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Head of Unit Supervision and Enforcement

[DPO of a European Institution, Body or Agency]

Brussels, 21st April 2020

[…]/ D(2020) 1005 **C 2020-0320**

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**Subject: Consultation of [the Institution] on the data protection provisions of a framework agreement concerning payroll services for local employees of [the Institution]** **located in [a third country] (Case 2020-0320)**

Dear [DPO],

We have registered your consultation request of 12 March 2020 under the case number **2020-0320**. We have decided to treat your request as a formal consultation since it raises important issues that are also of interest for other EU institutions, agencies and bodies. We also inform you that we intend to publish a redacted version of this reply without any reference to [the Institution]. We will send you the text of the reply as edited before publication.

The subject of your consultation concerns the data protection provisions of a future framework agreement between [the Institution] and [the service provider] concerning payroll-related services for local employees of [the Institution] based in [a third country]. This entails the processing of personal data, namely the transfer of data of local employees to the service provider in [a third country], which are necessary for the provision of the payroll services. The [service provider] is a private company that applies [that third country’s] law, including [that third country’s] data protection law, and it is not bound by Regulation (EU) 2018/1725[[1]](#footnote-1).

The questions you raised in your consultation concern the legal ground(s) for transfers of data of local employees to the service provider in [a third country] under Chapter V of Regulation (EU) 2018/1725. Based on the scenario detailed in your email and the information you have provided us with, we have answered your questions below.

***1) Could [the Institution] consider using one of the derogations of Article 50 of Regulation (EU) 2018/1725 in that case, by informing the EDPS accordingly in line with paragraph 6 thereof?***

We first recall that all derogations for specific situations under Article 50 of Regulation (EU) 2018/1725 must be interpreted restrictively, so that the exception does not become the rule. We have checked each one of the derogations under Article 50(1), including the ones under points (c) and (d) mentioned in your email. You may find useful information on the use of derogations in the [EDPB Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf).

Regarding the derogation under Article(50)(1)(c) “the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person”, although the data subject is not a party to the contract, but the contract with a non-EU based company is signed in his or her interest (*i.e.* his interest is to receive his salary), we note that recital 68 provides that *“Provision should be made in specific situations for the possibility for transfers in certain circumstances (...) where the transfer is* ***occasional*** *and necessary* ***in relation to a contract****”*. The term “occasional” in recital 68 indicates that such transfers may happen more than once, but not regularly, and would occur outside the regular course of actions. However, in the scenario envisaged in your consultation, data transfers will occur regularly in the course of a stable relationship between [the Institution] and the service provider in [a third country].

Regarding the derogation under Article 50(1)(d) “for important reasons of public interest”, the essential requirement for the application of this derogation is the finding of an important public interest that is recognised in Union law. We consider that such important public interest does not exist in this case and refer you to the examples listed in recital 69 of Regulation (EU) 2018/1725.

Therefore, we consider that derogations for specific situations under Article 50 are not applicable in the case at hand.

***2) If [the Institution]*** ***can use one of the derogations of Article 50, can [the Institution]*** ***accept that [the Institution] related personal data can be processed in accordance with guarantees provided by [a third country’s]*** ***law? If the answer is no, the data protection provisions should be deleted in the contract and consequently there will be no data protection clauses applicable.***

Although we already concluded that [the Institution] cannot use the derogations of Article 50 in answer to your first question, we will also provide you with an answer to your second question.

As controller, when using derogations, [the Institution] cannot simply rely on the guarantees provided by a third country’s law for the processing of personal data by its processor. When applying Article 50 or any ground for transfer in Chapter V of Regulation (EU)2018/1725, [the Institution] must bear in mind the application of Article 46, which provides that any international transfers shall take place **only if:**

**- subject to the other provisions of this Regulation,**

**- the conditions laid down in Chapter V are complied with by the controller and processor**, including for onward transfers of personal data to controllers or processors in the same or another third country.

