

REFERENCE:

6 February 2024

Dear Ms. Talus,

RE: Impact of European Union Data Protection Law on the Activities of UN System Organizations

At the outset, allow me to congratulate you on your election as Chair of the European Data Protection Board. I have the honour to refer to my previous exchanges with your predecessor, Ms. Andrea Jelinek, in relation to the impact of European Union data protection law on the activities of United Nations System Organizations, as part of our ongoing dialogue with European Union institutions, including the European Commission, on these issues. Specifically, I wish to recall the submissions that I made to the European Data Protection Board on behalf of United Nations System Organizations on 14 May 2020 (in the context of public consultations on Guidelines 2/2020) and on 27 January 2022 (in the context of public consultations on Guidelines 5/2021).

I. Summary of the legal position of United Nations System Organizations

The legal position of United Nations System Organizations remains as described in those submissions. 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. Several such internal regulatory frameworks apply to the handling of data, including the processing of personal data. 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.

Ms. Anu Talus
Chair
European Data Protection Board
Brussels

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.

Furthermore, as part of the “archives” and “documents” of United Nations System Organizations, all data processed by or on behalf of United Nations System Organizations, wherever located and by whomsoever held, fall under the category of their “property and assets”. Such data is inviolable, and it must be exempt from any type of search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action. All data transfers between such United Nations System Organizations and between such Organizations and States, regional organizations, vendors or implementing partners must equally be free from interference, including legislative interference.

These exemptions, privileges and immunities are enshrined *inter alia* in the Charter of the United Nations (Articles 100 and 105), in the respective constitutive instruments of other United Nations System Organizations, in the 1946 Convention on the Privileges and Immunities of the United Nations, in the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, and in several other bilateral and multilateral treaties.

Although the European Union acknowledged early on in our ongoing dialogue that European Union data protection law does not apply, directly and as such, to United Nations System Organizations, several challenging issues have arisen because of the attempted indirect application of European Union data protection law to United Nations System Organizations, including by third parties that interact 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.

To the extent that European Union data protection law may be 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 United Nations, as well as all its funds and programmes, such interference would run counter to Article 100 and Article 105 of the Charter. Moreover, and importantly, 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.

In their invaluable 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 Charter of the United Nations and the privileges and immunities of United Nations System Organizations.

II. Our outstanding proposal to the European Data Protection Board

I wish to take this opportunity thank the European Data Protection Board for Ms. Jelinek's letter dated 18 November 2021 (Ref: OUT2021-00156), which acknowledged the importance of the exchanges between the United Nations and the European Data Protection Board on these issues.

In that letter, the European Data Protection Board took note of our outstanding proposal that the European Data Protection Board address the specific situation of all transfers to United Nations System Organizations, both from public authorities and private entities, in a dedicated set of guidelines providing third parties and European institutions reassurance that they can lawfully transfer data to United Nations System Organizations, as well as fully respecting the applicable legal framework concerning the privileges and immunities of United Nations System Organizations.

Unfortunately, to our knowledge, no further action was taken by the European Data Protection Board in that respect. To this date, the issues highlighted in our submissions and correspondence have not yet been resolved.

III. The Task Force established by the European Data Protection Supervisor

In her letter dated 18 November 2021, Ms. Jelinek also 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. It was the view of the Board that this Task Force would eventually offer useful practical solutions to the issues identified by United Nations System Organizations.

Unfortunately, the work of the Task Force, to date, has not proved to be a meaningful venue for the resolution of these issues. While the Task Force has been useful as an informal venue for technical-level exchanges, the documents that have been discussed under its auspices have not resolved – and, in fact, significantly risk compounding – the issues of indirect application of European Union data protection law that we have been highlighting over the years. I will focus here on two recent

developments that are especially concerning for United Nations System Organizations.

IV. The Model Template (“Administrative Arrangement”)

First, the Task Force appears to have concluded its consideration of the Model Template (“Administrative Arrangement”) Agreement for Data Transfers from European Union Institutions and Bodies to International Organizations. This document remains wholly unsatisfactory from the perspective of international law, even after considerable efforts on the part of several United Nations System Organizations to informally convey at the technical level the importance of safeguarding the applicable framework under international law, including their status, privileges, and immunities. In its latest version, this Model “Administrative Arrangement” continues to seek to regulate onward transfers from international organizations and it continues to envisage oversight and redress mechanisms that are not compatible with the applicable international law, as well as the regulatory framework governing UN System Organizations, including the single audit principle.

Once again, I wish to recall that the informal participation of United Nations System Organizations in this Task Force cannot be interpreted as the European Union having consulted the United Nations on this Model “Administrative Arrangement”; much less should our participation be interpreted as acquiescence or agreement to any text, including this Model “Administrative Arrangement”. On the contrary, I wish to reiterate our overall strong objection to the Model, which cannot form the basis of viable arrangements for transfers from European Union institutions to United Nations System Organizations unless it is significantly revised in each specific situation while allowing for all necessary flexibility. Any envisaged practical solutions concerning transfers to United Nations System Organizations must respect the status, as well as the privileges and immunities, of United Nations System Organizations and must be compatible with the essential elements of their administrative law.

