵ However, the issues concerning “soft enforcement” have persisted.

17. The purpose of these comments is to move such dialogue further by considering the legal implications of the above-mentioned attempts at “soft enforcement” of the General Data Protection Regulation towards United Nations System Organizations, with a view to finding possible solutions.

2. Summary of the legal position of the United Nations

18. The fundamental legal position of the United Nations is underpinned by the pre-eminence of the Charter of the United Nations under international law. Under Article 103 of the Charter of the United Nations, the obligations of Member States under the Charter prevail over any other obligations of Member States, including European Union Member States, under any other international agreement, including the European Union Treaties.

19. As “property and assets” of the United Nations, all data of the Organization is immune from any form of interference, including by legislative action. As will be discussed below, this is a result of the privileges and immunities of the United Nations enshrined in the Charter (Article 105), in the Conventions on the Privileges and Immunities of the United Nations and of its Specialised Agencies,²⁶ and in other bilateral and multilateral treaties.

20. More generally, an external regulatory framework, such as that arising from European Union data protection law, may not be imposed on the activities of the United Nations. Several obligations exist, both under the Charter and under other international agreements, that

²⁴ NV 2018/56 from the European Union Delegation to the United Nations to the United Nations Office of Legal Affairs, 3 July 2018.

²⁵ 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.

²⁶ 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.

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. The Charter of the United Nations and the established practice of the Organization define the respective roles and responsibilities of its organs, including the General Assembly, the Security Council, and the Secretariat, in relation to the adoption of any internal rules of the Organization. Similarly, each United Nations System Organization can only adopt internal rules, including rules concerning privacy and data protection, according to the modalities established by its respective constitutive instrument and by the established practice of the respective organization.²⁷ According to the Charter, for example, the General Assembly *inter alia* “may discuss any questions or any matters ... relating to the powers and functions of any organs provided for in the ... Charter”, including those of the Secretariat (Article 10); it “shall consider and approve the budget of the Organization” (Article 17); and it shall establish regulations concerning Secretariat staff (Article 101). By virtue of Article 101 of the Charter, the General Assembly adopts staff regulations which set out the broad principles governing the staffing and administrative policies of the Secretariat and the separately administered funds and programmes. In his or her role as the chief administrative officer of the Organization (Article 97) as well as pursuant to specific mandates from the General Assembly (Article 98), the Secretary-General provides rules, policies and procedures to give effect to such principles. Similar provisions exist in the constitutive instruments of other United Nations System Organizations.

21. The United Nations operates on the basis of the Charter and of mandates received from States from all regions of the world coming together in the Organization’s intergovernmental organs. Diversity in legal cultures, legal processes, and political sensitivities abounds. It would simply not be permissible nor appropriate to take an external national or regional regulatory framework, however advanced, and transpose it wholesale at the level of the United Nations. It would also be inappropriate for United Nations System Organizations to conform their internal rules to one specific framework of data protection, when several other frameworks, potentially conflicting therewith, may emerge across different jurisdictions.

22. Finally, the specific framework arising from European Union data protection law would not be fit for purpose in relation to the activities of the United Nations required by the Charter and by the intergovernmental mandates adopted by Member States on the basis of the Charter, which are not commercial in nature. United Nations System Organizations are not multinational corporations harvesting data for profit.

²⁷ The established practice of intergovernmental organization is a source of their internal rules: see e.g. Article 1(1)(34), Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975), A/CONF.67/16; Article 2(1)(j), Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), A/CONF.129/15.

23. It is ultimately for the European Union and its Member States to find practical solutions to ensure the free flow of data between United Nations System Organizations and entities bound by European Union law. This flow is essential to the effective discharge of the mandates of both United Nations System Organizations and the European Union. The ongoing dialogue that began in 2018 with the European Union has unfortunately not yet yielded clear results, beyond the explicit acknowledgment by the European Union that the General Data Protection Regulation is not applicable as such to United Nations System Organizations.²⁸

24. **We suggest that what may be needed is a set of comprehensive and overarching guidelines to be adopted by the European Data Protection Board addressing specifically the situation of United Nations System Organizations.**

3. The conflation of third countries and international organizations

25. In considering the legal implications of the “soft enforcement” of the General Data Protection Regulation, the first issue that arises is the conflation of third countries and international organizations. 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” adopted by the Board on 18 January 2020 address data transfers to and from “non-EEA public authorities”. In the Guidelines, “non-EEA public authorities” are defined as “public authorit[ies] or bodies in third countries and international organisations” alike, and discussed together throughout.²⁹ This conflation, which mirrors the same conflation in the text of the General Data Protection Regulation, is in fact unwarranted and unhelpful in practice. We invite the Board to clearly distinguish, at least in the Guidelines, the effects of the General Data Protection Regulation on transfers to third States from those concerning international organizations.

