INFORMATION NOTE

A request from the Princely Supreme Court (Fürstlicher Oberster Gerichtshof), dated 4 April 2025, was lodged on 11 April 2025, requesting the EFTA Court give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice. This request was registered as Case E-5/25 - *Rainer Silbernagl* v *Universität Liechtenstein (University of Liechtenstein)*, on 11 April 2025.

In the request for an advisory opinion the Princely Supreme Court sent the following questions to the EFTA Court;

1. Must the second sentence of Article 38(3) of the GDPR be interpreted as meaning that it precludes a national provision such as, in the present case, Article 7(4) of the Data Protection Act, according to which a data protection officer employed by a public body may only be dismissed by the public body with just cause, in particular, where circumstances exist in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected, even if the data protection officer precisely does not perform his function or does not perform it correctly?

2. Must the second sentence of Article 38(3) of the GDPR as worded in German be interpreted as meaning that the term "dismissed" [in German "abberufen"] includes also an (ordinary) termination of the employment contract by the employer of the data protection officer if, as a result, the employment contract basis and thus the factual possibility of exercising the activity of data protection officer ceases to exist?

3. Does the protective purpose of the second sentence of Article 38(3) of the GDPR, that is to say, safeguarding the functional independence of the data protection officer, require an interpretation of this provision and corresponding national rules serving the same protective purpose, such as Article 7(3) and (4) of the Data Protection Act, to mean that a dismissal which is effected contrary to these rules entails that the dismissal is void and

that the employment relationship between the employer and data protection officer as such remains intact?

On 14 May 2025, in accordance with Article 20 of the Statute and Article 90(1) of the Rules of Procedure of the EFTA Court, the Governments of the EFTA States, the EFTA Surveillance Authority, the Union (which includes the Governments of the EU States), the European Commission and the parties to the dispute were invited to submit written observations to the Court on the referred questions within a two months.

The Court received and registered written observations from:

Rainer Silbernagl

University of Liechtenstein

The Government of Liechtenstein

The EFTA Surveillance Authority

The European Commission

The submitted suggested answers to the questions posed by the referring Court are as follows:

Rainer Silbernagl

1. A data-protection officer shall according to Art. 38(3) sentence 2 of the GDPR not be dismissed or penalised by the controller or the processor for performing his tasks. A national provision according to which a data protection officer employed by a public body may only be dismissed by the public body with just cause, in particular, where circumstances exist in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected, even if the data protection officer precisely does not perform his function or does not perform it correctly, is in so far contrary to Art. 38(3) sentence 2 GDPR, as such legislation does not undermine the achievement of the objectives of the GDPR. This is the case if the data

protection officer does not perform his function or does not perform it correctly due to the actions of his or her employer.

2. Art. 38(3) sentence 2 of the GDPR must be interpreted as meaning that the term "dismissed" includes also an (ordinary) termination of the employment contract by the employer of the data protection officer if, as a result, the employment contract basis and thus the factual possibility of exercising the activity as data protection officer ceases to exist.

3. The protective purpose of the second sentence of Article 38(3) of the GDPR, that is to say, safeguarding the functional independence of the data protection officer, requires an interpretation of this provision and corresponding national rules serving the same protective purpose to mean that a dismissal which is effected contrary to these rules entails that the dismissal is void and that the employment relationship between the employer and data protection officer as such remains intact.

University of Liechtenstein

1. Art. 38(3) 2nd sentence GDPR is in conflict with any national rule that would prohibit the dismissal of a data protection officer who has not performed or not correctly performed his or her tasks and thereby inhibits the realisation of the Regulation's objectives.

2. The purpose of the GDPR is the protection of personal data, not the protection of employees. The GDPR does not lay down any provisions of labour law. The definition of dismissal pursuant to the GDPR does not express any legal implication under labour law.

   Dismissal means that the data protection officer can and may no longer perform his or her tasks; he or she is removed from his or her position, and the person concerned loses his or her function.

   The contractual relationship agreed upon between the controller or the processor of the one part and the data protection officer of the other may have a different

legal fate and must in each individual case be assessed according to the national provisions of civil law.

