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ASSISTANT SUPERVISOR

[…]
Data Protection Officer
[…]

Brussels, 30 July 2018
WW/[…]/ D(2018) 1760 **C 2018-0365**
Please use edps@edps.europa.eu for all
correspondence

Dear […],

Thank you for your consultation of […] 2018 concerning certain clauses that a contractor wants to include in the service contracts with […] You inform the EDPS that a processor has proposed to amend a contract with the […] to align it with the conditions set forth by Regulation (EU) 2016/679, the General Data Protection Regulation[1] (GDPR). Kindly note for further communications that the consultation has been registered under the number **C 2018-0365**.

As a general rule, for contracts awarded through inter-institutional procurement procedures led by the Commission DG BUDG prepares standard model contracts with robust data protection clauses. In particular, these clauses aim at ensuring that the institutions are compliant with Regulation 45/2001[2] when taking a processor (contractor) to develop certain tasks. These clauses also aim at ensuring data subjects' rights and that both controllers (institutions) and processors (contractors) are aware of their responsibilities.

Regulation 45/2001 will be soon replaced by a new piece of legislation[3] and in line with Article 29 both the Commission and the European Data Protection Supervisor (EDPS) can adopt models of clauses to be inserted in the contracts with processors. The EDPS and DG BUDG of the Commission are working together on the new clauses to provide guidance to EU institutions

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[1] 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] Official Journal L 008 , 12/01/2001 P. 0001 - 0022

[3] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of individuals 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 (https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CONSIL:ST_9296_2018_INIT&from=EN)

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before the new Regulation enters into force. As soon at these clauses are approved we will send them to you for your convenience.

It should be reminded that, in case of contracts awarded by EUIs, it is the contracting authority (the institution/controller) that proposes the clauses to the contractor and not vice-versa. In this regard, the institution shall ensure compliance with the rules applicable to it.

On the other hand, the processor (contractor) acts on the basis of instructions from the controller and, in addition, shall ensure respect of the General Data Protection Regulation (GDPR) as well as the regulation itself. Nevertheless the EDPS cannot ensure that the contractor that the clauses that it intends to apply are GDPR compliant. The role of the EDPS is to advise the EU institutions and bodies[4], but not third parties about their compliance with data protection law. In addition, in case of inter-institutional procurements where a contract is awarded and signed on behalf of different EUIs it is important to ensure and maintain consistency throughout the duration of the contract and not to amend general conditions for processing of personal data on a case by case basis.

The EESC must nevertheless comply with the provision of Regulation 45/2001, which is still in force. Therefore, **the EDPS does not recommend modifying contracts based on standard model clauses on a case by case basis to ensure compliance with the GDPR**

Concerning the particular case at stake please note the following:

1. As soon as we have standard clauses on data protection agreed between DG BUDG and the EDPS we will send them to you for your convenience;
2. The contractor should understand that the applicable legal framework for EUIs has not changed yet and the proposal for the insertion of the clauses will come from the contracting authority / controller;
3. For any question relating to internal compliance with national legislation and GDPR, the contractor should contact directly the national Data Protection Authority.

Please note that, **in general, concerning the use of revised model contractual clauses for EUIs**, the EDPS recommends the following steps to determine if there is a need to amend on-going contracts and use the up-dated clauses:

1. **Prepare an inventory of on-going contracts**: it is recommended to have a central inventory to ensure a comprehensive overview, but depending on the size of the EUI and the number of contracts in course, the inventory may be decentralized. The aim is to ensure that the controller is aware of and mitigates all potential risks, if necessary through amendments of contracts.

2. **Identify risks** based on the following criteria:
   2.1. NO RISK: If no personal data is processed on the basis of the contract.
   2.2. LOW RISK: If limited personal data is processed on the basis of the contract (no sensitive data at stake).
   2.3. HIGH RISK: contracts shall be regarded as representing high risk to the rights and freedoms of data subjects in case

   a. sensitive data affected as defined in Articles 10 and 11,

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[4] See in particular article 46 (d) of the regulation quoted in footnote 1 according to which the EDPS shall advise all Community institutions and bodies, either on his or her own initiative or in response to a consultation, on all matters concerning the processing of personal data, in particular before they draw up internal rules relating to the protection of fundamental rights and freedoms with regard to the processing of personal data.

    b. large-scale[5] processing of personal data at stake, including cases where the contract mainly related to processing of personal data

    c. if the contract relates to the core-business of the EUI and personal data is processed.

3. **EUIs shall inform all low- and high-risk contractors[6]** about
   - the changes introduced by new Regulation 45', including provisions of Article 71 on replacement of references to Regulation 45/2001,
   - the new data protection clauses and offer them the new data protection clauses
   - the possibility to amend on-going contracts with the new model data protection clauses.

It should be underlined that model data protection clauses of the General Conditions of contracts[7] as agreed between DG BUDG of the Commission and the EDPS are **not negotiable** when amending the contracts.

It is strongly recommended to inform all contractors with whom the EUI has on-going contracts evaluated as a low- or high-risk contract. Nevertheless, depending on the size of the EUI and the number of contracts in course, the EUI may publish a general communication on its website and launch amendments directly with contractors of high risk contracts as defined in point 2.

4. **Amendments shall be initiated** immediately in case of high-risk contracts (e.g. for points 2.3 a) –c)), otherwise the new data protection clause has to be added with the next renewal or formal amendment of the contract.

5. EUIs should **publish all tenders** with the new data protection clauses as soon as they are ready.

6. After the new Regulation enters into force all new and amended contracts must be signed with the up-dated clause.

If you require more information or details, please contact my services at […].

Yours sincerely,

[signed]
Wojciech Rafał WIEWIÓROWSKI

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[5] Data processed on a large scale, whether based on number of people concerned and/or amount of data processed each of them and/or permanence and/or geographical coverage.

[6] As defined in point 2 above.

[7] Including Framework and specific contracts, low value contracts, purchase orders etc.