26. Unlike the 1995 Data Protection Directive,³⁰ which did not purport to regulate transfers to international organizations, the General Data Protection Regulation treats international organizations and third countries interchangeably. International organizations are mentioned more than twenty times in the General Data Protection Regulation, and always in conjunction with and to the same purported regulatory effect as third countries.³¹ In particular,

²⁸ NV 2018/56 from the European Union Delegation to the United Nations to the United Nations Office of Legal Affairs, 3 July 2018; 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.

²⁹ Paras. 1 and 8, 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” adopted by the Board on 18 January 2020.

³⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003.

³¹ Except for the definition at Article 4(26) of the General Data Protection Regulation. See Articles 13(1)(f), 14(1)(f), 15, 28(3)(a), 30, 40(2)(j), 40(3), 42, 44, 45, 46, 49, 50, 58(2)(j), 70, 71, 83, 85, 96, and 97 of the General Data Protection Regulation.

Chapter V of the General Data Protection Regulation regulates transfers of personal data to third countries and international organizations in the exact same way. Had input from the United Nations been solicited during the development of the General Data Protection Regulation, the pertinent differences between States and the United Nations would have been remarked (among other issues).

27. As a matter of international law, international organizations and States are very different subjects. While States enjoy a general competence to exercise legislative, executive and judicial jurisdiction, international organizations operate based on mandates in their constituent instruments or received from their respective intergovernmental organs. As the International Court of Justice remarked in its 1949 Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, “[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice”.³² Different rules of public international law apply to States and international organizations: for example, the privileges and immunities that States enjoy are quite different (and in some respects more limited) than those of international organizations.

28. In addition, States have the jurisdictional competence to regulate the data processing activity of private actors who fall within their jurisdiction. They may pass regulations analogous to the General Data Protection Regulation that would be binding on actors within their jurisdiction if they so wish. United Nations System Organizations do not have any such regulatory competence towards third parties, nor law enforcement capacity towards the actors with which they are interacting (except, in the case of the United Nations, in the highly exceptional cases in which it exercises an executive mandate in respect of an area of territory).

29. Crucially, the purposes of data processing for States and United Nations System Organizations is also different. States process personal data for a broad set of purposes, including commercial purposes, whereas United Nations System Organizations only process data for collective public policy purposes, as established in the intergovernmental mandates adopted by their respective Member States, and not for commercial purposes. These important collective purposes are acknowledged by the General Data Protection Regulation. In its preamble, the General Data Protection Regulation clearly recognizes that “[s]ome types of processing may serve both important grounds of public interest and the vital interests of the data subject as for instance when processing is necessary for humanitarian purposes, including for monitoring epidemics and their spread or in situations of humanitarian emergencies, in particular in situations of natural and

³² *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 180.

man-made disasters”.³³ The preamble adds that “[a]ny transfer to an international humanitarian organisation of personal data of a data subject who is physically or legally incapable of giving consent, with a view to accomplishing a task incumbent under the Geneva Conventions or to complying with international humanitarian law applicable in armed conflicts, could be considered to be necessary for an important reason of public interest or because it is in the vital interest of the data subject”.³⁴ Such important reasons of public interest are at the heart of the work of United Nations System Organizations. Crucially, the reasons of public interest for which the United Nations operates must be defined at the international level by reference to the will of its Member States collectively, and not under European Union law.

4. The special status of the United Nations under international law

30. The United Nations is distinguishable from other international organizations. The definition of “international organisation” adopted in the General Data Protection Regulation encompasses disparate legal entities: it defines an “international organisation” as “an organisation and its subordinate bodies governed by public international law, or any other body which is set up by, or on the basis of, an agreement between two or more countries”. This is a much broader definition than that typically adopted under international law. For example, the International Law Commission considers an international organization to be “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality”.³⁵ While the Guidelines as currently drafted by the European Data Protection Board might perhaps be applicable to some other organizations, they do not fully meet the unique needs and concerns of United Nations System Organizations.

31. The membership of the United Nations is universal, and its scope of work is equally broad. The core mission of the United Nations encompasses the maintenance of peace and security, the protection of human rights, the delivery of humanitarian aid, the promotion of sustainable development, and the upholding of international law. Due to the powers vested in it by its Charter and its unique universal character, the United Nations takes action on most issues facing humanity, including climate change, disarmament, terrorism, health emergencies, gender equality, governance, the rule of law, food production, and many more. The United Nations also provides a forum for its Member States to express their views in the General Assembly, the

³³ Preambular para. 46, 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).

³⁴ Preambular para. 112, 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).

³⁵ Article 2(a), Articles on the Responsibility of International Organizations, annexed to General Assembly resolution 66/100 of 9 December 2011.

Security Council, the Economic and Social Council, and other bodies and committees. Article 1 of the Charter articulates the purposes of the Organization as follows:

“To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

To be a centre for harmonizing the actions of nations in the attainment of these common ends”.

32. The United Nations is also unique as a matter of international law. Its constitutive instrument, the Charter of the United Nations, expressly stipulates its own pre-eminence over any other international agreement binding on its Members. Article 103 of the Charter provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. In this respect, it is worth recalling that all 27 Member States of the European Union are among the 193 Member States of the United Nations, and they are as such bound by the Charter. As discussed below, the pre-eminence of the Charter is also recognized under European Union law.