This implies that the use of any ground for transfers in Chapter V, including the derogations, should never lead to a situation where fundamental rights might be breached. The **“other provisions of this Regulation”** in particular include **Article 4** on the principles relating to processing of personal data**, Article 5** on the lawfulness of processing and **Article 29** on the processor. In case of use of a processor, Article 29 notably obliges the controller (here, [the Institution]) to conclude a contract or another legally binding arrangement with the processor (here, [the service provider]).

Therefore, we consider that, whichever ground for transfer is used in the case at hand, [the Institution] related personal data cannot be processed (solely) in accordance with guarantees provided by [that third country’s] law.

***3) If [the Institution] cannot use one of the derogations of Article 50, what is the advisable way for [the Institution]*** ***to proceed?***

You have explained that you have proposed to sign controller-processor model clauses with the envisaged processor, which applies [a third country’s] data protection law and is not bound by Regulation (EU) 2018/1725, but that it has not been possible so far to reach an agreement.

Because of the fact that the processor is not bound by Regulation (EU) 2018/1725, [the Institution], being the controller and an EU institution, must ensure that the transfer of its personal data is based on one of the grounds for transfers under Chapter V and that the [service provider], being the processor, is able to demonstrate that appropriate guarantees and safeguards are in place for the processing of personal data it receives and processes on behalf of [the Institution].

As regard the proper legal ground for transfers of personal data to a processor located in a third country, Article 48(1) of Regulation (EU) 2018/1725 is applicable in the case at hand, which states that in the absence of an adequacy decision, the EUI may transfer personal data to a recipient in a third country, only if it has **provided appropriate safeguards** and on condition that **enforceable** **data subject rights and effective legal remedies for data subjects are available**. There are currently no standard contractual clauses for controller-processor adopted by the Commission or the EDPS under Article 48(2)(b) or (c). Thus, such appropriate safeguards may be provided by [the Institution] and the processor in the case at hand by:

- binding corporate rules approved by the competent supervisory authority pursuant to Article 46(2)(b) of the GDPR (Article 48(2)(d) of Regulation (EU) 2018/1725). However, to our knowledge, [the service provider] does not (yet) have such approved binding corporate rules for controllers and for processors; or

- contractual clauses between the controller and the processor in the third country subject to the authorisation from the EDPS (Article 48(3)(a) of Regulation (EU) 2018/1725)[[2]](#footnote-2).

Furthermore, the EUI must inform the EDPS of the categories of cases in which Article 48 has been applied.

Besides finding the proper legal ground for transfers, we invite [the Institution], as the controller, to read the EDPS Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725 (available at: <https://edps.europa.eu/sites/edp/files/publication/19-11-07_edps_guidelines_on_controller_processor_and_jc_reg_2018_1725_en.pdf>), in particular section 4.2 relating to the choice of the processor. Indeed, in line with **Article 26** (and recital 45) of Regulation (EU) 2018/1725, the controller is obliged to put in place or to have put in place appropriate and effective measures taking into account the nature, scope, context and purposes of the processing and the risks to the rights and freedoms of natural persons.

In light of the above, we urge [the Institution] not to consider engaging any processor (or sub-processor) that is not willing to provide sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of Regulation (EU) 2018/1725 and ensure the protection of the rights of data subjects.

We hope this information was useful. Should you have any doubts, please do not hesitate to contact us.

Yours sincerely,

(signed)

Delphine HAROU

Cc: [...]

1. 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, OJ L 295/39, 21.11.2018. [↑](#footnote-ref-1)
2. EUIs could use the inter-institutional model clauses for international transfers being prepared by the Working Group of the EUI DPO Network on International Transfers. As you may know, the EDPS is cooperating with the EUI DPO working group with a view of pre-approving the models (though not adopting them as the standard data protection clauses for transfers in the sense of Article 48(2)(c) of Regulation (EU) 2018/1725). EUI controllers wishing to rely on those inter-institutional model clauses for e.g. transfers to non-EEA private companies would still need to ask for authorisation from the EDPS in line with Article 48(3)(a) of Regulation (EU) 2018/1725, but the procedure would be quicker. [↑](#footnote-ref-2)