



Formal comments of the EDPS on the draft Commission Implementing Decision on the adequacy of the competent authorities of the United States of America in the field of statutory audit pursuant to Directive 2006/43/EC of the European Parliament and of the Council

1. Introduction and background

-) The following formal comments concern the draft Commission Implementing Decision on the adequacy of the competent authorities of the United States of America pursuant to Directive 2006/43/EC of the European Parliament and of the Council ('the draft Decision').
-) By Commission Implementing Decision 2016/1156/EU¹, the Commission considered that the competent authorities of the United States of America, namely the Public Company Accounting Oversight Board ('the PCAOB') and the Securities and Exchange Commission ('the SEC'), meet the requirements of Article 47(1)(c) of Directive 2006/43/EC ('the Audit Directive')².
-) Implementing Decision 2016/1156/EU is applicable since 1 August 2016. The draft Decision would replace Implementing Decision 2016/1156/EU that will cease to be in force on 31 July 2022.
-) The draft Decision would thus allow EU Member State authorities to continue to recognise the competent authority of the United States of America (the PCAOB and the SEC) as adequate to cooperate with the competent authorities of EU Member States on the exchange of audit working papers or other documents held by statutory auditors and audit firms pursuant to Article 47 of Directive 2006/43/EC.
-) The adoption of the draft Decision is, as laid down in Article 47(1)(c) of the Audit Directive, one of the conditions for the transfer of audit papers to the third country in question, together with, among others, the stipulation of working arrangements between the EU Member States' competent authorities and the third country's competent authorities³.

¹ Commission Implementing Decision (EU) 2016/1156 of 14 July 2016 on the adequacy of the competent authorities of the United States of America pursuant to Directive 2006/43/EC of the European Parliament and of the Council (notified under document C(2016) 4364) (Text with EEA relevance), (OJ L 190, 15.7.2016, p. 83).

² Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC (Text with EEA relevance), (OJ L 157, 9.6.2006, p. 87).

³ See Article 47(1)(d) of the Audit Directive.

-) These comments are provided in reply to the formal request for consultation sent by the European Commission ('the Commission') on 4 May 2022 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')⁴. We limited our comments below to the provisions of the draft Decision that are relevant from a data protection perspective.
-) These formal comments do not preclude any future additional comments by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, these formal comments are without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 EUDPR.

2. Comments

-) The EDPS recalls that any transfer of audit working papers or other working documents containing personal data held by statutory auditors or audit firms between the competent authorities of a Member State and the competent authorities of the third country implies an international transfer of personal data in the meaning of Chapter V of Regulation (EU) 2016/679 (hereinafter 'the GDPR')⁵, and therefore needs to rely on one of the legal basis for transfers provided by the GDPR under this Chapter (namely, Article 45, transfers on the basis of an adequacy decision; Article 46, transfers on the basis of appropriate safeguards; Article 47, binding corporate rules; Article 49, derogations for specific situations).
-) At present, the United States of America is not recognised as ensuring an adequate level of protection by adequacy decision of the Commission under Article 45 of the GDPR. Moreover, the derogations under Article 49 of the GDPR do not seem to be applicable to the **structural** transfer of personal data that would be triggered by the administrative cooperation between Member States' competent authorities and the PCAOB.
-) Having regard to Article 46 of the GDPR, the possible legal bases allowing the aforesaid transfer would be: (i) (safeguards provided by) a **legally binding and enforceable instrument between the public authorities**, under Article 46(2)(a); or (ii) subject to the authorization from the competent supervisory authority,

⁴ 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, 21.11.2018, p. 1).

⁵ 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), (OJ L 119, 4.5.2016, p. 1).

(safeguards provided by) provisions inserted into **administrative arrangements between public authorities**, under Article 46(3)(b)⁶.

- | The EDPS also notes that the draft Decision would not and cannot provide in itself (as self-standing legal instrument, not accompanied by the legally binding and enforceable instrument or administrative arrangement referred to above) the legal basis allowing the transfer of personal data pursuant to Chapter V of the GDPR.
- | In this respect, the EDPS welcomes Recital 8 of the draft Decision that specifies that the transfer of personal data between the EU competent authorities and the competent authorities of the United States should take place “in accordance with Article 46 of Regulation (EU) 2016/679”.
- | Recital 12 recalls that several EU Member States’ competent authorities have cooperation arrangements with the PCAOB and that in most cases these cooperation agreements “*are expanded upon through a Data Protection Agreement under Regulation (EU) 2016/679 or under national law based on the Directive predating this Regulation.*” In this regard, the EDPS recalls that personal data transferred on the basis of Article 46 of the GDPR should be afforded a level of protection essentially equivalent to that guaranteed within the EU⁷.
- | The EDPS also notes and welcomes, having regard to onward transfers, that the last sentence of recital 8 specifies that “*Member States should ensure that the competent authorities of United States will not further disclose personal data contained in the documents transferred without the prior agreement of the competent authorities of the Member States concerned.*”
- | In the light of the above, the EDPS does not have specific recommendations having regard to the data protection aspects of the draft Decision.

Brussels, 13 May 2022

(e-signed)
Wojciech Rafał WIEWIÓROWSKI

⁶ In this regard, see EDPB 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, Version 2.0 Adopted on 15 December 2020.

⁷ Judgment of 16 July 2020, *Schrems II*, C-311/18, EU:C:2020:559, para. 105.