33. Member States are bound to recognize the legal status of the United Nations, as well as its privileges and immunities. Under Article 104 of the Charter, “[t]he Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes”. The International Court of Justice clarified that, in addition to legal capacity under domestic law, the Organization, being “the supreme type of international organization”, also enjoys international personality and is “a subject of international law”.³⁶

³⁶ *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, *I.C.J. Reports 1949*, p. 174, at p. 179 (“In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of

34. Under Article 105, paragraph 1, “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes”. Furthermore, paragraph 3 of the same Article provides that “The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose”. In order to give effect to these provisions and to provisions on immunities included in the constitutive instruments of the Specialised Agencies, the two Conventions on the Privileges and Immunities of the United Nations and of its Specialised Agencies were adopted in 1946 and 1947 respectively.³⁷

35. The 1946 Convention on the Privileges and Immunities of the United Nations (the “General Convention” hereinafter)³⁸ was intended to determine “the details of the application” of the obligations of Member States concerning the privileges and immunities of the Organization enshrined under Article 105 of the Charter. The International Court of Justice explicitly recognized the role of the General Convention in determining the privileges and immunities “contemplated” in Article 105.³⁹ The Court thus found that certain obligations arising from the General Convention also fell under Article 105.⁴⁰ It follows that the obligations under the General Convention, insofar as they fall also under Article 105 of the Charter, are included among those obligations that, under Article 103 of the Charter, must prevail over obligations of Member States under other any other international agreements, including the European Union Treaties.

international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged. Accordingly, the Court has come to the conclusion that the Organization is an international person. [...] What [this] mean[s] is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.”)

³⁷ 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.

³⁸ 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).

³⁹ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177, at p. 192 (“Acting in conformity with Article 105 of the Charter, the General Assembly approved the General Convention on 13 February 1946 and proposed it for accession by each Member of the United Nations. [...] As contemplated by Article 105 of the Charter, the General Convention determines the privileges and immunities enjoyed by the United Nations as such (Arts. II and III), lays down the privileges and immunities of the representatives of Members of the United Nations (Art. IV), and defines those of the officials of the Organization (Art. V)”). See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 82.

⁴⁰ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 87 (where, at paras. 61 and 62, an obligation arising from the General Convention is deemed by the Court to also be an obligation under Article 105 of the Charter).

36. In addition, several other international agreements recognizing similar privileges and immunities were entered into between United Nations System Organizations and Member States over the years. The fundamental general principle arising from the wide array of privileges and immunities of the United Nations is that Member States should not “hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens”,⁴¹ it is in light of this principle that specific rules on privileges and immunities, including those concerning the prohibition of interference with United Nations data to which we will now turn, must be interpreted. More generally, it is in view of this special status and the privileges and immunities of United Nations System Organizations that a separate set of guidelines, addressing specifically United Nations System Organizations, would be needed.

5. The prohibition to interfere with United Nations data wherever located

37. The privileges and immunities just described clearly also apply to the handling of data by United Nations System Organizations, as well as to the data itself. The European Union agrees that the General Data Protection Regulation does not apply as such to United Nations System Organizations.⁴² Because of the privileges and immunities of United Nations System Organizations, even if the Regulation had purported to apply thereto, it would not have been enforceable. Rules on privileges and immunities of the United Nations and of the Specialized Agencies also specifically provide for the freedom of United Nations data from interference, including legislative interference, wherever they may be located, including in transit. This is in addition to immunity from legal process and to their inviolability. Similar rules apply to United Nations System Organizations that are not Specialized Agencies, for example under the Privileges and Immunities Agreement of the International Atomic Energy Agency, adopted by its Board of Governors on 1 July 1959.⁴³

38. As part of the “archives” and “documents” of the Organization, United Nations data fall under the provisions concerning “property and assets” of the Organization under Article II of the 1946 Convention on the Privileges and Immunities of the United Nations (“the General Convention”).

39. Under Article II, section 3, of the General Convention, the property and assets of the United Nations, “wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action”. In addition, under Article II, section 2, of the General

⁴¹ Preparatory works of the United Nations Charter, Report of Commission IV on Judicial Organization, UNCIO, Documents, Volume 13, p. 705.

⁴² NV 2018/56 from the European Union Delegation to the United Nations to the United Nations Office of Legal Affairs, 3 July 2018; 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.

⁴³ See <https://www.iaea.org/sites/default/files/publications/documents/infcircs/1959/infcirc9.pdf>.

Convention, “wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution”.⁴⁴ This immunity from legal process is accompanied by an absolute inviolability for United Nations archives and documents, enshrined in Article II, section 4, according to which “[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located”.⁴⁵ Article III of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies mirror these provisions in relation to the Specialized Agencies.⁴⁶ These provisions are also mirrored in multilateral and bilateral treaties concerning United Nations System Organizations that are not Specialized Agencies.

