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WORLD EMPLOYMENT CONFEDERATION EUROPE

Subject: EU General Data Protection Regulation (GDPR)

31st January 2017

Dear members of the Article 29 Working Party,

The World Employment Confederation-Europe is very happy that the Article 29 Working Party takes the effort to create more clarity on some new and some adapted topics in light of the new forthcoming EU GDPR. Also we are enthusiastic about the fact that you invite stakeholders, like us, to interact on these kind topics.

On behalf of the World Employment Confederation-Europe, we have asked our members to assess the draft guidelines and come back with relevant feedback, questions and topics that need clarification. Below you'll find a summarized response and some questions regarding the draft guidelines on Data Portability, Data Protection Officers and Lead Supervisory Authority.

The overall feedback from our members is that the draft guidelines provide good direction to implement the new EU GDPR elements and we are hoping to get this kind of guidance also on the other new EU GDPR elements.

Considering the previous observations, we are looking though for some additional clarification on the following topics:

1. Concerning the draft guidelines on DPOs:
   - Section 2. Article 37(1) b) states "where the core activities of the controller or the processor consist of processing operations, which require regular and systematic monitoring of data subjects on a large scale". When do core activities require processing operations with the objective of "regular and systematic monitoring" on a large scale? In our view, staffing activities (and the processing of personal data in connection with such activities) do not constitute regular and systematic monitoring but mere (large) processing activities of personal data.
   - Many of our members have already appointed data protection officers as we consider it important that data subjects have a clear focal point. They are using that specific job title, but are not always acting as a formal DPO according to current and future legislation. However, based on the draft guidelines we understand that the title Data Protection Officer can per 25-5-2018 only be used for formal DPO's. In our view, this creates an unreasonable burden for all organisations involved as they have to change their governance, policies and websites while it is also unclear what the formal legal naming will be per Member State. The rationale behind this guideline can be achieved in a more efficient

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manner without creating the risk that the use of DPO title leads to unrealistic expectations. We therefore propose:

- deleting the last three paragraphs at the end of section 2.1 (starting with *"When an organisation designates a DPO on a voluntary basis, (...)"* and ending with *"(...) this individual or consultant is not a 'DPO')"*; and
- replacing these paragraphs by the following wording: "When an organisation designates a DPO on a voluntary basis (ie. when the GDPR does not require the organisation to formally designate a DPO), the requirements under Articles 37 through 39 will not apply to his or her designation, position and tasks provided that the organisation makes it clear in any communications within the company, as well as with data protection authorities, data subjects, and the public at large, that this individual or consultant is not a 'DPO' in the formal sense of the word."

2. Concerning the draft guidelines for identifying a controller or processor's lead supervisory authority:

- Several provisions in the GDPR limit the scope of the one-stop-shop mechanism (OSS):
  - In some cases the legal ground for processing employee data is that such processing is necessary to comply with a legal obligation. According to art. 55(2) GDPR the OSS mechanism does not apply in respect of data processing that is necessary in order to comply with a legal obligation.
  - Article 56(2) GDPR provides that each supervisory authority will be competent to handle a complaint lodged with it or a possible violation of the GDPR, if the subject matter "relates only to an establishment in its Member State or substantially affects data subjects only in its Member State". According to recital (127) GDPR this is for example the case "where the subject matter concerns the processing of employees' personal data in the specific employment context of a Member State." According to the draft guidelines on 'lead supervisory authority' this means that "the supervision of HR data connected to local employment context could fall to several supervisory authorities".

This raises various questions. What if a French establishment of a multinational controller processes personal data in order to comply with a local legal obligation and, in order to process such data, the establishment uses a group-wide HR information system ("HRIS") that is used by all establishments of the controller and that has been selected, procured and implemented by the main establishment of the controller in Germany? Which DPA is competent to supervise the processing of the data (including the data relating to the French employees)? Is it the German lead DPA (for the controller's main establishment in Germany)? Or will it be the French DPA (for the data relating to the employees of the French establishment)?

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In our view, articles 55(2), 56(2) and recital (127) GDPR constitute an exception to the OSS mechanism and should therefore be interpreted narrowly. For example, if HR data are processed via an external HRIS that has been selected, procured and implemented by the main establishment of the controller in an EU Member State and if that system is used by all establishments of the controller, then article 56(2) GDPR should not apply if there is a breach in connection with the HRIS.

Also, we invite the Article 29 Working Party to confirm that the scope of article 55(2) GDPR is limited to legal obligations stemming from local/national law and not from EU law (or other transnational law) because processing for compliance with an obligation under EU law (or other transnational law) cannot be considered to be a local type of processing.

- The relationship between cross-border processing and intra-group joint controllership is unclear. One could argue that the various establishments involved in cross-border processing cannot be joint controllers because:
  - The first part of the definition of "cross-border processing" refers to a controller with establishments in several EU Member States; and
  - From article 26(1) GDPR it is clear that joint controllership requires two or more controllers ("Where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers.")

  We invite the Article 29 Working Party to clarify the scope of article 26 (joint controllers) GDPR and its relationship with:
    - The definition of cross-border processing in art. 4(23) GDPR; and
    - The OSS mechanism.

- We invite the Article 29 Working Party to confirm the application of the OSS mechanism in specific cases that are not mentioned in the GDPR. In our view, the OSS mechanism should apply to the following instances: approval of BCRs; approval of data protection clauses (including contract clauses for data transfers); notification of personal data breaches that affect establishments of a controller/processor in various EU Member States; consultation with the lead supervisory authority regarding processing where a PIA indicates a high risk in the absence of risk mitigation measures.
- Some of our members have legal entities operating in multiple Member States. In most cases these entities do not operate cross border but only within the jurisdiction where they are located. We kindly invite the Article 29 Working Party to confirm that in those situations the entity in the Member States has only to align with the local authority in the Member State they are processing and that the one stop shop principle does not apply on that type of "non-cross border" data processing?

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- Could a central Privacy officer support a group of small establishments of the controller or processor in the EU? What would the liability implications be?

3. Concerning the draft guidelines on the right to data portability:
   - Could the portability right be exercised for the sole purpose of the individual receiving the data without transmitting it to a third party?
   - In our industry it is common to complement data provided by a candidate with other data (for instance, data resulting from "test questions", "quality surveys" and data resulting from "references" that have been provided by a third party (eg. former colleagues of a candidate) and that relate to the candidate). In our view, neither such complementary data nor the questions fall under the data portability right because the questions as such do not relate to the data subjects and because the complementary data are exclusively generated by the controller (and therefore have not been provided by the data subjects). We kindly invite the Article 29 Working Party to confirm this interpretation (eg. by inserting this example in the final version of its guidelines on data portability).
   - Within our industry there is currently no defined standard for data exchange other than regularly used "office automation" standards. In our view such formats as "PDF", "Word" or "Excel" can be considered as an accepted data format to facilitate data portability. We kindly invite the Article 29 Working Party to confirm this interpretation (e.g. by inserting this example in the final version of its guidelines on data portability).

Given that the above topics are crucial for our members, we would like to set up a meeting with the Article 29 Working Party during which a small delegation of the World Employment Confederation-Europe can further explain our concerns and can answer any questions from the Article 29 Working Party. This would also help us in informing our stakeholders on the rationale of some of the choices made and how to implement these.

Best regards,

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