The end of the employment relationship inevitably causes the end of his or her tasks. The end of the employment relationship indicates his or her dismissal.

3. The functional independence laid down in Art. 38(3) 2nd sentence GDPR is not a protective purpose of the GDPR; rather, it is a regulatory means to achieve and ensure the protective purpose.

   The GDPR does not order the ineffectiveness of dismissal, even where Art. 38(3) 2nd sentence GDPR has been violated.

   Any interpretation of Art. 38(3) 2nd sentence GDPR to the effect that dismissal may be declared ineffective interferes with the duty to appoint pursuant to Art. 37 DSGVO and thwarts the regulated harmonised and permanent implementation of the provisions.

   The civil-law implications of dismissal in violation of Art. 38(3) 2nd sentence GDPR for the contractual relationship with the data protection officer depends on the national law of the Member States.

The Government of Liechtenstein

1. The second sentence of Article 38(3) GDPR must be interpreted as meaning that it precludes an interpretation of a national provision such as, in the present case, Article 7(4) of the Data Protection Act, according to which a data protection officer employed by a public body may only be dismissed by the public body with just cause, in particular, where circumstances exist in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected, even if the data protection officer precisely does not perform his function or does not perform it correctly.

2. The second sentence of Article 38(3) of the GDPR as worded in German must be interpreted as meaning that the term ‘dismissed’ (in German ‘abberufen’) includes also an (ordinary) termination of the employment contract by the employer of the data

protection officer if, as a result, the employment contract basis and thus the factual possibility of exercising the activity of data protection officer ceases to exist.

3. The protective purpose of the second sentence of Article 38(3) of the GDPR, that is to say, safeguarding the functional independence of the data protection officer, does not require an Interpretation of this Provision and corresponding national rules serving the same protective purpose, such as Article 7(3) and (4) of the Data Protection Act, to mean that a dismissal which is effected contrary to these rules entails that the dismissal is void and that the employment relationship between the employer and data protection officer as such remains intact.

The EFTA Surveillance Authority

1. The second sentence of Article 38(3) of the GDPR must be interpreted as not precluding national legislation which provides that a controller or a processor may terminate the employment contract of a data protection officer only with just cause, even if the contractual termination is not related to the performance of that officer's tasks, in so far as such legislation does not undermine the achievement of the objectives of the GDPR.

2. The second sentence of Article 38(3) of the GDPR must be interpreted as applying to the dismissal of a data protection officer, including the termination of a data protection officer's employment contract, in so far as it relates to the performance of that officer's tasks.

3. The second sentence of Article 38(3) of the GDPR must be interpreted as not precluding national legislation which does not require that dismissals contrary to this provision are void and result in the maintenance of the employment relationship between the employer and the data protection officer, provided that the principles of equivalence and effectiveness are complied with.

The European Commission

1. The second sentence of Article 38(3) of Regulation (EU) 2016/679 must be interpreted as meaning that it precludes neither a national provision according to which a public body may terminate without just cause the employment contract of its data protection officer, provided that the termination is not due to the data protection officer performing his tasks, nor a national provision according to which a public body

may terminate said employment contract only with just cause, provided that such legislation does not undermine the achievement of the objectives of that regulation.

2. The second sentence of Article 38(3) of Regulation (EU) 2016/679 must be interpreted as meaning that the term "dismissed" includes also an (ordinary) termination of the employment contract by the employer of the data protection officer.

3. The second sentence of Article 38(3) of Regulation (EU) 2016/679 must be interpreted as meaning that it is for the domestic legal system of each Member State to determine the legal consequences of a termination of the employment contract of a data protection officer by the controller in breach of that provision, provided that the principles of equivalence and effectiveness are observed.

The public hearing of the Court in Case E-5/25 - *Rainer Silbernagl* v *Universität Liechtenstein (University of Liechtenstein)*, has been set for: **Tuesday 30 September at 9:30am** at the EFTA Court (1 rue du Fort Thűngen, L-1499, Luxembourg). The hearing will also be livestreamed on the Court's website, here.

Luxembourg, 2 September 2025

Ólafur Jóhannes Einarsson

Registrar