40. By virtue of Article II, section 3, of the General Convention and its corresponding provision concerning the Specialized Agencies, data belonging to the United Nations and the Specialized Agencies may not be interfered with by legislative action. By virtue of section 4 of the same Article, they are inviolable. To the extent that the General Data Protection Regulation seeks to indirectly regulate (through its so called “soft enforcement”) the handling of data by the United Nations or the Specialized Agencies, such interference would be incompatible with the obligations of Member States of the United Nations under the General Convention and, in the case of the United Nations itself, under Article 105 of the Charter.

41. All data transfers between the United Nations and its vendors or implementing partners must equally be free from such legislative interference. Article II, section 3 of the General Convention and its corresponding provision in the Specialized Agencies Convention explicitly refer to the immunity of property “wherever located and by whomsoever held”. Archives and documents are inviolable “wherever located” under section 4 of the same Article.

42. In addition, implementing partners and vendors of United Nations System Organizations may sometimes be instructed to act on behalf of those Organizations and in furtherance of their mandates. It would be equally impermissible for States to interfere, legislatively or otherwise, with the handling of data in this context.

6. Pre-eminence of the obligations of European Union Member States under international law

43. Article 3, paragraph 5, and Article 21 of the Treaty on European Union respectively enshrine the contribution of the European Union to “the strict observance and the development of international law, including respect for the principles of the United Nations Charter”, and the

⁴⁴ Article II (Property, Funds and Assets), 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).

⁴⁵ *Ibid.*

⁴⁶ Article III (Property, Funds and Assets), Convention on the Privileges and Immunities of the Specialized Agencies (1947), United Nations, *Treaty Series*, vol. 33, p. 261.

objective of the European Union to advance the “principles of the United Nations Charter and international law”. The European Union Treaties also specifically recognize the pre-eminence of the United Nations Charter over the European Union Treaties. Article 351 of the Treaty on the Functioning of the European Union safeguards obligations from pre-existing agreements, including the Charter, by providing that “[t]he rights and obligations arising from agreements concluded before 1 January 1958 ... between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties”. As a consequence, the European Court of Justice held that European Union rules “may be deprived of effect” by such an earlier international agreement if “that agreement imposes on the Member State concerned obligations whose performance may still be required by non-member States which are parties to it”.⁴⁷ European Union law may thus cease to apply to measures adopted by Member States that are “necessary in order to ensure that the Member State concerned performs its obligations under the Charter of the United Nations and [a] United Nations Security Council Resolution”.⁴⁸

44. The Court of Justice of the European Union has also clarified that it cannot adjudicate upon the legality of conduct of the United Nations. The 2008 *Kadi* decision, for example, focused on the legality under European Union law of European Union acts implementing a Security Council resolution, not on the legality of the Security Council resolution itself, which would not be subject to review as such.⁴⁹ The General Court has subsequently explicitly excluded that the Courts of the European Union would have any jurisdiction “to review acts adopted by the Security Council *per se* or [to determine] whether the investigations conducted by the UN bodies comply with fundamental rights”.⁵⁰

45. In addition, an important distinction must be drawn between categories of fundamental rights, some of which are absolute in nature (for example the prohibition of torture) and others which are not, as is the case for the rights of data holders. In the *Google* case, the Grand Chamber acknowledged that “the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality”, and that such balance “is likely to vary significantly around the world”.⁵¹ In the Court’s view, the European Union legislator had not

⁴⁷ *The Queen, ex parte Centro Com v HM Treasury and Bank of England*, Case C-124/95, EU:C:1997:8, 14 January 1997, para. 57

⁴⁸ *Ibid.*, para. 159.

⁴⁹ *Ibid.*, para. 288. See also Grand Chamber, *Melli Bank plc v Council of the European Union*, Case C-380/09 P, EU:C:2012:137, 13 March 2012, para. 54.

⁵⁰ General Court (Ninth Chamber), *Bureau d’achat de diamant Centrafrique (Badica) and Kardiam v Council of the European Union*, Case T-619/15, EU:T:2017:532, 20 July 2017, para. 65.

⁵¹ Grand Chamber, *Google LLC v Commission nationale de l’informatique et des libertés*, Case C-507/17, EU:C:2019:772, 24 September 2019, para. 60.

“chosen to confer a scope on the rights enshrined in [certain provisions of European Union data protection law] which would go beyond the territory of the Member States”.⁵²

46. Furthermore, as discussed above, the pre-eminence of obligations of Member States towards the United Nations under international law remains. Any interpretation of the General Data Protection Regulation that is inconsistent with the obligations of European Union Member States under the Charter’s provisions on the privileges and immunities of the United Nations would potentially engender a conflict between obligations arising from the European Union legal order and those under international law. Should such a conflict arise between the obligations of States under European Union law and under the Charter, Article 103 of the Charter would be the method to address such conflicts, as discussed above. Obligations under the Charter would prevail. In addition, obligations under the two Conventions on Privileges and Immunities of the United Nations and of its Specialized Agencies of 1946 and 1947,⁵³ as well as obligations under constitutive instruments of United Nations System Organizations concluded before 1 January 1958, would prevail as envisaged in Article 351 of the Treaty on the Functioning of the European Union.