V. The European Commission proposal for “standard contractual clauses”

Second, with respect to the broader issue of transfers to international organizations by other third parties, I wish to convey the strong concerns of United Nations System Organizations in respect of the proposal recently sent by the European Commission to the Task Force concerning a possible set of “standard contractual clauses” to be eventually adopted by the European Commission. This proposal disregards the status, privileges, and immunities of United Nations System Organizations. The adoption of any such “standard contractual clauses” by the Commission would suffer from insurmountable legal difficulties.

In practice, these clauses, if adopted, would compound, rather than mitigate, the issues of an attempted ‘indirect application’ of European Union data protection law to United Nations System Organizations. Should the clauses be adopted by the European Commission, it is likely that third parties would increasingly insist on the inclusion of such clauses in their contractual relationships with United Nations System Organizations, even if the clauses are manifestly unsuitable for United Nations System Organizations because they are objectionable from the legal perspective. This increased pressure from third parties seeking to regulate how the United Nations processes personal data is precisely the ‘indirect application’ of European Union law that has been addressed in all our previous communications. It is also evident that the freedom of United Nations System Organizations to enter into contracts of their own choosing, as well as appropriate clauses for such contracts, cannot be regulated by the European Commission.

Moreover, these “standard contractual clauses” are wholly incompatible with the status, privileges, and immunities of United Nations System Organizations under international law. They explicitly purport to subject the contractual relationship between United Nations System Organizations and their contractual counterparts to European Union data protection law, which is obviously an untenable proposition. For example, the clauses assert that they must be interpreted in accordance with the European Union General Data Protection Regulation and in a way not conflicting with the rights and obligations arising therefrom; the clauses seek to create a system whereby rights of individuals under the European Union General Data Protection Regulation may be enforced against United Nations System Organizations; they make reference to “data subjects” as “third-party beneficiaries” of the clauses themselves; they seek to be governed by the domestic law of a specific (yet unidentified) country recognizing contracts with such “third-party” beneficiaries; and they refer to oversight and redress mechanisms for such “third-party beneficiaries”. All these provisions are manifestly incompatible with the applicable international law framework and the regulatory framework governing United Nations System Organizations, as outlined above and in our previous submissions to the Board.

In the light of the above, I must put on record the strong and principled objection of United Nations System Organizations to the “standard contractual clauses”. I also regret to inform you that, in these circumstances, United Nations System Organizations consider that technical-level engagement within the Task Force is unlikely to be productive in relation to these clauses.

VI. *Proposed way forward*

I would kindly request the European Data Protection Board, as a matter of priority, to issue overarching guidelines, to address the specific situation of all transfers to United Nations System Organizations, with a view to providing third parties and European institutions reassurance that they can lawfully transfer data to United Nations System Organizations, while at the same time fully respecting the applicable legal framework concerning the privileges and immunities of United Nations System Organizations, including the non-applicability of European data protection law to United Nations System Organizations, either directly or indirectly.

Furthermore, and specifically in relation to both the Model Template (“Administrative Arrangement”) Agreement and the draft “standard contractual clauses”, we expect that the European Data Protection Board and the European Commission will clarify that neither instrument is intended to apply to United Nations System Organizations by virtue of the applicable legal framework concerning their status, privileges and immunities.

We note that the Commission has already adopted such a non-applicability statement in relation to existing “standard contractual clauses” adopted for commercial entities in third countries (https://commission.europa.eu/system/files/2022-05/questions_answers_on_sccs_en.pdf, at para. 25), and we fully expect a similar pronouncement to be issued immediately should “standard contractual clauses” be adopted for “international organizations”.

Under international law, neither the European Union nor its Member States have the authority to regulate the activities of United Nations System Organizations, either directly or indirectly. Such attempted indirect regulation of the working of the United Nations by a limited number of United Nations Member States runs directly counter to the existing legal framework as summarised above and outlined in greater detail in my submissions to the European Data Protection Board dated 14 May 2020 (in the context of public consultations on Guidelines 2/2020) and 27 January 2022 (in the context of public consultations on Guidelines 5/2021).

I would be most grateful if this letter 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 as part of the record of our formal correspondence on these matters.

A copy of this letter will be sent to Mr. Wojciech Wiewiórowski, European Data Protection Supervisor, and to the following officials of the European Commission: Ms. Ana Gallego Torres, Director-General, Directorate-General Justice and Consumers; Mr. Daniel Calleja Crespo, Director-General, Legal Service. It will also be brought to the attention of the Office of the Head of the Delegation of the European Union to the United Nations in New York.

I look forward to continuing our essential dialogue, as well as further engaging with the European Commission on these matters.

Yours sincerely,



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