47. In the view of the European Court of Justice, a “distinct legal order” was brought about by the European Union Treaties.⁵⁴ European Union legislative acts such as the General Data Protection Regulation are similar in nature, vis-à-vis international law, to the internal law of its Member States. From the point of view of international law, the consequence of this is that European Union Member States would not be able to assert that their failure to comply with obligations under international law is justified by virtue of contrary European Union law provisions. As the Vienna Convention on the Law of Treaties clarifies, “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.⁵⁵ The same applies to customary international law.⁵⁶ As the International Court of Justice remarked, it is a

⁵² Ibid., para. 62.

⁵³ 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.

⁵⁴ See e.g. Grand Chamber, *Melli Bank plc v Council of the European Union*, Case C-380/09 P, EU:C:2012:137, 13 March 2012, para. 54.

⁵⁵ Article 27, Vienna Convention on the Law of Treaties (1969), United Nations, *Treaty Series*, vol. 1155, p. 331

⁵⁶ See, e.g., *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, *Advisory Opinion*, 1932, *P.C.I.J., Series A/B*, No. 44, p. 4 (“[C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force... The application of the Danzig Constitution may ... result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law...”). This view was more recently espoused by the International Law Commission in Articles 3 and 12, Articles on Responsibility of States for Internationally Wrongful Acts (2001), annexed to General Assembly resolution 56/83 of 12 December 2001.

“fundamental principle of international law that international law prevails over domestic law”.⁵⁷

48. It is for the European Union and its Member States to advance an interpretation of the General Data Protection Regulation that will avoid any possible conflict between obligations under international law and existing rules of European Union law. It may well be the case that the General Data Protection Regulation can be interpreted in such a manner as to avoid any conflict with basic principles of international law on the immunity of United Nations property and data from legislative interference, on the inviolability of its archives and documents, and on the role of the principal organs of the United Nations in regulating its activities.

49. Under Article 50 of the General Data Protection Regulation, European Union institutions have a mandate to take steps to develop international cooperation mechanisms to facilitate the enforcement of data protection. Among these steps, the European Data Protection Board could consider the adoption of a set of guidelines focusing specifically on United Nations System Organizations. From a practical perspective, the intensity, length, and specificity of the relationship between the European Union and the United Nations warrants consideration of such specific guidelines, which may address the questions of interpretation that remain open in relation to the “soft enforcement” of the General Data Protection Regulation.

7. Comments on the Guidelines on the territorial scope of the General Data Protection Regulation (Article 3) and the Guidelines on derogations of Article 49 under Regulation 2016/679

50. In its letter of 16 December 2019 to the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, the Directors General of the Directorate-General Justice and Consumers and of the Legal Service made note of the efforts of the European Commission to obtain from the European Data Protection Board “clarification on the specific status of international organisations”.⁵⁸ The letter then states that the Guidelines on the territorial scope of the General Data Protection Regulation issued by the European Data Protection Board on 12 November 2019⁵⁹ clarify 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”.

⁵⁷ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at pp. 34-35. See also *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 180.

⁵⁸ Letter from the Directors General of the Directorate General Justice and Consumers and of the Legal Service to the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, Ref. Ares(2019)7708694, 16 December 2019.

⁵⁹ 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.

51. This quoted text from the guidelines on the territorial scope of the General Data Protection Regulation provides further affirmation that the Regulation does not purport to impose obligations on United Nations System Organizations. However, the Guidelines state that “[a]t the same time, it is important to recall that any controller or processor that falls within the scope of the GDPR for a given processing activity and that exchanges personal data with such ... organisations have to comply with the GDPR, including where applicable its rules on transfers to third countries or international organizations”.⁶⁰

52. Regrettably, the quoted text from the guidelines on the territorial scope of the General Data Protection Regulation seem to simply lead back to the rules on transfers to third countries and international organizations set forth in Chapter V of the General Data Protection Regulation. Such rules do not differentiate requirements for transfers based on whether the international organization to which the transfer is being made has been afforded privileges and immunities. Nor do they take into account that the privileges and immunities of international organizations differ from those of States. Instead, as discussed above, Chapter V would appear to subject transfer of personal data to all third states and to all international organizations to the same conditions interchangeably. These conditions include, amongst others, the requirement that the Commission has adopted an adequacy decision, or in the absence of such a decision that appropriate safeguards have been provided, or, in the absence of both, that derogations for specific situations apply. It would therefore be helpful if the Board would provide further guidelines or other public clarification as to what practical effect it gives to the privileges and immunities of United Nations System Organizations in relation to such transfers.

53. With respect to an adequacy decision, both the process and the substantive inquiry appear to be incompatible with the obligation to respect the status and privileges and immunities of United Nations System Organizations including by refraining from interfering in the conduct of their mandated activities. The process would essentially subject the rules governing the handling of the data by United Nations System Organizations in the exercise of mandates decided by 193 Member States to the scrutiny of 27 States via the European Commission. The criteria for adequacy would, if taken at face value, essentially require the United Nations System Organizations to apply the substantive requirements of the General Data Protection Regulation.

54. With respect to the condition of the existence of appropriate safeguards, we note that during the meetings held with the European Commission in February 2020, the European Commission mentioned work currently underway to develop model contractual clauses that, in accordance with Chapter V, Article 46, paragraph 3 of the General Data Protection Regulation could serve as an “appropriate safeguard” pursuant to which transfers of personal data to and from United Nations System organizations could be made. Consistent with our earlier observations, such clauses should

⁶⁰ 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 (emphasis added).

not impose obligations on United Nations System Organizations in indirect application or “soft enforcement” of the General Data Protection Regulation.

55. Concurrently, the European Commission has also emphasized in exchanges with the United Nations the utility of the derogations set out in Article 49, giving particular attention to the derogation on important reasons of public interest (Article 49 (1) (d)) as further interpreted by the Guidelines on derogations adopted by the Board.⁶¹

56. Given this emphasis, we have the following observations with respect to such guidelines as they relate to the derogation for important reasons of public interest:

- The concept of a derogation for important reasons of public interest, would, in the abstract, seem to be a promising avenue to permit data to be shared between an entity subject to the General Data Protection Regulation and United Nations System Organizations in a manner that both (i) provides comfort to such entity that it is acting in compliance with the General Data Protection Regulation and (ii) would not indirectly require United Nations System organizations to apply the General Data Protection Regulation.
- Indeed, many instances of data handling by United Nations System Organizations in the European Union concern precisely those cases where “processing is necessary for humanitarian purposes, including for monitoring epidemics and their spread or in situations of humanitarian emergencies, in particular in situations of natural and man-made disasters”,⁶² which the preamble of the General Data Protection Regulation acknowledged to be serving “both important grounds of public interest and the vital interests of the data subject”.⁶³
- However, the guidelines on derogations make it clear that all derogations, including the derogation for important reasons of public interest, which although “not expressly limited to ‘occasional’ or ‘non repetitive’ transfers have to be interpreted in a way that does not contradict the very nature of the derogations as being exceptions...”.
- Further, the guidelines expressly state that “the essential requirement for the applicability of this derogation is the finding of an important public interest and not the nature of the organization... that transfers and/or receives the data”.
- Amongst such criteria is the requirement that only public interests recognized in European Union law or in the law of the Member State to which the controller is subject can lead to the application of the derogation.

⁶¹ Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, as adopted by the European Data Protection Board on 25 May 2018.

⁶² Preamble para. 46, 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).

⁶³ Ibid.

- Such condition would effectively subject the mandates determined by the legislative bodies of United Nations System Organizations to an additional level of scrutiny that is incompatible with the Charter and with other constitutive instruments of United Nations System Organizations. Since a transfer based on this derogation is not required to be notified or approved by a supervisory authority, the transferring party has to make its own assessment as to whether the conditions for a specific derogation are met, with the risk that this would at a later stage be invalidated by a competent authority or court.
- **As such, in order to provide a predictably reliable avenue for the necessary transfers to take place, there would need to be further guidelines or other public confirmation with respect to transfers to and from United Nations System Organizations that (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.**

8. Comments on the adopted Guidelines on transfers of personal data between EEA and non-EEA public authorities and bodies

A. General comments

57. The “list of minimum safeguards to be included in international agreements between public bodies falling under Articles 46 (2) (a) or 46 (3) (b) GDPR” essentially mirrors the regulatory framework enshrined in the General Data Protection Regulation. Moreover, the implementation of the Guidelines, procedurally, would be subject to enforcement and administrative decisions by relevant supervisory authorities.

58. As discussed in Section 2 above, it would be contrary to the legal order established by the United Nations Charter, constitutive instruments of United Nations System Organizations, and the privileges and immunities of United Nations System Organizations for any Member State or group of Member States to impose its legal or regulatory framework on the mandated activities of United Nations System Organizations, including the governance and regulatory framework for the processing of data by United Nations System Organizations. This must equally apply in the context of the General Data Protection Regulation, including any guidelines promulgated by the European Data Protection Board.

59. Moreover, the Guidelines, if applied, would necessitate the conclusion of, or amendment to, a significant number of instruments or arrangements, each for a particular administrative purpose, between a potentially significant number of entities of the European Union or its Member States and United Nations System Organizations. In this connection, paragraph 5 of the Guidelines prescribes that each transfer of data must comply with Chapter V and all relevant substantive provisions of the General Data Protection Regulation.

60. We are concerned that this Organization-by-Organization and case-by-case approach would lead to fragmentation, lack of legal certainty and inefficiency, including administrative burden, delays and additional cost. This approach therefore will hamper the ability of United Nations System Organizations to discharge their mandated activities in an effective and efficient manner.

61. Without prejudice to these general comments, United Nations System Organizations acknowledge that individual provisions of the Guidelines seek to take account of the specific features of United Nations System Organizations (e.g., in respect of redress and supervisory mechanisms, discussed below). United Nations System Organizations are encouraged by this and look forward to engaging with the European Data Protection Board in a constructive dialogue. **United Nations System Organizations hope that, as a result of this dialogue, the European Data Protection Board will be able to issue specific separate Guidelines applicable to United Nations System Organizations that: (i) provide for a comprehensive framework with broad application to United Nations System Organizations generally and to all types of data transfers; (ii) mitigate the effects of the application of the General Data Protection Regulation on United Nations System Organizations mandated activities; and (iii) respect the unique legal status and regulatory frameworks governing United Nations System Organizations data privacy and protection.**

B. Specific comments

62. We provide below our comments on specific provisions of the Guidelines. The below list is non-exhaustive and is intended to illustrate some of the concerns and areas that United Nations System Organizations would wish to explore further with the European Data Protection Board.

63. Exclusions. Paragraph 4 of the Guidelines excludes from the application of the Guidelines certain categories of data transfers, including for public security. It would be essential for the scope of such exclusions to be broadened to apply to data transfers for other public purposes, including in but not limited to the humanitarian context (e.g., provision of humanitarian aid, protection of vulnerable populations, combating of diseases, etc.). It would also be essential for such exclusions to apply generally and not be limited to the occasional and non-repetitive transfer of data. This would facilitate the ability of United Nations System Organizations to effectively discharge their mandated activities. In fact, a set of exclusions applicable specifically to all transfers to and from United Nations System Organizations would be in order.

64. Compliance with Data Protection Principles. Paragraph 4 of the Guidelines requires compliance with the data protection principles set forth in Article 5 of the General Data Protection Regulation, i.e., lawfulness, fairness and transparency; purpose limitation; data minimization; accuracy; storage limitation; and integrity and confidentiality. While the General Data Protection Regulation does not apply to United Nations System Organizations, United Nations System Organizations are committed to observing these principles. Indeed, data

protection principles were recognized at a system-wide level in the 2018 Personal Data Protection and Privacy Principles of the United Nations,⁶⁴ as well as by the General Assembly in 1989 and 1990.⁶⁵ That said, and bearing in mind that United Nations System Organizations process data for public purposes, the application of these principles must be consistent with, and subject to, the mandates of United Nations System Organizations and the regulatory framework governing the processing of data, as adopted by the governing bodies of United Nations System Organizations. In this connection, and as much as the Guidelines recognize exceptions or restrictions that are based on domestic law, it would be important for the European Data Protection Board to equally recognize the regulatory framework of United Nations System Organizations governing data privacy and protection as a basis for exceptions or restrictions (*lex specialis*).

65. Purpose limitation principle. United Nations System Organizations are committed to the purpose limitation principle (paragraph 15 to 17). That said, the processing of data by United Nations System Organizations should be interpreted broadly so as to ensure that the processing of data will be in accordance with, and subject to, the mandates of United Nations System Organizations and consistent with the public purposes for which they are processed. Moreover, to the extent that paragraphs 17 and 38 ff. of the Guidelines appear to potentially limit the ability of United Nations System Organizations to transfer data to third parties, it should be noted that the data of United Nations System Organizations are inviolable and immune from any form of interference, including legislative interference. Restrictions on their transfer are limited to those arising from the regulatory frameworks of United Nations System Organizations.

66. Storage limitation principle. United Nations System Organizations have in place regulations, rules, policies and procedures for the retention of data. These rules may require United Nations System Organizations to maintain certain data indefinitely, with a view to discharging their respective mandates. Accordingly, paragraph 21 of the Guidelines, in its current form, would run counter to the internal rules of United Nations System Organizations on the schedule for retention and public disclosure of data.

67. Rights of the data subjects. Paragraph 24 of the Guidelines indicates that relevant safeguards “must ensure enforceable effective data subject rights”. In this regard, the Guidelines refer to a number of rights, including the right to transparency and rights of access, to rectification, erasure, restriction of processing and to object thereto. United Nations System Organizations acknowledge the importance of these rights. At the same time, the specific application of these rights in the context of United Nations System Organizations depends on the specific circumstances, including the categories of data subjects, the mandates pursuant to which the data are processed and the purposes for which the data are used. For example, the “right to be forgotten”

⁶⁴ See <https://www.unsystem.org/personal-data-protection-and-privacy-principles>.

⁶⁵ General Assembly resolution 44/132, Guidelines for the Regulation of Computerized Personal Data Files, 5 December 1989; and General Assembly resolution 45/95, Guidelines for the Regulation of Computerized Personal Data Files, 14 December 1990.

may not be compatible with the duty of United Nations System Organizations, in certain contexts, to keep personally identifiable information for certain periods or indefinitely, as defined by applicable mandates. Other rights, including the right to provide informed consent to data processing, may not be appropriate in specific contexts, for example individuals on United Nations sanctions lists or situations of emergency. For these reasons, it is simply not possible to expect that the regulatory framework of United Nations System Organizations will mirror the General Data Protection Regulation. Nevertheless, there is a commonality between the principles set forth in the General Data Protection Regulation and the data protection regulations and rules of United Nations System Organizations, including the 2018 Personal Data Protection and Privacy Principles.

68. Paragraph 26 purports to limit any restrictions to the rights of data subjects for the safeguarding of “important objectives of general public interest” only to situations in which “the public interest concerned is also recognised by the European Union or a Member State”. As discussed above, this would imply accepting that the concept of public interest, insofar as the United Nations is concerned, is determined by a group of Member States (European Union Member States) rather than by the governing bodies of United Nations System Organizations. This would obviously be unacceptable.

69. Redress. Concerning the redress mechanism discussed at paragraphs 45 ff. of the Guidelines, United Nations System Organizations welcome the recognition that courts do not have jurisdiction to adjudicate their conduct. The Guidelines address “alternative safeguards” and envisage “a structure which enables the data subject to enforce its rights outside the courts, for example through quasi-judicial, binding mechanisms such as arbitration or alternative dispute resolution mechanisms such as mediation, which would guarantee an independent review”. Indeed, in the case of United Nations System Organizations, redress is already carefully considered, with due regard to the existing regulatory frameworks of United Nations System Organizations, including their privileges and immunities. Additional consideration of these matters must take into account the relationship of data subjects with the United Nations System Organization concerned and the context in which such data is processed. Moreover, additional avenues of redress may require action by the governing bodies of United Nations System Organizations, including the United Nations General Assembly.

70. Supervision mechanism. The “Supervision mechanism” envisaged in paragraphs 51 ff. of the Guidelines would imply that an entity external to United Nations System Organizations would conduct a review and monitor how United Nations System Organizations perform the agreements and use their data. This would be incompatible with the privileges and immunities of United Nations System Organizations, as it would subject these organization to external interference on their internal workings. Accordingly, United Nations System Organizations welcome that paragraphs 57 and 58 of the Guidelines recognize that such an arrangement may not be possible. This notwithstanding, it should be noted that United Nations System Organizations

already have in place certain independent oversight mechanisms (e.g., Office of Internal Oversight Services, Joint Investigation Unit and Board of Auditors). Any additional alternative mechanisms, if deemed necessary, would, of course, need to be consistent with the privileges and immunities of United Nations System Organizations, and, in any event, adopted by the requisite governing body of each United Nations System Organization, including the United Nations General Assembly.

71. Suspension or termination. Paragraph 50 of the Guidelines provide for the possibility of terminating or suspending the transfer of personal data under existing arrangements in the event that the parties to the agreement do not resolve a dispute amicably. The application of this provision would be problematic in that it could affect or delay the ability of United Nations System Organizations to discharge their mandated activities pending the resolution of the dispute.

9. Conclusions and way forward

72. For the reasons set forth above, it is neither legally acceptable nor feasible for the General Data Protection Regulation to apply to United Nations System Organizations, either directly or indirectly. Nor is it possible for United Nations System Organizations to mirror the General Data Protection Regulation when United Nations System Organizations have in fact their own governing bodies, mandates, data protection regulations, and operational requirements. Moreover, it is difficult to reconcile the European Union's apparent intention effectively to regulate data transfers from and to United Nations System Organizations in accordance with the General Data Protection Regulation with its acknowledgement that the General Data Protection does not apply to United Nations System Organizations.

73. It is for all of these reasons that the European Union and the United Nations System Organizations will need to find an acceptable way forward.

74. United Nations System Organizations are committed to the goal of data privacy and protection. Some have already developed detailed guidance on protection of personal data and some are in the process of reviewing their regulatory frameworks around best practices and standards, with a view of updating them, as necessary, including in respect of new technologies, in the context of the United Nations data strategy.

75. United Nations System Organizations are also mindful of the deep and long-standing relationship with the European Union and recall that Article 50 of the General Data Protection Regulation calls for international cooperation for the protection of personal data.

76. **In the spirit of such international cooperation, United Nations System Organizations call on the European Data Protection Board to issue comprehensive guidelines specifically addressing the situation of United Nations System Organizations, with the following elements:**

- **To clarify that European Union institutions and European Union Member States will interpret the General Data Protection Regulation 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.**
- **To clarify that the General Data Protection Regulation 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.**
- **To recognize the regulatory framework of United Nations System Organizations governing the processing of data, including data protection and privacy (*lex specialis*).**
- **To 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.**
- **Concerning the possibility of using derogations, to give public confirmation that, in case of transfers to and from 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.**
- **To 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.**

77. **A working group to which United Nations System Organizations would participate could be set up to give effect to Article 50 of the General Data Protection Regulation in this manner.**

78. United Nations System Organizations wish to underline the urgency of the issuance of such comprehensive guidelines so as 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 General Data Protection Regulation and United Nations System Organizations. Indeed, it is simply unthinkable for data flows to be interrupted or delayed on account of this issue.

79. 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 very near future.